

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

Case No. 50/2019
Date of Institution 22.04.2019
Date of Order 21.10.2019

In the matter of:

1. Sh. Sandeep Puri, Commissioner of Central Goods and Services Tax, Mumbai West Commissionerate, 1st floor, Mahavir Jain Vidhalaya, CB Burfiwala Marg, Andheri (W), Mumbai- 400058.
2. Director General of Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Glenmark Pharmaceutical Ltd., Glenmark House, B. D. Sawant Marg, Chakala, Off Western Express Highway, Andheri (E), Mumbai – 400099.

Respondent



Quorum:-

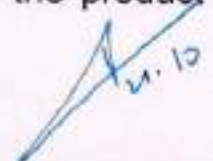
1. Sh. B. N. Sharma, Chairman
2. Sh. J. C. Chauhan, Technical Member
3. Ms. R. Bhagyadevi, Technical Member
4. Sh. Amand Shah, Technical Member

Present:-

1. None for the Applicant No. 1.
2. Sh. Shivender Pandey, Superintendent, DGAP for the Applicant No. 2.
3. Sh. Virender Sharma, VP-Taxation, Sh. Pratik Jain, Sh. Jatin Arora, and Sh. Gaurav Shah, Authorised Representatives for the Respondent.

ORDER

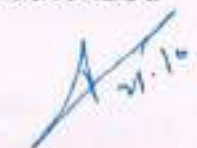
1. The brief facts of the case are that under Rule 128 of the Central Goods and Services Tax (CGST) Rules, 2017, an Application was filed before the Standing Committee on Anti-Profitteering by the Applicant No. 1 against the Respondent alleging that in the bill raised for "Sanitary Napkin" (hereinafter referred to as the product) after exemption of GST from 12% to Nil w.e.f. 27.07.2018 on the above product, vide Notification No. 19/2018-Central Tax (Rate) dated 26.07.2018, the old stock of the product was being sold at the pre rate reduction MRP.

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2. The above issue was examined by the Standing Committee on Anti-profiteering in its meeting held on 08.10.2018, where it was decided, to refer the matter to the Director General of Anti-Profiteering (DGAP) to initiate detailed investigation in the matter and collect evidence necessary to determine whether the benefit of reduction in the rate of GST on supply of the product had been passed on by the Respondent to the recipients.

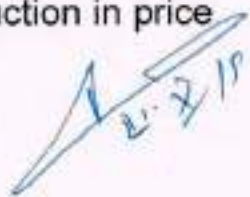
3. The DGAP, after completing the investigation has submitted his Report under Rule 129 (6) of CGST Rules, 2017 on 23.04.2019 pertaining to the period w.e.f. 27.07.2018 to 30.11.2018.

4. The DGAP in his Report has stated that a notice under Rule 129 of the CGST Rules, 2017 was issued on 02.11.2018, calling upon the Respondent to reply as to whether he admitted that the benefit of GST 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 along with all the supporting documents. The Respondent was also given an opportunity to inspect the non-confidential evidences/information furnished by the above Applicant and it was availed by the Respondent through an authorized representative on 22.11.2018.



5. The DGAP in his Report has stated that the Respondent in his reply to the notice had stated that he had sent a communication to all his distributors announcing the reduction in MRP of his product and the new reduced price (MRP) for each pack was also conveyed to the distributors, stockists and retailers and the inventory sold by them after 26.07.2018 was at a price lower than the MRP of the products and also claimed that it was advertised in one of the leading newspapers, informing the public at large about the reduction in the MRP of the product.

6. The DGAP further stated that the contention of the Respondent that immediately he had given effect to the Notification No. 19/2018 - Central tax (Rate) dated 26.07.2018, regarding reduction in GST rate from 12% to Nil on the product by reducing the MRPs of said goods, appeared to be correct but based on the Applicant No. 1's field inspection, it was noticed that the old stocks were being sold at the same MRP prevailing prior to the reduction of GST rate. The Report also stated that neither the GST rate nor the price was indicated on the invoice except the MRP of the product. This MRP also did not indicate that there was commensurate reduction in price charged from the ultimate consumers.



