

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

I.O. No. 25/2020
Date of Institution 27.03.2019
Date of Order 20.11.2020

In the matter of:

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.

Applicant

Versus

M/s Dange Enterprises, 2nd Floor, Food Court, Sector-46,
Grand Central Mall, Seawoods, Navi Mumbai-400706.

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.
2. None for the Respondent.

ORDER

1. The present Report dated 27.03.2020 has been furnished by the Director-General of Anti-Profiteering (DGAP), under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the case are that a reference was received by the DGAP from the Standing Committee on Anti-Profiteering on 01.07.2019 recommending a detailed investigation in respect of an application under Rule 128 (2) of the CGST Rules 2017, alleging profiteering in respect of restaurant service supplied by the Respondent (Franchisee of M/s Subway Systems India Pvt. Ltd.). In the application, it was alleged that despite the reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017, the Respondent had not passed on the commensurate benefit of tax-rate reduction as he had increased the base prices of his products. On receipt of the said reference from the Standing Committee on Anti-profiteering, a notice under Rule 129 (3) of the CGST Rules, 2017 was issued on 12.07.2019 by the DGAP, 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 to his recipients by way of commensurate reduction in prices and if so, to suo-moto determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all the supporting documents. The Respondent was also allowed to inspect the relied upon non-confidential evidence/information which formed the basis of the investigation between 18.07.2019 and 22.07.2019, which was however not availed of by the Respondent.

2. The DGAP has reported that the period covered by the current investigation was from 15.11.2017 to 30.06.2019. That the time limit to complete the investigation was extended up to 30.03.2020 by this Authority vide order dated 23.12.2019.
3. The DGAP has also reported that in response to the notice dated 12.07.2019 and subsequent reminders, the Respondent submitted his replies vide his letters/e-mails dated 01.10.2019, 17.10.2019, 31.10.2019, 18.02.2020, 25.02.2020, 26.02.2020, 28.02.2020, 03.03.2020, 05.03.2020, 06.03.2020, and 13.03.2020 whereby the Respondent has, interalia, submitted:-
 - a) That he has received the request for his sales and other data from CGST, Navi Mumbai, and that an officer from CGST, CBD Belapur, Navi Mumbai, Maharashtra had also visited his place of business and collected certain data.
 - b) That his place of business was also visited by the Asstt. Commr. of State Tax(INV-D-003) on 12/12/2018 and summons were issued to him asking for the data and

information, also that he had requested to transfer his case to the concerned officer at Navi Mumbai.

4. The DGAP has further reported that vide his e-mail dated 18.02.2020, the Respondent submitted certain data and information in respect of his sales, itemization report and his cash reports to the DGAP and that vide his e-mails dated 25.02.2020 and 26.02.2020, he furnished his GSTR-1 and GSTR-3B Returns; that vide his e-mail dated 03.03.2020, the Respondent submitted that as a franchisee, the pricing of his products was controlled by M/s Subway Systems India Pvt. Ltd. (the franchisor) and that he should not be penalized for adopting the prices suggested by his franchisor; that as a franchisee, he had nothing to do with the issue of passing of the benefit to the customers/ recipients, post the reduction of GST rate; that he had been made to understand by his franchisor that if he did not get any ITC in the 5% GST slab, then he would be at a loss and for that reason he revised his product pricing upwards to offset the loss on account of non-availability of ITC; further, that the sales data from 01 July 2017 to 01 March 2018 was unavailable with him but the same was available with his franchisor, SSIPL; and that the data for the period from 02 March 2018 to 31 July 2019 had been made available to him by his franchisor; that the Respondent had requested the DGAP for a time of two months to submit the requisite data, as requisitioned by the DGAP; that the Respondent also submitted that the requisite data could be obtained by the

DGAP from his franchisor, M/s Subway Systems India Pvt. Ltd. ; and that the franchisor not only had the requisite records but also had the manpower and resources to cull the data.

5. The DGAP has reported that based on a careful examination of the case records, including the reference received from the Standing Committee on Anti-Profiteering, various replies of the Respondent, and the documents/evidence placed on record, it emerged that the main issues for determination were whether the rate of GST on the service supplied by the Respondent was reduced from 18% to 5% w.e.f. 15.11.2017 and if so, whether the benefit of such reduction in the rate of GST had been passed on by the Respondent to his recipients, in terms of Section 171 of the CGST Act, 2017.
6. The DGAP has further reported that the GST rate on the restaurant service had indeed been reduced from 18% to 5% w.e.f. 15.11.2017 vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 with the condition that no ITC on the goods and services used in supplying the restaurant service would be admissible; that since it was a case of reduction in the rate of tax, it was important to examine the provisions of Section 171 (1) of the CGST Act, 2017, to ascertain whether the present case was a case of profiteering or not; that Section 171 (1) provides as follows- "*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:* that thus, the legal

requirement of the above provision was abundantly clear that in the event of the benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in the prices of the goods or services being supplied by a registered person, the final prices being charged on each supply must be reduced commensurately with the extent of benefit and there was no other legally tenable mode of passing on such benefits to the recipients/consumers.

