BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Order No.	26/2022
Date of Institution	31.08.2020
Date of Order	23.06.2022

In the matter of:

1. **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

1. **M/s L'Oreal India Pvt. Ltd.**, A-Wing, 8th Floor, Marathon Futurex, N.M. Joshi Marg, Lower Parel, Mumbai - 400013

Respondent

Quorum:-

1. Sh. Amand Shah, Technical Member & Chairman
2. Sh. Pramod Kumar Singh, Technical Member
3. Sh. Hitesh Shah, Technical Member

Present:-

1. Shri Lal Bahadur, Assistant Commissioner for DGAP.
2. Shri V Laxmikumaran, Advocate, Shri K Sreekant, Advocate, Shri Darshan Maccher, CA Shri Mahesh Morye, Shri Rohit Gupta and Shri Anand Nagda on behalf of the Respondent

ORDER

The **Director General of Anti-Profiteering** (hereinafter referred to as DGAP) has submitted a report dated 28.8.2020 under Rule 133(4) of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as "**the Rules**) in the matter relating to **M/s L'Oreal India Pvt. Ltd.**, A-Wing, 8th Floor, Marathon Futurex, N.M. Joshi Marg, Lower Parel, Mumbai - 400013 (hereinafter referred to as "**Respondent**" also). The aforesaid report dated 28.8.2020 was submitted by DGAP pursuant to the National Anti-profiteering Authority's (hereinafter referred to as **"NAA"** or **"the Authority" also**) direction contained in Interim Order (I. O). No.

05/2020 dated 03.01.2020 in the matter of Respondent, whereby the matter was referred back to the DGAP under Rule 133(4) of the Central Goods and Services Tax Rules, 2017 to conduct further investigation with the following observations/directions:-

(i) DGAP has submitted that an amount of Rs. 19,75,12,265/- can be reduced on account of rectification of the non-averaging of base prices where description was used for comparison {01.10.2017 to 14.11.2017 (Goods Desc.) and 01.09.2017 to 30.09.2017 (Goods Desc.)}. However, the DGAP has also stated that the above rectification could be made if it was decided to do so by this Authority. The DGAP has not mentioned the reasons on the basis of which such an approach can be approved by this Authority. He has also not explained why the above approach was not applied by him at the time of preparing of his Report dated 05.07.2019.

(ii) DGAP has also submitted that an amount of Rs. 4,80,88,937/- can be excluded from the original profiteered amount due to rectification of inconsistency in the sequence followed by him in respect of certain line items in case it is so decided by this Authority. However, no explanation has been given why the above inconsistency cannot be rectified by him in case such an error has taken place.

(iii) DGAP has also stated that an amount of Rs. 5,18,75,235/- could be subtracted from the profiteered amount on the ground of rectification of the adopted average price on description wherever comparable product code was used subject to the approval of this Authority. However, no reasons have been given why the above approach was more appropriate as compared to the approach which was adopted by the DGAP while computing the profiteered amount vide his Report dated 05.07.2019.

(iv) This Authority had also directed the Respondent to furnish the details pertaining to his claim of having passed on the benefit of rate reduction by increasing the grammage/volume of his products to the DGAP. The said information was to be examined by the DGAP and his findings included in the fresh Report to be filed by him in consequence of I. O. dated 03.01.2020.

2. Briefly stated, the facts of the case are as under:-

2.1 A reference was received on 07.01.2019 from the Standing Committee on Anti-profiteering under Rule 129 of the Central Goods and Services Tax Rules, 2017, to conduct a detailed investigation on the basis of a letter F.No.22011/NAA/36/2018 dated 17.10.2018, of the Secretary, NAA, along with supporting documents, alleging profiteering by the Respondent. It was alleged that the Respondent had not passed on the benefit of reduction in the rate of GST on the goods supplied by the Respondent, when the rate of GST was reduced from 28% to 18% w.e.f. 15.11.2017 vide Notification No 41/2017- Central Tax (Rate) dated 14.11.2017

(hereinafter referred as **Notification** also), in terms of Section 171 of the Central Goods and Services Tax Act, 2017.

2.2. The said reference was examined by the Director General of Anti-Profiteering and the Investigation Report dated 05.07.2019 under Rule 129(6) of the Rules, was furnished to the Authority. Vide the said Report, it was concluded that the allegation of profiteering by way of either increasing the base prices of the products while maintaining the same selling price or by way of not reducing the selling prices of the products commensurately, despite a reduction in GST rate from 28% to 18% w.e.f. 15.11.2017 stands established against the Respondent. On this account, the Respondent has realized an additional amount to the tune of **Rs. 2,16,49,61,535/-** from the recipients during the period from 15.11.2017 to 31.12.2018, which includes both the profiteered amount and GST on the said profiteered amount. The conclusion was based on the documents and information submitted by the Respondent during the course of original investigation. The aforesaid amount was revised to Rs. **1,86,39,57,058/-** vide DGAP letter dated 23.12.2019 after rectifying certain inadvertent discrepancies as submitted by the Respondent during the course of hearings held before the Authority.

3. The above said Investigation Report dated 5.7.2019 and subsequent revision of the quantification of the profiteered amount conveyed vide letter dated 23.12.2019 was shared with the Respondent. Personal hearing was given by the Authority to the Respondent on 01.01.2020 and the proceedings culminated in passing of its I. O. No. 05/2019 dated 03.01.2020 with a direction to the DGAP to conduct further investigation on the observations as mentioned in paragraph 1 above. The Authority also directed DGAP to supply detailed list of the Stock Keeping Units (SKUs) impacted by the rate reduction w.e.f. 15.11.2017 along with the pre-rate reduction base prices and the commensurate reduced base prices post rate reduction with percentage increase/reduction made by the Respondent in respect of such SKU.

4. The DGAP in it's report dated 28.8.2020 has, inter-alia, submitted as under: -

4.1 After receiving reference from the Authority, letter was issued to the Respondent on 14.01.2020 calling upon him to submit the information/ documents required to further investigate the matter.

4.2 In response to DGAP's letter dated 14.01.2020 the Respondent replied vide letter dated 03.02.2020 and submitted the following details with regard to his claim of having passed on the benefit of rate reduction by increasing the grammage/volume of his products:

(i) Name of SKU: The change in grammage is recognized in the SAP accounting system by changing the 11-digit product code. Accordingly, when the Respondent increased the grammage of products to pass on the benefit of reduction in rate of tax, the same was also reflected by way of change in product

code at 11-digit level as per outward supply details submitted by the Respondent.

(ii) Base price of the SKU pre-rate reduction with documentary evidence: The base price adopted by DGAP in Report dated 05.07.2019 as adjusted for base price discrepancies and *weighted average price of products with latest MRP* highlighted by the Respondent in his submissions dated 01.11.2019 has been adopted by him as the base price for SKUs pre-rate reduction. The Respondent has used this base price as the pre-rate reduction price for computing the commensurate price pursuant to increase in grammage.

(iii) Weight/Volume of the SKU pre-rate reduction with documentary evidence: This old grammage is reflected in the Minutes of Meeting of the Respondent dated 21.12.2017, wherein the Respondent decided that he will pass on the benefit of reduction in GST rate by increasing the grammage of the product. Further, the details of old grammage can also be seen from the supporting documents viz., the shipper labels as per production records.

(iv) Commensurate base price of the SKU post rate reduction with details of computations: The Respondent has computed the revised base price by considering base price adopted by DGAP in Report dated 05.07.2019 and adjusting it for discrepancies and *weighted average price of products with latest MRP*, as highlighted by the Respondent in his submissions dated 01.11.2019. Since this base price is for product with Old Grammage, the Respondent computed commensurate base price of the SKU sold post rate reduction by adjusting the base price for the increased grammage. The Respondent has used this commensurate base price to calculate the amount of increase in grammage.

(v) Commensurate increase in the Weight/Volume required post rate reduction with computations: The Respondent submits that the commensurate increase required in the Weight/Volume to pass on the benefit of reduction in rate of tax comes to 8.48%. Respondent submitted that it has increased the grammage by 10%, 18.18% and 41.30% at 11-digit code level, which is much higher than the 8.48% commensurate increase in grammage required.

(vi) Actual Increase in the weight in grams/mls: The Respondent has increased grammage by 10%, 18.18% and 41.30% respectively in respect of products supplied by him, and the details of increased grammage at 11-digit code level. This grammage increase is more than the 8.48% grammage increase required to pass on the benefit of reduction in rate of tax. The Respondent has also provided supporting documents viz. the shipper labels for sample SKUs as per production records showing the increased grammage along with the corresponding SKUs with old grammage.

(vii) Whether the increase is commensurate with the rate reduction: The Respondent has increased grammage by 10%, 18.18% and 41.30% respectively in respect of products supplied by him. Thus, the Respondent has increased the grammage to pass on the benefit of rate reduction commensurately. In fact, the Respondent has passed on more than the required benefit, as the increase in grammage is higher than 8.48% required to be passed on.

(viii) Date of passing on the benefit of tax reduction with documentary evidence: The Respondent, in its Minutes of Meeting dated 21.12.2017, discussed that since grammage increase is viewed as one of the methods to pass on the benefit of reduction in rate of GST, it shall pass on the benefit by increasing the grammage and the increase in grammage to be made was recorded in the Minutes of Meeting. Accordingly, the Respondent instructed its production team to commence new production with higher grammage. The sale of these products with higher grammage were effected starting January 2018. As an evidence for the same, the Respondent has provided the details of first invoice date for sale of products with higher grammage.

Further, in some cases, the product code with higher grammage may have changed subsequently due to changes in art work or other changes. In such cases, it will be relevant to refer to the first invoice date of product at 8-digit level. For instance, product code CNCFC316-F0 shows first invoice date of product with higher grammage as 03.09.2018. However, the said code was created only due to some art work or other changes and the Respondent was in fact selling the product with higher grammage prior to that as well, through product code CNCFC316-B1, the first sale invoice date for which was 02.01.2018.

(ix) Amount of benefit of tax reduction passed on the SKU: The Respondent has mapped the benefit passed on by way of higher grammage and also the Respondent has also restricted the benefit so passed on to revised alleged profiteering.

(x) Amount of benefit of tax reduction passed on State/Union territory wise: The Respondent has provided the benefit of tax reduction passed on in the State/Union Territory wise 35 files provided by DGAP. These files contain State/Union territory wise details based on calculation of alleged profiteering provided by DGAP.

(xi) Amount of profiteering computed by DGAP on the SKU as per DGAP letter dated 23.12.2019: The amount of profiteering computed by DGAP as adjusted for base price discrepancies and *weighted average price of products with latest MRP.*

(xii) Amount of profiteering computed by DGAP on these SKUs State/Union Territory wise: The amount of profiteering computed by DGAP as adjusted for base price discrepancies and *weighted average price of products with latest MRP* as per Respondent's submission dated 01.11.2019.

4.3 The Respondent submits that an amount of **INR 26,96,31,164** (restricted to profiteering amount at line item level) passed on by the Respondent by way of increase in grammage (calculated based on *weighted average price of products with latest MRP*) should be reduced from the total profiteering alleged to have been made by the Respondent. Further, the Respondent has on totality basis passed on **INR 82,97,36,596** by way of higher grammage.

4.4 However, the Respondent vide E-mail dated 22.08.2020 has submitted that there was an inadvertent formula error in 2 files out of total 35 files, which they have revised and corrected. Accordingly, the Respondent submitted that amount is revised to **INR 26,65,22,215** (earlier was Rs. 30,29,26,538/-) (restricted to profiteering amount at line item level) passed on by the Respondent by way of increase in grammage (calculated based on **weighted average price of the products with all the MRPs**) should be reduced from the total profiteering alleged to have been made by the Respondent.

4.5 The Respondent also clarified that, since, they have claimed reduction from profiteering to the extent goods are returned, they do not intend to claim grammage benefit for the very said sale. The same can be better explained from the illustration is given table below:

Particulars	Profiteering	Grammage benefit
Sale	+1	+1
Credit note	0	-1
Total profiteering	1	0

In respect of the above sale line item, profiteering of INR 1 was computed when the sale took place, but subsequent reduction was not made when the goods were returned and credit note was issued. Accordingly, the Respondent has claimed reduction of INR 1 in profiteering on account of subsequent sales return for which credit note was issued. Now that the said benefit of INR 1 in respect of credit note is being allowed, he has adjusted the same in our computation for grammage benefit. That is, in a case where goods with higher grammage were sold and subsequently returned, he has not claimed any benefit of higher grammage (by adding and subtracting, effect is nullified).

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

a. Master of Product codes supply with Increased Grammage
b. 35 sheets containing transaction wise benefit of Increase in grammage claimed by the Respondent.

c. Copy of Minutes of Meeting for GST rate reduction implementation method dated 21.12.2017.'

d. Shipper Labels as per production records

e. Computation of commensurate increase in grammage

4.7 The I. O. received from the National Anti-Profiteering Authority, the various replies of the Respondent and the documents/evidences on record have been carefully examined by the DGAP and it's point wise submissions to issues raised by the Authority are as under:-

(i). Non-averaging of base price where description is used for comparison [01.10.2017 to 14.11.2017 (Goods Desc.) and 01.09.2017 to 30.09.2017 (Goods Desc.)]: DGAP has adopted the Average base price *(arrived by dividing the total taxable value by total quantity sold)* in pre-rate reduction period and compared it with the actual transaction value in post-rate reduction period. However, in case one product having same description is sold in multiple product code, then DGAP has adopted the average base price available at *first place* in the same product. The same has happened due to the proprietary of VLOOKUP function (used to lookup a value in a table by matching on the first column) in MS-Excel, which in case of duplicate values, find the *first match* when the match mode is exact.

Respondent has submitted that instead of taking average price at first place, the pre-rate reduction base price should be taken as one out of the following three approaches:

(a) Weighted Average Base Price of the product having same description with all the MRPs.

(b) Average Base Price of the product with latest MRP of the latest product code introduced immediately prior to rate-reduction.

(c) Weighted Average Base Price of the products with latest MRP prevailing in pre-rate reduction period.

Accordingly, Respondent has re-computed the profiteering amount and submitted that the profiteering should be reduced by Rs. 19,75,12,265/- in case approach (a) above is adopted or by Rs. 30,39,43,079/- in case approach (b) above is adopted or by Rs. 30,51,84,398/- in case approach (c) is adopted.

In this regard, the DGAP has submitted that Respondent has sold some products with same description in multiple product codes with different MRPs. However, these MRPs are prevailing in pre-rate reduction period and are not obsolete. For this an example of the product with description "MAJIREL (NEW) SHADE NO. 4", for General Trade Channel has been taken, the details are furnished in table below:

No.	Product Code	Product Description	HSN	MRP	Quantity	Taxable Amount	Average Price
2439	MRCIP400-70	MAJIREL (NEW) SHADE NO. 4	33059040	310	73,906	163,20,873	220.83
2440	MRCIP400-80	MAJIREL (NEW) SHADE NO. 4	33059040	335	30,465	72,70,227	238.64
Total					1,04,371	2,35,91,101	226.03

In the post rate reduction period, DGAP has adopted the pre-rate reduction base price as **Rs. 220.83/-** (available at first place) and determined the profiteering for product sold in post-rate reduction period. It is pertinent to mention here that this product was sold post-rate reduction period with MRP of Rs. 310/- only and accordingly determined profiteering of Rs. 27,72,970/- (for the state Delhi- General Trade). However, Respondent submitted that as per approach (c) Weighted average price of latest MRP of Rs. 238.64/- should be adopted and profiteering reduced by Rs. 26,38,779/- resulting into profiteering of Rs. 1,34,191/- [Rs. 27,72,970/- (-) Rs. 26,38,779/-].

The above submission of the Respondent is not appropriate as Respondent has sold 73,906 units of Rs. 310/- MRP and 30,465 units of Rs. 335/- MRP during pre-rate reduction period which shows both MRPs were in market and neither was obsolete. Similarly, approach (b) does not hold good as adopting average price of product with latest MRP is not appropriate when old/other MRPs were also prevailing in pre-rate reduction period.

Therefore, approach (a) where Weighted Average Base Price of the product having same description with all the MRPs is the correct approach to be adopted for pre-rate reduction base price to address the issue of adopting old MRP/first line item. Following the approach as per (a) above, and adopting weighted average base price of Rs. 226.03/-, the profiteering amount will reduce by Rs. 7,70,237/- resulting into revised profiteering of Rs. 20,02,733/- [Rs. 27,72,970/- (-) Rs. 7,70,237] for the State- Delhi General Trade.

Another example of the product with description "MAJIREL (NEW) SHADE NO.3", for General Trade Channel, of which the details are furnished in table below:

S.No.	Product Code	Product Description	HSN	MRP	Quantity	Taxable Amount	Average Price
2435	MRCIP300-70	MAJIREL (NEW) SHADE NO.3	33059040	310	1,01,854	224,92,710	220.83
2436	MRCIP300-80	MAJIREL (NEW) SHADE NO.3	33059040	335	23,106	55,14,061	238.64
		Total			1,24,960	2,80,06,771	224.12

In the post rate reduction period, DGAP has adopted the pre-rate reduction base price as Rs. 220.83/- (available at *first place*) and determined the profiteering for product sold in post-rate reduction period amounting to Rs. 28,81,815/- (for the state Delhi- General Trade). However, Respondent submitted that as per approach (c) Weighted average price of latest MRP of Rs. 238.64/- should be adopted and profiteering reduced by Rs.

26,17,512/- resulting into profiteering of Rs. 2,64,303/- [Rs. 28,81,815/- (-) Rs. 26,17,512/-].

The above submission of the Respondent is not appropriate as he has sold 1,01,854 units of Rs. 310/- MRP and only 23,106 units of Rs. 335/- MRP during pre-rate reduction period which shows both MRPs were in market and neither was obsolete. Similarly, approach (b) does not hold good as adopting average price of product with latest MRP is not appropriate when old/other MRPs were also prevailing in pre-rate reduction period.

Therefore, approach (a) where Weighted Average Base Price of the product having same description with all the MRPs is the correct approach to be adopted for pre-rate reduction base price to address the issue of adopting old MRP/first line item. Following the approach as per (a) above, and adopting weighted average base price of Rs. 224.12/-, the profiteering amount will reduce by Rs. 4,83,997/- resulting into revised profiteering of Rs. 23,97,818/- [Rs. 28,18,815/- (-) Rs. 4,83,997/-] for the State - Delhi General Trade.

Therefore, considering the approach (a), the total profiteering amount will get reduced by Rs. 19,75,12,265/- as against the amount of Rs. 30,51,84,398/- claimed by the Respondent, for approach (c).

(ii). Rectification of inconsistency in sequence followed for some line items: The methodology adopted by DGAP has been explained in para-22 of the Investigation Report dated 05.07.2019 read with "Summary Sheet" of Annexure-15 of the said report and diligently followed without any inconsistency wherein, it is mentioned that at first step, DGAP has compared pre-rate reduction average base price (during the period 01.10.2017 to 14.11.2017) with post-rate reduction actual base price using product codes and wherever, product codes were not found, he has used product description to compare the pre-rate reduction average base price (during the period 01.10.2017 to 14.11.2017) with post-rate reduction actual base price at step two. In similar manner, wherever, price was still not found, DGAP has used pre-rate reduction average base price (during the period 01.09.2017 to 30.09.2017) with post-rate reduction actual base price using product code at step three and used product description to compare the pre-rate reduction average base price (during the period 01.09.2017 to 30.09.2017) with post-rate reduction actual base price at step four and so on. However, due to adoption of the average base price available at *first place* in the same product (having multiple product codes), if the price was not obtained at Step-2 (due to non-availability of price in particular channel) then, DGAP has proceeded to Step-3 and so on to find the pre-rate reduction base price for computation of profiteering. Therefore, the claim made by the Respondent before the Authority that Weighted Average Base Price of the product having same description is available at step two itself has merit and accordingly the profiteering is to be revised.

However, to address the issue of following incorrect sequence for few line items identified by the Respondent due to adopting first line item, as discussed above, approach (a) where Weighted Average Base Price of the product having same description with all the MRPs is the correct approach which was adopted for pre-rate reduction base price and accordingly, the total profiteering will further reduce by an amount of Rs. 4,80,88,937/- as against Rs. 5,28,32,173/- claimed by the Respondent, for approach (c).

(iii). Adoption of average price of description wherever comparable product code is used: In addition to the steps mentioned in point (ii) above, where after applying step four, pre-rate reductions prices were still not found, DGAP proceeded to step five & six, where comparable product were used (having minor difference in description and having different product code) to compare the average pre-rate reduction base prices *(arrived by dividing the total taxable value by total quantity sold)* during the period 01.10.2017 to 14.11.2017 and during the period 01.09.2017 to 30.09.2017 respectively. Respondent has mentioned one such instance of having sold product GN MEN Acnofight FW 50 ml with product code SYMAF050-70 at a per unit price of INR 61.93 (excluding GST). Since, the said product code or sale of that description was not available in pre-rate reduction period, DGAP has mapped product code SYMAF050-00 (having product description AcnoFight Face wash 50 ml) as comparable whose pre-rate reduction price was INR 53.92 (excluding GST) and accordingly computed a profiteering of INR 8.01 p.u. (excluding GST) or Rs. 9.45 p.u. including GST.

The Respondent has submitted the details of pre-rate reduction prices of the product code SYMAF050-00 having product description AcnoFight Facewash 50ml as also details of other product codes having same product description which are furnished in table below:

S.No.	Product Code	Product Description	HSN	MRP	Quantity	Taxable Amount	Average Price
3626	SYMAF050-00	AcnoFight Face wash 50ml	33049990	85	3,096	166,926	53.92
3627	SYMAF050-30	AcnoFight Face wash 50ml	33049990	95	210	12,655	60.26
3628	SYMAF050-40	AcnoFight Face wash 50ml	33049990	99	1,96,034	1,21,84,724	62.80
		Total			1,99,340	1,23,64,305	62.03

Further, in case one product having same description is sold in multiple product code, then DGAP has adopted the average base price available at *first place* in the same product. The same has happened due to the proprietary of VLOOKUP function (used to lookup a value in a table by matching on the first column) in MS-Excel, which in case of duplicate values, finds the *first match* when the match mode is exact.

However, the Respondent contented that if the aforesaid product code SYMAF050-00 having product description AcnoFight Face wash 50 ml is a correct comparable, then all the other products viz. SYMAF050-30 and SYMAF050-40 having the same description AcnoFight Face wash 50 ml should also be considered as correct comparable and accordingly, the average price of all the codes having the same comparable description must be considered instead of considering the price of 1 product code alone.

The above contention of the Respondent has merit and as already discussed in detail in point- (i) above, considering the approach (a) where Weighted Average Base Price of the product having same description with all the MRPs is adopted for pre-rate reduction base price, the total profiteering will further reduce by an amount of Rs. 5,18,75,235/- as against Rs. 5,72,41,346/- claimed by the Respondent, for approach (c).

(iv) Benefit of rate reduction passed on by increasing the grammage/volume of the products: The concern raised by the Respondent has already been addressed in para-14 & 17 of Investigation Report dated 05.07.2019 which is re-produced below:

> *"14. Before enquiring into the allegation of profiteering, it is important to examine Section 171 of the Central Goods and Services Tax Act, 2017 which governs the anti-profiteering provisions under GST. The said Section 171(1) reads as "any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices." Thus, the legal requirement is abundantly clear that in the event of benefit of input tax credit or reduction in rate of tax, there must be a commensurate reduction in the prices of the goods or services supplied. Such reduction in price can only be in terms of money, so that the final price payable by a recipient gets reduced commensurate with the reduction in the tax rate or benefit of input tax credit. This is the only legally prescribed mechanism to pass on the benefit of input tax credit or reduction in the rate of tax under the GST regime and there is no other method which a supplier can adopt to pass on such benefits.*
>
> *17. As the provisions contained in Section 171 of the Central Goods and Services Tax Act, 2017 do not provide for any means of passing on the benefit of reduction in the rate of tax or benefit of input tax credit other than by way of commensurate reduction in price, the claim of the Respondent that they had passed on the benefit of GST rate reduction on certain SKUs by increasing the quantity or grammage of the product while maintaining the earlier pre-rate reduction MRP of such SKUs, is also not acceptable."*

4.8 As per directions of the Authority contained in para-103 of aforesaid I. O. No. 05/2020 dated 03.01.2020, the documents submitted by the Respondent regarding his claim of passing on the benefit of reduction in rate of tax by increasing the grammage/volume were examined and it was observed that there were formula errors in three columns viz. Column-BA "Commensurate Base Price with Grammage including GST", column-BB "Grammage Benefit-Gross" and column-BC "Grammage Benefit-Net restricted to Alleged Profiteering incl. GST". However, on specific pointing out, the Respondent revised and corrected only two columns i.e. column BB & BC. Therefore, the formula error in Column-BA "Commensurate Base Price with

Grammage including GST" remains in the 2 files submitted by the Respondent vide his e-mail dated 22.08.2020. The same was examined and corrected by DGAP in his working sheets.

Accordingly, considering the approach (a) where Weighted Average Base Price of the product having same description with all the MRPs to be adopted for pre-rate reduction base price (as discussed above, the Respondent has passed on the benefit of reduction in rate of tax by increasing the grammage/volume amounting to **Rs. 27,49,45,942/-** (restricted to profiteering amount computed at transaction level). The same was quantified on specific direction of the Authority without admitting the claim of the Respondent.

4.9 The profiteering has been computed at each transaction level (approximately 52 lakh transactions) consisting of 35 files, therefore, the detailed list of the SKUs impacted by the rate reduction w.e.f. 15.11.2017 along with the pre-rate reduction base price (Column *AS*) and the commensurate reduced base price post rate reduction (Column *AE*) with percentage increase/reduction made by the Respondent in respect of such SKU are provided in column **BF** in each 35 files of **Annex-6** of the Report.

4.10 After examining the various contentions raised by the Respondent vide letter dated 05.11.2019 before the Authority, DGAP has revised his profiteering amount to Rs. 1,86,39,57,058/- vide table-'C' in para-4 of DGAP's letter of even no. 1172 dated 23.12.2019, which is reproduced in table below:

S.No.	Particulars	Amount (in Rs.)	Remark
1.	Reported Profiteering as per DGAP's Report dated 05.07.2017 **(A)**	**2,16,49,61,535/-**	Para-22 of Report
2.	***Less:*** Rectification of non-averaging of base price where description is used for comparison (01.10.2017 to 14.11.2017 (Goods Desc.) and 01.09.2017 to 30.09.2017 (Goods Desc.)) **(B)**	**19,75,12,265/-**	Para- B(I) of letter dated 23.12.2019
3.	***Less:*** Rectification of inconsistency in sequence followed for some line items **(C)**	**4,80,88,937/-**	Para- B(II) of letter dated 23.12.2019
4.	***Less:*** Rectification of Adoption of average price of description wherever comparable product code is used **(D)**	**5,18,75,235/-**	Para- B(III) of letter dated 23.12.2019
5.	***Less:*** Exclusion of profiteering in respect of line items for which credit notes issued **(E)**	**65,20,961/-**	Para- B(IV) of letter dated 23.12.2019
6.	***Less:*** Exclusion of profiteering for sales not impacted by rate reduction **(F)**	**14,45,267/-**	Para- B(V) of letter dated 23.12.2019
7.	***Less:*** Rectification of profiteering computed in respect of Invoice No. MH1814006635 dated 22.06.2018 (G)	**1,63,882/-**	Para- B(VI) of letter dated 23.12.2019
8.	***Add:*** Rectification of inadvertent error in adopting pre-rate reduction base price from Respondent's Price List **(H)**	**46,02,070/-**	Para- 3 of letter dated 23.12.2019
Net Revised Profiteering (I)= [A-(B+C+D+E+F+G)+H]		**1,86,39,57,058/-**	

However, vide aforesaid I. O. No. 05/2020 dated 03.01.2020, the Authority sought detailed clarifications on the deductions allowed in S. No. 2, 3 & 4 above which were duly addressed in para 4.7 above.

Apart from above, the Authority directed DGAP to examine the Respondent's claim of passing on the benefit of rate reduction by increasing the grammage/volume of their products and include the findings in the fresh Report to be furnished by DGAP.

In view of the above, the place (State or Union Territory) of supply-wise break-up of the revised profiteered amount of Rs. 1,86,39,57,058/- (as per DGAP letter of even no.1172 dated 23.12.2019) and increase in grammage amounting Rs. 27,49,45,942/- is furnished in table below:

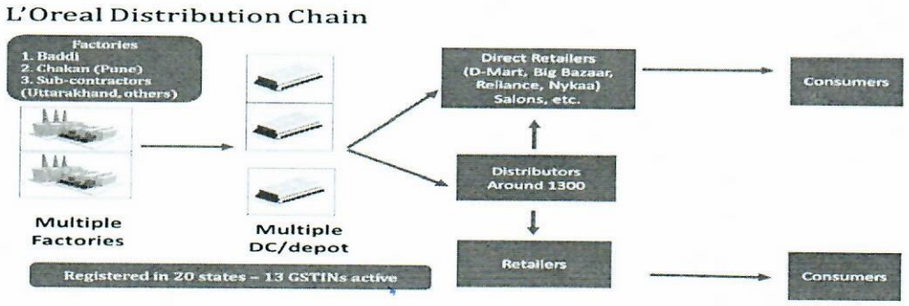
S. No.	Name of State	State Code	Revised Profiteering Amount as per Report dated 23.12.2019 (in Rs.)	Benefit passed on by increase in grammage	Net profiteering
A	B	C	D	E	F=D-E
1	Andaman & Nicobar Islands	35	7,31,376	2,27,065	5,04,312
2	Andhra Pradesh	37	1,93,23,189	42,00,193	1,51,22,996
3	Arunachal Pradesh	12	24,84,310	4,41,306	20,43,003
4	Assam	18	3,26,34,331	77,55,612	2,48,78,719
5	Bihar	10	3,30,11,667	89,07,480	2,41,04,187
6	Chandigarh	4	1,37,87,443	8,28,849	1,29,58,595
7	Chhattisgarh	22	1,74,40,804	35,78,123	1,38,62,681
8	Dadra and Nagar Haveli	26	3,16,680	84,008	2,32,672
9	Daman and Diu	25	4,96,288	1,59,447	3,36,841
10	Delhi	7	23,05,94,750	2,08,17,829	20,97,76,921
11	Goa	30	1,21,32,941	19,26,455	1,02,06,486
12	Gujarat	24	11,95,97,065	2,16,20,776	9,79,76,289
13	Haryana	6	9,58,25,575	1,12,00,203	8,46,25,372
14	Himachal Pradesh	2	77,75,294	15,95,812	61,79,482
15	Jammu & Kashmir	1	1,62,28,548	38,20,248	1,24,08,299
16	Jharkhand	20	2,33,41,894	51,08,609	1,82,33,285
17	Karnataka	29	15,40,52,967	2,06,76,923	13,33,76,044
18	Kerala	32	2,70,97,666	44,85,782	2,26,11,883
19	Madhya Pradesh	23	4,38,21,931	84,93,520	3,53,28,411
20	Maharashtra	27	37,57,54,539	3,95,11,422	33,62,43,117
21	Manipur	14	48,17,508	4,56,526	43,60,982
22	Meghalaya	17	52,45,762	9,85,463	42,60,299
23	Mizoram	15	39,27,568	3,40,460	35,87,108
24	Nagaland	13	74,20,071	17,67,448	56,52,623
25	Orissa	21	2,57,22,155	43,42,020	2,13,80,135
26	Puducherry	34	16,43,307	2,74,164	13,69,142
27	Punjab	3	8,30,45,161	1,03,17,250	7,27,27,911
28	Rajasthan	8	6,08,22,347	1,42,86,912	4,65,35,435
29	Sikkim	11	30,79,109	4,10,887	26,68,222
30	Tamil Nadu	33	6,21,10,519	99,72,842	5,21,37,677
31	Telangana	36	5,76,76,182	96,42,487	4,80,33,695
32	Tripura	16	30,93,745	8,65,260	22,28,485
33	Uttar Pradesh	9	14,22,37,365	2,84,37,729	11,37,99,636
34	Uttarakhand	5	1,42,01,632	26,02,258	1,15,99,374
35	West Bengal	19	16,24,65,370	2,48,04,575	13,76,60,795
	Grand Total		1,86,39,57,058	27,49,45,942	1,58,90,11,116

4.11 Thus, **the total profiteering amount is Rs. 1,86,39,57,508/-.** Further, on specific direction of the Authority to examine the Respondent's claim of having passed on the benefit of rate reduction by increasing the grammage/volume, though Section 171 of the Central Goods and Services Tax Act, 2017 does not provide for any means of passing on the benefit of reduction in the rate of tax or benefit of input tax credit other than by way of commensurate reduction in prices, DGAP has computed the actual increase in grammage amounting to Rs. 27,49,45,942/. In case the Authority considers the passing on benefit of rate reduction by increasing the grammage/volume, the **Net profiteering will reduce to Rs. 1,58,90,11,116/- as mentioned in table above**.

4.12 In view of the aforementioned findings, it appears that Section 171(1) of the Central Goods and Services Tax Act, 2017 requiring that *"any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices",* **has been contravened** in the present case.

5. The report dated 28.8.2020 was provided to the Respondent vide notice dated 8.9.2020 by the Authority directing him to file his reply. The Respondent vide letter dated 14.09.2020 informed that he has engaged M/s Lakshmi Kumaran and Sridharan, Attorneys to represent his case and considering the volume of the matter sought additional time of three weeks to file written submissions. The Respondent vide email dated 26.11.2020 informed that consolidated written submission along with three Annexures have been filed. During proceedings till 26.11.2020; the Respondent has filed written submission dated 14.9.2019 and 20.10.2020; and consolidated submission dated 26.11.2020. In the consolidated written submission, the Respondent, inter-alia, contended as under:-

5.1 The goods manufactured by the Respondent are distributed from the factory to customers in the following manner:



5.2 GST @ 28% (CGST of 14% and SGST of 14% or IGST of 28%) was applicable from 1.07.2017 to 14.11.2017 on most products supplied by the Respondent. The Central Government vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017 reduced the rate of CGST on many consumer goods including the goods supplied by the Respondent from 14% to 9%. Simultaneously, State Governments also issued notifications to reduce the SGST from 14% to 9% effective from 15.11.2017. The details of the products impacted by the aforesaid GST rate reduction with effect from 15.11.2017 along with the corresponding HSN codes are tabulated as under:

Category	Product	HSN	Impacted category
Hair Care	Shampoo, Conditioner, Serum etc.	3305	Yes (except Hair Oil)
Hair Color	L'Oréal Paris, Garnier	3305	Yes
Skin Care	Cream	3304	Yes
Make Up	Kajal, Maybelline, etc.,	3304	Yes (except Kajal)
Luxury Products	Giorgio Armani, Diesel, etc.	3303	Yes

The above portfolio of products is supplied by the Respondent under different brands and in different sizes and forms. Each type of such products is identified as a Stock Keeping Unit (SKU) and at the time of GST rate reduction the Respondent was supplying several SKUs. The Respondent is engaged in the manufacture and sale of more than 12,000 such SKUs under 5 major categories which are tabulated above.

5.3 The Respondent was supplying the above said products to more than 1,300 customers grouped under the following categories:

(i) General Trade (GT) (Distributors)
(ii) Modern Trade (MT)
(iii) E-Commerce Platforms
(iv) Canteen Stores Department (CSD), CPC, etc.

The above said products were either manufactured by the Respondent at his factories located in Baddi and Chakan (Pune) or by his contract manufacturers. The Respondent also imports goods from outside India. Customers of the Respondent either directly sell to the consumers or further sell to other wholesalers and distributors in the market and products eventually reaching the consumers through a chain of such distributors, wholesalers and retailers.

With several hundreds of SKUs being impacted by the GST rate change, execution of any price change due to such tax rate reduction needed to be carried out after taking into account the requirements of the Legal Metrology law and also business considerations to avoid massive business disruption and confusion among customers and consumers.

5.4 Effective from 15.11.2017, the Respondent has charged GST at the applicable rate of 18% on the invoices issued for supply of the above said goods to his recipients thereby fully complying with GST laws including Section 171 of Central Goods and Services Tax Act. As the Respondent was required to pass on the benefit of reduction in rate of tax in terms of Section 171 of CGST Act, the Respondent undertook the following measures to pass on such benefit to his recipients:

Date	GST Rate Reduction Execution Plan - Efforts and measures taken by L'Oréal for passing on the GST benefits to its recipients
10.11.2017	GST rate reduction was announced in the GST Council meeting held in Guwahati.
14.11.2017	A notification was issued to implement the decision of GST Council and made effective from 15th November 2017. Accordingly, all system changes were successfully implemented by the Respondent on the midnight of November 14th to fully comply with the law and the Respondent charged the revised GST rate of 18% for all

Date	GST Rate Reduction Execution Plan - Efforts and measures taken by L'Oréal for passing on the GST benefits to its recipients
	supplies made effective from November 15, 2017.
10.11.2017 to 30.11.2017	The Respondent prepared the plan immediately from the date of issue of notification to pass the net commensurate benefit through combination of price reductions in majority of the cases and by way of increase in quantity in respect of three product lines (shampoo, conditioner and colour naturals) considering the nature of SKUs, free higher grammage and higher post supply price reduction (discounts). The Respondent communicated the price reduction plan to its recipients from November 2017 onwards and also educated them of their obligations to ensure they further pass on the net benefits arising from GST rate reduction to their customers to ensure that the benefits reach the end consumers. The Respondent allowed price claims to the customers for the supplies made by the customers at reduced prices after GST rate reduction. The Respondent had advised the recipients to submit claims for this purpose to compensate them for the higher prices paid after GST rate reduction. The Respondent also ensured mass awareness about price reductions by publishing advertisements in leading newspapers. Thus, the Respondent made all efforts to communicate to its recipients through its huge and robust marketing and sales department to ensure that reduced MRP is effectively implemented in the market. L'Oréal also ensured that retailers communicate reduced prices to the end consumers by way of display at stores.
Jan 2018 Onwards	The process of MRP change as well as increase in grammage on packs started in November 2017 itself, and as the old MRP printed inventory was phased out and the fresh stock with reduced MRP on artwork became ready, it started to hit shelves from January 2018 onwards. The Respondent reduced the prices on invoices issued to its recipients commencing January 2018 onwards for majority of products, and also increased grammage for some. The Respondent offered discounts in the form of post supply price reductions till the time MRP reduction or higher grammage was given.

From the above facts it is clear that the Respondent took all possible steps to pass on the benefit arising from the reduction of rate of tax. It is further submitted that there was no guideline at that point of time (even now) as to how to pass on the GST benefit to the recipients. Non issuance of guidelines will no doubt lead to arbitrariness. Since, reduction in MRP of the SKU involves various steps, the same could not have been reduced overnight after issuance of notification for reduction of rate of tax.

5.5 While the DGAP's present finding is that the Respondent has profiteered by INR 186.40 crores (incl. GST on alleged profiteering amount), the Respondent has in fact passed on about INR 276.48 crores, which is INR 90.08 crores more than the profiteering alleged by the DGAP. The summary of benefit passed on by the Respondent is tabulated below:

Sl. No.	Particulars	Amount (INR in crs.)
1	Post-supply discount due to GST rate reduction	73.59
2	Increase in grammage (restricted to alleged profiteering) (as per Respondent 's approach (c))	26.96
3	Zeroing due to higher price reductions, increased grammage and area-based incentive	139.98
4	Increase in Customs Duty	19.19
5	Reduction in budgetary support	16.76
Total		276.48

5.6 The conclusions drawn in report Under Rule 133(4) of the CGST Rules dated 28.08.2020 i.e. 2nd DGAP report are incorrect and are devoid of legal merits. The Respondent has not retained any benefit from the reduction in rate of GST and hence has not profiteered. Therefore, the Respondent does not agree with the conclusions drawn by the DGAP and challenges the 1st and 2nd DGAP report on the following grounds which are independent and without prejudice to one another. The detailed submissions are mentioned in the subsequent paragraphs.

5.7 Vide this written statement, the Respondent submits the following:

i. Preliminary objections - The time limit for passing of order in the case of the Respondent has already expired and hence the proceedings are barred by limitation.

ii. The methodology adopted by DGAP of comparing the average price pre-rate reduction with actual price post-rate reduction is not equitable comparison, is erroneous, without logical reasoning and requires reconsideration. The methodology adopted by the Respondent should be considered as correct.

iii. Submissions of the Respondent on grounds A to S provided below need to be considered

5.8 Preliminary objections of the Respondent

5.8.1 In terms of rule 133(1) of the CGST Rules, the Authority is required to determine whether the registered person has passed on the benefit of reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, within six months from the date of the receipt of report from the DGAP. Further, the Authority has powers to seek clarifications from DGAP u/r 133(2A) and also refer the matter to DGAP to cause further investigation or inquiry in accordance with the provisions of the Act and the rules, if the Authority is of the said opinion that further investigation or inquiry is required.

5.8.2 Additionally, rule 133(5)(a) of the CGST Rules provides that if the Authority, after receiving report from DGAP, has reasons to believe that there has been contravention of the provisions of section 171 in respect of goods or services or both other than those covered in the said report, it may for reasons to be recorded in writing direct the DGAP to cause investigation or enquiry with regard to such other goods or services or both, in accordance with the provisions of the Act and the rules. Rule 133(5)(b) provides that this investigation shall be

deemed to be a new investigation or enquiry and all the provisions of rule 129 shall mutatis mutandis apply to such investigation or enquiry.

5.8.3 The effect of rule 133(5)(b) creating a deeming fiction of considering it as a new investigation or enquiry and applying all the provisions of rule 129 mutatis mutandis to such investigation or enquiry is that a fresh time limit of 6 months (with further extension of 3 months if granted by NAA) becomes available to the DGAP to furnish its report u/r 129(6) of the CGST Rules, and accordingly, the Authority has a time of 6 months from the date of receipt of report from DGAP to decide the matter in terms of rule 133(1) of the CGST Rules.

5.8.4 Unlike rule 133(5)(b) of the CGST Rules which deems the investigation/enquiry as a new investigation / enquiry, no such provision exists in rule 133(4) of the CGST Rules. The rule making authority has consciously distinguished a further investigation u/s 133(4) from a new investigation u/r 133(5). The rule making authority has picked up rule 133(5) and provided that a fresh time limit will be available for the new investigation. The same has not been done for rule 133(4). This implies that the fresh time limit is not available u/r 133(4). As a consequence of this, the fresh time limit available to a new investigation is not available to a further investigation u/r 133(4), and that the further investigation u/r 133(4) needs to be completed and final order of the NAA needs to be passed within the overall time limit of 6 months from the date of receipt of original report of DGAP provided in rule 133(1).

5.8.5 Every time an order is passed by the NAA u/r 133(4) of the CGST Rules, if a fresh time limit is made available to DGAP to furnish report based on further investigation to be carried out by it and for NAA to pass an order, it will lead to a situation where the proceedings will not attain finality at any point of time and will lead to a situation of ever-greening, which cannot be permitted. Prolonging the time period permitted for investigations is likely to result in adverse impact. The Respondent submits following dates and events which are relevant to its facts:

Sl. No.	Events	Date
1	Report furnished by DGAP	05.07.2019
2	Personal Hearing before NAA	30.08.2019, 01.10.2019, 30.10.2019, 27.12.2019 and 01.01.2020
3	Written submissions filed by Respondent	Filed on 30.07.2019, 13.09.2010, 24.10.2019, 05.11.2019, 27.12.2019 and 02.01.2020
4	Interim Order No. 5/2020 passed by NAA	03.01.2020
5	Report by DGAP after further investigation u/r 133(4)	28.08.2020
6	NAA notice subsequent to report by DGAP after further investigation u/r 133(4) – fixing date of hearing as 28.02.2020	07.09.2020

5.8.6 Since the DGAP furnished its original report to NAA on 05.07.2019, the NAA is required to pass a final order within 6 months from 05.07.2019, that is by 04.01.2020, after carrying out the entire process, including further investigation by the DGAP u/r 133(4), if required.

5.8.7 Since the time limit has already expired, the entire proceedings are barred by limitation and need to be set aside on this ground alone.

