

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

Order No. : 27/2020
Date of Institution : 09.10.2019
Date of Order : 19.05.2020

In the matter of:

1. Kerala State Level Screening Committee on Anti-Profiteering,
Commissioner, State GST Department, 9th Flr, Tax Tower,
Killipalam, Karamana Post, Thiruvananthapuram, Kerala- 695 002.
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 Phillips India Ltd., Corporate Office, 8th Floor, DLF-9B, DLF
Cyber City, Sector-25, DLF Phase-3, Gurgaon-122002.

Respondent



Quorum:-

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

Present:-

1. Smt. A. Shainamol, Additional Commissioner, SGST, Kerala for the Applicant No. 1
2. Sh. Anwar Ali T.P, Additional Commissioner for the Applicant No. 2
3. Sh. Harish Chawla, Tax Head, Sh. Gaurav Gulati and Sh. Manish Singh, Authorised Representatives for the Respondent

ORDER

1. The present report dated 26.09.2018, has been received from the Director-General of Anti-Profiteering (DGAP) after a detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that the Applicant No. 1 vide the minutes of it's meeting held on 08.05.2018 had referred the present case to the Standing Committee on Anti-profiteering, alleging profiteering by the Respondent on the supply of "Food Processor" (HSN: 85094090), by not passing on the benefit of GST at the time of implementation of the GST w.e.f. 01.07.2017. It was also alleged that the Respondent had indulged in profiteering in contravention of the provisions of Section 171 of the CGST Act, 2017. In this regard, the above Applicant had relied on two invoices issued



by the Respondent, one dated 09.05.2017 (Pre-GST) and the other dated 22.12.2017 (Post-GST).

2. The above reference was examined by the Standing Committee on Anti-Profiteering and was further referred to the DGAP vide minutes of its meeting dated 02.07.2018 for detailed investigations under Rule 129 (1) of the CGST Rules, 2017.
3. The DGAP vide his report dated 26.09.2018 has stated that after scrutiny of the two invoices issued by the Respondent, it was observed that in the pre-GST era, the applicable tax rate on the product "Food Processor" (HSN Code 85094090 was 26.24%, including Excise duty @ 12.5% (abatment @35% of MRP) and VAT @14.5%. On implementation of GST w.e.f. 01.07.2017, the GST rate on the said product was fixed at 28%. However, the invoice dated 22.12.2017, relied on by Kerala State Screening Committee has been issued after GST rate reduction w.e.f. 15.11.2017, vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017 wherein the GST has been charged at the lower rate of 18%. The DGAP further stated that in the absence of any invoice issued during the period 01.07.2017 to 14.11.2017, it was not possible to compare the pre-GST and post-GST actual selling price.
4. The DGAP further stated that since the allegation of profiteering was based on the observation that the pre-GST and post-GST MRP were the same, a comparison of pre and post-GST tax rates was done taking the MRP as the selling price. In this case, as could be seen from the invoices evidence sent by the Applicant No. 1 that the pre-GST and post-GST MRP was the same, i.e. Rs. 5795/.

& post-GST MRP-wise details of the base price and the tax rate applicable to the said product supplied by the Respondent were furnished by the DGAP as is given in the Table below wherein DGAP observed that after implementation of GST w.e.f. 01.07.2017 the rate of tax had gone up from 26.24% to 28%.

TABLE

Particulars		Pre-GST	Post GST
Invoice No. & Date		6482538756 dated 09.05.2017	6482541444 dated 22.12.2017 to 14.11.2017
Invoice No. & Date	A	5,795	5,795
MRP	B	12.50%	
Excise Duty Rate	C	2,028.25	
Abatement @35%of MRP	D	14.50%	
VAT Rate	E		28%
GST Rate	$F=(A-C)*B$	470.84	
Excise Duty Rate(Rs.)	$G=(A/1+D)*D$	733.86	
VAT amount (Rs.)	$H=A/1+E)*E$		1,267.66
GST amount (Rs.)	$I=F+G$ OR H	1,204.70	1,267.66
Total Tax (Rs.)	$J=A-I$	4,590.30	4,527.34
Base Price excluding duties/Taxes (Rs.)	$K=I/J*100$	26.24%	28%

5. The DGAP has further submitted that the Central Government, on the recommendation of the GST Council, had levied GST @28% on Food Processor w.e.f. 01.07.2017 vide Notification No. 01/2017- Central Tax (Rate), dated 28.08.2017, which was reduced to 18% w.e.f. 15.11.2017, vide Notification No 41/2017- Central Tax (Rate), dated 14.11.2017. The referred Invoice dated 22.12.2017 (post-GST era) was issued post reduction in the rate of GST w.e.f. 15.11.2017 (from 28% to 18%) therefore, no comparison could be made between pre-

GST and post-GST selling prices, in the absence of any invoice issued during the intervening period, pre-GST and post-GST MRPs, the details of which were indicated in the table above. The DGAP found that there was an increase in the rate of tax on "Food Processor" from 26.24% in the pre-GST era to 28% in the post-GST era. The DGAP also found that the Respondent did not increase the MRP of the product which was Rs. 5,795 during both the periods. Furthermore, Section 171 of the Central Goods and Services Tax Act, 2017 came into play in the event when there was a reduction in the rate of tax or increase in the input tax credit, the latter was not the subject matter of this inquiry as there was no reduction in the rate of tax in the present case, the provisions of the said Section 171 were not attracted in the instant case.

6. We have carefully examined the DGAP's report and the documents placed on record and find that the following issues were required to be settled in the present proceedings as per the provisions of Section 171 of the CGST Act:-

I. Whether there was a reduction in the rate of tax on the product w.e.f. 01.07.2017?

II. Whether any benefit of reduction in the rate of tax was to be passed on?

III. Whether the benefit of reduction in tax was passed on to the recipient by way of commensurate reduction in prices?

7. It is apparent from the perusal of the facts of the case that there was no reduction in the rate of tax on the above product w.e.f. 01.07.2017,

as could be seen from the table given above. There is also no increase in the per-unit base price (excluding tax) of the above product and therefore the allegation of profiteering was not established.

8. Though the rate of tax has been reduced from 28% to 18% w.e.f. 14.11.2017 the Applicant No. 1 has failed to produce any invoice to establish that the benefit of tax reduction has not been passed on by the Respondent to the recipients hence DGAP has rightly observed that no supporting documents or invoices of the product 'Food Processor' for the period post 15.11.2017 have been either examined or presented before the Standing Committee. Hence the allegation that the benefit of rate reduction has not been passed on is not sustained.
9. The above Report was considered by the Authority in its meeting held on 03.10.2018 and it was decided that since there was no complainant/ applicant in this case, the Kerala Screening Committee be asked to appear before the Authority on 18.10.2018. Since no one appeared for the hearing on 18.10.2018, this Authority decided to ask Kerala Screening Committee to appear before this Authority again on 31.10.2018. Ms. A. Shainamol, Additional Commissioner, SGST, Kerala appeared on behalf of the above committee on 31.10.2018. During the hearing, it was observed that in the DGAP's report, the issue of MRP had not been addressed.
10. This Authority, vide its order dated 12.12.2018, had decided to send the DGAP's report back to him for re-investigation on the above-mentioned issue under Rule 133 (4) of the CGST Rules, 2017.

11. The DGAP vide his Report dated 14.08.2019, filed under Rule 133(4), stated that on receipt of the case back from this Authority, he decided to initiate an investigation to collect the evidence necessary to determine whether the benefit of input tax credit had been passed on by the Respondent to the recipients in respect of the impugned product supplied by the Respondent and a Notice under Rule 129 of the Rules was issued by the Director-General of Anti-profiteering on 09.01.2019, calling upon the Respondent to reply as to whether he admitted that the benefit of rate reduction had not been passed on to the recipients by way of commensurate reduction in price and if so, to suo-moto determine the quantum thereof and indicate the same in his reply to the Notice as well as to furnish all the supporting documents. Further, in the said Notice dated 09.01.2019, the DGAP allowed the Respondent to inspect the non-confidential evidence/ information relied upon in the Notice during the period 14.01.2019 to 16.01.2019 and the Respondent availed of the said opportunity on 16.01.2019 and collected copies of invoices of pre-GST and post-GST. The period covered by the DGAP in the current investigation is from 01.07.2017 to 31.12.2018.