7. The DGAP has also reported that a notice of initiation of investigation was issued to the Respondent on 12.07.2019. Subsequently, reminders 01.08.2019, 24.09.2019 & 15.10.2019 and Summons dated 24.10.2019 & 01.11.2019 were also issued, but the Respondent did not submit the requisite details/information. Since no information was forthcoming from the Respondent, letters dated 13.12.2019, 09.01.2020, 24.01.2020 & 14.02.2020 were issued to the Additional Commissioner (Anti-Evasion) requesting necessary action to get the requisite information and details from the Respondent. Further, letters dated 24.01.2020, 07.02.2020 & 14.02.2020 were also issued by the DGAP to the Commissioner, CGST Belapur Commissionerate, Navi Mumbai, requesting him to depute an officer to get the requisite documents from the Respondent.
8. The DGAP also reported that the Respondent was also issued another (fourth) reminder dated 14.02.2020 asking him to submit the required details/documents. Further, since the Respondent was a franchisee of M/s Subway Systems India Pvt. Ltd., the

requisite details/ information in respect of the said franchisee was also solicited by the DGAP from the franchisor vide letter dated 14.02.2020.

9. The DGAP has reported that vide his letter dated 14.02.2020 the Joint Commissioner, CGST & CEx., Belapur Commissionerate forwarded certain documents gathered from the Respondent. That on examining these documents, it was found that the Respondent had provided the copies of GSTR -1 and GSTR-3B Returns for the period from July 2017 to June 2019. It was also found that the other documents gathered and forwarded by the above said Commissionerate, such as cash reports, were not relevant to the investigation.
10. The DGAP has further reported that the Respondent also furnished partial data/ information vide his successive emails dated 18.02.2020, 25.02.2020, 26.02.2020 & 28.02.2020, which comprised his GSTR-1 and GSTR-3B Returns and cash reports, as also the itemization reports and sales-details for the period from June 2017 to Oct 2017. However, the submissions made by the Respondent did not contain any data/ details pertaining to the period from November 2017 to June 2019. It was also found that the Respondent had not provided product-wise invoice-wise outward taxable sales data for even a single month, which had been requisitioned by the DGAP as the same was essential for the investigation and hence the submitted by the Respondent was incomplete.

11. The DGAP has further, interalia, reported that the Respondent, vide letter/e-mail dated 03.03.2020, has submitted that –

- a. the data/ information for the period 01/07/2017 to 01/03/2018 was not available with him, however, the same was available with M/s Subway Systems India Pvt. Ltd. (SSIPL) the franchisor;
- b. even the data/ information that was available at his end was in 'text' format and copying from text format to 'M.S. word' document format would take him two months and requested the DGAP for at least two months to submit the data;
- c. The data/ information could be procured by the DGAP from SSIPL as it was available with SSIPL.

12. The DGAP has reported that summons were issued to Chief Financial Officer SSIPL, the franchisor, on 06.03.2020 seeking production of data/ information pertaining to the Respondent before 16.03.2020 but since the summons were not complied with by SSIPL, another summons was issued to the Chief Financial Officer SSIPL seeking furnishing of the data/ information by 19.03.2020. Since the required data/ information was not furnished by SSIPL despite the abovementioned two summons, third summons were issued to the Chief Financial Officer SSIPL on 19.03.2020 seeking the information. However, neither the

requisite data/ information nor any reply was received from SSIPL in response to the summons.

13. The DGAP has also stated that only due to the above reasons, he requested this Authority to extend the period of submission of the investigation report by a period of three months, which was duly granted by this Authority in terms of Rule 129(6) of the CGST Rules, 2017 and the last date for the submission of Report to this Authority was 30.03.2020.
14. DGAP has further reported that despite the above-mentioned steps taken by it and despite all possible efforts made by the officers concerned, the Respondent and SSIPL, the franchisor, did not submit the data/ information that had been solicited from them for completing the investigation.
15. DGAP has also stated that since the Respondent, as also SSIPL the franchisor, was not cooperating in the investigation by not providing the requisite data/ information on one pretext or the other, DGAP was not able to compute the amount of profiteering as per the standard methodology followed in similar cases of restaurant services. The DGAP has further reported that in the absence of the requisite data required for the investigation as per the standard practice adopted in other such similar cases of franchisees of SSIPL, the DGAP was left with no option but to compute the amount of profiteering, taking the other similar cases of Subway franchisees investigated by the DGAP as the basis, which is detailed in Table-A below:-

