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

I.O. No.	17/2020
Date of Institution	26.09.2019
Date of Order	20.05.2020

In the matter of:

1. Shri Rahul Sharma, M/s Local Circles India Pvt. Ltd., 4th Floor, Tower-2, Express Trade Towers-2, Sector-132, Noida – 201301.
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 Barbeque Nation Hospitality Ltd., Prestige Zeenath, No. 8/1, Residency Road, Bangalore-560025.

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 Applicant No. 1 and 2.

2) Sh. K. P. Kumar, Advocate, Sh. Vishwasai Rajendera, Advocate, Sh. Kaushal Varma, Vice President (Finance) and Sh. Rahul Agrawal, President & CFO for the Respondent.

ORDER

1. This Report dated 24.09.2019 has been received from 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. Brief facts of the case are that an application dated 31.07.2018 was filed, under Rule 128 (1) of the CGST Rules, 2017 by the Applicant No. 1 alleging profiteering by the Respondent, by not passing on the benefit of reduction in the GST rate from 18% to 5% w.e.f. 15.11.2017, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017, by way of commensurate reduction in the price, in terms of Section 171 of the CGST Act, 2017. The Applicant No. 1 had alleged that the Respondent increased the base price of "Dinner Veg." from Rs. 862/- to Rs. 929/- and that of "Dinner Non-Veg." from Rs. 969/- to Rs. 1039/- when the GST rate was reduced from 18% to 5% w.e.f. 15.11.2017. The Applicant had also enclosed copies of the invoices dated 09.11.2017 and 15.11.2017 along with his application filed in APAF-1 form. The details of the above

invoices issued by the Respondent before and after the GST rate reduction w.e.f 15.11.2017, are furnished in Table- 'A' below:-

Table- 'A'

Particulars		Pre reduction	Post reduction	Pre reduction	Post reduction
Product Description	A	Dinner Veg.		Dinner Non-Veg.	
Transaction No.	B	147310	147840	147310	147839
Transaction Date	C	09.11.2017	15.11.2017	09.11.2017	15.11.2017
Base Price (in Rs.)	D	862.00/-	929.00/-	969.00/-	1039.00/-
GST Rate (%)	E	18	5	18	5
GST Amount (in Rs.)	F= (D*E)	155.16/-	46.45/-	174.42/-	51.95/-
Selling Price (in Rs.)	G= (D + F)	1017.16/-	975.45/-	1143.42/-	1090.95/-
Difference in Base Price (in Rs.)	Difference of Column (D)	**67.00/-**		**70.00/-**	

2. The aforesaid complaint was examined by the Standing Committee on Anti-profiteering, in its meeting held on 11.03.2019, the minutes of which were received by the DGAP on 27.03.2019 for conducting a detailed investigation in the matter.

3. The DGAP has submitted that on receipt of the aforesaid reference from the Standing Committee on Anti-profiteering on 27.03.2019, he had issued a Notice on 04.04.2019 under Rule 129 (3) of the above Rules, calling upon the Respondent to reply as to whether he admitted that the benefit of reduction in the GST rate w.e.f. 15.11.2017, 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.

4. The period covered by the current investigation is from 15.11.2017 to 31.03.2019. The time limit to complete the investigation was extended upto 26.09.2019 by this Authority in terms of Rule 129 (6) of the above Rules vide its order dated 19.06.2019.

5. The DGAP has further submitted that the Respondent did not furnish the complete and the relevant documents required for investigation and two Summons under Section 70 of the CGST Act, 2017 read with Rule 132 of the above Rules, were issued on 09.07.2019 and 18.07.2019 to Sh. Kaushal Kumar Verma, Vice President (Finance & Accounts) of the Respondent, asking him to appear before the Superintendent of the Directorate General of Anti-profiteering on 16.07.2019 and 24.07.2019 and produce the relevant documents. In response, Sh. Verma had appeared and submitted the requisite documents. The Respondent submitted his replies to the Notice vide e-mails/letters dated 12.04.2019, 25.04.2019, 07.05.2019, 13.05.2019, 25.05.2019, 30.05.2019, 04.06.2019, 12.06.2019, 18.06.2019, 28.06.2019, 10.07.2019, 15.07.2019, 22.07.2019, 10.09.2019, 14.09.2019 and 16.09.2019 which may be summed up as follows:-

(a) That he was running a chain of restaurants having operations in almost 25 States including Union Territories across India and has presence outside India also and had obtained separate GST registration numbers for his establishments in each State in terms of

the GST law. Further, he was paying taxes regularly on time and was complying with the GST law.

(b) That on the restaurant service, in the pre-GST period, *'Value Added Tax (VAT) on supply of food'* and *'Service Tax on supply of Services'* was levied. However, with introduction of the GST w.e.f. 01.07.2017, several indirect taxes such as VAT, Central Sales Tax (CST), Service Tax, Entry Tax, Luxury Tax, Entertainment Tax, Excise Duty and Customs Duty etc. were subsumed and the rate of tax on supply of Restaurant Service was levied @ 18% in terms of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Further, the Respondent was eligible to claim Input Tax Credit (ITC) subject to restrictions in terms of Section 17 (5) of the CGST Act, 2017. Therefore, the Respondent was paying taxes after setting off the ITC to which he was eligible under the GST law.

(c) That, the Central Government vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 had reduced the rate of tax on restaurant service from 18% to 5% with a caveat of non-eligibility for ITC. Thus, the restaurant industry was impacted with an additional cost of ineligible ITC. The impact of rate charge would have been different for each restaurant the way it was operated.

(d) That on account of the change in the rate of tax he had ceased to claim the ITC. This had resulted in increase in the cost of the products as the tax charged on the inward supplies was added to the cost. On an average, based on computation made by him, his chain of restaurants was in loss of 7 to 8% of the ITC on the turnover. Therefore, on an average he had added the ineligible ITC to his base prices.

(e) That he had considered the various factors before making changes in the base prices of food menu, which were as follows:-

(i) *Increase in the cost of establishment every year:* His major cost for running the restaurant service was salary of the staff, consumables, rent, water and electricity etc. Majority of these expenses would increase every year, as he needed to pay increments to the staff, there was increase in the prices of the consumables, revision in rent after every 11 months, GST on the water and electricity charges collected by the owners and many other costs which would increase every year which would result in increase in the cost of production. Every business organization would consider these costs to arrive at the selling prices.

(ii) *Difference in price of food during weekdays and weekends:* His restaurant occupancy rate would differ during the weekdays and during the weekends. Therefore, he had different base prices for the food served during the weekdays and the weekends. They were also changed during the lunch and the dinner timings. Based on the occupancy rate, in order to attract the customers, the base prices were also changed. The Respondent has further claimed that he has reduced the rate of tax based on the changes in rate of tax notified by the Central Government. The Respondent has also informed that it was mentioned in the notice that it was alleged by the Applicant that he has not reduced the tax rate from 18% to 5% but it was nowhere mentioned that he had become ineligible to avail benefit of ITC which made it clear that the above applicant was not aware of the GST impact on this

industry, as the rate reduction had come with caveat of ineligibility of ITC. Without appreciating the facts and understanding the impact of GST rate change on restaurants, the above applicant had filed the complaint against the Respondent stating that he was not passing on the benefit of reduction in the rate of tax. Further, the allegation made by the above applicant would have been accepted, if the rate of tax was only reduced without having any caveat like in-eligibility for availing ITC.

(f) That the crux of the anti-profiteering provision was:-

Limb (a)-If there was reduction in the rate of tax on the supply of goods or services or

Limb (b)-Benefit of ITC was now available under the GST

then a registered person must pass on the benefit by reduction in prices.

That he has charged tax @ 5% post 15.11.2017 without availing ITC. Limb (a) subsection (1) of Section 171 of the provision referred only to the cases where rate of tax was reduced and the benefit had not been passed on. In the present case, it was not only rate reduction but along with the reduction the benefit of ITC was also denied. As the benefit of ITC had become unavailable post 15.11.2017, it had resulted in additional cost to the Respondent. This cost was captured in the base price of the product. Hence, no profiteering was made by the Respondent due to the reduction in the tax rate. Hence, applicability of Section 171 of the CGST Act, 2017 did not arise.

(g) Limb (b) of the sub-section (1) required that the benefit of ITC shall be passed on to the recipients by way of commensurate reduction in

the prices. The Respondent did not have any benefit of ITC in terms of the Notification No. 46/2017-Cental tax (Rate) dated 14.11.2017, in fact, the rate of tax was 5% without ITC benefit. Hence, there was no benefit of ITC which was required to be passed on to the customers. Accordingly, this provision has no relevance. In fact, it was not a benefit but an additional cost in the hands of the Respondent.

(h) That the term *"profiteering"* meant making unreasonably high profits in the course of ordinary trade or business. In the present case there was no profiteering out of the reduction in the rate of tax. In fact, the rate of tax was reduced from 18% to 5% without availing the ITC. He was hit by 7-8% of ITC lost on account of unavailability of ITC. The increase in the base prices constituted ineligible ITC post 15.11.2017. Therefore, no profit was made out of the rate change. Hence, the Anti-profiteering provision made under Section 171 of the CGST Act, 2017 would not be applicable.

6. The DGAP has also intimated that the Respondent submitted the following documents/information:-

(a) List of all the GSTINs along with the copies of the GST Registration Certificates.

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

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

(d) Copies of sample sale invoices.

(e) Pre & Post 15.11.2017 price lists of the products for the outlets in Delhi State.

(f) Monthly summary of item-wise sales register for the period from July, 2017 to March, 2019 for all the States.

(g) Details of B2B invoice wise outward taxable supplies for the period from July 2017 to March, 2019.

(h) Justification for increase in the base prices by providing:

(i) Computation of revised base prices of impugned goods;

(ii) Factors impacting the pricing of products;

(iii) Computation of average forgoes in ITC;

(iv) Increase in cost computation.

(i) ITC Register for July, 2017 to November, 2017.

(j) Detailed workings for reversal of ITC on closing stock as on 14.11.2017.

