

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

I. O. No. : 15/2020
Date of Institution : 25.09.2019
Date of Order : 20.04.2020

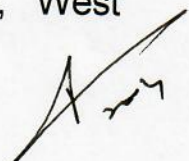
In the matter of:

1. Shri Samit Chakraborty, 14-B, Shyam Sunder Pally, Main Road (Shankuntala Park), Kolkata -700061.
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 Cloudbtail India Pvt. Ltd. C/o Kuehne Nagel Pvt. Ltd., Dag No. 8-31, Dag No. 414-425 L R, Khatian No. 871, 798, Mouza-Shimla null Satghara, JL No. 17-18, Shimla, Sreerampore, Hooghly, West Bengal-712203.


Respondent

Quorum:-

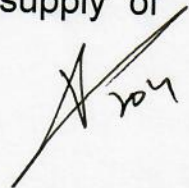
1. Dr. B. N. Sharma, Chairman
2. Sh. J. C. Chauhan, Technical Member
3. Sh. Amand Shah, Technical Member

Present:-

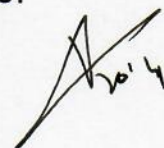
1. None for the Applicants.
2. Sh. V. Lakshmikumaran, Sh. Anshul Mathur, Smt. Arushi Jain and Smt. Nitum Jain, Advocates for the Respondent.

ORDER

1. This Report dated 24.09.2019 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 Standing Committee on Anti-profiteering vide its communication dated 11.03.2019 had requested the DGAP to conduct detailed investigation as per Rule 129 (1) of the above Rules on the allegation made by the Applicant No. 1 that the Respondent had not passed on the benefit of tax reduction from 12% to Nil which was notified vide Notification No.19/2018-Central Tax (Rate) dated 26.07.2018, in respect of the supply of "Stayfree Sanitary Napkins" w.e.f. 27.07.2018.

 2019

2. The DGAP has stated in his above Report that he had issued Notice under Rule 129 (3) of the CGST Rules, 2017 on 10.04.2019 to the Respondent, to submit his reply as to whether he admitted that the benefit of reduction in the GST rate w.e.f. 27.07.2018, had not been passed on by him 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 the documents in support of his reply. The Respondent was also afforded an opportunity to inspect the non-confidential evidence/information which formed the basis of the said Notice, during the period from 15.04.2019 to 17.04.2019, which the Respondent had availed on 22.04.2019.
3. The DGAP has also mentioned that the time period of the present investigation was from 01.07.2018 to 31.03.2019 and he had also sought extension of the time limit to complete the investigation from this Authority under Rule 129 (6) which was granted to him.
4. The DGAP has further stated that the Respondent has replied to the above Notice vide his letters dated 17.04.2019, 18.04.2019, 03.05.2019, 05.07.2019, 09.07.2019, 18.09.2019 and 20.09.2019 and raised objections against the investigation launched by the DGAP.
5. The DGAP has also intimated that the Respondent has submitted the following documents/information:-
 - a. Invoice-wise details of outward taxable supplies of Sanitary Napkins during the period from 01.07.2018 to 31.03.2019.
 - b. Sample invoices, pre and post 27.07.2018.



- c. GSTR-1 and GSTR-3B Returns for the period from 01.07.2018 to 31.03.2019.
- d. Outward supply data of the closing stock.
- e. ASIN-wise details of credit reversal in respect of closing stock.
6. The DGAP has further intimated that the Central Government, on the recommendation of the GST Council had reduced the GST rate on the "Sanitary towels (pads) or sanitary napkins, tampons" from 12% to Nil w.e.f. 27.07.2018, vide Sr. No. 146A of the Schedule attached to Notification No. 19/2018-Central Tax (Rate) dated 26.07.2018 which has also not been contested by the Respondent.
7. The DGAP has also submitted that the Respondent has contended that in the case of M/s Unicharm India Pvt. Ltd. & M/s Apollo Hospitals Enterprise Ltd., the DGAP had limited the investigation of M/s Apollo Hospitals Enterprise Ltd. (being retailer), to the closing stock of Sanitary Napkins available as on 26.07.2018 and in his case also as he was also a retailer, the investigation should be limited to the stock held as on 26.07.2018 and sold thereafter by him. The DGAP has further submitted that in the above case the profiteering was calculated at the manufacturer level i.e. at the level of M/s Unicharm India Pvt. Ltd. which was the supplier of the subject goods and profiteering on the closing stock of the retailer i.e. M/s Apollo Hospitals Enterprise Ltd. was also calculated. But, in the instant case, the Respondent being a retailer of various manufacturers, the entire profiteering at his level was required to be calculated as in the instant case, no manufacturer has been made co-Respondent as was done

in the above case. Therefore, the DGAP has claimed that the facts and circumstances of the case of M/s Unicharm India Pvt. Ltd. and M/s Apollo Hospitals Enterprise Ltd. were entirely different from the instant case.

