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

I.O. No.	:	02/2020
Date of Institution	:	04.07.2019
Date of Order	:	01.01.2020

In the matter of:

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

Applicant

Versus

M/s ITC Ltd., Virginia House, 37, Jawaharlal Nehru Road, Kolkata – 700071

Respondent

Quorum:-

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

Present:-

1. None for the Applicant.
2. Sh. Abhiroop Mukherjee, Assistant General Counsel, Sh. TSM Shenoy, Head of Finance, Sh. Prachar Gupta, Assistant Manager (Finance), Sh. Ravinder Narain, Sh. Ajay Aggarwal and Sh. Mallina Joshi, Advocates for the Respondent.

ORDER

1. This Report dated 02.07.2019 has been received from the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that the Standing Committee on Anti-profiteering vide its communication dated 14.09.2018 had requested the DGAP to conduct detailed investigation as per Rule 129 (1) of the above Rules on the allegation that the Respondent had not passed on the benefit of tax reduction from 28% to 18% w.e.f. 15.11.2017 on the products which he was selling.

2. The DGAP had issued Notice under Rule 129 (3) of the CGST Rules, 2017 on 09.01.2019 to the Respondent, to submit his reply as to whether he admitted that the benefit of reduction in the GST rate w.e.f. 15.11.2017, had not been passed by him on to his recipients by way of commensurate reduction in prices and if so, to *suo moto* determine the quantum thereof and indicate the same in his reply to the Notice as well as furnish all documents in support of his reply. The Respondent was

also afforded an opportunity to inspect the non-confidential evidences/information which formed the basis of the said Notice, during the period from 18.01.2019 to 21.01.2019, which the Respondent did not avail.

3. The DGAP has mentioned the time period of the present investigation from 15.11.2017 to 31.12.2018 and also sought extension of the time limit to complete the investigation from this Authority, which was granted to him.

4. The DGAP has stated that the Respondent replied to the above Notice vide his letters/e-mails dated 18.01.2019, 04.02.2019 and12.02.2019, 22.04.2019, 21.06.2019and 28.06.2019.The Respondent, vide his letter dated 04.02.2019, had raised a few preliminary objections which are summed up as follows by the DGAP:-

a. The Act did not contain reference to various Authorities in relation to Section 171 of the Act. The Standing Committee and the Director General (Anti-profiteering) have been mentioned only in the Rules.

b. The Rules did not set out the method for calculation of the benefit of reduction in the rate of tax or benefit of input tax credit that was required to be passed on to the recipients, in terms of Section 171 of the Act. Section 171 of the Act merely provided for the setting up of an Authority to examine whether input tax credit availed by any registered person or the reduction in the tax rate has resulted in commensurate reduction in the prices of the goods or services or both supplied by him.

c. Rule 126 of the above Rules provided that the procedure and methodology may be determined by the NAA for determination as to

whether the reduction in rate of tax or the benefit of the input tax credit has been passed on to the recipient. However, no methodology has been made available by the NAA till date, for making such determination. The Respondent contended that this was in stark contrast to the provisions contained in other statutes like the Central Excise Act, 1944 or the Customs Act, 1962 etc. where the Rules were backed by adequate authority in the relevant parent legislations which laid down the principles/methods to be followed for valuation. In the absence of any such method, there was no legal basis to determine if the benefit of reduction in rate of tax or the benefit of input tax credit had been passed on to the recipient. No enquiry can be initiated without communication of such methodology and any obligation imposed under a statute has to be specific in material particulars to demand compliance. In the absence of any methodology and procedure to determine contravention of Section 171 of the Act, the initiation of any proceeding to determine such contravention would be an arbitrary, capricious and fanciful exercise of power.

d. Rule 128 of the above Rules set out the procedure to be followed by the Standing Committee while examining applications filed in the prescribed form and manner to determine existence of prima facie evidence. An application in the prescribed form with supporting evidence was a mandatory procedural requirement which must be satisfied as a pre-condition for the initiation of any such inquiry under Rule 129. This was based on the judicially settled legal principle that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. The Respondent sought a copy

of the application filed in the prescribed format, which had been examined by the Standing Committee on Anti-profiteering.