Table-A					
S. No.	Name of the unit /franchisee	Period of investigation	Profiteered amount	Relevant turnover in post rate reduction period of which profiteering found	Percentage of profiteering
1	M/s Smookey Kitchen Foods OPC Pvt. Ltd.	15.11.2017 to 30.06.2019	6,49,397	43,18,208	15.04%
2	M/s N Rai Delights LLP	15.11.2017 to 31.03.2019	1,49,896	49,98,693	3.00%
3	M/s Hungry Eyes	15.11.2017 to 31.03.2019	6,66,700	1,55,30,721	4.29%
4	M/s Le Reve Pvt. Ltd.	15.11.2017 to 31.03.2019	8,24,260	1,66,60,124	4.94%
5	M/s Lite Bite Travel Foods	15.11.2017 to 30.04.2019	61,67,097	6,35,16,820	9.70%
6	M/s Cilantro Diners Pvt. Ltd.	15.11.2017 to 31.03.2019	20,80,087	1,21,64,185	17.10%
7	M/s Bonne Sante	15.11.2017 to 30.06.2019	7,33,043	1,04,33,995	7.03%
8	M/s Gaurav Sharma Foods Industries	15.11.2017 to 30.06.2019	7,53,854	1,50,52,143	5.01%
9	M/s Neeva Foods Pvt. Ltd.	15.11.2017 to 30.06.2019	41,93,431	2,60,61,557	16.09%
10	M/s Dough Makers India (P) Ltd.	15.11.2017 to 31.03.2019	78,41,754	8,50,72,793	9.22%
11	M/s Subwest Restaurant LLP	15.11.2017 to 30.06.2019	685531	23761435	2.89%

16. The DGAP has reported that amongst the above-listed cases, the highest 'profiteering to turnover' ratio for exactly the same period of investigation had been computed in the case of M/s Neeva Foods Pvt Ltd, another franchisee of SSIPL. Accordingly, the 'profiteering to turnover' ratio computed in the case of M/S Neeva

Foods Pvt. Ltd., i.e. 16.09%, was adopted as the basis of quantification of the quantum of profiteering in the instant case as well. DGAP has further stated that the aggregate of the monthly taxable turnovers of the Respondent, as reflected in his GSTR-3B returns for the period from 15.11.2017 to 30.06.2019, worked out to Rs. 1,78,65,489/- as shown in table-B below:-

Table-B		(Amount in Rs.)
Month	Taxable Value/Turnover	
Nov-17	4,41,553	
Dec-17	11,02,071	
Jan-18	9,86,076	
Feb-18	8,17,167	
Mar-18	10,41,285	
Apr-18	6,85,121	
May-18	8,96,883	
Jun-18	9,93,637	
Jul-18	8,23,674	
Aug-18	8,82,193	
Sep-18	10,45,296	
Oct-18	9,32,241	
Nov-18	11,25,578	
Dec-18	11,41,770	
Jan-19	7,71,830	
Feb-19	6,98,252	
Mar-19	8,00,230	
Apr-19	8,83,545	
May-19	8,38,417	
Jun-19	9,58,670	
Total	1,78,65,489	

*Note: The Taxable turnover for the month of November 2017 mentioned in the above table is half of the total taxable turnover for the month of Nov-2017 as mentioned in GSTR-3B since the

period of determination of profiteering covers the period from 15.11.2017 to 30.06.2019.

17. The DGAP has further stated that adopting 16.09% as the percentage of profiteering based on the discussion in the preceding paragraphs, the amount of profiteering in the case of the Respondent works out to Rs. **28,74,557/-**. Based on the above, it has been concluded by the DGAP that the provisions of Section 171(1) of the CGST Act, 2017 have indeed been contravened by the Respondent in the present case.
18. The above Report of the DGAP was considered by this Authority and it was decided to allow the Respondent to file his consolidated written submissions by 05.06.2020. A Notice dated 27.05.2020 was also issued to the Respondent asking him to explain why the Report of the DGAP dated 27.03.2020 furnished by the DGAP should not be accepted and his liability for violating the provisions of Section 171 of the above Act should not be fixed.
19. The Respondent was also granted an opportunity to file his consolidated written submissions in respect of the report of the DGAP vide Order dated 09.06.2020. However, the Respondent did not file any submissions, however, vide his e-mail dated 30.06.2020, he requested for some more time to prepare and represent his case before this Authority. Accordingly, this Authority, vide its Order dated 08.07.2020 extended another opportunity to the Respondent to file his written submissions latest

by 03.08.2020. However, the Respondent did not file any submission before this Authority yet again, although vide an e-mail dated 03.08.2020, he again requested for some more time to file his submissions.