5.8.8 Hon'ble Supreme Court in ***L. Chandra Kumar v Union of India*** reported at **(1997) Supreme Court Cases 261**, has held that the Tribunals shall act as the only courts of first instance in respect of areas of law for which they have been constituted. No additional time limit is available in respect of further investigation u/r 133(4) and that the order needs to be

passed within the time limit from the report as furnished by the DGAP u/r 129(6). The relevant portion of the judgment is extracted below:

> *"93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the views of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned."*
>
> (emphasis supplied)

5.8.9 The guidelines issued by NAA vide File No. Admn (NAA)/P&M/81/2019/ dated 04.10.2019 specify in para 10 that the Reports submitted by the Director General of Anti-profiteering under Rule 133(4) shall be construed to be fresh Reports for the purpose of Rule 133(1).

5.8.10 Para 10 of the Authority's guidelines dated 04.10.2019 treating report u/r 133(4) (in respect of further investigation) as a fresh report will tantamount to amendment in rule 133(4) on the lines of rule 133(5), which the Authority cannot do as the power to amend rules is available only vest with the Central Government.

5.8.11 Rule 133(4) provides for a further investigation by DGAP as opposed to a clarification in terms of rule 133(2A). Pursuant to the Respondent 's submissions filed on 05.11.2019, the NAA had forwarded the submissions to DGAP. Further, the Authority also directed the DGAP to submit clarifications u/r 133(2A) on the objections raised by the Respondent, which was furnished by the DGAP on 11.12.2019 and 23.12.2019. Thus, it can be seen that clarifications were sought from the DGAP u/r 133(2A) but since the DGAP did not give its clear cut findings, as observed by the Authority in Para 101 of its order dated 03.01.2020, the Authority stated that it could not pass a reasoned order and accordingly directed the DGAP to cause further investigation on the issues and furnish a fresh report u/r 133(4). However, from the points referred for further investigation, it can be seen that these are nothing but the Respondent's objections for which clarification u/r 133(2A) was sought earlier. The Respondent submits that a further investigation u/r 133(4) stands in distinction from a clarification u/r 133(2A). The DGAP not providing clarifications sought for by the Authority u/r 133(2A) does not grant powers to the Authority to direct the DGAP to carry out further investigation u/r 133(4) with respect to the very same objections raised by the Respondent . Therefore, the Respondent submits that the interim order dated 03.01.2020 is nothing but a direction seeking clarifications from the DGAP u/r 133(2A). In light of the above submissions, the Respondent submits that the time limit for

passing of order by the Authority has already lapsed, and any order passed in the present case will be completely barred by time. It is submitted that in a proceeding between the Respondent and DGAP as adversary, if the DGAP has not provided reasons or clarifications, the NAA should draw adverse inference against the DGAP. Instead, in the present case, the DGAP has been granted additional time to provide clarifications on the subject which ought not to be in accordance with the law.

5.9 The methodology adopted by DGAP of comparing the average price pre-rate reduction with actual price post-rate reduction is not equitable comparison, is erroneous, without logical reasoning and requires reconsideration. The methodology adopted by the Respondent should be considered as correct.

5.9.1 Neither the CGST Act nor the CGST Rules provide for methodology by which benefit of reduction in rate of tax needs to be passed on. In the absence of any prescribed methodology, the Respondent passed on the benefit in following manner:

(i) Post-supply price discounts on account of GST rate reduction
(ii) Reduction in prices and MRP of products
(iii) Increase in grammage

5.9.2 While considering the above methods of passing benefit, the Respondent followed entity level approach, thereby allowing higher price reductions/ higher increase in grammage on some SKUs which would be offset against other SKUs.

5.9.3 Further, the Respondent had to adjust losses on account of various factors while arriving at the benefit required to be passed on. Such losses include reduction in budgetary support due to reduction in GST rate from 28% to 18%, increased Customs Duty. If all the above factors are considered, the Respondent has passed on a total benefit of **INR 276.48 crores**, which is way more than the total profiteering of INR 186.40 crores alleged by the DGAP in its report dated 28.08.2020.

5.9.4 The method of taking average prices pre-rate reduction and comparing them with actual individual sale prices (from the invoice) post GST rate reduction is on the face of it an inequitable comparison, is incorrect, is without any logical reasoning and not applicable to the facts of the Respondent. This methodology is bound to produce not actual but distorted picture of the pre and post- GST rate reduction prices. The Respondent submits that its prices to various customers even within the same channel (e.g. distributors, modern retail customers) may vary from time to time, based on commercial considerations.

5.9.5 When the above methodology was applied by the DGAP on products not impacted by GST rate reduction, profiteering was getting computed even on those products. In this regard, reference shall be made to the DGAP's report dated 05.07.2019 and subsequent Respondent's submissions dated 04.11.2019). Thus, it shows that the methodology adopted by the DGAP is flawed, incorrect and inflates the profiteering amount without any basis. Though the DGAP has in its 2nd report excluded non-impacted products, this shows that there is a major flaw in the methodology adopted.

5.9.6 Hon'ble Delhi High Court in W.P.(C) 1780/2020 in the case of ***M/s. Johnson & Johnson Pvt. Ltd Vs. Union of India & Ors***, wherein the order passed by NAA was challenged, the High Court has passed an interim order dated 18.02.2020, taking a prima facie view that the methodology adopted by the NAA to consider average of prices pre-rate change and comparing it with specific instances of prices post the change of rates appears to be

incorrect and that the impugned order of NAA needed reconsideration. Based on this prima facie case, a stay of operation of impugned order of NAA has been granted in the said case. The relevant portion of the order passed by Hon'ble Delhi High Court is extracted below:

> *"We have heard learned senior counsel for the petitioner as well as the counsel for the respondent on the aspect of grant of interim relief. It is pointed out by learned senior counsel for the petitioner that the respondents have acted unreasonably, inasmuch, as, for the period prior to reduction of GST from 12% to nil w.e.f. 27.07.2018, the DGAP had computed the base price on average basis. However, for the period after the GST rate became nil w.e.f. 27.07.2018, the base price has been worked out item by item. Our attention has been drawn to the tabulation filed by the petitioner before the DGAP, which shows that in respect of several items sold by the petitioner, after the reduction of GST to nil, the price actually fell, however, while computing the profiteered amount; such cases have been excluded from consideration. Prima facie, it appears to us that the impugned order needs consideration and the petitioner has been able to make out a strong case for grant of interim relief.*
> *Till the next date, we stay the operation of the impugned order. List on 24.09.2020.*
>
> *No penalty proceedings shall be initiated against the petitioner in the meantime."*

5.10 Without prejudice to the preliminary objections as above and the Respondent's submissions regarding the methodology adopted by it, and the incorrect methodology adopted by DGAP, the Respondent makes following submissions as per grounds A to S:

GROUNDS

A. PERIOD ADOPTED FOR INVESTIGATION IS ARBITRARY

(a) Period covering about 14 months not having statutory basis

(b) FMCG business, in which the Respondent operates, is very dynamic and periodic price revisions are undertaken considering the impact of various factors such as cost, competition, market situation, outlook etc.

(c) Pricing of product is primarily based on expenses incurred and therefore, increase in costs ought to have been considered

B. BASE PRICE DISCREPANCIES RESULTING IN INFLATED ALLEGED PROFITEERING CALCULATION BY DGAP

C. BENEFITS PASSED ON TO RECIPIENTS BY WAY OF PRICE REDUCTION POST SUPPLY NOT CONSIDERED

(a) Discounts are admissible deductions

(b) Passing of benefit by way of price reduction post supply of goods is reduction in price in monetary terms

D. GST RATE REDUCTION BENEFIT PASSED ON BY WAY OF INCREASED QUANTITY (HIGHER GRAMMAGE) ON CERTAIN SKUs NOT CONSIDERED BY DG

E. IMPACT OF CUSTOMS DUTY INCREASE ON PRICING NOT CONSIDERED BY DG

F. ALLEGED PROFITEERING CANNOT BE IN EXCESS OF GST RATE REDUCTION

G. HIGHER BENEFIT PASSED ON IN RESPECT OF CERTAIN SKUs NOT CONSIDERED -

H. LOSS DUE TO REDUCED FISCAL INCENTIVES UNDER BUDGETARY SUPPORT SCHEME TO BE CONSIDERED.

I. PROFITEERING SHOULD NOT BE COMPUTED FOR LUXURY PRODUCTS

J. ALLEGED PROFITEERING AMOUNT HAS BEEN INCORRECTLY INFLATED BY ADDING GST AND THE SAME IS NOT SUSTAINABLE.

K. INTERPRETATION OF SECTION 171 OF CGST ACT BY THE DGAP IS NOT CORRECT

L. AMOUNT, IF ANY, HELD AS PROFITEERED, CAN BE REFUNDED TO RECIPIENTS

M. MANUFACTURER IS NOT UNDER LEGAL OBLIGATION TO AFFIX STICKERS FOR CHANGE OF MRP ON THE GOODS LYING IN DISTRIBUTION CHAIN.

N. IN THE ABSENCE OF ANY PRESCRIBED METHODOLOGY IN THE CGST ACT TO CALCULATE PROFITEERING OR IN THE CGST RULES OR IN THE PROCEDURE PRESCRIBED BY NAA, THE PROCEEDINGS ARE ARBITRARY AND LIABLE TO BE DROPPED.

O. IN THE ABSENCE OF ISSUANCE OF SHOW CAUSE NOTICE, PROCEEDINGS INITIATED ARE IN VIOLATION OF PRINCIPLES OF NATURAL JUSTICE.

OTHER LEGAL GROUNDS

P. IN ABSENCE OF A JUDICIAL MEMBER, THE CONSTITUTION OF THE NAA IS UNCONSTITUTIONAL

Q. SECTION 171 OF THE CGST ACT AND THE RULES MADE THEREUNDER ARE UNCONSTITUTIONAL BEING VIOLATIVE OF ARTICLE 14 & 19(1)(G) OF THE CONSTITUTION OF INDIA.

R. RULES 126, 127 AND 133 OF THE CGST RULES SUFFER FROM THE VICE OF EXCESSIVE DELEGATION.

S. NON-PRESCRIPTION OF ANY METHODOLOGY OR GUIDELINES RENDERS THE INVESTIGATION REPORT UNSUSTAINABLE.

A. PERIOD ADOPTED FOR INVESTIGATION IS ARBITRARY

A.1 The period covered under the investigation is from 15.11.2017 to 31.12.2018. However, the report is silent about the period till when the Respondent will be investigated for alleged profiteering, if any. This can lead to an inference that in the absence of any specified time period, increase in the price, if any, undertaken by the Respondent will be considered as profiteering till the time Respondent is in business. Such exercise is contrary to the true intent and spirit of the anti-profiteering provisions contained in the CGST Act which by their very essence are transitionary in nature and therefore, cannot be applied in perpetuity.

A.2 The methodology adopted for calculating the reduction in price and MRP required to be adopted was as follows, which was submitted before the DGAP:

a. To compute the taxes forming part of MRP in the pre-GST regime and under GST regime @ 18%, and to reduce the MRP to the extent required to maintain similar level of MRP less taxes in the supply chain, i.e. by comparing pre-GST MRP less taxes with MRP less taxes @ 18% GST.
b. Tax cost considered in GST regime was GST @ 18% embedded in MRP (less budgetary support, if any, for products manufactured in Baddi). Tax costs considered in pre-GST regime were VAT, excise duty/CVD on finished/imported products, excise duty/service tax on inputs/input services in case of products manufactured in Baddi plant (as no credit was available due to area-based exemption, no credit was available), octroi, service tax credit reversal on account of traded products, etc. Calculations were made at product level after factoring in the factual position on

bifurcation of products into those manufactured in area-based exemption plant (Baddi), those manufactured in excise-duty paying plant (i.e. Pune) and imported products.

c. Comparison was made between pre-GST and GST @ 18% instead of GST @ 28% and GST @ 18%, as there was increase in effective rate of tax during the implementation of GST as on July 1, 2017 compared to that under the pre-GST regime, which was not fully factored in by way of increased prices when the GST rate became 28%. Accordingly, in most cases, the reduction in MRP required worked out to be less than 7.8%, which was undertaken after rounding off to the nearest multiple using business sensitivities. In some cases where the price increase between 1st July 2017 and 14th November 2017 had fully factored the additional cost, reduction was made at full 7.8% of MRP.

A.3 The above exercise was carried out in November and December 2017 and the new MRP and prices were given effect to in production from January 2018 onwards. Once the MRP was revised by the Respondent considering the above factors and also taking into consideration various other commercial factors affecting the pricing and MRP of the products, it should be considered as a conscious effort on the part of Respondent to pave the way for new prices to be charged for products sold by the Respondent . Since the production of these goods with new MRP came into effect from January 2018, the sale of these products would have started by around January/February/March 2018.

A.4 In a number of instances, the Authority has passed orders covering period of investigation of 2 to 5 months, as follows:

Period of investigation adopted is arbitrary

- Period of investigation – 15th November 2017 to 31st December 2018 – extending over 14 months is arbitrary

Orders passed by National Anti-Profiteering Authority (NAA)			
Party	Order Number and Date	Period covered	Duration
Sharma Trading Company	6/2018 dated 7.9.2018	15.11.2017 to 31.1.2018	3 months
Hardcastle Restaurants (McDonald's)	14/2018 dated 16.11.2018	15.11.2017 to 31.1.2018	3 months
Unicharm India Pvt. Ltd.	43/2019 dated 28.6.2019	27.7.2018 to 30.9.2018	2 months
Excel Rasayan Pvt. Ltd.	2/2019 dated 16.1.2019	15.11.2017 to 31.3.2018	5 months
Harish Bakers & Confectioners	17/2018 dated 7.12.2018	15.11.2017 to 31.3.2018	5 months

A.5 The period of investigation should be restricted to a shorter period.

A.6 While in various investigations, the period of investigation adopted was 2-5 months, in the present case of Respondent , the period adopted is almost 14 months, which is discriminatory and hence violative of Article 14 of the Constitution of India. Hon'ble Supreme Court in the case of **S.G. Jaisinghani vs. Union of India & Ors. (1967) 2 SCR 703**, wherein the following was held:

> *"14. In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should now where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the Rule of law. (See Dicey – Law of the Constitution – 10th Edn., Introduction ex). "Law has reached its finest moments," stated Douglas, J. in United States v. Wunderuck,*

"when it has freed man from the unlimited discretion of some ruler.... Where discretion, is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield slated it in classic terms in the case of John Wilkes, "means sound discretion guided by law. It must be governed by Rule, not by humour: it must not be arbitrary, vague and fanciful"."

(emphasis supplied)

Further, the Respondent has also placed his reliance on the case of **Maneka Gandhi** in his rejoinder dt. 30.12.2019.

B. BASE PRICE DISCREPANCIES RESULTING IN INFLATED ALLEGED PROFITEERING CALCULATION BY DGAP

B.1 The Respondent vide its submissions dated 04.11.2019 pointed out various mistakes in DGAP's computation and provided detailed submissions along with illustration. It was further submitted that if the said mistakes are rectified and Respondent 's submissions are accepted, the profiteering will reduce by INR 42.33 crores, a break-up of which was provided as follows:

Sl.No.	Particulars	Amount (Rs. in Crores) (considering weighted average price of latest MRP)
	Base price discrepancies resulting in inflated alleged profiteering calculation by DGAP	
1	Non-averaging of base price where description is used for comparison (01.10.2017 to 14.11.2017 (Goods Desc.) and 01.09.2017 to 30.09.2017 (Goods Desc.))	30.52
2	Rectification of inconsistency in sequence followed for some line items	5.28
3	Adoption of average price of description wherever comparable product code is used	5.72
4	Above figures are based on adoption of weighted average of prices of products with latest MRP instead of weighted average of all products (Annexure 1 & Annexure 2 in CD submitted on 25.10.2019):	
5	Calculation of profiteering in respect of line items for which credit notes issued (based on DG computation)	0.65
6	Computation of profiteering for sales not impacted by rate reduction (based on DG computation)	0.14
7	Incorrect quantity in 1 line item of sale (Annexure 1 & Annexure 4 in CD submitted on 25.10.2019) has been rectified	0.02
	Total	42.33

B.2 The DGAP considered the above submissions in his reply dated 23.12.2019 and the Respondent provided clarification vide his rejoinder submissions dated 30.12.2019. The Authority in its order dated 03.01.2020 noted that the DGAP left the rectification of the claims made by the Respondent on the Authority without mentioning the grounds on the basis of which the Authority can decide as to why the recommendations of the DGAP should be accepted. Accordingly, the DGAP was directed to cause further investigation u/r 133(4) and furnish fresh report.

B.3 The DGAP in his report dated 28.08.2020 has accepted the computation error and deducted the amount for Sl. No. 5 to 7 as submitted by the Respondent. However, as regards Sl. No. 1 to 3 of the above table, the DGAP has stated that the benefit can be allowed only to the extent of INR 29.75 crores, break – up of which is as follows:

Sl.No. of DGAP report	Particulars	Amount (Rs. in Crores) as allowed by DGAP	Amount (Rs. in Crores) as submitted by Respondent
2	Rectification of non-averaging of base price where description is used for comparison (01.10.2017 to 14.11.2017 (Goods Desc.) and 01.09.2017 to 30.09.2017 (Goods Desc.))	19.75	30.52
3	Rectification of inconsistency in sequence followed for some line items	4.81	5.28
4	Adoption of average price of description wherever comparable product code is used	5.19	5.72
	Total	29.75	41.52

B.4 The difference in amounts is due to the difference in methodology adopted by the DGAP and the Respondent, which can be explained with the below illustration taken from the DGAP report.

B.5 For instance, the Respondent was selling product Majirel (New) Shade No. 4 in the pre-rate reduction period under 2 different MRPs, which was as follows:

S. No.	Product code	Product description	HSN	MRP	Quantity	Taxable Amount	Average price
2439	MRCIP400-70	MAJIREL (NEW) SHADE NO. 4	33059040	310	73,906	163,20,873	220.83
2440	MRCIP400-80	MAJIREL (NEW) SHADE NO. 4	33059040	335	30,465	72,70,227	238.64
Total					1,04,371	2,35,91,101	226.03

B.6 While calculating the alleged profiteering, the DGAP compared the actual invoice-wise selling price post GST with the pre-rate reduction price. However, although DGAP had mentioned that the average price pre-rate reduction was compared, the Respondent pointed out that the price at the first line item (i.e. Sl. No. 2439 having price of INR 220.83) was adopted by the DGAP instead of the average price of all the products. The DGAP has rectified the computation based on the submission of the Respondent and has adopted INR 226.03 as the pre-rate reduction price, based on approach (a) considered by the DGAP, i.e. Weighted Average Base Price of the product with same description with all the MRPs.

B.7 While the Respondent appreciates the DGAP's acceptance of mistake in computation, the Respondent further submitted that even INR 226.03 should not be adopted as the pre-rate reduction price, and that the DGAP may adopt the following price:

i. Average Base Price of the product with latest MRP of the latest product code introduced immediately prior to rate reduction [Approach (b)]

ii. Weighted Average Base Price of the products with latest MRP prevailing in pre-rate reduction period [Approach (c)]

B.8 The DGAP has stated that Approach (b) and (c) cannot be adopted for the reason that the product was being sold at 2 MRPs even pre-rate reduction and none of the MRPs had become obsolete. In this regard, the Respondent submits that the understanding of the DGAP is not correct. In an FMCG industry, when the MRP of a particular product changes, there is a possibility that products with the previous MRP are still in the stock in hand and these continue to be sold at the price as per previous MRP only. For instance, the Respondent was selling product description GAR COL NAT SHADE 1 with following 5 MRPs pre-rate reduction (also forming part of Respondent 's presentation during hearing before the Authority on 30.10.2019):

Base Prices used for comparison of certain SKUs incorrect

Lakshmikumaran & Sridharan attorneys exceeding expectations

- Weighted average price : INR 123.44
- Average of latest MRP : INR 123.48

						General Trade		
S.No.	Goods Code	Goods Description	HSN	MRP	Date of Creation	Quantity	Taxable Amount	Average Price
425	CNCFR100-9B	GAR COL NAT SHADE 1	33059040	175	29-Nov-16	1,116	127,199	113.98
426	CNCFR100-A0	GAR COL NAT SHADE 1	33059040	180	24-May-17	2,267	265,770	117.23
427	CNCFR100-B0	GAR COL NAT SHADE 1	33059040	190	7-Jul-17	68,763	8,478,331	123.30
428	CNCFR100-D0	GAR COL NAT SHADE 1	33059040	190	7-Jul-17	448,600	55,435,512	123.57
429	CNCFR100-DA	GAR COL NAT SHADE 1	33059040	190	27-Sep-17	70,444	8,670,157	123.08

B.9 In the above instance, the product with price at first and second line item (Sl. No. 425 and 426) was being sold during the pre-rate reduction period (from 01.10.2017 to 14.11.2017) only for the reason that the stock already in hand as on 30.09.2017 had to be liquidated during that period. However, once the said stock was phased out, the Respondent would have sold the product at the new MRP only, as per Sl. No. 427 to 429 of the above table. The Respondent, therefore, submits that the DGAP's assumption that since the product was being sold pre-rate reduction at old MRP, the said line item also needs to be considered to compute the average price pre-rate reduction is incorrect.

B.10 The Respondent submits that the price at Sl. No. 425 and 426 above already stood revised pre-rate reduction itself. Even if there had been no rate reduction, once the stock with MRP of INR 175 and INR 180 would have been exhausted, the Respondent would sell products with revised MRP of INR 190 only. In that case, even without rate reduction, the Respondent would have sold the product in the range of INR 123.08 to 123.57 only (or higher than that, considering the said prices are average and not actual prices). The prices of INR 113.98 and INR 117.23 had become irrelevant as far as Respondent is concerned. By including even those prices in computation of the weighted average prices, the DGAP effectively expects the Respondent to sell at such lower prices even post rate reduction. The Respondent submits that it is erroneous on the part of DGAP to expect the Respondent to sell at prices which have otherwise become irrelevant. It is for this reason that the Respondent requested for considering the weighted average price of products with latest MRP. In the above example, the DGAP may consider the price based on Sl. No. 427 to 429 (all 3 of which have MRP of INR 190).

B.11 In any case, the present matter is in respect of allegation of profiteering against the Respondent, and in the event that there is a possibility to compute profiteering in 2 possible manners, the manner which favours the Respondent alone needs to be considered. In the instant case, if the Respondent's submissions are accepted, the profiteering will reduce further by INR 11.78 crores, which is as follows:

Particulars	Amount of further reduction as per approach (c) (in Rupees)
Rectification of non-averaging of base price where description is used for comparison (01.10.2017 to 14.11.2017 (Goods Desc.) and 01.09.2017 to 30.09.2017 (Goods Desc.))	10,76,72,133
Rectification of inconsistency in sequence followed for some line items	53,66,111
Rectification of adoption of average price of description wherever comparable product code is used	47,43,236
Further reduction in alleged profiteering	11,77,81,480

B.12 Therefore, the Respondent requests to accept the submissions of the Respondent and reduce the profiteering by further INR 11.78 crores mentioned supra.

B.13 The DGAP has merely reiterated its stand as per report u/r 133(4) dated 28.08.2020. Further, the DGAP has referred to an illustration for product MAJIREL (NEW) SHADE NO. 4 to deny the Respondent 's submission.

B.14 In this regard, the Respondent reiterates its above submissions and submits that the method suggested by Respondent will result in a more appropriate computation of average price pre-rate reduction, as it takes into consideration those prices of the products which have been fixed closer to the reduction in rate of GST and charged to customers. The Respondent requests the Authority to accept Respondent's submissions and reduce the profiteering to the extent of INR 11,77,81,480.

C. GST RATE REDUCTION BENEFIT PASSED ON THROUGH POST-SUPPLY DISCOUNTS

C.1 As an immediate measure after the notification dated 15-11-2017 repeating the GST rates, the Respondent started giving ad-hoc post-supply discount of 5%-12.5% till such time a solution was found to pass on the benefit in respect of stocks with old MRP on pack.

C.2 The Respondent had internal meetings to analyse the pros and cons of various methods, checked the practices followed by competitors in the industry, etc., to find a way to pass on the benefit. After serious deliberations, it was felt that post-supply price reduction was the most effective manner by which this benefit could be passed on and the same was continued till the time new artwork with revised MRP became ready. The process by which Respondent granted post supply price reduction is as follows:

a. L'Oréal makes sales to its customers.

b. Customers make a further sale to their customers at a discounted price to pass on the benefit of reduction in rate of GST

c. Such discount is claimed back by customers from L'Oréal, effectively ensuring compliance for both L'Oréal and customer

Discounts are admissible deductions

C.3 The fact that implementation of reduced MRP on the package is a time-consuming process and accordingly, the same was carried out over a period of time. Till then, although MRP was not reduced on the package, the Respondent was determined to pass on the benefit to the ultimate consumers through its customers.

C.4 The Respondent introduced a system of price reduction in the form of GST discount claims, wherein sales by Respondent to its customers was at a price higher than the price which existed prior to 15th November 2017, and upon the distributor/MR selling to their customers at reduced prices communicated to them by Respondent on account of GST rate reduction, they would become eligible to claim the said GST discount from Respondent by way of claims.

C.5 As reduced MRP was not reflected on package for some time, L'Oréal chose to adopt a system of GST claim discount so that benefit reaches beyond direct customers of L'Oréal and is not retained within the supply chain. It is further submitted that direct reduction in prices of the products impacted by GST rate reduction was made once the revised MRP was reflected on package. Further, since the exercise of determining revised MRP was time-consuming and the discounts based on such revised MRP could be made effective only from January 2018, till such time that the revised MRP based GST discount claim system was in place (i.e. till December 2017), an ad-hoc discount in the range of 5% to 12.5% of the sale price of distributor/MT customers was given as GST claim discount to them.

C.6 In this regard the Respondent further submitted that the customers were aware of the post supply GST price reductions and accordingly claims were raised by them which were settled through issuance of credit notes by the Respondent after due verification. In fact, in the supply invoice issued by the Respondent to its customers, it had clearly been mentioned that considering the anti-profiteering provisions under GST, the Respondent will pass on the benefit by way of claim in respect of stock manufactured/imported with old MRP. Further, the declaration of old MRP and reduced MRP was also made on the invoice. The declaration as to post-supply discount was as follows:

> *"Considering the anti-profiteering provisions under GST, we will pass on the benefit with respect to the stock (manufactured / imported at old MRP) sold to you , post supply of such stock when made by you to the retailer / salons at the reduced price as shown above. Such benefit will be passed by way of claims. It should be ensured that the benefits should be transferred to the ultimate customer"*

C.7 The relevant declarations from the Respondent 's invoice are extracted below:

Declaration of old and reduced MRP:

ORIGINAL FOR RECIPIENT

L'OREAL INDIA PRIVATE LIMITED
Division :CPD
Address Sahi Enterprises
Begumpur Kotala Road,Behrampur Indl Estate,38th KM Mile Stone,JaipurHighway, Gurgaon 122001 Haryana
GSTIN: 06AAACL0738K1ZL

TAX INVOICE

Invoice No.: HR0017703882	Invoice Date: 23.01.2018	Date of Supply : 23.01.2018	Contact No.: 124-4779000
Billed To Name : GOVIND SALES Address : H NO 396, SEC-45, G.F, NEAR DPS PUBLIC SCHOOL, GURGAON 122001 State : Haryana GSTIN : 06AGMPB7309R1ZX OTP:	**Shipped To** Name : GOVIND SALES Address : H.NO 396, SEC-45, G.F, NEAR DPS PUBLIC SCHOOL, GURGAON 122001 State : Haryana GSTIN : 06AGMPB7309R1ZX Your Reference:	PO No. : Manual OrderP PO Date: 22.01.2018 SAP Doc. Ref. No. 0511299904 Delivery No : 311373710 Place of Supply : Haryana Place of Delivery : Haryana E-Way Bill No. : E-Way Valid Date: Vehicle No.:	Trans : LR/RR GRNo.: 4962 SAHI WAREHOUS LR/RR GR Date : 23.01.2018 Factory Packed Cases : 3 Total No of Cases : 3 Total Repacked Cases : 00000 Total Unit : 204 Total Weight : 9,547.200 G Offer Desc:

Product Code	Description of Goods	HSN Code	Print MRP (Rs/Ut)	Qty (cases)	Units	Rate (Rs/Ut)	Total Value (Rs)	Reduced M.R.P(Rs)	Taxable Value(Rs)	CGST Rate%	CGST Amount (Rs)	SGST /UTGST Rate%	SGST /UTGST Amount (Rs)
BLLCK005-51	CHERYY KISS - BERRY CRUSH	33041000	190.00	3	204	129.52	26,422.76	175.00	26,422.76	9.00	2,378.05	9.00	2,378.05

Declaration of post-supply discount:

Considering the anti-profiteering provisions under GST, we will pass on the benefit with respect to the stock (manufactured / imported at old MRP) sold to you , post supply of such stock when made by you to the retailer / salons at the reduced price as shown above. Such benefit will be passed by way of claims. It should be ensured that the benefits should be transferred to the ultimate customer

C.8 An illustrative set of documents containing the details of credit notes issued to customers along with corresponding sample credit note copies have already been submitted to the DG by the Respondent as Annexure-1 to Respondent's letter dated 19.06.2019. Further, vide e-mail dated 20.06.2019, in respect of one credit note amounting to Rs.10,15,587.31 issued by it, the Respondent has also provided the sales register of distributor to his retailers containing the GST scheme discount along with sample invoices issued by him which also provide for a declaration that the benefit is being passed on by distributor pursuant to anti-profiteering provisions, the relevant portion is extracted as under:

> ***"GST Price Reduction Declaration***
>
> *Considering the anti-profiteering provisions under GST, we are passing on the benefit of stock manufactured at old MRP sold to you. It should be ensured by you that these benefits should be transferred to the ultimate customer, by selling at the "Reduced MRP" mentioned on the invoice."*

C.9 Thus, from the above it is evident that the Respondent has passed on the benefit to its recipient by way of credit notes as required, while also ensuring that the benefits are further passed down the line even though the Respondent was not obligated to do so. Further, in respect of modern trade/e-commerce, the claim was raised by them by way of service invoices. Accordingly, it is respectfully submitted that the Hon'ble Authority may please take note of the benefit passed on by the Respondent in this manner and reckon the same while calculating the alleged profiteering in respect of supplies made by the Respondent. The total amount passed on by L'Oréal in this manner is **Rs.73.59 crores** for which the customer-wise claim document-wise details were submitted to the DG vide Annexure – 1 to letter dated 19.06.2019. The Respondent submitted that the said amount should be reduced from the alleged profiteering.

C.10 It was observed in the DGAP's Report that the documents submitted in support of the claim do not indicate that those were related to the benefit of reduction in GST rate. Also, it was observed that there was no SKU wise correlation between the claim texts appearing in the calculation and details of invoice wise outward supply submitted by the Respondent. It was also observed that the documents were for provision of advertisement, sales promotion, sponsorship and brand promotion services to the Respondent, which were subsequently reimbursed by way of credit notes issued by the Respondent. Hence, deduction of benefit passed on by way of claims aggregating to INR 73.59 crores was not allowed.

C.11 L'Oréal had, in the submissions dated 25.06.2019 to DGAP in response to his e-mail dated 20.06.2019 explained clearly with complete chain of documents for one transaction (running to more than 500 pages) as to how GST rate reduction benefit has been passed on by way of post-supply discounts to distributors and modern retail customers. L'Oréal has noted that such submissions were not considered by DGAP and in his report, he has rejected an amount of Rs.73.59 crores passed by way of such discounts on the ground that there was no one-to-one correlation between supplies made and the discounts given.

C.12 The observation of DG that there is no one-to-one correlation is a completely misplaced one. For instance, in the claim file submitted to DG for one of our customers (Delhi Trading Co.), it can be clearly seen that the discount is based on the actual sale made by distributor to retailer for a given product. For instance, the discount offered in respect of one invoice by customer to retailer for product DGL Eye Liner Studio Gel and the related claim made by the customer on L'Oréal is as follows:

C.13 Invoice shows the MRP, Reduced MRP and the Scheme Discount (Sch Disc) is calculated based on the rate per unit of product, as applicable based on difference between old and reduced MRP. Discount per unit given by customer to retailer – INR 1723.47/48 (qty.) = INR 35.91 per unit

DELHI TRADING CO
1/2, BASEMENT FLOOR, EAST
PATEL NAGAR ROAD, PATEL NAGAR,
CENTRAL DELHI, NEW DELHI 110008
PH No. 9810533112
GSTIN No. 07ANTPS1493B1ZO
State Code & Name: 07 Delhi

Billed To
PRABHA COLLECTION
KAMLA NAGAR
KAMLA NAGAR
NEW DELHI
PH No.
GSTIN No. 07AAGFP9769H1ZL
State Code & Name: 07 Delhi

Invoice No : LCBL041341701898
Invoice Dt : 11/01/2018
Salesman : ANKIT
Route : KAMLA NAGAR
Doc Ref No :

S.No	Product Description	HSN	MRP	Reduced MRP	Rate	Qty	Sch Disc	Taxable Amount	CGST/IGST %	CGST/IGST Amt	SGST/UTGST %	SGST/UTGST Amt	Net Amt
16	DGL Eye Studio Gel L	33042000	550.00	500.00	395.00	48	1723.47	17236.60	9.0	1551.29	9.0	1551.29	20339.18

Claim made by customer on L'Oréal and processed by L'Oréal

C.14 The claim made by customer on L'Oreal shows the very same invoice line item sold by customer to retailer.

Bill Date	Bill No	Retailer Name	Shipping Address	Product Code	Product Name	Sales Qty	GST Scheme Discount
11-01-2018	LCBL041341701898	PRABHA COLLECTION	KAMLA NAGAR --> KAMLA NAGAR --> NEW DELHI	DMEEL001-D0	DGL Eye Studio Gel Liner Blackest	48.0	1,723.47

C.15 The claim made by customer for the above product worked out to INR 35.91 on a p.u. basis. This is the same product sold by L'Oréal to customer which can be seen from the invoice of L'Oréal as follows:

ORIGINAL FOR RECIPIENT

L'OREAL INDIA PRIVATE LIMITED
Division :CPD
Address:DHL Supply Chain India Pvt. Ltd
Gut No.428, Mahalunge Ingle, Chakan-Talegaon Road,Chakan, Pune 410501 Maharashtra
GSTIN: 27AAACL0738K1ZH

TAX INVOICE

Invoice No.: MH0017714319	Invoice Date: 27.12.2017	Date of Supply : 27.12.2017	Contact No.: 124-4779000
Billed To Name : DELHI TRADING CO Address : 1 2, BASEMENT FLOOR, EAST PATEL NAGAR ROAD, PATEL NAGAR, CENTRAL DELHI, NEW DELHI 110008 State : Delhi GSTIN : 07ANTPS1493B1ZO OTP:	**Shipped To** Name : DELHI TRADING CO Address : 1 2, BASEMENT FLOOR, EAST PATEL NAGAR ROAD, PATEL NAGAR, CENTRAL DELHI, NEW DELHI 110008 State : Delhi GSTIN : 07ANTPS1493B1ZO Your Reference:	PO No. : OUT 2017 1600 3733 PO Date: 26.12.2017 SAP Doc. Ref. No. 0511285720 Delivery No : 311357924 Place of Supply : Delhi Place of Delivery : Delhi E-Way Bill No. : E-Way Valid Date: Vehicle No.:	Trans : BLUE DART EXPRESS LTD LR RR GRNo.: 50482731445 LR RR GR Date : 27.12.2017 Factory Packed Cases : 74 Total No of Cases : 74 Total Repacked Cases : 00000 Total Unit : 3684 Total Weight : 214,746.468 G Offer Desc:

Product Code	Description of Goods	HSN Code	M.R.P (Rs./Ut)	Qty (cases)	Units	Rate (Rs./Ut)	Total Value (Rs)	Discount Value (Rs)	Taxable Value (Rs)	IGST Rate (%)	IGST Amount
DMEEL001-D0	DGL Eye Studio Gel Liner Blackest	3304-2000	550.00	1	400	365.40	[illegible]	0.00	[illegible]	18.00	[illegible]

C.16 As can be seen from the above, there is clear correlation between the product sold by customer to retailer on which claim is made with the product sold by L'Oréal to customer. In fact, in the above invoice for the said product supplied by L'Oréal, DG has computed a p.u.

profiteering of INR 33.69. The Respondent is appalled to see that while they had done their best to pass on the benefit of rate reduction to customer and also ensure that the customer passed it on downstream, he is being accused of having profiteered by following the said methodology.

C.17 The Respondent had done the exercise of apportioning the discount given to sale line items in the outward supply sheet furnished vide submission dt. 21.06.2019 (refer Annexure-1), which has not been considered by the DG in his report.

C.18 The Respondent has passed on the claim in respect of distributors by way of issuance of credit notes post claim made by the distributors in this behalf. Such credit notes contained specific description as to the amount was for passing on GST rate reduction benefit. A screenshot of credit note issued by the Respondent to its distributor is as follows, which clearly shows that the credit note is for GST Price Reduction:

ORIGINAL FOR RECIPIENT

L'OREAL INDIA PRIVATE LIMITED
Division :CPD
Address:Navbharat Enterprise
Khasra No.70, Village saidullajab,Near Gyan Jyoti Vidhya Niketan,Saidulajaib, New Delhi 110030 Delhi
GSTIN: 07AAACL0738K1ZJ

CREDIT NOTE

Credit Note No.: CTS1700073	Credit Note Date: 16.02.2018	Date of Supply :	Contact No.: 124-4779000
Billed To Name : DELHI TRADING CO Address : 1/2, BASEMENT FLOOR, EAST PATEL NAGAR ROAD, PATEL NAGAR, CENTRAL DELHI, NEW DELHI 110008 State : Delhi GSTIN : 07ANTPS1493B1ZO	**Shipped To** Name : DELHI TRADING CO Address : 1/2, BASEMENT FLOOR, EAST PATEL NAGAR ROAD, PATEL NAGAR, CENTRAL DELHI, NEW DELHI 110008 State : Delhi GSTIN : 07ANTPS1493B1ZO Your Reference:	Purchase Order No. : CTS1700073 Purchase Order Date: 16.02.2018 SAP Doc. Ref. No. 0520382583 Delivery No : Offer Description : Place of Supply : Delhi Place of Delivery : Delhi	Trans : LR/RR/GRNo. : LR/RR/GR Date : E-Way Bill No. & Date : Factory Packed Cases : 0 Total No of Cases : 0 Total Repacked Cases : 00000 Total Unit : 0 Total Weight : 0.000

Product Code	Description of Goods	HSN Code	MRP	Qty	Units	Rate	Total Value	TDS	Taxable	CGST		SGST /UTGST	
			(Rs/Ut)	(cases)		(Rs/Ut)	(Rs)	Value(Rs)	Value(Rs)	Rate%	Amount (Rs)	Rate%	Amount (Rs)
CPDTGST	GST PRICE REDUCTION -CPD	998599	0	0	0	1,444.05	1,444.05	0.00	0.00	0.00	0.00	0.00	0.00
CPDTGST	GST PRICE REDUCTION -CPD	998599	0	0	0	4,870.91	4,870.91	0.00	0.00	0.00	0.00	0.00	0.00
CPDTGST	GST PRICE REDUCTION -CPD	998599	0	0	0	702.27	702.27	0.00	0.00	0.00	0.00	0.00	0.00
CPDTGST	GST PRICE REDUCTION -CPD	998599	0	0	0	6,177.79	6,177.79	0.00	0.00	0.00	0.00	0.00	0.00
CPDTGST	GST PRICE REDUCTION -CPD	998599	0	0	0	1,203.70	1,203.70	0.00	0.00	0.00	0.00	0.00	0.00
CPDTGST	GST PRICE REDUCTION -CPD	998599	0	0	0	412.39	412.39	0.00	0.00	0.00	0.00	0.00	0.00

C.19 In this regard, it is further submitted that the desired copies of credit notes (505 out of 12,214 credit notes) were already submitted to DGAP vide e-mail dated 25.06.2019 (in 2 parts) with a request to refer the column "Number for viewing the Documents" in the said excel file to link the excel file with the credit note copies. However, DGAP in his report has not given any finding on passing of benefits through credit notes. The said description of GST price reduction on credit note was captured once the system design for credit note was changed. Even till such time that the system design was changed, the discount was on account of GST reduction only and the same was issued by way of credit note.

C.20 This exercise has been clubbed by DGAP with the fact of invoices raised by Modern Trade (MT) customers for claiming post-supply discounts extended on account of GST rate reduction. In respect of modern trade / modern retail customers, such discounts were extended by way of settlement of invoices raised by such MT customers on L'Oréal. It is submitted that recipients of L'Oréal treated these price reductions / discounts as service in view of the fact that there were disputes under the erstwhile service tax legislation between the department and the dealers of the automobile companies who were receiving the incentives from the manufacturers

post sale. The incentive received by the dealers was considered by the department as consideration for the service provided by the dealers to the manufacturers and service tax was demanded on such incentives. In order to avoid dispute regarding future tax liability and interest thereon, if any, L'Oréal took a position to accept the claim for price reductions from the recipient with tax as it was revenue neutral, being creditable in the hands of the Respondent. The Respondent submits that the amount paid was towards price reduction, passed on by modern retail customers on account of GST only.

C.21 In this regard, the Respondent submitted that as a part of its regular trade practice, it runs various schemes for its recipients, wherein the recipient sells the goods at a reduced price to its customers and such price reduction is reimbursed to the recipient by the Respondent. This results in reduction in net realization by the Respondent from its recipients. Since the same is towards reduction in price of goods supplied earlier, the Respondent adjusts such price reductions from its sales turnover and reports only the net turnover in its books of accounts as well as Financial Statements (viz. Profit and Loss Account).

C.22 The Respondent further submitted that the said amount was over and above the normal trade discount, if any, running at the time of such sale. In fact, these discount claims which were pertaining to GST have been specifically accounted in the Respondent 's books of accounts as **"GST price reduction claims"** and the said discount was netted off against the sale of products revenue of the Respondent . In fact, the Respondent 's books of accounts have been audited and there was no objection by the auditor towards such accounting, as the said discount was purely relating to passing on the benefit of GST rate reduction.

C.23 The accounting for credit note and grouping of GST price reduction claims in the sale of products are as follows:

Claims accounted in a separate "GST Price Reduction" Account

Business partner 0001004134 DELHI TRADING CO

Document	On	Time	Status
Crd Req Financial 0140287147	16.02.2018	17:42:42	Completed
Crd Note Financial 0520382583	16.02.2018	17:45:06	Completed
Accounting document 1600025682	16.02.2018	17:45:06	Cleared

Data Entry View

Document Number	1600025682	Company Code	0462	Fiscal Year	2018
Document Date	16.02.2018	Posting Date	16.02.2018	Period	2
Reference	CTS1700073	Cross-Comp.No.			
Currency	INR	Texts exist		Ledger Group	

CoCd	...	PK	...	Account	Description	Profit Center	Amount	Curr.	Amount in LC	Cost Center	Tx	Material	Purch.Do
0462	1	11		1004134	DELHI TRADING CO		1,015,587.31-	INR	1,015,587.31-				
0462	2	40		8305021	GST PRICE REDUCTION	210199	2,225.28	INR	2,225.28			CPDTGST	
0462	3	40		8305021	GST PRICE REDUCTION	210199	4,705.21	INR	4,705.21			CPDTGST	
0462	4	40		8305021	GST PRICE REDUCTION	210199	3,824.30	INR	3,824.30			CPDTGST	
0462	5	40		8305021	GST PRICE REDUCTION	210199	2,525.70	INR	2,525.70			CPDTGST	

L'Oreal India Private Limited
Notes to the financial statements for the year ended 31 March 2018

Note No. 21 - Revenue from Operations

Rs. in millions

Particulars	Year ended 31 March 2018	Year ended 31 March 2017
(a) Sale of products	26,746.51	26,131.91

L'Oreal India Private Limited
Notes to the financial statements for the year ended 31 March 2018

Note No. 21 - Revenue from Operations

(a)	Sale of products		
Account Number	Text for B/S P&L item	Grouping	Sub - group
6101010	06101010 SALES - LOCAL	Revenue from operations	Sale of products
6101020	06101020 SALES RETURNS - LOCAL	Revenue from operations	Sale of products
6102010	06102010 SALES - EXPORTS - INTRA GROUP	Revenue from operations	Sale of products
6102050	06102050 SALES - EXPORTS - NON GROUP	Revenue from operations	Sale of products
6102080	06102080 PROVISION FOR SALES RETURN	Revenue from operations	Sale of products
6102105	06102105 PROV SALES RETURN - CUT OFF PROV RODUCT	Revenue from operations	Sale of products
6201020	06201020 DISCOUNT & SPECIAL MARGIN	Revenue from operations	Sale of products
6201030	06201030 RATE DIFFERENCE	Revenue from operations	Sale of products
6201060	06201060 KEY ACCOUNTS DISCOUNT	Revenue from operations	Sale of products
6202010	06202010 VAT REIMBURSEMENT	Revenue from operations	Sale of products
6203010	06203010 REBATES	Revenue from operations	Sale of products
8305020	08305020 QPS/INSHOP/TRADE SCHEMES	Revenue from operations	Sale of products
8305021	08305021 GST PRICE REDUCTION CLAIMS	Revenue from operations	Sale of products
6102010	06102010 SALES - EXPORTS - INTRA GROUP	Revenue from operations	Sale of products

C.24 The Respondent submitted that there is no iota of doubt that such discounts were offered on account of passing on the benefit of reduction in rate of GST. The Respondent thought the method of passing on reduction in rate by way of post supply discount as the most appropriate and feasible method wherein not only the immediate recipient of L'Oréal receives the benefit but the same also gets passed through the supply chain to customers at next stage.