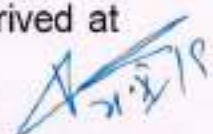
7. The DGAP further stated that the rate of tax was reduced from 12% to Nil w.e.f 27.07.2018, vide Notification No. 19/2018-Central Tax (Rate) dated 26.07.2018 with denial of the benefit of Input Tax Credit (ITC). Accordingly ITC pertaining to the product that had accrued to the Respondent during the period from July, 2017 to 26.07.2018 was calculated as Rs. 1,27,11,749/- and the reversal of ITC on the closing stock as on 26.07.2018, was Rs. 42,56,338/-. The Report stated that in order to estimate the ratio of ITC in respect of the products as a percentage of the taxable turnover supplied during the period w.e.f. July, 2017 to 26.07.2018, the ITC on closing stock as on 26.07.2018 had to be excluded and therefore the ITC amounting to Rs. 84,55,411/- [Rs. 1,27,11,749/- (-) Rs. 42,56,338/-] was available to the Respondent during the period from July, 2017 to 26.07.2018, which was approximately 8.39% of the taxable turnover. The DGAP based on these calculations has arrived at the ITC ratio of 8.39% as has been shown in the table below:-

| Sl. No. | Period | Particulars | Amount (in Rs.) |
|---------|--------------------------|--|-----------------|
| 1. | July, 2017 to 26.07.2018 | Total Taxable Turnover exclusively from Sanitary Napkins (A) | 10,07,45,295 |

| | | | |
|----|---|---|-------------|
| 2. | July, 2017 to 26.07.2018 | Input Tax Credit exclusively in respect of Sanitary Napkins (B) | 1,27,11,749 |
| 3. | | Reversal of Input Tax Credit on closing stock as on 26.07.2018 (C) | 42,56,338 |
| 4. | July, 2017 to 26.07.2018 | Input Tax Credit relevant to Taxable Turnover (D) = (B-C) | 84,55,411 |
| 5. | Ratio of Input Tax Credit to Taxable Turnover (%) (E)= (D/A*100) | | 8.39% |

8. The DGAP further stated that due to the reduction in GST rate from 12% to Nil w.e.f. 27.07.2018, the ITC which was not available to the Respondent became part of his cost and thus, the commensurate base price of the product post GST rate reduction, would be higher to the extent of loss of ITC. The DGAP after taking into account the loss of ITC @8.39% assessed the commensurate price for each SKU and compared it with the base prices at which the Respondent had actually sold each SKU during the period from 27.07.2018 to 30.11.2018.

9. The DGAP also submitted that based on the outward taxable supplies made by the Respondent during the period 01.07.2018 to 30.11.2018, it was seen that he had increased the base prices of the product in question when the GST rate was reduced from 12% to Nil. The commensurate base prices or selling prices post reduction in GST rate from 12% to Nil w.e.f. 27.07.2018, had been arrived at



by the DGAP by increasing the pre-GST rate reduction base prices by 8.39% on account of denial of ITC. The profiteered amount thus has been calculated by the DGAP by comparing the said commensurate selling price with the actual invoice-wise selling prices during the period 27.07.2018 to 30.11.2018.

10. Further the DGAP has stated that from the outward supplies made from 27.07.2018 to 30.11.2018, it was found that the Respondent had sold 13 products and out of these 13 only 12 products were sold by him prior to 27.07.2018. Therefore the profiteered amount has been arrived at by the DGAP by comparing the commensurate prices of these 12 products (by increasing the pre GST rate reduction prices by 8.39%), with the actual selling prices charged during the period 27.07.2018 to 30.11.2018. Accordingly the DGAP vide Annexure 27 of his Report has computed the profiteered amount as Rs. 42,52,370/-.

11. On perusal of the DGAP's Report, the Authority in its meeting held on 25.04.2019 decided to hear the Applicants and the Respondent on 09.05.2019 and accordingly notice was issued to them. On the request of the Respondent the hearing was adjourned to 28.05.2019 and final hearing was held on 11.06.2019. On behalf of the Applicant No.1 none appeared, the DGAP was represented by

Sh. Shivender Pandey, Superintendent and the Respondent was represented by Sh. Virender Sharma, VP-Taxation, Sh. Pratik Jain, Sh. Jatin Arora and Sh. Gaurav Shah, Authorised Representatives.