(k) Copies of sample invoices of ITC claimed during 01.11.2017 to 14.11.2017.

7. The DGAP has also submitted that the Respondent had informed that he might take a call at any time to list his shares in the stock exchange and hence, publishing of any of the details supplied by him in the public forum would cause an irreparable damage to him and requested to consider all the details/documents in a confidential manner in terms of Rule 130 of the above Rules.

8. The DGAP has further submitted that the legal position in terms of Section 171 of the CGST, 2017 was unambiguous and could 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 did 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.

He has also stated that increase in the cost of inputs and input services was a factor for determination of prices but this factor was independent of the output GST rate. It could not be asserted that the elements of cost unrelated to GST were affected by the change in the output GST rate. Therefore, in terms of Section 171 of the CGST Act, 2017, the claim of increase in the cost of inputs and input services had not been considered as it could not change overnight.

9. Regarding the Respondent's contention of different base prices depending on weekdays, weekends, lunch timings, dinner timings, outlet location, occupancy rate and change in the base prices in order to attract the customers, the DGAP has further stated that the Respondent was maintaining different item codes for the different base prices depending on the various factors cited above and the profiteering, if any has been arrived at by comparing the restaurant wise (which were in operation in both the pre 14.11.2017 and post 14.11.2017 periods), item code wise average selling prices for the items sold during the period from 01.11.2017 to 14.11.2017 (or the latest month, if item was not sold during 01.11.2017 to 14.11.2017), and the prices post 15.11.2017 for the items similar in each aspect.

10. The DGAP has also claimed that from the details of the outward taxable supplies it was revealed that the Respondent had been operating 129 outlets in 24 States and was dealing in 584 items while supplying restaurant service after 15.11.2017. Thus, while the Respondent's contention that the tax was computed @ 18% prior to 15.11.2017, and at reduced rate of 5% w.e.f. 15.11.2017 was correct, this in no way established that the commensurate benefit of the reduction in the GST rate was passed on by him to the customers. On the contrary, the fact was that the customers should have paid a lower final price after the GST rate was reduced to 5% but they did not get this benefit. Therefore, the only remaining point for determination was whether the increase in the base prices was solely on account of the denial of ITC.

11. The DGAP has further claimed that the assessment of the impact of denial of ITC, which was an uncontested fact, required the determination of the ITC in respect of "restaurant service" as a percentage of the taxable turnover from the outward supplies of the "products" during the pre-GST rate reduction period. To illustrate, if the ITC in respect of the restaurant service was 10% of the taxable turnover of the Respondent till 14.11.2017 (which became unavailable w.e.f. 15.11.2017) and the increase in the pre-GST rate reduction base prices w.e.f. 15.11.2017, was upto 10%, one could conclude that there was no profiteering. However, if the increase in the pre-GST rate reduction base prices w.e.f. 15.11.2017, was by 14%, the extent of profiteering would be 14% - 10% = 4% of the turnover. Therefore, this exercise to work out the ITC in respect of the restaurant service as a percentage of the taxable turnover from

the products sold during the pre-GST rate reduction period has to be carried out, though by taking into consideration the period from 01.07.2017 to 31.10.2017 and not upto 14.11.2017 due to the following reasons:-

(a) That the Respondent had claimed that he was required to reverse an amount of Rs. 23,84,549/- on closing stock of inputs held on 14.11.2017. However, there was no reversal in the GSTR-3B Return of ITC on the closing stock of inputs and capital goods as on 14.11.2017 by the Respondent, which was required as per the provisions of Section 17 of the CGST Act, 2017 read with Rule 42 and 43 of the CGST Rules, 2017.

(b) That the invoice-wise outward taxable turnover for the month of November, 2017 was not provided by the Respondent to compute the taxable turnover for the period from 01.11.2017 to 14.11.2017.

(c) That on examination of the copies of the sample invoices submitted by the Respondent for the ITC availed during 01.11.2017 to 14.11.2017 (ITC of Rs. 26,87,690/- availed in 35 invoices), it was revealed that in 22 cases, credit was taken by the Respondent without fulfilling the prescribed conditions and some discrepancies were also noticed in the ITC availed. For instance, the Respondent had availed ITC of Rs. 2,18,298/- in November, 2017 on invoice No. 33 dated 01.11.2017 issued by MD. Zafrulla Khan for renting of immovable property service for the month of November 2017 which he could not have availed. This was similar to the other 22 cases (ITC amounting

to Rs. 14,53,950/-). The details of sample invoices and observations are mentioned in Annexure-23 of the DGAP's Report. Thus, the Respondent had not received the services on the date of availing of ITC, in contrast to the provisions of Section 16 (2) (b) of the CGST Act, 2017. Accordingly, the ratio of ITC to the net taxable turnover has been computed by the DGAP for determining the impact of denial of ITC (which was available to the Respondent till 14.11.2017).

12. The DGAP has also contended that while determining the ITC as a percentage of the total taxable turnover of the Respondent, the ITC for the period from July, 2017 to October, 2017, as furnished in the GSTR-3B Returns, has been adjusted by excluding the amount of ITC of tax paid on inter-unit branch transfers as per the Sales Register. While determining the net taxable turnover of the Respondent during the period from July, 2017 to October, 2017, the total taxable turnover (excluding inter-unit branch transfers) as per the GSTR-1 Returns for the period from July, 2017 to October, 2017 has been taken into consideration. Finally, the ratio of ITC to the net taxable turnover has been taken for determining the impact of denial of ITC (which was available to the Respondent till 14.11.2017). On this basis the findings of the DGAP were that ITC amounting to Rs. 11,12,57,235/- was available to the Respondent during the period from July, 2017 to October, 2017 which was approximately 6.71% of the net taxable turnover of the restaurant service (Rs. 1,65,81,62,452/-) 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 given by the DGAP as per Table-'B' below:-

Table–'B' **(Amount in Rs.)**

Particulars	Jul-2017	Aug-2017	Sept.-2017	Oct.-2017	Total
ITC Availed as per GSTR-3B (A)	22,972,669	28,186,304	31,873,401	36,404,324	119,436,698
Less: Tax on Inter unit branch transfer as per Sales Register (B)	1,520,979	1,473,316	1,468,360	3,716,807	8,179,463
Net ITC available for the period from July, 2017 to October, 2017 (C)= (A-B)	**21,451,690**	**26,712,988**	**30,405,041**	**32,687,517**	**111,257,235**
Total Outward Taxable Turnover as per GSTR-1 (D)	451,393,947	417,406,509	422,875,815	490,180,812	1,781,857,083
Less: Inter unit branch transfers Included in B2B Sales as per Sale Register (E)	22,133,920	19,898,290	22,422,398	59,240,023	123,694,631
Net Outward Taxable Turnover for the period from July, 2017 to October, 2017 (F) = (D-E)	**429,260,027**	**397,508,219**	**400,453,417**	**430,940,789**	**1,658,162,452**
Ratio of ITC to Net Outward Taxable Turnover (G)= (C/F)					**6.71%**

13. The DGAP has further contended that the analysis of the details of item-wise outward taxable supplies made during the period from 15.11.2017 to 31.03.2019 has revealed that the Respondent had increased 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. The pre and post GST rate reduction prices of the items sold as a part of restaurant service during the period from 15.11.2017 to 31.03.2019 were compared by the DGAP and it was established that the Respondent has increased the base prices by more than

6.71% i.e. by more than what was required to offset the impact of denial of ITC in respect of 298 items (out of total 368 items) sold during the same period. Thus, the conclusion of the DGAP was that in respect of these items, the commensurate benefit of reduction in the rate of tax from 18% to 5% had not been passed on. It was also clear that there was no profiteering with regard to the remaining items on which there was either no increase in base prices or the increase in base prices was less or equal to the denial of ITC, or these were new products launched in many States with the different dishes or sold in new outlets which had started operations post 15.11.2017.

14. The DGAP has also explained the methodology adopted for calculating profiteering by illustrating calculation in respect of a specific item i.e. DINNER NONVEG WED TO SUNDY (Item code-I00006872) sold in a particular outlet i.e. KOL-PARK STREET (KPS01), during the period from 01.11.2017 to 14.11.2017 (pre-GST rate reduction). An average base price (after discount) of the above item was obtained by dividing the total taxable value by the total quantity of this item sold during the above period. The average base price of this item was compared with the actual selling price of this item sold in the same restaurant during the post-GST rate reduction i.e. on or after 15.11.2017 as has been illustrated in the Table-'C' below:-

Table-'C' **(Amount in Rs.)**

Sl. No.	Description	Factors	Pre Rate Reduction (01.11.2017 to 14.11.2017)	Post Rate Reduction (From 15.11.2017)
1.	Item Description (Item Code)	A	DINNER NONVEG WED TO SUNDY (I00006879)	
2.	Store Name (Store No.)	B	KOL-PARK STREET (KPS01)	
3.	Total quantity of item sold	C	1,868	
4.	Total taxable value (after Discount)	D	14,82,832/-	
5.	Average base price (without GST)	E=(D/C)	793.81/-	
6.	GST Rate	F	18%	5%
7.	Denial of ITC of 6.71% as per Table- 'B' above	G=E*6.71%		53.26/-
8.	Commensurate Base Price (post Rate reduction) (Excluding GST)	H=E+G		847.07/-
9.	Commensurate Selling price (post Rate reduction) (including GST)	I=105% of H		889.42/-
10.	Post reduction illustrative month	J		Dec-2017
11.	Total quantity Sold	K		5,854
12.	Total Invoice Value (including GST)	L		53,92,848/-
13.	Actual Selling price (post rate reduction) (including GST)	M=L/K		921.22/-
14.	Excess amount charged or Profiteering per unit	N=M-I	31.80/-	
15.	Total Profiteering	O= K*N	**1,86,157/-**	

15. From the above Table, the DGAP has claimed that the Respondent did not reduce the selling price commensurately of the "DINNER NONVEG WED TO SUNDY (I00006879)" item, when the GST rate

was reduced from 18% to 5% w.e.f. 15.11.2017, vide Notification No. 46/2017 Central Tax (Rate) dated 14.11.2017 and hence he has profiteered an amount of Rs. 1,86,157/- on this particular item sold in a particular restaurant in a particular period and thus the benefit of reduction in the GST rate was not passed on to the recipients by way of commensurate reduction in the price, in terms of Section 171 of the CGST Act, 2017. On the basis of above calculation as illustrated in Table 'C' above, profiteering in the case of all items of the Respondent has also been arrived at in a similar manner by the DGAP.