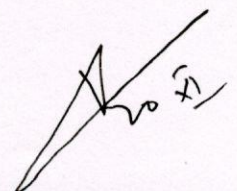
20. Therefore this Authority, in the interest of justice, vide its Order dated 06.08.2020, extended yet another opportunity to the Respondent to file his consolidated submissions before this Authority latest by 20.08.2020. Vide his e-mail dated 20.08.2020, the Respondent filed his written submissions, interalia submitting:-

a. That due to Covid-19 pandemic and subsequent lockdown in Mumbai, he was unable to file his written submissions any earlier as he was not able to reach his premises.

b. That in his case, the methodology adopted by the DGAP for calculation of profiteering is based on adopting the highest ratio of the benefit received to turnover amongst all similar cases of profiteering pertaining to another franchisee of M/s SSIPL, i.e. based on the profiteering percentage in the case of M/s Neeva Foods Pvt. Ltd. which had been decided by this Authority; that however, he has not been provided the data and the computation done in the case of M/s Neeva Foods Pvt. Ltd. which he needed to understand the basis of the calculation of profiteering.



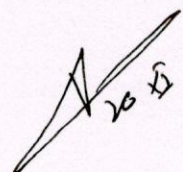
- c. That in his case why the ratio of the percentage of profiteering to turnover worked by and determined by this Authority in the case of M/s N Rai Delights LLP and Jijrusha N. Bhattacharya vs. N.P. Foods Pvt. Ltd. could not be adopted in place of the profiteering percentage determined in the case of M/s Neeva Foods Pvt. Ltd.
- d. That Summons was also issued to his franchisor i.e. M/s Subway Systems India Pvt. Ltd. (SSIPL) but there is no mention of any response from M/s SSIPL to the DGAP in the DGAP report.
- e. That the pricing of his products and other such issues in respect of his restaurant were decided by his franchisor i.e. M/s SSIPL and not controlled by him and that he was just following the rules and regulations set by his franchisor i.e. M/s SSIPL and hence he can't be held responsible for any profiteering.
21. On request of the Respondent, vide Order dated 26.08.2020, this Authority allowed him time up to 09.09.2020 to file his final/consolidated submissions. In response to the said Order of this Authority, the Respondent vide his e-mail dated 10.09.2020 reiterated the submissions made by him on 20.08.2020 and also requested for some more time to represent his matter before this Authority.



22. Vide Order of this Authority dated 15.09.2020, the Respondent was again granted further time till 28.09.2020 to file his consolidated submissions. However, the Respondent vide his e-mail dated 25.09.2020 again reiterated his previous submissions made through his e-mails dated 20.08.2020 and 10.09.2020 and requested that he be provided the data vide which the DGAP had calculated the profiteered amount in the case of M/s Neeva Foods Pvt. Ltd. The Respondent also agreed to submit invoice-wise and customer-wise data/information as required by the DGAP during the investigation proceedings for which he requested for a time of six months.
23. The request of the Respondent was considered by this Authority and it was observed that being a time-bound matter, a further time of six months could not be allowed for submissions of the required data/information. Hence this Authority vide its Order dated 28.09.2020, directed the Respondent to file his consolidated submissions latest by 12.10.2020. In response, the Respondent vide his e-mail dated 13.10.2020, again reiterated his previous submissions dated 20.08.2020, 10.09.2020, and 25.09.2020 and further contended that as per the 'One Nation One Tax' principle, all subway franchisees should be treated at par and a universal percentage of 'profiteering to turnover' should be adopted for all franchisees of M/s SSIPL. He further submitted that he had been running discount promotions throughout the period and that the said discount was more than the 13% reduction (reduced from

18% to 5% w.e.f. 15.11.2017) and that the discounted sales needed to be reduced from the figures of his Total Sales of Rs. 1,78,65,489/-. He also added that he had issued more than 3 Lakh invoices in the period of investigation and that it would take him 4 to 6 months to submit the same and hence he requests for an extension of 4 to 6 months for submission of the Sales data/information.

