BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

I.O. No.	19/2020
Date of Institution	23.10.2019
Date of Order	15.06.2020

In the matter of:

1. Sh. Joydeep Sarkar, General Secretary, All India Chemists & Distributors Federation, 56/1, Canning Street, Room C-19, Kolkata, West Bengal- 700001.

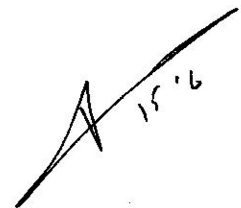
2. Director General of Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Himalaya Drug Company, Makali Aluru Main Road, Bengaluru, Karnataka- 562162.

Respondent



Quorum:-

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

Present:-

1. None from Applicants.
2. Sh. Shankar Prasad, Sr. Manager, Sh. Sachin Agarwal and Sh. Kaushal Maheshwari, Tax Consultants for the Respondent.

ORDER

1. The brief facts of the case are that under Rule 128 (1) of the Central Goods and Services Tax (CGST) Rules, 2017 an application dated 27.11.2017 was filed before the Standing Committee on Anti-profiteering by the Applicant No. 1 alleging that the Respondent had not passed on the benefit of reduction in the GST rate w.e.f. 15.11.2017 to his customers but had instead increased the base prices of his products by keeping the Maximum Retail Prices (MRP) unchanged. The above Applicant had also submitted Price Lists of a large number of the products supplied by the Respondent showing both the pre and post GST rate reduction prices claiming that the Respondent had not reduced the MRPs.

2. The application was examined by the Standing Committee on Anti-profiteering in its meeting held on 09.02.2018 wherein it was decided to forward it to the Director General of Anti-profiteering (DGAP) for detailed investigation under Rule 129 (1) of the above Rules. Another application dated 11.04.2018 was filed by the Applicant No. 1 against the Respondent, when the rate of GST was reduced from 12% to 5% w.e.f. 14.10.2017. The Standing Committee on Anti-profiteering vide the minutes of its meeting held on 02.05.2018 had clubbed it with the earlier application for the purpose of investigation and forwarded it to the DGAP.

3. The DGAP after completing the investigation had submitted his Report under Rule 129 (6) of CGST Rules, 2017 on 27.08.2018. In his Report the DGAP had submitted that the provisions of Section 171 of the CGST Act, 2017 have been infringed and the Respondent had profiteered by not passing on the benefit of reduction in the tax rates by lowering the prices of his products commensurately. The DGAP had quantified the profiteering amount on the basis of pre and post-reduction GST rates and the details of the outward supplies (other than zero rated, nil rated and exempted supplies) for the period from 14.10.2017 to 31.03.2018, furnished by the Respondent.

4. The DGAP had also stated that a total of 425 items supplied by the Respondent were impacted by both the GST rate reductions. Out of these 425 items, 52 items were impacted by the GST rate reduction from 12% to 5% w.e.f. 14.10.2017 and 373 items were impacted by the GST rate reduction from 28% to 18% w.e.f.15.11.2017. The

amount of net higher sales realization due to increase in the base prices of the products consequent to the reduction in the GST rates, either from 12% to 5% or from 28% to 18% or the amount of profiteering was arrived at as Rs. 32,48,33,436/- (Rs. 1,18,49,171/- for the items impacted by the GST rate reduction from 12% to 5% w.e.f. 14.10.2017 and Rs. 31,29,84,264/- for the items impacted by the GST rate reduction from 28% to 18% w.e.f. 15.11.2017). However, taking into account the credit notes issued by the Respondent to his stockists, amounting to Rs. 13,20,40,302/-, the net benefit that had not been passed i.e. the net amount of profiteering was worked out to be Rs. 19,27,93,133/- (Rs. 32,48,33,436/- - Rs. 13,20,40,302/-) by the DGAP.

5. The Respondent in his initial written submissions dated 10.10.2018 had submitted that with the implementation of the GST from 01.07.2017 some of his products were levied higher rates of GST of 28%/12% as against the indirect tax rates of 26%/7% (approx.) which were applicable prior to the implementation of the GST and the Respondent had not undertaken any revision of the prices then which had resulted in financial loss of Rs. 8,30,66,056/- to him. Subsequently, the Government had reduced the rates of GST in respect of some of his products from 14.10.2017 onwards and for some more products from 15.11.2017 and he had passed on the GST rate reduction benefit by reducing the prices from 01.12.2017 onwards. While there was reduction in the MRPs, there was no reduction in the margin which was being paid to the stockists or dealers on the sale of the products and he had issued credit notes

to all his stockists/distributors to compensate the difference due to reduced MRPs with the instructions to pass on the benefit of reduced MRPs to the end consumers. The Respondent has also stated that the DGAP had erred while calculating the profiteered amount to the extent of Rs. 21,71,18,388/- as the DGAP for the purpose of computation had also considered branch transfers. He had also claimed that the computation of profiteered amount included promo supplies also which did not represent the supplies made in the usual course of business, for the reason that such promo supplies included physician's samples given for free, products used for marketing given for free and the combo packs supplied for a very short period on which GST was being paid instead of reversing the ITC as per the provisions of Section 17 of the CGST Act, 2017. He has also claimed that majority of such promo supplies included removal as samples, gifts and for other marketing purposes and the GST paid on the output value was expensed off in the books of accounts and no amount was recovered (in respect of supplies) from the customers, hence it would not be right to allege that the Respondent had profiteered in respect of the supply of promo products. He had further claimed that the Report was inconsistent to the extent of considering promo supplies in certain months and not considering the same in respect of the other months. He had also filed Annexure-B which provided the details of branch transfers and promo supplies and stated that if his aforesaid details were taken into account for re-verification the alleged profiteered amount would get reduced. He had also claimed

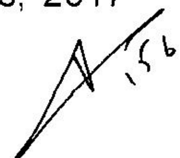
that the difference in average selling prices arrived by the DGAP would also come down, if the quantity and the value of sales in respect of the above two supplies was removed from the computation.

6. The DGAP in his subsequent Reports dated 26.11.2018, 20.12.2018 and 21.01.2019 had admitted that inadvertently certain branch transfers were included in the calculations and hence he had revised the profiteered amount as per the revised Annexure-14. The Report further stated that 500 credit notes submitted by the Respondent had been verified and it was observed that they were issued with the remark 'on account of difference in MRP on closing stock for November 2017'. It was also submitted that on verification it was found that Rs. 13,20,40,902/- were passed on by way of credit notes. Accordingly, the amount of profiteering was computed as Rs. 14,22,54,443/- by the DGAP after considering the branch transfers and the credit notes.

7. During the course of the hearing it was observed that the Respondent had vehemently argued that the promo supplies which included physician's samples, marketing samples and gifts etc. and which were supplied free of cost were also taken into consideration for computing the profiteered amount. Hence, he had contended that an amount of Rs. 3,52,02,969/- which had been computed as profiteered amount by the DGAP should be excluded from the profiteered amount. He had also stated that since no price including GST was collected for these supplies, the question of profiteering did not arise. He had also argued that the GST Policy Wing of the

Central Board of Indirect Taxes (CBIC) vide its circular No. 92/11/20/2019-GST dated 07.03.2019 had clarified that the goods or services which were supplied free of cost (without any consideration) should not be treated as 'supply' under the GST except in the case of activities mentioned in schedule I of the CGST Act. The Respondent had also claimed to have paid the GST in order to avoid reversal of ITC as per sub-section (5) of Section 17 of the CGST Act, 2017 which provided that the ITC would not be available in respect of the goods disposed by way of gifts or free samples. He had further claimed that in spite of repeated submissions made on this ground, this aspect had not been examined by the DGAP in any of his Reports. The DGAP has claimed that the promo supplies had been rightly taken into account for calculating the profiteered amount, however no grounds had been given to justify their inclusion.