e. The Respondent also submitted to the DGAP that at the behest of the NAA, his representatives had met the Chairman as well as the Members of this Authority several times and had provided the explanation and the details sought. He had assumed that this Authority was satisfied with the steps taken by him to comply with the requirements of Section 171 of the Act and was therefore, surprised to learn from the Notice issued by the DGAP that the present proceedings had been initiated on the basis of the reference of the Standing Committee which was based on their own letter dated 02.10.2018, addressed to the Chairman of this Authority. While deciding to reject the detailed explanation offered in relation to the queries raised by this Authority, no reason was communicated to him. The Respondent has also contended that it was a settled principle of law that while forming a 'prima facie' opinion as to the existence or otherwise of certain matters, there must exist some relevant material on which such belief or opinion was based. Otherwise, such exercise of power could be held to be illegal. No opportunity of hearing was provided by the Standing Committee to him before making a reference to the DGAP for investigation.

f. The above Rules empowered this Authority to determine whether there has been contravention of Section 171 of the Act, only after receipt of the complete investigation report from the DGAP but in the present case, sequence of events clearly showed that the matter has already been pre-judged by this Authority and further proceedings

including the investigation by the DGAP has been reduced to a mere formality.

5. The DGAP has also stated that the Respondent submitted the following documents/information:-

a) GSTR-1 and GSTR-3B Returns for the period from October, 2017 to December, 2018 for all the registrations held all over India.

b) Details of invoice-wise outward taxable supplies for the impacted items during the period from October, 2017 to December, 2018.

c) Sample copies of invoices issued to his Wholesale Dealers prior to 15.11.2017 and thereafter.

d) Sample price lists of impacted SKUs pertaining to the period prior to 15.11.2017 and thereafter.

6. Further replies of the Respondent to the DGAP are summarized below:-

a. That the Respondent was engaged in the manufacture and sale of more than 460 Stock Keeping Units (SKUs) which were impacted by the GST rate reduction w.e.f. 15.11.2017 and the said products were sold to his customers which included (a) Wholesale Dealers (WD), (b) Modern Trade (MT) and (C) Institutional Sale (IN). The Respondent also submitted that his prices for different channels of customers were different and hence, the pricing for one channel could not be adopted for the pricing of another.

b. The Respondent has 25 GSTINs as supplier and the number of HSN Codes that were impacted by the GST rate reduction w.e.f. 15.11.2017, was 11.

c. Price communications (price lists) issued by the Respondent were indicative and might vary from customer to customer. Price lists were issued mainly when there was a change in the MRP and the actual price charged might be net of rebates/discounts, which were not indicated in the price lists.

d. The Respondent has also claimed that he had passed on the benefit of GST rate reduction w.e.f. 15.11.2017, by reducing his selling prices or by increasing the quantity/grammage while maintaining the earlier price.

7. The DGAP has stated that the main issues which needed to be examined were as under:-

a) Whether the rate of GST on the goods supplied by the Respondent was reduced from 28% to 18% w.e.f. 15.11.2017.

b) If so, whether the benefit of such reduction in the rate of GST had been passed on by the Respondent to his recipients, in terms of Section 171 of the Act.

8. The DGAP also further stated that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on the Fast Moving Consumer Goods(FMCGs) supplied by the Respondent from 28% to 18% w.e.f. 15.11.2017, vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017which has also not been contested by the Respondent.

9. The DGAP has further stated that as the provisions contained in Section 171 of the Act did 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 he 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/price of such SKUs, was not acceptable.