8. The DGAP has also contended that the discount offered by the Respondent was pursuant to the discretionary business strategy wherein the Respondent had willingly cut into his profit margins to offer appropriate discounts time and again. Section 15 (3) (a) of the CGST Act, 2017 provided that the value of the supply should not include any discount which was given before or at the time of the supply if such discount had been duly recorded in the invoice issued in respect of such supply. Thus, the GST was chargeable on actual transaction value after excluding any discount and therefore, for the purpose of computation of profiteering MRP could not be considered. The actual transaction value was the correct amount which was to be considered to determine whether any reduction in the rate of tax on any supply of goods or services has been passed on to the recipients by way of commensurate reduction in prices. He has further contended that the MRP was the maximum price at which an item might be sold but it was not the actual sale price. Therefore, for the purpose of determination of profiteering in the instant case, actual selling price or discounted price instead of MRP has been considered in accordance with the provisions of the Central Goods and Services Tax Act, 2017 and the Rules made thereunder.
9. The DGAP has also claimed that the Respondent has argued that this Authority in the case of M/s Flipkart Internet Pvt. Ltd., notably in the context of sales made online over e-commerce platforms as was

the Respondent's case, has held that the withdrawal of discount did not amount to profiteering as the same was offered from the supplier's profit margin. Thus, since the Respondent never went beyond the reduced MRP affixed by the manufacturer, it could not be said that he has profited under Section 171 of the CGST Act merely because he chose to offer a lower discount at the time of second purchase by the Applicant No. 1. In this context The DGAP has observed that the legislative intent behind Section 171 of the CGST Act, 2017 was to pass on the benefit of tax rate reduction by way of commensurate reduction in prices. Mere charging of GST at the reduced/nil rate was not sufficient to pass on the benefit of tax rate reduction. Even when the GST was nil, the benefit which ought to have been passed on to the recipient, could still be denied by increasing the base price. He has further stated that the discount was offered on the MRP which was the maximum price at which the goods could be sold in retail. The value of transaction between the manufacturer and the wholesaler or the wholesaler and the retailer would invariably be less than the MRP. Therefore, regardless of whether the MRP was printed/marked on the product or not, the pre and post-tax rate reduction transaction values were to be compared to determine the amount of profiteering. The DGAP has also claimed that in the case of closing stock carrying higher MRP, everybody in the supply chain was legally required to pass on the benefit of tax rate reduction by maintaining the same base prices or increasing the base prices commensurate with the denial of input tax credit and charging GST at the reduced/nil rate on such base prices. He has further claimed that every supplier of goods and services was free to

increase the prices of his supplies depending upon the various components affecting the cost of production/supplies. But as per the provisions of the Section 171 of the CGST Act, 2017, no supplier could increase the base prices of the products overnight in such a manner that even with reduction in the rate of tax, the cum-tax selling price would remain unchanged or would increase.

10. The DGAP has also argued that to establish any profiteering, transaction value before and after the rate reduction was compared and there was no significance of MRP in establishing profiteering. Thus, GST was chargeable on actual transaction value after excluding any discount and therefore, for the purpose of computation of profiteering, MRP could not be considered. The actual transaction value was the correct value which was required to be considered while determining whether any reduction in the rate of tax on any supply of goods or services has been passed on to the recipients by way of commensurate reduction in prices or not. The DGAP has further argued that in the case of M/s Flipkart Internet Pvt. Ltd., the Applicant was seeking refund of excess payment made by him to M/s Flipkart Internet Pvt. Ltd. as the invoiced value was lower than that of the payment made to M/s Flipkart Internet Pvt. Ltd. Therefore, the facts of the case of M/s Flipkart Internet Pvt. Ltd. were completely different from the instant case.
11. The DGAP has also stated that the Respondent was asked to provide purchase data for the pre and post rate reduction periods vide e-mail dated 17.09.2019 but the same was not provided by the Respondent. However, the average of purchase prices for the pre and post rate reduction periods was provided and the same has been considered

for computation of profiteering. The DGAP has also mentioned that from the sales data made available, it appeared that the Respondent has increased the base prices of the Sanitary Napkins when the GST rate was reduced from 12% to NIL w.e.f. 27.07.2018. The DGAP has illustrated that during the pre-rate reduction period (01.07.2018 to 26.07.2018), the Respondent has purchased the goods "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)" at an average base price of Rs. 66.91/- while the average selling price of the same goods during the said period was Rs. 67.99/-. Thus, the profit margin for the Respondent during the pre-rate reduction period was Rs. 1.08/- per unit.