C.25 The Respondent also submitted that in common parlance discount is nothing but reduction in price. The amount by which the price is reduced is discount. It is settled law that discounts known in advance to the customer are deductible from the value, irrespective of its form or nomenclature. Any benefit passed on by the assessee in whatever form to the recipient must be taken into consideration.

C.26 It is the policy of the Respondent that while price reduction scheme was made known in advance to the recipients, the same are allowed only when the Respondent is assured of the fact that the benefit of such price reduction is passed on further to the trade partners below in the supply chain, after carrying out appropriate verification.

C.27 The Respondent submitted that allegation of profiteering (if any) should have been made after taking into account the amount passed on by way of post supply discount claims as that alone reflects the net realization of the Respondent. These discounts were given on account of GST rate reduction and the practice of post-supply discount followed by the Respondent is as per the established practice followed in the past for giving discounts not only by the Respondent but by the entire FMCG industry. It is submitted that once discount is allowed as per established practice, the same should be allowed to be deducted from the sale price of the goods. In this regard, the Respondent relies on the decision of Hon'ble Supreme Court in the case of **Union of India vs. Bombay Tyres International 1984 (17) E.L.T. 329 (S.C.)** wherein it was held that discounts allowed in the trade by whatever name such discount is described should be allowed to be deducted from the sale price having regard to the nature of the goods if established under agreements, or under terms of sale or by established practice. The relevant paragraph of the judgement is extracted below:

"Discounts allowed in the Trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under agreements or under terms of sale or by established practice, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such Trade Discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price"

[Emphasis supplied]

C.28 The Respondent further wishes to place reliance on the judgment of Hon'ble Supreme Court in the case of **Moped India Ltd. vs. Asst. Collector 1986 (23) E.L.T. 8 (S.C.).** In this case, it was held that:

"Now it is true that this amount allowed to the dealers has been referred to in the agreement as commission but the level given by the parties cannot be determinative because it is, for the court to decide whether the amount is trade discount or not, whatever be the name given to it..... The relationship between the appellants and the dealers was clearly on principal to principal basis and in the circumstances it is difficult to see how the amount of Rs. 110/-, 145/- and 165/- allowed to the dealers in respect of different varieties of mopeds could be regarded as anything other than trade discount. The appellants charged to the dealers the price of the mopeds sold to them less the amount of Rs. 110/-, Rs. 145/- and Rs. 165/-in respect of different varieties of mopeds. These amounts allowed to the dealers were clearly trade discount liable to be deducted from the price charged to the dealers for the purpose of arriving at the excisable value of the mopeds."

[Emphasis supplied]

C.29 In view of the law laid down by the Hon'ble Supreme Court, the discounts given by the Respondent, are admissible to be deducted from gross price.

C.30 DG vide para 14 of his report dated 5th July 2019 observed as under:

"*The legal requirement is abundantly clear that in the event of benefit of input tax credit or reduction in rate of tax, there must be a commensurate reduction in the prices of the goods or services supplied. Such reduction in price can only be in terms of money, so that the final price payable by a recipient gets reduced commensurate with the reduction in the tax rate or benefit of input tax credit. This is the only legally prescribed mechanism to pass on the benefit of input tax credit or reduction in the rate of tax under the GST regime and there is no other method which a supplier can adopt to pass on such benefits.*"

C.31 The Respondent passed on the benefit of tax rate reduction by way of reducing the price subsequent to supply. It is submitted that in common parlance discount is nothing but reduction in price. The amount by which the price is reduced is discount. It is settled law that discounts known in advance to the customer are deductible from the value, irrespective of its form or nomenclature, as discussed earlier.

C.32 It is submitted that the price reduction has been given in the monetary form to the recipients on the basis of documents received from the recipients. It is nowhere prescribed that benefit of GST rate reduction should be given on the invoice itself. The benefit can be given subsequent to the supply by way of adjustments in books of accounts of the recipient and supplier. In the present case admittedly, the price reduction had been given subsequent to supply either by way of credit notes or honoring service invoice issued by customer and by way of adjustment in the books of accounts. It also satisfies the condition put by DG that monetary form is the form in which the benefit can be passed on.

C.33 The Respondent further submitted that the GST charged to the customer was available as credit to him which could be utilized against his output tax liability and accordingly, there was no need to separately refund the GST portion as well. Further, as and when the customer sold the goods, they reduced the discount amount passed on (and claimed from L'Oréal) while arriving at the taxable value under Section 15 of CGST Act and charged GST only on the net price after discount recovered from their customer.

C.34 Accordingly, the Respondent submitted that the computation of alleged profiteering ought to have been made after taking into account the benefit passed on by way of credit notes/ service invoices received from the recipient Distributors/ MT customers, which represents the prices charged by the Respondent after allowing for price reduction based on the schemes announced to pass on the benefit of GST rate reduction, and the net price alone reflects the actual consideration towards the supply realized by the Respondent. The Respondent submits that the computation of alleged profiteering made by the DG be reduced by an amount of **INR 73.59 crores** which has been passed on by the Respondent by way of post-supply price reduction on account of GST rate reduction.

C.35 The DGAP in its reply letter dated 11.12.2019 stated that it was Respondent 's business decision to extend the period of consumer promotion schemes, the cost of which cannot be set off against the benefit that the Respondent ought to have passed on to their recipients. In this regard, the Respondent submits that it has never been Respondent's submission that it has passed on the benefit by extending consumer promotion schemes. In fact, the Respondent had passed on the benefit by way of post supply discounts specifically on account of GST and the same was also made known to the customers.

C.36 The Respondent has provided detailed submissions vide its submissions dated 04.11.2019 to support its claims that the benefit of reduction in rate of tax has been passed on by way of post-supply discount and also provided submissions in respect of DGAP's observations in its report dt. 05.07.2019. However, without acknowledging the submissions made by the Respondent and providing a finding or response to the same, the DGAP has simply referred back to paras 15-17 of its own report dt. 05.07.2019 without dealing specifically with any of the submissions made by the Respondent.

C.37 Further, the DGAP once again cited an example of sample document in which invoice is raised by trade partner for provision of services, advertising, sales promotion, etc. to deny the benefit of discount passed on by the Respondent. In this regard, the Respondent submitted that the GST post-supply discounts have been processed by the Respondent in separate modes for General Trade (through credit notes) and modern trade/ e-commerce (through service invoices). The GST post-supply discounts are as follows:

- **General trade:** In respect of these customers, once they passed on the amount to their customers, they became entitled to claim the said amount from the Respondent. Once the Respondent processed their claims on account of GST post-supply discounts, same were settled through issuance of credit notes by Respondent. This was unlike the case of modern trade/e-commerce where service invoices were issued by customer on Respondent. The value of such credit notes processed by Respondent on account of GST rate reduction is **INR 51.93 crores** (51,93,52,553). GST rate reduction discount is reflected on the invoice as a note in respect of both sale by Respondent to distributor and distributor to his customers. It is exclusively for passing on the benefit of GST rate reduction.
- **Modern trade/e-commerce:** In respect of these customers as well, once they passed on the amount to their customers, they became entitled to claim the said amount from the Respondent. However, the claims were processed through service invoices issued by them on Respondent. The value of such invoices processed by the Respondent on account of GST rate reduction is **INR 21.66 crores** (21,65,88,061).

C.38 It is submitted that the DGAP has already been provided with bifurcation of cases where credit notes have been issued by Respondent and cases where service invoices are raised by recipients on Respondent. Despite this, the DGAP is only citing cases where service invoices have been issued to deny full claim of benefit of GST rate reduction passed on by the Respondent. Accordingly, the Respondent submitted that the documents in the form of credit notes and service invoices be examined separately. The objection of DGAP in respect of invoices does not hold good in respect of credit notes and thus, reduction must be given for the amount passed on by way of credit notes. Further, in respect of invoices issued by recipients, the Respondent has already submitted that service invoice was issued, and GST was charged on services in order to avoid any litigation with the indirect tax department which was treating such post-supply discounts as service income in the hands of recipient in pre-GST regime. Mere issuance of service invoice instead of credit note or mentioning of nomenclature on the invoice does not change the nature of transaction, which was that of post-supply GST discount and not towards any supply of promotion, advertisement service, etc. However, the DGAP has not considered this submission or provided reply to this submission of the Respondent as well.

C.39 The Respondent has provided SKU-wise correlation and has also established that the post-supply discount is nothing but discount on account of GST rate change. Not only did the Respondent communicate the fact that customers shall be eligible for post-supply discount on account of GST rate reduction, the same was also reflected through declaration on invoices for supplies made by Respondent to its customers. Accordingly, the Respondent reiterates the submissions made by it in its written submissions filed on 05.11.2019 and requests the Authority to allow reduction to the tune of **INR 73.59 crores** (INR 51.93 crores + INR 21.66 crores) which has been passed on by the Respondent by way of post-supply price reduction on account of GST rate reduction.

C.40 The DGAP has not dealt with the aforesaid submissions in its report dated 28.08.2020 u/r 133(4). In the absence of any findings in this regard in the report, the Respondent requests to accept their submissions and reduce an amount of INR 73.59 crores as above from the profiteering alleged by the DGAP.

C.41 The DGAP has in its reply u/s 133(2A) dated 05.11.2020 on this issue reiterated its earlier stand that it was Respondent 's own business decision to extend consumer promotion the cost of which cannot be offset. Further, it has referred to the sample document in case of Modern Trade customer showing description "Advertising services". In this regard, the Respondent had in para C.22 already submitted that these price reductions/discounts were treated as service in view of the fact that there were disputes under the erstwhile service tax legislation between the department and the dealers of the automobile companies who were receiving the incentives from the manufacturers post sale. The incentive received by the dealers was considered by the department as consideration for the service provided by the dealers to the manufacturers and service tax was demanded on such incentives. In order to avoid dispute regarding future tax liability and interest thereon, if any, L'Oréal took a position to accept the claim for price reductions from the recipient with tax as it was revenue neutral, being creditable in the hands of the Respondent. The DGAP has not considered this submission in its reply but merely reiterated its earlier stand.

C.42 Further, in respect of benefit passed on to distributors, the DGAP has observed that most of the credit notes are issued towards "**TRADE SCHEMES**". The Respondent submits that the said observation of DGAP is factually incorrect. In this regard, the Respondent would once again like to explain the facts in brief for the sake of better clarity.

C.43 As submitted by the Respondent in Para C.7 supra, the exercise of determining revised MRP was time-consuming and the discounts based on such revised MRP could be made effective only from January 2018. Accordingly, the Respondent passed on ad-hoc post sale discount of 5% to 12.5% of the sale price of distributor/MT customers for the period pertaining to 15.11.2017 to December 2017, and thereafter the post-sale discount was determined based

on such revised MRP. The Respondent could not make immediate system changes in the nomenclature. Accordingly, the existing nomenclature in system of TRADE SCHEMES was used for the initial period of 15.11.2017 to December 2017. However, once the GST discount based on revised MRP was implemented effective January 2018, the Notice also changed the nomenclature / description in the system. All claims pertaining to period from January 2018 onwards reflect the nomenclature / description on credit note as GST PRICE REDUCTION. Claims having description of "TRADE SCHEME" scheme and dated after December 2017 are pertaining to the sales made up to December 2017. Irrespective of this change in nomenclature / description in the system, the Respondent submits that the benefit was passed on account of GST rate reduction only. Further, to substantiate its claim that the benefit of 5% / 12.5% was on account of GST rate reduction, the Respondent has provided an internal email dated 25.11.2017, which clearly reflects that the Respondent has introduced a new "12.5% GST benefit scheme".

C.44 The Respondent has also submitted copies of credit notes which reflect that the benefit is on account of GST price reduction. The Respondent provided a copy an additional credit note dated 16.04.2018 issued to M/s. Ankita Enterprises for total amount of INR 1,61,645.05, which clearly reflects that it is on account of GST price reduction. A screenshot of the credit note is also provided below:

L'OREAL INDIA PRIVATE LIMITED
Division :CPD
Address:Swamy Sons Agencies Pvt. Ltd
4-97 / "O" Godown,St Johns Regional
Seminary Church Compound,Ramanthapur Hyderabad
500013 Telangana
PAN:AAACL0738K GSTIN: 36AAACL0738K1ZI

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ORIGINAL FOR RECIPIENT — CREDIT NOTE

Credit Note No.: CTS1700105	Credit Note Date: 16.04.2018	Date of Supply :	Contact No.: 80-40261500
Billed To Name : ANKITA ENTERPRISES Address : PLOT NO 5 C IDA, NACHARAM X ROAD HYDERABAD 500076 State : Telangana GSTIN : 36AAIFA4501G1ZV	**Shipped To** Name : ANKITA ENTERPRISES Address : PLOT NO 5 C IDA, NACHARAM X ROAD HYDERABAD 500076 State : Telangana GSTIN : 36AAIFA4501G1ZV Your Reference:	PO No. : CTS1700105 PO Date: 16.04.2018 SAP Doc. Ref. No: 0520390131 Delivery No : Place of Supply : Telangana Place of Delivery : Telangana E-Way Bill No. : E-Way Valid Date: Vehicle No.:	Trans : LR/RR GRNo.: LR/RR GR Date : Factory Packed Cases : 0 Total No of Cases : 0 Total Repacked Cases : 00000 Total Unit : 0 Total Weight : 0.000 Offer Desc

Product Code	Description of Goods	HSN Code	MRP (Rs/Ut)	Qty (cases)	Units	Rate (Rs/Ut)	Total Value (Rs)	TDS Value(Rs)	Taxable Value(Rs)	CGST Rate*	CGST Amount (Rs)	SGST /UTGST Rate*	SGST /UTGST Amount (Rs)
CPDTGST	GST PRICE REDUCTION -CPD	998599		0	0.000	1,737.46	1,737.46	0.00					
CPDTGST	GST PRICE REDUCTION -CPD	998599		0	0.000	1,737.46	1,737.46	0.00					
CPDTGST	GST PRICE REDUCTION -CPD	998599		0	0.000	329.71	329.71	0.00					
CPDTGST	GST PRICE REDUCTION -CPD	998599		0	0.000	329.71	329.71	0.00					
CPDTGST	GST PRICE REDUCTION -CPD	998599		0	0.000	329.71	329.71	0.00					
CPDTGST	GST PRICE REDUCTION	998599		0	0.000	232.13	232.13	0.00					

C.45 Further, it has also been observed by DGAP that the said credit notes nowhere indicated that those were related to benefit of reduction in GST rate from 28% to 18% w.e.f. 15.11.2017. In this regard, the Respondent submits that the credit notes pertaining to period from January 2018 onwards clearly indicate that they are for "GST PRICE REDUCTION". Therefore, the claim cannot be rejected on the basis of this reason. As regards period up to December 2017, although the credit notes used the nomenclature as TRADE SCHEMES, the Respondent has already demonstrated through email communication above that they pertained to GST rate reduction only. Therefore, the DGAP's observation is incorrect. The Respondent submits that the benefit has been passed on account of GST rate reduction only.

C.46 It has also been stated by DGAP that no SKU-wise correlation could be made between the claim texts appearing in the credit notes and invoice-wise outward supply submitted by Respondent. At the outset, the Respondent submits that the said observations of DGAP is completely inaccurate and does not represent the correct factual position with regard to data or documentation. The Respondent has already provided its submission in relation to the same and demonstrated SKU-wise correlation in paras C.13 to C.19 of his submissions, which have been completely ignored by the DGAP. Thus, the Respondent submits that the DGAP's

observation is factually incorrect and requests the Authority to accept Respondent's submissions.

C.47 The DGAP has referred to one credit note issued to M/s Ankita Enterprises bearing credit note number 520383546 dated 14.09.2017 to state that the credit note being claimed on account of passing of benefit of GST rate reduction has been given in September 2017, which is actually prior to GST rate reduction. In this regard, the Respondent submits that certain details in the said credit note have been wrongly printed due to selection of incorrect "Old Print Layout" in SAP accounting system. The Respondent submits that the said credit note number 520383546 is actually dated 21.02.2018 (after GST rate reduction). A screenshot of the credit note with correct Print Layout is also provided below:

L'OREAL INDIA PRIVATE LIMITED
Division :CPD
Address:Swamy Sons Agencies Pvt. Ltd
4-97 / 'O' Godown,St.Johns Regional
Seminary Church Compound,Ramanthapur Hyderabad
500013 Telangana
PAN:AAACL0738K GSTIN: 36AAACL0738K1ZI

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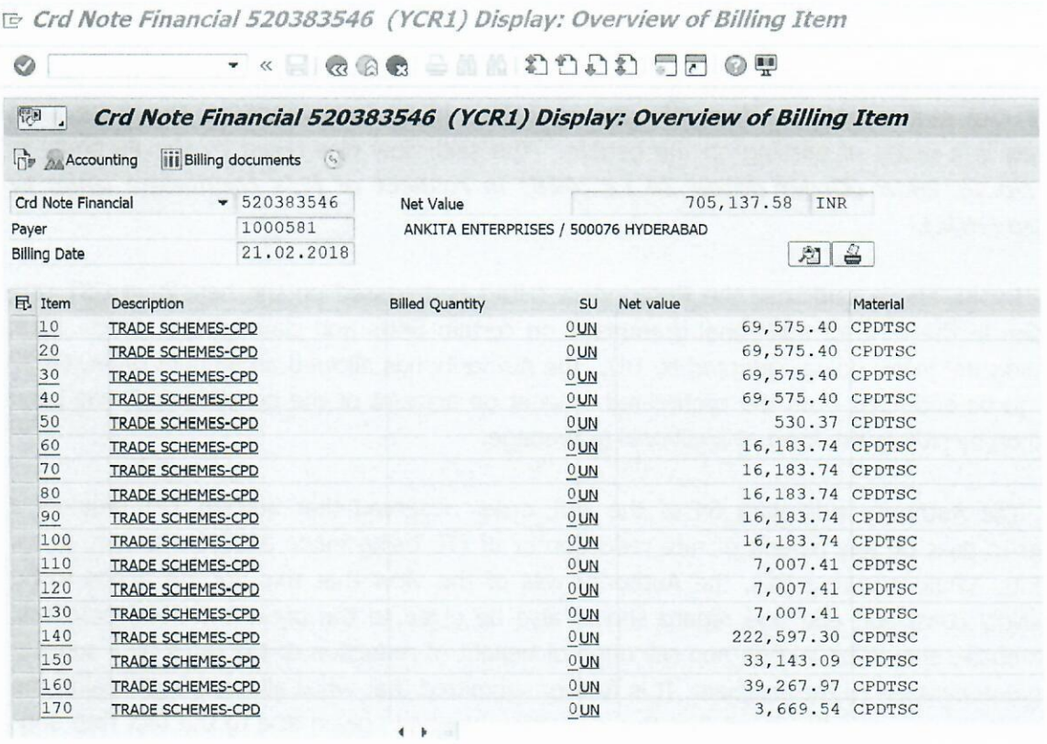
ORIGINAL FOR RECIPIENT — CREDIT NOTE

Credit Note No.: CTS17000100	Credit Note Date: 21.02.2018	Date of Supply :	Contact No.: 80-40261500
Billed To Name : ANKITA ENTERPRISES Address : PLOT NO.5 C IDA, NACHARAM X ROAD HYDERABAD 500076 State : Telangana GSTIN : 36AAIFA4501G1ZV	**Shipped To** Name : ANKITA ENTERPRISES Address : PLOT NO 5 C IDA, NACHARAM X ROAD HYDERABAD 500076 State : Telangana GSTIN 36AAIFA4501G1ZV Your Reference:	PO No. : CTS17000100 PO Date: 21.02.2018 SAP Doc. Ref. No. 0520383546 Delivery No : Place of Supply : Telangana Place of Delivery : Telangana E-Way Bill No. : E-Way Valid Date: Vehicle No.:	Trans : LR RR GRNo.: LR RR GR Date : Factory Packed Cases : 0 Total No of Cases : 0 Total Repacked Cases : 00000 Total Unit : 0 Total Weight : 0.000 Offer Desc

Product Code	Description of Goods	HSN Code	MRP (Rs/Ut)	Qty (cases)	Units	Rate (Rs/Ut)	Total Value (Rs)	TDS Value(Rs)	Taxable Value(Rs)	CGST Rate%	CGST Amount (Rs)	SGST /UTGST Rate%	SGST /UTGST Amount (Rs)
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	[illegible]	[illegible]	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	[illegible]	[illegible]	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	[illegible]	[illegible]	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	[illegible]	[illegible]	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	[illegible]	[illegible]	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	[illegible]	[illegible]	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	[illegible]	[illegible]	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	[illegible]	[illegible]	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	[illegible]	[illegible]	0.00					

C.48 Further, the said credit note has been accounted in the books of accounts (SAP system) on 21.02.2018 only. In order to substantiate that the same was a genuine system error in printing, the Respondent is also providing herewith screenshot of the accounting entry, which clearly reflects that the date of accounting is 21.02.2018. The screenshot of accounting entry is as follows:



Crd Note Financial 520383546 (YCR1) Display: Overview of Billing Item

Accounting | Billing documents

Crd Note Financial	520383546	Net Value	705,137.58 INR
Payer	1000581	ANKITA ENTERPRISES / 500076 HYDERABAD	
Billing Date	21.02.2018		

Item	Description	Billed Quantity	SU	Net value	Material
10	TRADE SCHEMES-CPD		0 UN	69,575.40	CPDTSC
20	TRADE SCHEMES-CPD		0 UN	69,575.40	CPDTSC
30	TRADE SCHEMES-CPD		0 UN	69,575.40	CPDTSC
40	TRADE SCHEMES-CPD		0 UN	69,575.40	CPDTSC
50	TRADE SCHEMES-CPD		0 UN	530.37	CPDTSC
60	TRADE SCHEMES-CPD		0 UN	16,183.74	CPDTSC
70	TRADE SCHEMES-CPD		0 UN	16,183.74	CPDTSC
80	TRADE SCHEMES-CPD		0 UN	16,183.74	CPDTSC
90	TRADE SCHEMES-CPD		0 UN	16,183.74	CPDTSC
100	TRADE SCHEMES-CPD		0 UN	16,183.74	CPDTSC
110	TRADE SCHEMES-CPD		0 UN	7,007.41	CPDTSC
120	TRADE SCHEMES-CPD		0 UN	7,007.41	CPDTSC
130	TRADE SCHEMES-CPD		0 UN	7,007.41	CPDTSC
140	TRADE SCHEMES-CPD		0 UN	222,597.30	CPDTSC
150	TRADE SCHEMES-CPD		0 UN	33,143.09	CPDTSC
160	TRADE SCHEMES-CPD		0 UN	39,267.97	CPDTSC
170	TRADE SCHEMES-CPD		0 UN	3,669.54	CPDTSC

C.49 The Respondent would like to reiterate that the entire amount of INR 73.59 crores is in respect of benefit passed on account of GST rate reduction only. The Respondent is not trying to make any undue or false claims and has provided all the details as required from time to time to support its claim that the benefit passed on by it is indeed on account of GST rate reduction. Therefore, the Respondent requests the Authority to accept the submissions and reduce an amount of INR 73.59 crores from the total alleged profiteering computed by DGAP. The correct breakup of INR 73.59 crores into various types of customers is as follows:

Type of customer	Amount (in crs.)
General Trade	54.19
MR / E-comm (i.e. other than General Trade)	19.40
Total	73.59

D. BENEFIT OF GST RATE REDUCTION PASSED ON BY WAY OF INCREASED QUANITITY (HIGHER GRAMMAGE) ON CERTAIN SKUS NOT CONSIDERED BY DG

D.1 In the absence of any prescribed methodology for passing of benefit of GST rate reduction, the Respondent had passed on the benefit by various methods. The same also included providing increased quantity of the same product at the same/ reduced price per grammage. The Respondent as a part of GST rate reduction pass through plan, had passed the benefit through higher grammage on certain SKUs. In this regard, the Respondent vide paras 5.11 to 5.13 of letter dated 21.06.2019 had submitted before DGAP the details of products where quantity/grammage was increased along with the percentage increase after 15.11.2017 vide Annexure 4 of the said letter. In response to this submission, DGAP vide para 17 of his report dated 5.7.2019 has given the following finding:

> *"As the provisions contained in Section 171 of CGST Act do not provide for any means of passing on the benefit of reduction in the rate of tax or benefit of input tax credit other than by way of commensurate reduction in price, the claim of the Respondent that they had passed on the benefit of GST rate reduction on certain SKUs by increasing the quantity or grammage of the*

product while maintaining the earlier pre-rate reduction MRP of such SKUs is also not acceptable."

D.2 In this regard, the Authority has in respect of FMCG industry taken the view that benefit of GST rate reduction in the form of extra quantity / higher grammage for the same price definitely is a mode of passing on the benefit. The said view was taken by the Authority in ***case No.20/2018 (Order dated 24.12.2018) in respect of M/s Hindustan Unilever Limited (HUL).***

D.3 In the above said case the Respondent (HUL) had passed on the benefit of GST rate reduction in the form of additional grammage on certain SKUs and claimed the same. After examining the methodology adopted by HUL, the Authority has allowed an amount of Rs. 68.77 crores to be deducted from the profiteered amount on account of the benefit which has been passed on by HUL in the form of additional grammage.

D.4 The Authority vide para 64 of the HUL order observed that Section 171 requires a supplier to pass on any benefit of rate reduction or of ITC being made available to him, to his recipients. While ensuring this, the Authority was of the view that this Section needs to be purposively construed and due regard should also be given to the prevalent trade practices. The emphasis should be laid on non-retention of benefit of reduction of tax rates by a supplier and its due passage to the recipient. It is further submitted that while allowing such claim, the Authority has categorically stated that this deduction has been given due to the fact that anti-profiteering measure has been incorporated in the tax laws for the first time and the Respondent had tried to pass on the benefit of tax reduction by increasing the quantity of his products.

D.5 In the present case, the Respondent has passed on the benefit of GST rate reduction by way of increasing the quantity of the product while retaining the same/reduced selling price including tax. For an illustration, please see below:

Customer type	Product code	Description	Selling price incl. tax	Base price as per DG incl. tax	Profiteering as per DG	New grammage	Old grammage
General Trade	HESEC640-20	HEX ExtraOrd Clay SH 704 ml	371.68	341.09	30.59	704 ml	640 ml

Per ml price:

Period	Selling price incl. tax	Grammage	Per ml price
Post rate reduction	371.68	704 ml	0.528
Pre rate reduction	341.09	640 ml	0.533

D.6 From the above illustration, it can be seen that if the price comparison is made on per ml basis, the price of INR 0.528 charged after 15th November 2017 is lower than the price of INR 0.533 charged before 15th November 2017. The price per ml charged post rate reduction is lower than the price per ml pre-rate reduction.

D.7 The Respondent also submitted in Para C.7 of written submissions dated 03.09.2019 and para E of written submissions dated 30.09.2019 that it has passed on benefit of GST rate reduction by way of increase in quantity of products and the actual quantification of this amount can be made only when the methodology for calculation of base price / base price calculation sheet is made available to the Respondent.

D.8 Accordingly, on receipt of base price calculation sheet from the Authority on 13.09.2019, the Respondent computed the actual benefit passed on by way of increase in quantity of products and based on weighted average price of products with latest MRP, the same amounted to **INR 82,97,36,596** (INR 26,96,31,164 if restricted to profiteering at line item level), which is computed in column CB and CC of Annexure-1 (Revised calculation as per Annexure-15 of DG) to submission dated 24.10.2019.

D.9 During the course of personal hearing held on 30th October 2019, the Authority has specifically mentioned about the stand taken by the Authority on the issue relating to method of passing on the benefit of GST rate reduction in the form of extra quantity / additional grammage in the case of HUL (supra). Further, the Authority had also handed over a template in excel format to the Respondent to corroborate the grammage benefit as a measure of passing the benefit and directed the Respondent to provide the data and supporting information in the said format. For sake of ready reference the said template is extracted below:

Sr.No.	Item Name (SKU-wise)	CBU Code	Date of reduction of GST rate	Date on which the benefit was actually passed	Extra Grammage supposed to be passed on due to GST rate reduction	Extra grammage actually given as benefit	Additionalal benefit passed on	Commensurate (Yes/ No)	If any documentary proof available to evidence the cause-effect relationship between GST rate reduction and Grammage increase. If yes, kindly attach	Profiteering amount as calculated by DGAP
Format to corroborate the Grammage benefit as a Non-profiteering Measure.										

D.10 Accordingly, the Respondent once again mapped the data relating to benefit of GST rate reduction passed on through higher grammage / extra quantity on various SKUs during the period of investigation viz., (November 15, 2017 to December 31, 2018) in the above said template by, introducing additional columns in the 35 excel sheets shared by DGAP with his report dated 5.7.2019 (as Annexure 15 to DGAP report). As the number of line items for grammage was running into number of rows and the volume of data was huge, the Respondent provided said information in CD by adding additional columns as desired by the Authority in the 35 excel sheets relating to line items where benefit was passed on by way of additional grammage, which was enclosed as Annexure – 19 to submissions dated 04.11.2019.

D.11 From the above, the Respondent submitted that it has passed on benefit of GST rate reduction by way of increase in quantity of products which should be reduced from the alleged profiteering computation.

D.12 The DGAP reiterated its stand in its reply dated 11.12.2019. However, the Authority in its Interim Order No. 5/2020 dated 03.01.2020 was pleased to note the order in the case of M/s Hindustan Unilever Limited mentioned supra and accordingly directed the Respondent to furnish certain additional information, which shall be examined by the DGAP and included in the fresh Report to be filed by him in consequence of the said Order. The Respondent was directed to furnish the following details:

i. Name of the SKU
ii. Base price of the SKU pre rate reduction with documentary evidence
iii. Weight/volume of the SKU pre rate reduction with documentary evidence
iv. Commensurate base price of the SKU post rate reduction with details of computations
v. Commensurate increase in the weight/Volume required post rate reduction with computations
v. Increase in the weight in grams/mls
vi. Whether the increase is commensurate with the rate reduction
vii. Date of passing on the benefit of tax reduction with documentary evidence

viii. Amount of benefit of tax reduction passed on the SKU

ix. Amount of benefit of tax reduction passed on State/Union Territory wise

D.13 Accordingly, the DGAP vide letter dated 14.01.2020 directed the Respondent to furnish the above details pertaining to benefit given in the form of increase in grammage, which was duly provided by the Respondent vide its submissions dated 03.02.2020. This fact has also been recorded in paras 7 to 11 of DGAP report dated 28.08.2020.

D.14 After considering the above submissions of the Respondent and correcting formula errors in respect of 2 files, the DGAP has stated in Para 13 of its report dated 28.08.2020 that the Respondent has passed on the benefit of reduction in rate of tax by increasing the grammage/volume amount to INR 27,49,45,942, by considering approach (a) of Weighted Average Base Price of the product having same description with all MRPs for pre-rate reduction period. However, the DGAP has further stated in para 12(iv) of its report that the concern of the Respondent regarding passing of benefit by way of increase in grammage is addressed in Para 14 & 17 of report dated 05.07.2019, wherein it has been inter alia stated that the legal requirement u/s 171 is abundantly clear that the benefit needs to be passed on by way of commensurate reduction in prices, and that such reduction in price can only be in terms of money, so that the final price payable by a recipient gets reduced commensurate to the rate reduction. The DGAP has not accepted Respondent's submissions that increasing the grammage of a product for same / reduced price can also be one of the modes of passing on the benefit of GST rate reduction and for this reason, the DGAP has stated that the claim of the Respondent of having passed on the benefit by increasing the grammage is not acceptable.

D.15 In this regard, the Respondent submits that the NAA has already held in Hindustan Unilever Limited's order mentioned supra that increase in grammage is one of the manners in which benefit of reduction in rate of tax can be passed on, and once the NAA has already accepted the said stand, the DGAP being an investigative body should not take a different view. Therefore, the Respondent submits that the DGAP's stand that benefit cannot be passed on by increasing the grammage cannot be accepted. The DGAP has computed benefit of **INR 27,49,45,942** (restricted to profiteering at line item level by considering approach (a) of Weighted Average Base Price of the product having same description with all MRPs for pre-rate reduction period) passed on by the Respondent by way of increase in grammage, which the Authority may be pleased to deduct from the total profiteering alleged by the Respondent.

D.16 Further, the Respondent submits that if the submissions made by it in Para B above are accepted, the benefit passed on by way of increase in grammage will be INR 26.96 crores (restricted to profiteering alleged at line item level by considering approach (c) of Weighted Average Base Price of the products having same description with latest MRP for pre-rate reduction period).

D.17 The DGAP has merely reiterated its stand as per report u/r 133(4) dated 28.08.2020. Accordingly, the Respondent reiterates its above submissions and submits that once it has been accepted by this Authority that grammage is also a mode of passing on benefit of GST rate reduction, the DGAP cannot adopt a different stand and accordingly the grammage benefit as computed by the DGAP may be considered and reduced from the total alleged profiteering.

E. INCREASE IN CUSTOMS DUTY

E.1 The Respondent submitted that vide the Second Schedule to the Finance Bill 2018 (Sl. No. 2), First Schedule of the Customs Tariff Act, 1975 was amended with effect from 1st February 2018 to increase the rate of basic Customs Duty from 10% to 20% for products

imported by L'Oréal. Further, from the said date, education cess (EC) and secondary and higher education cess (SHEC) were replaced by social welfare surcharge @ 10% of aggregate duties/taxes. This led to increase in effective rate of non-creditable Customs Duty from 10.30% to 22% of the value of imported product. Sample copy of Bills of Entry covering the import of the products both before and after 1st Feb 2018 showing the BCD rate as 10% and 20% have been collectively enclosed as Annexure – 20 to submissions dated 04.11.2019.

E.2 Increased Customs Duty led to increased cost of doing business in respect of imported products w.e.f. 1st February 2018. L'Oréal had, in their submissions before DGAP, sought allowance for reduction in alleged profiteering, if any, to the extent of such increase in Customs Duty. The list of SKUs impacted by increase in Customs Duty rate and the increase in duty on per unit basis were provided in separate annexure to DGAP and the increased Customs Duty on per unit basis on supply of these products from 1st March 2018 was mapped separately in the line item wise details of outward supply provided as per the relevant annexure. Further, in cases where the price was revised subsequent to such increase in Customs Duty and considering other factors, the Respondent had asked for relief from any computation of profiteering on those line items.

E.3 The Respondent further submitted in its submissions dated 04.11.2019 that the above submissions were not considered by the DGAP in its report dated 05.07.2019. There was no finding in DGAP's report on this very important submission of L'Oréal. The Respondent submitted that an amount of **INR 19,18,68,113** for the 35 excel sheets representing the amount of profiteering (recalculated based on average price of products with latest MRP) computed on these line items is required to be reduced from the total alleged profiteering computed by DG. These line items can be identified by filtering non-zero and non-blank line items in Column BH – heading 'Increased Custom Duty Paid w.e.f Mar18-Total' and taking the total of column BY - Total Profiteering-Revised Including GST (Avg. of Latest). The difference in Customs Duty rate has resulted in additional cost of Rs. 14,10,48,577 (Column BH – heading 'Increased Custom Duty Paid w.e.f. March 18-Total') to L'Oréal, which is a significant change in business environment as applicable for such imported products and hence, such SKUs must be removed from the computation of profiteering at least from the date of increase in Customs Duty rate. Both GST and Customs Duty are the taxes payable by L'Oréal directly linked to the product.

E.4 The Respondent further submitted that in previous 5 years, there was no increase in Customs Duty rate of products imported and traded as such. As and when the Customs Duty had reduced, the market forces would come into picture and based on competition and demand in the market, new price would be determined.

E.5 The Respondent in its reply dated 11.12.2019 stated that the concern of the Respondent of not considering the price increase in Customs Duty on the products imported by him has been addressed in Para 18 of DGAP report dated 05.07.2019. Para 18 of the DGAP report is extracted below:

> *"18. The contention of the Respondent that the base prices were increased to offset the increase in the cost of production/imports, raw materials, packing material, labour, transportation, rentals, advertising & other services etc. cannot also be accepted as such increase in the price of raw materials could not have happened overnight to exactly coincide with the GST rate reduction w.e.f. 15.11.2017. The increase in the cost of raw materials/input services, if any, has no relevance in the context of GST rate reduction w.e.f. 15.11.2017. Section 171 of the Central Goods and Services Tax Act, 2017 does not provide for any scope for adjustment of increase in cost against the benefit of reduced tax rate. The increase in the cost of inputs/input services may be a factor for*

determination of price but this factor is independent of the output GST rate. It cannot be argued that elements of cost were affected by the downward revision of the output GST rate."

E.6 The DGAP in its reply dated 11.12.2019 had referred to Para 18 of its report dated 05.07.2019. As can be seen from the above extracted Para 18, the DGAP, while disallowing Respondent 's claim for not computing profiteering in respect of products impacted by Customs Duty, has stated that the contention cannot be accepted as such increase in base prices could not have happened overnight to exactly coincide with the GST rate reduction w.e.f. 15.11.2017. In this regard, it is submitted that the Respondent has not claimed that the Customs Duty increase has coincided with GST rate reduction overnight on 15.11.2017. In fact, the increase in Customs Duty has only happened on 01.02.2018 and the Respondent has made claim for non-computation of profiteering on account of increased Customs Duty only for period post 01.02.2018.

E.7 It is submitted that the DGAP's understanding of the effect of increased Customs Duty on business of Respondent is completely incorrect. While the DGAP alleges that the Respondent has profiteered from a transaction, the increase in Customs Duty has added significant cost on supply of very same products on which the GST rate has been reduced. It is submitted that both the benefit of GST rate reduction and the increase in Customs Duty are pursuant to changes in tax structure made by the Government only. Accordingly, the said increase in Customs Duty must be offset against the profiteering alleged by DGAP. An illustration of products wherein profiteering has been computed by DGAP whereas simultaneous Customs Duty has increased is provided below (for channel type GT from 20. Maharashtra_GT file):

Illustration for Product 1:

Product Code BLSPA500-10 with product description Blond Studio Platinum Amm-Free 500GM

Sr. No.	Invoice date	Actual sale price per unit incl. GST	Commensurate sale price as per DGAP	Profiteering p.u. as per DGAP	Customs Duty p.u. (before 01.02.2018)	Customs Duty p.u. (post 01.02.2018)	Increase in Customs Duty p.u.
4335	19-11-17	1276.56	1176.82	99.74	53.98		
155319	14-03-18	1276.56	1176.82	99.74		115.30	61.32

Illustration for Product 2:

Product Code DCFFN021-00 with product description Dream Cushion Fdn 21 Nude

Sr. No.	Invoice date	Actual sale price per unit incl. GST	Commensurate sale price as per DGAP	Profiteering p.u. as per DGAP	Customs Duty p.u. (before 01.02.2018)	Customs Duty p.u. (post 01.02.2018)	Increase in Customs Duty p.u.
731	18-11-17	783.17	721.99	61.19	24.64		
139363	05-03-18	783.17	721.99	61.19		52.62	27.99

Illustration for Product 3:

Product Code CSFFC005-00 with product description C SMOOTH AIO R2016 04 HY EB

Sr. No.	Invoice date	Actual sale price per unit incl. GST	Commensurate sale price as per DGAP	Profiteering p.u. as per DGAP	Customs Duty p.u. (before 01.02.2018)	Customs Duty p.u. (post 01.02.2018)	Increase in Customs Duty p.u.
559	18-11-17	223.43	205.97	17.46	7.41		
150408	12-03-18	223.43	205.97	17.46		15.83	8.42

E.8 The Respondent has already provided SKU-wise details where there is an increase in Customs Duty alongside mapping the old Customs Duty per unit and the new Customs Duty per unit and the same has also been mapped in the 35 excel sheets of profiteering computation by DGAP. Accordingly, it is once again submitted that such increased Customs Duty be allowed to be deducted against the profiteering alleged by DGAP in respect of line items of sale of import products.

E.9 The Respondent placed reliance on the order of NAA in **Case no. 3/2018** of ***Sh. Kumar Gandharv vs KRBL Limited*** [2018-VIL-02-NAA], wherein the NAA has decided that cost increase needs to be considered for the purpose of determining profiteering, if any:

> *7. It is also revealed from the perusal of the tax invoices submitted by the Respondent that there was an increase in the purchase price of paddy in the year 2017 as compared to its price during the year 2016 which constitutes major part of the cost of the above product. It is further revealed from the record that the Respondent had increased the MRP of his product from Rs. 540/- to Rs. 585/- which constituted increase of 8.33% keeping in view the increase in the purchase price. Therefore, due to the imposition of the GST on the above product* ***as well as the increase in the purchase price of the paddy there does not appear to be denial of benefit of ITC as has been alleged by the Applicant*** *as there has been no net benefit of ITC available to the Respondent which could be passed on to the consumers. Accordingly there is no substance in the application filed by the above Applicant as there is no violation of the provisions of Section 171 of the CGST Act, 2017 and hence the same is dismissed. A copy of this order be supplied to the Applicant and the Respondent free of cost. A copy be also supplied to the DGSG. File be consigned after completion.*
>
> ***(emphasis supplied)***

E.10 Accordingly, the Respondent submitted that cost increase on account of Customs Duty increase, be offset from profiteering computed in respect of sales of products imported as such. Such cost increase had not happened overnight on 15.11.2017 but pursuant to amendment by the Government on 01.02.2020. Increase in Customs Duty had taken place within 3 months from the date of rate reduction and falls during the period of investigation.

E.11 In the absence of any findings in this regard in the DGAP's report u/r 133(4) dated 28.08.2020, the Respondent requests to accept Respondent 's submissions regarding reduction in alleged profiteering due to increase in Customs Duty and reduce an amount of **INR 19,18,68,113** as stated above.

E.12 The DGAP has merely reiterated its stand as provided earlier in its clarification dated 11.12.2019. Accordingly, the Respondent reiterates its above submissions. As submitted in Para E.6, the DGAP, while disallowing Respondent's claim for not computing profiteering in respect of

products impacted by Customs Duty, has stated that the contention cannot be accepted as such increase in base prices could not have happened overnight to exactly coincide with the GST rate reduction w.e.f. 15.11.2017. In this regard, it is submitted that the Respondent has not claimed that the Customs Duty increase has coincided with GST rate reduction overnight on 15.11.2017. In fact, the increase in Customs Duty has only happened on 01.02.2018 and the Respondent has made claim for non-computation of profiteering on account of increased Customs Duty only for period post 01.02.2018. Accordingly, the basis for disallowing Respondent's claim by DGAP is incorrect.

E.13 Further, it has been stated by DGAP that though there is an increase in Customs Duty, the actual selling price per unit has not undergone any change during the period November 2017 to March 2018. In this regard, the Respondent submits that the claim for reduction in alleged profiteering due to increase in Customs Duty needs to be examined independent of any price change. It is a matter of fact that the Customs Duty has increased substantially. Therefore, when the Government has reduced the rate of tax from 15.11.2017 and increased Customs Duty on imported goods from 02.02.2018, the DGAP ought to have offset such increased Customs Duty against the alleged profiteering.

E.14 The DGAP has stated that the order of this Authority in Sh. Kumar Gandharv vs. KRBL Ltd. (Case No. 03/2018) does not support the Respondent as in the said case, there was an increase in rate of tax and hence section 171 of the CGST Act was not applicable, whereas in the present case, the rate of tax has been reduced. The Respondent does not agree with the said observation of DGAP. This Authority has specifically considered increase in the cost of inputs as a factor while deciding the case, as can be seen from the extract of this Authority's order in para above. Further, it has been noted that there was an increase in rate of tax in the said case. The Respondent submits that even in the Respondent's facts, there is an increase in rate of Customs Duty. Therefore, the ratio of above case is squarely applicable to the facts of the Respondent. The observation of DGAP is not correct and cannot be accepted.