10. The DGAP has also claimed that from the invoices made available by the Respondent, it appeared that the Respondent had increased the base prices of the goods when the rate of GST was reduced from 28% to 18% w.e.f. 15.11.2017, so that the commensurate benefit of GST rate reduction was not passed on to the recipients. The DGAP, on the basis of aforesaid pre and post-reduction GST rates and the details of outward taxable supplies (other than zero rated, nil rated and exempted supplies) of the impacted products during the period from 01.07.2017 to 31.12.2018, as furnished by the Respondent, has calculated the amount of net higher sales realization due to increase in the base prices of the impacted goods, despite the reduction in the GST rate from 28% to 18% or in other words, the total profiteered amount during the period from 15.11.2017 to 31.12.2018, as Rs. 32,28,47,142/- The details of the this computation have been given by the DGAP in**Annexure-11**of his above Report. The DGAP has further claimed that the said amount was the sum total of profiteered amounts arrived at separately for different channels of the Respondent's customers (Wholesale Dealers, Modern Trade and Institutional Sales), by comparing the average of the base prices of the impacted products sold during the period from 01.11.2017 to 14.11.2017 or during the period from 01.07.2017 to 31.10.2017 for the products not sold during the period from 01.11.2017 to 14.11.2017, with the actual invoice-wise base prices of such products sold during the

period from 15.11.2017 to 31.12.2018. The excess GST so collected from the recipients has also been included by the DGAP in the aforesaid profiteered amount as the excess price collected from the recipients also included the GST charged on the increased base prices.

11. The DGAP has given the State or Union Territory wise supply break-up of the total profiteered amount of ₹ 32,28,47,142/- in his Report as has been furnished in the Table given below:-

Table

S.No	State	State Code	Profiteering (₹.)
1	Andaman & Nicobar Islands	35	1,05,595
2	Andrapradesh(New)	37	75,70,586
3	Arunachal Pradesh	12	4,72,631
4	Assam	18	86,99,672
5	Bihar	10	62,15,296
6	Chandigarh	04	4,05,127
7	Chhattisgarh	22	25,12,532
8	Dadra & Nagar Haveli	26	60,738
9	Delhi	07	1,66,40,752
10	Goa	30	15,49,329
11	Gujarat	24	1,32,89,997
12	Haryana	06	3,60,58,198
13	Himachal Pradesh	02	13,11,569
14	Jammu & Kashmir	01	26,99,097
15	Jharkhand	20	31,54,262
16	Karnataka	29	2,71,30,046
17	Kerala	32	2,16,64,434
18	Madhya Pradesh	23	61,67,137
19	Maharashtra	27	3,80,39,883
20	Manipur	14	2,58,251
21	Meghalaya	17	8,63,915
22	Mizoram	15	3,20,785
23	Nagaland	13	2,18,639
24	Orissa	21	75,77,716
25	Puducherry	34	3,17,609
26	Punjab	03	55,81,460
27	Rajasthan	08	57,53,432
28	Sikkim	11	2,60,376
29	Tamil Nadu	33	2,17,88,854
30	Telengana	36	1,88,46,843
31	Tripura	16	10,98,755
32	Uttar Pradesh	09	1,86,03,954
33	Uttarakhand	05	1,39,64,213
34	West Bengal	19	3,36,45,459
	Grand Total		**32,28,47,142**

12. From the Table give above, the DGAP has concluded that it appeared that by increasing the base prices of the goods consequent to the reduction in the GST rate, the commensurate benefit of reduction in

GST rate from 28% to 18%, was not passed on by the Respondent to the recipients and therefore, Section 171(1) of the Central Goods and Services Tax Act, 2017 has been contravened in the present case.

13. After perusal of the DGAP's Report, the Authority in its meeting held on 09.07.2019 decided to hear the Applicant and the Respondent on 01.08.2019 and accordingly notice was issued to all the interested parties. A Notice was also issued to the Respondent on 09.07.2019 asking him to reply why the Report dated 02.07.2019 furnished by the DGAP should not be accepted and his liability for profiteering under Section 171 of the CGST Act, 2017 should not be fixed. He was also asked to explain why penal provisions should not be invoked against him under Section 29 and 122-127 of the CGST Act, 2017 read with Rule 21 and 133 of the CGST Rules, 2017. On the request of the Respondent hearing was adjourned to 26.08.2019. On behalf of the Applicant none appeared whereas the Respondent was represented by Sh. Abhiroop Mukherjee, Assistant General Counsel, Sh. TSM Shenoy, Head of Finance, Sh. Prachar Gupta, Assistant Manager (Finance), Sh. Ravinder Narain, Sh. Ajay Aggarwal and Sh. Mallina Joshi, Advocates. Further hearings were held on 12.09.2019, 04.10.2019, 04.11.2019 and 13.12.2019.