12. The DGAP has further stated that as on 26.07.2018, the Respondent had a closing stock of 47 units of the "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)". As the rate of tax on the "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)" was reduced from 12% to NIL w.e.f. 27.07.2018, the Respondent was not entitled to avail input tax credit on this closing stock. Hence, the commensurate price of the closing stock of "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)" as on 26.07.2018 should have been the sum total of Rs. 66.91/- (basic purchase price), Rs. 8.03/- (increase in cost due to denial of input tax credit @12% of the basic purchase price of Rs. 66.91/-) and Rs. 1.08/- (profit margin) i.e. Rs. 76.02/-. However, the Respondent had sold 9 units out of the closing stock of 47 units at a price above the aforesaid commensurate price. The total profiteering on the sale of the goods "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)", made out of the closing stock as on 26.07.2018, appeared to be Rs. 107

27.82/- . Further, the DGAP has claimed that during the post-rate reduction period (27.07.2018 to 31.03.2019), the purchase price of the goods "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)" for the Respondent increased to Rs. 73.61/-. Hence, the commensurate selling price of the Respondent for the stock purchased after rate reduction w.e.f. 27.07.2018 should have been the sum of Rs. 73.61/- (basic purchase price) and Rs. 1.08/-(profit margin), i.e. Rs. 74.69/-. However, the Respondent had sold 75 units of the above-mentioned goods at a price above this commensurate price. The total profiteering on account of the sale of "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)", out of the stock purchased after reduction of the GST rate w.e.f. 27.07.2018, appeared to be Rs. 361.19/-.

13. The DGAP has also submitted that he has analysed the outward supply of all the Sanitary Napkins (including "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)") made by the Respondent and it was found by him that during the period from 27.07.2018 to 31.03.2019 i.e. after the reduction of the GST rate from 12% to Nil w.e.f. 27.07.2018, the amount of profiteering on account of the sales made from the closing stock as on 26.07.2018, was Rs. 1,43,868/-. The amount of profiteering on account of the sales made from the fresh stock was Rs. 18,17,165/-. Thus, the total profited amount in respect of all the units supplied by the Respondent during the period from 27.07.2018 to 31.03.2019, at a price above the commensurate price, came to Rs. 19,61,033/-. However, the profiteering in the case of the Applicant No. 1 was found to be nil by the DGAP. The place (State or Union Territory) of supply-wise break-up of the total

profiteered amount of Rs 19,61,033/- as provided by the DGAP is furnished in the Table given below:-

Table (Amount in Rs.)

Sr.No.	State Code	Fresh Stock Profiteering	Closing Stock Profiteering	Total Profiteering
1	01-Jammu & Kashmir	6528	227	6755
2	02-Himachal Pradesh	9093	619	9712
3	03-Punjab	28330	1568	29898
4	04-Chandigarh	12910	1047	13957
5	05-Uttarakhand	17800	816	18615
6	06-Haryana	98001	7457	105458
7	07-Delhi	169397	13020	182417
8	08-Rajasthan	47283	2182	49465
9	09-Uttar Pradesh	121030	6751	127780
10	10-Bihar	23253	1245	24498
11	11-Sikkim	429	31	459
12	12-Arunachal Pradesh	617	2	619
13	13-Nagaland	1348	5	1353
14	14-Manipur	2770	75	2845
15	15-Mizoram	1933	46	1979
16	16-Tripura	1350	44	1394
17	17-Meghalaya	2701	114	2815
18	18-Assam	18318	814	19132
19	19-West Bengal	121261	8930	130191
20	20-Jharkhand	13035	519	13553
21	21-Odisha	23034	734	23768
22	22-Chhattisgarh	8371	290	8661
23	23-Madhya Pradesh	22602	1627	24229
24	24-Gujarat	37069	1730	38799
25	25-Daman & Diu	250	13	263
26	26-Dadra & Nagar Haveli	180	16	197
27	27-Maharashtra	335264	27816	363080
28	29-Karnataka	264250	24883	289134
29	30-Goa	11164	724	11889
30	31-Lakshdweep	143	0	143
31	32-Kerala	33392	1636	35027
32	33-Tamil Nadu	213109	23189	236298
33	34-Pondicherry	6113	546	6659
34	35-Andaman & Nicobar Islands	1820	258	2078
35	36-Telangana	130818	13056	143873
36	37-Andhra Pradesh	32199	1842	34041
Total		1817165	143868	1961033