24. This Authority, vide its Order dated 14.10.2020, disallowed the request of the Respondent for allowing him a further six month time for submitting the required data/information and directed him to file his submissions, if any, by 29.10.2020. However, the Respondent, vide his e-mail dated 30.10.2020, again has reiterated his earlier submissions and requested for another 04 months to furnish the requisite data/information.
25. The Authority has provided as many as seven opportunities spanning over more than 5 months, to the Respondent, for filing his submissions before this Authority and for furnishing the data/information required for the investigation. However, the Respondent has only been seeking one extension after another and has been avoiding the submission of data/information and has thus been avoiding cooperation with this Authority just as he had done during the investigation process. Therefore, this Authority, vide its Order dated 13.11.2020, closed the hearings in the present matter.



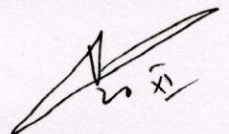
26. We have carefully considered the Report furnished by the DGAP, the submissions made by the Respondent, and the other material placed on record. On examining the various submissions we find that the Respondent has not cooperated in the investigation and has not provided any data to the DGAP which was required to examine whether the benefit of reduction in the rate of tax has been passed on to the customers or not. The DGAP, in absence of the requisite data, was unable to compute the amount of profiteering as per the standard methodology adopted in similar cases of restaurant services. Therefore, in the present case, the DGAP has thus arrived at the profiteering amount by adopting the highest ratio of the amount of profiteering to the turnover of 16.09% in the similar case of M/s Neeva Foods Pvt. Ltd. for the same period of investigation and has thus computed that the Respondent has profited an amount of Rs. 28,74,557/- approximately.
27. We observe that as an investigating agency, the DGAP has been conferred with wide-ranging powers under Rules 129 and 132 of the CGST Rules read with Section 171 of the CGST Act, 2017 to summon any relevant record which may be required for conducting an investigation and the DGAP should have exhausted all the options available to him to get the requisite data from the Respondent. Since the respondent had not furnished the requisite data for a significant period, we find this was a fit case for exercise of all the powers granted under the CGST Act 2017

and the CGST` Rules 2017 to the DGAP to summon the data/information and any other records for computation of the amount of profiteering accordingly. We take note that the DGAP has neither taken available appropriate coercive action against the Respondent under Rule 132 of the CGST Rules, 2017 nor the DGAP has initiated prosecution against the Respondent under Section 122 of the CGST Act, 2017. Hence we are of the view that the DGAP has still not exhausted all the legal recourses available under the CGST Law to arrive at an evidence-based conclusion in this matter.

28. We also observe that the Respondent has abysmally failed to comply with the repeated directions of not only the DGAP to furnish the data/information etc. during the investigation but also the repeated directions of this Authority over a five-month period to furnish the same. We also take note of the fact that the same data/information has been supplied in a timely manner by all the other franchisees of SSIPL who are/have been investigation by the DGAP and that none of the other Subway franchisees have advanced such reasons, as the Respondent has done for non-submission of data/information requisitioned from him by the DGAP.
29. Therefore, without going into any merits/other submissions filed by the Respondent at this stage, we find this case to be a fit case for revisiting the investigation by the DGAP and for computing the amount of profiteering based on the data/records to be submitted

by the Respondent and SSIPL, the franchisor. We direct the Respondent to furnish all the data/information to the DGAP within 30 days of this order under any circumstances, failing which the DGAP shall use all the means, available within the law, to obtain the requisite data/information and complete the investigation and submit his report to this Authority. Thus, we direct the DGAP to reinvestigate the matter as per the provisions of Rule 133(4) of the CGST Rules 2017.

30. We also direct the Respondent to promptly extend all co-operation to the DGAP and furnish the data/ information/ documents in the manner required by the DGAP expeditiously failing which final order may be passed based on the available records otherwise we will have no hesitation in adopting the report of the DGAP.
31. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was required to be passed within a period of 6 months from the date of receipt of the Report from the DGAP under Rule 129 (6) of the above Rules. Since the present Report has been received by this Authority on 13.05.2020 the order was to be passed on or before 12.11.2020. However, due to the prevalent pandemic of COVID-19 in the country, this order could not be passed on or before the above date due to *force majeure*. Accordingly, this order is being passed today in terms of the Notification No. 65/2020-Central Tax dated 01.09.2020 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.

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

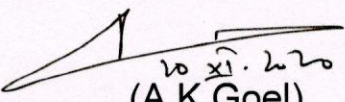
Sd/-
(J.C. Chauhan)
Technical Member



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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

O/C 
20.11.2020
(A.K Goel)
Secretary, NAA

File No. 22011/NAA/160/Dange/2020/6057-59 Dated: 20.11.2020
Copy To:-

1. M/s Dange Enterprises, 2nd Floor, Food Court, Sector-46, Grand Central Mall, Seawoods, Navi Mumbai-400706.
2. 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.
3. Guard File.


A. K. GOEL
SECRETARY, NAA