16. The DGAP has further claimed that for computation of the total profiteering, only those items where the increase in base prices was more than what was required to offset the impact of denial of ITC, have been considered. On the basis of the aforesaid pre and post reduction in the 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 from 15.11.2017 to 31.03.2019, as per the product wise Sales Registers, the amount of net higher sale realization due to increase in the base prices of the service, despite the reduction in the GST rate from 18% to 5% (with denial of ITC) or in other words, the profiteered amount came to **Rs. 32,58,84,772/-** (including GST on the base profiteered amount). The details of the computation have been given in **Annexure-25** of the DGAP's Report.

17. The DGAP has also reported the place (State or Union Territory) of supply-wise break-up of the total profiteered amount of Rs. 32,58,84,772/- as per Table- 'D' given below:-

Table- 'D'

S. No.	Name of State	State Code	Total Profiteering (Rs.)
1	Andhra Pradesh	37	1,15,84,131
2	Assam	18	55,59,698
3	Chandigarh	4	61,09,729
4	Chhattisgarh	22	28,64,779
5	Delhi	7	3,46,12,141
6	Goa	30	25,17,237
7	Gujarat	24	1,84,30,773
8	Haryana	6	1,23,91,318
9	Jammu & Kashmir	1	36,64,133
10	Karnataka	29	4,14,46,718
11	Kerala	32	34,71,361
12	Maharashtra	27	9,41,63,588
13	Odisha	21	22,94,896
14	Puducherry	34	15,59,902
15	Punjab	3	1,13,90,040
16	Rajasthan	8	47,71,381
17	Tamil Nadu	33	2,44,81,182

18	Telangana	36	1,05,73,575
19	Uttar Pradesh	9	1,37,86,044
20	Uttarakhand	5	14,52,786
21	West Bengal	19	1,87,59,360
	Grand Total		**32,58,84,772**

18. The DGAP has also submitted that the allegation of profiteering by way of either increasing the base prices of the products while maintaining the same selling prices or by way of not reducing the selling prices of the products commensurately, despite a reduction in the GST rate from 18% to 5% w.e.f. 15.11.2017 stood confirmed against the Respondent and on this account, the Respondent has realized an additional amount to the tune of Rs. 32,58,84,772/- from the recipients which included both the profiteered amount and the GST on the said profiteered amount.

19. The above Report was considered by this Authority in its meeting held on 26.09.2019 and it was decided to hear the Applicants and the Respondent on 25.10.2019. Notice dated 30.09.2019 was also issued to the Respondent to explain why the Report furnished by the DGAP should not be accepted and his liability for having violated the provisions of Section 171 of the CGST Act, 2017 should not be fixed. The hearing fixed on 25.09.2019 was postponed to 14.11.2019 on the request of the Respondent. On 14.11.2019 the Applicants did not appear while Sh. Vishwasai Rajendera, Advocate, Sh. K. P. Kumar, Advocate, Sh. Kaushal Verma, Vice President (Finance) and Sh. Rahul Agrawal, President & CFO appeared on behalf of the Respondent.

Further hearings were held on 02.12.2019, 09.01.2020, 28.01.2020 and 31.03.2020.

20. The Respondent has filed written submissions dated 22.10.2019, 14.11.2019, 02.12.2019, 05.12.2019, 31.01.2020, 10.02.2020 and 15.02.2020 which may be summed up as follows:-

I. That he was engaged in the hospitality industry and was supplying restaurant and food catering services at more than 137 outlets covering more than 25 States in India and 7 outlets abroad. In relation to the above business, he had obtained registration under the various laws and was strictly complying with all the laws, which included the GST law.

II. That all his outlets had buffet offerings only. He kept changing the buffet menu to enhance guest experience. He had different base prices for the buffet served during the weekdays and during the weekends and the prices were also changed during the lunch time and the dinner time. Further, the cost of buffet in each outlet would also vary depending on the cost incurred by each outlet and the different dishes being served during a given buffet.

III. That the major costs incurred by him to run a restaurant included food costs, salaries to staff, consumables, rent, water and electricity etc. While staff salaries were generally increased on a yearly basis due to annual increments besides recruitments from time to time, rent increased annually, whereas prices of all other inputs increased all the time. Therefore, in order to counter these rising costs and to maintain his profits, he was revising his prices periodically based on the exigencies. There was also reduction in

the buffet tariff from time to time due to competition and change in the offerings in a buffet. In other words, the buffet tariff was dynamic varying from day to day, outlet to outlet and from city to city. The decision to revise the tariff upward or downward was solely taken by him based on commercial realities and was not influenced/ controlled by any authority whosoever.

IV. That before the GST was introduced; he was discharging VAT on the supply of food and Service Tax on the provision of services. However, upon introduction of the GST w.e.f. 01.07.2017, he was discharging GST @ 18% on supply of restaurant service and he was eligible for ITC and therefore he was paying tax to the Government after setting off the admissible ITC.

V. That the Central Government vide Notification No. 46/2017–Central Tax (Rate) dated 14.11.2017 had reduced the rate of tax on restaurant service from 18% to 5% with a caveat of non-availability of ITC. This has impacted him as well as the restaurant industry as a whole as every restaurant would now have to bear the consequences of in-eligible ITC. The only way to counter the same and maintain profit margins was to include the value of ineligible input tax (hitherto available) in the sale price (base price) of the food.

VI. That the total ITC loss to him was 7.2% and therefore he had increased the base prices to a certain extent as the commercials permitted however, the increase was not to the extent of the loss of ITC but to a lesser extent.

VII. That he was not a Government entity but a privately run business. The base price of the buffet was determined by factors such as

costs incurred, market conditions and the price of the competitors etc. and the same was increased and decreased accordingly. The base price of the buffet has no relation to the output tax payable by the Respondent.

VIII. That he had received a notice from the DGAP, calling upon him to respond to the allegation of profiteering and also to furnish all the documents in support of his reply. He had appeared before the DGAP on 24.07.2019 and subsequently furnished a detailed reply and relevant documents.

IX. That the DGAP has reported that he had realised an additional amount of Rs. 32, 58, 84,772/- "*on account 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 price of the products commensurately, despite a reduction in GST rate from 18% to 5% w.e.f 15.11.2017.*"

X. That he denied the allegation of profiteering on the following grounds which were independent and without prejudice to one and other:-

A. <u>PRICING POLICY OF THE RESPONDENT AND DYNAMIC PRICING EVEN BEFORE THE CHANGE IN RATE OF GST:</u>

That his pricing was dynamic and was not based on any pricing policy per say, but was based purely on commercials. The Respondent had 3 Regional Heads who reviewed the performance of each outlet (at least monthly or as often as required) and decided to alter the prices depending on various factors. His prices

varied based on different sessions of the day, different days of the week, seasonality, special occasions and changes in the respondent's offerings etc. His pricing framework was based on the following:-

a) Different prices for different sessions: Each outlet was running for 2 sessions (lunch and dinner) in a day, seven days of the week. Since, the eating activity was generally lesser during the lunches, the lunch prices were generally lower as compared to dinner.

b) Different prices for different days of the week: The demand for eating out was not evenly spread during each day of the week, hence, the restaurants had different prices for different days of the week. For example, prices were generally low on Monday lunch as the eating out activity was generally low during that part of the week. In order to attract more customers, the prices were generally kept low during the Mondays. Similarly, during Sundays, as the eating out activity was among the highest, the prices were typically higher.

c) 'Early Bird' offers: In order to make the offerings more value driven and guest friendly, he was having "Early Bird" prices, which offered lower prices to the customers who came to the restaurant early (generally 12 noon during lunch or 7 pm during dinner) so that they finish their meals early and the same table could be utilized for other guests.

d) Different prices for Vegetarian and Non Vegetarian: The restaurants served both vegetarian and non-vegetarian options. The prices were different for vegetarian and non-vegetarian meals.

e) Seasonality during the year: The demand for eating out varied based on months/seasons/holidays. For example, during Christmas-New Year period in December, the demand was higher and therefore prices were also customised during this period.

f) Food festivals organized by the outlet: In order to maintain customer excitement, various 'food festivals' were being organised wherein cuisines or festivals of a particular type were emphasized. For example, he was organising 'Street Food' festivals wherein delicacies of street foods were offered in the restaurant.

g) Local factors relevant in the trade area: In a diverse country like India, the demand in various local markets varied based on festivals. A simple example of this was increased eating out activity in Kolkata during the 'Durga Puja'. During this period, the guests also expected increased offerings in the restaurants. In order to meet the guest demands and also to attract more guests, the Respondent was enhancing his offerings and therefore was also changing the prices.

h) Different prices for Kids below 12 years: The restaurants also had differential pricing for kids (which was generally 50% of the peak regular pricing)

i) Competition in the trade area: Any increase or decrease in the competition in the trade area led to change in the demand and therefore impacted prices.

j) Cost structures: The key cost of running a outlet was food cost, gas and fuel, rent and common area maintenance, electricity, employee cost, consumables and license cost etc. These costs were not fixed in nature but changed often based on the market factors.

He has also submitted that he had no fixed pricing policy but was changing his prices at the restaurant level depending on the factors mentioned above. The prices were dynamic and were based on market demand and cost structures. He has also stated that this Authority in the case of M/s ***KRBL Ltd. vide Case No. 3/2018 dated 04.05.2018*** had clearly laid down that there could be no profiteering if the cost of inputs had increased. The DGAP has however failed to account for the changing cost structures month on month while determining the alleged amount profiteered by the respondent.