12. The Respondent vide letters/e-mails dated 21.01.2019, 31.01.2019, 19.02.2019, 08.03.2019, 18.03.2019, 05.06.2019 and 25.06.2019 submitted following arguments before the DGAP:

- i. That the Maximum Retail Price (MRP) taken into consideration in the Notice of initiation was Rs. 5,795 instead of correct MRP of Rs. 4,795. Further, his business was engaged only in the trading of goods and did not have any

manufacturing facility, and thereby, he was not registered under the Central Excise Laws. Further, Respondent contended that the effective rate of tax on the impugned goods was increased from 14.5% to 28% and therefore requested to drop the proceedings.

- ii. That the impugned product was imported on MRP basis and Countervailing Duty (CVD) under Section 3 (1) of the Customs Tariff Act, 1975 @ 12.50% on 65% of MRP was applicable, however, Special Additional Duty (SAD) under Section 3 (5) of the Customs Tariff Act, 1975 was not levied and accordingly, Respondent had not made any reversal of VAT input credit on stock transfer of impugned product. He had not undertaken any interstate sales of the impugned product during the period April 2017 to June 2017.
- iii. That the anti-profiteering provisions were inherently designed to protect the consumers by restricting the companies to benefit unjustly on account of any reduction in tax. In the notice issued to him, it has been mentioned that the effective rate of output tax has been reduced, accordingly, he was liable to reduce the price of the impugned product. However, the total amount of tax component included in the entire chain has increased post implementation of GST. The total tax cost included in the entire chain has been enumerated in Table- 'A' below:



Table- 'A'

Particulars	Actual tax cost applicable to the product		
	Reference	Pre GST	Post GST
Invoice No		6482538756	6482541444
Invoice date		09.05.2017	22.12.2017
Quantity Sold		2	4
Output tax			
MRP	A	4,795	4,795
VAT @ 14.5%	$B=A/114.5*14.5$	607	
GST @ 28%	$C=A/128*28$		1,049
CVD @ 12.5% on 65%	$D = (A*65%)*12.5%$	390	
Total Tax	$E = B+C+D$	997	1,049
Total Tax (% of MRP)	$F = E/A$	20.8%	21.9%
(Increase) /reduction in tax i.e. Net Impact on sale of Product	Diff of E		(52)

- iv. That although the total tax incidence has been increased on the said product post implementation of GST, he had not increased the MRP of the product.
- v. That the effective sale price of the goods sold to QRS Retail Limited was much below the basic price, which was considered in the aforesaid Notice. The correct working, after considering the credit notes, was furnished in Table- 'B' as follows:

Table- 'B'

Particulars	Actual price - Considering credit notes		
	Reference	Pre GST	Post GST
Invoice No		6482538756	6482541444
Invoice date		09.05.2017	22.12.2017
Quantity Sold		2	4
MRP	A	4,795	4,795
Basic Price to the distributor before discount per unit	B	3,031	2,711
Countervailing duty (CVD)	$C=A*65%*12.5%$	390	
Basic Price (Excluding taxes)	$D=B-C$	2,641	2,711
VAT @14.5%	$E=B*14.5%$	439	
GST@28%	$F=B*28%$		759
Total tax (Rs.)	$G=C+E$ or F	829	759
Total tax (in %)	$H=G/D$	31%	28%
Cum Tax selling price (As per invoice)	$I=B+E$ or $B+F$	3,470	3,470
Gross amount	$J=\text{Difference of } D$		70
Additional Credit Note post	$K = 9\% \text{ of net realization}$		244
The net impact on the sale of the product	$L = J-K$		(174)

Based on the above, Respondent inferred that he has passed on the adequate benefit to the customer by way of additional credit notes and hence there was no profiteering made on the impugned product sold to the QRS Retail Limited.

13. The Respondent submitted the following documents/information to the DGAP vide the aforementioned letters/e-mails:

- i. List of all GSTIN.
- ii. GSTR-1 and GSTR-3B Returns for the period from July 2017 to December 2018 for all the GST registrations.
- iii. Invoice-wise details of outward taxable supplies of the impugned product under investigation for the period April 2017 to December 2018 for all the GST registrations.
- iv. Details of the applicable tax rate, pre-GST & post-GST.
- v. Price lists of the impugned product, pre and post 01.07.2017.
- vi. Sample copies of the invoices, pre and post 01.07.2017.
- vii. Sample copies bill of entries for import of impugned products.
- viii. Copies of credit note in the context of Bill no. 6482541444 dated 22.12.2019.

14. The DGAP stated that the main issues to be examined in the instant case were whether there was the benefit of reduction in the rate of tax on the supply of impugned products by the Respondent after implementation of GST w.e.f. 01.07.2017 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 Central Goods and Services Tax Act, 2017.

15. The DGAP has observed that the Central Government, on the recommendation of the GST Council, had levied 28% GST on the "Electro-mechanical domestic appliances, with a self-contained electric motor, other than vacuum cleaners of heading 8508", vide Sl. No. 141 of Schedule- IV to Notification No. 01/2017-Central Tax (Rate) dated 28.06.2017. The impugned product, Food Processor, was covered by the aforesaid Notification. The GST rate on the impugned product was reduced from 28% to 18%, vide Notification No. 18/2018-Central Tax (Rate) dated 26.07.2018.
16. The DGAP also stated that the Respondent contended that the total tax incidence of tax on the impugned product had increased from 14.50% (pre-GST) to 28% (post-GST). However, on examining the documents submitted by the Respondent, it was observed by the DGAP that the impugned product was imported from outside India and has liable to Countervailing Duty @ 12.50% on the abated MRP apart from Value Added Tax (ranging between 12.50% to 15.95%). Therefore, the average tax incident in the pre-GST era was 29.80% (Approx) which was reduced to 28% on the implementation of GST. The State-wise details of pre-GST tax incidence were furnished in Annexure-17 of the DGAP's Report. Therefore, the contention of the Respondent that the total tax incidence on the impugned product has increased in the post-GST period was not correct.
17. The DGAP has also reported that the Respondent also contended that the total amount of tax component included in the entire chain has

increased post-GST implementation and he had computed the tax component by the reverse calculation on MRP by ignoring actual transaction value and discounts which were referred in Table-'A' supra. In this regard, the DGAP has drawn reference to Section 15 (1) of the Central Goods and Services Tax Act, 2017 which reads as "*The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.*" Further, Section 15 (3) (a) provides that the value of the supply shall not include any discount which is given before or at the time of the supply if such a discount has been duly recorded in the invoice issued in respect of such supply. Therefore, the DGAP stated that the GST was chargeable on actual transaction value after excluding any discount and to establish profiteering, if any, Basic Price before discount could not be considered and the Basic Price after discount (excluding duties) should be taken into consideration.

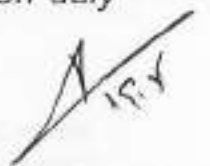
18. The DGAP examined provisions of Section 171 of Central Goods and Services Tax Act, 2017 which govern the anti-profiteering measures under GST and stated that Section 171(1) reads as "*Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" Thus, the legal requirement was abundantly clear that in the event of a benefit of input tax credit or reduction in the rate of tax, there must be a commensurate reduction in prices of the goods or services. Such reduction could only be in absolute terms and the

final price payable by a consumer must get reduced commensurate with the reduction in the tax rate. This was the legally prescribed mechanism for passing on the benefit of input tax credit or reduction in the rate of tax to the consumers under the GST regime.