E.15 Accordingly, the Respondent requests the Authority to consider Respondent's submissions and allow reduction in alleged profiteering to the extent of **INR 19,18,68,113** as stated above.

F. ALLEGED PROFITEERING CANNOT BE IN EXCESS OF GST RATE REDUCTION

F.1 The Respondent submitted during the course of personal hearing before the Authority on 30.08.2019 and also re-iterated in written submissions dated 03.09.2019 and 30.09.2019 about the fact that there are instances where the DGAP has computed profiteering on an SKU which is in excess of the reduction in GST rates.

F.2 The Respondent submitted that Section 171(1) of the CGST Act mandates any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit to be passed on to the recipient by way of commensurate reduction in prices.

F.3 The Respondent further submitted that according to the provisions of Section 171 of the CGST Act, The Authority is mandated to investigate through DGAP and determine the quantum of commensurate benefit arising out of reduction in tax rate which has not been passed on by a supplier. Therefore, allegation of profiteering (if any) can only be to the extent of reduction in GST rates.

F.4 In the instant case, there has been a reduction in tax rates by 10% (From 28% to 18% w.e.f. 15.11.2017) which as per the DG's computation methodology can be given effect to by keeping the pre-tax price (base price) constant. The same can be illustrated as follows:

Period	Base price (excl. GST)	GST	Base price (incl. GST)
Pre-reduction	69.14	28% (19.36)	88.50
Post-reduction	69.14	18% (12.45)	81.59
Commensurate reduction as per DG			INR 6.91

(Note – Pre-reduction price is the base price adopted by DG for sale of product BB Cream Miracle Skin Perfector 18ml as per 11. Goa File)

F.5 The Respondent submitted that allegation of profiteering (if at all) can only be to the extent of the 10% of the pre-rate reduction base price, which reflects the reduction in GST rate from 28% to 18%. In other words, it is respectfully submitted that there can be no allegation of profiteering in excess of the 10% reduction as any amount charged in excess thereof represents the profit of the supplier over which Section 171 of the CGST Act does not confer jurisdiction on the Authority.

F.6 In the above illustration, it appears that the Respondent was supplying the product BB Cream Miracle Skin Perfector 18ml for INR 69.14 in the period prior to GST rate reduction, charging applicable 28% GST on the price of INR 69.14. Accordingly, cum-tax price for the supply of such SKU was INR 88.50 in the pre-rate reduction period. Based on the calculation methodology adopted by the DGAP, it appears that the Respondent was required to maintain the base price to INR 69.14 and thereafter charge applicable GST of 18%. Accordingly, the ideal cum-tax price as per DG could only be INR 81.59.

F.7 It is the understanding of the Respondent that in the above example, if the Respondent had not reduced the cum-tax price, it could be charged for profiteering under Section 171 of the CGST Act to the maximum extent of INR 6.91 (that is, the difference between INR 88.50 and ideal cum-tax price of INR 81.59). Similarly, if the Respondent had reduced the cum-tax price to INR 85, allegation of profiteering on such product could have been to the extent of INR 3.41 (difference between INR 85 and ideal cum-tax price of INR 81.59).

F.8 In one of the case, the price post rate reduction including 18% GST was INR 109.61 for sales made to General Trade Customers (product BB Cream Miracle Skin Perfector 18ml with product code SYCBB018-50 as per Goa sales data). The DGAP has calculated profiteering to the extent of full difference between INR 109.61 and INR 81.59 i.e., INR 28.02. The Respondent, however, submits that allegation of profiteering (if any) on this SKU can be only to the extent of INR 6.91 and thereafter, the balance INR 21.11 (if any, subject to revision in methodology of not including consumer promotion SKUs as comparable) is attributable to the business profits of the Respondent which is not within the scope of Section 171. In other words, this differential amount of INR 21.11 cannot be alleged as profiteered as per Section 171 of the CGST Act, as the scope of Section 171 is limited to commensurate reduction in prices to the extent of reduction in rate of tax or benefit of input tax credit.

F.9 The Respondent submits that if the business profits are also treated as profiteered amount, the same may amount to '**price control**' which is neither intended nor mandated by Section 171 of the CGST Act. The Respondent wishes to draw the attention of the Authority to the order passed in the case of ***Lifestyle Retail Pvt. Ltd.- Case No. 8/2018 dated 25.09.2018*** [vide Para No. 20 of the order], wherein the Authority has observed that it is not functioning as a 'price regulator'.

F.10 The Respondent had submitted that the computation of aggregate reduction in the amount alleged as profiteered due to the above error committed by DGAP can be made by the Respondent only if the basis of computation of base price is made available to the Respondent. Accordingly, post receipt of base price computation data from The Authority on 13.09.2019, the Respondent has computed this amount and based on the weighted average price of products with latest MRP, the same comes to **INR 14,39,46,529,** computed in **column CE** of **Annexure-1 (Revised calculation as per Annexure-15 of DG) of submission dt. 24.10.2019**.

F.11 In view of the above, the Respondent submitted that the amount alleged as profiteered is required to be reduced to the extent as mentioned above.

F.12 Further, the Respondent submitted that the above differences in pre-rate reduction price and actual sale price is mainly occurring due to usage of description as one of the basis for comparison of prices. The Respondent submitted that there are SKUs where due to the price of promotional SKU with same description being lower, the comparable price is low, due to which excess profiteering has been computed. Price of promotional SKU is always lower than the regular price of a product. The price of said promotional SKUs cannot be considered as comparable to prices of normal SKUs charged post GST rate reduction. Post the consumer promotion time period is expired the price of the product return back to regular price as a usual business practice. The Respondent had even submitted a list of SKUs on which it was running promotions in the month of October-November 2017 in the price list submitted to DG vide ***Annexure-6*** to letter dt. **18.02.2019** and had also made an averment in this regard in ***para 5.20*** of its submission dt. **21.06.2019** that products under consumer promotion schemes must not be used as comparables. It is therefore once again submitted that the price of these promotional SKUs should not be taken as the basis for computing profiteering, if any. This further supports the submission of the Respondent that the highest price charged from customer for the period prior to rate reduction must be considered as comparable price for computing profiteering, if any.

F.13 The DGAP in its reply dated 11.12.2019 stated that the Respondent 's submissions that business profits have also been treated as profiteered amount is not correct as the profiteered amount of each product has been calculated with reference to a base price which includes the profit margin, if any on any product on the basis of data provided by the Respondent.

F.14 Further, the DGAP has stated that the legal requirement is abundantly clear that in the event of a benefit of ITC or reduction in rate of tax, there must be a commensurate reduction in the prices of any supply of goods or services. Therefore, the Respondent is under legal obligation to pass on the benefit of ITC or reduction in rate of tax by way of commensurate reduction in price of each and every supply of goods or services.

F.15 Anti-profiteering provisions are for the benefit of the recipients and each recipient must get benefit of reduction in rate of tax or increase in ITC on each and every supply of goods or services or both. Further, the transactions where base price is not increased were excluded from the computation of profiteering.

F.16 The Respondent had submitted that the allegation of profiteering can only be for reduction in rate of GST. If the Respondent is required to pass on the benefit of reduction in rate of tax from 28% to 18% and fails to do so, the Respondent can be alleged to have profiteered only to the extent of such reduction from 28% to 18%. The DGAP in its reply dated 11.12.2019 has re-iterated that the base prices should be kept constant and any amount charged in excess of the base price shall be considered as profiteering, without understanding the submission of Respondent.

F.17 Section 171 requires that any reduction in rate of tax shall be passed on by way of commensurate reduction in prices. If the Respondent was charging say INR 100 + 28 % = INR 128 and the rate subsequently reduced from 28% to 18%, the Respondent may be required to make the price INR 100 + 18% = INR 118. If the Respondent does not reduce prices and keeps them as it is (i.e. INR 128), it may at the most be said to have profiteered by INR 10 (INR 128 – INR 118). Similarly, if the Respondent reduces price by say INR 3, it may be said to have profiteered by INR 7 (INR 125 – INR 118). However, if the Respondent increased the prices to say INR 135, it cannot be said that the difference between INR 135 (price post rate reduction incl. 18% GST) and INR 128 (price pre-rate reduction incl. 28% GST) is also on account of reduction in rate of GST. Only INR 10 (128-118) may be attributed to reduction in rate of GST and the profiteering, if any, should be capped to the extent of reduction in rate of tax. The allegation of profiteering cannot be INR 17 when the reduction in rate of tax is only to the extent of INR 10. The Respondent provided detailed illustration along with detailed calculations on this issue of computation of profiteering in excess of GST rate reduction, for which no response has been found in DGAP's replies dt. 11.12.2019 or 23.12.2019, or the DGAP's report dated 28.08.2020 u/r 133(4).

F.18 The Respondent submits that as per DGAP's own admission, reduction in prices is required commensurate only to reduction in rate of GST, which in the above illustration is clearly only INR 10. It is submitted that the scope of section 171 and corresponding jurisdiction of NAA is confined to reduction in price commensurate with reduction in rate of GST and does not extend to any price increase if taken by the Respondent beyond what it may have been required to reduce in terms of section 171.

F.19 Accordingly, it is submitted that the submissions of Respondent filed on 05.11.2019 be accepted and the quantum of alleged profiteering be reduced by **INR 14.39 crores**.

F.20 It is further submitted that the fact that profiteering gets computed in excess of reduction in rate of tax going by DGAP's methodology, or for that matter even for non-impacted SKUs or SKUs where additional grammage has been given, itself shows that the mathematical approach adopted by DGAP is a flawed one and cannot be considered as the correct approach for determining profiteering, if any.

F.21 In the absence of any findings in this regard in the DGAP's report u/r 133(4) dated 28.08.2020, the Respondent requests to accept Respondent's submissions and reduce an amount of INR 14.39 crores from the total profiteering amount.

F.22 The DGAP has merely reiterated its stand as provided earlier in its clarification dated 11.12.2019. Accordingly, the Respondent reiterates its above submissions. The Respondent has provided specific illustration in paras F.4 to F.8, from which it can be clearly seen that the DGAP has exceeded its mandate u/s 171 of the CGST Act. Since the reduction in rate of tax is 10%, the maximum profiteering that can be alleged in a transaction cannot exceed 10%. Thus, the profiteering has to be capped at 10% of the price pre-rate reduction and cannot exceed the said amount. The Respondent requests this Authority to consider this submission and accordingly provide relief on this account.

G. HIGHER BENEFIT PASSED ON IN RESPECT OF CERTAIN SKUs NOT CONSIDERED - DG HAS ERRONEOUSLY RESORTED TO 'ZEROING' WHICH IS INCORRECT

G.1 The Respondent vide its submissions dated 04.11.2019 submitted that the rate of GST on certain products supplied by the Respondent was reduced from 28% to 18% from 15.11.2017 vide Notification No. 41/2017-Central Tax (Rate). Accordingly, the Respondent also

reduced the rate of GST charged from its customers from 28% to 18% in the invoices issued to them.

G.2 The Respondent submitted that it is fully aware of its obligation of passing on the benefit of reduction in GST rates to the recipients under Section 171 of the CGST Act. The provisions of Section 171 of the CGST Act and rules made thereunder are very clear that such benefit is to be passed on at an entity level and not at an SKU level. While the report of DG alleges a profiteering at SKU level, the Respondent submits that it had ensured passing of benefits using various means, which have already been submitted before the DG and also reproduced in this submission.

G.3 The Respondent has also passed on the above said benefit by allowing greater price reductions i.e. more than commensurate to the GST rate reduction on various impacted SKUs. Looking from a different angle, in the present case, the recipients who are our distributors have received the GST rate reduction benefits from Respondent sometime slightly more and sometimes slightly less. In other words, our distributors (recipients as per Section 171) are in fact happy and have not made any complaint whatsoever in this regard. However, while determination of alleged profiteering on other impacted SKUs, the DG has ignored such excess benefit passed on by the Respondent.

G.4 The Respondent submitted that the DG has selectively applied the anti-profiteering provisions in the present case. Where the Respondent has passed on benefit to the customer in excess of the required amount, the DG has ignored such measures (treating these as zero (0) for profiteering calculations). On the other hand, DG has insisted that where the benefit to the customer is less than what is the required amount, regardless of other measures, the differential amount is being sought to be alleged as profiteered amount. This is called 'zeroing' which has been held to be incorrect and the Government of India itself had objected to the concept of 'zeroing-in' at the World Trade Organization (WTO).

G.5 While calculating the alleged profiteering amount, DG has incorrectly applied a methodology similar to 'zeroing' which was used by anti-dumping authorities in certain countries like European Union. According to the said methodology, while calculating the dumping margin only those SKUs were considered which were being dumped and those SKUs which were not being dumped were not considered. The Government of India disputed this practice and has taken a stand against such methodology at the WTO and argued that while determining the dumping margin, all SKUs should be taken into consideration rather than only those which show positive dumping.

G.6 In this regard, attention is invited to ***Report No. WT/DSl41/AB/R dated 1.3.2001*** of the Appellate Body, WTO regarding Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India. In the subject case, Indian exporters faced an anti-dumping action by EU and the exporter was exporting different variety of bed linen to EU. In some cases, the exporter was exporting at positive dumping margin, wherein in many cases there was negative dumping margin, i.e., the export price was more than the normal value at which goods were sold in India.

G.7 The European Commission applied their usual practice of not netting off the positive and negative dumping margins. In fact, they applied 'zero' (0) for negative dumping margins and cumulated only positive dumping margins and thereby arrive at higher dumping margins for Indian exporters. Government of India objected to this approach of European Commission and the matter was taken to the Dispute Settlement Body of the World Trade Organization which held in favour of Government of India. In an appeal filed by the EU before the Appellate Body, the Appellate Body held that the practice of not netting off of positive dumping margin and negative dumping margins was not correct.

G.8 Thus, the Government of India succeeded before the WTO Appellate Body that positive and negative dumping margins must be taken together and therefore got lower dumping

margin for Indian exporters. European Commission accepted the decision and revised dumping margin not only for bed linens cases but also for all other cases against India.

G.9 In this regard, the Respondent submitted that it has passed on more than required amounts by following means:

a. **Higher reduction in per unit price of the goods sold:** This is a flat reduction in price of the goods by more than 7.8% reflected on the invoice itself. For instance, if the Respondent was selling the goods at INR 100 + 28% GST = INR 128 and as per the DGAP's methodology, the commensurate price should have been INR 100 + 18% GST = INR 118, the Respondent sold these goods at a price of say INR 95 + 18% GST = INR 112.1, thereby reducing the price by INR 5.9 (118-112.1) more than that considered commensurate by DG. Amount passed on by this measure alone is **INR 68.59 crores** (68,59,12,188), considering weighted average price of products with latest MRP.

b. **Increase in grammage in excess of 8.5%:** The Respondent has also passed on higher price reduction in some goods by way of higher grammage in excess of 8.5% which effectively results in a higher price reduction when comparison is made between prices per ml/gm. For instance, if the price of the goods was INR 100 (ex-GST) for 100 ml pack (per ml price of INR 1), instead of increasing the grammage to only 108.5 ml (with a sale price excluding GST of INR 108.5 thereby resulting in per ml price of INR 1), the Respondent increased the grammage to say 110 ml, thereby passing on 1.5 ml (INR 1.5 equivalent) in excess of what may be considered as commensurate by DG. Amount passed on by this measure alone is **INR 56.01 crores** (56,01,05,432), considering weighted average price of products with latest MRP.

c. **Price reduction more than required in cases where fiscal incentives have reduced:** The Respondent has suffered reduced realization in cases where the fiscal incentives have reduced on account of reduction in GST rate from 28% to 18%. However, the Respondent reduced prices of certain supplies more than required after considering the impact of reduced fiscal incentives. For instance, the Respondent was earlier realizing INR 100 from customer + INR 2 from Government by way of budgetary support. Although the budgetary support may have reduced to INR 0.5 due to GST rate reduction from 28% to 18%, the Respondent did not increase the prices or increased the prices less than INR 1.5 - reduction in fiscal incentives (for instance, say price was increased to INR 101 and no increase was taken to the extent of INR 0.5). Amount passed on by this measure alone is **INR 15.38 crores** (15,37,84,257), considering weighted average price of products with latest MRP.

G.10 The Respondent further submitted that if a customer is charged INR 2 extra for 1 SKU and is provided a higher than required price reduction of INR 3 for another SKU, as long as the amount on a totality basis has been returned to customer and has not been charged extra, it should not matter that an extra amount of INR 2 was charged. As long as the customer receives the benefit (whether on 1 SKU or another), it cannot be construed that the Respondent has profiteered.

G.11 Accordingly, negative price variations as discussed above should also be considered for determining alleged profiteering (if any). The value of excess benefit passed on other SKUs by this measure aggregates to **INR 139.98 crores** (139,98,01,877), (considering weighted average price of products with latest MRP), which should be reduced from the alleged profiteering computation. This is without prejudice to submissions of the Respondent that the allegation of profiteering is not sustainable.

G.12 The DGAP in its reply dated 11.12.2019 has stated that the legal position is unambiguous and can be summed up as follows:

i. A supplier of goods or services must pass on the benefit of ITC or reduction in the rate of tax to the recipients by way of reducing the prices thereof paid by the recipients; and

ii. The law does not offer a supplier of goods and services any flexibility to *suo moto* decide on any other modality to pass on the benefit of ITC or reduction in rate of tax to the recipients.

G.13 The DGAP has further stated that the law does not offer a supplier of goods and services, flexibility to pass on the benefit of ITC or reduction in rate of tax on one product, say 'X' by reducing the prices of any other product, say 'Y'. It has further stated that section 171 is very clear according to which the benefit of reduction in tax rate has to be passed on each and every supply individually. Thus, if the Respondent has passed on excess benefit in respect of any supply to a recipient, the same cannot be adjusted against the profiteered amount in relation to some other supply.

G.14 The Respondent had inter *alia* in its written submissions filed on 05.11.2019 submitted in para G that it had passed on higher benefit in respect of certain SKUs, which should be reduced from the alleged profiteering computation. In this regard, it is pertinent to observe the comments of DGAP in relation to para G in its reply dt. 13.12.2019, wherein the legal position is summed up by DGAP, one of which is that:

> *(a) a supplier of goods or services must pass on* the *benefit of ITC or reduction in rate of tax to the recipients by way of reducing the prices thereof paid by the recipient.*

G.15 It is submitted that as long as the above condition is being fulfilled, it does not matter whether the same is given for Product X or Product Y, in as much as it is given to the very same customer. Accordingly, it is submitted that even if profiteering has been alleged to the extent of approx. INR 175.28 crores (after considering base price discrepancies as per weighted average prices of products with latest MRP), the Respondent has already passed on more than INR 117.72 crore by way of higher price reduction even if such higher benefit passed on is restricted to profiteering at customer + GSTIN level. In effect, the excess amount stands (alleged profiteering) at customer+ GSTIN level reduces to INR 57.56 crores (as per Annexure-1 zeroing summary). After adjusting for amount passed on in light of other submissions made by the Respondent, it is submitted that the Respondent has fully passed on the benefit of rate reduction.

G.16 In this regard, it is also submitted that a transaction must be viewed from the perspective of a man of commerce, and as long as the benefit is passed on to the same customer by Respondent and also received by the customer, the same should be adjusted from total profiteering. The Respondent places its reliance on the case of ***Dai Ichi Karkaria Ltd. 1999 (112) ELT 0353 SC***, wherein the Supreme Court observed the following:

> *"24. We think it is appropriate that the cost of the excisable product for the purposes of assessment of excise duty under Section 4(1)(b) of the Act read with Rule 6 of the Valuation Rules should be reckoned as it would be reckoned by a man of commerce. We think that such realism must inform the meaning that the Courts give to words of a commercial nature, like cost, which are not defined in the statutes which use them. A man of commerce would, in our view, look at the matter thus : "I paid Rs. 100/- to the seller of the raw material as the price thereof. The seller of the raw material had paid Rs. 10/- as the excise duty thereon. Consequent upon purchasing the raw material and by virtue of the Modvat scheme, I have become entitled to the credit of Rs. 10/- with the excise authorities and can utilise this credit when I pay excise duty on my finished product. The real cost of the raw material (exclusive of freight, insurance and the like) to me is, therefore, Rs. 90/-. In reckoning the cost of the final product I would include Rs. 90/- on this account." This, in real terms, is the cost of the raw material (exclusive of*

freight, insurance and the like) and it is this, in our view, which should properly be included in computing the cost of the excisable product."

G.17 Accordingly, it is once again submitted that the higher benefit should be adjusted against profiteering alleged by DGAP.

G.18 The Respondent also places reliance on the decision of the Hon'ble Delhi High Court in W.P.(C) 1780/2020 in the case of ***M/s. Johnson & Johnson Pvt. Ltd Vs. Union of India & Ors*** wherein the order passed by NAA was challenged. The High Court in that case has passed an interim order dated 18.02.2020 wherein it has been observed that the Petitioner has been able to make out a strong case for grant of interim relief, and one of the points considered by the Hon'ble Delhi High Court was that cases where the price actually fell after reduction in rate of tax were excluded from consideration by the Authority in its impugned order. The relevant portion of the order passed by Hon'ble Delhi High Court is extracted below:

> *"We have heard learned senior counsel for the petitioner as well as the counsel for the respondent on the aspect of grant of interim relief. It is pointed out by learned senior counsel for the petitioner that the respondents have acted unreasonably, inasmuch, as, for the period prior to reduction of GST from 12% to nil w.e.f. 27.07.2018, the DGAP had computed the base price on average basis. However, for the period after the GST rate became nil w.e.f. 27.07.2018, the base price has been worked out item by item. Our attention has been drawn to the tabulation filed by the petitioner before the DGAP, which shows that in respect of several items sold by the petitioner, after the reduction of GST to nil, the price actually fell, however, while computing the profiteered amount; such cases have been excluded from consideration.*
>
> *Prima facie, it appears to us that the impugned order needs consideration and the petitioner has been able to make out a strong case for grant of interim relief. Till the next date, we stay the operation of the impugned order. List on 24.09.2020*
>
> *No penalty proceedings shall be initiated against the petitioner in the meantime."*
>
> *[Emphasis supplied]*

G.19 Thus, the Respondent submits that the methodology of zeroing adopted by the DGAP is incorrect and is required to be set aside for the grounds mentioned supra. In the absence of any findings in this regard in the DGAP's report u/r 133(4) dated 28.08.2020, the Respondent requests to accept Respondent's submissions.

G.20 The DGAP has merely reiterated its stand as provided earlier in its clarification dated 11.12.2019. Accordingly, the Respondent reiterates its above submissions. The Respondent has provided reference to Bed Linen case supra in respect of dumping duties, wherein the Government of India had itself opposed ignoring the negative amounts (i.e. zeroing) and successfully appealed before the WTO Appellate Body. Further, the Respondent submitted that the Hon'ble Delhi High Court observed in Johnson & Johnson supra that comparing average price with actual price while ignoring negative needs consideration and accordingly stayed the impugned order. The Respondent placed reliance on the case of Dai Ichi Karkaria supra, decided by the Hon'ble Supreme Court. The DGAP has not offered any comments with respect to the submission of the Respondent. The Respondent therefore requests this Authority to consider its submission and accordingly reduce the alleged profiteering.

H. LOSS DUE TO REDUCED FISCAL INCENTIVES UNDER BUDGETARY SUPPORT SCHEME TO BE CONSIDERED

H.1 The Respondent vide its submissions dated 04.11.2019 submitted that it is having a unit in Baddi, Himachal Pradesh where it was availing the benefit of area-based exemption under the erstwhile Central Excise regime. Further, the Respondent also gets goods manufactured through its sub-contractors located in Baddi. Under the exemption, the Respondent was not required to pay Central Excise Duty on the goods manufactured in such unit and was also not

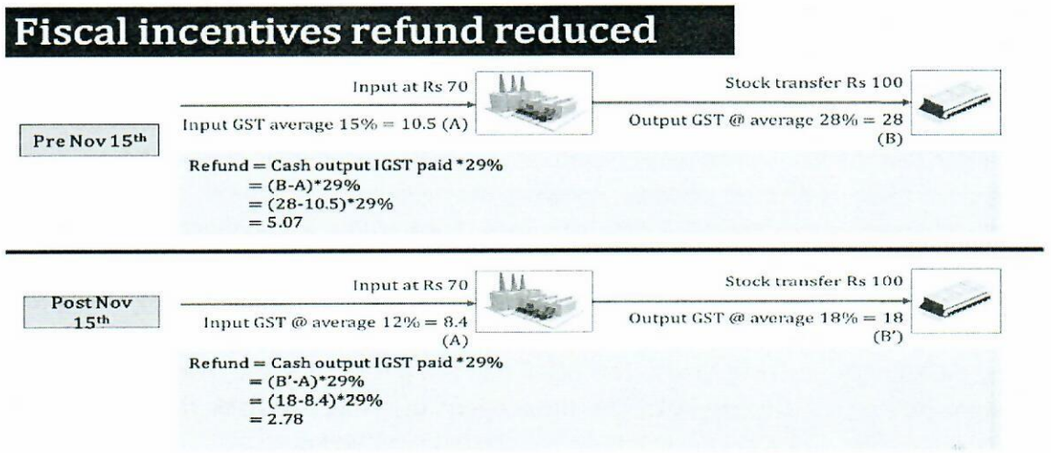
entitled to avail any Cenvat Credit. With the introduction of GST, upfront exemption to such units was withdrawn and instead they are required to pay GST on goods supplied and thereafter claim refund to the extent of 58% of the central tax component paid out in cash.

H.2 The Respondent had submitted to the DG that the implementation of GST w.e.f 01.07.2017 resulted in taking away a substantial portion of the tax benefit which was available to the Respondent under the excise regime, and a loss to the tune of Rs.74,41,87,041 in respect of its own manufacturing plant in Baddi had been suffered, the calculation of which can be seen at Annexure 11 of submission dated 21.06.2019 of Respondent before DGAP. This loss was computed by comparing the reduced refund available to it under GST regime (which is 58% of amount paid in cash, by adopting 90% of sale price as transaction value) with the refund which was available under pre-GST regime (100% of excise duty paid in cash was available as refund/exemption was available whereby no excise duty was payable and CENVAT credit was not available). Value on which excise duty was calculated was almost equal to the sale price of L'Oréal.

H.3 The Respondent also suffered loss due to substantial reduction in the benefit available on introduction of GST, for products manufactured by sub-contractor factories. This loss on account of implementation of GST during the period of investigation is INR 38.72 crores (38,72,53,979).

H.4 However, the same has been rejected by DG on the ground that the Respondent is entitled to the same proportion of 58% of CGST component paid in cash as earlier and hence, the amount of refund has not reduced in relative terms. The DG has also stated that reduction in refund could also be possible due to increased utilization of ITC without any factual finding on the same. It is incorrect on part of the DG to have assumed reduction in cash payout and consequently reduced refund due to increased utilization of ITC.

H.5 In this regard, the Respondent submitted that due to reduction in rate of tax from 28% to 18%, there is a considerable reduction in the output GST paid by the Respondent. Further, the raw materials have also undergone a reduction in rate of GST from 28% to 18%. For sake of ready reference and easy understanding an illustration showing the reduced refunds in absolute terms is given below, by comparing refund available in pre-reduction period with refund available in post-reduction period:



H.6 From the above illustration, it can be seen that the refund available under the new scheme in the GST regime is restricted to specified percentage of tax paid by cash after utilizing input tax credit. Accordingly, if the tax payout in cash reduces, the amount of refund allowable also gets reduced.

H.7 In this regard, the Respondent submitted that loss cannot be considered in relative terms as there is a clear reduction in refund when compared on a per unit basis. For instance, if

the Respondent is selling a product at a selling price of INR 100 and the refund gets reduced from say INR 5 to INR 2 per unit, it will directly impact the selling price and the Respondent will be forced to increase the price by INR 3 per unit to compensate for the reduced refund.

H.8 Further, it is submitted that in order to negate any impact due to fluctuation in ITC, the Respondent has calculated the refund on a per unit basis by taking the data for a period of 4.5 month each pre- and post GST rate reduction, which is a sufficiently long period to negate any impact of ITC. In fact, in the case of the Respondent, there is only a reduction in rate of tax on raw materials and the ITC has only reduced. A reduced ITC in post-rate reduction period will result in increased cash outflow and consequently increased refund, which ultimately results in reduction in the loss when compared to pre-rate period. The Respondent has therefore adjusted the increased benefit on account of reduced ITC and is only claiming the net loss on account of reduced GST rate. This can be better understood with the following example:

H.9

Particulars	Pre-rate reduction	Post rate reduction (no ITC change)	Post rate reduction (ITC reduction)
Stock transfer price	100	100	100
Output IGST	28	18	18
Purchase cost	70	70	70
Purchase GST	15% = 10.5	15% = 10.5	12% = 8.4
Tax paid in cash	28-10.5=17.5	18-10.5=7.5	18-8.4=9.6
Refund @ 29%	5.07	2.18	2.78
Loss		5.07-2.18=2.89	5.07-2.78=2.29*

*As can be seen from the above, the net loss being claimed by Respondent is only lower than the actual loss on account of GST rate reduction in outward supply of products

H.10 Accordingly, the Respondent has reworked the quantum of reduced refund solely on account of reduction in rate of tax from 28% to 18% without considering loss on account of refund restricted to 58% of CGST/29% of IGST instead of Respondent 's expectation of 100% refund of CGST/50% refund of IGST. The refund reduced solely on account of reduction in rate of tax from 28% to 18% works out to **INR 16.76 crores** (16,75,98,492), which should be adjusted while arriving at profiteering, if any.

H.11 The Respondent submitted that with the reduction in GST rates w.e.f. 15.11.2017, the tax payout directly reduced, resulting in reduced refund in absolute terms. Hence, the absolute reduction in refund allowable (even though refund is still allowed at the same proportion of 58% of CGST paid in cash) is directly attributable to reduced GST rates and hence, the value of reduced refund should be reduced from the alleged profiteering (if any) to determine the net impact of the GST rate reduction on the Respondent .

H.12 The DGAP in its reply dt. 11.12.2019 stated that the concern of the Respondent is duly addressed in para-19 of its report dt. 05.07.2019. In this regard, the Respondent has already provided its detailed submissions in response to para 19 of DGAP report in its written submissions dated 04.11.2019. Since the DGAP has not provided any reply to these submissions made by the Respondent, the Respondent re-iterated its submissions dated on 04.11.2019.

H.13 Further, the Respondent vide rejoinder submissions dated 30.12.2019 submitted that reduction in budgetary support has to be seen in absolute terms and relative % has no relevance whatsoever to determine the reduction suffered by Respondent. The Respondent specifically computed the reduction in budgetary support solely on account of reduction in rate of tax. Although the Respondent had provided detailed sales line item wise computation of the reduction in budgetary support due to reduction in GST rate from 28% to 18%, it further provided few illustrations of the budgetary support so reduced (for channel type GT from file 20.Maharashtra_GT):

Illustration for product 1:

H.14 Product Code BNTFR100-60 with product description GAR BL NAT SHADE 1

Sr. No.	Invoice date	Actual sale price per unit incl. GST	Commensurate sale price as per DGAP	Profiteering p.u. as per DGAP	Budgetary support (after 15.11.2017)	Budgetary support (before 15.11.2017)	Reduction in Budgetary support
11	16-11-17	33.35	30.74	2.61	0.76	1.54	0.78

Illustration for product 2:

H.15 Product Code CCGIF316-F0 with product description CASTING CREAM GLOSS 3.16 PLUM

Sr. No.	Invoice date	Actual sale price per unit incl. GST	Commensurate sale price as per DGAP	Profiteering p.u. as per DGAP	Budgetary support (after 15.11.2017)	Budgetary support (before 15.11.2017)	Reduction in Budgetary support
15	16-11-17	520.35	478.33	42.03	13.37	23.44	10.08

Illustration for product 3:

H.16 Product Code CNCFU100-90 with product description CN. Unidose Sh. No. 1 Black

Sr. No.	Invoice date	Actual sale price per unit incl. GST	Commensurate sale price as per DGAP	Profiteering p.u. as per DGAP	Budgetary support (after 15.11.2017)	Budgetary support (before 15.11.2017)	Reduction in Budgetary support
25	16-11-17	66.69	61.48	5.21	1.57	3.03	1.46

H.17 In the absence of any findings in this regard in the DGAP's report u/r 133(4) dated 28.08.2020, the Respondent requests to accept Respondent's submissions. The Respondent once again submits that the refund reduced solely on account of reduction in rate of tax from 28% to 18% works out to **INR 16.76 crores** (16,75,98,492), which should be adjusted while arriving at profiteering, if any.

H.18 The DGAP has merely reiterated its stand as provided earlier in its report dated 05.07.2019. Since the DGAP has not dealt with the submissions made by Respondent, the Respondent reiterates its above submissions. The Respondent has demonstrated with illustration that reduction in GST rate has led to reduction in budgetary support in relative terms, thereby reducing the absolute quantum of budgetary support. Such reduction in budgetary support due to reduction in GST rate ought to be considered while computing profiteering, if any.

H.19 In this regard, the Respondent submits that a transaction must be viewed from the perspective of a man of commerce, as has been held by the Hon'ble Supreme Court in ***Dai Ichi Karkaria Ltd. 1999 (112) ELT 0353 SC***, mentioned supra. Reduction in rate of GST leads to a direct reduction in budgetary support. Reduction in budgetary support due to reduction in rate of GST rate must be necessarily offset against the benefit required to be passed on account of

reduction in rate of GST. Therefore, the Respondent requests this Authority to consider the submissions of the Respondent and reduce alleged profiteering by **INR 16.76 crores** (16,75,98,492).

I. PROFITEERING SHOULD NOT BE COMPUTED FOR LUXURY PRODUCTS

I.1 The DG has in the course of computation of profiteering covered certain luxury products sold by the Respondent. There are certain products/markets/services which are priced based on perception in the market and brand positioning and therefore these products should be excluded from computation of profiteering, if any. These products are sold under the Luxury Products Division (LPD) and can be identified from the outward supply sheets based on Division LPD in column AB.

I.2 The DGAP has in its reply dt. 11.12.2019 stated that section 171 does not make any differentiation between necessity and luxury products and that the report covers all products impacted by rate reduction. The Respondent vide its rejoinder submissions dated 30.12.2019 submitted that section 171 must be interpreted to exclude products the prices of which is based on perception in the market and brand positioning. Accordingly, supply of luxury products must be excluded from computation of profiteering.

J. ALLEGED PROFITEERING AMOUNT HAS BEEN INCORRECTLY INFLATED IN THE REPORT BY ADDING GST AND THE SAME IS NOT SUSTAINABLE

J.1 The Respondent, referring to the DGAP report dated 05.07.2019, submitted that the profiteered alleged by the DGAP was arrived at by comparing the customer type-wise average of the base prices of the impugned products sold during the period 01.10.2017 to 14.11.2017, with the actual invoice-wise base prices of such products sold during the period 15.11.2017 to 31.12.2018, and that the GST collected from the recipients on such alleged profiteering was also included in the total profiteering amount, as the DGAP alleged that the excess price collected from the recipients also includes the GST charged on the increased base price.

J.2 The Respondent submitted that while arriving at the total alleged profiteering amount, the DG has incorrectly inflated the pre-rate reduction price by adding 18% GST to it and comparing it with the actual sale price including 18% GST, without adducing grounds as to why this amount has been added.

J.3 Whatever amount was charged as GST by the Respondent, the same has been duly deposited in government account. There has been no allegation that the amount termed as excess GST in the Report is not GST per se and that such excess tax has not been paid to the government.

J.4 Assuming, without admitting, that the Respondent has profiteered and GST has been collected thereon and said GST is to be paid in Consumer Welfare Fund then instead of Respondent, the Government can transfer the amount equivalent to GST on the profiteered amount to the Consumer Welfare Fund.

J.5 The Respondent further submitted that addition of 18% would have been correct if the case of DG was that the amount has been collected and retained by the Respondent and not deposited with the Government. In this regard, reliance is placed on the case of ***R.S. Joshi, Sales Tax Officer, Gujarat v. Ajit Mills Limited*** reported at **(1977) 4 SCC 98**, wherein the Supreme Court analysed what the term "collected' meant in the context of the sales tax legislation of Gujarat. It observed as under:

> *|"34. Section 37 (1) uses the expressions, in relation to forfeiture any sum collected by the person - shall be forfeited'. What does collected' mean here? Words cannot be construed effectively without reference to their context. The*

setting colours the sense of the word. The spirit of the provision lends force to the construction that 'collected" means "collected and kept as his" by the trader. If the dealer merely gathered the sum by way of tax and kept it in suspense account because of dispute about taxability or was ready to return if eventually it was not taxable, it is not collected. 'Collected., in an Australian Customs Tariff Act, was held by Griffth C.J., not .to include money deposited under an agreement that if it was not legally payable it will be returned' (Words & Phrases p. 274). We therefore, semanticise. Collected' not to cover amounts gathered tentatively to be given back if found non-exigible from the dealer."

J.6 Since the amount collected as GST by the Respondent from the recipient on the alleged profiteering amount has already been deposited with Government and there is no factual dispute by the DG on this aspect, the Respondent submitted that addition of 18% GST to calculate the alleged profiteering amount is incorrect, not sustainable and liable to be rejected.

K. INTERPRETATION OF SECTION 171 OF CGST ACT BY THE DGAP IS NOT CORRECT.

K.1 The Respondent in its submissions dated 04.11.2019 submitted that in the absence of any guidelines issued by the authority, the Respondent understood that passing of benefits of GST rate reduction through the above said methods (mentioned in the preceding paragraphs) was and is in full compliance of Section 171 of CGST Act.

K.2 The word "commensurate reduction" in the Section denotes reduction in price after taking into account all factors which impact pricing of goods. Had the legislative intention been otherwise, instead of the word 'commensurate', the word 'equal' or 'equivalent' would have been used in this Section. 'Commensurate' connotes proportionality and adequacy.

K.3 There may be multiple prices for the same supply at different points of time viz., one before the supply and one after the supply when the price is finalized based on terms of sale like discounts or price reductions based on schemes, turnover, etc. To cover such situations, the word 'prices' is used in Section 171. The law also uses the word 'any' before supply of goods and the same has been used to denote singular as against the plural for price.

K.4 Commensurate reduction is not restricted to passing of benefit of tax rate reduction in monetary terms which is normally the price. Section 171 does not use the words 'pass on the benefit by reduction in price'. The effect of commensurate reduction in price is increased benefit to the recipient due to tax rate reduction. If the recipient gets the benefit in monetary or non-monetary form proportionate to tax rate reduction, Section 171 is complied with. Price in this regard is the consideration paid or payable for the supply.

K.5 As per Indian Contract Act, 1872, consideration includes any act or abstinence. While consideration for supply is generally measured in monetary terms, the same can also include non-monetary elements.

K.6 By use of the word 'commensurate', cost of raw materials, packing materials, overheads and other such elements involving increase in cost are required to be factored in while examining whether Section 171 is applicable or not. Further, increase in quantity or grammage of goods supplied should be considered while considering whether the benefit passed on is commensurate or not. It is for such purpose, the word 'commensurate' has been used in Section 171.

K.7 The word 'any' has been used twice in Section 171(1). 'Any' would mean tax reduction can be any percentage and it can be ad valorem, specific rate or combination of both i.e. any type of reduction. Any supply does not necessarily mean SKU-level supply. At the most it may be interpreted as goods classified under a particular tariff heading / HSN code.

K.8 Section 171 uses the words 'registered person'. When the same is read along with 'supply', it denotes that Section 171 is applicable to persons registered under CGST Act. The Respondent has not obtained registration SKU-wise. Form GST REG-01 is the form specified under CGST Rules as application form for obtaining registration under CGST Act. S. No. 18 of this form seeks details of goods supplied and the words used are 'Please specify top 5 goods' and the table thereunder seeks description of goods along with HSN code. When registration is obtained based on goods supplied which are classifiable under particular tariff headings, applying Section 171, SKU-wise is neither legally sanctioned nor correct. It is submitted that in place of SKU wise calculation of profiteering, HSN code can be considered in the light of above submission for the purpose of calculating alleged profiteering. This is without prejudice to the argument that profiteering (if any) is to be considered at legal entity level.

K.9 Vide its rejoinder submissions dated 30.12.2019, the Respondent further stated as under:

i. The fact that the term equivalent has not been used itself shows the intention of the legislature to provide for adjustment of various other factors affecting the pricing of products.

ii. The term *prices* is used in plural form, any interpretation of the same to mean only one selling price would defeat the very purpose of usage of the term in plurality.

L. AMOUNT, IF ANY, HELD AS PROFITEERED, CAN BE REFUNDED TO RECIPIENTS.

L.1 The Respondent in its submissions dated 04.11.2019 submitted that it has not violated Section 171 and rules made thereunder and the allegation of profiteering consequent to GST rate reduction is not sustainable. In the unlikely event of the Authority holding that some amount has been profiteered by the Respondent, then the same will be refunded by the Respondent to its recipients.

L.2 Rule 133 of CGST Rules provides that where the Authority determines that a registered person has not passed on the benefit of the reduction of rate of tax, the Authority may, inter alia, order return to the recipient an amount equivalent to the amount not passed on. It further provides for deposit of such amount in Consumer Welfare Fund constituted under Section 57 of CGST Act where the eligible person does not claim return of the amount or where such person is not identifiable.

L.3 The Respondent submitted that recipients of the Respondent are identifiable as they are its distributors, modern retail, e-commerce customers etc. and therefore, in the unlikelihood of the Authority holding any amount as profiteered, appropriate orders may be passed to enable the Respondent to return such amount to its recipients, and not Consumer Welfare Fund.

L.4 the Respondent in its rejoinder filed on 30.12.2019 submitted that section 171 only provides that benefit shall be passed on to the recipients. The recipients of Respondent are its various distributors, modern trade customers, etc.

L.5 the DGAP has stated that the benefit has to be passed on to each recipient who is the final recipient, i.e. the end consumer who suffers the burden of tax, as evident from various media briefings, parliamentary debates/speeches of more than one Union Finance Ministers, which state that the consumer (who is the final recipient and who suffers the final burden of GST) should be at the fulcrum of this law. The DGAP has stated that when section 171 of the CGST Act provides that the benefit shall be passed on to the recipient, it really intends the ultimate beneficiary to be the final recipient (the consumer) who has really borne the burden of this indirect tax. The Respondent submits that the DGAP's interpretation is not in accordance

with the accepted principles of statutory interpretation. Section 171 of the CGST Act uses the term "recipient". Recipient has been defined u/s 2(93) of the CGST Act as follows:

> *(93) "recipient" of supply of goods or services or both, means —*
> *(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;*
>
> *(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and*
>
> *(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered,*
>
> *and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;*

L.6 In the instant case, the distributors, modern trade, e-commerce customers of Respondent are liable to pay consideration for the supply of goods. They are acting on a principal to principal basis by purchasing the goods from the Respondent for making further sales. These customers are not acting as agents between the Respondent and the final consumer. The Respondent does not have any direct transaction with the consumer, i.e. the consumer is not liable to pay consideration directly to the Respondent.

L.7 The Respondent submits that section 171 of the CGST Act uses the term recipient which is defined in the CGST Act. Thus, when the definition is provided in the Act itself, the DGAP cannot adopt a different interpretation. Section 171 does not use the term "consumer". Thus, by construing recipient to be the consumer, the DGAP is substituting the term used by the legislature. The Respondent submits that the legislature has consciously used the term "recipient" which has been defined in the CGST Act. When a defined term has been used in a provision, the meaning has to be derived from the said definition only and no other meaning can be adopted. Therefore, the Respondent submits that the DGAP's interpretation that recipient should mean the consumer is not in accordance with the accepted principles of statutory interpretation and therefore requests this Authority to reject this interpretation and accept Respondent 's submissions.

M. MANUFACTURER IS NOT UNDER LEGAL OBLIGATION TO AFFIX STICKERS FOR CHANGE OF MRP ON THE GOODS LYING IN DISTRIBUTION CHAIN.