14. The Respondent has filed submissions dated 26.08.2019, 12.09.2019, 04.11.2019, 08.11.2019 and 13.12.2019 and submitted that the DGAP's Report has proceeded on a complete erroneous understanding of Section 171 of the CGST Act, 2017 and a bare reading of Section 171(1) would reveal that it, inter alia, contemplated that any reduction in the rate of tax on any supply of goods or services which was required to be passed on to the recipient by way of commensurate

reduction in prices. He has also submitted that the expression 'recipient' was defined in Section 2(93) of the CGST Act and as per Section 171(1) read with Section 2(93) of the above Act, any reduction in the rate of tax on any supply of goods was required to be passed on to the 'recipient' by way of commensurate reduction in prices. On reduction in rate of GST from 28% to 18%, the Respondent has charged only the reduced rate of tax i.e. 18% on all supplies of goods made by him to his 'recipients' with immediate effect from 15.11.2017, without any exception, whatsoever.

15. The Respondent has also claimed that even though there was no legal obligation upon him to do anything further in the matter, hehas voluntarily issued trade circulars to inform the trade chain, comprising of WDs, retailers and end consumers about reduction in the rate of tax and passing on of the benefit to his 'recipient', who were in turn requested to pass on the aforesaid benefit further down the chain. In addition, he has also put a LEGEND to the following effect on his invoices to his 'recipient':-

> *"Benefit of the GST rate reduction on relevant goods vide Notification No.41/2017- Central Tax (Rate) dated 14.11.2017 (read with relevant State notification), sold under this invoice, is being passed on by way of applying reduced taxes rates.* ***It is expected that the said benefit is passed on by you also to your trade partners / end-consumers as directed by the Government."***

16. The Respondent has further claimed that the DGAP's Report was also in clear violation of mandate of Rule 128(1) of the CGST Rules read with Rule 137(c) of CGST Rules as no proceedings for alleged

violation of Section 171(1) could be initiated under Section 171(2), without a "written application" made by an Applicant, as specified in Rule 128(1) and in the present case, there was no "written application" made by any Applicant against the Respondent. No such "written application" by any Applicant had been referred to in the DGAP's Report.

17. He has also argued that as per Rule 129(6) of CGST Rules, investigation by the DGAP was required to be completed within a period of three months from the date of receipt of reference from the Standing Committee or within a further period of three months, if so extended by this Authority and the time limit prescribed under Rule 129(6) was sacrosanct and mandatory in nature, which has to be followed, without reservation and in the present case, since the 'reference' under Rule 129(1) of CGST Rules was itself indisputably received by the DGAP on 14.09.2018 from the Standing Committee, the period of three months prescribed in Rule 129(6) had expired on 13.12.2018, starting from the aforesaid date of receipt of 'reference' on 14.09.2018, hence, the purported extension of time granted by this Authority on 19.03.2019 vide Annexure-3 to the DGAP's Report was inconsequential, meaningless and a dead letter in the eyes of law, without having any legal effect.

18. The Respondent has also mentioned that Para 1 of the DGAP's Report merely detailed certain internal correspondence which clearly revealed that there was no compliance of mandate of Rule 128(1) of the CGST Rules in the present case. Hence, the proceedings ought to be dropped, as being violative of Rule 128(1).

19. On Para 14 of the DGAP's Report, the Respondent has pleaded that it dealt with analysis of Section 171(1) of CGST Act and upon analysis it had come to a correct conclusion in law that the only obligation upon supplier of goods under Section 171(1) was to charge reduced rate of tax from his 'recipient', so that the final price payable by the 'recipient' gets reduced commensurately and if the supplier charged reduced rate of tax from his 'recipient', then there would be commensurate reduction in prices of the goods sold.

20. The Respondent has further pleaded that the DGAP has made reference to the 'base price' allegedly set out in the invoices which did not use the term 'base price', nor was such a term contemplated under the GST Act. He has also contended that for the purposes of any supply, three elements were relevant i.e. price, discount and tax thereon and for the sake of convenience, in his reply, the price was referred to as "gross basic price", which was price of the goods supplied, before applying the discount thereon. From this "gross basic price", discount, if any, was deducted to arrive at "net basic price". The "net basic price" so arrived was subjected to rate of tax of GST, to arrive at the final price payable by the "recipient", which included an element of GST, which was paid over to the exchequer.