19. The DGAP stated that the Respondent also submitted before him that though the base price excluding taxes increased by Rs. 70/- per unit (as mentioned in Table- 'B' supra), however, on comparing the total discounts passed to QRS Limited (Recipient in the two invoices referred in Table-'B' supra) for the periods, Jan-Jun 2017 and Jul-Dec 2017, it could be seen that the actual discount had increased by 9% resulting in passing on of Rs. 244/- (9% of the base price in general) as an additional discount post GST. However, the Respondent submitted that he had passed on benefit amounting to 2.5% in the form of rebates and that the same was passed on to the recipients in the form of credit notes pertaining to Invoice No. 6482541444 dated 22.12.2017 (invoices referred in Table-'B' supra). However, the DGAP observed that the rebates offered by the Respondent were in the form of logistics rebates, service rebates, and rebates on operational income and not on account of reduction in the rate of tax. Therefore, it was established that the Respondent had not passed on any benefit of reduction in the rate of tax to their recipients in any manner.

20. The DGAP further stated that Section 15 (3) of the Central Goods and Services Tax Act, 2017 states *"The value of the supply shall not include any discount which is given—*

(a) before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply; and



(b) after the supply has been effected, if—

(i) such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and

(ii) input tax credit as is attributable to the discount based on document issued by the supplier has been reversed by the recipient of the supply”

Therefore, to exclude any discount after the supply has been affected, the supplier should produce an agreement of such a discount entered into at or before the time of such supply. Further, the discount should be specifically linked to the relevant invoice and the recipient should reverse the input tax credit attributable to such a discount. Since the aforesaid conditions had not been satisfied in this case, the discount claimed by the Respondent after the supply has been affected was liable to be disallowed.

21. The DGAP stated that the amount of profiteering made by the Respondent for failing to pass on the benefit of the reduction in the rate of tax to the recipients, in terms of Section 171 of the Central Goods and Services Tax Act, 2017, apparently worked out to Rs. 4,53,949/, after considering the details of outward supplies during the period 01.07.2017 to 31.12.2018 furnished by the Respondent. The details of transaction wise computation were given in Annexure-18 of the DGAP's Report. The said profited amount has been arrived at by comparing the State-wise average basic price (after discount) of

the impugned product during the period 01.04.2017 to 30.06.2017, with the transaction-wise basic price (after discount) during the period 01.07.2017 to 31.12.2018 for all the States.

22. The place of supply wise break-up of the total profiteered amount of Rs. 4,53,949/- was furnished by the DGAP as is given in Table-'C' below:-

Table -'C'

S. No.	State/Union Territory (Place of Supply)	State Code	No. of Units Sold	Amount of Profiteering (Rs.)
1	Andhra Pradesh	37	57	1,154
2	Bihar	10	16	1,666
3	Chandigarh	4	32	637
4	Chhattisgarh	22	2	179
5	Delhi	7	630	32,203
6	Goa	30	17	336
7	Gujarat	24	208	15,667
8	Haryana	6	2,198	30,124
9	Himachal Pradesh	2	11	1,034
10	Jharkhand	20	32	179
11	Karnataka	29	2,225	55,050
12	Kerala	32	523	40,293
13	Madhya Pradesh	23	104	5,624
14	Maharashtra	27	1,392	66,772
15	Meghalaya	17	4	246
16	Orissa	21	8	972
17	Puducherry	34	10	204
18	Punjab	3	423	47,990
19	Rajasthan	8	163	12,399
20	Tamil Nadu	33	2,635	87,456
21	Telangana	36	497	44,628
22	Uttar Pradesh	9	227	3,485
23	Uttarakhand	5	112	1,598
24	West Bengal	19	172	4,054
	Grand Total		11,698	4,53,949

23. Further, in reply to the contention of the Respondent that the basic price (excluding tax) of the impugned product was increased when there was a reduction in the rate of tax, on the introduction of GST

w.e.f. 01.07.2017, the DGAP stated that from the details furnished in Annexure-18 of the Report, it appeared that the basic price of the impugned product was increased after 01.07.2017. Thus, it appeared that by increasing the basic price of the impugned product consequent to the reduction in the rate of tax, the commensurate benefit of the implementation of GST was not passed on to the recipients. The total amount of profiteering covering the period 01.07.2017 to 31.12.2018 has been computed as Rs. 4,53,949/-.

24. The DGAP stated that Section 171(1) of the Central Goods and Services Tax Act, 2017, requiring that *"any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices"*, has been contravened in the present case.
25. The above Report was considered by this Authority in its meeting held on 11.10.2019 and it was decided that the Applicants and the Respondent be asked to appear before this Authority on 07.11.2019. The Respondent was issued a notice on 16.10.2019 to explain why the above Report of the DGAP should not be accepted and his liability for violating the provisions of Section 171 of the CGST Act, 2017 should not be fixed. During the course of the hearings, no one appeared for the Applicants and the Respondent was represented by Sh. Harish Chawla, Tax Head, Sh. Gaurav Gulati and Sh. Manish Singh, Authorised Representatives. The Respondent has filed his written submissions dated 25.11.2019. The grounds raised by the Respondent vide his above submissions are mentioned below:

i. That the benefit of reduction in the rate of tax has been passed on by him to the recipients by way of credit notes/rebates; that while the Respondent has generally passed on 9% of the net realization of the invoice amount as an additional rebate to QRS Retail Limited, as a whole, to comply with Section 171 of the CGST Act, 2017; that for the supplies made to QRS Ltd. vide invoice no. 6482541444, he has issued additional credit note amounting to 2.5% of the net realization of the invoice amount; that he had passed on the benefit of reduction in the rate of tax by reducing the prices of the goods by way of additional credit notes; that he wishes to place reliance on the order of the National Anti-profiteering Authority in the case of Ankit Kumar Bajoria v. M/s. Hindustan Unilever Ltd. Case No. 20/2018 dated 24.12.2018 wherein it was held that passing on extra quantity could be one of the modes of passing on of the benefit under Section 171 of the CGST Act, 2017.

ii. Section 15 of the CGST Act, 2017 did not have any applicability in the present case. That the DGAP, vide his Report dated 14.08.2019, has observed that GST was chargeable on actual transaction value after excluding any discount; that for the computation of profiteering the DGAP has not considered the basic price before discount but has instead worked out the computation taking into account the basic price after discount (excluding duties, which was an incorrect and flawed understanding and the computation has

thus been done without application of mind and was based on a wrong understanding of the CGST provisions; that Section 15 of that Act can only be correctly used to determine the value of supply i.e. 'transaction value' for levying the tax; that the DGAP has erroneously applied provisions of Section 15 of the CGST Act, 2017 for determining whether the Respondent has profiteered or not.

- iii. That the methodology he had himself adopted to compute the profiteered amount was correct; that CGST Rules did not set any method for calculation of the benefit of reduction in the rate of tax or benefit of input tax credit that was required to be passed on to the recipients in terms of Section 171 of the CGST Act; that Section 171 of the CGST Act merely provided for the setting up of an Authority to examine whether input tax credits availed by any registered person or the reduction in the tax rate has resulted in a commensurate reduction in the price of the goods or services or both supplied by the Respondent; that in the absence of clarity regarding the whether the computation should be based on the price actually changed or not and on what level, i.e. entity level, state level, location level, product level, category level or stock-keeping unit (SKU) level, he had himself calculated the price change both at the entity level and the product level by comparing the weighted average price Pre-GST across India and weighted average price Post-GST across India and had

found that there was no profiteering made by him at the time when the GST was introduced.