The Respondent in his reply dated 19.11.2019 has also claimed that the increase in the cost of inputs and input services was a factor for determining the prices but this factor was independent of the output GST rate. He has further claimed that it could not be asserted that elements of cost unrelated to GST were affected by the change in the output GST rates. The elements of cost may be unrelated to GST, however elements of cost had an impact on prices charged from the consumers. As per the DGAP's workings in this case, the entire changes in prices were attributed to alleged profiteering and not to changes in the elements of cost.

The Respondent has further claimed that the issue in the present case was not that he had charged a higher rate of GST than prescribed by law. The issue related to the fact that the base prices of the buffets offered by him were allegedly increased and as a result of such increase, he has allegedly not passed on the benefit

of reduction in the rate of GST commensurately to the end consumers. One factor which influenced the base prices of the buffets was the cost of inputs and input services. He has also asserted that this factor had been accepted by the DGAP also. The Respondent has further asserted that the cost of his inputs and input services like rent and salaries etc had increased substantially on a yearly basis. The entire difference in prices had been attributed to alleged profiteering without considering any changes in the input costs.

B. ALLEGED PERIOD OF PROFITEERING SHOULD BE RESTRICTED TO 30th NOVEMBER 2017

The Respondent has also argued that another factor which had extreme relevance to the interpretation of Section 171 of the CGST Act and its scope was that price of restaurant service would depend on various factors and inputs. One of the important inputs, value-wise, was inventory of raw-materials and inputs required for preparation of food on the date the GST rate had been reduced. He has further argued that this Authority in the case of ***M/s Adarsh Marbels*** *in* ***Case No. 42/2019 dated 26.06.2019*** had already noted that the implication of Section 171 would be applicable till the subsisting inventory lasted suggesting that there ought not to be any price increase. Being restaurant service the inventory in the form of various inputs and raw materials could be expected to last at the most for a fortnight. Consequently, the prices charged from

14.11.2017 to 30.11.2017 should be reckoned to examine whether benefit of price reduction had been passed on.

Another aspect which had a material bearing was the period up to which the trading operations were to be considered and it could not be indefinite. When the price reduction had occurred on 14.11.2017 and the inventory as on that date would have lasted up to 30.11.2017, the prices charged thereafter much less up to 31.03.2019 could not be taken into consideration.

C. THE STANDING COMMITTEE HAD FAILED TO COMPLY WITH THE PERIOD OF LIMITATION SPECIFIED IN THE CGST RULES, HENCE RENDERING THE ENTIRE PROCEEDINGS VOID

The Respondent has also pleaded that according to the DGAP the alleged period of profiteering was extended till 31.03.2019 as he had received a reference from the Standing Committee only on 27.03.2019 (decision taken at the meeting on 11.03.2019) and a notice for initiation of investigation under Rule 129 was issued only on 04.04.2019.

The Respondent has further pleaded that the period of alleged profiteering should be restricted only till 30.11.2017 and not beyond that. The Respondent has also submitted that two bills of different dates, submitted by the Applicant No. 1, seemed to have triggered the entire exercise and it was shocking that the date of complaint or date of reference from the Standing Committee could form the basis for deciding the period of alleged profiteering. He has also

submitted that hypothetically if somebody complained 10 years after the price reduction the prices charged up to the date of such complaint would be taken note of while freezing the base prices as on the date of rate reduction. Totally extraneous grounds relied upon by a customer choosing to complain at any point of time at his whims and fancies should not trigger an exercise resulting in devastating financial consequences, as was the issue in the instance case. The Applicant No. 1 who has complained against the Respondent alleging profiteering has relied on two invoices - one dated 09.11.2017 and another dated 15.11.2017, whilst the reduction in the GST rate had occurred on the intervening date namely 14.11.2017. The above Applicant had chosen to wait for more than 8 months to lodge a complaint. Added to this, the Standing Committee has taken more than 8 months to take cognizance of the complaint and refer it to the DGAP to initiate the present proceedings. This was a clear breach of Rule 128 of the CGST Rules which prescribed a period of 2 months plus a maximum period of one month extension, from the date of receipt of the application, for the Standing Committee to satisfy itself as to the existence or otherwise of prima facie evidence to support the claim of the above Applicant and then to refer the matter to the DGAP.

The Respondent has also alleged that not only has the Standing Committee violated Rule 128 of the CGST Rules but the said violation has grossly proved detrimental to the Respondent as the DGAP has extended the alleged period of profiteering solely on the basis of the date on which the matter was referred to him. He has

also submitted that the provisions of Rule 128 enabled the Standing Committee to act within a period of 2 months to examine accuracy and adequacy of the evidence and satisfy itself as to the existence or otherwise of prima facie evidence to support the alleged claim of anti-profiteering. If it did find such a case, it was to refer the matter to the DGAP for a detailed investigation vide Rule 129. When the law prescribed the limitation of 2 months, the Standing Committee could not have pondered over the complaint for any longer period to arrive at its satisfaction as to the existence of prima facie evidence of profiteering and refer the matter to the DGAP. The Standing Committee having gone beyond two months from the date of receipt of the complaint to initiate action, its such action was void ab initio. Merely because the Standing Committee had illegally chosen to ponder over the matter for a period beyond the permissible limit it could not legally enable the DGAP to justify his action as permissible under law. When the source of power to act flowed from an action which was otherwise void, it could not legalize or regularize subsequent actions and therefore all such subsequent actions also fall to the ground. Consequently, initiation of the entire proceedings amounted to usurping jurisdiction and it was ex facie illegal.

D. <u>THE DGAP USED WEIGHTED AVERAGE PRICE FOR AN ITEM CODE TO ARRIVE AT THE AVERAGE BASE PRICE FROM 1st – 14th NOVEMBER, HOWEVER DID NOT CONSIDER THE SAME WHILE ARRIVING AT THE PROFITEERING AMOUNT</u>

The Respondent has also averred that to arrive at the base price for any particular Item Code, the DGAP had considered average price during "the Pre GST rate change period" viz. Nov 1st to Nov 14th, 2017 i.e. the base price was arrived as the total base amount divided by the total quantity. However, post reduction in the rate of GST, the DGAP had taken different 'net prices' across different months and applied a check of actual selling prices with projected commensurate selling prices. If the DGAP had consistently followed the methodology and would had compared 'Average base price in the pre GST period' with the average price during the post GST period, there would had been no profiteering which clearly evidenced that the DGAP had been inconsistent in his working with the sole intention of foisting a huge demand on the Respondent one way or another. The average prices of Pre GST period should be compared directly with the average prices of the Post GST period. The DGAP should follow same method during the pre and the post GST period i.e. the average price should be considered for an Item Code.

E. THE INPUT TAX LOSS WAS 7.20% AS AGAINST 6.71% CALCULATED BY THE DGAP

The Respondent has further averred that the DGAP has calculated the ITC loss as 6.71% after excluding/denying the ITC loss on inter unit branch transfers though it was ITC and not anything else. The DGAP should not have denied the ITC on the inter unit branch transfers. The Respondent was incuring costs on movement of

semi cooked food and other inputs from his commissary/warehouse to his outlets and the GST paid on that account was available as ITC earlier when he was paying GST @ 18%. If the ITC loss on inter unit branch transfers was reckoned, the total ITC loss to the Respondent would be 7.2% as against 6.71% determined by the DGAP. The DGAP's contention was that the ITC on interstate transfers had been ignored as he had already availed ITC on the original purchase of the inputs, however, it should be noted that the ITC denied post 14.11.2017 didn't allow him to claim ITC even on inter-state transfers. On any item, GST paid by the him at the time of original purchase was not allowed to be set off against the GST output. Further, when these items (originally purchased and GST paid) were transferred from one State to another (inter-state transfer) and applicable GST was paid on them, the GST amount was also not available for ITC benefit. Therefore, while calculating the ITC loss, even ITC lost on interstate transfers should be considered to which the DGAP had replied that since the inter unit branch transfer turnover was deducted while calculating the taxable turnover of the Respondent, the ITC attributable to the same had also been denied to the Respondent. The Respondent has also submitted that it was not clear to him why the DGAP has chosen to deduct the inter unit branch transfer turnover from the outward taxable turnover of the Respondent. He has further submitted that the DGAP had conveniently chosen to deduct the turnover pertaining to the inter unit branch transfers from his total outward taxable turnover (Table – B of the DGAP's report), in order to determine the percentage of

ITC loss. The Respondent has claimed that if the inter unit branch transfer turnover was included in the outward taxable turnover and the credit of tax availed on the same was also included, the percentage of ITC to the net outward taxable turnover would be 7.2%.

F. ITEMS CONSUMED BY THE APPLICANT WERE NOT THE SAME

The Respondent has also insisted that as per the complaint lodged by a customer who had submitted two bills of different dates which seemed to have triggered the entire exercise, it was alleged that he had charged different prices on 9th Nov and 15th November however, as discussed earlier, his menu changed frequently. Based on the menu, the product offered was not the same and therefore expecting same price for both the buffets was unreasonable. As per the Applicant No. 1, the base price of Rs. 862/- was charged for the Dinner Veg and Rs. 969/- for Dinner Non Veg on 9th Nov, 2017 and Rs. 929/- were charged for the Dinner Veg and Rs. 1039/- for the Dinner Non Veg on 15th Nov, 2017 but the items offered on 15th November were much more than those offered on 9th November and since the items offered were not the same, the prices could not be compared. He has also submitted that the individual items consumed by the complainant were irrelevant as the dinner served by the Respondent was buffet and the price charged by him was on a consolidated head. The Respondent has further submitted that the DGAP had erred in

arriving at this conclusion. The price charged by the Respondent varied according to the items served in the buffet. Further, the Respondent also had early bird offers which charged a lesser price than the regular buffet, despite the same items being served. The DGAP had thus erred in not taking these factors into consideration.

G. **THE "SUPPLY OF GOODS AND SERVICES" UNDER ANY ITEM CODE WAS NOT SAME AND THEREFORE WORKINGS BASED ON ITEM CODE WERE INCORRECT**

The Respondent has also submitted that he was offering unlimited buffet at a fixed price and the offerings varied frequently and were impacted by factors like demand, seasons and festivals etc. The 'goods and supplies' offered under an Item Code relating to a Food buffet were not be same. Therefore, to consider that the prices under any one Item code for a restaurant (even when 'the goods and supply' offered were not same) should had been same for 17 months was unreasonable.