14. Thus, the DGAP has concluded that the base prices of the Sanitary Napkins were increased by the Respondent when there was a reduction in the GST rate from 12% to Nil w.e.f. 27.07.2018, therefore, the commensurate benefit of GST rate reduction was not passed on to the recipients. The total amount of profiteering covering the period from 27.07.2018 to 31.03.2019, has been computed to be Rs. 19,61,033/- (Nineteen Lakh Sixty-One Thousand and Thirty-Three only) (Rs. 1,43,868/-+ Rs. 18,17,165/-) by the DGAP.
15. After perusal of the DGAP's Report, this Authority in its meeting held on 25.09.2019 had decided to hear the Applicants and the Respondent on 23.10.2019 and accordingly notice was issued to all the interested parties. A Notice was also issued to the Respondent on 27.09.2019 asking him to reply why the Report dated 24.09.2019 furnished by the DGAP should not be accepted and his liability for profiteering under Section 171 of the CGST Act, 2017 should not be fixed. On the request of the Respondent hearing was adjourned to 07.11.2019. On behalf of the Applicants none appeared whereas the Respondent was represented by Sh. V. Lakshmikumaran, Sh. Anshul Mathur, Smt. Arushi Jain and Smt. Nitum Jain, Advocates. Further hearing was held on 13.01.2020.
16. The Respondent has filed written submissions dated 11.11.2019 and has also filed additional written submissions dated 13.01.2020 and raised a number of objections against the Report of the DGAP dated 24.09.2019. However, the Respondent had requested that the objections raised by him through his additional written submissions dated 13.01.2020 should be decided first before proceeding further in the matter. The Respondent vide his submissions dated 13.01.2020

had contended that the application dated 26.12.2018 filed by the Applicant No. 1 alleging profiteering against him was not considered by the Standing Committee on Anti-Profiteering within the time limit of two (2) months provided in Rule 128 (1) of the CGST Rules, 2017 and hence, the reference made by the Standing Committee and the consequent investigation conducted by the DGAP was liable to be set aside on this ground alone as the period of 2 months had expired on 25.02.2019 whereas the complaint was examined by the Standing Committee on 11.03.2019. The Respondent had also claimed that the Standing Committee did not have prima facie accurate and adequate evidence before it which was required to be examined by it under Rule 128 (1) of the above Rules before forwarding the complaint to the DGAP for detailed investigation.

17. The above objections of the Respondent were carefully considered by this Authority and were found to be not tenable and were accordingly disposed of vide its I. O. No. 9/2020 dated 17.02.2020.
18. The Respondent vide his written submissions dated 11.11.2019 has raised the following objections:-

- (A) That the investigation conducted by the DGAP and the present proceedings were beyond the provisions of Section 171 of the CGST Act, 2017 which could not be invoked in the present case.
- (B) That the method adopted by the DGAP was unworkable in the present case as the Respondent was a retailer selling at highly dynamic prices and hence the investigation ought to be dropped as the sales were made by him at varying discounts given from the MRPs fixed by the manufacturers.

- (C) That the provisions of Section 171 of the above Act were not applicable as the goods had been exempted from the levy of GST. Therefore, the investigation should be limited to the closing stock.
- (D) That the period of investigation chosen by the DGAP w.e.f. 27.07.2018 to 31.03.2019 was arbitrary.
- (E) That in the present case the profiteering should have been examined at the HSN level and not line item wise for each transaction. The DGAP had also resorted to 'Zeroing' which was incorrect.
- (F) That the loss of common Input Tax Credit (ITC) was required to be taken into consideration as the same was component of his cost after the exemption of GST. The DGAP had failed to consider the cost of common ITC.
- (G) That there were errors in the computation of the profited amount. The DGAP had failed to factor in the discounts which were mentioned in the invoices while computing the rate per unit. The DGAP has computed profiteering on the closing stock vide Annexure-13 of his Report dated 14.09.2019, however, for calculation of profiteering on the new stock, the total outward supplies data has been taken by the DGAP instead of the supplies of new stock and hence, the profiteering has been calculated twice on the supplies of the closing stock treating the same as the supply of new stock.
- (H) That in the absence of show cause notice by this Authority the present proceedings were not maintainable as they had been launched in violation of the principles of natural justice.



