BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

I.O. No.	11/2020
Date of Institution	29.08.2019
Date of Order	27.02.2020

In the matter of:

1. Deputy Commissioner of State Tax, E-901, 3rd Floor, GST Bhavan, Yervada, Pune-411006.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Dough Makers India Pvt Ltd, Plot No 34/2, Rajiv Gandhi Infotech Park, Phase-I, Hinjawadi, Pune-411057.

Respondent

Quorum:-

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

27.2.2020

Present:-

1. None for Applicant No. 1.
2. None for Applicant No. 2.
3. Sh. Rakesh Kumar, IRS(Retd.) and Sh. Aneesh Mittal, Advocate, authorized representatives for the Respondent.

ORDER

1. The Present Report dated 28.08.2019, received on 29.08.2019 by this Authority, has been furnished by the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP), under Rule 129(6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the present case are that a reference was received from the Standing Committee on Anti Profiteering on 27.03.2019 by the DGAP, to conduct a detailed investigation in respect of an application (originally examined by the Maharashtra State Screening Committee on Anti-profiteering) **(Annex-1)** filed under Rule 128 of the CGST Rules 2017, alleging profiteering in respect of restaurant service supplied by the Respondent (Franchisee of M/s Subway Systems India Pvt. Ltd.) despite reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017. It was alleged that the Respondent has increased the base prices of his products and has not passed on the benefit of reduction in the GST rate from 18% to 5% w.e.f.

15.11.2017, affected vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 by way of commensurate reduction in prices, in terms of Section 171 of the CGST Act, 2017. The DGAP in his report has stated that the summary sheet of the extent of profiteering was prepared by the Deputy Commissioner of State Tax, Pune, which was also enclosed with the reference received from the Standing Committee on Anti-profiteering. This above issue was examined by the Maharashtra State Screening Committee and upon being prima facie satisfied that the Respondent had contravened the provisions of Section 171 of the CGST Act, 2017, it forwarded the said complaint with its recommendation to the Standing Committee on Anti-profiteering for further action vide its letter dated 21.02.2019.

2. The above complaint was examined by the Standing Committee on Anti-profiteering in its meeting held on 11.03.2019 and vide its minutes, the said complaint was forwarded to the DGAP for detailed investigation and to collect evidence necessary to determine whether the benefit of reduction in the rate of GST on supply of "restaurant services" has been passed on by the Respondent to the recipients, which was received by the DGAP on 27.03.2019.

3. The DGAP in his report has stated that on receipt of the said reference from the Standing Committee on Anti-profiteering, a notice under Rule 129 was issued on 09.04.2019 **(Annex-2),** calling upon the Respondent to reply as to whether he admitted

that the benefit of reduction in GST rate w.e.f. 15.11.2017, had not been passed on to his recipients by way of commensurate reduction in prices and if so, to suo-moto determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all supporting documents. The Respondent was also given an opportunity to inspect the non-confidential evidence/ information which formed the basis of the investigation from 15.04.2019 to 17.04.2019, which was not availed of by the Respondent.

4. The DGAP further reported that the period covered by the current investigation is from 15.11.2017 to 31.03.2019 and that this Authority, vide its Order No. F. No.22011/NAA/19/2018/3819 dated 19.06.2019 (**Annex-3**), had extended the time limit to complete the investigation up to 26.09.2019, in terms of Rules 129(6) of the CGST Rules.

5. The DGAP has stated that the Respondent had replied to the above said notice vide various letters but did not furnish the complete and relevant documents. Hence, Summons under Section 70 of the Central Goods and Services Tax Act, 2017 read with Rule 132 of the Rules, were issued on 21.05.2019 to Shri. Unmesh Jethanand Bhatija, Director (Authorised Representative of the Respondent), directing him to appear before the Superintendent of Directorate General of Anti-profiteering on 30.05.2019 and produce the relevant documents. In response to the Summons dated 21.05.2019, the Respondent

did not appear. However, he had submitted the requisite documents vide letter dated 27.05.2019.

6. The DGAP has further reported that in response to the notice dated 09.04.2019 and subsequent reminders, the Respondent submitted his replies vide his letters/e-mails dated 18.04.2019 **(Annex-4)**, 29.04.2019 **(Annex-5)**, 07.05.2019 (**Annex-6**), 20.05.2019 **(Annex-7)**, 21.05.2019 (**Annex-8),** 30.05.2019 **(Annex-9)**, 31.07.2019 **(Annex-10),** 02.08.2019 **(Annex-11),** 14.08.2019 **(Annex-12),** 16.08.2019 **(Annex-13)** and 22.08.2019 **(Annex-14)**. The Respondent submitted that he had availed Input Tax Credit (ITC) during the period July 2017 till 14th Nov. 2017 and thereafter he has not availed any input tax credit. The Respondent further submitted that due to nature of his business and the fact that he had multiple outlets, significant number of invoices were being generated on a daily basis, due to which he was unable to provide invoice-wise details of the supplies made by him and could provide day wise outward taxable supplies reconciled with the GSTR-1 and GSTR-3B Returns.

7. Vide the aforementioned e-mails/letters, the Respondent submitted the following documents/information:

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

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

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

(d) Copy of Tran-1 Return along with copies of ST-3 returns for the period April 2017 to June 2017

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

(f) Price lists of the products.

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

(h) Details of ITC availed, utilised and reversed during the period from July 2017 to 14th November 2017.

(i) Details of Closing Stock of inputs on 14th November 2017.

8. The DGAP, in his report, has mentioned that in terms of Rule 130 of the CGST Rules, 2017, the Respondent had been asked by the DGAP vide notice dated 09.04.2019 to indicate whether any information/ documents furnished were confidential. However, the Respondent did not classify any of the information/ documents furnished by him as confidential in terms of Rule 130 of the Rules, ibid.

9. The DGAP has reported that the reference from the Standing Committee on Anti-Profiteering, the various replies of the Respondent and the documents/evidence on record had been carefully examined. The main issues for determination were whether the rate of GST on the service supplied by the Respondent was reduced from 18% to 5% w.e.f. 15.11.2017 and if so, whether the benefit of such reduction in the rate of GST

had been passed on by the Respondent to his recipients, in terms of Section 171 of the CGST Act, 2017.

10. The DGAP has also reported that at the outset, it was noted that the Central Government, on the recommendation of the GST Council, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017, had reduced the GST rate on the restaurant service from 18% to 5% w.e.f. 15.11.2017, with the proviso that ITC on the goods and services used in the supply of said service is not availed.