M.1. The Respondent vide submissions dated 04.11.2019 submitted that at the time of import or manufacture, the importer or manufacturer is under obligation to comply with various laws. Legal Metrology Act, 2009, casts obligation and places a ban that the MRP cannot be altered. CGST Act and Rules made thereunder do not deal with affixation of MRP. Affixation of stickers with revised MRP and allied compliances are provided under Legal Metrology Act, 2009 and Legal Metrology (Packaged Commodities) Rules 2011.

Rule 6(3) of Legal Metrology (Packaged Commodities) Rules 2011 ("LM Rules") reads as under:

> *"Rule 6 (3) It shall not be permissible to affix individual stickers on the package for altering or making declaration required under these rules:*
>
> *Provided that for reducing the Maximum Retail Price (MRP), a sticker with the revised lower MRP (inclusive of all taxes) may be affixed and the same shall not cover the MRP declaration made by the manufacturer or the packer, as the case may be, on the label of the package."*

M.2. As per the above provision, in respect of reduction in MRP, it is permissible to affix sticker with revised lower MRP and ensure the revised MRP does not cover the MRP declared earlier. The said rule provides discretion to the supplier regarding affixation of sticker as the words used are 'may be affixed'. Therefore, in case of reduction in MRP, there is no compulsion to affix sticker with revised MRP.

M.3. In terms of Rule 33(1) of the aforesaid rules, the Central Government can relax any of the conditions in the rules. In exercise of the said powers, the Legal Metrology Division of Department of Consumer Affairs has issued a circular dated 04.07.2017 permitting the manufacturers or packers or importers to change the MRP on unsold stock manufactured / packed / imported prior to 1st July 2017 after inclusion of the increased amount of tax due to GST if any, in addition to the existing MRP for a period of three months w.e.f. from 1st July 2017 to 30th September 2017.

M.4. The Respondent submitted that Rule 6(3) deals with affixation of sticker with revised lower MRP without reference to person who is empowered in this regard. The only condition is that such sticker should not cover the MRP declaration already made by the manufacturer or packer. Therefore, it can be said that such sticker can also be affixed by persons like distributors, dealers or retailers. The law recognizes that the product may be anywhere in the distribution channel and all such persons like dealers and retailers may affix sticker to show reduced MRP.

M.5. As submitted above, in case of increase in MRP, relaxation was granted to manufacturers, importers and packers by the above said circular dated 04.07.2017 to affix sticker to declare changed MRP on unsold stock as existing on 1st July, 2017. In case of reduction of MRP, all persons including dealers and retailers have been provided the discretion to affix stickers as per Rule 6(3). In respect of reduction of MRP on the goods lying with dealers and others, law has taken into account practical considerations. It is not possible for manufacturers to affix stickers with reduced MRP on the products which have already been sold and lying with dealers and retailers. The manufacturers are not liable to affix sticker with reduced MRP when GST rate was reduced in respect of goods lying with others.

M.6. Accordingly, the Respondent submitted that a commensurate reduction in price of supply of goods is the only mandate under section 171 of the CGST Act and further that affixing of stickers with reduced MRP is not a mandatory provision but a discretion provided in the Legal Metrology Act and the rules framed thereunder.

N. IN THE ABSENCE OF ANY PRESCRIBED METHODOLOGY OF CALCULATION OF PROFITEERING IN THE CGST ACT, THE CGST RULES OR THE PROCEDURE PRESCRIBED BY NAA, THE PROCEEDINGS ARE ARBITRARY AND LIABLE TO BE DROPPED.

N.1. The Respondent in its submissions dated 04.11.2019 submitted that the CGST Act or the CGST Rules or the National Anti-Profiteering Authority Methodology and Procedure, 2018 do not prescribe any procedure and mechanism of determination and calculation of profiteering. It amounts to violation of principles of natural justice. It further submitted that the 'Procedure and Methodology' issued on 19.7.2018 by NAA only provides the procedure pertaining to the investigation and hearing.

N.2. In absence of any framework or guidelines laid down by Section 171 or Rules made thereunder, different approaches may be followed by NAA/ DG. If methodology or guidelines would have been prescribed, then the Respondent would have passed on the benefit to its customers according to such methodology or guidelines and the present proceedings would have been avoided.

N.3. The Respondent in its rejoinder submissions dated 30.12.2019 informed practice followed in Malaysia, Australia, etc. in the anti-profiteering matter, where detailed methodology has been prescribed.

N.4. Respondent also informed that detailed policy guidelines are available in different legislation for determining and quantification. For example,

a. Section 9A of the Customs Tariff Act, 1975 lays down the broad guidelines on the basis of which the extent of dumping and anti-dumping duty is to be quantified including "normal value", "export price" and "margin of dumping". Furthermore, the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 have been notified, under which the applicable principles such as determination of injury, evidence of dumping and calculation of non-injurious price have been provided in detail.
b. The CGST Act itself prescribes detailed guidelines to determine value of supplies under Section 15 supplemented by Rules 27 to 35 of the CGST Rules. This is not left to the subjective determination of the authorities to be decided on a case to case basis.
c. Section 19(3) of the Competition Act, 2002, lays down the factors to be taken into consideration while determining whether an agreement has an appreciable adverse effect.

O. IN THE ABSENCE OF ISSUANCE OF SHOW CAUSE NOTICE, PROCEEDINGS INITIATED ARE IN VIOLATION OF PRINCIPLES OF NATURAL JUSTICE.

O.1 The present proceedings have been issued in violation of principles of natural justice as show cause notice has not been issued to the Respondent proposing the action to be taken by the NAA.

O.2 The first principle of natural justice viz., *audi alteram partem* requires that the person concerned should be heard. In other words, nobody should be condemned unheard. Hon'ble Supreme Court in the case of ***Canara Bank and Others v. Debasis Das and Others*** reported at **(2003) 4 SCC 557**, where the Hon'ble SC held that a notice apprises the party of the case it has to meet. The Court held:

> "15. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate enough so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice.
>
> ..
>
> 16. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."
>
> [Emphasis supplied]

O.3 The Respondent has also placed reliance upon the decision of Hon'ble Supreme Court in the case of ***Uma Nath Pandey and Others v. State of UP*** reported at **(2009) 12 SCC 40, *Collector of Central Excise v. ITC Ltd.*** reported at **1994 (71) ELT 324 (SC)**, ***Dharampal Satyapal Ltd. v. Dy. Commissioner of C.Ex*** reported at **2015 (320) ELT 3 (SC)**, ***Union of India v. Hanil Era Textiles Ltd.***, reported at **2017 (349) ELT 384 (SC)** and claimed that

even if the CGST Act and the CGST Rules do not provide for issuance of a show cause notice before initiating proceedings under Section 171, NAA should have issued a show cause notice to the Respondent in terms of principles of natural justice as held by courts in the decisions/judgments referred *supra*.

P. In absence of a judicial member, the constitution of NAA is improper.

Q. Section 171 of the CGST Act and Rules made thereunder pertaining to anti-profiteering are unconstitutional being violative of Article 14 and Article 19(1)(g) of Constitution of India.

R. Rules 126, 127 and 133 of the CGST Rules suffer from the vice of excessive delegation.

S. Non-prescription of any methodology or guidelines renders the investigation report unsustainable.

6. The written submissions filed by the Respondent were forwarded to DGAP for clarifications under Rule 133(2A) of the Rules. The DGAP vide his report dated 05.11.2020, inter-alia, has clarified on the relevant paras of the Respondent's submissions dated 20.10.2020 as under:-

a. The contention of the Respondent that he has not retained any benefit from the reduction in rate of GST and hence has not profiteered is incorrect and hence denied. The DGAP has carried out detailed investigation concluding that the Respondent has profiteered amounting to Rs. 186.40 Crores during the period 15.11.2017 to 31.08.2018, which is based on the documents/information submitted by the Respondent. Further, the computation of aforesaid profiteering is clearly outlined in the Report itself.

b. It was contended by the Respondent that the methodology adopted by DGAP of comparing the average price pre-rate reduction with actual post-rate reduction price is not equitable comparison, is erroneous, without logical reasoning and required reconsideration. The Methodology adopted by the Respondent should be considered as correct. In this regard, it has been submitted by DGAP that the average base price in the pre rate reduction period has been calculated separately for each product and each channel of sale on the basis of data supplied by the Respondent. This base price is exclusive of GST which has been calculated over a period of one and half month prior to rate reduction. In case the base price of some products is not available, then DGAP has taken previous month's data for calculating the base price. Thus, he has got the base price for a particular product for a particular channel of sale which has been then compared with the transaction wise taxable value for the period after rate reduction for the same product and the same channel of sale. The benefit of this is that it avoids fluctuations in pre reduction base price as the same product can be sold at different rates depending on the discount given, quantity sold etc. In the post rate reduction period, the transaction wise value has to be considered as the profiteering has to be calculated separately for each transaction and for each customer. Section 171(1) states that "*any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in*

prices". The word used in the statute are "on any supply" and "to the recipients". This clearly shows that the benefit of reduction of tax has to be calculated on every supply i.e. transaction wise and benefit has to be passed to each recipient individually. Thus, for the post reduction period profiteering has to be calculated transaction wise. Further the profiteering in any one transaction/product or recipient cannot be set off against any other transaction/product or recipient. The reasons for not adopting other alternatives are as under:

(i) Comparison of Actual to Actual price for the same product

Why comparison of Actual to Actual price was not considered proper? In the instant situation, comparison of the price of each impacted product on which tax rate has been reduced is made in pre rate reduction period vis- a- vis post rate reduction period.

For example, for a product 'X', there could be several prices in any particular day sold to several buyers or several categories of buyers. In each category of buyers also there could be several invoices having different prices. For calculation of profiteering one cannot take any single price i.e. the lowest of the all prices or the highest of all prices because when the highest price is taken then there may not be any profiteering and when the lowest price is taken for comparison then there may be very high profiteering or incorrect profiteering. Further, a random selection of a price of any invoice could have led to unreasonable profiteering amount.

(ii) Comparison of Actual to Actual price for same product for same Consumer

This method had a limited scope as the price of single consumer was also found to be different in different invoices during a single day or during a period of one month. Further, this could have led to a situation when in the pre rate reduction period a consumer who had not purchased any product could have been deprived of the benefit which the Legislature intended to pass on to all the recipients. The profiteering, in terms of Section 171 of the Act, if any, needs to be calculated independently for each and every transaction as each purchaser is entitled to get the benefit on each supply from the supplier. For example, if a consumer "Y" purchases an impacted product in post rate reduction period and claims that he should be given the benefit of rate reduction, then his claim could have been rejected as he had not purchased any product in pre rate reduction period and there could not have been any comparison with the pre rate reduction price. As this method was also against the purpose of the legislation, the same was not considered for computation of profiteering.

(iii) Comparison of Average to Average Price

The method of comparison of Average price of Pre rate reduction with Average price of Post rate reduction for computation of profiteering also does not serve the purpose.

For Example- In the pre rate reduction period a product 'X' may have been sold at a price of Rs. 90/, 92/, 95/, 98/- and 100/ in a day or during a month to different or same buyer falling under same category, the average price of all these sales would be Rs. 95/-. Now in post rate reduction era suppose the same product 'X' is sold at Rs. 88/, 94/, 95/-, 97/ and Rs. 101/- to different or same buyer then the following picture shall emerge-

.No	Pre Rate reduction Price of Product 'X'			Post Rate Reduction Price of Product 'X'			Profiteering in case of **Average to Average** comparison	Profiteering in case of **Average to Actual** comparison
	Invoice No.	Base price declared on Invoice	Average Base Price of product	Invoice No.	Base Price declared on Invoice	Average Base Price of Product		
1	01	90	95	02	88	95	0	0
2	02	92		03	94			0
3	03	95		09	95			0
4	04	98		10	97			2
5	05	100		11	101			6

Thus, comparison of average price of pre rate reduction with average price of post rate reduction, for computation of profiteering, will lead to a situation where a person/consumer who had paid Rs. 97/- or Rs. 101/- in post rate reduction will not be given any benefit of profiteering even though he may have or may not have purchased goods in pre rate reduction at a rate less than Rs. 95. Even a new purchaser who purchased goods at Rs. 97/- in post rate reduction would not get any benefit of profiteering.

From the above it is observed that the method of computation of profiteering on Actual to Actual or Average to Average price failed to serve the purpose of extending the benefit to each consumer on each transaction as enshrined under Section 171 of the CGST Act, 2017.

Thus, by taking Average to Actual method, it is ensured that

(i) All transactions are covered for the purpose of calculation/computation of profiteering
(ii) Anyone who has actually paid higher price gets the benefit of rate reduction.
(iii) The intent and purpose of the Legislature for including a new Section 171 in the CGST Act, 2017 is fulfilled.

Thus the methodology of comparing the average price pre-rate reduction with actual post-rate reduction price is reasonable and in accordance with the provisions of Section 171 of the CGST Act, 2017.

c. As regard to the period of investigation, the period of investigation has not been prescribed either in the Central Goods and Services Tax Act, 2017 or in the corresponding Rules/Notifications. DGAP has received the reference from the Standing Committee on Anti-profiteering on 07.01.2019 to investigate the matter, the period from 15.11.2017 up to the latest month of receipt of reference was taken up for investigation, i.e. from 15.11.2017 to 31.12.2018.

d. As regard the base price discrepancies resulting in inflated alleged profiteering calculation by DGAP, it was informed that the concern raised by the Respondent has been duly addressed vide para - 12(i) to 12(iii) of DGAP Report dated 28.08.2020 which are reproduced below:

"12. (i). Non-averaging of base price where description is used for comparison [01.10.2017 to 14.11.2017 (Goods Desc.) and 01.09.2017 to 30.09.2017 (Goods Desc.)]: In this regard, it is submitted that DGAP has adopted the Average base price (arrived by dividing the total taxable value by total quantity sold) in pre-rate reduction period and compared it with the actual transaction value in post-rate reduction period. However, in case one product having same description is sold in multiple product code, then DGAP has adopted the average base price available at first place in the same product. The same was happened due to the proprietary of VLOOKUP function (used to lookup a value in a table by matching on the first column) in MS-Excel, which in case of duplicate values, find the first match when the match mode is exact.

Respondent has submitted that instead of taking average price at first place, the pre-rate reduction base price should be taken as one out of the following three approaches:

(d) Weighted Average Base Price of the product having same description with all the MRPs.

(e) Average Base Price of the product with latest MRP of the latest product code introduced immediately prior to rate-reduction.

(f) Weighted Average Base Price of the products with latest MRP prevailing in pre-rate reduction period.

Accordingly, Respondent has re-computed the profiteering amount and submitted that the profiteering should be reduced by Rs. 19,75,12,265/- in case approach (a) above is adopted or by Rs. 30,39,43,079/- in case approach (b) above is adopted or by Rs. 30,51,84,398/- in case approach (c) is adopted.

In this regard, it is submitted that Respondent has sold some products with same description in multiple product codes with different MRPs. However, these MRPs are prevailing in pre-rate reduction period and not obsolete. For this we shall take an example of the product with description "MAJIREL (NEW) SHADE NO. 4", for General Trade Channel, the details are furnished in table below:

S.No.	*Product Code*	*Product Description*	*HSN*	*MRP*	*Quantity*	*Taxable Amount*	*Average Price*
2439	MRCIP400-70	MAJIREL (NEW) SHADE NO. 4	33059040	310	73,906	163,20,873	220.83
2440	MRCIP400-80	MAJIREL (NEW) SHADE NO. 4	33059040	335	30,465	72,70,227	238.64
Total					*1,04,371*	*2,35,91,101*	*226.03*

In the post rate reduction period, DGAP has adopted the pre-rate reduction base price as Rs. 220.83/- (available at first place) and determined the profiteering for product sold in post-rate reduction period. It is pertinent to mention here that this product was sold post-rate reduction period with MRP of Rs. 310/- only and accordingly determined profiteering of Rs. 27,72,970/- (for the state Delhi- General Trade). However, Respondent submitted that as per approach (c) Weighted average price of latest MRP of Rs. 238.64/- should be adopted and profiteering reduced by Rs. 26,38,779/- resulting into profiteering of Rs. 1,34,191/- [Rs. 27,72,970/- (-) Rs. 26,38,779/-].

The above submission of the Respondent is not appropriate as Respondent has sold 73,906 units of Rs. 310/- MRP and only 30,465 units of Rs. 335/- MRP during pre-rate reduction period which shows both MRPs were in market and neither was obsolete. Similarly, approach (b) does not hold good as adopting average price of product with latest MRP is not appropriate when old/other MRPs were also prevailing in pre-rate reduction period.

Therefore, approach (a) where Weighted Average Base Price of the product having same description with all the MRPs is the correct approach to be adopted for pre-rate reduction base price to address the issue of adopting old MRP/first line item. Following the approach as per (a) above, and adopting weighted average base price of Rs.226.03/-, the profiteering amount will reduce by Rs. 7,70,237/- resulting into revised profiteering of Rs. 20,02,733/- [Rs. 27,72,970/- (-) Rs. 7,70,237] for the State- Delhi_General Trade.

Another example of the product with description "MAJIREL (NEW) SHADE NO.3", for General Trade Channel, the details are furnished in table below:

S.No.	Product Code	Product Description	HSN	MRP	Quantity	Taxable Amount	Average Price
2435	MRCIP300-70	MAJIREL (NEW) SHADE NO.3	33059040	310	1,01,854	224,92,710	220.83
2436	MRCIP300-80	MAJIREL (NEW) SHADE NO.3	33059040	335	23,106	55,14,061	238.64
		Total			1,24,960	2,80,06,771	224.12

In the post rate reduction period, DGAP has adopted the pre-rate reduction base price as Rs. 220.83/- (available at first place) and determined the profiteering for product sold in post-rate reduction period amounting to Rs. 28,81,815/- (for the state Delhi- General Trade). However, Respondent submitted that as per approach (c) Weighted average price of latest MRP of Rs. 238.64/- should be adopted and profiteering reduced by Rs. 26,17,512/- resulting into profiteering of Rs. 2,64,303/- [Rs. 28,81,815/- (-) Rs. 26,17,512/-].

The above submission of the Respondent is not appropriate as Respondent has sold 1,01,851 units of Rs. 310/- MRP and only 23,106 units of Rs. 335/- MRP during pre-rate reduction period which shows both MRPs were in market and neither was obsolete. Similarly, approach (b) does not hold good as adopting average price of product with latest MRP is not appropriate when old/other MRPs were also prevailing in pre-rate reduction period.

Therefore, approach (a) where Weighted Average Base Price of the product having same description with all the MRPs is the correct approach to be adopted for pre-rate reduction base price to address the issue of adopting old MRP/first line item. Following the approach as per (a) above, and adopting weighted average base price of Rs.224.12/-, the profiteering amount will reduce by Rs. 4,83,997/- resulting into revised profiteering of Rs. 23,97,818/- [Rs. 28,18,815/- (-) Rs. 4,83,997/-] for the State- Delhi_General Trade.
Therefore, considering the approach (a), the total profiteering amount will get reduced by Rs. 19,75,12,265/- as against the amount of Rs. 30,51,84,398/- claimed by the Respondent, for approach (c).

(ii). Rectification of inconsistency in sequence followed for some line items: The methodology adopted by DGAP has been explained in para-22 in the Investigation Report dated 05.07.2019 read with "Summary Sheet" of Annexure-15 of the said report and diligently followed the same without any inconsistency wherein, it is mentioned that at first step, DGAP has compared pre-rate reduction average base price (during the period 01.10.2017 to 14.11.2017) with post-rate reduction actual base price using product codes and wherever, products codes were not found, DGAP used product description to compare the pre-rate reduction average base price (during the period 01.10.2017 to 14.11.2017) with post-rate reduction actual base price at step two. In similar manner, wherever, price was still not found, DGAP used pre-rate reduction average base price (during the period 01.09.2017 to 30.09.2017) with post-rate reduction actual base price using product code at step three and used product description to compare the pre-rate reduction average base price (during the period 01.09.2017 to 30.09.2017) with post-rate reduction actual base price at step four and so on. However, due to adoption of the average base price available at first place in the same product (having multiple product codes), if the price was not obtained at Step-2 (due to non-availability of price in particular channel) then, DGAP proceeds for Step-3 and so on to find the pre-rate reduction base price for computation of profiteering. Therefore, the claim made by the Respondent before the Authority that Weighted Average Base Price of the product having same description is available at step two itself have merit and accordingly the profiteering is to be revised.

However, to address the issue of following incorrect sequence for few line items identified by the Respondent due to adopting first line item, as discussed above, approach (a) where Weighted Average Base Price of the product having same description with all the MRPs is the correct approach to be adopted for pre-rate reduction base price and accordingly, the total profiteering will further reduce by an amount of Rs. 4,80,88,937/- as against Rs. 5,28,32,173/- claimed by the Respondent, for approach (c).

(iii). Adoption of average price of description wherever comparable product code is used: In addition to the steps mentioned in point (ii) above, where after applying step four, pre-rate reductions prices were still not found, DGAP proceed to step five & six where comparable product were used (having minor difference in description and having different product code) to compare the average pre-rate reduction base prices (arrived by dividing the total taxable value by total quantity sold) during the period 01.10.2017 to 14.11.2017 and during the period 01.09.2017 to 30.09.2017 respectively. Respondent has mentioned one such instance of having sold product GN MEN Acnofight FW 50 ml with product code SYMAF050-70 at a per unit price of INR 61.93 (excluding GST). Since the said product code or sale of that description was not available in pre-rate reduction period, DGAP mapped product code SYMAF050-00 (having product description AcnoFight Facewash 50 ml) as comparable whose pre-rate reduction price was INT 53.92 (excluding GST) and accordingly computed a profiteering of INR 8.01 p.u. (excluding GST) or Rs. 9.45 p.u. including GST.

The Respondent has submitted the details of pre-rate reduction price of the product code SYMAF050-00 having product description AcnoFight Facewash 50ml as also details of other product codes having same product description are furnished in table below:

S. No.	Product Code	Product Description	HSN	MRP	Quantity	Taxable Amount	Average Price
3626	SYMAF050-00	AcnoFight Facewash 50ml	33049990	85	3,096	166,926	53.92
3627	SYMAF050-30	AcnoFight Facewash 50ml	33049990	95	210	12,655	60.26
3628	SYMAF050-40	AcnoFight Facewash 50ml	33049990	99	1,96,034	1,21,84,724	62.80
		Total			1,99,340	1,23,64,305	62.03

Further, in case one product having same description is sold in multiple product code, then DGAP has adopted the average base price available at first place in the same product. The same was happened due to the proprietary of VLOOKUP function (used to

lookup a value in a table by matching on the first column) in MS-Excel, which in case of duplicate values, find the first match when the match mode is exact.

However, the Respondent contented that if the aforesaid product code SYMAF050-00 having product description AcnoFight Facewash 50 ml is a correct comparable, then all the other products viz. SYMAF050-30 and SYMAF050-40 having the same description AcnoFight Facewash 50 ml should also be considered as correct comparable and accordingly, the average price of all the codes having the same comparable description must be considered instead of considering the price of 1 product code alone.
The above contention of the Respondent have merit and as already discussed in detail in point- (i) above, considering the approach (a) where Weighted Average Base Price of the product having same description with all the MRPs is adopted for pre-rate reduction base price, the total profiteering will further reduce by an amount of Rs. 5,18,75,235/- as against Rs. 5,72,41,346/- claimed by the Respondent, for approach (c)."

Further, the submission of the Respondent that they would be selling only products with new MRP after phasing out the stock in hand of the products with old MRP does not seem to be correct. As can be seen from the details of outward supply of the products for the period 15.11.2017 to 31.12.2018 (for instance Delhi_General Trade for the same product "MAJIREL (NEW) SHADE NO. 4" as has been illustrated above, the Respondent have sold total 1,72,583 of the products with both MRP of Rs. 310 and Rs. 335/- out of which 1,30,226 units (75.46%) of the Product bears MRP of Rs. 310 (including 10,366 units Sold in December 2018 alone).

e. As regard to the submission of the Respondent that GST rate reduction benefit passed on through post-supply discounts, it was clarified by the DGAP that the concern raised by the Respondent has been duly addressed vide DGAP letter of even no. 3075 dated 11.12.2020 which is reproduced below:

"The provisions contained in Section 171 of the Central Goods and Services Tax Act, 2017 do not provide for any means of passing on the benefit of reduction in the rate of tax or benefit of Input Tax credit other than by way of commensurate reduction in price. It was the Respondent's own business decision to extend the period of consumer promotion schemes, the cost of which cannot be set off against the benefit that the Respondent ought to have passed on to their recipients on account of GST rate reduction w.e.f. 15.11.2017. The issue has been discussed in detail in paras 15-17 of the Report dated 05.07.2019. Further, DGAP has examined some sample documents of Credit Notes which reveals that these were invoices raised by the Respondent's trade partners for provision of services like advertising, sales promotion, sponsorship, brand promotion etc. to the Respondent, which the Respondent had reimbursed by issuing credit notes. In one of such credit note no. 5100028622 dated 22.03.2018, the Respondent has issued a Credit Note amounting Rs. 64,90,000/- (Base Price: Rs. 55,00,000/- plus 18% Rs. 9,90,000/-) against Invoice raised by M/s. Nykaa E-Retail Pvt. Ltd. for the Advertising Services for the month of Jan'17.

Copy of said invoice is furnished on the next page:

Tax Invoice

Nykaa E-Retail Pvt Ltd-Mumbai 104, Vasan Udyog Bhavan Sun Mill Compound, Tulsi Pipe Road, Lower Parel Wes ST No: AAFCN5072PSD001 GSTIN/UIN: 27AAFCN5072P1ZV State Name : Maharashtra, Code : 27 CIN: U74999MH2017PTC291558 E-Mail : accounts@nykaa com	Invoice No **2017-18/619B** Supplier's Ref. **2017-18/619B**	Dated **17-Mar-2018** Other Reference(s)
Buyer **Loreal India Private Limited** A- Wing,8th Floor,Marathon Futurex, N.M Joshi Marg,Lowerparel, Mumbai-400013 GSTIN/UIN : 27AAACL0738K1ZH State Name : Maharashtra, Code : 27 Place of Supply : Maharashtra	9101055632	

Sl No	Description of Goods	HSN/SAC	GST Rate	Amount
1	**Advertising Services** *Advertising Services for the Month of Jan'17* *Brand - Loreal* *Activity Month - Jan17* *PO - 4300263181*	998365	18 %	**55,00,000.00**
	Output CGST@ 9%			**4,95,000.00**
	Output SGST@ 9%			**4,95,000.00**
	Total			**₹ 64,90,000.00**

KEY ACCOUNTS
ADDITIONAL MARGIN
PROMO CLAIM ✓
WD/SOH/VISIBILITY
Purchase Order No. 4300263181
GST Partner Code

The Respondent has claimed the above Credit Note being on account of passing of benefit of reduction in rate of tax which is absolutely incorrect and therefore denied."

Further, vide e-mail dated 25.06.2020 (Annex-10 to DGAP Report dated 05.07.2019), the Respondent has submitted sample credit notes (505 out of total 12,214 Credit Notes) issued to his General Trade Customers to substantiate his claim of passing on the benefit of 51.93 crores to the General Trade Customers. On examination of these credit Notes, it is observed that most of these are issued towards "TRADE SCHEMES". Moreover, the said credit notes nowhere indicated that those were related to the benefit of reduction in the GST rate from 28% to 18% w.e.f. 15.11.2017. No SKU-wise correlation could be made between the claim texts appearing in

the credit notes and the details of invoice-wise outward supply submitted by the Respondent. Besides, it is observed that Credit notes were issued even prior to reduction in rate of tax. In one of such credit note no. 520383546 dated 14.09.2017 (While rates were reduced w.e.f. 15.11.2017), the Respondent has claimed to pass on the benefit of reduction in rate of GST amounting to Rs. 7,05,138/- issued to M/s. Ankita Enterprises for the Trade Schemes. Further, the GSTIN details of the Respondent and customers were nowhere mentioned in the credit note. Copy of said credit note is enclosed as Annex-1 and snapshot is furnished below:

L'OREAL INDIA PRIVATE LIMITED
DIVISION:CPD
REGIONAL OFFICE:L'Oreal India Pvt. Ltd.
#SNC HOUSE##Ground Floor # 7, Residency Road
Bangalore
Phone:080-40261500 Fax:080-40261589

CREDIT NOTE

DOCUMENT NO.:520383546	DOCUMENT DATE : 14.09.2017		CONTACT NO.: 80-40261500
Sold To : ANKITA ENTERPRISES PLOT NO.5 C IDA, NACHARAM X ROAD HYDERABAD-500076 CST No.: VAT/TIN NO.:36090252262	Ship To: ANKITA ENTERPRISES PLOT NO.5 C IDA, NACHARAM X ROAD HYDERABAD-500076 CST No.: VAT/TIN No.:36090252262	Claim No. : CTS17000100 Claim Date : 14.09.2017 Nature/Activity :Trade Schemes Delivery No Your Reference:	

Product Code	Client Code/ EAN Code	Description	No.of cases	M.R.P (Rs./Unit)	No. of Units	Rate (Rs./Unit)	Disc1. Disc2	Tax%	Value (Rs.)
CPDTSC		TRADE SCHEMES-CPD	0		0	16183.74			16183.74
CPDTSC		TRADE SCHEMES-CPD	0		0	16183.74			16183.74
CPDTSC		TRADE SCHEMES-CPD	0		0	530.37			530.37
CPDTSC		TRADE SCHEMES-CPD	0		0	69575.40			69575.40
CPDTSC		TRADE SCHEMES-CPD	0		0	69575.40			69575.40
CPDTSC		TRADE SCHEMES-CPD	0		0	69575.40			69575.40
CPDTSC		TRADE SCHEMES-CPD	0		0	69575.40			69575.40
TOTAL									705137.58

Amt. in Words : SEVEN LAKH FIVE THOUSAND ONE HUNDRED THIRTY SEVEN Rupees FIFTY EIGHT Paise

For L'OREAL INDIA PRIVATE LIMITED

Authorised Signatory

Therefore, the Respondent's claim that the above Credit Note being on account of passing of benefit of reduction in rate of tax was absolutely incorrect and therefore denied.

f. As regard to the contention of the Respondent that benefit of GST rate reduction passed on by way of increased quantity (Higher Grammage) on certain SKUs not considered by DGAP, it was clarified that the concern raised by the Respondent has been duly addressed vide DGAP Report dated 28.08.2020 which are reproduced below:

> *"12. (iv) Benefit of rate reduction passed on by increasing the grammage/volume of the products: The concern raised by the Respondent has already been addressed in*

para-14 & 17 of DGAP Investigation Report dated 05.07.2019 which are re-produced below:

"14. Before enquiring into the allegation of profiteering, it is important to examine Section 171 of the Central Goods and Services Tax Act, 2017 which governs the anti-profiteering provisions under GST. The said Section 171(1) reads as "any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices." Thus, the legal requirement is abundantly clear that in the event of benefit of input tax credit or reduction in rate of tax, there must be a commensurate reduction in the prices of the goods or services supplied. Such reduction in price can only be in terms of money, so that the final price payable by a recipient gets reduced commensurate with the reduction in the tax rate or benefit of input tax credit. This is the only legally prescribed mechanism to pass on the benefit of input tax credit or reduction in the rate of tax under the GST regime and there is no other method which a supplier can adopt to pass on such benefits.

17. As the provisions contained in Section 171 of the Central Goods and Services Tax Act, 2017 do not provide for any means of passing on the benefit of reduction in the rate of tax or benefit of input tax credit other than by way of commensurate reduction in price, the claim of the Respondent that they had passed on the benefit of GST rate reduction on certain SKUs by increasing the quantity or grammage of the product while maintaining the earlier pre-rate reduction MRP of such SKUs, is also not acceptable."

13. However, as per directions of the Authority contained in para-103 of aforesaid Internal order no. 05/2019 dated 03.01.2020, DGAP has examined the documents submitted by the Respondent regarding his claim of passing on the benefit of reduction in rate of tax by increasing the grammage/volume and observed that there were formula errors in three columns viz. Column-BA "Commensurate Base Price with Grammage including GST", column-BB "Grammage Benefit-Gross" and column-BC "Grammage Benefit-Net restricted to Alleged Profiteering incl. GST". However, on specific pointing out, the Respondent inadvertently revised and corrected only two columns i.e. column BB & BC. Therefore, the formula error in Column-BA "Commensurate Base Price with Grammage including GST" remains in the 2 files submitted by the Respondent vide their e-mail dated 22.08.2020. The same was examined and corrected by DGAP in their working sheets.
Accordingly, considering the approach (a) where Weighted Average Base Price of the product having same description with all the MRPs to be adopted for pre-rate reduction base price (as discussed in para-12(i) above, the Respondent has passed on ***the*** *benefit of reduction in rate of tax by increasing the grammage/volume amounting to Rs. 27,49,45,942/- (restricted to profiteering amount computed at transaction level). The details of the computation are given in Annex-6. The same was quantified on specific direction of the Authority without admitting the claim of the Respondent."*

g. As regard to the contention of the respondent regarding Customs Duty, it was clarified by the DGAP that the concern raised by the Respondent has been duly addressed vide DGAP letter of even no. 3075 dated 11.12.2020 which is reproduced below**:**

"The concern of the Respondent of not considering the increase in price due to increase in Customs Duty on the products imported by them has been addressed in the Para 18 of DGAP report dated 05.07.2019."

Further, on preliminary examination of 3 illustrations as submitted by the Respondent in his submissions it can be seen that though increase in Custom Duty (as claimed by the Respondent), his actual sale price per unit (incl. GST) did not change from Nov.-17 to March-2018 and remained constant at Rs. 1276.56/-, Rs. 783.17/- & Rs. 223.43/- for the product

'Blond Studio Platinum Amm-Free 500GM, Dream Cushion Fdn 21 Nude & C Smooth Aio R2016 04 HY EB respectively. Therefore, the contention of the Respondent does not hold good.

Further, perusal of the case of *Sh. Kumar Gandharv Vs. KRBL Ltd.* (Case No. 03/2018) shows that in the above case the rate of tax had increased and not reduced and since, there was no reduction, the provisions of Section 171 were not applicable in the above case. However, in the present case the rate of tax has been reduced and therefore, the above Order does not support the Respondent.

h. As regard to the contention of the Respondent that alleged Profiteering cannot be in excess of GST rate reduction, it was clarified by the DGAP that the concern raised by the Respondent has been duly addressed vide DGAP letter of even no. 3075 dated 11.12.2020 which is reproduced below:

> *"The Respondent's submission that business profits have also been treated as profiteered amount is not correct as the profiteered amount of each product has been calculated with reference to a base price which includes the profit margin, if any on any product on the basis of data provided by the Respondent.*

Further, Section 171(1) of the Central Goods and Services Tax Act, 2017 reads as "Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices." Thus, the legal requirement is abundantly clear that in the event of a benefit of ITC or reduction in rate of tax, there must be a commensurate reduction in ***prices*** *of the* ***any supply*** *of goods or services.*
Therefore, Respondent is under legal obligation to pass on the benefit of ITC or reduction in rate of tax by way of commensurate reduction in price of each and every supply of goods or services.
Anti-profiteering provisions are for the benefit of the recipients and each recipient must get benefit of reduction in rate of tax or increase in ITC on each and every supply of goods or services or both. Further, the transactions where base price is not increased were excluded from the computation of profiteering."

i. As regard to the contention of the Respondent that higher benefit passed on in respect of certain SKUs not considered, it was clarified that the concern raised by the Respondent has been duly addressed vide DGAP letter of even no. 3075 dated 11.12.2020 which are reproduced below:

> *"In terms of Section 171 of Central Goods and Services Tax Act, 2017 which governs the anti-profiteering provisions under GST reads as "Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices." Thus, the legal requirement is abundantly clear that in the event of a benefit of ITC or reduction in rate of tax, there must be a commensurate reduction in prices of the goods or services. Such reduction can obviously only be in absolute terms such that the final price payable by a consumer must get reduced. This is the legally prescribed mechanism for passing on the benefit of ITC or reduction in rate of tax under the GST regime to the consumers. Moreover, it is clear that the said Section 171 simply does not provide a supplier of the goods or services any other means of passing on the benefit of ITC or reduction in rate of tax to the consumers. Thus, the legal position is unambiguous and can be summed up as follows:*
>
> *(a) A supplier of goods or services must pass on the benefit of ITC or reduction in rate of tax to the recipients by way of reducing the prices thereof paid by the recipients; and*

(b) The law does not offer a supplier of goods and services any flexibility to suo moto decide on any other modality to pass on the benefit of ITC or reduction in rate of tax to the recipients.
Therefore, the law does not offer a supplier of goods and services, flexibility to pass on the benefit of ITC or reduction in rate of tax on one product, say 'X' by reducing the prices of any other product, say 'Y'.

The text of Section 171 of the CGST ACT, 2017 is very clear according to which the benefit of reduction in tax rate has to be passed on each and every supply individually. Thus, if the Respondent has passed on excess benefit in respect of any supply to a recipient, the same cannot be adjusted against the profiteered amount in relation to some other supply."

j. As regard to the contention of the respondent regarding loss due to reduced fiscal incentives under budgetary support scheme to be considered, it was clarified that concern raised by the Respondent has been duly addressed vide DGAP's letter of even no. 3075 dated 11.12.2020 which is reproduced below:

"The concern raised by the Respondent is duly addressed in Para-19 of the DGAP's report dated 05.07.2019."

k. As regard to the contention of the Respondent that profiteering should not be computed for luxury products, it was clarified that the concern raised by the Respondent has been duly addressed vide DGAP's letter of even no. 3075 dated 11.12.2020 which is reproduced below:

"Section 171 of the Central Goods and Services Tax Act does not make any differentiation between necessity and luxury products. DGAP's investigation report covers all the products which were impacted by the GST rate reduction w.e.f. 15.11.2017 which attract the provisions of Section 171 of the Central Goods and Services Tax Act, 2017 read with Chapter XV of the Rules as these were to be treated as supply of goods by the Respondent. The transactions excluded by DGAP are addressed in para-20 of DGAP Report dated 05.07.2019."

l. As regard to the contention of the Respondent that profiteered amount has been incorrectly inflated in the report by adding GST and the same is not sustainable it was clarified that the concern raised by the Respondent has been duly addressed vide DGAP's letter of even no. 3075 dated 11.12.2020 which is reproduced below:

"The submission of the Respondent is contradictory to the submission made in the Para 'F' wherein it has been submitted that the base price has been calculated by excluding the applicable GST. Further, it is submitted that the Section 171 of the CGST Act, 2017 and Chapter XV of the CGST Rules, 2017, require the supplier of goods or services to pass on the benefit of the tax rate reduction to the recipients by way of commensurate reduction in price. Price includes both, the base price and the tax paid on it. If any supplier has charged more tax from the recipients, the aforesaid statutory provisions would require that such amount be refunded to the eligible recipients or alternatively deposited in the Consumer Welfare Fund, regardless of whether such extra tax collected from the recipient has been deposited in the Government account or not. Besides, any extra tax returned to the recipients by the supplier by issuing credit note can be declared in the return filed by such supplier and his tax liability shall stand adjusted to that extent in terms of Section 34 of the CGST Act, 2017. Therefore, the option was always open to the Respondent to return the tax amount to the recipients by issuing credit notes and adjusting his tax liability for the subsequent period to that extent."

m. As regard to the contention of the Respondent that interpretation of Section 171 of CGST Act by the DGAP is not correct, it was clarified that the concern raised by the Respondent

has been duly addressed vide DGAP's letter of even no. 3075 dated 11.12.2020 which is reproduced below:

> *"Section 171 of the CGST Act, 2017 is very clear, according to which benefit commensurate to the amount of reduction in tax has to be passed on to the recipient by way of reduction in price. As per the website "Lexico", powered by Oxford, the word "equivalent" is also a synonym of the word "commensurate" and the intention of the law is clear that the price of the goods/services has to be reduced by the amount of reduction in the tax.*
>
> *The word "prices" is used in the law to refer to the prices of various goods/services but for each individual product or service, there would be only one selling price and one commensurate price, the difference of which would be the profiteered amount.*
>
> *The word "any" is used before the word "supply" to indicate the benefit of reduction in rate of tax has to be passed on for each and every supply.*
>
> *The word "registered person" has been used as Section 171 of the CGST Act, 2017 cannot be applied on suppliers who are not registered under the GST Act, and it is clear from the word "recipient" (in singular) that the benefit has to be passed on each and every recipient, who may buy a single SKU also. Thus, the profiteering has to be determined at the SKU-level.*
>
> *The text of the law is very clear according to which the benefit of reduction in rate of tax has to be passed on to each recipient on every supply. Thus, there is no scope for interpretation of the marginal notes."*

n. As regard to the contention of the Respondent that amount, if any, held as profiteered, can be refunded to recipients, it was clarified that the concern raised by the Respondent has been duly addressed vide DGAP's letter of even no. 3075 dated 11.12.2020 which is reproduced below:

> *"In this regard, it is submitted that the benefit must be passed on to the recipient who has borne the incidence of such amount i.e. the end customers. In the present case the recipients of the Respondent are the re-seller and must have passed on the burden of such excess amount collected from them by the Respondent to their end customers."*

It is also submitted that although the letter of the law says that the benefit has to be passed on to each recipient who is the final recipient is the end-consumer who suffers the burden of tax, as is evident from various media briefings, parliamentary debates/speeches of more than one Union Finance Ministers, which state that the consumer (who is the final recipient and who suffers the final burden of GST) should be at the fulcrum of this law. When the Section 171(1) says, "any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the **recipient**", it really intends the ultimate beneficiary to be the final recipient (the consumer) who has really borne the burden of this indirect tax.

This means that every recipient/consumer is important when it comes to the transmission of this benefit by the supplier. A supplier cannot say to the consumer 'A' that he cannot give him the benefit of this rate reduction because he has given that benefit to consumer 'B' by overcompensating him. The averaging of prices in post GST does precisely the same. If DGAP averages the prices of supplies in the post GST period, it means that somebody would get lesser benefit than he actually deserves and some other person would be passed on more benefit as

there would be setting off of the benefit between the two. This cross-benefitting is not only contrary to the port of Section 171 of the CGST Act, 2017 but also utterly vague, arbitrary and inequitable from the legal as well as practical point of view.

o. As regard to the contention of the Respondent that manufacturer is not under legal obligation to affix stickers for change of MRP on the goods lying in the distribution chain, it was clarified that the concern raised by the Respondent has been duly addressed vide DGAP's letter of even no. 3075 dated 11.12.2020 which is reproduced below:

> *"This issue has no bearing on the amount of profiteering determined in respect of the Respondent, as the profiteering has been quantified only on the goods supplied by the Respondent after 15.11.1017 and not on the goods lying in the distribution chain."*

p. As regard to the contention of the Respondent that in the absence of any prescribed methodology of calculation of profiteering in the CGST Act, the CGST Rules or the procedure prescribed by NAA, the proceedings are liable to be dropped**,** it was clarified that the contentions of the Respondent made in these paras are wrong as the Report has been prepared in accordance with the provisions of Section 171 of CGST Act, 2017. The main contours of the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and the benefit of ITC are enshrined in Section 171 (1) of the CGST Act, 2017 itself which states that *"Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."* It is clear from the perusal of the above provision that it mentions *"reduction in the rate of tax on any supply of goods or services"* which does not mean that the reduction in the rate of tax is to be taken at the level of an entity/group/company for the entire supplies made by it. Therefore, the benefit of tax reduction has to be passed on at the level of each supply of Stock Keeping Unit (SKU) to each buyer of such SKU and in case it is not passed on the profiteered amount has to be calculated on each SKU. Therefore, the contention that the profiteered amount should be computed at the entity/group/company level is untenable. Further, the above Section mentions "any supply" i.e. each taxable supply made to each recipient thereby clearly indicating that netting off of the benefit of tax reduction by a supplier is not allowed. A supplier cannot claim that he has passed on more benefit to one customer therefore he could pass less benefit to another customer than the benefit which is actually due to that customer. Each customer is entitled to receive the benefit of tax reduction or ITC on each product or unit purchased by him. The word "commensurate" mentioned in the above Section gives the extent of benefit to be passed on by way of reduction in the prices which has to be computed in respect of each product based on tax reduction as well as the existing base price (price without GST) of the product. The computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from product to product and hence no fixed mathematical methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a recipient or the profiteered amount. However, to give further clarifications and to elaborate upon this legislative intent

behind the law, the Authority has been empowered to determine/expand the Procedure and Methodology in detail.