H. **SINCE ITC IS CALCULATED PAN INDIA, EVEN ITEM CODES AND APC SHOULD ALSO BE CALCULATED PAN INDIA**

The Respondent has further submitted that the DGAP has calculated the anti-profiteering amount by applying 4 different levels namely:

A) at different prices

B) for each Item Code

C) for each restaurant

D) for different months

He has found following inconsistencies in each of these levels:

i. At different prices: As per the DGAP's own working, he has considered "average prices" to arrive at "commensurate selling prices". Therefore, the average prices should be taken to arrive at the actual selling prices and not different prices.

ii. For each Item Code: The product offered for each Item code is not same and therefore, the workings cannot be based on an Item Code. Since, the Respondent was engaged in the selling of a buffet which changed frequently, any workings should be based at Company level.

iii. For each restaurant: The Respondent was engaged in selling buffet which varied across days in a particular restaurant and also across restaurants. Since the offering was not the same in a restaurant, it could not be applied at restaurant level. If Item Code has been considered, the Item code has been same across restaurant and therefore, same has to be applied at the company level.

iv. For Different Months: If the Pre GST rate change period has to be considered for Post GST rate change period, the same has to be considered as a whole and not in part. If the same has to be done in part whether it was daily, monthly, quarterly or annual it was not understandable.

The Respondent has also claimed that the DGAP has considered ITC loss pan India and has considered one number for the entire company. In the similar manner, since the key offering was food buffet, the entire working has to be done at pan India level for the applicable Post GST rate change period however, there must be uniformity in approach with regard to determination of the base prices pre 14.11.2017 and post 14.11.2017 on account of ineligibility of ITC, determination of APC and total turnover based on a given Item Code. The DGAP has chosen to apply pan India figures in arriving at the ineligible ITC whereas he has adopted turnover figures of each outlet with reference to the Item Codes. This sort of inconsistent approach has led to highly distorted results. Adoption of different approaches was highly improper and would result in grave injustice.

I. CALCULATION OF PROFITEERING SHOULD BE ON THE REALIZATION TO THE COMPANY EXCLUDING TAX RATHER THAN REALIZATION INCLUDING TAX

As per the method adopted by the DGAP, the profiteering has been calculated based on the difference in the prices including tax. Since, the net realization to the Respondent was excluding tax and the tax amount had been deposited with the GST authorities, any calculations of profiteered amount should be based on price realization excluding tax. As per the workings of the DGAP, total profiteering per unit was negative 13.51.

However, if the same working was compared based on pre GST amount, the total profiteering per unit would be negative 12.87 i.e. the profiteering calculated by the DGAP per unit would be higher by 0.64 as has been shown below:-

Total Invoice Amount	A	3,86,176
Quantity	B	615
Actual Selling Price (Including Tax)	C = A/B	627.93
Base Price	D	572.48
Denial of ITC @ 6.71%	E	38.41
Commensurate Base Price	F=D+E	610.89
GST@5%	G	30.54
Commensurate Selling Price	H = G+F	641.44
Profiteering Per Unit	I = C-H	-13.51
GST Base Amount	J	3,67,786
Quantity	B	615
Base price (excluding tax)	K = J/B	598.03
Profiteering Per Unit	L = K-F	-12.87
Difference in profiteering	M	0.64

J. NEGATIVE VARIANCE SHOULD ALSO BE CONSIDERED

The DGAP has not considered negative variance while calculating the alleged profiteering amount of Rs. 33 Crore. It would be absolutely illogical to reckon positive variance and ignore negative variance. Every business was evaluated on net profit and loss. Further, the negative variance was also indicative that the selling prices were very dynamic.

K. OVERALL PROFITABILITY OF THE RESPONDENT HAS REDUCED

The profitability of the Respondent at operating level (EBITDA) as well as profit after tax (PAT) has decreased in the FY 17 - 18

& FY 18 - 19. If the Respondent had made profits as alleged by the DGAP, the Respondent would have made more profits and the same would have been reflected in the EBITDA and PAT margins. However, the EBITDA and PAT margins of the Respondent have decreased significantly after the implementation of the GST. Further, profitability for the FY 17-18 and FY 18-19 has shown a declining trend when compared to the three years average of pre FY 17-18 period. The Table given below demonstrated the same:-

Brief P & L of the Respondent for the last 5 years

In Lacs	FY 2014-15	FY 2015-16	FY 2016-17	FY 2017-18	FY 2018-19
Sales	30,410	40,305	50,349	59,754	74,306
EBITDA	4,750	4,890	6,559	7,163	7,285
EBITDA %	***15.6%***	***12.1%***	***13.0%***	***12.0%***	***9.8%***
PAT	1,366	606	1,161	353	-2,987
PAT %	***4.5%***	***1.5%***	***2.3%***	***0.6%***	***-4.0%***

EBITDA Margin decline with reference to the last 3 years:

Details	Figures (in lakhs)
Average of 3 years EBITDA margin %	13.4%

before GST regime (A)	
EBITDA Margin % for FY 18 (B)	12.0%
EBITDA Margin % for FY 19 (C)	9.8%
Decline in EBITDA margin for FY 18 (B-A)= (D)	-1.4%
Loss in EBITDA profit for FY 18= F*FY18 Sales= (E)	**-833**
Decline in EBITDA margin for FY 19 (C-A)= (F)	-3.6%
Loss in EBITDA profit for FY 19= F*FY19 Sales= (G)	**-2,657**
Total Loss in EBITDA for 2 years (E+G)= H	**-3,490**

The Respondent has also claimed that he has suffered relative EBITDA loss of Rs. 8.33 Crore in the FY 2017-2018 and Rs. 26.57 Crore in the FY 2018-2019. The total relative EBITDA loss suffered by the Respondent in both the years was Rs. 34.90 Crore. The Respondent has also stated that he has suffered relative PAT loss of Rs. 12.68 Crore in FY 2018 and Rs. 50.03 Crore in the FY 2019. The Table given below shows the profit margin decline post the GST regime compared to the pre GST regime:-

PAT Margin decline with reference to the last 3 years:

Details	Figures (in lakhs)
Average of 3 years PAT margin % before GST regime (A)	2.7%
PAT Margin % for FY 18 (B)	0.6%
PAT Margin % for FY 19 (C)	-4.0%
Decline in PAT margin for FY 18 (B-A)= (D)	-2.1%
Loss in PAT profit for FY 18= F*FY18 Sales= (E)	**-1,268**
Decline in PAT margin for FY 19 (C-A)= (F)	-6.7%
Loss in PAT profit for FY 19= F*FY19 Sales= (G)	**-5,003**
Total Loss in PAT for 2 years (E+G)= H	**-6,272**

The Respondent has further claimed that the total relative PAT loss suffered by him in both the years was Rs. 62.72 Crore and he was already under immense margin pressure. Significant increase in the cost of materials, salaries and wages and cost of operations has resulted in decrease in the bottom line. In the light of the above it would be grossly unfair and unjust to even suggest much

less hold that the Respondent profiteered at all, much less to the extent of Rs. 33 Crore.

L. LEGAL INTERPRETATION OF SECTION 171 OF THE CGST ACT 2017 AND THE MEANING OF THE TERM "PROFITEERING"

The entire object of the exercise envisaged under Section 171 of the Act was to examine whether any reduction in the rate of tax on goods or services or the benefit of ITC has been passed on to the recipients by way of commensurate reduction in prices. The issue in the present case was whether there has been commensurate reduction in the prices when GST rate was reduced from 18% to 5% on 14.11.2017 in respect of the restaurant service. As simultaneously the benefit of ITC has been withdrawn in respect of the above service, the effective reduction in the rate of tax would have to be worked out by reducing from 13% (difference between 18% and 5%), the corresponding loss on account of ineligibility to claim ITC. Rule 126 of the CGST Rules provided that this Authority may determine the methodology and procedure for determining as to whether the reduction in the rate of tax in the supply of services (as in the instant case) has been passed on by the registered person to the recipient by way of commensurate reduction in prices. The Respondent was not aware as to how the DGAP was proceeding in the matter and which methodology or procedure was being followed by the DGAP. The DGAP has taken note of

the business carried on upto 31.03.2019 though the reduction in the rate of tax had occurred on 14.11.2017, which meant that every increase in the prices during the 17 month period was reckoned in arriving at the alleged profiteered amount with attending consequences. The Respondent has also submitted that the manner in which the word 'profiteering' would have to be understood in the absence of a statutory definition, would be as per the meaning of the word 'profiteer' as has been given in the different dictionaries mentioned below:-

<u>The Webster's New World College Dictionary – New Millennium Fourth edition:</u>

"Profiteer – a person who makes excessive profits esp. by taking advantage of a shortage of supply to charge exorbitant prices."

<u>The Law Lexicon Encyclopaedic legal and commercial dictionary reprint 2002:</u>

"Profiteer –make profit out of the State's or consumer's straits esp. used of contractors and traders in war time."

<u>The Concise Oxford Dictionary 9th edition:</u>

"Profiteer – make or seek to make excessive profits esp. illegally or in back market conditions."

The Respondent has also contended that 'profiteering' was not a respectable term but has an odious connotation – something detestable or reprehensible. To allege one to be profiteering, it must be demonstrated that the person has exploited the situation

or derived undue advantage or deprived someone of what was legitimately due to him. These actions must be reflected in the conduct of the person so accused. However, a person carrying on business in an entirely lawful manner could not be alleged to have profiteered.