11. The DGAP has further stated that before enquiring into the allegation of profiteering, it was important to examine Section 171 of the CGST Act 2017 which governs the anti-profiteering provisions under GST. Section 171(1) and reads as "*Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.*" Thus, the legal requirement was abundantly clear that in the event of benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in the prices of the goods or services. Further, such a reduction can be in money terms only so that the final price payable by a consumer gets commensurately reduced. This was the legally prescribed mechanism for passing on the benefit of ITC or reduction in the rate of tax to the consumers under the GST regime. Moreover, it was also clear that Section 171 simply did not provide a supplier of goods or services, any other means

of passing on the benefit of ITC or reduction in the rate of tax to the consumers.

12. The DGAP in his report has mentioned that the Respondent had been dealing with a total of 255 items while supplying restaurant services before and after 15.11.2017. Upon comparing the average selling prices as per details submitted by the Respondent for the period 01.10.2017 to 14.11.2017, the increase in base prices after the reduction in GST rate w.e.f. 15.11.2017 was evident in respect of 246 items (96.47% of 255 items) supplied by him. This increase in the base prices has been indicated in **Annex-16 (Confidential)**. The lower GST rate of 5% had been charged on the increased base prices of these 255 items, which confirmed that the tax amount was computed @ 18% prior to 15.11.2017 and @ 5% w.e.f. 15.11.2017. However, the fact was that because of the increase in base prices the cum-tax price paid by the consumers was not reduced commensurately for all the items, despite the reduction in the GST rate. Therefore, the only remaining point for determination was whether the increase in base prices was solely on account of the denial of ITC.

13. The DGAP has also stated that the assessment of the impact of denial of ITC, which was an uncontested fact, requires the determination of the ITC in respect of "restaurant service" as a percentage of the taxable turnover from the outward supply of "products" during the pre-GST rate reduction period. The DGAP

has further illustrated with an example that if the ITC in respect of restaurant service was 10% of the taxable turnover of the Respondent till 14.11.2017 (which became unavailable w.e.f. 15.11.2017) and the increase in the pre-GST rate reduction base price w.e.f. 15.11.2017, was up to 10%, it can be concluded that there was no profiteering. However, if the increase in the pre-GST rate reduction base price w.e.f. 15.11.2017, was by 14%, the extent of profiteering would be 14% - 10% = 4% of the turnover. Therefore, this exercise to work out the ITC in respect of restaurant service as a percentage of the taxable turnover of the products supplied during the pre-GST rate reduction period has to be carried out by taking into consideration the period from 01.07.2017 to 31.10.2017 and not up to 14.11.2017. The reason for doing the same has been stated by the DGAP as below:-

a. Reversal of ITC on the closing stock of input and capital goods as on 14.11.2017 had been effected by the Respondent. The said reversal of credit was not in accordance with the provisions of Section 17 of the CGST Act 2017 read with Rule 42 and 43 of the CGST Rules.

b. The invoice-wise outward taxable turnover in November 2017 was not provided by the Respondent to compute taxable turnover for the period 01.11.2017 to 14.11.2017.

c. Random checks of the invoices for ITC availed in November 2017 revealed that in some cases, credit was taken by the Respondent without fulfilling the prescribed

conditions and also some discrepancies were noticed in ITC availed. For instance, the Respondent availed ITC of Rs. 22,368/- in November 2017 on the basis of invoice no. TRL - 135 dated 01.11.2017 issued by M/s Tremont Reality LLP and of Rs. 25,032/- on the strength of invoice no. 270517180107316 dated 02.11.2017 issued by M/s Vamona Developers Pvt. Ltd. A scrutiny of the above invoices has revealed that while the first of the two invoices pertains to

the monthly rental charges paid by the respondent for the period from 01.11.2017 to 30.11.2017, the latter invoice relates to the license fees paid for the period from 01.11.2017 to 30.11.2017, implying thereby that the services pertaining to these invoices had not yet been received on the date of availment of ITC by the respondent, which was a violation of the provisions of Section 16(2) (b) of the CGST Act, 2017.

14. The DGAP has further reported that the ratio of ITC to the net taxable turnover had been taken for determining the impact of denial of ITC (which was available to the Respondent till 14.11.2017). On this basis of the statutory documents made available by the Respondent, it was found that the ITC amounting to Rs. 17,16,253/- was available to the Respondent from the period July 2017 to October 2017 which is 8.72% of the net taxable turnover of restaurant service amounting to Rs.

1,96,90,023/- supplied during the same period. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the said ITC was not available to the Respondent. A summary of the computation of ratio of ITC to the taxable turnover of the Respondent has been furnished by the DGAP as per Table-A below:-

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

Particulars	Jul-17	Aug-17	Sept.-2017	Oct.-2017	Total
ITC Availed as per GSTR-3B (A)*	3,40,095	4,04,062	5,00,187	4,71,909	17,16,253
Total Outward Taxable Turnover as per GSTR-3B (B)	50,52,696	48,84,153	48,47,832	49,05,342	1,96,90,023
Ratio of ITC to Net Outward Taxable Turnover (C)= (A/B)					8.72%

**ITC availed as per GSTR-3B excludes ITC of Compensation cess amounting to Rs. 13,093/- as the Respondent did not have any output liability of compensation cess and the same was also reversed on 14.11.2017 by him.*

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

during the period 15.11.2017 to 31.03.2019 were compared and it was established that the Respondent had increased the base prices by more than 8.72% i.e., by more than what was required to offset the impact of denial of ITC in respect of 241 items (out of 255 items) sold during the same period and hence, the commensurate benefit of reduction in rate of tax from 18% to 5% had not been passed on. It was also clear that there had been no profiteering in regard to the remaining items on which there was either no increase in the base price or the increase in base price was less or equal to the denial of ITC.

16. The DGAP has also contended that after the establishment of the fact of profiteering, the next issue to be examined was the amount of profiteering made in this case. For this purpose, only those items where the increase in base price was more than what was required to offset the impact of denial of ITC, had been considered. On the basis of the aforesaid pre and post reduction in GST rates, the impact of denial of ITC and the details of outward supplies (other than zero rated, nil rated and exempted supplies) during the period 15.11.2017 to 31.03.2019, as per the product wise sales registers reconciled with the GSTR-1 and GSTR-3B returns, the amount of net higher sale realization due to increase in the base price of the service, despite the reduction in GST rate from 18% to 5% (with denial of ITC) or in other words, the profiteered amount came to **Rs. 78,41,754/-** (including GST on the base profiteered amount). The details of

the computation were furnished by the DGAP vide **Annex-17 (Confidential).**

17. The DGAP has also mentioned that on the basis of the details of outward supplies of the restaurant service submitted by the Respondent, it was observed that the said service had been supplied by the Respondent in the State of Maharashtra only.