Further, the CGST Rules, 2017 have been framed by the Parliament based on the recommendations of GST Council which consist of Union Finance Minister and the Finance/Revenue Ministers of the States. The Authority can pass appropriate order on receipt of Investigation Report from the DGAP after considering the facts of each case. Over past 2.5 years around 160 orders have been issued by the Authority and there is a consistent pattern on how to calculate profiteering in various sectors.

Further, the issue before the Hon'ble Apex Court in the case of ***Commissioner of Income Tax, Bangalore v. B C Srinivasa Setty (1981) 2SCC 460*** related to levy of Capital Gains Tax on transfer of Goodwill. The findings of the Hon'ble Court are limited to the facts of the said case and cannot be applied to the present case.

7. Personal hearings in the matter were scheduled on 24.12.2020 and 18.01.2021. However, the subsequent proceedings in the matter could not be completed by the Authority due to lack of required quorum of members in the Authority during the period 29.04.2021 till 23.02.2022, and that the minimum quorum was restored only w.e.f. 23.02.2022 and hence the matter was taken up for further proceedings vide Order dated 24.02.2022.

7.1 Personal hearing in the matter took place on 5.5.2022, which was attended by Shri V. Laxmikumaran, Advocate; Shri K. Sreekant, Advocate; Shri Darshan Maccher, CA, Shri Mahesh Morye, Shri Rohit Gupta and Shri Anand Nagda on behalf of the Respondent and Shri Lal Bahadur, Assistant Commissioner for DGAP. During the personal hearing, the learned advocate made a PowerPoint presentation and reiterated his submissions made earlier. The Respondent requested for one week's time to file consolidated written submissions including purchase order/design placed on the suppliers of packing material to affect delivery of increased grammage, etc.,

7.2 The Respondent vide letter dated 12-05-2022 informed that he has already filed consolidated written submission vide email dated 26.11.2020 incorporating all submissions made. It was submitted that finding of DGAP that he had profiteered by Rs 186.40 crores was incorrect. The Respondent in fact has passed on around Rs 276.48 crores i.e. Rs 90.08 crores more than the profiteered amount alleged by DGAP. As regard to the grammage, the Authority has taken a view in case of M/s Hindustan Unilever Ltd and all details as required in the format of HUL order have been submitted by him. As regard to the information relating to the purchase orders as sought during the personal hearing, the following documents are provided:-

a. Internal email dated 28.11. 2017 regarding to pass on the benefit of GST to consumer.

b. Change of artwork to show the additional grammage

c. Purchase order dated 17-1-2018 showing the artwork code

d. A copy of power point presentation used in personal hearing through video conferencing on 05.05.2020.

8. The Authority has gone through the full facts of the case and records including the Investigation Report dated 05.07.2019, replies and emails of the Respondent, I. O. No. 5/2020 dated 3.1.2020, the Report dated 28.8.2020 submitted by DGAP under Rule 133(4) of the Rules and the submissions made during the course of personal hearing.

9. The Respondent is engaged in the manufacture and supply of hair care, hair colour, skin care, make up and luxury products. The Respondent is either himself manufacturing these products or is getting them manufactured from the sub-contractors and is selling them under different brands and in different sizes in packaged form. Each type of such product is identified as a Stock Keeping Unit (SKU) and he is supplying about 12000 SKUs to his customers. These SKUs are supplied through the channels of direct retailers and distributors who are further selling them directly to the consumers or through the whole sellers to the grocery stores, pharmacies and hyper/super/mini stores to the ultimate consumers. It is also revealed that the goods sold by the Respondent were attracting GST @28% w.e.f. 01.07.2017 when the above tax had come in to force and the same was reduced to 18% w.e.f. 15.11.2017 vide Notification No. 41/2017-Central tax (Rate) dated 14.11.2017 by the Central as well as the State Governments. Therefore, there is no doubt that the rate of tax was reduced on the above products w.e.f. 15.11.2017 and therefore, the Respondent is liable to pass on the benefit of tax reduction to the customers as per the provisions of Section 171. A list of the goods which were impacted by the above rate reduction is given as under:-

Category	Product	HSN	Impacted
Hair Care	Shampoo, Conditioner, Serum etc.	3305	Yes (except Hair Oil)
Hair Color	L'Oréal Paris, Garnier	3305	Yes
Skin Care	Cream	3304	Yes
Make Up	Kajal, Maybelline, etc.,	3304	Yes (except Kajal)
Luxury Products	Giorgio Armani, Diesel, etc.	3303	Yes

9.1 It is an admitted fact that the GST rates on several products manufactured and sold by the Respondent were reduced vide Notification No 41/2017-CT dated 14.11.2017 and notifications issued by the State governments. The relevant provisions of the law to decide the matter in the given facts and circumstances as discussed hereinabove are as under:

Section 171 of CGST Act 2017

> *"1) Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*
>
> *(2) The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority*

constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

(3) The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.

[1][(3A) Where the Authority referred to in sub-section (2), after holding examination as required under the said sub-section comes to the conclusion that any registered person has profiteered under sub-section (1), such person shall be liable to pay penalty equivalent to ten per cent. of the amount so profiteered:

Provided that no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority.

Explanation. -- For the purposes of this section, the expression "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both."

9.2 From the bare perusal of the provisions of section 171 of the Act as mentioned in the earlier paragraph, it would emerge that the registered person is required to pass on the benefit of the reduction of tax to the recipient of the goods or services by way of commensurate reduction in prices. It has been admitted by the Respondent that he was required to pass on the benefit of the reduction in the GST rates to the recipient and there is no dispute in this regard. However, it is contended by the Respondent that he has passed on the benefit to the recipients amounting to Rs. 276.48 Crores, which is more than the profiteered amount worked out by DGAP. However, DGAP has investigated the whole matter and has submitted two reports dated 05.07.2019 and 28.08.2020 and came to a conclusion that the Respondent has profiteered an amount of Rs 186.39 crores.

9.3 Having perused and examined all relevant documents like DGAP's reports dated 05.07.2019 and 28.02.2020; elaborate and voluminous submissions of the Respondent dated 14.9.2019, 20.10.2020 and consolidated submission dated 26.11.2020 including grounds mentioned in those submissions and the submissions made during the course of personal hearing, the Authority finds that following points/issues need decision:-

a. Whether proceedings are time-barred under the provisions of Rule 133?

b. Whether in absence of any prescribed methodology in the CGST Act to calculate profiteering or the procedure prescribed by Authority, the whole proceedings are arbitrary and liable to be dropped?

c. Whether period of investigation has been selected in arbitrary manner?

d. Whether base price discrepancies have resulted in inflated profiteered amount?

e. Whether claim of benefits like discounts or by way of price reduction post supply of goods to recipients by way of price reduction is considerable?

f. Whether increased quantity of grammage on certain SKUs can be permitted as commensurate reduction under section 171 (1) of the Act?

g. Whether increase of Customs Duty on certain products needs to be considered for calculating the profiteered amount?

h. Whether GST already collected needs to be deducted from the profiteered amount?

i. Whether higher benefits passed in respect of certain SKUs, as claimed by Respondent, can be considered and netted of?

j. Whether loss due to reduced fiscal incentive under budgetary support scheme can be considered to calculate the profiteered amount?

k. Whether profiteering should not be computed for luxury products?

l. Whether profiteered amount, if any, can be refunded to recipients of the Respondent?

m. Whether in absence of any show cause notice proceedings initiated are in violation of principle of natural Justice?

n. Whether in absence of a Judicial member, the Constitution of the authority is unconstitutional?

o. Whether section 171 of the CGST Act and Rules made thereunder are unconstitutional and violative of article 14 and 19(1)(g) of the Constitution of India?

p. Whether Rules 126, 127 and 133 of the CGST Rules suffer from the vice of excessive delegation?

Issue of limitation

10. One of the primary objections of the Respondent is that the matter is time barred in view of the provisions contained in Rule 133. It is claimed that when the application for the alleged profiteering was received by the DGAP on 07.01.2019; then in accordance with the provisions of rule 129(6); the investigation should have been completed within six months i.e. 06.07.2019 by the DGAP and the Authority should have concluded the proceedings within six months of receipt of the report i.e. by 04.01.2020. It is further contended by the Respondent that the Authority does not have power to direct DGAP to conduct fresh investigation under the provisions of rule 133 (4) of the Rules and if such practice adopted, the matter would not attain finality ever. From the contention of the Respondent, it would appear that he has argued that provisions of the law in the matter relating to time limit as mentioned in the Act and the rules made thereunder are mandatory and need to be strictly complied with.

10.1 The Respondent has also stated that in terms of Rule 133(1) of the CGST Rules, 2017 the Authority was required to pass order within six months by 04.01.2020 as the report from the DGAP was received on 5.07.2019 as the fresh time limit of six months was not available under Rule 133(4) otherwise the proceedings would never come to an end. In this regard it

would be pertinent to note that the I.O. No. 05/2020 dated 03.01.2020 under Rule 133(4) directing the DGAP to conduct further investigation in the present case was passed as the Authority could not have passed a reasoned and just order on the said Report dated05.07.2019, after considering the Respondent's submissions and personal hearings. The Respondent has also submitted the dates and events of the present proceedings to prove his above contention, however, perusal of the record shows that the Report from the DGAP was received on 05.07.2019 and the respondent was directed to appear on 02.08.2019 however, he had sought repeated adjournments for filing replies and had taken a period of about 5 months w.e.f. 30.07.2019 to 01.01.2020 to file the same. The Respondent has not explained why the above period of 5 months should be counted in the period of 6 months prescribed under Rule 133(1) while passing order after receipt of the Report under Rule 133(4). Further investigation was required to be done as a consequence of which the profiteered amount has been reduced to Rs. 1,86,39,57,058/- from Rs. 2,16,49,61,535/-. The Respondent cannot contend that the entire investigation including the further investigation ordered under Rule 133(4) should be completed within a period of 6 months when it involved fresh appreciation of the evidence, submission of the additional evidence by the Respondent including his claim of grammage benefit and recalculation of the profiteered amount involving about 55 lakh transactions.

10.2 The Respondent has also contended that this Authority had asked the DGAP to file clarifications under Rule 133(2A) on his submissions dated 05.11.2019 but since the DGAP vide his replies dated 11.12.2019 and 23.12.2019 did not clarify the objections raised by the Respondent, this Authority had directed the DGAP to carry out further investigation vide its order dated 03.01.2020. However, the points referred for further investigation were nothing but the Respondent's objections. Since, further investigation under Rule 133(4) stood in distinction from a clarification under Rule 133(2A) and if the DGAP had not provided the clarifications it did not empower this Authority to direct further investigation with respect to the same objections. Therefore, the order dated 03.01.2020 was nothing but a direction seeking clarifications from the DGAP under Rule 133(2A). It was claimed by the Respondent that if the DGAP had not provided clarifications, this Authority should have drawn adverse inference and should not have granted additional time to him to provide clarifications. As mentioned in Para supra it is reiterated that further investigation under Rule 133(4) was only ordered to examine the issues mentioned in Paras 98 to 101 of the I.O. dated 03.01.2020 which were raised by the Authority and not by the Respondent for re-computation of the profiteered amount which has resulted in reducing the liability of the Respondent. The Respondent was also required to submit further evidence on his claim of passing on the benefit by increasing the quantity in grammage vide Para 103 of the above I. O. It appears that the Respondent is not satisfied by further investigation and is willing to admit more profiteering. This Authority is fully competent to direct the DGAP to furnish clarifications under Rule 133(2A) or order further investigation as per Rule 133(4) on the basis of the reasonable grounds which have been duly mentioned in the above I. O. and the Respondent cannot dictate what order is to be passed in the proceedings pending before it to arrive at just and reasonable decision. Since the issues raised in the above I. O. were distinct and separate and were not raised by the Respondent the Authority was fully

entitled to order further investigation as per Rule 133 (4). The Respondent further has no ground to misconstrue the provisions of Rule 133 (5) and claim that the period of 6 months was not available for conducting further investigation under Rule 133 (4). Such a claim would be against the principles of natural justice as during every fresh investigation due opportunity has to be given to the interested parties including the Respondent and the DGAP to collect fresh evidence and seek replies from the parties. Therefore, the above claim of the Respondent is unacceptable.

10.3 The Respondent has also claimed that Para 10 of the Guidelines dated 04.10.2019 issued by the Authority was illegal as it amounted to amendment in Rule 133 (4) and it would also be bad as per the law settled in the case of **L. Chandra Kumar v. Union of India (1997) SCC 261**, wherein it had been held that the Tribunals shall act as the only courts of first instance in respect of areas of law for which they have been constituted. Accordingly, the Respondent has requested this Authority to consider his aforesaid submissions and hold that no additional time limit was available in respect of further investigation under Rule 133(4) and that the order needed to be passed within the time limit of 6 months from the date of report furnished by the DGAP under Rule 129(6). In this connection it would be relevant to refer to the findings recorded in para supra which amply prove that Para 10 of the Guidelines only clarifies the import of the provisions of Rule 133(1) under which the Report submitted by the DGAP after further investigation under Rule 133(4) has to be considered a fresh Report on which order can be passed within a period of six months. Further, perusal of Para 93 of the above judgement shows that the Hon'ble Supreme Court has specifically held that "The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional." Since, the Guidelines dated 04.10.2019 have been issued under Rule 126 which has been promulgated under Section 171 (3) read with Section 164 of the CGST Act, 2017 therefore, the legal validity of Para 10 cannot be decided by this Authority unless it examines the vires of Section 171 and 164 of CGST Act, 2017 under which this Authority has been created and power to issue the above Guidelines has been conferred on it. Since, the Hon'ble Supreme Court has specifically barred entertaining question of vires of the parent statute this Authority cannot examine the above provisions and consequently Para 10 of the above Guidelines and declare it ultra vires of the above provisions of the Act. Moreover, as per the judgement of the Hon'ble Supreme Court this Authority is only Court of first instance and its decisions are subject to review by the Hon'ble High Court.

10.4 The Respondent has further claimed that Para 10 supra treating the Report filed under Rule 133(4) as a fresh report under Rule 133(1) would tantamount to amendment in Rule 133(4) on the lines of Rule 133(5), which this Authority could not do as the power to amend rules was available only with the Central Government. In this regard it would be pertinent to mention that, as discussed in Para supra, this Authority has only clarified the position which already exists in Rule 133(1) and hence such a clarification cannot amount to amendment of

Rule 133 (4). Moreover, as per the power conferred on this Authority under Rule 126, which has been framed under Section 171 (3) and 164 of the above Act, this Authority is competent to clarify vide Para 10 of the above Guidelines that the Report furnished by the DGAP after further investigation ordered under Rule 133(4) shall be treated as a fresh Report under Rule 133 (1) and accordingly order on such Report can be passed within a period of 6 months. Therefore, there is no requirement of modifying the above Para and hold that the present proceedings are time barred as it does not amount to amendment in Rule 133(4) in line with Rule 133(5).

10.5 Further, this Authority under Section 171 (3) of the above Act has been empowered by Rule 126 to determine its own "Methodology & Procedure". Accordingly, under the above Rule read with the OM No. F. No. 13/1/2017-Ad-I dated 09.09.2019, issued by the Government of India, Ministry of Finance, Department of Revenue, as per Para 10 of the Guidelines issued vide File No. Admn(NAA)/P&M)/81/2019 dated 04.10.2019 this Authority has stated that *"It is clarified that the Reports submitted by the DGAP under Rule 133(4) shall be construed to be fresh Reports for the purpose of Rule 133(1)"*. Therefore, it is apparent that Para 10 of the Guidelines only clarifies the import of Rule 133(1) which already included in it the provision that the Report submitted by the DGAP on further investigation shall be a Report submitted under Rule 129(6) and accordingly order can be passed on it within a period of six months. Since, the above Guidelines have been framed under the powers vested in this Authority as per the provisions of Section 171(3), Rule 126 as well as the OM dated 09.09.2019 which have approval of the Parliament, the State Legislatures, GST Council, the Central Government and the State Government therefore, the above Guidelines have legal sanctity and any clarification of the time frame fixed for passing order on the Reports filed under Rule 133(4) by considering them fresh Reports within a period of 6 months is legally correct and binding on the Respondent. It is also mentioned that further investigation is not ordered in each and every case and hence there is no question of passing repeated orders under Rule 133(4) and hence, no allegation of perpetual pending of proceedings can survive.

10.6 The Authority finds that the provisions of section 171 relating to anti-profiteering and rules made thereunder have been enacted with the object of benefiting the end consumer, in a situation where tax rates are reduced or benefit of ITC has to be passed on to the consumer. The intent of the legislation is to ensure that the common person is benefited on account of reduction of tax rate or benefit of ITC and that the manufacturer or service provider or builder or trader is not benefited by such sacrifice of the government revenue. With a view to provide expedient disposal of the applications/complaints received under these provisions, the statute has provided for certain time limits under Rule 133. The statute has not provided for nullification of any proceedings for failure to adhere to the prescribed time limits. In the given situation, it is imperative to examine as to whether the said provisions under Rules 133 are mandatory or directory.

10.7 The question as to whether any provision of a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The

meaning and intention of the legislature must govern which is to be ascertained not only from the phraseology of the provision but also by considering its nature, its design and consequences which would follow from construing it the one way or other, as observed by the Apex Court in some of the judgement. It is an admitted fact that anti-profiteering provisions provided under the CGST Act are a beneficial enactment with a view to provide relief to the common person, where the government sacrifices its revenue.

10.8 The Authority finds that the statute has not provided for any consequences for failure to adhere to the time limit and it has not provided that in case of such failure of time limit, the whole proceedings would be null and void. Hon'ble Supreme Court in the case of ***Rajsekhar Gogoi v State of Assam AIR 2001 SC 2313 p2315*** has held that when the consequences of nullification on failure to comply with a prescribed requirement is provided by the statute itself, there can be no manner of doubt that such statutory requirement must be interpreted as mandatory. As mentioned above, no such consequences have been provided in the CGST Act 2017 or rules made thereunder for failure of completing the investigation by DGAP within six months or passing of the order on the investigation report of DGAP within six months by the Authority or extended period as provided under the law. As such, it can be construed that the time limit prescribed under the CGST Act and rules made thereunder to complete the investigation and further decision by the Authority is directory in nature.

10.9 In this connection it would also be relevant to mention that the time limits prescribed under Rule 129(6) and 133(1) are only directory and are not mandatory as no consequences have been provided in the above Rules or the CGST Act, 2017 in case these limits are not observed. The Hon'ble High Court of Delhi while considering the time limit prescribed under Rule 133(1) vide its order dated 27.01.2020 passed in W. P. (C) 969/2020 in the case of ***M/s Nestle India Ltd. & another. v. Union of India others*** has ruled as under:-

> *"We also observe that prima facie, it appears to us that the limitation of period of six months provided in Rule 133 of the CGST Rules, 2017 within which the Authority should make its order from the date of receipt of the report of the Directorate General of Anti Profiteering, appears to be directory in as much as no consequence of non-adherence of the said period of six months is prescribed either in the CGST Act or the rules framed thereunder."*

Reliance is also placed on the judgment of the Hon'ble Supreme Court in the case of ***Mahadev Govind Gharge v. Special Land Acquisition Officer (2011) 6 SCC 321*** wherein it was held that:-

> *"37. Procedural laws, like the Code, are intended to control and regulate the procedure of judicial proceedings to achieve the objects of justice and expeditious disposal of cases. The provisions of procedural law which do not provide for penal consequences in default of their compliance should normally be construed as directory in nature and should receive liberal construction. The Court should always keep in mind the object of the statute and adopt an interpretation which would further such cause in light of attendant circumstances. To put it simply, the procedural law must act as a linchpin to keep the wheel of expeditious and effective determination of dispute moving in its place. The procedural checks must achieve its end object of just, fair and expeditious justice to parties without seriously prejudicing the rights of any of them."*

Reliance in this regard is further placed on the following judgement of the Hon'ble Supreme Court in the case of ***P. T. Rajan v. T. P. M. Sahir and Ors. (2003) 8 SCC 498***:-

> *"48. It is well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefore, the same would be directory and not mandatory. (See Shiveshwar Prasad Sinha v. The District Magistrate of Monghur & Anr. AIR (1966) Patna 144, Nomita Chowdhury v. The State of West Bengal & Ors. (1999) CLJ 21 and Garbari Union Co-operative Agricultural Credit Society Limited & Anr. V. Swapan Kumar Jana & Ors. (1997) 1 CHN 189).*
>
> *49. Furthermore, a provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused."*

10.10 The Authority also find that it has passed Interim Order No. 5/2020 dated 3.1.2020 directing the DGAP to carry out further investigation under the provisions of Rule 133(4). The Respondent did not oppose the said interim order, and participated in subsequent proceedings including personal hearing. If the Respondent had any grievance against the said interim order, being violative of relevant provisions of the law, he had the option of seeking appropriate legal remedy. Since, the said Interim Order No. 5/2020 dated 3.1.2020 was not taken through any legal challenge, it has attained finality and the direction given therein cannot be questioned at this point of time.

10.11 In view of the above said discussion and position of the settled law, the time limits prescribed under Rule 133(1) and Rule 129(6) are not mandatory and hence all the contentions of the Respondent on the ground of not observing the time limits are untenable and hence rejected.

Issue relating to methodology

11. The Respondent has contended that in absence of prescribed method of calculation of profiteering in the Act or the Rules or the Procedure and Methodology, the proceedings are arbitrary and liable to be set aside. The Procedure and Methodology prescribed by the Authority on 19.07.2018 only provided the procedure pertaining to investigation and hearing. However, no method/formula had been notified/prescribed pertaining to calculation of profiteering amount. In the absence of the same, there was lack of transparency and the results could vary from case to case resulting in arbitrariness and violation of Article 14 of the Constitution of India. He has further contended that there was no defined procedure being adopted by the Authority leading to arbitrariness.

11.1 The Respondent is claiming that he was required to carry out highly complex and exhaustive mathematical computations for passing on the benefit of tax reduction which he could not do in the absence of the guidelines and methodology framed by this Authority. However, the Authority finds that no such elaborate computation was required to be carried out as the Respondent was required to maintain the base price of a SKU which he was charging as on 14.11.2017 and then charge GST @18% w.e.f. 15.11.2017 in place of 28%. Instead of doing

that he has raised his prices over night as is evident from the discussion made in the subsequent paragraphs. Respondent was simply required to maintain the base prices of the SKUs which he was charging before the rate reduction and charge GST @18% instead of 28% and no method was required to be prescribed by the Government to pass on the benefit of tax reduction. He was to replace only one entry of GST in his billing software from 28% to 18% w.e.f. 15.11.2017. If the Respondent could change several entries in his software to increase the base prices w.e.f. 15.11.2017 he could have very easily replaced one entry of rate reduction. No guidelines and methodology or elaborate mathematical calculations are required to be prescribed separately under Rule 126 for passing on the benefit of tax reduction or for computation of the profiteered amount. The Respondent cannot deny the benefit of tax reduction to his customers on the above ground and enrich himself at the expense of his buyers as Section 171 provides clear cut methodology and procedure to compute the benefit of tax reduction and the profiteered amount.

11.2 The Respondent was also required to fix and display revised MRPs because as a manufacture he was legally responsible for fixing the revised MRPs as per the provisions of Rule 6 of the Legal Metrology (Packaged Commodities) Rules, 2011. However, he has not re-fixed the MRPs after rate reductions. He was also required to stamp or re-sticker or reprint the MRPs on all the impacted SKUs as per the letter issued by the Ministry of Consumer Affairs, Food and Public Distribution, Govt. of India, dated: 16.11.2017 which states as under:-

"WM-10(31)/2017
Government of India
Ministry of Consumer Affairs, Food and Public Distribution
Department of Consumer Affairs
Legal Metrology Division
Krishi Bhawan, New Delhi
Dated: 16.11.2017

To,

The Controller of Legal Metrology,
All States/ UTS

Subject: Labelling of MRP of pre-packaged commodities due to reduction in GST-reg.

Reference is invited to this office letter No. WM-10(31)/2017 dated 29.9.2017 regarding declaration of MRP on unsold stock of pre-packaged commodities manufactured/packed/ Imported prior to 1st July, 2017. Subsequent to that, Government has reduced the rates of GST on certain specified items. Consequent upon that, permission is hereby granted under sub-rule (3) of rule 6 of the Legal Metrology (Packaged Commodities) Rules, 2011, to affix an additional sticker or stamping or online printing for declaring the reduced MRP on the pre-packaged commodity. In this case also, the earlier Labelling/ Sticker of MRP will continue to be visible.

Further, this relaxation will also be applicable in the case of unsold stocks manufactured/packed/ imported after 1st July, 2017 where the MRP would reduce due to reduction in the rate of GST post 1st July, 2017.
This order would be applicable upto 31st December, 2017

Yours faithfully

(B. N. Dixit)
Director of Legal Metrology
Tel: 01123389489 / Fax.-011-23385322
Email: dirwm-ca@nic.in

Copy to: All Industries/ Industry Associations/ Stake Holders

If the Respondent was not capable of doing the above he could have computed the profiteered amount and deposited it in the CWF of the Central and the State Governments as per the provisions of Rule 133(3)(b), which has been done by some other manufactures/traders. However, the Respondent had no such bonafide intention as he had not reduced and re-fixed the MRPs and had continued to sell his products at the pre rate reduction MRPs and therefore, his unconvincing arguments cannot be relied upon. It is reiterated that as per Section 171(1) reduction in prices is the only legally permissible method for passing on the benefit of tax reduction.

11.3 The 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and ITC or for computation of the profiteered amount has been outlined in Section 171 (1) of the CGST Act, 2017 itself which provides that *"any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."* It is clear from the plain reading of the above provision that it mentions "reduction in the rate of tax or benefit of ITC" which means that if any reduction in the rate of tax is ordered by the Central and the State Governments or a registered supplier avails benefit of additional ITC, the same have to be passed on by him to his recipients since both the above benefits are being given by the above Governments out of their tax revenue. It also provides that the above benefits are to be passed on any supply i.e. on each product to every buyer and in case they are not passed on, the quantum of denial of these benefits or the profiteered amount has to be computed for which investigation has to be conducted in respect of all such products/units/services by the DGAP.

11.4 The 'profiteered amount' has been clearly defined in the explanation attached to Section 171. These benefits can also not be passed on at the entity / organisation / branch/ invoice/ business vertical level as they have to be passed on to each and every buyer at each product/unit/service level by treating them equally. The above provision also mentions "any supply" which connotes each taxable supply made to each recipient thereby making it evident that a supplier cannot claim that he has passed on more benefit to one customer on a particular product therefore he would pass less benefit or no benefit to another customer than what is actually due to that customer, on another product. Each customer is entitled to receive the benefit of tax reduction or ITC on each product or unit or service purchased by him subject to his eligibility.

11.5 The Respondent has also pleaded that the word "commensurate reduction" used in Section 171 (1) denoted reduction in price after taking into account all the factors such as cost of raw materials, packing materials, overheads and other such elements which impacted pricing of goods and also connoted proportionality and adequacy. In this connection it would be pertinent to mention that Section 171 (1) only requires passing on the benefit of tax reduction and ITC and it has no connection with the other factors which influence the prices of the products. The term "commensurate" mentioned in the above Sub-Section provides the extent of benefit to be passed on by way of reduction in the price which has to be computed in respect of

each product or unit or service based on the price and the rate of tax reduction or the additional ITC which has become available to a registered person. The legislature has deliberately not used the word 'equal' or 'equivalent' in this Section and used the word 'Commensurate' as it had no intention that it should be used to denote proportionality and adequacy. The benefit of tax reduction would depend upon the pre rate reduction price of the product and quantum of reduction in the rate of tax from the date of its notification. Computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from product to product or unit to unit or service to service and hence no fixed mathematical methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a buyer.

11.6 Computation of the profiteered amount is a mathematical exercise which can be done by any person who has knowledge of accounts and mathematics as per the Explanation attached to Section 171. However, to further explain the legislative intent behind the above provision, this Authority has been authorised to determine the 'Procedure and Methodology' which has been done by it vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, no fixed mathematical formula, in respect of all the Sectors or the products or the services, can be set for passing on the above benefits or for computation of the profiteered amount, as the facts of each case are different.

11.7 This Authority under Rule 126 has been empowered to 'determine' Methodology & Procedure and not to 'prescribe' it. Similarly, the facts of the cases relating to the sectors of Fast Moving Consumer Goods (FMCG), restaurant service, construction service and cinema service are completely different from each other and therefore, the mathematical methodology adopted in the case of one sector cannot be applied to the other sector. Moreover, both the above benefits are being given by the Central as well as the State Governments as a special concession out of their tax revenue in the public interest and hence the suppliers are not required to pay them from their own pocket and therefore, they are bound to pass on the above benefits as per the provisions of Section 171 (1) which are abundantly clear, unambiguous, mandatory and legally enforceable. The above provisions also reflect that the true intent behind the above provisions, made by the Central and the State legislatures in their respective GST Acts, is to pass on the above benefits to the common buyers who bear the burden of tax and who are unorganised, voiceless and vulnerable. It is abundantly clear from the above narration of the facts and the law that no elaborate mathematical calculations are required to be prescribed separately for passing on the benefit of tax reduction and computation of the profiteered amount.

11.8 The Respondent has further claimed that the word 'any' has been used twice in Section 171(1). 'Any' would mean that tax reduction could be any percentage and it could be ad valorem, specific rate or combination of both. Any supply did not necessarily mean SKU level supply and at the most it might be interpreted as goods classified under a particular tariff heading / HSN code. Section 171 has used the words 'registered person' however, the

Respondent has not obtained registration SKU wise and it has been obtained based on the goods supplied which were classifiable under a particular tariff heading and hence Section 171 could not be applied SKU wise and calculation of profiteering should be considered at the level of HSN code without prejudice that profiteering has to be considered at the legal entity level. In this regard it would be appropriate to note that as per the provisions of the CGST Act, the rate of CGST and SGST has to be fixed as percentage of the transaction value. "Any supply" mentioned in Section 171 (1) would mean each supply made to each customer. Since the Respondent is making supplies at the SKU level, he has to pass on the benefit on each such supply at the SKU level. The Respondent is not making supplies and charging prices at the HSN Code or entity level, hence he cannot pass on the benefit at such Code or entity level. As per the provisions of Section 171(1), each recipient is entitled to the benefit of tax reduction at each SKU level and in case he is denied the benefit on the ground that it is to be passed at the HSN Code or entity level, then it would amount to infringement of Section 171(1) as well as Article 14 of the Constitution.

11.9 The Respondent has also submitted that the DGAP's interpretation of the term 'any' supply as 'each and every' supply was wholly misplaced and therefore, if a recipient has been supplied 2 SKUs and if any additional price charged on 1st SKU has been offset by passing on higher benefit on the 2nd SKU, then the profiteering should be determined after offsetting the higher benefit passed on to the very same recipient. The above claim of the Respondent is highly misplaced as the benefit has to be passed on each SKU to each recipient and it cannot be offset against the other SKU as every recipient may not buy the SKU on which more benefit has been passed on. Such an approach is inequitable as a recipient who has been denied benefit of tax reduction on a SKU in respect of which price has not been reduced commensurately cannot be compelled to get his benefit from the other recipient who has got the benefit on the SKU purchased by him. The above claim of the Respondent is not only against the provisions of Section 171(1) but it is also against Article 14 of the Constitution.

11.10 The Respondent cannot deny the benefit of tax reduction to his customers on the above ground and enrich himself at the expense of his buyers as Section 171 provides clear cut methodology and procedure to compute the benefit of tax reduction and the profiteered amount. Therefore, the Authority finds that the above plea of the Respondent cannot be accepted.

Issue relating to period of investigation

12 The Respondent has contended that period of investigation has been selected in arbitrary manner and profiteered amount has been calculated by treating the period from 15.11.2017 to 31.12.2018; about 14 months. It is further claimed that it is discriminatory inasmuch as in respect of some others, the period of investigation was around 2 to 5 months. The Government has issued the Notification No 41/2017-CT dated 14.11.2017 reducing GST

rates on certain products manufactured by the Respondent w.e.f 15.11.2017. The DGAP has informed that he had received the reference from the Standing Committee on 07.01.2019 and hence the period of investigation was up to the last day of the previous month i.e. 31.12.2018 from the date of issuance of the notification.

12.1 The Authority notes that the CGST Act or rules made thereunder have not provided for any provisions detailing the period of investigation. It would therefore be obvious that the period of investigation will commence from the date when GST rates are reduced or in case where benefit of ITC is to be considered from 1.7.2017 i.e. when GST was implemented. In terms of the provisions of section 171 of the CGST Act, 2017; the registered persons are expected to commensurately reduce the price of the goods or services, immediately after the announcement of the tax rate reduction by the Government. As such there cannot be any dispute relating to the commencing date of the investigation. As regard to the end date of investigation, the date would be dependent upon timing of receipt of complaint/application alleging profiteering by registered person or till the benefit of reduction is passed to recipients . Obviously, in such case the end date would be last day of the previous month, whereby details relating to taxable incomes and other information as contained in the GSTR 1 and /or GSTR3B could be analysed and scrutinised. However, if there has been an increase in the taxes or duties which impacted the profiteering amount, the Respondent is expected to demonstrate the said effect by producing verifiable documents. In the instant case, the Respondent has claimed that there has been increase in the Customs Duty on the imported material of his in February 2018, adjustment of which the profiteered amount was required to be done. This aspect of increase in Customs Duty impact will be discussed in the subsequent paragraphs.

12.2 It is logical to expect that the Respondent is liable to be investigated till the date he can prove that he has passed on the benefit of tax reduction. Since, the details of complaint made against the Respondent were received on 07.01.2019, he has been investigated till 31.12.2018 so that a reference point is available to conduct the investigation as no investigation can be conducted without a fixed time frame. Further, the Respondent has failed to produce any evidence during the course of the present proceedings that he has passed on the benefit, hence he is still profiteering in violation of the provisions of Section 171(1) and any subsequent price increase made by him also amounts to profiteering. The contention of the Respondent that one could be investigated in perpetuity is not correct as such a person would be ordered to reduce his prices immediately per as the provisions of Rule 133(3)(a) from the date of passing of the order by this Authority and if he does so, no further investigation can be held against him. The Respondent has not reduced his prices even once after the rate reduction to deny the benefit of tax reduction to the customers and hence the above claim of the Respondent cannot be accepted.

12.3 The Respondent has also averred that the DGAP has arbitrarily chosen the period of investigation for applying the anti-profiteering provisions which would result in the Respondent being indirectly brought into a price control regime. In the absence of any statutory provision on the period during which the Respondent needed to pass on the reduced tax rate, the same

would need to be construed in a reasonable manner keeping in mind the factors specific to the Respondent. This Authority was statutorily empowered to determine this issue and provide for either a specific time period for which investigation was to be conducted on reasonable basis or provide a set of guidelines to be followed by the DGAP while determining the period of investigation as per the Rule 126 or the Guidelines dated 04.10.2019. In this connection it would be appropriate to note that this Authority has repeatedly held that the investigation has to be carried out till the benefit of rate reduction is passed on as the offence continues to be committed by a registered person till he passes on the benefit in terms of Section 171(1). Such a person cannot be allowed to misappropriate the amount of benefit granted to him from the public exchequer and enrich himself at the expense of unorganised and vulnerable customers. The Respondent is not required to pay any thing from his own pocket while passing on the benefit of tax reduction and hence he should have no objection on the period of investigation. He cannot be investigated beyond the date from which he has passed on the benefit. His plea to restrict the period of investigation only means that he wants to appropriate the amount of benefit. Therefore, no provision is required to be made either under Rule 126 the Guidelines to fix the period of investigation as different registered persons may or may not have passed on the benefit from the same date and hence they would be required to be investigated till the time they have passed on the benefit which may be different in different cases. There is no question of the Respondent being brought under the price control regime as there is no such provision under Section 171(1).

12.4 The Respondent has also argued that period of investigation of around 14 months vis-a-vis investigation period of around 2 to 5 months in respect of some other registered person is discriminatory in nature. However, the Respondent has not provided any detail as to when the complaint/application in respect of these registered persons was received by the DGAP. The Respondent has submitted a list of cases in which this Authority has passed orders in which period of investigation was from 2 to 5 months. In this regard, it may be observed that in majority of these cases, investigation was started immediately after the rate reduction was notified on 15.11.2017 and therefore, they were investigated for not passing on the benefit till the previous month in which the complaint was received by the DGAP for investigation. The Respondent does not mean to contend that the DGAP should have waited for another year so that the period of investigation would be equal to the period of investigation in his case or till the period of investigation was similar in all such cases. Further in all these cases it has also been ordered that further investigation shall be carried out by the DGAP till the date benefit is passed on. Therefore, there is no question of arbitrary selection of the investigation period which as a matter of law is required to be done till the benefit is passed on as per the provisions of Section 171(1). Therefore, the above claim of the Respondent is not correct. In this regard, the Respondent has also cited the decisions of the Hon'ble Supreme Court in the cases of ***S. G. Jaisinghani v. Union of India & Ors. (1967) 2 SCR 703*** **and Maneka Gandhi v. Union Of India 1978 AIR 597**. The law settled in the above cases is not applicable as all the registered persons against whom complaints of profiteering are received are being investigated till the date they have not passed on the benefit of tax reduction or ITC.

12.5 The Respondent has also submitted that the period of investigation was neither envisaged in the CGST Act nor the CGST Rules. The DGAP was following the practice of taking period of investigation from the date of rate reduction till the previous month of the day on which reference was received from the Standing Committee which showed arbitrariness in determining the period of investigation. In this connection it would be relevant to mention that the above Committee after having been satisfied that the Respondent had not passed on the benefit had requested the DGAP to conduct detailed investigation under Rule 129(1). The investigation was conducted from 15.11.2017 to 31.12.2018, notice of which was duly served on the Respondent on 15.01.2019 under Rule 129(3) in which it was specifically mentioned that the Respondent has not passed on the above benefit. Therefore, there was specific allegation of profiteering made against the Respondent vide the above notice as he was asked to explain whether he admitted that the benefit of tax reduction had not been passed on by him and if so he should suo moto determine the same. The investigation could only have been done till December 2018 as it could not been done in respect of future months, as a specific reference period was required for it. The offence could also not have been presumed to be continued to have been committed in future. The Respondent had not raised any objection against the investigation being conducted till 31.12.2018 before the DGAP and hence his present objection is merely an afterthought. Conducting of investigation till 31.12.2018 causes no discrimination to the Respondent as it has been established after investigation that he has not passed on the benefit till 31.012.2018. It is absolutely clear from the provisions of Section 171(1) that "*any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" and therefore, every such person who has not passed on the above benefits is liable to be investigated till he passes on the benefits. Rule 129(2) also specifies that the DGAP shall conduct investigation and collect necessary evidence to determine whether the above benefits have been passed on. Accordingly, investigation has to be carried out till the date the benefit of tax reduction is not passed on by the Respondent which in this case is limited till 31.12.2018 but can be extended till he passes on the benefit. Therefore, there are clear cut provisions under the above Act and the Rules till what period the investigation is to be conducted and it cannot be restricted to a period of 3 months as contended by the Respondent as there is no such provision in the Act or the Rules or any justifiable ground and hence the above claim of the Respondent is not maintainable.

12.6 In view of the above said facts and discussions, the contention of the Respondent regarding arbitrariness of period of investigation is not sustainable and hence is rejected.

Issue relating to discrepancy in the base price

13 It has been the contention of the Respondent that discrepancies in the base price have resulted in the inflated calculation of the profiteered amount. From the facts of the case, one can see that the first report of DGAP dated 05.07.2019 has calculated profiteered amount to be

Rs. 216,49,61,535/-. Certain discrepancies in the calculated amount were detected during thw subsequent proceedings and the same were brought to notice of DGAP and the Authority and the said amount was rectified later on to Rs. 186,39,57,058/-. Reasons for rectification or otherwise have been very elaborately given by the DGAP in his report dated 28.8.2020. As may be seen from the facts of the case narrated in the earlier paragraphs each and every aspect of the Respondent relating to methodology adopted and the result arrived have been discussed and clarified by DGAP.

13 .1 The Respondent has contested method of calculation of profiteering amount adopted by the DGAP. It is seen from the facts of the case that DGAP has compared the average price during the pre-rate reduction period with the actual price after the rate reduction. The contention of the Respondent is that methodology of comparing average with the actuals ignoring negative line items is bound to produce not actual but distorted picture of pre-and post GST rate reduction prices. It is argued by the Respondent that prices to various customers within the same channel i.e. distributors, modern retail customer, etc. may vary from time to time based on commercial considerations. The DGAP has contended that he has worked out the profiteered amount by comparing the weighted average price with the actual price as other method of actual to actual comparison or average to average comparison would either deny benefit to the new customer or benefit to each and every supply of each recipient would not be available.

13 .2 The Authority finds from the submission of the Respondent that transactions involved during the period of investigation are voluminous. It has been further submitted by the Respondent through various tables that for a single day, the selling price to the same buyer for the same product may vary for variety of reasons. Obviously, it would lead to a situation whereby devising any methodology for working out the profiteered amount would be a challenging task and assistance of the various mathematical models may have to be critically examined and a particular model has to be adopted for arriving at best solution. In fact, the three options suggested by the Respondent himself have given three different profiteered amounts. Three methodologies as suggested by the Respondent are mentioned herein below:

a. Weighted average base price of product having same description with all the MRPs.
b. Average base price of the product with latest MRP of the latest product code introduced immediately prior to rate reduction.
c. Weighted average base price of the product with latest MRP prevailing in the pre-rate reduction period.

13 .3 From the facts mentioned hereinabove, it emerges that DGAP has compared average pre-GST rate reduction price of the product with the actual selling price post GST rate reduction to arrive at profiteered amount. DGAP vide his report dated 28.8.2020 has intimated the methodology of calculation of profiteered amount. It is stated that he has adopted six step methodology to work out the profiteered amount. It is informed that action has to be taken

sequentially for the purposes of determination of pre-GST rate reduction price of the product. The six steps are as under:-

First Step: Comparing pre-rate reduction average base price (1.10. 2017 to 14.11. 2017) with post-rate reduction actual base price using **product codes**.

Second step: If the **product code is not available**, product **description** has been used to compare pre-rate reduction average base price (1.10. 2017 to 14.11. 2017) with post-rate reduction actual base price

Third step: If the price was still not available for any product during 1.10. 2017 to 14.11.2017, comparing pre-rate reduction average base price (1.9. 2017 to 30.9. 2017) with post-rate reduction actual base price using **product codes**.

Fourth Step: If the **product code is not available**, product **description** has been used to compare pre-rate reduction average base price (1.9.2017 to 30.09. 2017) with post-rate reduction actual base price

Fifth Step: After applying above four steps, if the price is still not available, the comparison of pre-rate reduction base price during the period 1.10. 2017 to 14.11.2017 of comparable products having minor difference in description and product code has been made with the actual price post rate reduction.

Sixth Step: If the price cannot be determined adopting the above five steps, the comparison of pre-rate reduction base price during the period 1.09. 2017 to 30.9.2017 of comparable products having minor difference in description and product code has been made with the actual price post rate reduction.

13 .4 The above mentioned methodology adopted by the DGAP is suited to the case of Respondent, where he has been dealing with multiple products of different sizes, quantity with different type of buyers, where the price of any product for same day for the same buyer may be different. This fact of different MRPs for the same product to the same buyer even in the single day has been admitted by the Respondent. In view of the above said facts and in the given circumstances this Authority finds that the DGAP has critically examined various methodologies suggested by the Respondent and the most suited methodology has been adopted and all required rectification of the profiteered amount has been made in the Report dated 28.8.2020.

13 .5 The Respondent has given certain tabulation in respect of some of his products in the written submissions to challenge the methodology adopted by the DGAP. As mentioned in the earlier paragraphs that the submissions made by the Respondent were critically analysed by the

DGAP and necessary clarifications were given. One of the models, which can best capture the situation in respect of the Respondent could be comparison of the average base price in the pre-rate reduction period with the actual transaction wise base price after the date of rate reduction.

13 .6 The methodology proposed by the Respondent has taken MRP of the product for working out the profiteered amount. MRP is the maximum retail price of any product, which is required to be affixed on the product under the provisions of Legal Metrology Act/ Legal Metrology (Packaged Commodities) Rules, 2011 and it denotes the maximum price up to which product can be sold in the retail market. The retailer cannot sell the products at a price more than the MRP. The amount received by the Respondent through his intermediaries i.e distributors, e-commerce, is generally not in accordance with the MRP. There are many instances where the retailers' sell the product at a price lower than the MRP, maybe by cutting on their own margin. In the case in hand, the DGAP has worked on the average pre-GST rate reduction prices and actual prices for post-GST rate reduction on the basis of the taxable value declared in the returns.