- iv. That the methodology adopted to compute the alleged profiteered amount did not take into account various parameters such as distinct pricing for different customers; that healthcare and personal care products industry are very dynamic and market-driven and hence the pricing of products was also affected by the customer relationships and negotiation ability of the contracting parties and that there could be substantial differences in pricing of different customers at a given point of time for identical or similar products; that he was engaged as a reseller of healthcare and personal care products in the supply chain and the customer base of the Respondent was largely invariable; that considering the major pricing variations for different customers, the calculation of the quantum of profiteering should have been arrived at by comparing the weighted average state-wise price offered to each customer pre-GST and Post GST instead of weighted average state-wise calculation pre-GST applied to each invoice post-GST as adopted by the DGAP; that his supplies to new customers, added during the period subsequent to introduction of GST, should have been completely ignored for the calculation of profiteered amount as pricing for these new customers was decided based on various business factors, other than the rate of tax; further that the DGAP had ignored the excess

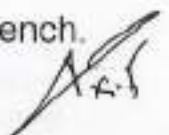
benefit passed by him to some of his customers, which, if incorporated, would have led to nil profiteering computation.

- v. That the constitution of this Authority was itself void in the absence of Judicial Members and therefore the proceedings could not be continued any further. Section 171(2) of the CGST Act provides that on the recommendation of GST Council, the Central Government would 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 resulted in a commensurate reduction in the price of the goods or services or both supplied by him. Rule 122 of the CGST Rules provided that the Chairman would be an officer of the rank of Secretary to the Government of India and the Technical Members should have been Commissioners of State Tax or Central Tax. However, the Rules did not contemplate (a) appointment of a judge of the High Court or a retired judge of the Supreme Court as the chairman of the Authority and (b) out of four Technical Members there had to be at least two Judicial Members, however, the same had also not been provided for in Rule 122 of the CGST Rules, 2017 and hence the constitution of the present Authority violated various judgments of the Hon'ble Supreme Court and several High Courts and therefore, this Authority did not have requisite jurisdiction to proceed with the matter. He placed reliance on the judgment

passed by the Hon'ble Supreme Court in the case of *Union of India v. R. Gandhi President Madras Bar Association (2010) 11 SCC, Madras Bar Association v. Union of India 2014 (308) ELT 209 (SC)*. He further submitted that this Authority has all the attributes of a Tribunal based on the following:-

1. Trappings of a court;
2. Power to decide *lis*;
3. Power to interpret provisions and statute;
4. The judicial power of the state;
5. A Chairman and Members;
6. The salary and conditions of employment have been fixed under the Statute;
7. Power to issue their own methodology and procedure.

That given the aforesaid submissions, submitted that this Authority acted as a Tribunal to determine whether the benefit arising out of the reduction in the rate of tax on supply of goods or services or increased input tax credit has been passed on by the registered person to the recipient by way of commensurate reduction in prices and that consequently, the authority has the power to impose penalty as specified under the Act and cancel the registration. Any Authority or Tribunal in which the Government was always the party against whom the relief was sought for, the number of Technical Members would not be more than the Judicial Members in the Bench.



Based on the principle laid down by various judgments of the Hon'ble Supreme Court and High Courts, this Authority being a tribunal, the proceedings before this Authority were judicial and therefore the presence of Judicial Member is a *sin qua non*.

- vi. That Section 171(2) of the CGST Act, 2017, and the Rules framed thereunder were unconstitutional being violative of Articles 14 & 19 of the Constitution of India; that it was settled law that the statute that delegated unfettered authority without laying down any measures within which such powers could be extended was discriminatory and manifestly arbitrary; and that Consequently, the Report was liable to be set aside and the present proceeding should be dropped.
- vii. That Rule 126 of the CGST Rules, 2017 was unconstitutional as there was no methodology provided for determining the 'commensurate benefit'; that Rule 126 of the CGST Rules vested the power to determine methodology and procedure on the Authority but it has not published the methodology and procedure till date; That hence, the exercise of powers by this Authority was opaque and unreasonable and it rendered the scheme of Section 171 of the CGST Act itself unconstitutional; that in this backdrop, without any methodology and guidelines being available in the public domain to determine 'profiteering', businesses such as the Respondent, also did not have a way to determine the same nor present a defensible case before the investigation

authorities if and when proceedings were initiated. This was a clear violation of the principles of natural justice, enshrined under Articles 14 and 21 of the Constitution of India.

viii. That the principle that a delegatee cannot further delegate applies to the present case. Rules 127 and especially Rule 133 of the CGST Rules confer wide and unfettered powers on this Authority, which include the power of imposition of penalty and cancellation of registration under the Act. Rule 126 of the CGST Rules conferred power on this Authority to determine the methodology and procedure. The CGST Act was completely silent on several important aspects and the powers of this Authority have been mentioned only in the delegated legislation, i.e. CGST Rules. Such powers being substantive in nature, should have been prescribed by the legislature in the CGST Act itself. Therefore, the Rules have gone beyond the Act in empowering this Authority with wide and uncontrolled powers mentioned under Rule 133(3) of the CGST Rules. The powers vested on this Authority vide the said rules included severe consequences against the Assessee such as ordering a reduction in prices and cancellation of registration under the Act. The concept of '*delegatus non-potest delegare*' which essentially means that a delegate cannot further delegate unless expressly or impliedly authorized applied in the present case. The Respondent further submitted that such sub-delegation was impermissible unless authorized by the parent legislation. The

Supreme Court has endorsed this maxim in the case of **Barium Chemicals Ltd. & Ors. v Company Law Board & Ors.**

- ix. That the DGAP has gone beyond his jurisdiction in exercising the right to further investigate the matter under rule 133 (4) of the CGST Rules, 2017; that prior to the present investigation; the DGAP had submitted an Investigation Report dated 26.09.2018 to this Authority under Rule 129 (6) of the CGST Rules, 2017. Vide the said report, the DGAP had concluded that the allegations made by the Applicant No. 1 could not be sustained as there was no tax rate reduction on the impugned goods at the time of introduction of GST and thus it was held that there was no contravention of Section 171 of the CGST Act, 2017. However, this Authority, vide its order dated 13.12.2018 referred the matter back to the DGAP's office for further investigation under Rule 133(4) of the CGST Rules, 2017. The reference for further investigation was concerning "the matter" for which the report had been submitted by the DGAP. Therefore, the scope of further investigation or inquiry should have been restricted to the matter on which the first report was sent to the Authority by the DGAP. The DGAP could not enlarge the scope of investigation for the matter referred to under Rule 133 (4) of the CGST Rules.
- x. That the Respondent has not profiteered at all and therefore there was no contravention of section 171 of the CGST Act, 2017. The explanation attached to Section 171 has defined

the term 'profiteered' for Section 171 of the CGST Act, 2017. As per the explanation, the term 'profiteered' meant the amount determined on account of not passing on the benefit of reduction in the 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 or both. The explanation provided under Section 171 of the CGST Act, 2017 is ambiguous and failed to provide a clear distinction between the profit and profiteering. Further, the explanation did not provide how profiteering was to be established, what were the considerations to be taken cognizance of by this Authority while making such determination, etc. In light of the aforesaid, the Respondent had not profiteered any amount concerning the supplies of the impugned product. The Respondent had issued additional credit notes to the recipients and therefore the benefit of reduction in the rate of tax was passed to the recipient.

26. The above submissions of the Respondent were forwarded to the DGAP vide Order dated 25.11.2019 for clarifications under Rule 133(2A). The DGAP has filed his clarifications dated 06.12.2019 on the objections raised by the Respondent as follows:

- i. Para-A:- The benefit of reduction in the rate of tax has been passed on to the recipient by way of credit notes/rebates:-



That the Concern raised by the Respondent had been duly addressed in Para-14 & 15 of his investigation report dated 14/20.08.2019 wherein It had been observed that credit notes issued by the Respondent were rebates issued on account of Logistics Rebate, Service Rebate and rebate on operating income and not on account of reduction in the rate of tax.