18. The DGAP in his report has concluded that the allegation of profiteering by way of either increasing the base prices of the products while maintaining the same selling price or by way of not reducing the selling prices of the products commensurately, despite the reduction in GST rate from 18% to 5% w.e.f. 15.11.2017 stood confirmed against the Respondent. On this account, the Respondent had realized an additional amount to the tune of **Rs. 78, 41,754/-** from the recipients which included both the profiteered amount and GST on the said profiteered amount and hence, the provisions of Section 171(1) of the CGST Act, 2017 had been contravened by the Respondent in the present case.

19. The above Report was considered by this Authority in its sitting held on 30.08.2019 and it was decided it was decided to accord an opportunity of hearing to the the Respondent on 17.09.2019. Notice was also issued to the Respondent directing him to explain why the Report dated 28.08.2019 furnished by the DGAP should not be accepted and his liability for violation of the provisions of Section 171 of the CGST Act, 2017 should not be

fixed. However, the Respondent did not appear for the hearing and requested for an adjournment. Sh. Rakish Kumar, IRS (Red.) and Sh. Amish Mittal, Advocate represented the Respondent.

20. The Respondent vide his written submissions dated 31.10.2019 and 04.11.2019 has made the following submissions:-

a. **Wrong Computation of alleged profiteered amount**:-

(i) The Respondent has stated that in DGAP's report dated 13.09.2019, the profiteered amount of Rs. 78,41,754/- for the period from 15.11.2017 to 31.03.2019, as per Annexure-17, was not possible, as the Respondent's sales during this period were of Rs. 9,44,27,338/- and alleged profiteering of Rs. 78,41,754/- during this period meant profiteering of 8.30% of the sales turnover, while in view of 13% reduction in the rate of tax and the impact of ITC withdrawal being from 9% to 13%, the maximum possible profiteering could be only 4% (13% - 9%).

(ii) The Respondent has further stated that for ascertaining as to whether the increase in base price (sale price excluding GST) in respect of items during the post- rate reduction period w.e.f. 15.11.2017 was more than 8.72% or not, the base price of an item as on 14.11.2017 (as per pricelist) should have been compared with the revised base price of the item

w.e.f. 15.11.2017 as per the revised pricelist for the post rate reduction period. But instead of calculating the increase in base price in the above manner, the DGAP had compared the base price during the pre-rate reduction period with the maximum of Average Base Price during each month from 15.11.2017 to 31.03.2019. During this period the cost of inputs may have increased and other factors influencing the price may have changed.

(iii) The Respondent has further stated that he had supplied the information regarding base prices of all the 255 items for the pre-rate reduction period, in respect of a large number of items but instead of taking the base prices for pre-rate reduction period as per the Respondent's price list, average base prices during the period from 01.10.2017 to 14.11.2017 had been adopted, which was lower than the base prices as per the price list. Because of taking lower than the actual base prices for the pre-rate reduction period and comparing the same with the maximum of the average base prices during the post- rate reduction period, the percentage of price increase had got inflated. He has further submitted that the Average prices couldn't be equated with Actual Transaction Prices, as on account of Sales

from the restaurant located in TCS Pane, which were at 10% lower price and Sub of the Day (SOTD) sales which were also at lower price, the average price of an item during the particular period would be lower than the actual price of the item as per the price list at which the item was normally sold.

(iv) The Respondent in his reply has mentioned that there was absolutely no justification for either taking maximum of the average base prices during post rate reduction period which were much more than the base prices as on 15.11.2017 and comparing the same, in a number of cases with average base prices during the pre-rate reduction period, which were lower than the base prices as on 14.11.2017 as per the price list.

(v) He has further stated that as per his calculations if the actual base prices as on 14.11.2017 as per the price list had been adopted, the alleged profiteered amount would come to Rs. 9,22,410/- as against the alleged profiteered amount of Rs. 78,41,754/- calculated by the DGAP.

(vi) The Respondent in his reply has also stated that the profiteered amount also included 5% GST, as the difference between the average base price of an item during post rate reduction period plus 5% GST

and the commensurate selling price of the item (commensurate base price + 5% GST) had been taken as profiteered amount. However, there was no justification for including the GST in the profiteered amount, as the GST collected by him from his customers had been paid by him to the Government and therefore there was no question of recovering the GST on the alleged excess price charged by him. If the element of GST was removed, the profiteered amount would come down to Rs. 8,78,485/- (excluding 5% GST) from Rs. 922,410/- (including 5% GST).

(vii) The Respondent has further stated that the DGAP while calculating the profiteered amount in Annexure-17 had not taken into account the fact that in case of the items sold as SOTD items', the price as on 14.11.2017 was Rs 110/- plus GST and the same had been revised to Rs 125/- including 5% GST w.e.f. 15.11.2017 which translated into an increase of only Rs. 9/- in the base price from Rs. 110/- to Rs 119/-. This represented an increase of only 8.18% in the base price, which was well within the impact of ITC withdrawal of 8.72% as calculated by the DGAP. Therefore, there was no profiteering in the case of SOTD sales, which constituted 13% of

the total sales and these sales should have been excluded while calculating the profiteered amount.