13.7 The Respondent has also submitted that Rule 6(3) of the Legal Metrology (Packaged Commodities) Rules 2011 provided discretion to the supplier regarding affixation of sticker as the words used were 'may be affixed'. Therefore, such sticker could be affixed also by the distributors, dealers or retailers. It was not possible for the manufacturers to affix stickers with reduced MRPs on the products which had already been sold and were lying with the dealers and retailers. In this regard it would be correct to mention that as per the provisions of Rule 2(d) of the above Rules and the admission of the Respondent himself that he was manufacturer or trader in some products of all the SKUs which were being supplied by him he is liable for fixing the Maximum Retail Price (MRP) as per the provisions of Rule 2(m). Therefore, unless he had revised his MRPs after the reduction in the rate of tax, his distributors would not have been able to fix stickers of revised MRPs. Therefore, the Respondent cannot shift his liability on to his recipients to affix stickers. Notification dated 16.11.2017 issued by the Ministry of Consumer Affairs, Food and Public Administration is discussed at para 11.2 on pre-page. Accordingly, the above submission of the Respondent is untenable.

13.8 The Respondent has also alleged that there were discrepancies in the calculation of profiteering as net price of SKU (Gross price net of discounts) prior to reduction of tax was compared with the gross price of SKU post reduction of tax in respect of certain SKUs, which has resulted in reduced margins on the products, has not been considered. It would emerge from the Report dated 05.07.2019 that the computation of the profiteered amount has been made by comparing the transaction value of the SKU charged by the Respondent during the pre and post reduction periods as has been provided under Section 15(1) excluding the amount of discounts as per Section 15(3)(a), both of which state as under:-

"15(1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply."

15(3) The value of the supply shall not include any discount which is given –

(a) before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply;"

Therefore, as per Section 15 (3) (a) of the above Act, the value of the supply does not include any discount which was given before or at the time of the supply if such discount had been duly recorded in the invoice issued in respect of such supply and thus, the GST was chargeable on the actual transaction value after excluding any discount (conditional as well as unconditional) and therefore, actual transaction value has been considered for computation of profiteering. Since, the DGAP has compared the transaction values of a SKU mentioned by the Respondent in his pre and post rate reduction invoices there is no question of comparing the net price of SKU (Gross price net of discounts) prior to reduction of tax with the gross price of SKU post reduction of tax in respect of certain SKUs. In support of his submissions, the Respondent has placed reliance on the decision of the Hon'ble High Court of Delhi given in W. P.(C) 1780/2020 in the case of ***M/s Johnson & Johnson Pvt. Ltd. v. Union of India & Ors.,*** given vide its order dated 18.02.2020 whereby the order passed by this Authority has been stayed. In this regard it is respectfully submitted that the above case is still pending for final adjudication before the Hon'ble High Court and hence the observations made in the above case cannot be applied in the present case of the Respondent.

13.9 As such, in the given facts and circumstances, the contention of the Respondent regarding incorrect method of determination of profiteered amount due to discrepancies in the base price is unsustainable and is rejected.

Issue relating to discount and credit notes

14 One of the contentions of the Respondent is that price reduction by means of discounts post supply of goods to recipients should be considered for modifying the amount of profiteering. It has been claimed that after the reduction of the GST rates vide notification dated 14.11.2017 in respect of the impacted products, efforts were made to pass on the benefit to the ultimate buyer. It was claimed that emails were sent to the concerned buyers to ensure that the benefit of GST rate reduction should be passed on in respect of the product, which are already in their possession or in the transit. The Respondent has relied upon the minutes of the meeting dated 19.12.2017 held in this regard and also the email dated 25.11.2017. It was also claimed by the respondent that credit notes were issued to the distributors/customers and

service invoices were issued by the modern retail/e-commerce customers. The Respondent has submitted sample copies of the credit notes and invoices to the DGAP and scanned copies of some of them have been displayed on the previous pages. The DGAP in his report has countered the claim of the Respondent in as much as that no SKU-wise correlation can be established and that benefit to the distributors is on account of various trade schemes and that one credit note is dated 14.9.2017 showing benefit passed on for the rate reduction, whereas the rates were reduced from 15.11.2017. The DGAP has also found that documents submitted by the Respondent claiming to be passing on benefit to modern retail/e-commerce customers, relates to advertising services. The Respondent has countered the above said observation of the DGAP by claiming that the SKU wise correlation has been submitted to the DGAP but has not been considered. As regard to the nomenclatures of Trade Schemes shown and the documents, it was claimed that the system could not be changed immediately and ad- hoc discount of 5%/12.5% on account of GST was extended. As regard to the one credit note dated 14.9.2017, the same was incorrectly reflected due to selection of old printout format in the system and the said credit note actually dated 21.02.2018.

14.1 The Authority has gone through the claims and counter claims made by the Respondent and DGAP. The observation of the Authority in respect of some of the documents discussed in the earlier paragraph is as under:

14.1.1 **Credit note dated 14.9.2017:** The Respondent has submitted to the DGAP the Credit Note bearing Document No. 520383546 dated 14.9.2017 in support of his contention that benefit of GST rate reduction has been passed on to the distributor (i.e. Ankita Enterprises) and the DGAP has pointed out as how such GST rate reduction benefit can be transferred on 14.9.2017, when the notification to this effect was issued on 14.11.2017. From the records, we find that decision to reduce the GST rate in respect of some of the products manufactured by the Respondent was taken by the GST Council in its meeting held on 10.11.2017 at Guwahati. As such, the Respondent had no means of knowing the fact in September 2017 that the GST rate on some of his products was going to be reduced in future. The Respondent has defended the said credit note by claiming that the date has been incorrectly reflected due to selection of old print layout and system and that the document and the accounting entry reflects date as 21.02.2018. The Authority finds that the Respondent in its written submission has claimed that he is a leading cosmetic group worldwide and has been present in India as a wholly owned subsidiary of L'Oreal SA since 1994. They occupy second position in the beauty industry with a strong portfolio of 14 powerful international brands across all distribution channels. With such credential and international presence, it would be logical to expect that the Respondent would have modern, secure and state of art accounting system, which would capture each and every transaction incorporating correct date and time, which cannot be tampered with. To fully understand the implication of this document, the scanned copy of both documents are pasted here below:-

L'OREAL INDIA PRIVATE LIMITED
DIVISION:CPD
REGIONAL OFFICE:L'Oreal India Pvt. Ltd.
#SNC HOUSE##Ground Floor # 7, Residency Road
Bangalore
Phone:080-40261500 Fax:080-40261589

CREDIT NOTE

DOCUMENT NO. 52038336	DOCUMENT DATE 14.03.2017		CONTRACT NO. 30 1026175
Sold To: ANKITA ENTERPRISES PLOT NO 5 CIDA NACHARAM X ROAD HYDERABAD 500076 CST No VAT TIN NO 36090252262	Ship To: ANKITA ENTERPRISES PLOT NO 5 CIDA NACHARAM X ROAD HYDERABAD 500076 CST No VAT TIN No 36090252262	Claim No CT317000190 Claim Date 14.03.2017 Claim/Activity Trade Schemes Delivery No Your Reference	

Product Code	Client Code/ EAN Code	Description	No.of cases	M.R.P (Rs/Unit)	No. of Units	Rate (Rs/Unit)	Disc1, Disc2	Tax%	Value (Rs)
CPDTSC		TRADE SCHEMES-CPD	0		0	3669.54			3669.54
CPDTSC		TRADE SCHEMES-CPD	0		0	3669.54			3669.54
CPDTSC		TRADE SCHEMES-CPD	0		0	3669.54			3669.54
CPDTSC		TRADE SCHEMES-CPD	0		0	3669.54			3669.54
CPDTSC		TRADE SCHEMES-CPD	0		0	3669.54			3669.54
CPDTSC		TRADE SCHEMES-CPD	0		0	3669.54			3669.54
CPDTSC		TRADE SCHEMES-CPD	0		0	3669.54			3669.54
CPDTSC		TRADE SCHEMES-CPD	0		0	3669.54			3669.54
CPDTSC		TRADE SCHEMES-CPD	0		0	37267.97			37267.97
CPDTSC		TRADE SCHEMES-CPD	0		0	33143.09			33143.09
CPDTSC		TRADE SCHEMES-CPD	0		0	222597.30			222597.30
CPDTSC		TRADE SCHEMES-CPD	0		0	7007.41			7007.41
CPDTSC		TRADE SCHEMES-CPD	0		0	7007.41			7007.41
CPDTSC		TRADE SCHEMES-CPD	0		0	7007.41			7007.41
CPDTSC		TRADE SCHEMES-CPD	0		0	16183.74			16183.74
CPDTSC		TRADE SCHEMES-CPD	0		0	16183.74			16183.74
CPDTSC		TRADE SCHEMES-CPD	0		0	16183.74			16183.74
CPDTSC									Cont. Page 2
TOTAL									

Amt in Words: SEVEN LAKH FIVE THOUSAND ONE HUNDRED THIRTY SEVEN Rupees FIFTY EIGHT Paise

For L'OREAL INDIA PRIVATE LIMITED

Authorised Signatory

L'OREAL INDIA PRIVATE LIMITED
DIVISION:CPD
REGIONAL OFFICE:L'Oreal India Pvt. Ltd.
#SNC HOUSE##Ground Floor # 7, Residency Road
Bangalore
Phone:080-40261500 Fax:080-40261589

CREDIT NOTE

DOCUMENT NO : 5203833546	DOCUMENT DATE : 14.09.2017		CONTACT NO : 80-40261500
Sold To : ANKITA ENTERPRISES PLOT NO 5 C IDA, NACHARAM X ROAD HYDERABAD-500076 CST No.: VAT/TIN NO : 36090252262	Ship To: ANKITA ENTERPRISES PLOT NO 5 C IDA, NACHARAM X ROAD HYDERABAD-500076 CST No.: VAT/TIN No. 36090252262	Claim No. : CTS17000100 Claim Date : 14.09.2017 Nature/Activity :Trade Schemes Delivery No Your Reference:	

Product Code	Client Code/ EAN Code	Description	No.of cases	M.R.P (Rs./Unit)	No. of Units	Rate (Rs./Unit)	Disc1, Disc2	Tax%	Value (Rs.)
CPDTSC		TRADE SCHEMES-CPD	0		0	16183.74			16183.74
CPDTSC		TRADE SCHEMES-CPD	0		0	16183.74			16183.74
CPDTSC		TRADE SCHEMES-CPD	0		0	530.37			530.37
CPDTSC		TRADE SCHEMES-CPD	0		0	69575.40			69575.40
CPDTSC		TRADE SCHEMES-CPD	0		0	69575.40			69575.40
CPDTSC		TRADE SCHEMES-CPD	0		0	69575.40			69575.40
CPDTSC		TRADE SCHEMES-CPD	0		0	69575.40			69575.40
TOTAL									705137.58

Amt. in Words : SEVEN LAKH FIVE THOUSAND ONE HUNDRED THIRTY SEVEN Rupees FIFTY EIGHT Paise

For L'OREAL INDIA PRIVATE LIMITED

Authorised Signatory

L'OREAL INDIA PRIVATE LIMITED
Division :CPD
Address:Swamy Sons Agencies Pvt. Ltd
4-97, "O" Godown,St.Johns Regional
Seminary Church Compound,Ramanthapur Hyderabad
500013 Telangana
PAN:AAACL0738K GSTIN 36AAACL0738K1Z1

ANNEXURE-3

Page No: 1 of 2

CREDIT NOTE

ORIGINAL FOR RECIPIENT

Credit Note No : CTS17000100	Credit Note Date: 21.02.2018	Date of Supply :	Contact No : 80-40261500
Billed To Name : ANKITA ENTERPRISES Address : PLOT NO 5 C IDA NACHARAM X ROAD HYDERABAD 500076 State : Telangana GSTIN : 36AAIFA4501G1ZV	**Shipped To** Name : ANKITA ENTERPRISES Address : PLOT NO 5 C IDA NACHARAM X ROAD HYDERABAD 500076 State : Telangana GSTIN : 36AAIFA4501G1ZV Your Reference:	PO No : CTS17000100 PO Date: 21.02.2018 SAP Doc. Ref. No. 0520383546 Delivery No : Place of Supply : Telangana Place of Delivery : Telangana E-Way Bill No : E-Way Valid Date: Vehicle No.	Trans : LR/RR/GR No : LR/RR/GR Date : Factory Packed Cases : 0 Total No of Cases : 0 Total Repacked Cases : 00000 Total Unit : 0 Total Weight 0.000 Offer Desc

Product Code	Description of Goods	HSN Code	MRP (Rs/Ut)	Qty (cases)	Units	Rate (Rs/Ut)	Total Value (Rs)	TDS Value(Rs)	Taxable Value(Rs)	CGST Rate*	CGST Amount (Rs)	SGST /UTGST Rate*	SGST /UTGST Amount (Rs)
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	3,669.54	3,669.54	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	3,669.54	3,669.54	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	3,669.54	3,669.54	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	3,669.54	3,669.54	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	3,669.54	3,669.54	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	3,669.54	3,669.54	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	3,669.54	3,669.54	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	3,669.54	3,669.54	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	39,267.97	39,267.97	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	33,143.09	33,143.09	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	222,597.30	222,597.30	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	7,007.41	7,007.41	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	7,007.41	7,007.41	0.00					

GST Payable under reverse charge : NO

This Credit Note is issued in adjustment of below Original Invoice :

Original Invoice No :
Original Invoice Date :

For L'OREAL INDIA PVT LTD

Authorised Signatory

L'OREAL INDIA PRIVATE LIMITED

Divison CPD

Address:Swamy Sons Agencies Pvt. Ltd

4-97 "O" Godown,St Johns Regional Seminary Church Compound,Ramanthapur Hyderabad 500013 Telangana Page No: 2 of2

PAN:AAACL0738K GSTIN: 36AAACL0738K1ZI

ORIGINAL FOR RECIPIENT

CREDIT NOTE

Credit Note No.: CTS17000100	Credit Note Date: 21.02.2018	Date of Supply :	Contact No.: 80-40261500
Billed To Name : ANKITA ENTERPRISES Address : PLOT NO 5 C IDA, NACHARAM X ROAD HYDERABAD 500076 State : Telangana GSTIN : 36AAIFA4501G1ZV	**Shipped To** Name : ANKITA ENTERPRISES Address : PLOT NO 5 C IDA, NACHARAM X ROAD HYDERABAD 500076 State : Telangana GSTIN : 36AAIFA4501G1ZV Your Reference	PO No. : CTS17000100 PO Date : 21.02.2018 SAP Doc. Ref No. 052038[illegible]46 Delivery No : Place of Supply : Telangana Place of Delivery : Telangana E-Way Bill No. : E-Way Valid Date. Vehicle No.:	Trans : LR/RR/GRNo. LR/RR/GR Date : Factory Packed Cases : 0 Total No of Cases . 0 Total Repacked Cases : 00000 Total Unit : 0 Total Weight : 0.000 Offer Desc. :

Product Code	Description of Goods	HSN Code	MRP (Rs/Ut)	Qty (cases)	Units	Rate (Rs/Ut)	Total Value (Rs)	TDS Value(Rs)	Taxable Value(Rs)	CGST Rate*	CGST Amount (Rs)	SGST /UTGST Rate*	SGST /UTGST Amount (Rs)
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	7,007.41	7,007.41	0.00					
CPDTS[illegible]	TRADE SCHEMES-CPD	998599		0	0.000	16,183.74	16,183.74	0.00					
[illegible]	TRADE SCHEMES-CPD	998599		0	0.000	16,183.74	16,183.74	0.00					
[illegible]	TRADE SCHEMES-CPD	998599		0	0.000	16,183.74	16,183.74	0.00					
CPDTS	TRADE SCHEMES-CPD	998599		0	0.000	16,183.74	16,183.74	0.00					
CPDT[illegible]	TRADE SCHEMES-CPD	998599		0	0.000	16,183.74	16,183.74	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	530.37	530.37	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	69,575.40	69,575.40	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	69,575.40	69,575.40	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	69,575.40	69,575.40	0.00					
CPDTSC	TRADE SCHEMES-CPD	998599		0	0.000	69,575.40	69,575.40	0.00					
Total							705,137.58		0.00		0.00		0.00

Total	705,137.58
Invoice Total	705,137.58

Invoice Total (In Words) : SEVEN LAKH FIVE THOUSAND ONE HUNDRED THIRTY SEVEN Rupees FIFTY EIGHT Paise

GST Payable under reverse charge : NO

This Credit Note is issued in adjustment of below Original Invoice :

Original Invoice No :

Original Invoice Date :

For L'OREAL INDIA PVT.LTD.

Authorised Signatory

A close look at these two documents would reveal the following:-

i. The document dated 14.9.2017 has been issued from the Bangalore office of the Respondent and is titled as CREDIT NOTE. It has document No 520383546 dated 14.9.2017 for M/s Ankita Enterprises Hyderabad for an amount of Rs. 705137.58. It is with respect to the claim number CTS17000100 dated 14.9.2017. The description given in the credit note is TRADE SCHEMES-CPD.

ii. The document dated 21.02.2018 has been issued from the Hyderabad office of the Respondent and titled CREDIT NOTE. In place of Document No. and Document Date (as seen in credit Note dated 14.9.2017); this document has Credit Note No. CTS17000100 and Credit Note date 21.02.2018. This document has PO No as CTS17000100 and PO date 21.02.2018. This document is for M/s Ankita Enterprises Hyderabad for an amount of Rs. 705137.58.

iii. If one compared these two documents, it would emerge that the basis of these documents is one document i.e. CTS17000100. While in the document dated 14.9.2017, it has been stated as 'claim' in the other document it has been mentioned as 'PO' (perhaps purchase order). All other relevant information in these two documents is same except the dates.

iv. The contention of the Respondent that the above said discrepancy is on account of selection of old print layout in system does not appear to be convincing. It is a known fact that data (like date, time, values, description, documentation number, rate, quantity, etc.) are very sacrosanct in the business, more so in respect of multinational corporations. They are stored in comprehensive and robust database and they cannot be changed easily and operated through tamperproof secure software like SAP, etc. Anyone who takes printout in any format irrespective of any print layout, important parameters like date and time cannot change from such database.

v. It is general practice that FMCG or several other consumer goods companies launch and implement various trade incentive promotional schemes from time to time with the view to promote sales and to get new customers. On several occasions, such companies introduce new products and carry out promotional activities. In fact in the case of the Respondent, copies of some advertisements given during the proceeding indicated that some quantity of their product has been given free of charge. For example, in the advertisement of Total Repair 5 Shampoo; it is mentioned that 17.5

ml is free with 175 ml. Obviously, such free supply of product cannot be considered as passing of GST rate reduction.

vi. In view of the above said observation and findings, where the veracity of the document itself is in doubt, the contentions of the Respondent relating to the credit notes are unsustainable and hence rejected.

14.1.2 **Credit notes for GST scheme discount**

The Respondent has contended that till the time the revised/amended MRP was affixed on the product after the notification dated 14-11-2017 in the month of January 2018, he has offered discount to his customers, who have received the claims from the retailers. The relevant paragraphs in his written submission are mentioned in the earlier paragraph 5.10 at C and the same are being reproduced for the purpose of analysis by the Authority.

"C.13 Invoice shows the MRP, Reduced MRP and the Scheme Discount (Sch Disc) are calculated based on the rate per unit of product, as applicable based on difference between old and reduced MRP. Discount per unit given by customer to retailer – INR 1723.47/48 (qty.) = INR 35.91 per unit

DELHI TRADING CO
1/2, BASEMENT FLOOR, EAST
PATEL NAGAR ROAD, PATEL NAGAR,
CENTRAL DELHI, NEW DELHI 110008
PH No. 9810533112
GSTIN No. 07ANTPS1493B1ZO
State Code & Name: 07 Delhi

Billed To.
PRABHA COLLECTION
KAMLA NAGAR
KAMLA NAGAR
NEW DELHI
PH No.
GSTIN No. 07AAGFP9769H1ZL
State Code & Name: 07 Delhi

Invoice No : LCBL041341701898
Invoice Dt : 11/01/2018
Salesman : ANKIT
Route : KAMLA NAGAR
Doc Ref No :

S.No	Product Description	HSN	MRP	Reduced MRP	Rate	Qty	Sch Disc	Taxable Amount	CGST\IGST %	CGST\IGST Amt	SGST\UTGST %	SGST\UTGST Amt	Net Amt
16	DGL Eye Studio Gel L	33042000	550.00	500.00	395.00	48	1723.47	17236.60	9.0	1551.29	9.0	1551.29	20339.18

Claim made by customer on L'Oréal and processed by L'Oréal

C.14. The claim made by customer on L'Oreal shows the very same invoice line item sold by customer to retailer.

Bill Date	Bill No	Retailer Name	Shipping Address	Product Code	Product Name	Sales Qty	GST Scheme Discount
11-01-2018	LCBL0413417018 98	PRABHA COLLECTION	KAMLA NAGAR --> KAMLA NAGAR --> NEW DELHI	DMEEL001-D0	DGL Eye Studio Gel Liner Blackest	48.0	1,723.47

C 15. The claim made by customer for the above product worked out to INR 35.91 on a p.u. basis. This is the same product sold by L'Oréal to customer which can be seen from the invoice of L'Oréal as follows:

ORIGINAL FOR RECIPIENT	L'OREAL INDIA PRIVATE LIMITED Division :CPD Address:DHL Supply Chain India Pvt. Ltd Gut No.428, Mahalunge Ingle, Chakan-Talegaon Road,Chakan, Pune 410501 Maharashtra GSTIN: 27AAACL0738K1ZH		
TAX INVOICE			
Invoice No.: MH0017714319	Invoice Date: 27.12.2017	Date of Supply : 27.12.2017	Contact No.: 124-4779000
Billed To Name : DELHI TRADING CO Address : 1 2, BASEMENT FLOOR, EAST PATEL NAGAR ROAD, PATEL NAGAR, CENTRAL DELHI, NEW DELHI 110008 State : Delhi GSTIN : 07ANTPS1493B1ZO OTP:	**Shipped To** Name : DELHI TRADING CO Address : 1 2, BASEMENT FLOOR, EAST PATEL NAGAR ROAD, PATEL NAGAR, CENTRAL DELHI, NEW DELHI 110008 State : Delhi GSTIN : 07ANTPS1493B1ZO Your Reference:	PO No. : OUT 2017 1600 3733 PO Date: 26.12.2017 SAP Doc. Ref. No. 0511285720 Delivery No : 811357924 Place of Supply : Delhi Place of Delivery : Delhi E-Way Bill No. : E-Way Valid Date: Vehicle No.:	Trans : BLUE DART EXPRESS LTD LR RR GRNo.: 50481731445 LR RR GR Date : 27.12.2017 Factory Packed Cases : 74 Total No of Cases : 74 Total Repacked Cases : 00000 Total Unit : 3684 Total Weight : 214.746.468 G Offer Desc:

Product Code	Description of Goods	HSN Code	M.R.P (Rs./Ut)	Qty (cases)	Units	Rate (Rs/Ut)	Total Value (Rs)	Discount Value (Rs)	Taxable Value (Rs)	IGST	
										Rate (%)	Amount
DNEEL001-D0	DGL Eye Studio Gel Liner Blackest	33042000	550.00	7	480	365.40	[illegible]	0.00	[illegible]	0.00	0.00

(the above copy taken from the power point presentation)

It may be seen from the tax invoice No MH0017714319 dated 27.12.2017 that the product DGL Eye Studio Gel Liner having MRP of Rs. 550 was sold to M/s Delhi Trading Co. The unit rate indicated is of Rs. 365.40. It is claimed by the Respondent that the same product was sold by M/s Delhi Trading Co. to the retailer at the reduced MRP of Rs. 500. However, it has been sold at the rate of Rs. 395 per unit by M/s Delhi Trading Co. It is claimed that he has offered a discount of Rs. 1723.47. It is not understood as to how the unit price of the product has been increased from Rs. 365.40 to Rs. 395 by the customer of Respondent i.e M/s Delhi Trading Co. It would appear from the above said documents that the unit price was raised by the customer (M/s Delhi Trading Company) by around Rs 30 per piece and on which scheme discount is given. If the indicated discount amount is taken into consideration from the unit price to the retailer, it would be Rs. 359.09 per unit. If that be so, the claim of the Respondent that discount offered per unit is Rs. 35.91 is wrong but discount of Rs. 6.30 per unit only has been given. Further, the invoice raised by the customer i.e. M/s Delhi Trading Co. upon the retailer only mentions 'Sch Disc' without disclosing as to whether it is normal trade discount or any other discount like GST rate reduction discount.

14.2 DGAP in his reports has also found that some of the credit notes adduced by the Respondent to support his contention that GST rate reduction was passed on through such credit notes, were in fact found to be relating to advertisements or sales promotions. Obviously, when the documents speak for themselves, only the said purposes should be taken for consideration. However, Respondent has argued that many other credit notes have indicated description of goods as 'GST price reduction-CPD' and the benefit of the same needed to be

extended to him. In support of the said claim, he has pasted scanned copy of one such credit note in para 5.10 C.44; which is reproduced here in below:

" C.44 *The Respondent has also submitted copies of credit notes which reflect that the benefit is on account of GST price reduction. In this regard, the Respondent would like to provide herewith as* ***Annexure-2*** *to this submission, an additional credit note dated 16.04.2018 issued to M/s. Ankita Enterprises for total amount of INR 1,61,645.05, which clearly reflects that it is on account of GST price reduction. A screenshot of the credit note is also provided below:*

L'OREAL INDIA PRIVATE LIMITED
Division :CPD
Address:Swamy Sons Agencies Pvt Ltd
4-97 / "O" Godown,St.Johns Regional
Seminary Church Compound,Ramanthapur Hyderabad
500013 Telangana
PAN:AAACL0738K GSTIN: 36AAACL0738K1ZI

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ORIGINAL FOR RECIPIENT — CREDIT NOTE

Credit Note No.: CTS1700105	Credit Note Date: 16.04.2018	Date of Supply :	Contact No.: 80-40261500
Billed To Name : ANKITA ENTERPRISES Address : PLOT NO 5 C IDA, NACHARAM X ROAD HYDERABAD 500076 State : Telangana GSTIN : 36AAIFA4501G1ZV	**Shipped To** Name : ANKITA ENTERPRISES Address : PLOT NO 5 C IDA, NACHARAM X ROAD HYDERABAD 500076 State : Telangana GSTIN : 36AAIFA4501G1ZV Your Reference:	PO No. : CTS1700105 PO Date: 16.04.2018 SAP Doc. Ref. No. 0520390131 Delivery No : Place of Supply : Telangana Place of Delivery : Telangana E-Way Bill No. : E-Way Valid Date: Vehicle No.:	Trans : LR/RR/GRNo.: LR/RR/GR Date : Factory Packed Cases : 0 Total No of Cases : 0 Total Repacked Cases : 00000 Total Unit : 0 Total Weight : 0.000 Offer Desc :

Product Code	Description of Goods	HSN Code	MRP (Rs/Ut)	Qty (cases)	Units	Rate (Rs/Ut)	Total Value (Rs)	TDS Value(Rs)	Taxable Value(Rs)	CGST Rate%	CGST Amount (Rs)	SGST /UTGST Rate%	SGST /UTGST Amount (Rs)
CPDTGST	GST PRICE REDUCTION -CPD	998599		0	0.000	1,732.40	1,732.40	0.00					
CPDTGST	GST PRICE REDUCTION -CPD	998599		0	0.000	1,732.40	1,732.40	0.00					
CPDTGST	GST PRICE REDUCTION -CPD	998599		0	0.000	329.71	329.71	0.00					
CPDTGST	GST PRICE REDUCTION -CPD	998599		0	0.000	329.71	329.71	0.00					
CPDTGST	GST PRICE REDUCTION -CPD	998599		0	0.000	329.71	329.71	0.00					
CPDTGST	GST PRICE REDUCTION	998599		0	0.000	272.11	272.11	0.00					

C.45 Further, it has also been observed by DGAP that the said credit notes nowhere indicated that those were related to benefit of reduction in GST rate from 28% to 18% w.e.f. 15.11.2017. In this regard, the Respondent submits that the credit notes pertaining to period from January 2018 onwards clearly indicate that they are for "GST PRICE REDUCTION". Therefore, the claim cannot be rejected on the basis of this reason. As regards period up to December 2017, although the credit notes used the nomenclature as TRADE SCHEMES, the Respondent has

already demonstrated through email communication above that they pertained to GST rate reduction only. Therefore, the DGAP's observation is incorrect. The Respondent submits that the benefit has been passed on account of GST rate reduction only."

As one would see from the above said credit note that it was billed to M/s Ankita enterprises and credit note is dated 16.4.2018 for the PO No. CTS1700105 dated 16.4.2018. The description given is and claimed as 'GST PRICE REDUCTION- CPD'. It may also be noted that Respondent in earlier paragraph 5.4 has claimed as under:

Jan 2018 onwards	The process of MRP change as well as increase in grammage on packs started in November 2017 itself, and as the old MRP printed inventory was phased out and the fresh stock with reduced MRP on artwork became ready, it started to hit shelves from January 2018 onwards. The Respondent reduced the prices on invoices issued to its recipients commencing January 2018 onwards for majority of products, and also increased grammage for some. The Respondent offered discounts in the form of post supply price reductions till the time MRP reduction or higher grammage was given.

The point which is required to be looked into these two paragraphs i.e. 5.4 and 5.10 is that when Respondent claims to have reduced the prices on invoices to its recipients commencing from January 2018, the 'GST PRICE REDUCTION- CPD' in the month of March 2018 and in subsequent months through the credit note are in contradiction of such claim. Hence, the claims of the Respondent are not trustworthy and not substantiated.

14.3 Further, as per the provisions of Section 171(1) the benefit can be passed on only by commensurate reduction in the price and it cannot be passed through promotion schemes. Many manufactures including Respondent usually float such promotion schemes in the ordinary course of his business, the main aim of which is to increase his sales as the name itself suggests and not to pass on the benefit of tax reduction. Moreover, these schemes benefit his distributors and retailers more than the ordinary consumers. The Respondent has also not been able to establish any correlation between such promotion schemes and the passing on of the benefit of tax reduction. Such an assertion is mere an afterthought to justify passing on of the benefit on the basis of the promotion schemes which were launched in pre or post rate reduction periods to promote sales and hence it cannot be relied upon.

14.4 The Respondent has further contended that his recipients viz. distributors and modern retailers had treated the discounts as service in view of the fact that the incentive received by the dealers was considered by the Department as consideration for the service and service tax was demanded on such incentives. In order to avoid litigation, the Respondent had accepted the claim for price reductions from the recipients with tax as it was revenue neutral, being creditable in the hands of the Respondent. Accordingly, even though the price reductions were

routed by way of service invoices received from the recipients, it remained a fact that the same were raised in lieu of schemes announced by the Respondent and were nothing but a reduction in sale prices of the Respondent, and not towards any services provided by Respondent's customers to the Respondent. Accordingly, the computation of profiteering ought to have been made on the basis of net prices only, which were the prices charged by the Respondent after allowing for price reduction based on the schemes announced from time to time, as the net price alone reflected the actual consideration towards the supply, realized by the Respondent. In this regard it would be worthwhile to state that the evidence submitted by the Respondent in his support was either the invoices issued by his distributors which mentioned the description as "Advertising Services" with HSN Code 998366 or the Credit Notes issued by the Respondent. Therefore, it is absolutely clear that the amount paid by the Respondent to his distributors was on account of the services rendered by them for promotion or advertisement of his sales and has nothing to do with passing on of the benefit. The Respondent cannot make arguments against the factual record and entries made in the invoices. The Respondent has also appeared to have resorted to misclassification of accounts by making such a claim. The benefit could have been passed on by simply maintaining the pre rate reduction prices and then charging GST on them @18%. Such a claim is being made by the Respondent deliberately to palm off the incentive given by him for sale promotion as passing on of the benefit. The benefit was required to be passed on by commensurate reduction in the price and not by post supply discounts or incentives. Moreover, no correlation has been established by the Respondent between the taxable value reported in the GST Returns and the post supply discounts given on any SKU. Therefore, it cannot be claimed that the post supply discounts were given on account of tax reduction. Since the discounts have been shown as promotion or advertisement services in the books of account, they cannot be treated as passing on of the benefit. There is also no correlation between the promotional amount and the sales made to the distributors which could establish that this amount was paid on account of passing on the benefit of tax reduction. Hence, the claim made by the Respondent on the above grounds is wrong and misleading and hence the same cannot be accepted. He has also placed reliance on the cases of ***Union of India v. Bombay Tyres International 1984 (17) E.L.T. 329 (SC)*** and ***M/s Moped India Ltd. v. Asst. Collector 1986 (23) E.L.T. 8 (SC)*** both of which do not apply in the facts of the present case.

14.5 In view of the above findings of the Authority in respect of the documents/evidences produced by the Respondent in support of his contention that GST rate reduction has been passed on through such trade discounts including credit notes, the Authority holds that such submission of the Respondent is not sustainable and hence is rejected.

Issue relating to grammage

15 One of the grounds taken by the Respondent is that he has passed on the benefit of reduction of tax by increasing the quantity of the product i.e. grammage, after the reduction in

the tax rate. In support of the said contention, the Respondent has adduced evidences like Minutes of Meeting dated 21.12.2017 and other documents like change of product code to 11 digit, labelling, etc.

15.1 To arrive at any conclusion on the above said contention of the Respondent, it is important to revisit the provisions of section 171 (1) of the Act, which reads as under:

'any reduction in the rate of tax on any supply of goods or services or the benefit of the input tax credit shall be passed on to the recipient by way of commensurate reduction in prices'.

The above said provisions have provided in plain and simple language that any reduction in rate of tax of any supply of goods or services or benefit of input tax credit should be passed on by way of commensurate reduction in prices to the recipient. The Respondent has made an attempt to expand the interpretation of two words in the above said provision, namely, 'commensurate' and 'prices'. It is claimed by him that commensurate should not only mean with respect to the monetary terms but should include other factors like increase in quantity/grammage sold. As per the Respondent, increase in quantity of grammage would be coming within the definition of commensurate reduction in prices.

15 .2 The Authority does not find from the facts or the evidences collected by the DGAP or any document/evidence given by the Respondent whereby it can be proved that the products sold by the Respondent are per gram or per kilogram. In fact, from the photographs of advertisements submitted by the Respondent, one doesn't find as to whether the consumer was consciously made aware of specific number of excess grammage being offered to them due to reduction in the tax rate. None of the photographs or evidence indicates that the products sold were with price fixed with respect to grammage. It is also not a case, where the price of the product is mentioned in immediate vicinity of the grams on the packet or vice versa. In fact, in one of the advertisements the quantity is shown as 175 ML with 15 ML as free. The contention of the Respondent may have some persuasive value if they would have been selling their product on the weight basis or volume basis. It is settled law that statute has to be read as per the language in the general manner and the meaning provided therein and import of any other word or meaning should be avoided, if the language is simple and is not open for two or many interpretations.

15 .3 Further, the contention of the Respondent that section 171 (1) provides for 'prices', which means that it has plural connotation. It is contended by him that increase in grammage of individual product would result in a reduction of the prices of the said product. However, as discussed in the earlier paragraph that no evidence or document has been shown during the whole proceedings, which would indicate that the transaction between the Respondent and his recipients are based on units of grams or millilitres. As settled by the Courts, the statute, especially relating to the revenue and taxation, need to be strictly interpreted and if the language of the provision is unambiguous and simple, no import of other

words or meaning should be allowed so as to expand the scope of the said provision. In the case in hand, the provisions are a beneficial enactment, which aim to provide relief to the common person by way of reduced taxes, which the government has sacrificed; any attempt to curtail the same would defeat the very object and purpose for which the said legislation was brought in.

15.4 The Authority finds from the profile submitted by the Respondent shows that he is mainly engaged in Fast Moving Consumer Goods (FMCG) like cosmetics, shampoo, hair colour, etc.; where the product is sold to the end consumer in various sizes, quantity and packaging. Such FMCG products like shampoo, cosmetics, etc. are used by the vast majority of consumers in their day-to-day life in a very routine manner. The brand loyalty or liking or disliking of any product by the consumer is a normal phenomenon and once a person/consumer is addicted to a certain brand of product and the manner of usage the same, he continues to consume or use the said product in the similar fashion, unless he/she is consciously informed of or made aware of the fact that certain additional quantity of the product has been filled in the package, which he/she has been routinely using. If he is not being made consciously aware of the fact that additional quantities have been given to him in the same price, he would continue to use it in the same fashion and manner, consuming the same within the same cycle, which he had been using in the past, especially when additional quantity given is not significant. For example, if a consumer has developed a habit of pouring some approximate quantity of shampoo on head or palm through the mouth of bottle, he would continue to do the same in approximate manner, without measuring the same in grams. Further, if consumer spreads toothpaste on toothbrush upto some length, he would continue to do the same, irrespective of the fact as whether the mouth of the tube has been marginally reduced or increased. The Authority finds from the copy of the meeting dated 21.12.2017 (as pasted below) that the Respondent has claimed to have increased the grammage from 65 grams to 71.5 grams (i.e, 6.5 grams, less than a Tola) in some cases and in other cases it is around 20- 36 grams (except one case, where increase is 64 gms). Some of the products have been packed in the multiples of 0.5 grams! It is not possible to believe that the consumer goes to buy products, such as, are sold by the Respondent, in units of 0.5 gms (500 mg).

Scanned copy of Minutes of Meeting dated 21.12.2017 is pasted below :

L'ORÉAL
INDIA

Date : 21 Dec 2017

Minutes of Meeting for GST Rate Reduction Implementation method

Attendees : KAUSHIK Aseem, LAURAIN Thierry, CHITLANGIA Naresh, BANSAL Manish, DEO Devinder, RANJAN Alok, GUNJAL Vikram, NAIR Sarita, DHAGAT Avinash, DESHPANDE Manas

Consumers view towards grammage increase is similar as MRP price reduction in Shampoos and Hair Color. There exist demand for higher grammage.

Further to our discussion on 19 Dec 2017 and post analyzing market conditions, we decided that for attached list of skus we will increase the grammage to pass on the benefit of GST rate reduction from 28 % to 18% :

Product Type	Existing Grammage	New grammage	Increase %
L'Oreal Paris 6 Oil Nourish Conditioner	65	71.5	10.00%
L'Oreal Paris 6 Oil Nourish Shampoo	75	82.5	10.00%
L'Oreal Paris 6 Oil Nourish Shampoo & Conditioner	175	192.5	10.00%
L'Oreal Paris 6 Oil Nourish Shampoo	360	396	10.00%
L'Oreal Paris 6 Oil Nourish Shampoo	640	704	10.00%
L'Oreal Paris Color Protect Conditioner	65	71.5	10.00%
L'Oreal Paris Color Protect Shampoo	75	82.5	10.00%
L'Oreal Paris Color Protect Shampoo & Conditioner	175	192.5	10.00%
L'Oreal Paris Color Protect Shampoo	360	396	10.00%
L'Oreal Paris Extraordinary Clay Conditioner	65	71.5	10.00%
L'Oreal Paris Extraordinary Clay Shampoo	75	82.5	10.00%
L'Oreal Paris Extraordinary Clay Shampoo & Conditioner	175	192.5	10.00%
L'Oreal Paris Extraordinary Clay Shampoo	360	396	10.00%
L'Oreal Paris Extraordinary Clay Shampoo	640	704	10.00%
L'Oreal Paris Fall Repair Conditioner	65	71.5	10.00%
L'Oreal Paris Fall Repair Shampoo	75	82.5	10.00%
L'Oreal Paris Fall Repair Shampoo & Conditioner	175	192.5	10.00%
L'Oreal Paris Fall Repair Shampoo	360	396	10.00%
L'Oreal Paris Fall Repair Shampoo	640	704	10.00%
L'Oreal Paris Fall Repair Anti-Dandruff Shampoo	75	82.5	10.00%
L'Oreal Paris Fall Repair Anti-Dandruff Shampoo	175	192.5	10.00%
L'Oreal Paris Fall Repair Anti-Dandruff Shampoo	360	396	10.00%
L'Oreal Paris Smooth Intense Shampoo & Conditioner	175	192.5	10.00%
L'Oreal Paris Smooth Intense Shampoo	360	396	10.00%
L'Oreal Paris Total Repair Conditioner	65	71.5	10.00%

L'Oréal India Private Limited – CIN - U85190MH1991PTC060363
A Wing, 8th Floor, Marathon Futurex, N.M. Joshi Marg, Lower Parel, Mumbai 400 013.
Tel. +91 22 67003000 – Fax +91 22 67003160 – Website www.loreal.co.in

L'ORÉAL
INDIA

L'Oreal Paris Total Repair Shampoo	75	82.5	10.00%
L'Oreal Paris Total Repair Shampoo & Conditioner	175	192.5	10.00%
L'Oreal Paris Total Repair Shampoo	360	396	10.00%
L'Oreal Paris Total Repair Shampoo	640	704	10.00%
Garnier Color Naturals Hair Color	110	130	18.18%
Garnier Color Naturals Hair Color	46	65	41.30%

The above list is indicative and not exhaustive in nature. We authorize operations to increase grammage for similar products.

ASEEM KAUSHIK
Director – Consumer Products Division

L'OREAL INDIA PVT LTD. MUMBAI

L'Oréal India Private Limited – CIN - U85190MH1991PTC060363
A Wing, 8th Floor, Marathon Futurex, N.M. Joshi Marg, Lower Parel, Mumbai 400 013.
Tel. +91 22 67003000 – Fax +91 22 67003160 – Website www.loreal.co.in

15.5 The Respondent was requested to provide details of design, purchase orders placed on the supplier of the packing materials after the Notification dated 15.11.2007, so as to ascertain that the increased quantity of products could be filled in them. From the details of the packing material provided by the Respondent, it is found that they have merely changed the outside artwork by indicating words like '10% extra', etc. Some of these artworks or the advertisements indicate that additional quantity is either provided free or as promotion. It is found that increased quantity of around 7 grams and above have been filled in the existing unit containers/bottles.

15.6 The Respondent has argued that the Authority has favourably considered increase in grammage as a means of commensurate reduction of price in the case of M/s Hindustan Unilever Ltd. case and that similar dispensation should be extended to them. In this regard, we have gone through the relevant paragraphs of the said decision and are reproduced herein below.

> *"Therefore, an amount of Rs. 68.77 Crores can be allowed to be deducted on account of the benefit which has been passed on by the Respondent in the shape of additional grammage as per the following table however the balance amount claimed by him cannot be allowed. However, it is made absolutely clear that this is a one time relaxation which has been accorded to the Respondent due to the fact that the anti-profiteering measures have been incorporated in the tax laws for the first time and he had tried to pass on the benefit by increasing the quantity of his products. However, in future in case there is any reduction in the rate of tax or benefit of ITC, the same shall be passed on by him only in the shape of commensurate reduction in the prices as per the provisions of Section 171 of the above Act and in case it is not possible to do so the amount so realised shall be deposited in the CWF:-"*

The wordings of the above said paragraph as mentioned in the referred order of the Authority in the matter of M/s Hindustan Unilever Ltd has admitted that reduction in the rate of tax or benefit of ITC can only be passed in the shape of commensurate reduction in the price as per the provisions of section 171. As observed by the Authority the provisions of section 171 are very simple and generate no ambiguity so as to resort to any construction for its interpretation.

15.7 Hence, this Authority, based on the discussions above, holds that increase in grammage, if any, is not in any way equivalent or akin to commensurate reduction in prices. The Authority finds that the statutory provisions under Section 171 mandate only commensurate reduction in price as the only method of passing on the benefit of reduction in rate of tax or availability of Input Tax Credit and there is no scope for any exception.

15.8 Even if, it is assumed that commensurate price reduction would include increase in grammage, then it would be worthwhile to consider the following:-

a. Vide Para 103 of the I. O. dated 03.01.2020, the Respondent was directed to supply the following details to establish his claim that he had passed on the benefit of tax reduction by increasing the quantity of his SKUs:-
   - (i) Name of the SKU.
   - (ii) Base price of the SKU pre rate reduction with documentary evidence.
   - (iii) Weight/Volume of the SKU pre rate reduction with documentary evidence.
   - (iv) Commensurate base price of the SKU post rate reduction with details of computation.
   - (v) Commensurate increase in the weight/volume required post rate reduction with computations.
   - (vi) Increase in weight in grams/mls.