- ii. Para-B: Section 15 of the CGST Act 2017 does not have any applicability In the present case:

In this regard, the DGAP Referred to Section 15 (1) read with Section 15 (3) (a) of the Central Goods and Services Tax Act, 2017 mentioned in the report dated 14/20.08.2019. The DGAP further stated that the GST was chargeable on actual transaction value after excluding any discount and therefore, to establish profiteering, if any, Basic Price before the discount cannot be considered and the Basic Price after discount (excluding duties) should be the correct amount which was taken into consideration as per the provisions of Section 15 of the CGST Act, therefore, a reference to Section 15 of the CGST Act, 2017 has been correctly made.

- iii. Para-C: Methodology adopted to compute the profiteered amount by the Respondent is correct:

Section 171(1) reads as "*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.*"

Thus the legal requirement was abundantly clear that in the event of a benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in prices of any supply of goods or services. Therefore, the Respondent was under a legal obligation to pass on the benefit of reduction in the rate of tax or the benefit of the input tax credit by way of commensurate reduction in the price of each supply of goods or services. Further, Anti-profiteering provisions are for the benefit of the recipients and each recipient must get the benefit of reduction in the rate of tax or increase in ITC on each supply of Goods or Services or both.

- iv. Para-D: Methodology adopted to compute the alleged profiteered amount does not take into account various parameters such as distinct pricing for different customers:

That in terms of Section 171 of Central Goods and Services Tax Act, 2017 which governs the anti-profiteering provisions under GST, the legal requirement was abundantly clear that in the event of a benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in prices of the goods or services. Such reduction could only be in absolute terms such that the final price payable by a consumer must get reduced. This was the legally prescribed mechanism for passing on the benefit of ITC or reduction in the rate of tax under the GST regime to the consumers. Moreover, it was clear that Section 171 simply did not provide a supplier of the goods or services any other means of passing on the benefit of ITC or

reduction in the rate of tax to the consumers. Thus the legal position was unambiguous and could be summed up as below:-

- (a) A supplier of goods or services must pass on the benefit of ITC or reduction in the rate of tax to the recipients by way of reducing the prices thereof paid by the recipient and
- (b) The law does not offer a supplier of goods and services the flexibility to suo-moto decide on any other modality to pass on the benefit of ITC or reduction in the rate of tax to the recipients.

Therefore the law did not offer a supplier of goods and services flexibility to pass on the benefit of ITC or reduction in the rate of tax on one supply, say 'X' by reducing the prices of any other supply say 'Y'. The text of Section 171 of the CGST ACT 2017 was very clear according to which the benefit of reduction in tax rate has to be passed on each supply individually. Thus, if the Respondent has passed on excess benefit in respect of any supply to the recipient, the same could be adjusted against the profiteered amount about some other supply.

- v. Para-I: The DGAP has gone beyond its jurisdiction in exercising its right to further investigate the matter under Rule 133 (4) of the Central Goods and Services Tax Act, 2017:

That the Respondent's contention (that while undertaking the investigation the DGAP has travelled beyond the jurisdiction of Rule

133 (4) and that the investigation should have been limited to the supplies of the impugned goods made to the retailer M/s QRS Limited only) was untenable and bereft of facts as in the initial investigation report dated 26.09.2018, a comparison was made between the applicability of tax on the product "Food Processor" (HSN Code 85094090) pre-GST and post-GST rate reduction w.e.f. 15.11.2017. The invoices issued to M/s. QRS Retail Limited were merely taken up for calculation of the base price of the impugned product. It did not imply that the investigation was limited to the supplies of the impugned product made to M/s QRS Retail.

- vi. Para-J: The Respondent has not profiteered and therefore, there is no contravention of Section 171 of the CGST Act, 2017:

The DGAP stated that vide his report dated 14/20.08.2019 profiteering amount was computed as Rs. 4,53,949/- by him, which was based on document/data provided by the Respondent himself.

27. The Above clarifications of the DGAP under Rule 133(2A) dated 06.12.2019 were supplied to the Respondent for filing his rejoinder if any. The Respondent during the hearing held on 15.01.2020 has filed re-joinder dated 14.01.2020 as has been mentioned below:

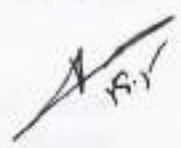
- i. That Section 171 provided for a commensurate reduction in the prices, however, it did not specifically lay down a particular methodology or procedure or did not specify a

particular head under which a supplier ought to reduce his prices. The additional credit notes issued by him to his recipients should be considered while calculating the profiteering amount.

- ii. That the Respondent had not increased MRP of product post-GST therefore, end consumers did not get affected. Section 9 of the CGST Act, 2017 categorically laid down that there shall be levied a tax on the value determined under Section 15 of the CGST Act, 2017. Therefore, Section 15 could only be used to determine the value of supply i.e. 'transaction value' for levying the tax. Accordingly, Section 15 of the CGST Act, 2017 was irrelevant for determining whether the Respondent had profited or not.
- iii. That given the provisions under Section 171 of the CGST Act, 2017, it was evident that one needed to assess whether there was any benefit on account of reduction in the rate of tax or input tax credit and then benefit, if accrued, was required to be passed on to the recipient. The benefit accrued could be ascertained only by computing the impact of the difference in the rate of tax or credit availability. The said impact could be determined product-wise, service wise and entity wise, etc. In the absence of clarity about whether price change was required to be computed at the entity level, state level, location level, product level, category level or stock-keeping unit (SKU) level in the CGST Act and/or the CGST Rules, the Respondent had calculated the price change both at the

entity level and product level and found that there was no profiteering made by Respondent at the time when GST was introduced. The Respondent had made the computation by comparing the weighted average price Pre-GST across India and weighted average price Post-GST across India and from the calculations, it could be concluded that there was no profiteering made on the impugned product.

- iv. That no guidelines had been framed to compute benefit accrued on account of rate reduction or input tax credit in the CGST Act or the Rules. Therefore, in the absence of any prescribed methodology, this Authority should adopt a methodology that was reasonable and consistent with the objectives of the statutory provisions considering all business factors that derive the final price of the product. The second part of the provision under Section 171 of the CGST Act provides that benefit if accrued, was required to be passed on to the recipient. Therefore, considering major price variations among various customers, the calculation of the quantum of profiteering should have been arrived at by comparing the weighted average state-wise price offered to each customer pre-GST and post GST instead of the weighted average state-wise calculation pre-GST applied to each invoice post-GST as adopted by DGAP. The Respondent submitted that considering the pricing calculation for each customer separately, the alleged profited amount would be reduced



to INR 2,51,067 (from INR 4,53,949). Hence, the reduced liability should be considered for this proceeding.

28. We have carefully considered all the submissions filed by the Applicants, the Respondent, and the other material placed on record and find that the Respondent is a manufacturer engaged in the manufacturing of electronics products. On examining the various submissions, we need to find whether there was any reduction in the GST rate and whether the benefit of reduction in the rate of tax was passed on or not to the recipients as provided under Section 171 of the CGST Act, 2017.

29. The Respondent has contended that he had already passed on the benefit to his recipients by way of Credit Notes/ Rebates. In this regard, it is observed that rebates were issued on account of Logistics rebate, Service Rebates, and rebate on operational income and not on account of reduction in the rate of tax. Therefore, it is established that the Respondent had not passed on any benefit of reduction in the rate of tax to his recipients in the form of a discount. Further, Section 15 (3) of the Central Goods and Services Tax Act, 2017 states "*The value of the supply shall not include any discount which is given—*

(a) before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply; and

(b) after the supply has been effected, if—

(i) such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and

(ii) input tax credit as is attributable to the discount based on document issued by the supplier has been reversed by the recipient of the supply"

Therefore, to exclude any discount after the supply had been made, the supplier should produce an agreement of such a discount entered into at or before the time of such supply. Further, the discount should have been specifically linked to the relevant invoice and the recipient should have reversed the input tax credit attributable to such a discount. Since the aforesaid conditions have not been satisfied in this case, the claim of the Respondent is not tenable and liable to be set aside.