(viii) The Respondent has further stated that the calculation of profiteered amount did not take into account the fact that the prices charged in respect of sales through food delivery companies such as Swiggy, Zomato, Food panda, etc., included their Commission which varied from 15% to 22% and which was paid to/retained by the food delivery companies. The commission retained by/paid to food delivery companies did not add to the profit margin of the Respondent and, therefore, the same could not be included in the profiteered amount. The Respondent has calculated the commission retained by/paid to food delivery companies during the period from 15.11.2017 to 31.03.2018 and during FY 2018-19 as Rs. 9,92,009/- and Rs. 44,90,812/- respectively. If this commission was excluded, the profiteered amount would be negative. This had been supported by the fact that during 2017-18, as well as 2018-19, he had suffered losses. In fact, there was not even an allegation that the Respondent during post- rate reduction period had earned abnormal profit.

b. **PERIOD OF PROFITEERING FROM 30.01.219 TO 31.03.2019 TO BE EXCLUDED:-**

The Respondent in his reply has mentioned that the DGAP in his Report dated 28.08.2019 has recorded no finding on what basis the long period of about one year and four and half months from 15.11.2017 to 31.3.2019 had been adopted, while during such a long period the cost of the inputs might increase and other factors influencing the price might change. In any case, since the prices of various items had been revised upward w.e.f. 30.01.2019 on account of increase in the cost of inputs, at least the period from 30.01.2019 to 31.03.2019 should have been excluded while calculating the alleged profiteered amount.

c. **Calculation of ITC availment to taxable turnover ratio for pre- rate reduction period is wrong:-**

He further stated that the DGAP, while calculating the ITC availment to taxable turnover ratio for pre- rate reduction period, had calculated the ratio for 01.07.2017 to 31.10.2017 period and had not taken into account the ITC availment for the period from 01.07.2017 to 14.11.2017 even though the details of ITC availment and the invoice wise details of taxable outward supplies had been provided by him. Total ITC availment during the period from 01.07.2017 to 14.11.2017 was Rs. 21,29,317/- and the taxable turnover for this period was Rs. 2,21,63,716/-.

Thus, the correct ITC availment to taxable turnover ratio for pre- rate reduction period was 9.60% [(2129317/22163716)* 100]. The reasons given in the para 16 of the DGAP report for excluding the period from 01.11.2017 to 14.11.2017 for calculation of the ITC availed to taxable turnover ratio were not correct, because of the following reasons:-

i. While it was not possible for him to give invoice-wise details of outward taxable supplies for the month of November 2017 as the number of invoices were too voluminous, in order to enable the calculation of his turnover for the period from 01.11.2017 to 14.11.2017 he had supplied the bifurcation of sale details for the month of November 2017 into the periods 01.11.2017 to 14.11.2017 and 15.11.2017 to 30.11.2017 vide e-mail dated 02.08.2019 in response to the DGAP's email dated 31.07.2019. He had reversed the credit in respect of inputs and input services lying unutilized as on 14.11.2017 as w.e.f. 15.11.2017, as per the condition of reduced rate of tax, he could not utilize the credit;

ii. There was no credit in respect of capital goods and hence there was no question of calculating the quantum of reversal in terms of Rule 43 of the CGST Rules and;

iii. He was required to pay the rent and license fee in advance, the invoices for which were received in the first week of the month and since in this case, the services covered by the invoices had been received by him, there was no question of denial of credit in respect of the same more so when no communication in this regard from the jurisdictional assessing officer had been received.

d. **NO MACHINERY PROVISION FOR DETERMINING THE IMPACT OF WITHDRAWL OF ITC BENEFIT**:-

He has further stated that for determining whether the benefit of reduction in rate of GST from 18% with ITC benefit to 5% without ITC benefit by way of commensurate reduction in prices had been passed on, it was necessary to ascertain as to whether the increase in base price of the items during post rate reduction period was only to that extent which was necessary to offset the effect of withdrawal of ITC benefit. But there was no machinery provision or computational provision either in the Act or in the rules made there under or in the 'Procedure and Methodology' notified by this Authority under Rule 126 to determine the impact of availment of ITC benefit or its withdrawal on the prices of the products being supplied. The method adopted by DGAP in this regard was not laid down anywhere and was based on certain assumptions

that the ITC availment to taxable turnover ratio calculated for pre-rate reduction period would be the same for post rate reduction period and in case of multiple products, would be the same for each product. These assumptions might not always be correct. Therefore, the formula adopted by DGAP for determining the impact of withdrawal of ITC benefit on the prices could not be applied in an inflexible manner and merely on the basis of this formula, an assessee could not be accused of profiteering and huge amount could not be demanded from him as profiteered amount along with interest and penalty, more so when in this case:-

i. As against the ITC availment ratio of 8.72% for pre-rate revision period, calculated by the DGAP, as per his calculations, the ratio was 9.60%; and

ii. In case of **M/s N*P Foods, Vadodara (A franchisee of SSIPL) (Case No 9/2018)*** decided by this Authority vide order dated 27.09.2018 the ITC availment to taxable turnover ratio of 11.8% was adopted and on this basis, it was held that 12% increase in the base price was necessary to offset the withdrawal of ITC benefit and therefore, there was no profiteering. There was no reason why the same ITC availment ratio should not be adopted in the instant case.

e. **NO ROLE OF THE FRANCHISEE IN FIXING THE BASE PRICES OF THE ITEMS SOLD AS THE PRICES ARE FIXED BY THE FRANCHISOR AND THE FRANCHISOR HAD REVISED THE BASE PRICES TAKING THE IMPACT OF ITC WITHDRAWAL AS FROM 11% TO 13%**:-

The Respondent has stated that as a franchisee of Subway Systems India Pvt. Ltd. (SSIPL), he followed the prices of various items fixed by the franchisor. From the franchisor's letter dated 14.11.2017 outlining the revised pricing policy, w.e.f. 15.11.2017 it was clear that the prices had been revised taking the impact of the withdrawal of ITC benefit to be between 11% to 13%.

f. **CHANGE IN RATE OF GST FROM 18% WITH ITC BENEFIT TO 5% WITHOUT ITC BENEFIT IS NOT A CASE OF REAL REDUCTION IN RATE OF TAX AND AS SUCH THE PROVISIONS OF SECTION 171 WOULD NOT APPLY:-**

He has further stated that the GST rate of 5% without ITC benefit w.e.f. 15.11.2017 was equivalent to the compounding scheme for restaurants u/s 10 of the CGST Act wherein the rate of GST was 5% without ITC benefit. If the impact of the withdrawal of ITC benefit was taken as 12%, the GST rate of 18% with ITC benefit would be

equivalent to the GST rate of 5% without ITC benefit. Therefore, the change in the rate of GST from 18% with ITC benefit, to 5% without ITC benefit, could not be construed to be a case of any real reduction in the rate of tax and as such the provisions of Section 171 would not apply

g. **NO MACHINERY PROVISION FOR DETERMINING WHETHER THERE IS ANY PROFITEERUNG AND CALCULATION OF PROFITEERED AMOUNT:-**

He has stated that neither the CGST Act nor the Rules made there under nor the 'Procedure and Methodology' notified by this Authority under Rule 126 of the CGST Rules had any provisions specifying as to-

i. how the cases of profiteering were to be identified and for this purpose, how the increase in base prices due to genuine reasons like increase in the cost of inputs, increase in the demand for the product, etc. was to be distinguished from increase with the objective of pocketing the tax concession;

ii. how the impact of the withdrawal of ITC benefit was to be calculated if the reduction in the rate of tax was accompanied by the withdrawal of ITC benefit; and

iii. Once the profiteering was established, how the period of price reduction for which the profiteered amount was to be calculated, was to be determined.