21. He has further contended that if the invoices issued customer wise prior to 15.11.17 were compared with the invoices issued to the same customer, for the subsequent period from 15.11.17 onwards, the correct factual position emerging would be as under:-

i. In the case of Foods Division (Confectionary), the supplies were made, as per the invoices issued to the customers during the period

from 15.11.2017 onwards upto 26.09.2018, where the "gross basis price" had remained unaltered. As such, the invoices and the records would show that for these supplies there was no increase in the "gross basic price" for supply of products after 15.11.2017 till about 26.09.2018, hence. it could not be suggested that the aforesaid "gross basic price" for the supply of the confectionary products to the same customer was increased upon reduction in the rate of GST from 28% to 18%. On these supplies, during the above period, without increasing the "gross basic price" for supply of goods, GST was charged at the reduced rate of 18% from 15.11.2017 onwards.

ii. He has also pointed out that during the aforesaid period, on account of fluctuation in the discounts given to the 'recipient', there would have been some differences in the "net basic price", on which reduced GST rate was applied. However, any fluctuation in discount, which might affect "net basic price" did not attract Section 171(1) and therefore, the same would be outside the purview of anti-profiteering measures.

22. The Respondent has also mentioned that the profiteering amount calculated by the DGAP on confectionary after excluding all other factual errors in quantification amounted to Rs.1,77,56,613/- which was not to be taken into account. The Respondent has further mentioned that under the Legal Metrology Act, 2009, he was required by law to have the MRP of candies as a round figure such as 50 paise or Rs.1/-,to obviate any problem on account of coinage. Therefore, upon reduction of GST rate w.e.f. 15.11.2017, the Respondent could not anyway had reduced the MRP of individual candies below Rs.1/-

since the minimum MRP he could fix in that case (downward revision) could only be to 50 paise per unit which would not make any business sense as it would obviously result in losses. He has also made reference to Rule 2(m) of the Legal Metrology (Packaged Commodities) Rules, 2011 read with Rule 6 (e) of the said Rules framed under the Legal Metrology Act, 2009.

23. The Respondent has also claimed that with regard to the products supplied from the Personal Care Division, there was no increase in the "gross basic price" with effect from 15.11.17 for supply of the respective products to the recipients. The "gross basic price" was increased only with effect from 28.11.2017 in some cases. As such, for Personal Care Products also it was wrong to assume that upon reduction of GST from 28% to 18%, the gross basic price for supply of goods to the recipients was increased with effect from 15.11.2017, as has been wrongly stated and assumed in para 16 of the DGAP's Report. He has also pointed out that during the aforesaid period, on account of fluctuation in the discount given to the 'recipient', there may be some difference in the "net basic price", on which reduced GST rate was applied. However, any fluctuation in discount, which might affect "net basic price" did not attract Section 171(1) and therefore, the same would be outside the purview of anti-profiteering measures.

24. In relation to the discounts, the Respondent has stated that they were given in accordance with the normal practice prevailing in the trade and keeping in view the stiff competition in the business of Personal Care Products in which there were a large number of competitors including well established large corporations who have been in this line for a very long time. These discounts, keeping into consideration the

market conditions prevailing in the respective locations, varied from time to time and as such the discounts given prior to 15.11.2017 might be slightly more or less than the discounts given to the same 'recipient' after 15.11.2017. As such, if to any customer a discount was given at a lower rate after 15.11.2017, then the "net basic price" charged from the particular 'recipient' would be slightly increased. Likewise, if the discount to a 'recipient' during the period after 15.11.2017 was increased, the net amount at which the supplies were made to that 'recipient' would decrease. Reference to such decrease in the net amount as against the increase in the net amount, on account of varying discounts from time to time was being made to clarify that these discounts were given in accordance with the normal trade practice and the prevailing competition and no inference of profiteering upon increase in the net amount realized from a particular 'recipient' based solely on the reduction in discount, could be justified. The net result of such variation in discounts could not be the basis for alleged violation of Section 171.