30. The Respondent has argued that Section 15 of the CGST Act, 2017 is not applicable in the instant case. In this connection, we observe that as the GST is chargeable on actual transaction value after excluding any discount and therefore, to establish profiteering if any, Basic Price before discount cannot be considered and the Basic Price after discount (excluding duties) is the correct amount which should be taken into consideration, Therefore, reference made to Section 15 of the CGST Act, 2017 is correct and contention of the Respondent is not tenable.

31. The Respondent has also contended that there was no defined methodology in Section 171 of the CGST Act, 2017. In this connection, the Authority observed that the main contours of the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and the benefit of ITC are enshrined in Section 171 (1) of the CGST Act, 2017 itself which states that "Any

reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices." It is clear from the perusal of the above provision that it mentions "reduction in the rate of tax on any supply of goods or services" which does not mean that the reduction in the rate of tax is to be taken at the level of an entity/group/company for the entire supplies made by it. Therefore, the benefit of tax reduction has to be passed on at the level of each supply of Stock Keeping Unit (SKU) to each buyer of such SKU and in case it is not passed on the profiteered amount has to be calculated on each SKU. Therefore, the contention that the profiteered amount should be computed at the entity/group/company level is untenable. Further, the above Section mentions "any supply" i.e. each taxable supply made to each recipient thereby clearly indicating that netting off of the benefit of tax reduction by any supplier is not allowed. A supplier cannot claim that he has passed on the excess benefit to one customer and therefore he could pass lesser than the due benefit to another customer in as much as Section 171 (1) and (2) of the CGST Act 2017 envisage that profiteering has to be seen from the prism of each supply and hence each recipient/ customer. In other words, each customer is separately entitled to receive the benefit of the tax reduction on each product purchased by him at the level of each supply, i.e. each invoice. The word "commensurate" mentioned in the above Section specifies 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

based on the tax reduction as well as the existing base price (price without GST) of the product. 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 mathematical methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a recipient or the profiteered amount. However, to give further clarifications and to elaborate upon this legislative intent behind the law, this Authority has been empowered to determine the Procedure and Methodology in detail.

Further, the "Methodology and Procedure" has been notified by this Authority vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, one formula which fits all cannot 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, the timing of the purchase of inputs, 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. Issuance of Occupancy Certificate/ Completion Certificate would also affect the amount of benefit of ITC as no such benefit would be available once the above certificates are issued. 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. 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, both the above benefits have been granted by the Central as well as the State Governments by sacrificing their tax revenue in the public interest and hence the suppliers are not required to pay even a single penny from their own pocket and hence they have to pass on the above benefits as per the provisions of Section 171 (1).

32. The Respondent has further contended that the methodology adopted to compute the alleged profiteered amount does not take into account various parameters such as distinct pricing for different customers. In this connection, we observe that in terms of Section 171 of Central Goods and Services Tax Act, 2017 which governs the anti-profiteering provisions under GST reads as "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 prices." Thus, the legal requirement is abundantly clear that in the event of a benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in prices of the goods or services. Such reduction can obviously only be in absolute terms such that the final price payable by a consumer must

get reduced. This is the legally prescribed mechanism for passing on the benefit of ITC or reduction in the rate of tax under the GST regime to the consumers. Moreover, it is clear that the said Section 171 simply does not provide a supplier of the goods or services any other means of passing on the benefit of ITC or reduction in the rate of tax to the consumers. Thus the legal position is unambiguous and summed up as below:

(a) A supplier of goods or services must pass on the benefit of ITC or reduction in the rate of tax to the recipients by way of reducing the prices thereof paid by the recipient and

(b) The law does not offer a supplier of goods and services and the flexibility to suo-moto decide on any other modality to pass on the benefit of ITC or reduction in the rate of tax to the recipients.

Therefore the law does not offer a supplier of goods and services flexibility to pass on the benefit of ITC or reduction in the rate of tax on one supply, say 'X' by reducing the prices of any other supply say 'Y'.

The text of Section 171 of the CGST ACT 2017 is very clear according to which the benefit of reduction in tax rate has to be passed on each supply individually. Thus, if the Respondent has passed on excess benefit in respect of any supply to the recipient, the same cannot be adjusted against the profiteered amount concerning some other supply. Therefore, the contention of the Respondent is baseless and frivolous and liable to be set aside.

33. The Respondent has also contended that the constitution of this Authority is unconstitutional as it does not have any Judicial Member

and in doing so he has placed reliance on the judgment passed by the Hon'ble Supreme Court in the case of *Union of India v. R. Gandhi President Madras Bar Association (2010) 11 SCC 1*. The facts of this case are not relevant in the present case as in the above case, the Hon'ble Supreme Court was reviewing the Constitutional validity of Part I-B and I-C of the Companies Act, 1956 inserted by the Companies (2nd Amendment) Act, 2002 by virtue of which the National Company Law Tribunal (NCLT), which took over the functions of the Hon'ble High Courts, was established and in that sense, the Hon'ble Supreme Court had held that as the NCLT was to discharge the functions of a High Court, its members should as nearly as possible, have the same position and status as the Hon'ble High Court Judges enjoyed, by ensuring that the persons who were nearly equal in rank, experience or competence to the Hon'ble High Court Judges should be appointed as the members of the NCLT. In the present case, no such power of adjudication has been taken away from the Hon'ble High Courts or any other Court and this Authority has been established with the statutory mandate under Section 171 of the CGST Act, 2017 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 prices of the goods or services or both supplied by him. Furthermore, even the Hon'ble Supreme Court in the case of *R. Gandhi Supra* has recognized that there could be an Authority which may have only Technical Members while holding that "...Some highly specialised fact-finding Tribunals may have only Technical

Members, but they are rare and are exceptions...". It is also noteworthy here that there are several other authorities like the Telecom Regulatory Authority of India (TRAI); Securities and Exchange Board of India (SEBI); National Medical Commission (earlier, Medical Council of India); Institute of Chartered Accountants of India (ICAI); Central Consumer protection Authority and the Authorities on the Advance Rulings on the Central Excise and the Goods and Services Tax which do not have a Judicial Member. In this connection it is also submitted that the Parliament and all the State Legislatures (31 States and Union Territories), the GST Council which is a constitutional body created under the 101st Amendment of the Constitution and the Central and the State Governments in their wisdom have not found it necessary to provide for a Judicial Member in this Authority due to its highly specialized and technical functions.

34. Similarly, in the case of *Madras Bar Association v. Union of India 2014 (308) ELT 209 (SC)*, the constitutional validity of the National Tax Tribunal Act 2005 , and the Constitution (Forty-Second) Amendment Act, 1976 was challenged on the ground of violating the basic structure of the Constitution. The National Tax Tribunal was vested with the power of adjudicating appeals which included a substantial question of law arising from the orders passed by the appellate authorities under the specific tax enactments. Before the 2005 Act, the jurisdiction to adjudicate these appeals lied with the jurisdictional High Court. Therefore, the facts of the case of *Madras Bar Association Supra* are also not applicable to the facts of the

present case as no substitution of the jurisdiction of the Hon'ble High Courts has taken place under the CGST Act, 2017. Therefore, the sequitur of the above discussion is that this Authority has not replaced or substituted any function which the Courts were performing hitherto. Though it performs quasi-judicial functions, it cannot be equated with a judicial tribunal. Also, it performs its functions in a fair and reasonable manner in accordance with the Act but does not have the trappings of a Court and therefore, the absence of a Judicial Member does not render the constitution of this Authority unconstitutional or legally invalid.