He has further contended that during the hearing held on 2nd December 2019, this Authority had drawn attention to the definition of "profiteered" as inserted in Section 171 of the CGST Act, 2017. He has also submitted that Section 171 (3A) of the CGST Act which defined the word "profiteered" was introduced by the Finance Act, 2019. The same was to come into effect from a date to be notified by the Central Government. To the best of his knowledge, the Central Government was yet to notify Section 171 (3A) of the CGST Act and thus the same was yet to form part of the statute. The very fact that the insertion has not yet been brought into effect, its import could not be read into the statute and definitely not during the period in question. This being the case, in the absence of a statutory definition of the word "profiteering", the same should be construed as per the definition laid down in the various dictionaries, and it could not be meant to be understood as has been defined under Section 171 (3A) of the CGST Act. The Respondent has revised his prices immediately on reduction of the GST rate in a manner that such reduction has effectively passed on the benefit after adjusting the consequent ineligible ITC which was worked out as 7.2% which meant that the Respondent could have revised the base prices upward by 7.2%. As the Respondent has over 125 outlets in the

country and the prices being dynamic, revising the prices upward/downward depended on various factors. Having regard to the nature of the services the Respondent was engaged, it was not possible to adjust the prices of his buffet products exactly to match the rate reduction. He had to necessarily take note of other commercial implications. As has been shown on the basis of financials, the Respondent, in fact, has passed on more than the reduction in the GST. The profiteering which has an odious connotation must be manifest from the conduct of the person accused of.

The Respondent has also stated that there were 10 key Item Codes in every outlet. They were I00006871 (LUNCH VEG), I00006872 (LUNCH NON VEG), I00006873 (KIDS BUFFET), I00006874 (SUNDAY LUNCH VEG), I00006875 (SUNDAY LUNCH NON VEG), I00006876 (DINNER VEG MON TO TUES), I00006877 (DINNER NON VEG MON TO TUES), I00006878 (DINNER VEG WED TO SUNDAY), I00006879 (DINNER NON VEG WED TO SUNDAY) and I00006880 (KIDS BUFFET). Thus, there were 10 common Item Codes for all the 125 outlets and prices and offerings for these Item Codes varied from outlet to outlet and State to State. The prices of these Item Codes were changed often depending on the commercial considerations and nothing else. Tax rate did not figure at all in those changes. If variations were observed it would be obvious that the prices went up and down often. The revised prices during the 15 day period from 15th November 2017 to 30th November 2017 i.e. immediately after the rate reduction were to be taken as

representative and manifesting the Respondent's intention. It could be seen that while prices of a few item codes (not uniformly but differently pan India) went up slightly beyond 7.2% from the base rates, quite a few went up from the base rates by less than 7.2% and a few others were fixed below the base rates. It would be unconscionable even to suggest that where the increase was more than 7.2%, the same was with an intent to profiteer, and altogether ignore the impact of the increase which was less than 7.2% and where there was a reduction from the base prices. When the customers have lunches or dinners all over the outlets on any given day, no motive of profiteering could be attributed to some.

The Respondent has further stated that this Authority has not prescribed any methodology in this regard as to how the determination would be done. Another important aspect was that the phrase 'commensurate reduction in prices' has not been defined or explained. It has to be understood contextually. The consequences flowing from an adverse order of this Authority were extremely severe. It resulted in deprivation of property besides affecting his right to carry on business. The anti-profiteering scheme was part of tax law. Neither the Act nor the Rules prescribe any mechanism as to how it was to be computed. In all the tax legislations thus far, the statute contained all the basic ingredients to effectuate the levy viz. charge, person, the measure for the levy and the manner of computation. Only the machinery or procedural provisions were delegated to the Authorities for prescription. However, the statute

being silent on all these aspects, the anti-profiteering determination and the amount to be collected on that account was totally unguided. They were the ingredients which were to be statutorily prescribed. When it was not so and delegated it led to arbitrary exercise of power which was wholly against all canons of law and as such open to challenge.

The Respondent has also extracted below what the Hon'ble Supreme Court has ruled in the case of ***Govind Saran Ganga Saran v. Commissioner of Sales Tax (1985) Supp SCC 205*** to support his case:-

"The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity."

He has also argued that the above principle has been reiterated in later cases e.g. in the case of ***Commissioner of Central Excise and Customs Kerala v. Larsen & Toubro Limited (2015) 84 VST 403*** as under:-

"The task of interpretation of a statutory provision is an attempt to discover the intention of the legislature from the language used. If strict literal construction leads to an absurd result i.e. result not intended to be sub-served by the legislative object and if other construction is possible apart from the strict literal construction then that construction should be preferred to the strict literal construction. So the principle of purposive construction will have to be applied when the literal construction leads to injustice or absurdity. The text, scheme of the relevant Act as a whole and its purpose are as relevant in construing a taxing Act as in construing any other Act. Therefore, the Rule that object of the legislature has to be kept in view and an equitable construction consistent with the object has to be placed on the words used if there be ambiguity."

The Respondent has also drawn support from the following judgements:-

CIT v. JH Gotla (1985) 156 ITR 323 at 339.

State of Kerala and Others v. AP Mammikutty (2015) 82 VST 418.

The Respondent has also argued that if construction was placed on Section 171 to mean that each and every transaction post 14.11.2017 has to be considered and where the Dealer has not passed on the full benefit of net reduction in tax then there was

profiteering and where the Dealer has passed on much more than the net reduction in prices it should altogether be ignored was a construction which was not consistent with the spirit of the provision. Such construction could never be attributed to the legislature and therefore it was impermissible to place such a construction. The reduction in the tax rate having been 13% and the loss of ITC being 7.2%, the reduction that was intended to be passed on was only to the extent of 5.8%. Immediately after 14.11.2017 the Respondent could have re-fixed the sale prices in such a manner as to increase the base prices up to 7.2% and the same would not have resulted in any element of profiteering. If the prices re-fixed were beyond 7.2%, the excess, if at all, could be said to be profiteering but such profiteering would have to be limited to 5.8%. A price fixed beyond the aggregate of 7.2% + 5.8% i.e. 13% would not amount to profiteering and such excess could not attract the provision of Section 171. He has further argued that this submission was without prejudice to the main contentions and in any case Item Code wise transactions (month wise and store wise) should not be looked at but they should be looked on a pan India basis. He has also pleaded that if the anti-profiteering provision was interpreted in an arbitrary manner it would impinge on a person's right to carry on business. The Respondent was engaged in the business of provision of restaurant service which was not controlled in any manner and he was free to organize his business as he desired. His right to fix prices was unfettered so much so it entitled him to vary the prices as often as he wanted and without any caps. Nonetheless,

while the anti-profiteering measure was a piece of social legislation intended to prevent exploitation by dealers and / or prevent dealers depriving their customers of what they were legitimately entitled to when the tax rates were reduced, it did not sensibly mean that the dealer could not alter his prices upward or downward so long as he passed on the benefits the State sought to extend to the society at large consistent with the spirit of the provision. He has further pleaded that this principle has also been accepted by this authority in the cases of ***M/s Johnson and Johnson Corp.*** *and* ***M/s Apollo Hospitals Enterprises Ltd.*** in ***Case No. 59/2019 dated 21.11.2019*** and in the case of ***M/s Adarsh Marbels vide Case No. 42/2019 dated 26.06.2019***.

21. The submissions filed by the Respondent on 14.11.2019 were sent to the DGAP who vide his supplementary Report dated 19.11.2019 has furnished his reply on the objections of the Respondent. The DGAP has submitted that the period of investigation was from 15.11.2017 to 31.03.2019 as he has received the reference from the Standing Committee on 27.03.2019 and the Notice of initiation was issued on 04.04.2019 and the period covered was upto the latest month of the Notice i.e. upto 31.03.2019 which was already mentioned in Para 5 of his Report dated 24.09.2019. The Respondent's submissions regarding same operating profit if increase in base prices was by an amount close to what he had lost by way of denial of ITC, had already been accepted and demonstrated in Para-18 of the Report dated 24.09.2019 which stated that if the increase in the pre-GST rate reduction base prices w.e.f. 15.11.2017 was upto the amount of

denial of ITC, one could conclude that there was no profiteering. However, if the increase in the pre-GST rate reduction base prices w.e.f.15.11.2017, was more than denial of ITC, the extent of profiteering would be such increase in base prices exceeding denial of ITC. On the issue of ITC loss on inter unit branch transfers, the DGAP has submitted that as the Respondent has already availed ITC on the original purchase of inputs, the same has been considered in the computation of denial of ITC to net turnover. Further, output tax liability on inter-unit branch transfers has been excluded from the ITC on the one hand and the inter-unit branch transfer turnover has been excluded from the outward taxable turnover on the other hand which neutralised the impact of branch transfer transactions on the computation. He has also submitted that in terms of Section 171 of CGST Act, 2017 which governed the anti-profiteering provisions under the GST 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 could obviously only be in absolute terms, so that the final price payable by a consumer got 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 Section 171 simply did not provide a supplier of the goods or services any other means of passing on the benefit of ITC or reduction in the

rate of tax to the consumers. Thus, the legal position was unambiguous and could be summed up as 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 the 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 rate of tax to the recipients.

Therefore, computation of the EBITDA or PAT Gain/Loss as per the financial statements could not be considered in the light of above statutory provisions. Regarding the Respondent's contention of increase in his costs the DGAP has submitted that the increase in the cost of inputs and input services was a factor for determination of prices but this factor was independent of the output GST rate. It could not be asserted that the elements of cost unrelated to GST were affected by the change in the output GST rates. Therefore, in terms of Section 171 of the above Act, the claim of increase in the cost of inputs and input services has not been considered. With regard to not including the items having negative variances, the DGAP has stated that he has already explained it in Para 22 of his Report dated 24.09.2019. As regards profiteering, only those items where the increase in base prices was more than what was required to offset the impact of denial of ITC, have been considered. Therefore, the DGAP has claimed that he has not quantified profiteering in respect of the Tables submitted by the Respondent

vide Para 10 F of his submissions dated 14.11.2019 before this Authority, which could be verified from Annexure-25 of his Report dated 24.09.2019. He has also claimed that the Respondent could not set off the negative variance as the law did not offer a supplier of goods and services, flexibility to pass on the benefit of ITC or reduction in the rate of tax on one product, say x by reducing the price of another product say Y.