25. The Respondent has also submitted that Section 15 of the CGST Act dealt with the value of taxable supply. Section 15(1) laid down that the value of a supply of goods or service or both shall be the "transaction value". Transaction value was the price actually paid or payable for the said supply, where the supplier and the recipient of the supply were not related person and the price was the sole consideration for the supply. Therefore, "transaction value" was the price actually paid / payable for the supply, in normal course, as Section 15(2) provided that the value of supply shall include the elements enumerated thereunder and Section 15(3) provided that the value of the supply

shall not include any discount which was of the nature specified in clause (a) and clause (b) provided therein. Therefore, the Respondent stated that the value of taxable supply would be the price, after excluding the discount out of it, which was subjected to GST.

26. The Respondent has further submitted that for the purposes of Section 171(1), if the "gross basic price" i.e. the price before the discount was not altered on the day of reduction in the rate of tax and the same was subjected to reduced rate of tax, no question of profiteering would arise. Any change in the "net basic price" i.e. price after discount, on account of fluctuation in discount was not relevant, so long as the "gross basic price" was not altered on the day of reduction in the rate of tax, which was on account of the reason that the discount, if any, was given by a supplier to his 'recipient', out of his own margin, which he might earn. Therefore, if the discount was reduced, without altering the "gross basic price" resulting into a increased "net basic price", there would be no profiteering, attracting Section 171(1) of the CGST Act.

27. The Respondent has also claimed that this Authority in Case No. 29 of 2018 of **Kerala State Screening Committee v. Asian Paints Limited** vide its order dated 27.12.2018 had clearly acknowledged that any difference in "net basic price" on account of reduction in discount did not amount to profiteering and no case of violation of Section 171(1) could be made out on that count. In the said case of Asian Paints Limited, the DGAP had given a Report pointing out that though there was a reduction in discount, the same would not violate Section 171(1). The aforesaid conclusion of the DGAP was also supported by the Applicant viz. the Kerala State Screening Committee, in its hearing

before this Authority. On this basis, this Authority has ultimately concluded that reduction in the discount did not amount to profiteering as the same was offered from the margin of the supplier and did not form part of the "gross basic price" and accordingly, it was held that there was no violation of Section 171(1) of the CGST Act. Thus, the view of the DGAP as well as of the Kerala State Screening Committee was accepted by this Authority.

28. The Respondent has also placed reliance upon the decision of this Authority given in the Case No.5/2018 dated 18.07.2018 in the matter of M/s Flipkart Internet Pvt. Ltd., where again it was held that withdrawal of discount did not amount to profiteering as the discount was offered from the margin of the supplier and discount did not form part of the basic price and consequently supplier was not liable for violation of Section 171(1) of CGST Act. He has also **argued** that the DGAP had found price increase on account of differential in discounts only in some cases and not in all cases. This was so as on account of differential in discounts before and after 15.11.2017, there were many cases where the 'net basic price' had actually decreased and as such the DGAP had not taken such cases into consideration. As a result thereof in cases where the net basic price before taxes was reduced, on and from 15.11.2017 the benefit of reduction in tax was fully passed on to the recipient, since the reduced rate of tax at 18% only had been charged from the recipient without any increase in 'net basic price'. It was significant that in such cases even if there was a price increase subsequently after a gap which may be as much as 10-11 months, it could not be suggested that because of any subsequent increase in 'gross basic price' [other than on account of differential discounts] such

subsequent increase might be taken into consideration for application of Section 171(1).