Therefore, in view of the above-mentioned judgments of the Apex Court and Hon'ble Madras High Court, the provisions of Sec 171(1) of the CGST Act had to be held as unenforceable. If the anti-profiteering provisions, as they existed, were to be implemented, the same must be implemented in a reasonable manner and not by an inflexible application of some rule of thumb.

h. **EVERY INCREASE IN BASE PRICE CANNOT BE PRESUMED TO BE ON ACCOUNT OF PROFITEERING:-** The Respondent has stated that in case of reduction in the rate of tax, every increase in base price could not be presumed to be on account of profiteering as the same could be due to genuine reasons. In the case of ***Shri Kumar Gandharv Vs KRBL Ltd. 2018-TIOL-2-NAA-GST***, this Authority has held that an increase in MRP of packed and branded Rice on account of an increase in the purchase price of loose Rice was justified. In this case, the Department had merely proceeded on the presumption that any increase in base price beyond 8.72% was on account of profiteering without ascertaining as to whether there were any other genuine factors for increase in the price, which was not correct. The Department's approach amounted to unreasonable price control or price regulation which violated the freedom of trade and commerce granted

to a citizen under Article 19(1)(g) of the Constitution of India.

i. **PENAL PROVISIONS NOT ATTRACTED:-**

The Respondent has further stated that in any case, there was no question of imposing penalty on him as he was only a franchisee of SSIPL and was following the prices fixed by the franchisor. Since there was no *mens-rea* on the part of him, no penalty could be imposed on him. In this regard, reliance was placed on the Apex Court's judgment passed in the case of ***Hindustan Steel Ltd. Vs State of Orissa*** **reported as** ***2012-TIOL-148-SC-CT.***

21. Further report was sought from the DGAP on the issues raised by the Respondent vide his above mentioned submissions dated 04.11.2019 and the DGAP vide his submissions dated 02.12.2019 has stated that:-

a. **<u>Para A.: Submissions regarding computation of Alleged Profiteered amount</u>**:-

i. In reply to Para A.1 of the Respondent's submissions dated 04.11.2019, the DGAP has stated that as clearly detailed in the Paras 17 and 18 of the report dated 28.08.2019 the Ratio of ITC to Net Outward Taxable Turnover was 8.72% thus the Respondent could have increased the base price by 8.72% post GST rate reduction w.e.f. 15.11.2017 in order to negate the impact of ITC denial but as it

was clear from the Annexure 16 & 17 of the report dated 28.08.2019, the Respondent had increased the base prices of 241 items in the range of 15% to 102%. Thus, the total profiteered amount had come to around 8.3% of the total turnover during the period of investigation as per the Respondent's calculation.

ii. In reply to Para A.2 and A.3 of the Respondent's submissions dated 04.11.2019, the DGAP has stated that the argument advanced by the Respondent that the DGAP has compared the base price during the pre-rate reduction period with the Maximum Average Base price during each month from 15.11. 2017 to 31.03.2019 was wrong and denied.

He had only added the denial of ITC to the pre rate reduction base price and then compared it with the average actual base price of each month from 15.11.2017 to 31.03.2019 due to non-submission of transaction wise outward taxable supplies by the Respondent.

He has also contended that Section 15(1) of the Central Goods and Services Tax Act, 2017 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.

Thus, GST was chargeable on actual transaction value after excluding any discount (conditional as well as unconditional) and therefore, for the purpose of computation of profiteering menu price or price list or MRP could not be considered whereas actual transaction value was the correct amount which had been considered for computation of profiteering amount. Price list was the maximum price at which an item might be sold but it was not the actual sale price

iii. In reply to Para A.4 of the Respondent's submissions dated 04.11.2019, the DGAP has stated tha the contention of the Respondent that taking of the maximum of the average base price during post rate reduction period for the computation was not correct as the average base price for each

month for each SKU had been taken separately while computing of the amount of profiteering.

iv. In reply to Para A.5 and A.6 of the Respondent's submissions dated 04.11.2019, the DGAP has stated that Annexure-16 of his report dated 28.08.2019 indicated the increase in % in the base prices only and it had no relation to the computation of profiteering. The details of SKU wise computation of profiteering were given in Annexure-17 of his report dated 28.08.2019 wherein profiteering had been computed for each SKU by comparing pre-rate reduction average base price with month wise post-rate reduction base price as the Respondent had not submitted the transaction wise details of outward taxable supplies.

v. In reply to Para A.7 of the Respondent's submissions dated 04.11.2019, the DGAP has stated that the reply to this contention had already been given vide para A.2 & A.3 above.

vi. In reply to Para A.8 of the Respondent's submissions dated 04.11.2019, the DGAP has stated that the contention of Respondent to adopt his price list for computation of alleged profiteering could not be accepted as detailed in para A.2 & A.3 above.

vii. In reply to Para A.9 of the Respondent's submissions dated 04.11.2019, the DGAP has stated that Section 171 of the CGST Act, 2017 and Chapter XV of the CGST Rules, 2017, required the supplier of goods or services to pass on the benefit of the tax rate reduction to the recipients by way of commensurate reduction in prices. Price included both, the base price and the tax paid on it. If any supplier had charged more tax from the recipients, the aforesaid statutory provisions would require that such amount be refunded to the eligible recipients or alternatively deposited in the Consumer Welfare Fund, regardless of whether such extra tax collected from the recipient had been deposited in the Government account or not. Besides, any extra tax returned to the recipients by the supplier by issuing credit note could be declared in the return filed by such supplier and his tax liability would stand adjusted to that extent in terms of Section 34 of the CGST Act, 2017. Therefore, the option was always open to the Respondent to return the tax amount to the recipients by issuing credit notes and adjusting his tax liability for the subsequent period to that extent.

viii. In reply to Para A.10 of the Respondent's submissions dated 04.11.2019, the DGAP has stated that the Respondent neither submitted nor his documents depicted any category of items as "Sub of the Day (SOTD) item'. Further, in case of any such category existed and the base price was increased from Rs. 110/- to Rs. 119/- (excluding taxes) i.e. by 8.23% [(119-110)/(110)] which was less than the denial of ITC of 8.72%, then there must be no profiteering computed as already detailed in para-18 of DGAP's report dated 28.08.2019.

ix. In reply to Para A.11 of the Respondent's submissions dated 04.11.2019, the DGAP has stated that In terms of Section 171 of Central Goods and Services Tax Act, 2017 which governed the anti-profiteering provisions under the CGST Act reads as "*Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.*" Thus, the legal requirement was 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 so that the final price payable by a consumer gets 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 the said 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 can be summed up as follows:

(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 commensurate reduction in prices.