- (I) That the present investigation and the Report filed by the DGAP was beyond the allegation levelled by the Applicant No. 1 and hence, the same was not maintainable.
- (J) That the investigation should be restricted to the supplies made by the Respondent from the registration taken by him in the State of West Bengal only.
- (K) That in the absence of prescribed methodology of calculation of the profiteered amount in the CGST Act or the Rules made thereunder or the procedure prescribed by this Authority, the present proceedings were arbitrary and liable to be dropped.
19. A copy of the written submissions dated 11.11.2019 filed by the Respondent was supplied to the DGAP for filing clarifications. The DGAP vide his Report dated 17.12.2019 has submitted detailed clarifications on the above written submissions. The DGAP in reply to the objections raised by the Respondent vide Paras F.1 to F.4 of his written submissions dated 11.11.2019 has submitted that "The contention of the Noticee (Respondent) is correct. The issue of the common input tax credit could not be addressed in the Report dated 24.09.2019. However, the authenticity and veracity of the common credit of Rs. 13,07,118/-, claimed as reversed, needs to be verified in terms of Section 17 (2) of the CGST Act, 2017 read with Rule 42 of the CGST Rules, 2017."
20. The DGAP in reply to Paras G.1 to G.1.7 mentioned by the Respondent in his written submissions dated 11.11.2019 has also stated that "The benefit of discounts will be allowed as per Section 15

(3) of the CGST Act, 2017. This has to be verified from the details submitted by the Noticee (Respondent) and recomputed.”

21. Perusal of the Report dated 17.12.2019 filed by the DGAP also shows that in reply to the Paras G.2. 1 to G.2.5 mentioned by the Respondent in his above written submissions, the DGAP has admitted that “On preliminary verification it is seen that the Noticee’s (Respondent’s) claim is genuine and correct. But it was committed as the Noticee (Respondent) supplied total outward supply data for the period 27.07.2018 to 31.03.2019 and simultaneously also provided outward supply data for the closing stock. However, the total sales data was not provided excluding the details of closing stock. As a result the profiteering on closing stock was computed twice.”
22. It is clear from the Report dated 17.12.2019 filed by the DGAP that the above three issues mentioned in the Paras supra are required to be further investigated by the DGAP and only then this Authority can determine the profited amount as per the provisions of Section 171 of the CGST Act, 2017 read with Rule 133 of the CGST Rules, 2017. Accordingly, this Authority directs the DGAP to carry out further investigation under Ruel 133 (4) of the above Rules, on the following issues:-
- (i) The issue of the common input tax credit shall be investigated by the DGAP and a detailed Report shall be submitted accordingly.
 - (ii) The claim of reversal of common credit of Rs. 13,07,118/- made by the Respondent, shall be verified by the DGAP as per the provisions of Section 17 (2) of the CGST Act, 2017 read with

Rule 42 of the CGST Rules, 2017 and his findings shall be recorded in the Report.

(iii) The issue of benefit of discounts shall be examined by the DGAP in terms of Section 15 (3) of the CGST Act, 2017 as per the details submitted by the Respondent and a detailed Report shall be filed by him in this regard.

(iv) The profiteered amount shall be again computed by the DGAP on the closing and the fresh stocks separately and mentioned in his Report.

23. Investigation on the above issues shall be completed by the DGAP within a period of 3 months from the date of passing of this order and Report submitted under Rule 129 (6) of the CGST Rules, 2017. The Respondent is also directed to extend full co-operation to the DGAP during the course of the investigation.

24. 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 25.09.2019 the order was to be passed on or before 24.03.2020. However, due to 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.



25. A copy of this order be supplied to the Applicants and the Respondent. File of this case be consigned after completion.

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



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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

A.K. Goel
(Secretary, NAA)

F. No. 22011/NAA/83/cloudtail(sn)/2019

Date: 20.04.2020

Copy To:-

1. M/s Cloudtail India Pvt. Ltd., C/o Kuehne Nagel Pvt. Ltd., Dag No.8-31, Dag No. 414-425 L R, Khatian No. 871,798, Mouza-Shimla null Satghara, JL No. 17-18, Shimla, Sreerampore, Hooghly, West Bengal -712203
2. Sh. Samit Chakraborty, 14-B, Shyam Sunder Pally Main Road (Shakuntalam Park), Kolkata-700061.
3. Directorate General of Anti-profiteering.
4. Guard File.