8. The DGAP in his Report had also stated that a total of 425 items were impacted by the GST rate reductions. Out of these total 425 items, 52 items were impacted by the GST rate reduction from 12% to 5% w.e.f. 14.10.2017 and 373 items were impacted by the GST rate reduction from 28% to 18% w.e.f. 15.11.2017. However, it was noticed that the Annexure-14 of the Report prepared by the DGAP did not provide any breakup of these items and the details of calculation of the base prices for these two categories of rate reductions. Therefore this Authority vide its I.O. No. 05/2019 dated 30.04.2019 passed under Rule 133 (4) of the CGST Rules, 2017 had directed the DGAP:-



i. To examine and submit his clear cut findings whether the promo sales should be included while calculating the profiteered amount keeping in view the Circular No. 92/11/20/2019-GST dated 07.03.2019 issued by the CBIC.

ii. To submit separate Annexures for the products in the case of which the rate of tax was reduced from 28% to 18% and from 18% to 12% respectively and how the base prices in respect of these products were computed.

9. The DGAP's Report after reinvestigation under Rule 133 (4) was received on 23.10.2019 in which he has stated that he has examined the matter in the light of Circular No. 92.11.20/2019-GST dated 07.03.2019 and Para 2A of the above Circular dealt with the issue relating to the free samples and gifts supplied by the suppliers to their stockists and dealers etc. without charging any consideration. As per the Circular, the goods or services or both which were supplied free of cost should not be treated as 'supply' under the GST. However, the ITC would not be available to the supplier on the inputs, input services and capital goods to the extent they were used in relation to the gifts or free samples. The DGAP has also stated that in the present case, the Respondent has admittedly not reversed the ITC availed in respect of these supplies and has also treated them as a taxable supplies by showing a taxable value for these goods in his returns

and has paid GST on the same and thus being taxable supplies they were covered within the ambit of Section 171 of the CGST Act, 2017.

10. The DGAP has further stated that Para 2B of the Circular dealt with the offers like 'Buy one, Get one free' announced by the companies, where a single price was being charged for the supply of two or more goods. The DGAP has stated that the Respondent has claimed that profiteering should not be computed on such combo packs, however the above Circular clearly mentioned that they were taxable supplies and the rate of tax would depend upon whether the supply was a mixed or a composite supply. Thus, the DGAP has claimed that being taxable supplies, these supplies were also covered within the ambit of Section 171 of the CGST Act, 2017.

11. The DGAP has further claimed that profiteering for each combo pack/offer pack has been determined individually by comparing the price of the same combo pack/offer pack during the pre-rate reduction and the post-rate reduction periods. The DGAP has illustrated calculation of profiteering with the help of the Table as has been shown below:-

Material Code	7001994
Material Description	ADS 400ml + ADS 100 ml FREE
Sum of invoiced qty. during 01.11.2017 to 14.11.2017 (A)	9139
Sum of taxable value during 01.11.2017 to 14.11.2017 (B)	1286874.19

Pre-rate reduction base price (C=B/A)	140.811
Total qty. sold during 15.11.2017 to 31.03.2018 (D)	1,23,024
Total amount during 15.11.2017 to 31.03.2018 (E)	1,83,92,155
Post rate reduction Average Basic Price (F=E/D)	149.50
Post rate reduction Average Basic price (G=F*1.18)	176.410
Commensurate Price (H=C*1.18)	166.157
Profiteering per unit (I=G-H)	10.253
Total Profiteering (J=I*D)	12,61,406.93

The DGAP has also submitted that the base price of the main product "7001769 Anti-Dandruff Shampoo 400 ml" has been arrived at separately and did not, in any way influence the base price of the combo pack "7001994 Anti-Dandruff Shampoo 400 ml + 100 ml free".

12. The DGAP has thus contended that the average base prices of the products impacted by the rate reduction w.e.f. 15.11.2017 have been determined by dividing the total taxable value of a product by the total quantity sold during the period from 01.11.2017 to 14.11.2017 to arrive at the profiteered amount of Rs. 26,24,46,632/- by comparing the pre-rate reduction average base prices with the post-rate reduction (15.11.2017 to 31.03.2018) average base prices. Similarly, the average base prices of the products impacted by the rate reduction w.e.f. 14.10.2017 have been determined by dividing the total taxable value of a good by the total quantity sold

during the period from 01.10.2017 to 13.10.2017 to arrive at the profiteering amount of Rs. 1,18,48,713/- by comparing the pre-rate reduction average base prices with the post rate reduction average base prices w.e.f. 14.10.2017 to 31.03.1018.

13. On perusal of the DGAP's Report, this Authority in its meeting held on 31.10.2019 had decided to hear the Applicants and the Respondent on 19.11.2019 and accordingly notice was issued to them. But, the Respondent had sought adjournment and accordingly the hearing took place on 09.12.2019. On behalf of the Applicants none appeared and the Respondent was represented by Sh. Shankar Prasad, Sr. Manager, Sh. Sachin Agarwal and Sh. Kaushal Maheshwari, Tax Consultants.

14. The Respondent has made submissions on 09.12.2019 in which he has stated that the DGAP has furnished the revised Report dated 22.10. 2019 *inter alia* discussing the findings in respect of the promo supplies and has alleged profiteering to the extent of Rs. 27,42,95,345/- against him but he has again not considered the amount of credit notes issued by him for passage of the rate reduction benefit aggregating to Rs. 13,20,40,302/- although it was accepted during the present proceedings vide Para 7 of the order dated 30.04.2019 issued by this Authority that the above credit notes have been issued by the Respondent. This fact itself has rendered the Report dated 22.10.2019 incorrect and contrary to the proceedings / earlier report / order passed.

15. The Respondent has also submitted that he was engaged in the supply of goods mainly covering two ranges / categories of

products, i.e. Cosmetics / Fast Moving Consumer Goods (FMCGs) and Pharma which were manufactured at different places and were being supplied through channel of distributors and retailers spread across India. Historically, the Cosmetics / FMCG products were being charged higher rates of tax whereas the Pharma products were being charged lower rate of tax and with the implementation of the GST w.e.f. 01.07.2017 some of the products of the Respondent were imposed higher rate of GST of 28% / 12% as against the Indirect tax rate of 26% / 7% (approx.) which was applicable prior to the coming in to force of the GST w.e.f. 01.07.2017.

16. He has further submitted that it was a matter of fact that he had not undertaken any upward or downward price revision of his products at the time of introduction of the GST irrespective of the tax rate change which had resulted in a financial loss of Rs. 8,30,66,056/- to him. He has also claimed that based on the various representations by the industry, he was under the impression that the Government was taking steps to reduce the GST rates in respect of some of the essential products which were in a lower tax bracket prior to the GST regime. While he was incurring losses due to increase in the tax rates he had not taken the hasty decision of increasing the prices of his products as the same would have caused undue confusion due to release of new prices, withdrawal of products from the market and additional cost burden to the end consumers.