(b) The law does not offer a supplier of goods and services any 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, computation of the marginal gain/loss as per financial statements cannot be considered in the light of said statutory provisions.

b. **Period of profiteering from 30.01.2019 to 31.03.2019 to be excluded**:-

In reply to Para B of the Respondent's submissions dated 04.11.2019, the DGAP has stated that as mentioned in

Para 5 of the report dated 28.08.2019, the period covered by the investigation was from 15.11.2017 to 31.03.2019 thus, the profiteering was computed for the aforesaid period.

c. **Calculation of ITC availment to taxable turnover ratio for pre-rate reduction period is wrong:-**

In reply to Para C of the Respondent's submissions dated 04.11.2019, the DGAP has stated that the concern raised by the Respondent had already been addressed in para-16 & 17 of this office report dated 28.08.2019.

d. **No machinery provision for determining the impact of the withdrawal of ITC benefit:-**

i. In reply to Para D-1 of the Respondent's submissions dated 04.11.2019, the DGAP has stated that he has no comment regarding the machinery provisions for computing the denial of ITC benefit. However, regarding the calculation of percentage denial of ITC benefit, the calculation had been explained in the Para 17 of the his report dated 28.08.2019.

ii. In reply to Para D-2 of the Respondent's submissions dated 04.11.2019, the DGAP has stated that being a registered person under the Goods and Services Tax Law, it was the responsibility of the Respondent to comply with the

provisions of Section 171 of the Central Goods and Services Tax Act, 2017.

e. **Change in rate of GST from 18% with ITC benefit to 5% without ITC benefit is not a case of a real reduction in the rate of Tax and as such the provisions of Section 171 would not apply:-**

In reply to Para E of the Respondent's submissions dated 04.11.2019, the DGAP has stated that the Respondent had been misleading the proceedings by comparing the reduced rate of GST @ 5% (without ITC) w.e.f. 15.11.2017 with that of GST @ 5% under composition scheme. Under the composition scheme, the supplier could not charge the Tax from the recipient. However, in the present case, the Respondent had opted for the normal scheme for the purpose of payment of GST and was charging 18% GST from his recipients, which was reduced to 5% and the same was charged by the Respondent w.e.f. 15.11.2019. Therefore, Section 171 of the CGST Act, 2017 got attracted in the present case as the Respondent had increased the base prices by more than what he ought to have done to offset the denial of ITC.

f. **No machinery provision for determining whether there is any profiteering and calculation of profiteering amount:-**

In reply to Para F of the Respondent's submissions dated 04.11.2019, the DGAP has stated that he has no comments to offer.

g. **Every increase in base price cannot be presumed to be on account of Profiteering:-**

In reply to Para F of the Respondent's submissions dated 04.11.2019, the DGAP has stated that the case cited by the Respondent was different from the instant case as in the case of M/s KRBL, the pre-GST rate was nil and for the first time, a tax rate of 5% was imposed on the impugned product. Further, there was no violation of Article 19(1) (g) of the Constitution of India as he had not attempted to examine or question the base prices as Section 171 did not mandate control over the prices of the goods or services as they were to be determined by the Respondent. Section 171 only mandated that any reduction in the rate of tax or the benefit of ITC which accrued to a supplier must be passed on to the consumers as both were the concessions given by the Government and the suppliers were not entitled to appropriate them. Such benefits must go the consumers and in case they were not identifiable, the amount so collected by the

suppliers was required to be deposited in the Consumer Welfare Fund. His investigation had not examined the cost component included in the base price. It had only added the denial of ITC to the pre rate reduction base price.

h. **Penal Provisions not attracted:-**

The DGAP has stated that he has no comments to offer.

22. The Respondent vide submissions dated 11.12.2019 filed against the supplementary report dated 02.12.2019 filed by the DGAP, has stated that:-

a. In reply to para A.1. of the DGAP's submissions dated 02.12.2019, the Respondent has stated that the DGAP has merely reiterated that the profiteered amount was about 8.4% of the sales turnover as he had increased the base prices of 241 items from 15% to 102% as against permitted increase of only 8.72% on account of withdrawal of ITC benefit which was wholly incorrect. The said reply was silent about the absurdity in its calculation of the profiteered amount when reduction in rate of GST was 13% and the minimum impact of withdrawal of ITC benefit, as per the DGAP's calculation, was about 9%, the profiteered amount could not be more than 4% of the sales turnover and it was also from the method of calculation of percentage increase in base price in Annexure-16, for calculating the increase in base price of an item, instead of

comparing the base price of the item as on 14.11.2017 with the revised base price weft 15.11.2017 as per the Respondent's revised price list for post rate reduction period, the base price during pre-rate reduction period had been compared with the maximum of the average base price during each month from 15.11.2017 to 31.03.2019, for which there was absolutely no justification. The respondent has further averred that the DGAP report dated 2.12.2019 was also silent about the method of calculation of increase in price of various items during post-rate reduction period.

b. In reply to Para A.2 and A.3 of the DGAP's submissions dated 02.12.2019, the Respondent has stated that:-

   i. The submission of the DGAP was factually incorrect. The methodology adopted by the DGAP in Annexure-16 was evident from the Excel sheet/Chart itself. As could be seen from the Excel sheet, the formula for column 'BO' pertaining to the increase in base price was- "BO= (BN-BL)/BL". The column BL pertained to average base price during 01.10.2017 to 14.11.2017 period and the column BN, whose formula was "Max (M,P,S,V,Y,AB,AE,AH,AK,AN,AQ,AT,AW,AZ,BC,BF, BI)", pertained to maximum base price post 15.11.2017.