22. The DGAP vide his supplementary Report dated 13.12.2019 has also submitted para wise reply on the submissions of the Respondent which are as follows:-

Pricing Policy of the Respondent and Dynamic Pricing even before the change in rate of GST:-

Clarification of DGAP: The Respondent was maintaining different Item Codes for the different base prices (depending upon various factors cited by the Respondent) and the profiteering, if any, has been arrived at by comparing restaurant-wise (restaurants in operation in both pre 14.11.2017 and post 14.11.2017), Item Code wise average selling prices for the items sold during the period from 01.11.2017 to 14.11.2017 (or the latest month, if the item was not sold during 01.11.2017 to 14.11.2017), and the prices post 15.11.2017 for the items similar in each aspect.

The DGAP has used weighted average price for an Item Code to arrive at the average base price from 1st to 14th November, however, did not consider the same while arriving at the profiteering amount:-

Clarification of DGAP: Section 171(1) reads as "Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall

be passed on to the recipient by way of commensurate reduction in prices." Thus, the legal requirement was abundantly clear that in the event of a benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in *prices* of *any supply* of goods or services. Therefore, Respondent was under legal obligation to pass on the benefit of ITC or reduction in the rate of tax by way of commensurate reduction in price of each and every supply of goods or services. Following the same rule, the DGAP had requested the Respondent to provide invoice-wise details of the outward taxable supplies vide his Notice of initiation dated 04.04.2019 and letters dated 22.04.2019, 29.04.209, 20.05.2019, 04.06.2019. However, the Respondent had expressed their inability to provide the invoice-wise outward taxable supply data due to extremely voluminous nature and submitted it in a summarized manner on monthly basis restaurant wise and item-wise sales for the period from July, 2017 to March, 2018 for some States; which was considered after accepting request of the Respondent and accordingly, the DGAP had asked the Respondent to submit the product/SKU-wise sales for the period from July 2017 to March 2018 for other States and from April 2018 to March 2019 for all the States vide Summons dated 09.07.2019 and 18.07.2019. Further anti-profiteering provisions were for the benefit of the recipients and each recipient must get benefit of reduction in the rate of tax or increase in the ITC on each and every supply of goods or services or both. Therefore, the DGAP has claimed that he was justified in applying the provisions of anti-profiteering at Product/SKUs level taking the average price for each month in the absence of invoice-wise outward taxable supplies data.

The Input Tax loss to the Respondent is 7.20% as against 6.71% calculated by the DGAP:-

Clarification of DGAP:- The ITC amounting to Rs. 26,87,690/- was found to be availed by the Respondent without fulfilling the prescribed conditions, which was also not taken into the account while computing the figure of 6.71% of the ITC denial impact which had already been explained in detail in his Report dated 24.09.2019.

Items consumed by the Applicant No. 1 were not the same:-

Clarification of DGAP:- The bills produced by the Applicant No. 1 for the pre-GST rate cut and post-GST rate cut periods were for the same item (i.e. veg-dinner and non-veg-dinner). The individual items consumed by the Applicant were irrelevant as the Dinner served by the Respondent was a 'Buffet' and the price charged by him was on a consolidated head viz. Veg or Non-Veg Dinner.

The "Supply of Goods and Services" under any item code is not same and therefore workings based on Item code is incorrect:-

Clarification of DGAP:- The Respondent has furnished the base price of an item under Item Code I00006879 for three different restaurants located at different locations. The base prices furnished were all pre-GST rate cut base prices. Further, vide Para 15 of his Report dated 24.09.2019, it has been explained that profiteering, if any, has been arrived at by comparing restaurant-wise (restaurants in operation in both pre 14.11.2017 and post 14.11.2017), item code wise average selling prices for the items sold during the period 01.11.2017 to 14.11.2017 (or the latest month, if item is not sold

during 01.11.2017 to 14.11.2017), and the prices post 15.11.2017 for the items similar in each aspect.

Since ITC is calculated PAN India, even Item codes and APC should also be calculated Pan- India:-

Clarification of DGAP:- The Respondent was not maintaining restaurant wise ITC and had submitted consolidated ITC registers during the investigation whereas he has contended that he was having different base prices depending on weekdays, weekends, lunch timings, dinner timings, outlet locality and occupancy rate and in order to attract the customers, he was changing the base prices. Therefore, he has computed the profiteering amount restaurant-wise as has been mentioned in para-15 of his Report dated 24.09.2019. However, the Respondent has furnished the details of State-wise APC and this Authority may take a view in this regard and consider accordingly.

Calculation of Profiteering should be on the realization to the company excluding tax rather than realization including tax:-

Clarification of DGAP:- The provisions of Section 171 of the CGST Act, 2017 and Chapter XV of the CGST Rules, 2017, require 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 price. Price includes both, the base price and the tax paid on it. If any supplier has 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 (CWF), regardless of whether such extra tax collected

from the recipient has 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.

23. We have carefully considered the Reports furnished by the DGAP, submissions made by the Respondent and all the material placed on record and it is revealed that the Respondent is engaged in the business of providing the restaurant and catering services and is having restaurants covering more than 25 States and Union Territories in India and 7 outlets abroad which have buffet offerings only. All his restaurants are registered under the CGST/SGST Acts.

24. It is also revealed that the Central Government vide Notification No. 46/2017–Central Tax (Rate) dated 14.11.2017 has reduced the rate of tax on restaurant service from 18% to 5% with a caveat that the registered persons shall not be eligible to claim ITC of the GST paid by them on the purchase of inputs or the input services w.e.f. 15.11.2017. Therefore, it is established that the Respondent is liable to pass on the benefit of tax reduction to his recipients in terms of the provisions of Section 171 of the CGST Act, 2017.

25. It is further revealed that a complaint dated 31.07.2019 was lodged by the Applicant No. 1 with the Standing Committee on Anti-Profiteering, on the basis of the communication received by him from Ms. Chitra Kumar in which it was alleged that the Respondent had resorted to

profiteering as he was not passing on the benefit of reduction in the GST rate from 18% to 5% w.e.f. 15.11.2017 to his customers. The above complaint was examined by the Standing Committee in its meeting held on 11.03.2019 and after satisfying itself that there was accurate and adequate evidence that the Respondent has not passed on the above benefit, was forwarded to the DGAP for detailed investigation under Rule 129 (1) of the CGST Rules, 2017. The DGAP after conducting detailed investigation has furnished his Report dated 24.09.2019 to this Authority under Rule 129 (6) of the above Rules.

26. Perusal of the above Report shows that the Respondent has contended before the DGAP that he was having different base prices for the buffets being served by him depending on the weekdays, weekends, lunch timings, dinner timings, location of the restaurant and occupancy rate and in order to attract the customers he was changing the base prices. The DGAP has also stated in his Report that the Respondent was maintaining different item codes for the different base prices depending on the factors cited above and the profiteering has been computed by comparing restaurant-wise (restaurants in operation in both pre 14.11.2017 and post 14.11.2017 periods), item code wise average selling prices for the items sold during the period from 01.11.2017 to 14.11.2017 (or the latest month, if item was not sold during 01.11.2017 to 14.11.2017), and the prices post 15.11.2017 for the items similar in each aspect.

27. The DGAP has further reported that from the details of the outward taxable supplies provided by the Respondent it was evident that he was operating 129 outlets in 24 States and Union Territories dealing with 584 items while supplying restaurant service after 15.11.2017.

After comparing the average selling prices for the items sold during the period from 01.11.2017 to 14.11.2017 (or the latest month, if an item was not sold during the period from 01.11.2017 to 14.11.2017), and the prices post 15.11.2017, it was evident that 216 items supplied by the Respondent were launched post the above rate reduction. The DGAP has also contended that lower GST rate of 5% has been charged on the increased base prices of the other items, which confirmed that the tax amount was computed @ 18% prior to 15.11.2017 and @ 5% w.e.f. 15.11.2017. The DGAP has further contended that charging of the lower tax on a higher (enhanced) base price has resulted in the customers having to pay more than the commensurate price. He has also claimed that while the Respondent's contention that the tax amount was computed @ 18% prior to 15.11.2017 and at the reduced rate of 5% w.e.f. 15.11.2017 was correct, this in no way established that the commensurate benefit of the reduction in the GST rate has been passed on by the Respondent to his customers. On the contrary, the customers should have paid lower final prices after the GST rate was reduced to 5% but they did not get this benefit.

28. The DGAP has also stated that assessment of the impact of denial of the ITC which was an uncontested fact, required computation of the ITC in respect of the "restaurant service" as a percentage of the taxable turnover from the outward supplies of the "products" during the pre-GST rate reduction period e.g. if the ITC in respect of restaurant service was 10% of the taxable turnover 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 upto 10%, one could

conclude that there was no profiteering. However, if the increase in the pre-GST rate reduction base prices w.e.f. 15.11.2017 was 14%, the extent of profiteering would be 14% - 10% = 4% of the turnover. Accordingly, the DGAP has worked out the ITC in respect of the restaurant service as a percentage of the taxable turnover from products during the pre-GST rate reduction period by taking into consideration the period from 01.07.2017 to 31.10.2017 and not upto 14.11.2017 which is generally done by the DGAP in all such cases of tax reduction where the benefit is required to be passed on, as the Respondent had not reversed an amount of Rs. 23,84,549/- of ITC on the stock which he was holding on 14.11.2017 which he was required to do as per the provisions of Section 17 of the CGST Act, 2017 read with Rule 42 and 43 of the CGST Rules, 2017. The invoice-wise outward taxable turnover for the month of November, 2017 was also not provided by the Respondent to compute the taxable turnover for the period from 01.11.2017 to 14.11.2017. The DGAP on examination of the copies of the sample invoices submitted by the Respondent for the ITC availed during the period from 01.11.2017 to 14.11.2017 (ITC of Rs. 26,87,690/- was availed in 35 invoices) had found that in 22 cases, ITC amounting to Rs. 14,53,950/- was taken by the Respondent without fulfilling the prescribed conditions and some discrepancies were also noticed in the ITC availed. The details of the 74 sample invoices and the grounds on which the ITC on them has not been taken in to account while computing the above ratio have been mentioned in **Annexure-23** of the Report dated 24.09.2019 filed by the DGAP which show that the Respondent had not received the services on the date of availing of the ITC, in contrast to the provisions of

Section 16 (2) (b) of the CGST Act, 2017. Accordingly, the ratio of ITC to the net taxable turnover has been taken for determining the impact of denial of ITC which was available to the Respondent till 14.11.2017.