17. He has also added that given the GST rate revision by the Government on 13.10.2017 and 14.11.2017 he had pro-actively

considered the reduction in the MRPs of his products to pass on the GST rate benefits from 01.12.2017. While there was a reduction in the MRPs there was no reduction in the margin (fixed percentage) which was being paid to the stockists or dealers i.e. the customers of the Respondent on the sale of the products. in fact, he had issued credit note(s) to all the stockists / distributors to compensate them for the commensurate difference due to reduced MRPs resulting from reduction in the tax rates.

18. He has further added that he had also issued specific instructions to the stockists / retailers to pass on the benefit of reduced MRPs further down the supply chain so that it reached the end consumers. His selling price was derived on the basis of MRP less output tax less retailer's margin less stockist's margin, irrespective of any loss to him on account of the increased cost of production or increase in the output tax at the time of introduction of the GST. He has also stated that the middlemen's margin had been fixed in percentage terms. Given the afore-said pricing mechanism he had endeavoured to bear the burden of any additional cost in the supply chain and had ensured that his customer's margin remained intact in the percentage terms.

19. He has also submitted that the stockist's margin, in percentage terms, had been maintained, irrespective of any loss / profit accruing to him due to the implementation of the GST and the rate of tax being fixed higher than the rate applicable prior to the GST. Given the reduction in the rate of tax any benefit accruing as a result of reduction in the rate of tax was not retained by him and he

had revised the prices of his goods w.e.f. 01.12. 2017 and had ensured that the commensurate benefit of rate reductions by way of issuance of credit notes in respect of the stocks already present in the market was passed on to the stockists / retailers. He has further submitted that while the Government vide Circular dated 16.11.2017, keeping in mind the requirements imposed under the Legal Metrology Act, 2009 had allowed pasting of the stickers reflecting the updated MRPs on the packaged products, however, he had resorted to issuance of credit notes, as it would not have been practical to recall all the products from the market to effect MRP changes on the products as the products were lying at different stages in the supply chain across the country. In order to effectuate the MRP revision, he had not only issued credit notes to the stockists but had also issued specific instructions to them to pass on the benefit of reduced MRPs to the end consumers which was passed on by him by way of issuance of credit notes.

20. He has also contended that since he had not increased his MRPs when the rates of tax had gone up at the time of introduction of GST, he had incurred incremental loss in the sales till the date of rate change i.e. up to 13.10.2017 / 14.11.2017 but the aforesaid loss had not been taken into consideration by the complainant as well as the investigating authorities, while scrutinizing the case of profiteering against him.

21. He has further contended that the DGAP has alleged that he has profiteered by drawing comparison between the post GST rates and post GST reduced rates. However, there could not be

comparison between the prices pre-rate changes and post rate changes, both under the GST regime, as he had not undertaken upward price revision at the time of introduction of GST even when the rates of tax had gone up in comparison to the rates of tax that were prevalent prior to the GST. Accordingly, the DGAP was incorrect in not bringing a comparison between the pre-GST and the post-GST periods. He has also argued that it was only logical that the pre-GST rates of tax and not the pre rate reduction rates of tax were compared with the tax rates existing after the rate reductions from 14.10.2017 / 15.11.2017. Accordingly, he has claimed that if he had undertaken downward price revisions as compared to the prices prevailing pre-GST, it could not be said that he has profiteered in any way.

22. He has further argued that the scope of investigation ought to have been restricted to the product complained against by the Applicant No. 1 or to the Pharma Division in which the profiteering was alleged. He has also added that the design of the legal provisions, which governed the anti-profiteering investigation was such that it gave 'the' recipient the right to file a complaint in the cases where the benefit of reduction in the tax rate or ITC was not passed on by 'the' registered person to 'the' recipient. Accordingly, 'the' recipient could file the complaint and the DGAP had no power under the law to extend the scope of investigation to all the customers or business divisions / verticals of 'the' registered person.

23. He has also pleaded that Section 171 of the CGST Act empowered "the recipient" to lodge a complaint against "a registered person"

and this empowerment was not extended to any person other than "the recipient", accordingly, he was not sure under which provision of the GST law the complaint had been lodged by the Applicant No. 1 and registered by the DGAP as the above Applicant was not the recipient in respect of the goods supplied by him. He has also submitted that the complaint having not been lodged by the recipient or any consumer and advanced by some other person had gone beyond the law. The present profiteering proceedings initiated against him on the basis of unlawful complaint could not be registered for investigation.

24. The Respondent has also averred that not only the legality of the complaint but also the action of the DGAP to extend the scope of investigation to other divisions and sale of all other products was in excess of jurisdiction and not tenable under the law. Assuming but not accepting that the complaint filed and investigated against him was as per the prescribed provisions, it might be pertinent to note that the complaint having been filed in respect of certain products, could not become the basis of conducting anti-profiteering proceedings in respect of all the products sold by him as a whole and the complaint should be investigated only if filed by "the recipient" / "consumer" and not by anyone else. He has further averred that the Hon'ble High Court of Delhi has stayed similar proceedings in the following cases, where this Authority and the DGAP had proceeded to investigate beyond the complaint or the complained product by seeking to carry out investigation on many or all the products of the assessed:-

- ***Reckitt Benckiser India Private Limited v. Union of India & Ors.*** [Interim Order dated 19.7.2019 in WP (C) 7743/2019]
- ***Abbott Healthcare Private Limited v. Union of India & Ors.*** [Interim Order dated 24.4.2019 in WP (C) 4213/2019]

He has also submitted that it might be fair to state that any proceedings which were found to be in excess of jurisdiction, beyond the complaint / complainant / complained product(s), were being viewed by the Hon'ble Courts as untenable under the law.

25. He has further submitted that even assuming without accepting that the present investigation was to be held good and the DGAP or this Authority was to be held correct in alleging profiteering at the legal entity level, there were many factors to be considered before concluding that the Respondent had profiteered, including but not limited to the additional costs and losses incurred by him due to GST, legality of complaint / complainant, pre-GST vis-à-vis post-GST changes, period up to the time of price revision after rate changes and any other critical facts and factors that had implications on the pricing etc.

26. He has also stated that it was a matter of fact that he had incurred incremental loss in the sales for the period from July 2017 up to the rate changes and might be said to have relatively profiteered from the sales during the period w.e.f. 14.10.2017 / 15.11.2017 to 30.11.2017 as he had effected price changes from 01.12.2017. Given the reduction in the rates of tax, in order to ensure that any tax

benefit accruing as a result of reduction in the rates of tax was not retained by him, he had revised the prices of his goods w.e.f. 01.12.2017 and had ensured to pass on the 'commensurate' benefit of rate reductions by way of issuance of credit notes in respect of the stocks already present in the market for supply by the stockists / retailers. He has further stated that in respect of the profiteering during the period from 14.10.2017 / 15.11.2017 to 30.11.2017, if any, he had anyway passed on the compensation by way of issuance of credit notes to his customers as has been admitted by the DGAP and this Authority in terms of para 7 of the Order dated 30.04.2019. However, the said loss suffered by him due to the higher rates of tax during the period from the introduction of the GST up to the rate changes had not been recovered by him from his customers but absorbed in the business which has resulted in net loss to him. Such loss was estimated to be Rs. 8,30,66,056/- which had been mentioned in the initial submissions.