12. The Respondent filed detailed written submissions on 28.05.2019 and 11.06.2019 where he has stated that he was engaged in the business of trading of oncological, respiratory and sanitary products. He also claimed that the products in question under the brand name (V-Wash WoW) was traded from December 2017 onwards which attracted 12% GST. The Government vide Notification No. 19/2018 w.e.f. 27.07.2018 had reduced the rate of tax from 12% to NIL without the benefit of ITC. Since the GST was collected over and above the base price charged to the distributors, the Respondent claimed that post exemption he discontinued to levy GST on the existent base prices. He also enclosed copies of invoices to prove his point.

13. The Respondent also submitted that the suppliers of the product had increased the purchase prices (by approximately 30% on an average for each pack type), partially on account of loss of ITC on procurement of inputs, input services and capital goods and partially on account of various business considerations and taking into account his loss of ITC on various other procurement of inputs and

input services the DGAP in his Report had rightly estimated the loss on account of ITC @8.39%. Therefore he claimed that his base price had increased only to the extent of loss of ITC.

14. The Respondent further stated that he had launched his products in November 2017 and the sales had started in December 2017 and therefore, he was in the process of fixing a suitable price on the basis of reduction in tax rate without the benefit of ITC. He also claimed that he had sold products worth Rs. 41 Lakhs for the period from April to June 2018 prior to the exemption and products worth Rs. 10.68 crores post exemption upto October 2018. Therefore he claimed that the price charged prior to the exemption was merely to launch the product and establish the brand within the market and such price charged prior to the exemption period could not be held to be a conclusive prices for comparison as after reasonable maturity of the product in the market it would be possible to determine suitable price which would provide him a sustainable growth.

15. The Respondent also referred to the Order No. 3/2018 dated 04.05.2018 passed in the case of Kumar Gandharv-
kumargandharv83760@gmail.com vs. KRBL Limited, by the

Authority where the Authority had accepted that the price on

Basmati Rice was increased on account of various market factors and hence there was no profiteering.

16. The Respondent further claimed that he had sent a communication to all his distributors vide letter dated 27.07.2018 that the MRPs had been reduced and had also enclosed the new reduced price list for each SKU. He further claimed that the profit percentage for the period from April 2018 to June 2018 was 57.46% and for the subsequent period of August 2018 to October 2018 was 49.48% as given in the Table below:-

| Particulars | Apr-18 – Jun-18 | Aug-18 – Oct-18 |
|----------------------------|-----------------|-----------------|
| Gross Sales (@NRV) | 0.41 | 11.64 |
| Credit Notes – GST related | - | 0.95 |
| Net Sales (@NRV) | 0.41 | 10.68 |
| Cost of Goods Sold | 0.18 | 5.40 |
| Gross Contribution Value | 0.24 | 5.29 |
| Gross Contribution % | 57.46% | 49.48% |

17. He also claimed that the averaging method used by the DGAP to arrive at the profited amount was conceptually inappropriate because in the pharmaceutical business the prices to the distributors depended on the business relations and volume of transactions and accordingly differed from one distributor to another. Hence the comparable prices for pre and post GST rate reduction should be distributor wise and if this was considered the profited amount

would be Rs. 38,678/- only. To substantiate his claim the following data was produced by the Respondent as has been given in the

Table below:-

| Particulars | Distributor 1 | Distributor 2 |
|--|---------------|---------------|
| MRP of Product X | 50 | 50 |
| Less: Profit Margin of Retailers at the rate of 20% of the MRP | (10) | (10) |
| Price to the Retailer | 40 | 40 |
| Less: Profit Margin of the stockist at the rate of 10% of the MRP | (5) | (5) |
| Price to the Stockist | 35 | 35 |
| Less: Profit Margin of the distributor at the rate of 7.5% of the MRP for Distributor 1 and at the rate of 5% of the MRP for Distributor 2 | (3.75) | (2.5) |
| Price to Distributor | 31.25 | 32.5 |

18. The Respondent also provided sample copies of the invoices issued by the distributors to demonstrate that the post rate reduction base price had reduced as compared to the pre rate reduction prices. With regard to the inventory lying with the distributors he claimed that he had directed them to invoice the existing stocks at the reduced MRPs which was also advertised in one of the leading newspapers informing the consumers about the reduction in the MRPs.