ii. With regard to not taking the price during pre-rate reduction period as per his price list for that period, the submission of the DGAP that price of an item mentioned in the Price list was not the actual sale price was not factually correct, as he, as a franchisee of SSIPL sold various items at prices which could not be less than the prices fixed by the Franchisor. The Franchisee could sell at prices lower than the price list only with the permission of the Franchisor. He had taken permission from the Franchisor for sale at 10% less price from his outlet in the premises of M/s TCS, Pune and for discounts in respect of sales through Swiggy, Food panda, etc for certain periods. All other sales were at the prices mentioned in the price list. Therefore, in most of the cases, the price list price represented the actual transaction value.

iii. During the period from 01.10.2017 to 14.11.2017, in case of a number of items, the average base price was less than the price list price, as in addition to sales through TCS outlet at 10% less price, there were substantial sales through Swiggy at discounted prices as sales promotion measures. In these circumstances, separate base prices for pre-rate reduction period should have been adopted for sales

through TCS outlet, discounted sales through Swiggy and other sales at the price as per price list. The Respondent relied upon the decision of this Authority given in the case of Johnson & Johnson Ltd. vide Order No. 59/2019 dated 21.11.2019. In para 9 of the aforesaid order it was mentioned that since the base prices of sanitary napkins were different for different channels/ category of sales, the DGAP had considered the average base prices of supplies to CSD and other than CSD outlets separately for calculation of the base prices during pre-rate reduction period. There was no reason why the same practice should not be adopted in this case also.

c. That in reply to Para A.4 of the DGAP's submissions dated 02.12.2019, the Respondent has stated that the DGAP's submissions on this point were applicable only to Annexure-17 and not to Annexure-16. For identifying the items in respect of which the post-rate reduction increase in the base price was more than what was warranted for offsetting the effect of withdrawal of ITC benefit, it was necessary to first calculate the percentage increase in the base price of various items during post rate reduction period w.e.f. 15.11.2017. This calculation was in Annexure-16 wherein the base price of items as on 14.11.2017 or in

a number of cases, the average base prices of the items during 01.10.2017 to 14.11.2017 period had been compared with the maximum of the average base prices during the post rate reduction period from 15.11.2017 to 31.03.2019 and on this basis, 241 items had been identified as the items in respect of which increase in base price was more than 8.72% i.e. more than what was required to offset the effect of withdrawal of ITC benefit. The calculation of the profiteered amount in Annexure-17 was in respect of these 241 items. The clarification by the DGAP did not explain why the maximum average base price during post-rate reduction period from 15.11.2017 to 31.03.2019 has been adopted for identifying the items in respect of which profiteering was alleged.

d. In reply to Para A.5 and A.6 of the DGAP's submission dated 02.12.2019, the Respondent has stated that the clarification of the DGAP in Para A.5 & 6 of his reply was not to the point. He has further submitted that the DGAP's clarification was in respect of the calculation of profiteered amount as computed in Annexure-17 while his objection was in respect of the calculation of the item-wise increase in base price in Annexure-16.

e. In reply to Para A.7 and A.8 of the DGAP's submissions, the Respondent has stated that the DGAP's clarification in respect of the Para A.7 and A.8 of his written submissions

dated 04.11.2019 was the same as that in respect of Para A.2 and A.3, i.e., since the price list price was the maximum price at which an item may be sold, it was not the actual sale price and did not represent the actual transaction value. The DGAP should have adopted separate base prices for pre-rate reduction period in respect of different categories of sales- i.e. sales through TCS, Pune outlet, sales through food delivery companies like Swiggy at discounts, and the sales as per the Pricelist price. At the cost of repetition it was stated that when this practice was adopted in the case of Johnson & Johnson Ltd. (supra) mentioned above, there was no reason why the same practice should not be adopted in this case.

f. In reply to Para A.9 of the DGAP's submissions, the Respondent has stated that even though the provisions of Section 34 of the CGST Act might be applicable, when he had paid the tax recovered from his customers to the Government, there was no justification for recovering the tax on the allegedly profiteered amount from the supplier once again and therefore GST to the extent of Rs.3,73,417/- was being wrongly included in the alleged profiteered amount calculated by the DGAP.

g. In reply to Para A.10 of the DGAP's submissions the Respondent has stated that the submission of the DGAP was not correct since, at the investigation stage, other than

asking for certain documents and information from him, no enquiry was made with him about the various channels of sale. That he had brought this fact on record in the written submissions submitted on 31.10.2019 filed as Annexure A-1 before this Authority and also in the Additional Written Submissions dated 4.11.2019. Since in respect of SOTD sales, which constituted 13% of the total sales during the period of investigation, there was no profiteering, these SOTD sales must be excluded for the purpose of calculation of the profiteered amount which came to Rs. 10,19,428/-.

h. In reply to Para A.11 of the DGAP's submissions, the Respondent has stated that the comments of the DGAP were not to the point. There was no explanation as to how there could be profiteering to the tune of Rs. 78.41 lakh by him during the period from 15.11.2017 to 31.03.2019 when during the FY 17-18 and 18-19, he had suffered losses.

i. In reply to Para B of the DGAP's submissions, the Respondent has stated that the clarification of the DGAP on this point was absolutely absurd. Since the price of some goods or service, in addition to the tax element, was dependent on a number of other important parameters like the cost of inputs, supply and demand position, degree of competition, etc., and these factors changed from time to time, the period of price reduction and on this basis, the

period for calculation of profiteered amount could not be arbitrarily adopted and a specific finding had to be given for adopting a particular period from the date of reduction in rate of tax for calculation of profiteered amount. Therefore, the period of one year and four and half months had been arbitrarily adopted for calculation of the profiteered amount. In any case, since prices had been revised w.e.f. 30.01.2019, on account of the increase in the cost of inputs, at least the period from 30.01.2019 t0 31.3.2019 should be excluded from the calculation of the profiteered amount which was Rs. 13,10,065/- approx.

j. In reply to Para C of the DGAP's submissions, the Respondent has stated that the DGAP had simply referred to Para 16 and 17 of his report dated 28.08.2019. But the reasons given in Para 16 and 17 of the DGAP's report for excluding the period from 01.11.2017 to 14.11.2017 were, for the reasons given in Para C.1 of his written submissions dated 04.11.2019, were wrong and the DGAP had not commented on the same. He, therefore, has submitted that the correct ITC availment to taxable turnover ratio for pre-rate reduction period was 9.6% and not 8.72% and if this ratio was adopted, the profiteered amount as calculated in Annexure 17 would further be reduced.