27. He has also maintained that although the selling prices have varied during the different periods, he had ensured that the margin of the stockists (who were his only customers) remained unchanged in the percentage terms. In fact, the stockists in general had acknowledged that they were in agreement with him and had no objection with the price changes and / or the process followed to implement the same by him. In view of this it could not be alleged that he had profiteered.

28. He has further maintained that he had not retained or adjusted any profit made during the transition period from the rate changes to price changes i.e. 14.10.2017 / 15.11.2017 to 30.11.2017 against

the loss suffered from 01.07.2017 up to 13.10.2017 / 14.11.2017. He has acted as a bonafide assessee and complied with the provisions framed in respect of anti-profiteering under the GST legislative framework. However, the DGAP had not only held him liable to have profiteered during the transition period but also gone ahead to include the period from 01.12. 2017 to 31.03.2018 in the profiteering computation, ignoring the fact that he had already reduced the prices from 01.12. 2017. He has also submitted that if any profiteering was to be alleged against him it should have been for the period from 14.10.2017 / 15.11.2017 to 30.11.2017 and not beyond that. Even the profiteering alleged to have been made during the above transition period had been compensated to the customers by way of issuance of credit notes worth Rs. 13,20,40,302/- as had been admitted by the DGAP and this Authority.

29. He has also submitted that the present proceedings were launched consequent to the Order dated 30.04.2019 passed by this Authority directing the DGAP to only investigate whether or not to include promo supplies in the computation of profiteering. The amount of profiteering was alleged as Rs. 19,27,93,133/- in the initial Report dated 27.08.2018 of the DGAP and was further revised to Rs. 14,22,54,443/- in the subsequent Report submitted by the DGAP to this Authority up to 21.01.2019 as has been mentioned in para 7 of the order dated 30.4.2019.

30. He has further submitted that it was a matter of fact that the DGAP's investigation was conducted in pursuance of a specific consumer complaint and as directed by the Standing Committee on

09.02.2018 and 02.05.2018. However, the Report of the DGAP dated 27.08.2018 was clearly in contravention of the time allowed in terms of Rule 129 (6) of the CGST Rules, 2017 which required the DGAP to furnish his investigation Report within a period of 3 months from the receipt of the reference from the Standing Committee. If one were to reconcile the dates between the DGAP's Report dated 27.08.2018 and this Authority's Order dated 30.04.2019, the Order of this Authority was also in contravention of the time limit prescribed under Rule 133 (1) of the CGST Rules, 2017, as this Authority was required to pass its order within 3 months from the date of receipt of the Report from the DGAP. He has also argued that even if one was to consider the subsequent correspondence made by the DGAP with this Authority as a 'Report' referred under Rule 129 of the CGST Rules, the last communication of the DGAP being on 21.01.2019 the Order of this Authority dated 30.04.2019 was barred by limitation.

31. He has also stated that the latest Report of the DGAP dated 22.10.2019 was also barred by limitation prescribed under Rule 129 (6) of the CGST Rules, as this Authority had directed the DGAP to furnish his Report within a period of 1 month from the date of receipt of the order dated 30.04.2019. He has further stated that Rule 129 (6) and 133 (1) of the CGST Rules, 2017 had used the word "shall" and thus it was mandated that the concerned authority must complete the investigation and / or pass the order within a period of 3 months from the date of receipt of the reference from the Standing Committee or from the receipt of the Report from the

DGAP. In this connection he has placed reliance on the judgement passed in the case of ***Bharat Hari Singhania v. Commissioner of Wealth Tax 1994 Supp 3 SCC 46*** wherein the Hon'ble Supreme Court has observed that, "... *the use of the term 'shall' implies a mandatory reference.*"

32. He has also argued that taking the above facts into account (1) the DGAP could not have completed the investigation and given his Report dated 27.08.2018 after expiry of a period of 3 months from the date of receipt of the reference from the Standing Committee on 09.02.2018 / 02.05.2018; (2) this Authority could not have passed the Order dated 30.04.2019 and given direction for specific investigation beyond a period of 3 months from the date on which the DGAP's Report was placed before it and (3) the DGAP could not have completed the investigation and given his Report dated 22.10.2019 beyond a period of 3 months from the time allowed by this Authority for such investigation. Thus the entire proceedings were carried out in disregard of the legal principles beyond the framework that has been prescribed by the statute and were thus without jurisdiction. He has also placed reliance on the decision of the Hon'ble Apex Court given in the case of ***Steel Authority of India Limited v. Sutni Sangam (2009) 16 SCC 1*** wherein it has been held that, *'When the statute prescribes a law of limitation, compliance thereof is mandatory.'* He has also cited the ratio of the judgement passed by the Hon'ble Karnataka High Court in the case of ***BHEL v. CCT (2006) 143 STC 10 (Kar)*** in which the issue was whether the power to pass a deterent order was to be exercised

even after the expiry of the period of limitation. The Hon'ble Court had answered the question in the negative and held that "*When once the period of limitation expires, the immunity against being subject to assessment sets in and the right to make assessment gets extinguished.*"

33. He has also pleaded that the DGAP in his Report dated 22.10.2019 has alleged profiteering against him to the tune of Rs. 27,42,95,345/- without appreciating the fact that he had issued credit notes to the tune of Rs. 13,20,40,302/- which had been duly accepted by the DGAP himself in his earlier reports furnished to this Authority. The fact that the Respondent had issued credit notes to pass on the benefit accruing on account of reduction in the tax rates had been verified and accepted by the DGAP and also appreciated by this Authority in Para 4 and Para 7 of the Order dated 30.04.2019. However, the DGAP had failed to incorporate the same in his recent Report furnished pursuant to this Authority's order which rendered his Report contradictory to his earlier position and this Authority's Order.

34. He has also requested to consider the submissions verified and accepted on the earlier occasions in the current Report dated 22.10.2019 so that the other issues yet to be settled in terms of para 10 of the order dated 30.04.2019 could be discussed. He has also submitted that in any case it appeared that the DGAP with the sole purpose of arbitrarily alleging profiteering against him had ignored to factor in the amount of credit notes in his current Report dated 22.10.2019 though it was admitted on an earlier occasion.

He has also re-iterated that the alleged profiteering amount of Rs. 27,42,95,345/- had to be first brought down to Rs. 14,22,54,443/- after reducing Rs. 13,20,40,302/- on account of credit notes, for further discussion in respect of the other observations made by the DGAP in his Report dated 22.10.2019.

35. The Respondent has also claimed that assuming but not accepting that he had profiteered, the DGAP had erred in computing the profiteering amount by including the taxes in the average prices taken for comparison. It was a matter of fact that the computation of profiteering amount was by way of difference between the average selling prices during the pre-rate reduction period and the average selling prices during the post rate reduction period (both periods falling under the GST regime) and such average selling prices, considered as the base for computing profiteering, included the amount of tax that has been deposited with the Government. Hence, the profiteering amount to the extent of weighted average of tax portion has accrued to the Government exchequer as the same could not be said to have been retained by him. Therefore, the profiteering amount alleged to have accrued to him has been incorrectly calculated on account of inclusion of tax.