19. The Respondent further submitted that Rule 129 (5) of the CGST Rules 2017 reads as "The Director General of Anti-profiteering shall make available the evidence presented to it by one interested party to the other interested party, participating in the

proceedings". Based on this he claimed that the evidences relied on by the Applicant No.1 should have been made available to him. He further submitted that in the case of Shiva Sahu vs. Union of India 2018 (362) ELT 439 (Cal.) it was held that it was the right of the person against whom the evidence was adduced to cross examine the witnesses. In view of this the Respondent submitted that in line with the principles of natural justice he should have been provided with the evidence that was relied upon and by not doing so it amounted to gross injustice. He further claimed that though a letter dated 29.11.2018 was issued permitting him to inspect the evidence but he was not allowed to inspect the evidence.

20. The Respondent also stated that Rule 126 of the CGST Rules, 2017 empowered the NAA to determine the methodology and procedure for computing the extent of profiteering but, no precise computation methodology or principles had been formulated by the Authority. He also submitted 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 could not be taken away without any explicit authority under the law passed by the Parliament or the State Legislature under Entry 34 of the Concurrent List (List III) of the Seventh Schedule to the

Constitution of India and therefore, this form of price control was in violation of Article 19(1)(g) of the Constitution of India.

21. The Respondent also claimed that, a penalty can be levied only if it was proved that there was presence of guilty, dishonest and wilful intent either to defraud revenue or evade the payment of tax and the element of mens rea or malafide intent must necessarily be present for justifying imposition of penalty. To substantiate the above claim he has relied upon the following judgements:-

- a. Landis and Gyr Ltd. vs. CCE (2013) 32 taxmann.com 268 (Kolkata- CESTAT).
- b. Hindustan Steel Ltd. vs. State of Orissa (1978) 2 ELT J 159 (SC),
- c. Akbar Badruddin Jiwani vs. Collector of Customs [1990 (47) ELT 161 (SC)].
- d. Hico Enterprises vs. Commissioner of Customs [2005 (189) ELT 135 (Tribunal – LB)];
- e. Narmada Giletines Limited vs. CCE, Bhopal [2009 (233) ELT 332 (Tri. – Del.)];
- f. Rallis India vs. Union of India [2009 (233) ELT 301 (Bom.)];
- g. CCE, Vadodara-I vs. Sterlin Gelatin [2011 (270) ELT 200 (Guj.)]

22. The Respondent further submitted that it was unreasonable to expect him to determine the net impact of the major changes in the GST rate structure and pass on the benefit immediately. The Respondent further claimed that he should not be penalised for not being able to conduct a comprehensive analysis with in a limited time frame. To support his claim he also relied upon the decision of

the Hon'ble Allahabad High Court in the case of Commissioner of Income Tax vs. Prem Kumar {2008 (214) ITR 452 (ALL.)} where the Hon'ble High Court had stated that "Lex Non Cogit ad impossibilia" is an age old maxim meaning that the law does not compel a man to do which he cannot possibly perform. Requiring the assessee to file a proper and complete return by including the income under the head 'Capital gain' would be impossible for the assessee, in cases of the nature referred above".

23. The Respondent in his further written submissions dated 11.06.2019 stated that the DGAP had computed the profiteered amount on promo packs which were launched in the post-GST rate exemption period. The DGAP has adopted the pre GST rate exemption price of normal packs to arrive at the alleged profiteering amount on promo packs, which was incorrect since the normal packs and promo packs were two different products. He also claimed that the procurement cost of the promo packs was 30% more than the normal packs as has been shown in the Table given below:-

| Particulars | Amount in Rs. | |
|---|-------------------|-------------------|
| | Normal Packs | Promo Packs |
| Sales for the period 01.08.2018 to 31.10.2018 | Rs. 7,84,70,500/- | Rs. 3,80,70,223/- |
| Corresponding purchase price of the product (excluding V-Wash WOW Liquid) | Rs. 3,20,72,358/- | Rs. 1,84,27,526/- |

24. Based on the above data the Respondent claimed that the additional procurement cost of Rs. 42,52,505/- which happened to be the additional cost burden not passed on to the consumers should have been deducted from the alleged profiteered amount. In addition he also claimed that the additional cost incurred on the promo item V-Wash WOW liquid which was purchased at Rs. 4.31/- and 9.56/- per bottle involved cost of Rs. 33,57,343/- which was required to be deducted from the alleged profiteered amount.