35. Furthermore, this Authority has been established under Section 171 of the CGST Act, 2017 with the statutory mandate 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 prices of the goods or services or both supplied by him, which is a highly specialised fact-finding and technical work which requires intimate knowledge of the Central and the State Goods and Services Tax Acts, the Central Sales Tax Act, 1956, the State Value Added Tax Acts of all the States and Union Territories of the country, the Finance Act, 1994 (Service Tax) and all other connected tax laws which only an officer who has dealt with these Acts/laws can have. Therefore, as per Rule 122 of the CGST Rules, 2017 it has been provided that a person who is appointed as Chairman of this Authority should have held a post equivalent to the Secretary to the Government of India and the Technical Members should have worked as Commissioners of State or the Central Tax

for one year before they are appointed as such. Accordingly, the Chairman and the Technical Members of the Authority are being appointed by the competent authority (Appointments Committee of the Cabinet) of the Union Cabinet keeping the requirements of the above mandate of the GST law in perspective. Moreover, the orders passed by this Authority are further subject to the judicial review and therefore, the Respondent should not have any grievance on this account. Therefore, the above contentions of the Respondent are not tenable.

36. The Respondent has also contended that Rule 126 of the CGST Rules, 2017 is unconstitutional as Methodology for calculation of profiteering is not provided. In this regard, it is to be clarified that the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and the benefit of ITC are enshrined in Section 171 (1) of the CGST Act, 2017 itself which states that "*Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" It is clear from the perusal of the above provision that it mentions "reduction in the rate of tax on any supply of goods or services" which does not mean that the reduction in the rate of tax is to be taken at the level of an entity/group/company for the entire supplies made by it. Therefore, the benefit of tax reduction has to be passed on at the level of each supply of Stock Keeping Unit (SKU) to each buyer of such SKU and in case it is not passed on the profiteered amount has to be calculated on each SKU. Therefore, the contention that the

profiteered amount should be computed at the entity/group/company level is untenable. Further, the above Section mentions "any supply" i.e. each taxable supply made to each recipient thereby clearly indicating that netting off of the benefit of tax reduction by any supplier is not allowed. A supplier cannot claim that he has passed on more benefits to one customer, therefore, he could pass less benefit to another customer than the benefit which is actually due to that customer. Each customer is entitled to receive the benefit of a tax reduction 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 based on the tax reduction as well as the existing base price (price without GST) of the product. 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 mathematical methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a recipient or the profiteered amount. However, to give further clarifications and to elaborate upon this legislative intent behind the law, this Authority has been empowered to determine/expand the Procedure and Methodology in detail in Rule 126, of the CGST Rules, 2017. Therefore, the contention of the Respondent is baseless and liable to be set aside.

37. The Respondent has also contended that the principle, that a delegated power cannot be further delegated, applies to the instant

case. In this connection, it is clarified that the Parliament, as well as all State Legislatures, have delegated the task of framing of the Rules under the CGST Act, 2017 on the Central Government as per the provisions of Section 164 of the above Act. Accordingly, the Central Government in terms of Section 171 (3) of the CGST Act, 2017 read with Section 2 (87) of the Act, has prescribed the powers and functions of the Authority, on the recommendation of the GST Council, which is a Constitutional federal body created under the 101st Amendment of the Constitution, as per Rule 127 and 133 of the CGST Rules, 2017. Further, the power to determine its own Methodology & Procedure has been delegated to this Authority under Rule 126 of the above Rules as per the provisions of Section 164 of the above Act as such power is generally and widely available to all the judicial, quasi-judicial and statutory authorities to carry out their functions and duties. The above delegation has been granted to this Authority after careful consideration at several levels and therefore, there is no ground for claiming that the present delegation is excessive. Since the functions and powers to be exercised by this Authority have been approved by the CGST Act 2017 and the Rules framed thereunder, these are legal and in keeping with the legal intent behind the anti-profiteering provisions in the CGST Act 2017. The Authority in the exercise of the powers delegated to it under Rule 126 has notified the Methodology and Procedure vide Notification dated 28.03.2018 which is also available on its website. However, it is submitted that no fixed/uniform mathematical methodology can be determined as the facts of each case differ.

Therefore, the determination of the profiteered amount has to be done by taking into account particular facts of each case.

38. The Respondent has also contended that the DGAP has travelled beyond the jurisdiction of Rule 133 (4) in as much as the investigation should have been limited to the supplies of the impugned goods made to the retailer M/s QRS Limited only, are false and bereft of facts as in the initial investigation report dated 26.09.2018, comparison was made between the applicability of tax on the product "Food Processor" (HSN Code 85094090) pre-GST and post-GST rate reduction w.e.f. 15.11.2017. The invoices, issued to M/s. QRS Retail Ltd were merely taken, as the basis for the calculation of the base price of the impugned product. It does not imply that the investigation was limited to the supplies of the impugned product made to M/s QRS Retail during the initial investigation. Further, it is observed from the investigation report of the DGAP that the Respondent has profiteered in respect of supplies made not only to M/s QRS Retail but also to other recipients. Therefore, the DGAP has investigated the matter as has been provided by the law, and hence, he has not travelled beyond his jurisdiction.

39. The Respondent has also contended that the Section 171 (2) of the CGST Act, 2017 and the Rules framed thereunder are unconstitutional as this Section and Rules are violative of Article 14 and 19 of the Constitution of India. In this regard, it has been duly provided in Section 171 (3) of the CGST Act, 2017 that the Authority shall exercise such powers and discharge such functions as may be

prescribed. Accordingly, the Central Government in terms of Section 171 (3) of the CGST Act, 2017 read with Section 2 (87) of the Act, has prescribed the powers and functions of the Authority, on the recommendation of the GST Council, which is a Constitutional federal body created under the 101st Amendment of the Constitution, as per Rule 127 and 133 of the CGST Rules, 2017. Both the above Rules have been framed under Section 164 of the CGST Act, 2017 which also has sanction of the Parliament and the state Legislatures. Further, the provisions of the Section 171 of the CGST Act are limited to the extent of protecting the interest of consumers by ensuring that both the benefits, benefit of additional ITC and the benefit of reduction in tax rate, are passed on to them. Neither the fixation of price nor of profit falls under the purview of the said Section. The Respondent was liable to pass on the benefit which has accrued to him on account of additional ITC to the homebuyers which he has not passed on commensurately. Therefore, the said Section and Rules framed thereunder, in any way, has not violated the Article 14 and 19 of the Constitution of India.

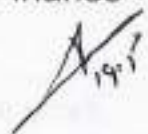
40. While the Respondent has contended that he had not profiteered and has not contravened the provisions of Section 171 of the CGST Act, 2017, it is clear from the DGAP's report that the Respondent has profiteered an amount of Rs. 4,53,949, the state-wise break-up of which is provided in the Para-22 of this Order. Further, it is also observed that the DGAP has computed the amount of profiteering based on documents/data provided by the Respondent himself.

Therefore, we hold that the Respondent has profiteered by an amount of Rs. 4,53,949/-.

41. It is evident from the details furnished in Annexure-17 & 18 that the profiteering is determined as Rs. 4,53,949/- as per the provisions of Rule 133 (1) of the CGST Rules, 2017. The Respondent is therefore directed to reduce the price of the impugned product as per the provisions of Rule 133 (3) (a) of the CGST Rules, 2017, keeping in view the reduction in the rate of tax so that the benefit is passed on to the recipients. The Respondent is also directed to deposit the profiteered amount of Rs. 4,53,949/- along with the interest to be calculated @ 18% from the date when the above amount was collected by him from the recipients till the above amount is deposited. Since the recipients, in this case, are not identifiable, the Respondent is directed to deposit the amount of profiteering of Rs. 2,26,975/- in the Central Consumer Welfare Fund (CWF) and Rs. 2,26,974/- in the State CWFs as per the provisions of Rule 133 (3) (c) of the CGST Rules, 2017, as mentioned in the Annexures- 17 & 18, along with 18% interest. The above amount shall be deposited within a period of 3 months from the date of receipt of this order failing which the same shall be recovered by the Commissioners CGST/SGST of the concerned State/Zone as per the provisions of the CGST/SGST Act, 2017.
42. It is also evident from the above narration of facts that the Respondent has denied the benefit of reduction in the rate of tax to his buyers in contravention of the provisions of Section 171 (1) of the CGST Act, 2017, and has thus resorted to profiteering. Hence, he

has committed an offence under section 171 (3A) of the CGST Act, 2017, and therefore, he appears to be liable for imposition of penalty under the provisions of the above Section. Accordingly, a Show Cause 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 them.