36. He has further claimed that the GST was collected by him on behalf of and as an agent of the Central / State Governments and duly paid to the Government in accordance with the relevant statutory provisions under the GST and accordingly, the same could not form a part of the alleged profiteering in his hands. He has also submitted that once the amount of tax so collected was deposited

with the Government and was not retained by him no recovery of this amount could be ordered against him. In this regard he has placed reliance on the decision of the Hon'ble Supreme Court passed in the case of ***Corporation Bank v. Saraswati Abharansala and Anr. (2009) 1 SCC 540*** wherein the Hon'ble Court has held as under:-

"Sales tax is leviable on sale of goods. It must be collected by the dealer as the agent of the State at such rate as may be specified."

He has further submitted that it has also been held by the Hon'ble High Court of Uttarakhand in the case of ***Director of Income Tax v. M/s Schlumberger Asia Service Limited*** ITA No. 40 of 2012 decided on 21.10.2016 that:-

"Like excise duty and sales tax, service tax is also an indirect tax and is recovered by the assessee on behalf of, and as the agent of, the Government."

37. He has also contended that any excess GST collected by him has already been deposited with the concerned Government and the same was in consonance with Section 76 of the CGST Act and accordingly, inclusion of tax in the profiteering computation was *ex facie* untenable and contrary to law. He has further contended that any recovery of excess tax with respect to the amount of alleged

profiteering liability already deposited with the respective Central and the State Governments could not by any stretch of imagination be said to be amount profiteered by him.

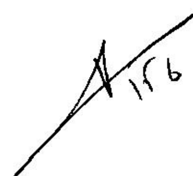
38. He has also submitted that the entire exercise was manifestly arbitrary and contrary to Article 300A and Article 19 (1) (g) of the Constitution of India. If the finding was that the GST charged on the excess collected amount was not as per the GST law the same ceased to be a tax collected under Article 265 of the Constitution and ought to be refunded to the assessee or transferred to the Consumer Welfare Fund (CWF) by the respective Government. Accusing a dealer of profiteering in respect of the tax amount duly deposited with the Government was clearly oppressive and confiscatory and infringed his right to trade guaranteed under Article 19 (1) (g) of the Constitution.

39. The Respondent has further submitted that the DGAP's Report dated 22.10.2019 was consequent to this Authority's Order dated 30.04.2019 vide which it was directed to only investigate whether or not the promo supplies should be included in the computation of the profiteering amount alleged to be Rs. 14,22,54,443/-. As submitted earlier the DGAP has erred in including the promo supplies in the profiteering computation, as these supplies did not represent supplies in the usual course of business. Such combo packs were generally in the nature of 'buy one get one free', 'buy 200 ml get 100 ml free' and 'buy a face wash and get a face pack free' etc. which were specially packed seasonally and not sold throughout the year. These combo packs were introduced in the

market to provide value addition to the end consumers and given that the consumer was provided with extra product or portion of the product it was unreasonable to allege profiteering in respect of such combo packs as such packs were anyway supplied at a far lesser price than the aggregate price of the two products put together owing to the fact that the product combination kept changing so did the combo-pack. He has also re-iterated that the combo packs were not representative of the sales volume and the amount generated from their supplies. He has also stated that the DGAP has erred in computing the profiteering amount in respect of the combo packs by including the tax of Rs. 1.56 per unit which had been deposited by him in the Government account, and therefore, profiteering to the extent of such amount could not be alleged. Merely because the combo product supplies were taxable supplies under the law, the same could not be a reason for alleging profiteering.

40. The Respondent has also stated that he had made various submissions with respect to the methodology adopted for computation of profiteering at various times which had not been discussed in the DGAP's Report dated 22.10.2019 and this Authority's Order dated 30.04.2019. He has further stated that his following submissions should be considered:-

- Profiteering should be based on comparison of prices between the pre-GST period and the post-GST period.



- Profiteering computations should not include the tax already deposited by the Respondent into the Govt. account: ***Amount involved: Rs. 4,05,98,456/-***
- Any loss suffered on account of higher rates of tax, post go-live and before rate reductions, which was not recovered from the customers. Even assuming without accepting that the Respondent has profiteered, such loss should also be factored in the profiteering computation: ***Amount involved: Rs. 8,30,66,056/-***
- Promo supplies do not represent regular supplies and considering that they result in value addition in the hands of the consumer, they should not be counted for alleging profiteering: ***Amount involved: Rs. 3,26,23,086/-***

41. The Respondent has also re-iterated that the prices of his products were not increased by him even during the period from 01.07.2017 to 13.10. 2017 / 14.11.2017 as he was expecting the GST rates to get reduced on account of various representations made by the industry and accordingly, the net margin earned by the Respondent from 01.12.2017 should be compared with the net margin which has accrued to him during the pre-GST era and not the period before and after the rate changes under the GST to allege profiteering. It would be pertinent to make comparison between his pricing that existed pre-GST *vis-à-vis* his pricing w.e.f. 01.12. 2017, however, the DGAP had resorted to colourable exercise of interpreting the anti-profiteering provisions in his own way and had

drawn comparison from the comprehensive details submitted by the Respondent as per his own convenience. He has also submitted that the DGAP appeared to have ignored the rightful comparison by picking the correct base.

42. He has further submitted that the statutory provisions have been framed in such a manner which suggested that it was only a broad correlation between the reduction in the rate of taxes and the pricing of the products that may be established to substantiate whether profiteering existed or not but there were many other factors as stated above influencing the pricing decisions. He has also stated that it was clear from the use of the word "commensurate" which was generally understood to mean *"an appropriate / suitable amount compared to something else"* that the intent of the law was not to apply exact reduction in the rate of tax to bring the same reduction in the price of goods but the intent was to take the overall facts and circumstances into consideration and bring an appropriate and justifiable reduction where there has been reduction in the rate of tax. Had the intent of the law makers been to require exact or accurate or equivalent reduction / change in the prices, such words would have been used in place of the word "commensurate" to mandate exact measurement of benefit (reduction in rate of tax) to be passed on and accordingly, there was no measure provided under the law to determine what would constitute 'commensurate'. He has also stated that while the onus to prove that he had not passed on commensurate benefit to the customers was on the DGAP, however, the DGAP had failed to

prove and demonstrate as to how the commensurate benefit passed on by him through issuance of credit notes could not be said to be commensurate, when the law had not prescribed the methodology for computing profiteering or the inclusions / exclusions to be considered while arriving at the existence of profiteering or otherwise. However, it was a matter of constructive interpretation of the legal provisions for which one has to give due consideration to any additional overheads / costs / losses occurring in the business to find an answer to the ultimate question of whether the supplier has actually profiteered or not. He has further stated that pricing of products was a complex exercise and products were usually not priced individually and in isolation at a unit level. Costs and benefits at an entity level, division level and product category level were the influencers of any pricing decision. Further, a rightful comparison would be whether the rate of tax prior to the GST was more than the rate of tax resulting from the reduction in the rate in the GST regime. Accordingly, ignoring the pricing prior to the GST or ignoring the comparison between the pre-GST and post-GST prices was not justifiable on the part of the DGAP.