25. The Respondent stated that as per his calculations, the profiteered amount was Rs. 38,755/- which he had arrived by comparing the actual price in the pre-GST rate exemption period with the actual price in the post-GST rate exemption period, which had been substantiated by way of the following illustration by the Respondent.

| Particulars | Distributor 1 | Distributor 2 |
|--|---------------|---------------|
| MRP of Product X | 50 | 50 |
| Less: Profit Margin of Retailers at the rate of 20% of the MRP | (10) | (10) |
| Price to the Retailer | 40 | 40 |
| Less: Profit Margin of the stockist at the rate of 10% of the MRP | (5) | (5) |
| Price to the Stockist | 35 | 35 |
| Less: Profit Margin of the distributor at the rate of 7.5% of the MRP for Distributor 1 and at the rate of 5% of the MRP for Distributor 2 | (3.75) | (2.5) |

| | | |
|----------------------|-------|------|
| Price to Distributor | 31.25 | 32.5 |
|----------------------|-------|------|

26. The DGAP in response to the submissions of the Respondent vide his Reports dated 11.06.2019 and 27.06.2019 stated that he had no more submissions to make.

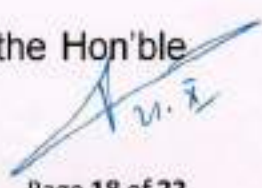
27. We have carefully considered the Report of the DGAP and the submissions made by the Respondent and the other documents placed on record which reveal that the product "Sanitary Napkin" vide Notification No. 19/2018-Central Tax (Rate) dated 26.07.2018, w.e.f 27.07.2018 was exempted and attracted NIL rate of GST. However prior to 27.07.2018 this product attracted 12% GST with the benefit of ITC on the inputs and input services which was denied from 27.07.2018 as the product was exempted from levy of tax. The GST paid on the inputs and on input service post rate reduction was a cost to the supplier, hence the base prices of the products would increase to the extent of denial of ITC. Accordingly the DGAP based on the turnover and the ITC available to the Respondent had rightly estimated the ratio of ITC to the taxable turnover as 8.39% which has not been disputed by the Respondent. The DGAP vide Annexure 27 of his Report has arrived at the base prices after taking into account the average price of the product for the period w.e.f.

01.07.2018 to 26.07.2018 i.e. prior to GST rate reduction. These base prices have been loaded with 8.39% as discussed above and accordingly recalibrated base prices per unit have been arrived at. These recalibrated base prices have been compared with the actual selling prices after the product was exempted and wherever the selling price of the product were more than the recalibrated base prices, it proved that the benefit of exemption of tax had not been extended to the recipients. Accordingly the profiteered amount for 12 SKUs supplied by the Respondent had been arrived at Rs. 42,52,370/-.

28. One of the contentions of the Respondent is that, his product was launched only in the month of November 2017 hence the price was not conclusive price for comparison. This argument is not acceptable for the reason that the product was sold at prices finalised by the Respondent from November, 2017 to July, 2018 and the transaction value was based on these prices. Therefore these prices are bound to be the actual prices prior to GST rate reduction from 12% to NIL. On the one hand the Respondent claims that his prices were increased to the extent of denial of ITC and other costs but at the same time he has claimed that a communication was sent to all the distributors directing them to sell the products at the

reduced prices, which appears to be baseless as the fact remains that the base prices were increased beyond 8.39%, denying the benefit of exemption to the recipients. His argument regarding reduction in profit from 57.46% to 49.48% will also not hold good in as much as we are not looking into his profit margins but only as to whether the benefit of tax reduction has been passed on to the recipients or not.