29. The DGAP has also stated that while calculating the ITC as a percentage of the total taxable turnover of the Respondent the ITC for the period from July, 2017 to October, 2017, as has been furnished in the GSTR-3B Returns, has been adjusted by excluding the amount of ITC of the tax paid on inter-unit branch transfers as per the Sales Register and the net taxable turnover during the period from July, 2017 to October, 2017 has also been adjusted by excluding the turnover of the inter-unit branch transfers as per the GSTR-1 Returns filed for the period from July, 2017 to October, 2017. Accordingly, the ratio of ITC to the net taxable turnover has been computed to assess the impact of denial of ITC which was available to the Respondent till 14.11.2017. On the basis of the above methodology the DGAP has claimed that ITC amounting to Rs. 11,12,57,235/- was available to the Respondent during the period from July, 2017 to October, 2017 which was approximately 6.71% of the net taxable turnover of restaurant service of Rs. 1,65,81,62,452/- supplied during the same period, which has been mentioned in **Annexure-24** of the above Report. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the above percentage of ITC was not available to the Respondent. A summary of the computation of the ratio of ITC to the taxable turnover in respect of the Respondent has been given by the DGAP vide Table-'B' of his Report dated 24.09.2019.

30. The DGAP has further stated that the analysis of the details of item-wise outward taxable supplies made during the period from

15.11.2017 to 31.03.2019 has revealed that the Respondent had increased the base prices of different items supplied as a part of the restaurant service to make up for the denial of ITC post GST rate reduction. The pre and post GST rate reduction prices of the items sold as a part of restaurant service during the period from 15.11.2017 to 31.03.2019 have been compared by the DGAP and he has found that the Respondent has increased the base prices by more than 6.71% i.e. by more than what was required to offset the impact of denial of ITC in respect of 298 items out of the total 368 items sold during the above period. Thus, the DGAP has stated that in respect of these items, the commensurate benefit of reduction in the rate of tax from 18% to 5% had not been passed on by the Respondent. He has further stated that there was no profiteering in respect of the remaining items on which there was either no increase in base prices or the increase in the base prices was less or equal to the denial of the ITC, or these were new products launched in many States with the different dishes or were sold in new outlets which had started operations post 15.11.2017.

31. The DGAP has also submitted that for computing profiteering, only those items where the increase in the base prices was more than what was required to offset the impact of denial of ITC, have been considered. On the basis of the aforesaid pre and post reduction in the GST rates, the impact of denial of ITC and the details of the outward supplies (other than zero rated, nil rated and exempted supplies) made during the period from 15.11.2017 to 31.03.2019, as per the product wise Sales Registers, the amount of net higher sale realization due to increase in the base prices of the service, despite reduction in the GST

rate from 18% to 5% (with denial of input tax credit) or in other words, the profiteered amount has been computed by the DGAP as **Rs. 32,58,84,772/-** including the GST on the base profiteered amount. The details of the computation have been given in **Annexure-25** by the DGAP attached with his Report dated 24.09.2019.

32. It is also evident from the perusal of the supplementary Report dated 13.12.2019 furnished by the DGAP in response to the submissions of the Respondent dated 02.12.2019 that while replying to Para C of the above submissions the DGAP has stated as under:-

"Para C. The DGAP used weighted average price for an Item Code to arrive at the average base price from 1st to 14th November, however, did not consider the same while arriving at the profiteering amount:-

Clarification of the DGAP: Section 171(1) reads as "Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices." Thus, the legal requirement is abundantly clear that in the event of a benefit of ITC or reduction in rate of tax, there must be a commensurate reduction in ***prices*** of the ***any supply*** of goods or services.

Therefore, Respondent is under legal obligation to pass on the benefit of ITC or reduction in rate of tax by way of commensurate reduction in price of each and every supply of goods or services. **And by following the same rule, the DGAP requested the Respondent to provide invoice-wise details of outward taxable**

supply vide Notice of initiation dated 04.04.2019 & letters dated 22.04.2019, 29.04.209, 20.05.2019, 04.06.2019. However, the Respondent expressed their inability to provide the invoice-wise outward taxable supply data due to extremely voluminous nature and submitted in summarized manner on monthly restaurant wise and item-wise sales for the period July, 2017 to March, 2018 for some states; which was considered after accepting request of the Noticee's and accordingly, the DGAP asked the Respondent to submit the product/SKU-wise sales for the period July 2017 to March 2018 for other states and from April 2018 to March 2019 for all the states vide Summons dated 09.07.2019 and 18.07.2019. Further anti-profiteering provisions are for the benefit of the recipients and each recipient must get benefit of reduction in rate of tax or increase in ITC on each and every supply of goods or services or both. Therefore, the DGAP is justified in applying the provisions of anti-profiteering at Product/SKUs level taking the average price for each month in the absence of invoice-wise outward taxable supplies data."

(Emphasis supplied)

33. It is clear from the above submissions of the DGAP that he has computed the profiteered amount by comparing the average base prices of the products/SKUs which the Respondent was charging during the pre rate reduction period w.e.f. 001.11.2017 to 14.11.2017 or the earlier period if no sale of a particular product had been made during the above period with the monthly average base prices of the same product/SKU of which the supply was made by the Respondent

and accordingly, the profiteered amount has been computed by the DGAP. The DGAP has also mentioned that the above methodology was applied by him to calculate the profiteered amount as the Respondent had not supplied the invoice wise details of the outward taxable supplies. However, the above methodology employed by the DGAP is not in consonance with the methodology which has been determined by this Authority in respect of all such cases of tax reduction in which benefit was required to be passed on by the registered persons as per the provisions of Section 171 of the CGST Act, 2017. This Authority has consistently held that while computing the profiteered amount the average pre rate reduction base price of each SKU should be compared with the actual post rate reduction base price of the same SKU so that every recipient gets the benefit of tax reduction on each purchase made by him as was the mandate of Section 171 otherwise it would result in denial of benefit to the eligible customers which would amount to contravention of Section 171 as well as Article 14 of the Constitution. Comparing of the average pre rate reduction base prices with the average post rate reduction base prices runs completely contrary to the methodology determined by this Authority as well as the provisions of Section 171 of the above Act. It also leads to the conclusion that the profiteered amount calculated by the DGAP on the basis of the above methodology is not accurate and hence, the same cannot be accepted to be correct. Moreover, the quantum of benefit computed by the DGAP on each SKU which is required to be passed on to the eligible buyers is also not correct. The Respondent cannot be allowed to enrich himself at the expense of the customers who are voiceless, unorganised and vulnerable and

appropriate the benefit of tax reduction which he is not required to pass on from his own pocket as it has been granted by the Central and the State Governments from their scarce tax revenue.

34. Accordingly, the reasons given by the DGAP for diverting from the approved methodology on the ground that the invoice wise details of the outward taxable supplies were not supplied by the Respondent for the period from 15.11.2017 to 31.03.2019 are not convincing and justified as the Respondent was bound to supply the above details.

35. Perusal of Annexure-1 attached by the DGAP with his Report dated 24.09.2019 also shows that the Applicant No. 1 has filed the application dated 31.07.2018 alleging profiteering by the Respondent on the basis of the information supplied by Ms. Chitra Kumar who had also provided copies of the tax invoices issued by the Respondent in respect of supply of 'Dinner Veg' and 'Dinner Non Veg' made during the pre-rate reduction period on 09.11.2017 and during the post rate reduction period on 15.11.2017. The Applicant No. 1 has also stated in his application that the above complaint has been received from Ms. Chitra Kumar who was member of the Local Circles. However, the DGAP has not recorded any finding in his above Report whether Ms. Chitra Kumar was eligible for refund of the profiteered amount or not.

36. Hence, on the basis of the above grounds the Report dated 24.09.2019 furnished by the DGAP cannot be accepted and therefore, the DGAP is directed to conduct further investigation in the present case under Rule 133 (4) of the CGST Rules, 2017 in consonance with the following directions and submit fresh Report as per the provisions of Rule 129 (6) of the above Rules:-

(a) The DGAP shall direct the Respondent to supply the invoice wise details of the outward taxable supplies for the period from 15.11.2017 to 31.03.2019 which shall be supplied by the Respondent within a period of 15 days from the date of receipt of the Notice issued by the DGAP.

(b) The DGAP shall again compute the profiteered amount after comparing the average pre rate reduction SKU wise base price with the post rate reduction actual base price of the same SKU.

(c) The DGAP shall also investigate and record his findings whether Ms. Chitra Kumar is entitled to the benefit of tax reduction and if so the quantum thereof.

(d) The Respondent shall extend necessary assistance to the DGAP during the course of the fresh investigation and in case the Respondent fails to submit the details as required by the DGAP coercive steps shall be taken against him as per the provisions of Rule 132 of the CGST Rules, 2017 as well as the provisions of the Civil Procedure Code 1908.

37. The above investigation shall be completed by the DGAP within a period of 3 months from the date of this order and report submitted.

38. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was to be passed on or before 25.03.2020 as the investigation Report was received from the DGAP on 26.09.2019. However, due to the COVID-19 pandemic prevailing in the Country the order could not be passed on or before the above date. Hence, the same 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.

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

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Member(Technical)

Certified Copy

20.5.2020

(A. K. Goel
NAA, Secretary

F. No. 22011/NAA/91/Barbeque/2019 Date: 21.05.2020

Copy to :-

1. Shri Rahul Sharma, on behalf of M/s Local Circles India Pvt. Ltd., 4th Floor, Tower-2, Express Trade Towers-2, Sector-132, Noida – 201 301.
2. M/s Barbeque Nation Hospitality Ltd., SY 62, Sit No. 13, 6th Corss, NS Palya, BTM Layout, Bangalore-5600076.
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.
4. Guard File.

20.5