43. He has also claimed that the taxes were just one of the elements which played part in the determination of the price. In a free market, several considerations such as those of demand, supply, product range, supplier's position in market, entity level operational costs etc. were to be taken into consideration for pricing decisions. By not considering the above aspects as listed in para 1.35 and by

concluding that profiteering existed the DGAP seemed to have applied a very narrow interpretation of the law and has conducted the anti-profiteering investigation with limitations and restrictive mind. Hence, the DGAP has failed to rightfully discharge his obligation under the law in finding out whether he had passed on the commensurate benefit or not. Therefore, a direct co-relation between the reduction in the rate of tax and the price of an individual product might not be a correct application to test the profiteering or otherwise. In fact, the Constitution of India, in terms of Article 19 (1) (g) granted everyone right to carry on trade or business and to fix prices and earn profits. Reasonable restrictions on that right were permissible but the right to carry on trade could not be subjected to unreasonable restrictions. Section 171 was in the nature of an anti-abuse provision and the power granted under the said provision had to be construed and used only to prevent abuse and not in a manner that it restricted the right of a person to carry on trade freely. Therefore, the entire enquiry conducted under the provisions of Section 171 had to necessarily limit itself to finding out if a business was flagrantly abusing its position in the market and was making abnormal profits by taking advantage of reduction in the rate of tax and conversely, if the business was able to establish that it has acted reasonably and has not abused its position, no action should be called for under Section 171.

44. He has further claimed that there was no statutory requirement for not considering the change in rates / GST benefits accruing to a registered person as a whole, where the registered person was

engaged in supply of different goods / services for the purpose of Section 171 of the CGST Act, 2017. He has also submitted that the alleged benefits or profits could not be seen in isolation and the same had to be considered in terms of the regime introduced, facts of the given business, overall costs of GST implementation, price revision undertaken, pre-GST vis-à-vis post-GST changes and upon factoring in of various other costs/ losses incurred at the entity level. Neither the constitutional provisions nor the CGST Act empowered this Authority to get into the realm of price fixation at an individual product level from the trigger of a tax rate revision.

45. He has also contended that in Section 171, there was no intention to move away from the free price market principles to an administered price mechanism and the aim of Section 171 of the CGST Act was not to fix the prices but was to prevent profiteering and merely making a profit was not "profiteering". It was only an abusive behaviour which could be termed as "profiteering" against which action has to be taken. Presently, he was functioning in a market/liberal economy where prices were determined by market forces and a mere change in the rates of tax could not be considered as profit, much less profiteering so as to lead to reduction in prices, without consideration of commensurate increase in costs and expenses.

46. The Respondent has re-iterated that he had incurred loss aggregating to Rs. 8,30,66,056/- on account of increase in the rates of tax at the time of introduction of GST but had not passed on the burden to the customers during the period from 01.07.2017 to

13.10. 2017 / 14.11. 2017 which was evident from the fact that the MRPs of the goods had remained unchanged up to 30.11.2017 as has been demonstrated by him and accepted by the DGAP in his Report dated 26.08.2018. He has further re-iterated that the comparison should be made between the MRPs prior to the GST and MRPs post rate reduction under the GST, bearing in mind the fact that reductions (if any) required, had to be brought in the MRPs and not the selling prices to the stockists / customers. He has also submitted that the DGAP has not verified or tested the precision of reduction in the MRPs between the pre-GST period and the period after 01.12.2017, accordingly, there could not be any doubt that the Respondent has profiteered in the absence of any test instituted in respect of the MRPs.

47. He has further submitted that assuming but not accepting that the profiteering existed, the DGAP has incorrectly computed the profiteering amount even in respect of the promo supplies. It might have been pertinent for the DGAP to consider only the regular sales made by the Respondent for the purpose of computation of average prices, however, the DGAP had also considered the supply of promo goods, due to which the alleged profiteering appeared to have been inflated. He has also contended that it could not be said that the profiteering existed in the case of promo supplies as such promo supplies were occasionally sold and anyway sold at much reduced prices resulting in value addition in the hands of the consumers. Therefore, the profiteering amount alleged to have accrued to the Respondent has been incorrectly

calculated. Accordingly, it was not right to allege that he had profiteered in respect of the said supplies to the extent of Rs. 3,26,23,086/-.

48. He has also contended that since the law did not prescribe the methodology for computing profiteering or the inclusions / exclusions to be considered to arrive at the profiteering or otherwise, it was a matter of constructive interpretation of the legal provisions that one has to give due consideration to any additional overheads / costs / losses occurring in the business, to find an answer to the ultimate question of whether the supplier has actually profiteered or not. The Respondent has incurred extra costs on account of increase in the cost of raw materials, increase in the cost of packing materials, implementation of GST, upgradation of ERP software to cater to the needs of GST, use of ASP / GSP for undertaking GST compliances, hiring of additional staff for dealing with the GST administration and reporting requirements and incurred tax consultant costs etc. which should have been considered while computing profiteering.

49. He has also submitted that he would not have incurred the above costs but for the implementation of GST and such costs were directly related to the efforts and expenses incurred by him for making necessary changes in the process, documentation and IT system for smooth transition to the GST regime and being compliant thereof. He has further submitted that he had to incur tax consultancy expenses to understand the changes from the erstwhile regime to the GST regime and the impact it would have

on the existing business. He also had to incur expenses to build the IT infrastructure and have necessary modifications made in the ERP to cater to the needs and requirements of the GST law. For the size of FMCG business that the Respondent ran, such costs were estimated to be Rs. 5,49,89,373/- which had not been factored in the profiteering computation made by the DGAP.

50. The Respondent has also claimed that his computation of profit / loss was as has been given in the Table below, keeping the alleged profiteering amount as the base :-

Particulars	**Amount in Rs.**
Profiteering alleged as per the Report of the DGAP dated 22.10.2019 (not accepted by the Respondent)	**27,42,95,345**
Less: Credit notes issued by the Respondent to pass on the benefit on account of reduced rate (accepted by DGAP as well as NAA in paragraph 4 and 7 of the NAA's order)	13,20,40,302
Net profiteering amount after adjustment of credit notes accepted by the DGAP / NAA (more by INR 600 than the amount in NAA order dated 30.4.2019)	**14,22,55,043**
Less: Profiteering alleged in respect of the taxes deposited as discussed in Para 1.43 above	4,05,98,456
Less: Loss suffered during the period 1 July 2017 to 12 October 2017 / 14 November 2017 on account of increase in rate of tax as discussed in Para 1.44 above	8,30,66,056
Less: Profiteering alleged in respect of promo supplies, which do not represent regular supplies by the Firm, as discussed in Para 1.45 above	3,26,23,086
Less: Increase in the cost at the time of implementation of GST as discussed in Para 1.46 above	5,49,89,373
Net Profit/ (Loss)	(6,90,21,929)

51. The Respondent has also argued that the Hon'ble High Court of Bombay in Writ Petition No. 3492 of 2018 filed by ***M/s. Hardcastle Restaurants Pvt. Ltd.*** against the proceedings and order of this Authority has ordered that the *principles of natural justice* ought to be followed by this Authority while conducting anti-profiteering

proceedings. Considering that the Order dated 30.04.2019 passed in the present case had not considered or directed the exclusion of the above costs and losses in the computation of profiteering amount by the DGAP, both the authorities have acted in complete disregard of the legal principles of natural justice. Therefore, the present proceedings were against the direction of the Hon'ble High Court in so far as they have not observed fairness and failed to follow the *principles of natural justice* strictly mandated by the Hon'ble Court.

52. The Respondent has also contended that he has passed on the benefit which has accrued on account of GST rate reductions by way of commensurate reduction in the prices and by issuing credit notes, therefore, there was no case of "profiteering". On the contrary, he had incurred huge expenses on account of IT system and accounting changes for implementation of the GST which have resulted in financial loss to him.