29. The Respondent has also contended that the Authority vide Order No. 3/2018 dated 04.05.2018 in the case of Kumar Gandharv-kumargandharv83760@gmail.com vs. KRBL Limited had held that increase in the price of the raw material could lead to increase in the price of the product. However the facts of the above case are different as compared to this case as in that case the provisions of Section 171 of the CGST Act, 2017 were not attracted because the rate of tax had in fact increased and hence the question of profiteering did not arise. But in the present case undisputedly the prices of the products ought to have been reduced as the rate of tax had decreased from 12% to NIL. The Respondent further claimed that the time was too short to take a conscious decision about reduction in prices and hence any delay in doing so was unintentional. He has also relied on a few decisions of the Hon'ble

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Courts mentioned in Para 21 supra. However it is respectfully submitted that the law settled in these cases is not being followed as facts of the present case are entirely different.

30. The DGAP has compared pre rate reduction average price with post rate reduction invoice wise price in respect of a particular SKU, as can be seen in the annexure-27 of the DGAP Report, the Respondent has strongly opposed this and has given his own calculations of average to average comparison, pre and post rate reduction when its done per product and per customer. Since the place of supply is only in Madhya Pradesh, the contention of the Respondent cannot be accepted because it is difficult to identify the customer with the purchase during the pre rate reduction period and the post rate reduction period. Therefore, we are of the opinion that since the actual prices are available for the post rate reduction, the DGAP has correctly followed this methodology and arrived at the profiteering amount.

31. In view of the above discussion the quantum of profiteering illegally obtained by the Respondent is determined as Rs. 42,52,370/- as per the provisions of Rule 133 (1) of the CGST Rules, 2017 as the Respondent has failed to passed on the benefit of rate reduction to his customers. Accordingly, the Respondent is

directed to reduce his prices by way of commensurate reduction keeping in view the reduced rate of tax and benefit of ITC which has been availed by him as per Rule 133 (3) (a). The Respondent is further directed to deposit the above amount as per the provisions of Rule 133 (3) (c) in the ratio of 50:50 in the Central or the State CWFs of the State of Madhya Pradesh, along with the interest @ 18% till the same is deposited. The concerned Central and State GST Commissioner are directed to ensure that the above amount is got deposited from the Respondent along with interest and in case the same is not deposited necessary steps shall be taken by them to get it recovered from the Respondent as per the provisions of the CGST/SCST Acts under the supervision of the DGAP. They are further directed to submit report in compliance of this order within a period of 3 months.

32. It is also evident from the above narration of facts that the Respondent has denied benefit of rate reduction to the buyers of the product "Sanitary Napkin" in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has thus resorted to profiteering, which is an offence under section 171 (3A) of the CGST Act, 2017 and therefore, he will be apparently liable for imposition of penalty under the provisions of the above Section. Accordingly, a

Show Cause Notice will 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.

33. A copy of this order be sent to both the Applicants and the Respondent free of cost. File of the case be consigned after completion.

sdl-

(B. N. Sharma)

Chairman

sdl-

(J. C. Chauhan)

Technical Member

sdl-

(R. Bhagyadevi)

Technical Member

sdl-

(Amand Shah)

Technical Member



o/c

Certified Copy

A.K. Goel

A.K. Goel

(Secretary, NAA)

F. No. 22011/NAA/37/glenmark/2019/5847-52

Date: 21.10.2019

Copy To:-

1. M/s Glenmark Pharmaceutical Ltd., Glenmark House, B. D. Sawant Marg, Chakala, Off Western Express Highway, Andheri (E), Mumbai – 400099

2. Sh. Sandeep Puri, Commissioner of Central Goods and Services Tax, Mumbai West Commissionerate, Mahavir Jain Vidyalaya, C D Burfiwala marg, Juhu Lane, Andheri (W), Mumbai-58.
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, Madhya Pradesh, Moti Bangla Compound, M.G. Road, Indore, Madhya Pradesh-452001.
5. Office of the Chief Commissioner, Customs, Central Excise & Central GST, 35-C, Mother Teresa Marg, Administrative Area, Arera Hills, Bhopal - 462011
6. Guard File.



A.K. Goel
21.2.19

A.K. Goel
(Secretary, NAA)