(vii) Whether the increase is commensurate with the rate reduction.

(viii) Date of passing on the benefit of tax reduction with documentary evidence.

(ix) Amount of benefit of tax reduction passed on the SKU.

(x) Amount of benefit of tax reduction passed on State/Union Territory wise.

b. The Respondent has submitted the details as asked above vide his reply dated 03.02.2020 which has been furnished to the Authority by the DGAP with his Report dated 28.08.2020. With his reply, the Respondent has enclosed the Minutes of the Meeting held on 21.12.2017 in which it was decided to pass on the benefit of GST by increase in the grammage. Perusal of the minutes shows that it includes 31 SKUs in respect of which the existing grammage has been proposed to be increased by 10%, however, there is no explanation how increase of 10% was decided. The minutes do not disclose the price of each SKU as on 14.11.2017 before the tax reduction nor show the commensurate price as on 15.11.2017 after tax rate reduction. No computation has been made to show how much grammage was required to be increased in respect of each SKU as the increase can never be the same for each of them as their prices are different.

c. Para 1 of the above minutes also shows that the increase is being made as "There exists demand for higher grammage." Therefore, one would believe that such blanket increase in the grammage appears to have been made on the market considerations. However, no supporting documents in this regard have been provided, which could justify that the end consumers were interested in buying around 7 grams or 30 grams of extra products in their packing. It is difficult to believe that the end consumers have made conscious demands on the Respondent to increase the quantity in the packing by around 7 grams or 30 grams! The above increase is without any logic and computation and is hence unreasonable and unjustified and an afterthought to justify it as passing on the benefit of GST and hence the above minutes cannot be relied upon.

d. The Respondent has also claimed in his above reply that he was required to increase grammage by 8.48% ,however; he has increased it by 10%, 18.18% and 41.30% without explaining why he has done so. The only plausible explanation appears to be the demand of the consumers and not passing on the benefit of tax reduction. The Respondent is running business for profit and hence such generous increase in the grammage appears to be without any basis and only an attempt to justify passing on the benefit of GST.

e. Perusal of Entry No. 1 of Annexure-2 supplied by the Respondent with his reply dated 03.02.2020 in respect of State of Delhi shows that the extra gGrammage on

account of commensurate reduction was to be 30.53 grams as per Column DC whereas the actual Grammage passed on is 36.00 Grams as per Column DD. In respect of State of Maharashtra, perusal of Entry No. 182 shows that grammage of 54.27 grams was required to be passed as commensurate benefit as per Colum DC however, 64.00 grams have been passed as per Column DD. Similar is the situation in respect of transactions of all the other States and Union Territories and the grammage given on account of GST benefit is apparently not commensurate with the reduction in the prices of the SKUs and an attempt is being made to palm of the excess grammage as passing on the benefit of rate reduction.

f. It seemed from the above that there is no co-relation between the commensurate prices and the grammage, which was to be given to each buyer. If the increase in grammage was in pursuant to reduction of GST rate and the intention of the Respondent to pass on the benefits with such method, there should have been some level of consistency. Even if it is presumed that this method of passing benefit under section 171 is permissible, the Respondent has totally failed to justify passing on of the benefit of tax reduction by increase in the Grammage. The data supplied by the Respondent is full of inconsistencies and hence the same cannot be relied upon.

15.9 For the reasons mentioned and discussed hereinabove and with the position of the law as provided under the section 171(1) of the CGST Act, 2017, the Authority do not concur with the contention of the Respondent that increase in grammage would be covered within the ambit of the term commensurate reduction in price of goods and hence the said contention is rejected.

Issue relating to increase of Customs Duty on certain product

16. It has been contended by the Respondent that there has been increase in the Customs Duty with effect from 01.02.2018 in respect of some of the products imported by them. It was argued that due to increase in the Customs Duty on such products, the cost of such products had increased at the hands of the Respondent. In support of the said contention, the Respondent has enclosed a copy of Bills of Entry of only two imports. Further, in support of his contention, he has given illustration for the products in para- 5.10 (E.7), which is reproduced here in below and no relevant documents, like invoices along with bills of entry have been given by the Respondent in his written submissions.

Illustration for Product 1:

Product Code BLSPA500-10 with product description Blond Studio Platinum Amm-Free 500GM

Sr. No.	Invoice date	Actual sale price per unit incl. GST	Commensurate sale price as per DGAP	Profiteering p.u. as per DGAP	Customs Duty p.u. (before 01.02.2018)	Customs Duty p.u. (post 01.02.2018)	Increase in Customs Duty p.u.
4335	19-11-17	1276.56	1176.82	99.74	53.98		
155319	14-03-18	1276.56	1176.82	99.74		115.30	61.32

Illustration for Product 2:

Product Code DCFFN021-00 with product description Dream Cushion Fdn 21 Nude

Sr. No.	Invoice date	Actual sale price per unit incl. GST	Commensurate sale price as per DGAP	Profiteering p.u. as per DGAP	Customs Duty p.u. (before 01.02.2018)	Customs Duty p.u. (post 01.02.2018)	Increase in Customs Duty p.u.
731	18-11-17	783.17	721.99	61.19	24.64		
139363	05-03-18	783.17	721.99	61.19		52.62	27.99

Illustration for Product 3:

Product Code CSFFC005-00 with product description C SMOOTH AIO R2016 04 HY EB

Sr. No.	Invoice date	Actual sale price per unit incl. GST	Commensurate sale price as per DGAP	Profiteering p.u. as per DGAP	Customs Duty p.u. (before 01.02.2018)	Customs Duty p.u. (post 01.02.2018)	Increase in Customs Duty p.u.
559	18-11-17	223.43	205.97	17.46	7.41		
150408	12-03-18	223.43	205.97	17.46		15.83	8.42

16.1 All these three illustration have compared the invoices issued during the period 15.11.2017-30.11.2017 with the invoice raised in the month of March 2018 and as may be seen from the above illustrations that the actual sale price per unit including GST has remained same during both periods. It has been indicated in the illustrations that Customs Duty before 1.2.2018 was about half of the value after 1.2.2018. The DGAP has not proposed any relief on account of the increase in Customs Duty holding that though there has been an increase in Customs Duty, actual selling price per unit has not undergone any change during the period November 2017 to March 2018. It was also contended by the DGAP that increase in the base price could not have happened overnight to exactly coincide with the GST rate reduction wef 15.11.2017. It is also contended by the DGAP that increase in the cost of raw material/input services, if any, has no relevance in the context of GST rate reduction w.e.f 15.11.2017 and

section 171 of the CGST Act, 2017 does not provide for any scope for adjustment of increase in cost against the benefit of reduced tax rate.

16.2 Also, From the illustration enclosed by the Respondent one finds that the selling price of the product, claiming to be having impact of Customs Duty have remained same. It was claimed by the Respondent that new set of MRP were introduced by them from the beginning of January, 2018 to take into effect the decrease in the GST rates. However, as per the above illustrations submitted by the Respondent, the selling rates of the products have remained the same during the month of November, 2017 and March, 2018. Hence, the Authority finds that the Respondent has been economical with the truth and has been submitting information and data which is inadequate, unreliable and unsubstantiated. The Authority is in agreement with the conclusion of the DGAP.

16.3 The above finding by this Authority is further corroborated while analysing the claims of the Respondent that an amount of Rs 19.18 Crores needs to be reduced from the calculated amount of profiteering worked out by the DGAP by claiming that the details are available in 35 Excel sheets at column BH- heading 'Increased Customs Duty paid w.e.f.- March 18-Total'. Those 35 Excel sheets do not have any heading of bills of entry number, date, value, duty, description of goods, etc. It is also not clear as to whether the imported goods are raw material or finished goods. If the imported goods are raw material, they must be going into the process of manufacture with other raw material and/or ingredients. To work out the impact of the increase in Custom Duty, one would also need to examine whether any other raw material/ingredient or other factor has shown increase in rate or decrease in rate and their consumption/utilisation has to be supported by proper manufacturing composition. Any purported increase in Customs Duty on certain raw material with effect from 1.2.2018 cannot be seen in isolation but in totality to work out any impact whatsoever.

16.4 In view of the above said discussion, the Authority finds that the Respondent has not been able to provide adequate supportive documents to claim that there has been an impact on the pricing of the product due to any increase in the Customs Duty. Hence, the Authority does not find any merit in this submission of the Respondent.

Issue relating to GST collected

17. The Respondent has also contended that the GST collected and deposited with the Government has been alleged as profiteering by the DGAP. It is informed by the Respondent that the GST collected over and above the higher base price has been duly deposited with the Government and it cannot be alleged to have been profiteered in respect of amount not retained by him. The Authority finds no merit in this submission of the Respondent. The Authority holds that if any registered person has charged any excess tax from any recipient of supply, the statutory provisions under Section 171 of the CGST Act, 2017, would require that such amount be refunded to the eligible recipients. It is the obligation of the Supplier to

return/pass on such amount and it is the vested right of the recipient as vested in him by the Statute.

17.1 In this connection it would be appropriate to mention that the Respondent has not only collected excess base prices from his customers which they were not required to pay due to the reduction in the rate of tax but he has also compelled them to pay additional GST on these excess base prices which they should not have paid. The Respondent has thus defeated the objective of both the Central and the State Governments to provide the benefit of rate reduction to the ordinary customers by sacrificing their tax revenue. The Respondent was legally not required to collect the excess GST and therefore, he has not only violated the provisions of the CGST Act, 2017 but has also acted in contravention of the provisions of Section 171 (1) of the said Act as he has denied the benefit of tax reduction to the ordinary buyers by charging excess GST. Had he not charged the excess GST, the customers would have paid less price while purchasing goods from the Respondent and hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit denied by the above Respondent. It would also be appropriate to state here that price includes GST. The profiteered amount can also not be paid from the GST deposited in the account of the Central and the State Governments by the Respondent as the above amount is required to be deposited in the Consumer Welfare Funds (CWFs) as per the provisions of Rule 133 (3) (a) of the CGST Rules, 2017 along with the interest. Therefore, the above contention of the Respondent is untenable and hence it cannot be accepted. The Respondent has also referred to the cases of ***R. S. Joshi Sales Tax Officer*** and ***Dai Ichi Karkaria 1999(112) ELT 0353 SC*** in his support, however, in view of the fact that the GST collected by the above Respondent amounts to denial of benefit of tax reduction to the customers, both the above cases are not directly relevant in the present facts of the case .

Issue relating to higher benefits passed in respect of some SKU

18. It is contended by the Respondent that the higher benefit which has been passed in respect of certain SKUs has not been considered by the DGAP and he has erroneously resorted to zeroing, which is incorrect. It was contended that Respondent has passed on benefit to customers in excess of the required amount, but, the DGAP has ignored all such excess benefits and treated them as zero, on the other hand, where the benefit passed on to the customer is less than the required amount, the differential amount is being sought to be alleged as profiteered amount. The DGAP has contended that the law does not offer a supplier of goods or services, flexibility to pass on the benefit of ITC or reduction in rate of tax on one product by reducing the price of any other product. It was also stated that section 171 is unambiguous and requires extending benefit of reduction in tax rate to each and every supply individually. Thus, if the respondent has passed on excess benefit in respect of any supply to any recipient, the same cannot be adjusted against the profiteered amount in relation to some other supply.

18.1 The Respondent has also contended that the DGAP has applied the methodology of "Zeroing" while computing the profiteered amount which was held to be incorrect by the Appellate Body of the WTO. In this regard, the Respondent has referred to the ***Report No. WT/DSI41/AB/R dated 01.03.2001*** of the Appellate Body of the WTO regarding Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India ,vide which it was held that the methodology of 'Zeroing' could not be applied and both the negative and positive margins have to be considered while applying the anti-dumping provisions. The above contention of the Respondent is not correct as no 'netting off' can be applied in the cases of profiteering as the benefit has to be passed on to each customer, which has to be computed on each SKU. Netting off implies that the amount of benefit not passed on certain SKUs will be subtracted from the amount of benefit passed on other SKUs and the resultant amount would be determined as the profiteered amount. If this methodology is applied the Respondent would be entitled to subtract the amount of benefit which he has not passed on one product from the amount of benefit which he has claimed to have passed on the other product, which will result in complete denial of benefit to the customer who has purchased a particular product on which no benefit or less benefit has been passed on. Hence, the methodology of 'netting off' cannot be applied in the case of tax reduction and the methodology of 'Zeroing' has to be applied as the customers have to be considered as individual beneficiaries and they cannot be dumped as goods and netted off against each other. This Authority has also clarified in its various orders that the benefit cannot be computed at the product, service or the entity level as the benefit has to be passed on each SKU, unit and service as per the provisions of Section 171 (1). Hence, the above contention of the Respondent is not correct as the Respondent cannot insist on not applying the methodology of 'Zeroing' as 'netting off' would amount to violation of the provisions of Section 171 of the above Act as well as Article 14 of the Constitution.

18.2 The Authority finds that the interpretation of DGAP in the matter is correct inasmuch as Section 171 of the CGST Act, 2017 provides that benefit of reduction in tax rate or the ITC has to be passed on to each and every supply individually. This will ensure equity and fairness to all the recipients of such goods and services, where the tax rates have been reduced or the ITC benefit has been made available. If the reduction in rate of tax is not applied uniformly for commensurate reduction in the prices, one recipient would be additionally benefited at the expense of another. The concept of 'zeroing' will keep a check upon the registered person in not permitting biased or uneven passing of benefits to recipients, where the tax rates have been reduced. In view of the above said observation, the Authority finds that the contention raised by the Respondent does not merit any consideration and is hence rejected.

Issue relating to budgetary support

19. It is contended by the Respondent that the refund under budgetary support scheme has been reduced after the GST implementation. This reduction was both in relative and absolute terms. It is submitted by the Respondent that he is having a unit in Himachal Pradesh, where it

was availing benefit of area-based exemption under the erstwhile Central Excise regime. With the introduction of the GST, upfront exemption to such units was withdrawn and he is required to pay GST on the goods supplied and seek the refund. The refund available under the new scheme in the GST regime is also restricted to specified percentage of tax paid by cash after utilising ITC.

19 .1 The Authority finds that the GST was implemented from 1.7.2017 and the above said provision of refund was in operation since then. However, the case of profiteering has been investigated by the DGAP after Notification No 41/2017-CT dated 14.11.2017, whereby the GST rates on certain products supplied by the Respondent were reduced. Further, DGAP in its calculations has taken the average price of pre-GST rate reduction for the period from 1.9.2017. Hence, the withdrawal of budgetary support w.e.f. 01.07.2017, may not be a factor during the period 1.9.2017 to 14.11.2017, when the average price was determined for the purpose of calculating profiteering.

19.2 The Respondent has further claimed that there has been reduction in the area based fiscal incentives as a result of reduction in the rate of GST, which has resulted in reduced margins on the products which should be reduced from the profiteered amount. In this regard perusal of the record shows that as per the Notification No. 10(0/2017-DBA-11/NER dated 05.10.2017, the unit of the Respondent based in industrially backward area of Himachal Pradesh was entitled to refund of 58% of the CGST or 29% of the IGST paid through debit through the cash ledger account, as per the provisions of Section 49(1) the CGST Act, 2017, after utilization of the input tax credit of the CGST or the IGST. Therefore, prior to 15.11.2017, the Respondent was entitled to the refund of CGST or IGST paid in cash as per the above percentages. Post 15.11.2017, the liability of the Respondent to make payment in cash has reduced due to reduction in the rate of GST and accordingly, the amount of refund has also reduced. However, there has been no loss to the Respondent as he was still entitled to get refund of the CGST @58% or IGST @29% if paid in cash, as per the Notification dated 05.10.2017, as was available to him prior to the reduction in the rate of GST from 28% to 18%. Therefore, he is still entitled to the same proportionate refund of tax which he was getting before 05.10.2017 hence; practically he has not suffered any adverse impact on account of reduction in the rate of tax. The refund of CGST or IGST as per the above Notification paid in cash was also dependent on the amount of input tax credit utilized by the Respondent for discharge of his output GST liability, which was further based on the output GST rate. In case the input tax credit utilization by the Respondent has reduced, the refund amount might increase in case the Respondent was paying GST in cash. Therefore, if there was increase in the rate of tax, the Respondent would have to reduce prices of his goods as there would be increase in the refund due to increase in the rate of tax. The Respondent has also furnished two illustrations to establish his claim which show that there has been loss in the refund from 5.22% in the pre rate reduction period to 2.9% in the post reduction period. The above reduction is normal as there has been reduction in the rate of tax from 28% to 18% and hence the refund would be proportionately less. However, it would not have any impact on the

margins of the Respondent. Hence, the above claim of the Respondent to reduce the profiteered amount on this ground is incorrect and therefore, it is untenable.

19.3 As such, in view of the above said facts, the contention of the Respondent regarding impact on the price of the product on account of budgetary support scheme is not sustainable and is rejected.

Issue relating to luxury goods

20. The Respondent has contended that the profiteering should not be computed on luxury goods as the pricing of these products and services are based on the perception of the consumer in the market. The Authority finds that this argument is without any basis. The fact remains that if the prices of such products have not been reduced after reduction in the tax rates under Notification dated 14.11.2017; such products would undoubtedly come under the ambit of profiteering in term of Section 171 of the CGST Act, 2017. This contention of the Respondent is unsustainable and hence rejected.

Issue relating to profiteered amount to be given to the recipients/distributors/e-commerce

21. It is contended by the Respondent that if any amount of profiteering is calculated and determined against him, it should be given to the recipients and in this case the recipients are identifiable i.e. distributors, modern trade retailers, etc. It is also argued that the determined amount of profiteering should not be credited into the Consumer Welfare Fund, by virtue of the fact that the recipients, to whom the goods were supplied by him, are easily identifiable. In support of the said contention, the Respondent has placed reliance upon the definition of recipient under section 2 of the CGST Act, 2017.

21 .1 The Authority has discussed the object and intention of the Government in enactment of the provisions under section 171 of the CGST Act 2017 and the rules made thereunder in the earlier paragraphs. As mentioned earlier, this beneficial clause of the Act provides for transfer of the sacrifice of the Government revenue to the common person or the end users. The Respondent in his defence has informed that he has distributors, modern trade retailers, e-commerce and canteen stores as his customers. All these customers i.e. distributors, modern trade retailers, e-commerce and canteen stores, etc may have certain business agreements amongst them but ultimately the products supplied by the Respondent reaches ~~to~~ the common person on payment of consideration. As such, distributors, modern trade retailers, e-commerce and canteen stores are intermediary in the process of transferring the consideration from the ultimate recipients to the Respondent. In this connection it would be relevant to state that it has been clarified several times by the Union Finance Minister, the Central Government and the GST Council that the benefit of tax reduction is required to be passed on to the ordinary customer, who bears the burden of tax

21.2 The distributors, modern trade retailers, e-commerce, etc. are not before the Authority seeking that the profiteered amount be transferred to them and the Respondent has no locus-standi to demand that the benefit of the tax reduction should be passed on to them. In the chain of events in normal business transaction, the consideration for any product or services is ultimately paid by the end consumer. The Respondent has also relied upon the cases of ***State of Jharkhand v. Ambay Cements 2004 (178) E.L.T. 55 (SC)***] and ***Tata Chemicals Ltd. v. Commissioner of Customs 2015 (320) E.L.T. 45 (SC)*** to support his above contention. However, the above cases do not support the case of the Respondent as the benefit has to be passed to the ordinary customer and not to the recipients of the Respondent.

21.3 In view of the above said discussion and for the reasons thereof, the contention of the Respondent that in case the profiteered amount is determined, such amount should be transferred to distributors, modern trade retailers, e-commerce, etc. is rejected.

Issue relating to denial of principle of Natural Justice

22. The Respondent has contended that in the present proceedings, he has not been issued show cause notice proposing the action to be taken by this Authority. The Report consequent to investigation by the DGAP was neither a show cause notice nor could it be treated as substitute to a show cause notice. This Authority should have issued a notice that should contain the description of the goods and services in respect of which the proceedings have been initiated; grounds / reasons on the basis of which profiteering has been alleged; issues proposed to be examined by this Authority and action proposed to be taken by this Authority against the Respondent invoking applicable statutory provisions.

22.1 The above contention of the Respondent is not correct. Perusal of Rule 129(6) of the CGST Rules, 2017 makes it clear that the DGAP shall complete the investigation and upon completion of the investigation, furnish a report of its findings alongwith the relevant records to this Authority. In the present case, the DGAP after detailed investigation has submitted his Report dated 05.07.2019 to this Authority. A copy of this Report was provided to the Respondent to file his replies. The Authority after hearing the Respondent and analysing the Report dated 05.07.2019, directed the DGAP to conduct investigation under rule 133 (4) of the Rules. On receipt of the Report dated 28.8.2020 of the DGAP, this Authority has carefully considered the allegations made against the Respondent and by Notice dated 08.09.2020, provided a copy of the said Report to the Respondent vide which the Respondent was directed to file their reply to the said Report so that the profiteered amount, if any, may be determined by this Authority. The Report of the DGAP was supplied to the Respondent along with all the annexures. The Respondent was also given opportunity to file his consolidated written submissions against the allegations levelled by the DGAP in his Report. 'The description of the goods and services' and 'the grounds/reasons on the basis of which profiteering has been alleged' have also been mentioned in the Report of the DGAP and the same has been supplied to the Respondent. The Respondent has filed several detailed written submissions and has

been accorded personal hearing on 5.5.2022 in which he has presented his facts and evidences. The above said chronology of events clearly demonstrates that Respondent has been made aware of every step of proceedings initiated with subject in details with the relevant law. No rights of the Respondent have been violated nor any decision has been taken affecting his rights, without according him adequate opportunity to defend himself. He has been supplied with all the material/documents which have been relied upon by the DGAP while framing the Report.

22.2 The Authority finds that the Respondent was duly served show cause notices after receipt of the investigation Reports in which it was clearly stated that it appeared that he had violated the provisions of Section 171 and hence his liability for profiteering was proposed to be fixed. Therefore, it is abundantly clear that due notices were served on the Respondent to impose the consequences mentioned in Rule 133. Accordingly, the above claim of the Respondent is far from truth and not acceptable. The Respondent has also cited the judgments of the Hon'ble Supreme Court passed in the cases of ***Uma Nath Pandey and Others v. State of UP*** **(2009) 12 SCC 40**, ***Collector of Central Excise v. ITC Ltd.*** **1994 (71) E.L.T. 324 (SC)**, ***Dharampal Satyapal Ltd. v. Dy. Commissioner of C. Ex.*** **2015 (320) E.L.T. 3 (SC)** and ***Union of India v. Hanil Era Textiles Ltd.*** **2017 (349) E.L.T. 384 (SC)** in his support. But since due show cause notice was given to the Respondent for imposition of consequences prescribed under Rule 133, the case laws cited by the Respondent are not relevant in the case in hand.

22.3 In view of the above said facts and settled position of law, the contention of violation of principle of natural justice claimed by the Respondent is untenable and rejected.

Issue relating to Judicial Member

23. The Respondent has contended that in the absence of a Judicial Member, the constitution of this Authority is improper. Section 171 (2) of the CGST Act, 2017 provides for the role of this Authority as "to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him." The duties of this Authority have been further elaborated in Rule 127 of the CGST Rules, 2017 which reads as follows:-

> *"127. Duties of the Authority.- It shall be the duty of the Authority,-*
> *(i) to determine whether any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices;*
> *(ii) to identify the registered person who has not passed on the benefit of reduction in the rate of tax on supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices;*
> *(iii) to order,*
> *(a) reduction in prices;*

(b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen percent. from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount not returned, as the case may be, in case the eligible person does not claim return of the amount or is not identifiable, and depositing the same in the Fund referred to in section 57;

(c) imposition of penalty as specified in the Act; and

(d) cancellation of registration under the Act.

(iv) to furnish a performance report to the Council by the tenth day of the close of each quarter."

23.1 The aforementioned duties clearly do not involve settling of any question of law and these are the expert functions being discharged by the domain experts who have experience in the field of indirect taxation. Therefore, the sequitur of the discussion above is that (a) this Authority has not replaced or substituted any function which the Courts were exercising hitherto (b) it was performing quasi-judicial functions but it cannot be equated with a judicial Tribunal (c) it performs its functions in a fair and reasonable manner in accordance with the Act but does not have the trappings of a Court and (d) absence of a Judicial Member does not render the constitution of this Authority unconstitutional or legally invalid.

23.2 Further, there are several statutory bodies which exercise quasi-judicial functions but they are not required to be composed of Judicial Members. There is no Judicial Member in the SEBI which has been constituted under the Securities and Exchange Board of India Act, 1992. Neither the statute nor any decision of the Court requires the SEBI to be composed of a Judicial Member simply because it also performs quasi-judicial functions under the Act apart from its other roles. SEBI's composition has been provided in Section 4 (1) of the aforementioned Act. The Hon'ble Supreme Court in the case of ***Clariant International Ltd. & Anr. v. Securities and Exchange Board of India (2004) 8 SCC 524*** has held that SEBI exercises its legislative power, executive power and judicial power:-

"77. The Board exercises its legislative power by making regulations, executive power by administering the regulations framed by it and taking action against any entity violating these regulations and judicial power by adjudicating disputes in the implementation thereof."

Similarly, the TRAI which also performs quasi-judicial functions has been constituted under the Telecom Regulatory Authority Act, 1997 but does not have a Judicial Member. Section 3 of the said Act provides for the composition of the Authority. Again, the Medical Council of India has been constituted under the Indian Medical Council Act, 1956. The various disciplinary powers which it exercises under the Act can be said to be quasi-judicial in nature but it does not require a Judicial Member in its Council. The constitution and composition of the Council is provided in

Section 3 of the said Act. The Institute of Chartered Accountants of India has been constituted under the Chartered Accountants Act, 1949. The ICAI also exercises quasi-judicial functions over its registered members and can pass orders which have far reaching consequences affecting the rights of Chartered Accountants but even its composition does not require a Judicial Member's presence. Its composition is provided in Section 9 (2) of the above Act and the same does not include a mandatory Judicial Member.

23.3 Similarly, the Assessing Officers, Commissioners of Appeal under the Income Tax Act, 1961 and the CGST Act, 2017, the Authorities on Advance Rulings under both the above Acts and the Dispute Resolution Panel under the Income Tax Act, 1961 all perform quasi-judicial functions but there is no requirement that such persons must be possessing either a law degree or have had judicial experience. Such a requirement is not only impractical but would also render several statutory authorities unworkable, which could never have been the intention of the Hon'ble Supreme Court while laying down the legal principles discussed above.

23.4 It is also submitted that this Authority has been constituted as per Section 171 (2), 171 (3) read with Rule 122 of the CGST Rules, 2017. The said Act or the Rules, nowhere mention requirement of a Judicial Member in this Authority. The Parliament, the State legislatures, the Central and the State Government as well as the GST Council in their wisdom, have not found it expedient to constitute this Authority by providing a Judicial Member in this Authority. Hence, the allegations made by the Respondent regarding the unconstitutionality of the Authority are devoid of any legal merit. Moreover, the orders passed by this Authority are subject to judicial review and hence no prejudice would be caused to the Respondent. Hence, the above contention of the Respondent is grossly misplaced and hence, it cannot be accepted.

23.5 Therefore, in light of the above, it can be concluded that this Authority has not replaced any Courts, cannot be equated to a Court or a Tribunal and hence the mandate of having a Judicial Member cannot be said to apply to this Authority.

Issue relating to section 171- violative of Article 14 and19(1)(g) of the Constitution

24 The Respondent has contended that Section 171 of the CGST Act and Rules made thereunder pertaining to anti-profiteering are unconstitutional being violative of Article 14 and Article 19(1)(g) of Constitution of India. In this connection it would be correct to point out that this Authority has not acted in any way as price controller or regulator as it doesn't have the mandate to regulate the same. The Respondent is absolutely free to exercise his right to practise any profession, or to carry on any occupation, trade or business, as per the provisions of Article 14 and 19 (1) (g) of the Constitution. He can also fix his prices and profit margins in respect of the supplies made by him. Under Section 171 this Authority has only been mandated to ensure that both the benefits of tax reduction and ITC which are the sacrifices of precious

tax revenue made from the kitty of the Central and the State Governments are passed on to the end consumers who bear the burden of tax.

24.1 The Respondent has also stated that in a few cases the DGAP has computed profiteering which was in excess of the reduction in the GST rate. He has further stated that the allegation of profiteering could only be to the extent of reduction in the price as a result of reduction in the GST rate. It is also submitted by him that the additional increase in price was attributable to the business profits of the Respondent which was not within the scope of Section 171. The above claim of the Respondent is not tenable as while passing on the benefit of tax reduction he on the one hand is claiming to reduce the prices commensurately and on the other hand he is withdrawing the benefit by stating that the increase in price was on account of business profits. This ingenious argument advance by the Respondent amounts to not passing on the benefit of tax reduction and hence the amount so claimed to be business profit is required to be added in the profiteered amount. Any price increase made by the Respondent on the eve of rate reduction cannot be divided in the increase due to denial of benefit of tax reduction and due to addition of profit, as such a distinction, if allowed would amount to non-passing of the benefit as it nullifies and negates the passing of tax reduction benefit. The Respondent has also placed reliance on the case of ***Lifestyle Retail Pvt. Ltd.- Case No. 8/2018 dated 25.09.2018***, wherein this Authority has observed that it was not functioning as a 'price regulator'. The above clarification of this Authority is correct and hence, the Respondent cannot claim that this Authority is working as a price regulator.

24.2 The intent of this provision is the welfare of the consumers who are voiceless, unorganised and vulnerable. This Authority is charged with the responsibility of ensuring that both the above benefits are passed on to the general public as per the provisions of Section 171 read with Rule 127 and Rule 133 of the CGST Rules, 2017. Hence, the anti-profiteering related Rules and Section 171 of the Act have express approval of the Parliament, all the State Legislatures, the Central and all the State Governments and the GST Council and therefore, Section 171 and the Rules are constitutional and are not violative of Article 14 and Article 19 (1) (g) of the Constitution. This Authority has nowhere interfered with the business decisions of the Respondent and therefore, there is no violation of Article 14 and Article 19 (1) (g) of the Constitution.

Issue relating to excessive delegation under Rule 122, 127 & 133 of the CGST Rules

25. The Respondent has further contended that Rule 122, 127 & 133 of the CGST Rules, 2017 suffered from the vice of excessive delegation. In this regard it would be pertinent to mention that the above mentioned CGST Rules have been framed by the Central Government under Section 164 of the CGST Act, 2017 on the recommendation of the GST Council which is a constitutional body established under the 101st Amendment of the Constitution and comprises of all the Finance/Taxation Ministers of the States and the Union Finance Minister. Hence, the above Rules have express approval of the Parliament, all the State Legislatures, the Central and

all the State Governments and the GST Council and therefore, constitution of this Authority under above Rules is legal and does not amount to excessive delegation. It is also mentioned that the Rule 122 only prescribes the qualifications of the members of the Authority whereas its constitution has been duly provided in Section 171 (2). Further it has been specifically provided in Section 171 (3) that "*The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.*" and hence, the functions and powers conferred on this Authority under Rule 127 also have mandate of the Parliament, the State Legislatures, the Central and the State Governments as well as of the GST Council and hence the conferring of powers and functions under the above Rules on this Authority does not tantamount to excessive delegation.

26. The Authority also notes that Respondent has claimed that he has passed on benefit of Rs 276.48 crores (as mentioned in paragraph 5.5), the details of which are as under:

SN	Particulars	Amount (In Crs)
1	Post-supply discount due to GST rate reduction	73.59
2	Increase in grammage	26.96
3	Zeroing due to higher price reduction, grammage	139.98
4	Increase in Customs Duty	19.19
5	Reduction in budgetary support	16.76
	Total	276.48

All the above said claims have been discussed in the earlier paragraphs in detail and it has been found that they do not merit consideration for the reasons discussed therein. As such, the claim of the Respondent that he has passed on the benefit amounting to Rs. 276.48 crores is rejected.

27. In view of the reasons mentioned hereinabove and in the given facts and circumstances:-

a. Under the provisions of Section 171(2) of the CGST Act 2017 read with Rule 133, the Authority finds that commensurate reduction in the price of the goods has not been effected by the Respondent after the GST rates were reduced vide Notification No 41/2017 –Central Tax(Rate) dated 14.11.2017 and other State notifications.

b. Under the provisions of Rule 133(1) of the CGST Rules, 2017, the Authority determines that the Respondent has profiteered an amount of Rs. 1,86,39,57,508/- on account of denial of benefit to his customers due to the reduction in the rate of taxes.

c. Under the provisions of Rule 133(3)(a) of the CGST Rules, 2017, the Authority directs the Respondent to commensurately reduce the prices of the impacted goods.

d. Under the provisions of Rule 133 (3) (c) of the CGST Rules, 2017; the Authority directs that fifty percent of the amount of Rs. 1,86,39,57,058/- i.e. Rs. 93,19,78,529.5/- along with interest at the rate of 18% (from the date of collection of such amount until the dates on amount is deposited) be deposited in the Central Consumer Welfare Fund and

the balance amount is to be deposited in the CWF of the concerned State, as per the amount indicated here under:-

S.No.	State	Amount
1	01-JAMMU AND KASHMIR	8114274
2	02-HIMACHAL PRADESH	3887647
3	03-PUNJAB	41522580.5
4	04-CHANDIGARH	6893721.5
5	05-UTTARAKHAND	7100816
6	06-HARYANA	47912787.5
7	07-DELHI	115297375
8	08-RAJASTHAN	30411173.5
9	09-UTTAR PRADESH	71118682.5
10	10-BIHAR	16505833.5
11	11-SIKKIM	1539554.5
12	12-ARUNACHAL PRADESH	1242155
13	13-NAGALAND	3710035.5
14	14-MANIPUR	2408754
15	15-MIZORAM	1963784
16	16-TRIPURA	1546872.5
17	17-MEGHLAYA	2622881
18	18-ASSAM	16317165.5
19	19-WEST BENGAL	81232685
20	20-JHARKHAND	11670947
21	21-ODISHA	12861077.5
22	22-CHATTISGARH	8720402
23	23-MADHYA PRADESH	21910965.5
24	24-GUJARAT	59798532.5
25	25-DAMAN AND DIU	248144
26	26-DADRA AND NAGAR HAVELI	158340
27	27-MAHARASHTRA	187877269.5
28	29-KARNATAKA	77026483.5
29	30-GOA	6066470.5
30	32-KERALA	13548833
31	33-TAMIL NADU	31055259.5
32	34-PUDUCHERRY	821653.5
33	35-ANDAMAN AND NICOBAR ISLANDS	365688
34	36-TELANGANA	28838091
35	37-ANDHRA PRADESH (NEW)	9661594.5
	Total	**931978529.5**

28. The Authority directs the Respondent to deposit the above amounts into the concerned CWF along with the interest @ 18% (from the date such amount was profiteered by them until the date such amount is deposited in the respective CWF) within 3 months from the date of this Order.

29. For the reasons mentioned hereinabove and in the given facts and circumstances and also stated position of law we find that the Respondent has denied the benefit of rate reduction to the recipients of his goods in contravention of the provisions of Section 171 (1) of the CGST Act, 2017. We hold that the Respondent has committed an offence by violating the provisions of Section 171 (1) during the period from 15.11.2017 to 31.12.2018, and therefore, he is liable for imposition of penalty under the provisions of Section 171 (3A) of the above Act. However, perusal of the provisions of the said Section 171 (3A) shows that it has been inserted in the CGST Act, 2017 w.e.f. 01.01.2020 vide Section 112 of the Finance Act, 2019 and it was not in operation during the period from 15.11.2017 to 31.12.2018 when the Respondent had committed the above violation. Hence, the said penalty under Section 171 (3A) cannot be imposed on the Respondent retrospectively. Accordingly, notice for the imposition of penalty is not required to be issued to the Respondents.

30. The concerned Central and the State GST Commissioners are directed to ensure that the above said amount is got deposited along with the interest with in the specified period under the supervision of the DGAP failing which the same shall be recovered by them as per the provisions of the CGST/SGST Acts. The action taken by them in pursuance of this Order shall be reported by them within a period of 4 months from the date of this Order.

31. Since the present investigation has been conducted for the period between 15.11.2017 to 31.12.2018, in view of the facts discussed hereinabove and in the given situation, the DGAP is directed under Rule 133(5) to conduct further investigation to ascertain whether the Respondent has passed on the benefit of tax reductions in respect of all the impacted products sold by him after 31.12.2018 and in case it is found that he has not done so, further Report shall be submitted by DGAP quantifying the amount of profiteering.

32. A copy of this order be supplied free of cost to all the Applicants, the Respondent and the concerned Central and State GST Commissioners and the file of the case be consigned after completion.

33. Further, the Hon'ble Supreme Court, vide its Order dated 23.03.2020 in Suo Moto Writ Petition (C) no. 3/2020, while taking *suo-moto* cognizance of the situation arising on account of Covid-19 pandemic, has extended the period of limitation prescribed under general law of limitation or any other specified laws (both Central and State) including those prescribed under Rule 133(1) of the CGST Rules, 2017, as is clear from the said Order which states as follows:-

> *"A period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or*

not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings."

Further, the Hon'ble Supreme Court, vide its subsequent Order dated 10.01.2022 has extended the period(s) of limitation till 28.02.2022 and the relevant portion of the said Order is as follows:-

"The Order dated 23.03.2020 is restored and in continuation of the subsequent Orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general of special laws in respect of all judicial or quasi-judicial proceedings."

Accordingly, this Order having been passed today falls within the limitation prescribed under Rule 133(1) of the CGST Rules, 2017.

Sd/-

(Amand Shah)

Technical Member & Chairman

Sd/-
(Pramod Kumar Singh)
Technical Member

Sd/-
(Hitesh Shah)
Technical Member

Certified Copy

(Dinesh Meena)
Secretary, NAA

F. No. 22011/NAA/196/L'oreal/2020 | 5970 – 6020 Date: 23.06.2022

Copy To:-

1. M/s L'Oreal India Pvt. Ltd., A-Wing, 8th Floor, Marathon Futurex, N.M. Joshi Marg, Lower Parel, Mumbai- 400013.
2. Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
3. Commissioner of Commercial Taxes, Office of the Chief Commissioner of State Tax, Eedupugallu, Krishna District, Andhra Pradesh.
4. Commissioner of Commercial Taxes, Department of Tax & Excise, Kar Bhawan, Itanagar, Arunachal Pradesh - 791 111
5. Commissioner of Commercial Taxes, Office of the Commissioner of Taxes, Government of Assam, Kar Bhawan, Ganeshpuri, Dispur, Guwahati - 781 006.
6. Commissioner of Commercial Taxes, Additional Commissioner (GST), Commercial Tax Department, Ground Floor, Vikas Bhawan, Baily Road, Patna – 800 001

7. Commissioner of Commercial Taxes, Commercial Tax, SGST Department, Behind Raj Bhawan, Civil Lines, Raipur - 492 001
8. Commissioner of Commercial Taxes, Office of Commissioner of Commercial Tax, Vikrikar Bhavan, Old High Court Building, Panji, Goa- 403 001
9. Commissioner of Commercial Taxes, C-5, Rajya Kar Bhavan, Near Times of India, Ashram Road, Ahmedabad.
10. Commissioner of Commercial Taxes, Vanijya Bhavan, Plot No. 1-3, Sector-5, Panchkula. PIN - 134 151.
11. Commissioner of Commercial Taxes, Excise & Taxation Commissioner, Government of Himachal Pradesh, B-30, SDA Complex, Kasumpati, Shimla.
12. Commissioner of Commercial Taxes, Excise & Taxation Complex, Rail Head Jammu.
13. Commissioner of Commercial Taxes, Commercial Taxes Department, Project Bhawan, Dhurva, Ranchi- 834 004.
14. Commissioner of Commercial Taxes, Vanijya Therige Karyalaya, 1st Main Road, Gandhinagar, Bangalore- 560 009
15. Commissioner of Commercial Taxes, Government Secretariat, Thiruvananthapuram - 695001.
16. Commissioner of Commercial Taxes, Moti Bangla Compound, M.G. Road, Indore
17. Commissioner of Commercial Taxes, GST Bhavan, Mazgaon, Mumbai- 400 010
18. Commissioner of Commercial Taxes, Department of Taxes, Old Guwahati High Court Complex, North AOC, Imphal West, Manipur - 795 001.
19. Commissioner of Commercial Taxes, Office of the Commissioner, GST&CX Commissionerate, Morellow Compound, M.G.Road, Shillong- 793001.
20. Commissioner of Commercial Taxes, Office of the Commissioner of State Tax, New Secretariat Complex, Aizawl – 796005.
21. Commissioner of Commercial Taxes, Office of the Commissioner of State Taxes, Dimapur, Nagaland - 797112.
22. Commissioner of Commercial Taxes, Office of the Commissioner of State Tax, Banijyakar Bhawan, Old Secretariat Compound, Cuttack - 753 001.
23. Commissioner of Commercial Taxes, Office of Excise and Taxation Commissioner, Bhupindra Road, Patiala- 147 001
24. Commissioner of Commercial Taxes, Kar Bhavan, Ambedkar Circle, Jaipur, Rajasthan - 302 005.
25. Commissioner of Commercial Taxes, SITCO Building, Block-D, above A.G. Office, Gangtok, East, Sikkim - 737 101.
26. Commissioner of Commercial Taxes, PAPJM Building, Greams Road, Chennai – 600 006.
27. Commissioner of Commercial Taxes, O/o the Commissioner of State Tax, CT Complex, Nampally Station Road, Hyderabad - 500 001.
28. Commissioner of Commercial Taxes, Office of the Commissioner of Taxes & Excise, Head of the Department, Revisional Authority, P.N. Complex, Gurkhabasti, Agartala - 799 006.
29. Commissioner of Commercial Taxes, Office of the Commissioner, Commercial Tax, U.P. Commercial Tax Head Office Vibhuti Khand, Gomti Nagar, Lucknow (U.P)
30. Commissioner of Commercial Taxes, State Tax Department, Head Office Uttarakhand, Ring Road, Near Pulia No. 6, Natthanpur, Dehradun
31. Commissioner of Commercial Taxes, 14, Beliaghata Road, Kolkata - 700 015.
32. Commissioner of Commercial Taxes, Deptt of Trade & Taxes, Vyapar Bhavan, IP Estate, New Delhi-2 Pin: 110 002
33. Commissioner of Commercial Taxes, First Floor, 100 feet Road, Ellapillaichavady, Pondicherry - 605 005.
34. Chief commissioner of central goods & services tax, bhopal zone 48, administrative area, arera hills, hoshangabad road, bhopal m.p. 462 011
35. Chief commissioner of central goods & service tax c.r.building rajaswa vihar, bhubaneswar751007

36. Chief commissioner of central goods & service tax chandigarh zone c.r. building, plot no.19a, sector17c, chandigarh160017
37. Chief commissioner central goods & service tax , cochin zone c.r.building, i.s.press road, ernakulam cochin682018
38. Chief commissioner of central goods & services taxdelhi zone c.r. building, i.p. estate, new delhi110 109
39. Chief commissioner of central goods & service tax, hyderabad zone gst bhavan, l.b.stadium road, basheer bagh, hyderabad 500 004
40. Chief commissioner of centran goods & services tax jaipur zone,new central revenue building, statue circle, cscheme jaipur 302 005
41. Chief commissioner of central goods & services tax, meerut zone opp. Ccs university,mangal pandey nagar, meerut250 004.
42. Chief commissioner of central goods & services tax, mumbai zone gst building, 115 m.k. road, opp. Churchagate station, mumbai400020
43. Chief commissioner of central goods & services tax, telangkhedi road, civil lines, nagpur 440001
44. Chief commissioner of central goods & services tax panchkula sco 407408, sector8, panchkula
45. Chief commissioner of central goods & services tax, pune zone gst bhawan ice house, 41a, sasoon road, opp. Wadia college, pune411001
46. Chief commissioner of central goods & services tax, (ranchi zone) 1st floor, c.r. building, (annex) veerchand patel path patna, 800001
47. Chief commissioner of central goods & services tax, shillong zone north eastern, 3rtd floor, crescens building, m.g. road, shillong793 001
48. Chief commissioner of central goods & services tax, vadodara zone 2nd floor, central excise building, race course circle, vadodara 390 007
49. Chief commissioner of central goods & services tax visakhapatnam zone gst bhavan, port area, visakhapatnam530 035.
50. Naa website.
51. Guard file.