53. The submissions of the Respondent were forwarded to the DGAP for his clarifications/reply. The DGAP vide his Report dated 20.12.2019 has stated that as the prices of the SKUs have not been reduced commensurately to pass on the benefit of rate reductions, profiteering has been computed for the period beyond the transition period. In respect of the Respondent's contention of time barring of the Report, the DGAP has submitted that the original application was examined by the Standing Committee on Anti-profiteering in its meeting held on 09.02.2018. The minutes of meeting were received in his office on 28.02.2018. Further, the time

limit to complete the investigation was extended upto 27.08.2018 in terms of Rule 129 (6) of the CGST Rules, 2017 by this Authority vide order dated 15.05.2018. Thus, he has claimed that the Report dated 27.08.2018 was submitted well within the prescribed time limit.

54. In respect of the issue of the credit notes, the DGAP has submitted that it has been discussed in Para 2 of his reply submitted vide Report dated 21.12.2018. The said 500 credit notes were verified and it was found that the same had been issued with the remark "*on account of difference in MRP on closing stock for Nov-17*". Admissibility of the benefit of credit notes was subject to the satisfaction of this Authority that these credit notes were issued in compliance of Section 171 of the CGST Act, 2017 and the benefits passed on in the form of credit notes to the distributors were ultimately passed on to the end consumers of the product.

55. The above Report of the DGAP was forwarded to the Respondent, and the Respondent was given opportunity of hearing on 21.01.2020 but during the hearing the Respondent has reiterated his earlier submissions.

56. We have carefully considered all the Reports furnished by the DGAP, the submissions made by the Respondent and the record of the case and it is revealed that Respondent is engaged in the manufacturing and marketing of Cosmetic, FMCGs and Pharma products through the network of distributors spread all over India. It is also revealed that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on

a number of products from 12% to 5% vide Notification No. 34/2017-Central Tax (Rate), dated 13.10.2017 with effect from 14.10.2017 and from 28% to 18% vide Notification No. 41/2017-Central Tax (Rate), dated 14.11.2017 with effect from 15.11.2017. This fact has also not been contested by the Respondent. Therefore, there is no dispute that the Respondent is liable to pass on the benefit of tax reductions w.e.f. 14.10.2017 and 15.11.2017 respectively. it is further revealed that a total of 425 items were impacted by the GST rate reductions. Out of these 425 items, 52 items were impacted by the GST rate reduction from 12% to 5% w.e.f. 14.10.2017 and 373 items were impacted by the GST rate reduction from 28% to 18% w.e.f. 15.11.2017.

57. It is also evident from the record that the Applicant No. 1 who is also General Secretary of All India Chemists & Distributors Federation had filed an application under Rule 128 (1) of the CGST Rules, 2017 on 27.11.2017 before the Standing Committee on Anti-profiteering alleging that the Respondent had not passed on the benefit of reductions in the GST rates to his customers but had instead increased the base prices of his products by keeping the Maximum Retail Prices (MRPs) unchanged. The above Applicant had also submitted Price Lists of a large number of products published by the Respondent showing both the pre and post GST rate reduction prices claiming that the Respondent had not reduced the MRPs.

58. The above application was scrutinised by the Standing Committee on Anti-profiteering in its meeting held on 09.02.2018 and it was resolved to refer the application to the DGAP for detailed

investigation under Rule 129 (1) of the above Rules. Another application dated 11.04.2018 was also filed by the Applicant No. 1 against the Respondent alleging that he has not passed on the benefit of tax reduction when the rate of GST was reduced from 12% to 5% w.e.f. 14.10.2017. The Standing Committee on Anti-profiteering vide the minutes of its meeting held on 02.05.2018 had ordered to club it with the earlier application and forwarded it to the DGAP for detailed investigation.

59. The DGAP after issuing notice to the Respondent has carried out detailed investigation in the allegations made against the Respondent and furnished his Report on 27.08.2018 under Rule 129 (6) of the above Rules. The DGAP had stated in his Report that perusal of the Price Lists effective as on 14.11.2017 and 01.12.2017 as well as the details of the outward sales data submitted by the Respondent showed that the base prices of the products under investigation were not maintained by the Respondent after the GST rates were reduced but instead, they were increased. Thus, there has been no reduction in the prices commensurate with the reduction in the GST rates as was required under Section 171 (1) of the Act. He has also stated that the Respondent has also admitted that he has changed his prices only w.e.f. 01.12.2017 and not from the dates from which the GST tax rates were actually reduced by the Central Government. The DGAP has further stated that although the Respondent has claimed to have reduced his base prices w.e.f. 01.12.2017, the revised base prices were more than the pre-rate reduction base prices, therefore, while there was a reduction in the

cum-tax prices, it was not commensurate with the reduction in the tax rates. He has also claimed that the Respondent has compensated his stockists for the sales made during the period from 14.10.2017 to 30.11.2017 by issuing credit notes amounting to Rs. 13,20,40,302/-. He has further stated that though the benefit of reduction in rates of tax has not been passed on by way of reduction in the prices, it was an acceptable business practice to compensate the distributors by way of issuing credit notes. He has also claimed that the benefit of reduction in the GST rates w.e.f. 14.10.2017 and 15.11.2017 should have resulted in commensurate reduction in the cum-tax prices which were more than the benefit actually passed on by the Respondent by way of issuance of credit notes. This was due to the fact that the Respondent after reduction in the GST rates has increased the base prices of his products due to which the reduction in the cum-tax prices was not commensurate with the reduction in the rates of tax. He has further claimed that the benefit passed on by the Respondent through the credit notes was less than the benefit that ought to have been passed on by him on account of reduction in the tax rates which has resulted in profiteering. He has also contended that the provisions of Section 171 of the CGST Act, 2017 have been infringed by the Respondent as he has not passed on the benefit of tax reductions.

60. The DGAP has also quantified the amount of benefit which the Respondent has denied to his customers or the profiteered amount on the basis of the pre and post-reduction GST rates and the details of the outward supplies (other than zero rated, nil rated and

exempted supplies) for the period from 14.10.2017 to 31.03.2018 furnished by the Respondent vide Annexures 11, 12, 13 and 14. Perusal of **Annexure-11** prepared by the DGAP shows that it mentions the material code, description of the material (product), HSN Code, pre rate reduction average base price and the post rate reduction average base price of 52 and 373 products respectively which were impacted by the rate reductions from 12% to 5% and 28% to 18% w.e.f. 14.10.2017 and 15.11.2017 respectively. **Annexure-14** mentions the material code, description of the material, HSN Code, pre rate reduction average base price, total quantity sold w.e.f. 14.10.2017 to 31.03.2018, total amount during 14.10.2017 to 31.03.2018, post rate reduction average basic price, post rate reduction average selling price, commensurate price, profiteering per unit and total profiteering in respect of both the above rate reductions. **Annexure-12 & 13** mention the name of the customer (dealer), GSTN, invoice No., invoice date, place of supply (name of the State), material No., material description, HSN Code, UOM, MRP, invoice quantity, Rate per unit, taxable value, discount, taxable value, rate of GST, amount of GST and the invoice amount of all the supplies made by the Respondent from 14.10.2017 to 31.03.2018.