43. Further, the Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST of concerned States/Zones to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by the Authority is deposited in respective Consumer Welfare Funds. A report in compliance of this order shall be submitted to this Authority by the DGAP within a period of 3 months from the date of receipt of this order.
44. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was required to be passed within a period of 6 months from the date of receipt of the Report from the DGAP under Rule 129 (6) of the above Rules. Since, the present Report has been received by this Authority on 09.10.2019 the order was to be passed on or before 08.04.2020. However, due to the prevalent pandemic of COVID-19 in the Country this order could not be passed on or before the above date due to *force majeure*. Accordingly, this order is being passed today in terms of the Notification No. 35/2020-Central Tax dated 03.04.2020 issued by the Government of India, Ministry of Finance



(Department of Revenue), Central Board of Indirect Taxes & Customs under Section 168 A of the CGST Act, 2017.

45. Further, we observe from the documents placed on record that the Respondent has been engaged in the supply of several other products, prices of which have been impacted at the time of introduction of GST. Since, the DGAP has established that the Respondent has contravened the provisions of Section 171 of the CGST Act, 2017 while selling the product "Food Processor", it becomes inevitable to investigate the profiteering aspect in respect of other impacted products too which have been supplied by the Respondent. Therefore, the Authority directs the DGAP to investigate into all the other impacted products which have been supplied by the Respondent and submit a detailed Report under Rule 133(5) of the CGST Rules, 2017.
46. A copy each of this order be supplied to the Applicants, the Respondent, Commissioners 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)



A. K. Goel
19.5.2020

(A. K. Goel)

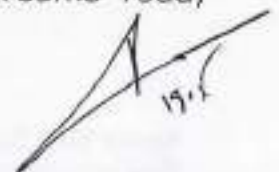
Secretary, NAA

F. No. 22011/NAA/81/Philips/2018 / 2013-2055

Date: .05.2020


Copy To:-

1. M/s Phillips India Ltd., Corporate Office, 8th Floor, DLF-9B, DLF Cyber City, Sector-25, DLF Phase-3, Gurgaon-122002.
2. Kerala State Level Screening Committee on Anti-Profiteering, Commissioner, State GST Department, 9th Flr, Tax Tower, Killipalam, Karamana Post, Thiruvananthapuram, Kerala- 695 002.
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, office of the chief Commissioner of state Tax, eedupugallu, krishna district, Andhra Pradesh.
5. Commissioner of commercial Taxes, additional Commissioner (GST), commercial Tax Department, ground floor, vikas bhawan, baily road, Patna - 800 001.
6. Commissioner of commercial Taxes, commercial Tax, SGST Department, behind raj bhawan, Civil Lines, Raipur - 492 001.
7. Commissioner of commercial Taxes, office of Commissioner of commercial Tax, vikrikar bhavan, old high court building, panji, Goa-403 001.
8. Commissioner of commercial Taxes, c-5, Rajya kar bhavan, near times of India, ashram road, Ahmedabad.
9. Commissioner of commercial Taxes, vanijya bhavan, plot no. 1-3, sector-5, panchkula. Pin - 134 151.
10. Commissioner of commercial Taxes, Excise & Taxation Commissioner, Government of Himachal Pradesh, b-30, sda complex, kasumpti, Shimla.
11. Commissioner of commercial Taxes, commercial Taxes Department, project bhawan, dhurva, Ranchi- 834 004.
12. Commissioner of commercial Taxes, vanijya therige karyalaya, 1st main road, Gandhinagar, Bangalore- 560 009
13. Commissioner of commercial Taxes, Government secretariat, Thiruvananthapuram -695001.
14. Commissioner of commercial Taxes, Moti Bangla compound, m.g. Road, Indore.
15. Commissioner of commercial Taxes, GST bhavan, mazgaon, Mumbai-400 010.
16. Commissioner of commercial Taxes, office of the Commissioner, GST & cx Commissionerate, morellow compound, m.g.road, shillong-793001.
17. Commissioner of commercial Taxes, office of the Commissioner of state Tax, baniykar bhawan, old secretariat compound, cuttack - 753 001.
18. Commissioner of commercial Taxes, office of Excise and Taxation Commissioner, bhupindra road, Patiala- 147 001.
19. Commissioner of Commercial Taxes, Kar Bhavan, Ambedkar Circle, Jaipur, Rajasthan - 302 005.
20. Commissioner of commercial Taxes, papjm building, greams road, Chennai - 600 006.



21. Commissioner of commercial Taxes, o/o the Commissioner of state Tax, ct complex, nampally station road, Hyderabad - 500 001.
22. Commissioner of commercial Taxes, office of the Commissioner, commercial Tax, u.p. Commercial Tax head office vibhuti khand, gomti nagar, Lucknow (U.P.).
23. Commissioner of commercial Taxes, State Tax Department, head office uttarakhand, ring road, near pulia no. 6, natthanpur, Dehradun.
24. Commissioner of commercial Taxes, 14, beliaghata road, Kolkata - 700 015.
25. Commissioner of commercial Taxes, deptt of trade & Taxes, vyapar bhavan, ip estate, new delhi-2 pin: 110 002.
26. Commissioner of commercial Taxes, first floor, 100 feet road, ellapillaichavady, pondicherry - 605 005.
27. Chief Commissioner of central Goods & Services Tax, Bhopal zone 48, administrative area, arera hills, hoshangabad road, Bhopal M.P. 462 011.
28. Chief Commissioner of central Goods & service Tax c.r.building rajaswa vihar, bhubaneswar-751007.
29. Chief Commissioner of central Goods & service Tax Chandigarh zone C.R. Building, plot no. 19 a, sector 17 c, chandigarh-160017.
30. Chief Commissioner central Goods & service Tax , cochin zone C.R.building, i.s.press road, Ernakulum cochin 682018.
31. Chief Commissioner of central Goods & Services Tax Delhi zone C.R. Building, I.P. Estate, new delhi 110 109.
32. Chief Commissioner of central Goods & service Tax, Hyderabad zone GST bhavan, I.B.stadium road, basheer bagh, Hyderabad 500 004.
33. Chief Commissioner of central Goods & Services Tax Jaipur zone, new central revenue building, statue circle, Jaipur 302 005.
34. Chief Commissioner of central Goods & Services Tax, Meerut zone opp. Ccs university, mangal pandey nagar, meerut-250 004.
35. Chief Commissioner of central Goods & Services Tax, Mumbai zone GST building, 115 m.k. Road, opp. Churchagate station, mumbai-400020.
36. Chief Commissioner of central Goods & Services Tax, Telangkhedi road, civil lines, Nagpur 440001.
37. Chief Commissioner of central Goods & Services Tax Panchkula sco 407408, sector-8, Panchkula.
38. Chief Commissioner of central Goods & Services Tax, Pune zone GST bhawan ice house, 41a, sasoon road, opp. Wadia college, pune 411001.
39. Chief Commissioner of central Goods & Services Tax, (Ranchi zone) 1st floor, C.R. Building, (annex) veer chand patel path Patna, 800001.
40. Chief Commissioner of central Goods & Services Tax, Shillong zone north eastern, 3rd floor, crescens building, MG Road, shillong-793 001.
41. Chief Commissioner of central Goods & Services Tax, Vadodara zone 2nd floor, central Excise building, race course circle, Vadodara 390 007.

42. Chief Commissioner of central Goods & Services Tax Visakhapatnam zone GST Bhavan, port area, Visakhapatnam 530 035.
43. Guard File.



(A. K. Goel)
Secretary, NAA

o/c