k. In reply to Para D-1 of the DGAP's submissions, the Respondent has stated that the DGAP in its clarification had merely stated that no comments can be offered by the DGAP on the point regarding the machinery provisions for the denial of ITC benefit. Since there was no machinery provision notified either in the Act or in the Rules or in any Notification issued by this Authority under Rule 126 of the CGST Rules for determining the impact of withdrawal of ITC benefit when reduction in rate of GST was accompanied by withdrawal of ITC benefit, the formula adopted by the DGAP in this regard, which was based on many assumptions, should not be applied in an inflexible manner and merely on this basis, an assessee could not be accused of having indulged in profiteering and huge amounts could not be demanded as profiteered amount along with interest and penalty.

l. In reply to Para D-2 of the DGAP's submissions the Respondent has stated that in this regard the DGAP's view was not correct as since there was no laid down procedure for determining the impact of withdrawal of ITC benefit on the prices, the Respondent was not in position to know as to whether the revised prices for various items fixed by the franchisor were in accordance with the provisions of Section 171(1) of the CGST Act, 2017 or not. Moreover, the methodology adopted by the DGAP was based on the

assumption that the ITC availment to taxable turnover ratio for pre- tax rate reduction period would be the same for post- tax rate reduction period and that in case of multiple products, the same would be uniformly applicable for each product. But both of these assumptions might not be correct.

m. In reply to Para E of the DGAP's submissions the Respondent has stated that the comments of the DGAP were silent on the point raised by the Respondent that while Sec 171(1) was applicable to the cases of reduction in rate of tax, the reduction in rate of GST from 18% with ITC benefit to 5% without ITC benefit was not a case of real reduction in rate of tax, as the concession given by way of reduction in rate of tax to the tune of 13% had been largely taken away by the denial of ITC benefit, the impact of which could be up to 13%.

n. In reply to Para F of the DGAP's submissions, the Respondent has stated that the DGAP has offered no comments.

o. In reply to Para G of the DGAP's submissions, the Respondent has stated that the observations of the DGAP did not answer the question as to whether increase in the base prices of the products during post rate reduction period could be presumed to be on account of profiteering without any investigation whatsoever as to whether the

increase was due to genuine reasons. In this case, the DGAP while calculating the profiteered amount for the period from 15.11.2017 to 31.03.2019, had presumed that during this period, there was no increase in the cost of inputs or change in any other factors influencing the price and had also ignored the fact that w.e.f. 30.01.2019, the prices of various items had been increased on account of increase in the cost of inputs.

23. We have carefully considered the Report of the DGAP, the submissions made by the Respondent and the material placed on the file. On examining the case record, we find that the computation of profiteering undertaken by the DGAP needs to be revisited in as much as the profiteering has been calculated on the basis of comparison of item-wise average base price in the pre-rate reduction period with the day-wise average base price of each item being supplied by the Respondent in the post-rate reduction period after reconciling the sales data with the GST Returns. However we observe that the profiteering ought to have been computed on the basis of the comparision of pre-rate reduction item-wise average base price with the actual transaction-wise/invoice-wise price charged by the Respondent in respect of his supplies in line with provisions of Section 171 (1) and Section 171 (2) of the CGST Act as has been done by the DGAP in similar cases. This is because profiteering needs to be computed in respect of each supply effected by the

registered person/supplier, i.e. the Respondent. We find that the reason for this anomalous computation has been detailed by the DGAP by stating that the Respondent had never furnished the actual invoice-wise / transaction-wise data for the relevant post-rate reduction period at any time during the investigation and hence profiteering could not be computed in respect of every supply/transaction for the post-reduction period. It has also been reported by the DGAP that the Respondent had refused to furnish the requisite transaction-wise / invoice-wise data stating that he was unable to do so because the invoice-wise data (which pertained to multiple outlets) was voluminous and there were technical issues in funishing the same and that he could only provide data containing the day-wise outward taxable supplies. We find this assertion of the Respondent unacceptable in as much as other franchisees of M/s Subway Sytems India Pvt. Ltd, who have been similarly investigated and proceeded against for alleged profiteering, have provided the actual invoice-wise/transaction wise data for the post-rate reduction period. This observation is based on the provisions of Section 171 of the CGST Act 2017 which clearly imply that the benefit of tax reduction has to be passed on in respect of each supply so that the benefit reaches each recipient.

24. We also observe that as investigating agency, the DGAP has been conferred with wide ranging powers under Rules 129 and 132 of the CGST Rules to summon any relevant record which

may be required for conducting an investigation. It is a fact that the Respondent is a franchise of M/s Subway Systems India Pvt. Ltd and conducts his business in terms of the franchisee-franchisor agreement and pays royalty to the franchisor in respect of all his sales. Therefore it is imperative that the item-wise invoice-wise / transaction-wise data is maintained at the end of the franchisor also. Since the respondent has expressed his inability to provide the requisite data on account of certain inexplicable technical reasons, we find it a fit case for exercise of the powers granted under the above Rules to the DGAP to summon the record and to recompute the amount of profiteering accordingly.

25. Therefore, without going into any merits/other submissions filed by the Applicants and the Respondent at this stage, we find this case to be a fit case for recomputation of the amount of profiteering. All the other submissions made by the Applicants and the Respondent will be taken up subsequently. Therefore, under the provisions of Rule 133(4) of the CGST Rules 2017, this Authority directs the DGAP to reinvestigate the matter. The DGAP is further directed to furnish his Report within three months of this order under Rule 129 (6) of the CGST Rules, 2017.

26. We also direct the Respondent to promptly extend all co-operation to the DGAP and furnish the data/ information/ documents in the manner required by the DGAP.

27. A Copy of this order be supplied to the Applicant and the Respondent. File of the case be cosigned after compeletion.

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

27/2/2020
(Dev Kumar Rajwani)
(Deputy Commissioner, NAA)

File No. 22011/NAA/57/Dough Makers /2019 Dated: 27.02.2020

Copy to:-

1. M/s Dough Makers India Pvt Ltd, Plot No 34/2, Rajiv Gandhi Infotech Park, Phase-I, Hinjawadi, Pune-411057.
2. Deputy Commissioner of State Tax, E-901, 3rd Floor, GST Bhavan, Yervada, Pune-411006.
3. Director General Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. NAA Website/Guard File.