61. Accordingly, the DGAP has computed amount of net higher sales realization or the profiteered amount due to increase in base prices of 425 products consequent upon the reduction in the GST rates, either from 12% to 5% or from 28% to 18% as **Rs. 32,48,33,436/-** out of which an amount of **Rs. 1,18,49,171/-** has been calculated for

the 52 products which were impacted by the GST rate reduction from 12% to 5% w.e.f. 14.10.2017 and **Rs. 31,29,84,264/-** for the 373 items in respect of which the GST rate was reduced from 28% to 18% w.e.f. 15.11.2017. The DGAP has also submitted that after reducing an amount of **Rs. 13,20,40,302/-** passed on by the Respondent through the credit notes to his dealers the net benefit that has not been passed on or in other words the net profiteered amount comes to **Rs. 19,27,93,133/-** (Rs. 32,48,33,436/- - Rs. 13,20,40,302/-).

62. During the course of the proceedings conducted by this Authority on the basis of the Report dated 27.08.2018 furnished by the DGAP the Respondent had vehemently argued that the promo supplies made by him could not be included while computing the profiteered amount as per the Circular No. 92/11/20/2019-GST dated 07.03.2019 issued by the CBIC. Accordingly, vide its Order dated 30.04.2019 this Authority had directed the DGAP to reinvestigate the above case under Rule 133 (4) of the CGST Rules, 2017 and to submit clear cut findings on the above issue in terms of the Circular dated 07.03.2019. The DGAP was also directed to submit separate Annexures for the products in the case of which the rate of tax was reduced from 28% to 18% and from 12% to 5%. Accordingly, the DGAP has carried out reinvestigation and submitted his Report on 23.10.2019 which has been mentioned supra. Perusal of **Annexure-1** attached with the above Report shows that it gives the Pivot Table in respect of the rate reduction which has come in to force w.e.f. 15.11.2017 by mentioning the material code, material description,

sum of invoiced quantity and sum of taxable value. The Sale Report given in this Annexure in respect of the above rate reduction mentions the name of the customer, GSTN, invoice No., invoice date, place of supply, new place of supply, material code, material description, HSN Code, UOM, MRP, invoice quantity, rate per unit, taxable value, discount, taxable value, rate of GST, amount of GST, invoiced GST, whether GST rate changed and impacted or not. The Final Base Price Sheet mentioned in this Annexure shows the material code, material description, sum of invoiced quantity during 01.11.2017 to 14.11.2017, sum of taxable value during 01.11.2017 to 14.11.2017 and pre rate reduction base price per unit. **Annexure-2** of the above Report mentions the material code, description of the material, HSN Code, pre rate reduction average base price, total quantity sold w.e.f. 15.11.2017 to 31.03.2018, total amount during 15.11.2017 to 31.03.2018, post rate reduction average basic price, post rate reduction average selling price, commensurate price, profiteering per unit and total profiteering in respect of the rate reduction from 28% to 18%. **Annexure-4** shows the details mentioned above w.e.f. 14.10.2017 to 31.03.2017 in respect of the tax reduction from 12% to 5%. **Annexure-3** shows the Base Price of the products impacted by the rate reduction from 12% to 5% by mentioning the material code, HSN Code, invoiced quantity during 01.10.2017 to 13.10.2017, taxable value during 01.10.2017 to 13.10.2017 and the Base Price.

63. It is further evident from the Report dated 22.10.2019 that the DGAP has calculated the pre tax reduction average base prices of the

products which were impacted by the tax reduction w.e.f. 15.11.2017 by dividing the total taxable value of the product by the total quantity of the product sold during the period from 01.11.2017 to 14.11.2017. The product wise taxable value, quantity and average base price has been computed as per Annexure-1 attached with the Report. **The profiteered amount has been computed as Rs. 26,24,46,632/- in respect of the impacted products by comparing the pre-rate reduction average base prices with the post rate reduction average base prices from 15.11.2017 to 31.03.2018 as per Annexure-2 of the Report.** The DGAP has also calculated the pre-rate reduction average base prices of the products impacted by the rate reduction which was notified w.e.f. 14.10.2017 by dividing the total taxable value of the product by the total quantity of the product sold during the period from 01.10.2017 to 13.10.2017. The product wise taxable value, quantity and average base prices have been computed as per Annexure-3 attached with the Report. **The profiteered amount has been calculated as Rs. 1,18,48,713/- in respect of the impacted products by comparing the pre-rate reduction average base prices with the post rate reduction average base prices from 14.10.2017 to 31.03.2018 as per Annexure-4 of the Report mentioned above.** Hence, the total profiteered amount has been computed as **Rs. 27,42,95,345/-** (Rs. 26,24,46,632/- + Rs. 1,18,48,713/-).

64. It is clear from the above narration of the facts that the profiteered amount has been computed by comparing the **average pre rate reduction base prices** of the impacted products with the **average**

post rate reduction base prices in respect of both the tax reductions. The above mathematical methodology adopted by the DGAP to compute the profiteered amount is not in consonance with the methodology approved by this Authority in the cases of tax reductions decided by it as the profiteered amount has been determined by comparing the **average pre rate reduction base prices** with the **actual post rate reduction prices**. It would also be pertinent to mention here that the DGAP has also been comparing the average pre rate reduction base prices with the actual post rate reduction prices in the cases where rate of tax has been reduced to compute the profiteered amount. In case the mathematical methodology of comparing the average to average base prices employed by the DGAP is approved it would not be possible to compute the benefit of tax reduction which is due to each customer on each supply. The profiteered amount computed by the DGAP would also not be correct. Hence, the above mathematical methodology adopted by the DGAP is not correct, logical, appropriate and in consonance with the provisions of Section 171 of the CGST Act, 2017. Therefore, the Report dated 22.10.2019 furnished by the DGAP cannot be accepted. Accordingly, the DGAP is directed to reinvestigate the above case under Rule 133 (4) of the CGST Rules, 2017 on the following issues:-

(i) The DGAP shall compare the average pre rate reduction base prices of the products which were impacted by the tax

rate reduction from 12% to 5% with the actual post rate reduction base prices of the impacted products.

(ii) The DGAP shall also compare the average pre rate reduction base prices of the products which were impacted by the tax rate reduction from 28% to 18% with the actual post rate reduction base prices of the impacted products.

(iii) He shall compute the profiteered amount afresh after comparing the average pre rate reduction base prices with the actual post rate reduction prices in respect of both the tax redcutions.

65. The DGAP shall complete the reinvestigation within a period of 3 months and submit his Report under Rule 129 (6) of the above Rules. The Respondent is directed to extend necessary assistance to the DGAP during the course of the investigation.

66. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was to be passed on or before 22.04.2020 as the investigation Report was received from the DGAP on 23.10.2019. 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 Central Goods & Services Tax Act, 2017.

67. A copy of this order be supplied to both the parties and file of the case be consigned after completion.

Sd/-

(Dr. B. N. Sharma)

Chairman

Sd/-

(J. C. Chauhan)

Technical Member

Sd/-

(Amand Shah)

Technical Member

Certified Copy

A.K. Goel

(Secretary, NAA)

F. No. 22011/NAA/72/himalaya/18 Date: .06.2020

Copy To:-

1. M/s Himalaya Drug Company, Makali, Makali Aluru Main Road, Bengaluru, Karnataka-562162.
2. Sh. Joydeep Sarkar, General Secretary, All India Chemists & Distributors Federation, 56/1, Canning Street, Room C-19, Kolkata, West Bengal- 700001.
3. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. Guard File

o/c