29. The Respondent has also submitted that the correct fact emerging from the comparison of invoices issued to a particular customer for any product was that there was no increase in the "gross basic price" for the supply of products either for (i) Confectionary or for (ii) Personal Care Products with effect from 15.11.2017, as has wrongly been stated and assumed in in para 16 of the DGAP's Report, and that with regard to 'Confectionary' the amount of "gross basic price" for supply was increased much later on almost all the products with effect from 26.09.2018 and in no case was such "gross basic price" increased to any 'recipient' prior to 26.09.2018. Likewise, in the case of 'Personal Care Products' the "gross basic price" for supply of goods was increased in some products with effect from 28.11.2017 but In no case was such "gross basic price" to any 'recipient' increased prior to 28.11.2o17. The Respondent further submitted that from the aforesaid facts it would be clear that upon reduction of rate of GST from 28% to 18%, with effect from 15.11.2017, the "gross basic price" at which supply of goods was made to respective 'recipients', was not increased, till the dates mentioned above and without increase in "gross basic price" with effect from 15.11.2017, GST was charged only at the reduced rate of 18% and this fact was neither disputed nor capable of being disputed and was also evident from the relevant invoices and record. As such, the very basis and factual foundation on which the allegation of profiteering was made in violation of Section 171, as per the DGAP's Report was fallacious and the consequential allegation of profiteering was incorrect and misconceived.

30. The Respondent has also contended that he did not increase the "gross basic price" for supply of goods to any customer w.e.f. 15.11.2017, which was factually a wrong premise in the entirety of the DGAP's Report. In relation to confectionary, he has only increased the "gross basic price" for supply of goods to any 'recipient' w.e.f. 26.09.2018, i.e. almost near about a year after the reduction in the rate of tax i.e. on 15.11.2017, in almost all cases. It could not even be suggested by the DGAP that the Respondent was prevented from increasing "gross basic price" for supply of goods to any 'recipient' at any time. Also, even in relation to personal care products, he was entitled to increase the "gross basic price" for supply of goods after a period of time, as aforesaid.

31. The Respondent has further contended that Section 171(1) of CGST Act did not control the pricing of commodities and he was free to increase the price, depending upon various factors, many of which would not even be in his control as determination of a price in a free market economy was governed by demand and supply matrix and did not depend on his wishes as there was no price control under the GST regime. Therefore, to expect him to continue to charge the same gross basic price, much after the reduction in the rate of tax, was to disregard the realities of the trade and commerce and to indirectly apply price control mechanism, which was neither contemplated by Section 171 of CGST Act nor by Rules made thereunder. Merely because he has increased the gross basic prices much after the reduction in the rate of tax did not in any manner reflect upon compliance or non-compliance of Section 171(1). The compliance of Section 171(1) depended upon only and only on one factor i.e. as to

whether he had charged reduced rate of tax on and from the date of reduction in rate of tax. He has also said that if he had charged reduced rate of tax, no case of violation of Section 171(1) could be made out, however, he had not charged reduced rate of tax, inspite of reduction in tax, then only a case for contravention of Section 171(1) could have been made out but in the absent of such a scenario, in the present case, no case for violation of Section 171(1) could be made out, irrespective of the increase in the gross basic price at a later date. The increase in the gross basic price at a later date was a consideration which was totally irrelevant and not germane to the alleged violation of Section 171(1), the compliance of which was to be tested on aforesaid one factor alone. The increase in the gross basic price, which obviously happened for variety of reasons, was a matter of contract between him and his 'recipient', for which he had full freedom of contract, which could not be interfered with in the guise of finding out alleged profiteering under Section 171(1) of the CGST Act and the DGAP could not sit in judgment over price mechanism of the goods sold by him, which could only be decided by him in contract with his 'recipient'.

32. The Respondent has therefore claimed that without prejudice to the fundamental contentions of the Respondent, there was no violation of Section 171(1) of the CGST Act by him. He has further claimed that the total alleged profiteering amount of Rs.32,28,47,142/- as per the DGAP's Report, suffered from following obvious factual errors of quantification, which if taken into account, by excluding the same from aforesaid total amount, would in any event, reduce the alleged amount of profiteering to Rs. 9,35,94,864/- due to the following reasons:-

(i) An amount of Rs.13,78,44,795/- was *ex-facie* liable to be excluded from the total amount on account of the undisputed fact that the said amount related to mere stock transfers by the Respondent to himself as it was too obvious that nobody could profit from his own self. It was also obvious that Section 171(1) of CGST Act could only apply in the context of a supply of goods to a 'recipient' within the meaning of Section 2(93) of CGST Act, and the 'recipient' could only be another party than the Respondent. Therefore, the aforesaid amount of Rs.13,78,44,795/- was straightaway liable to be excluded from the aforesaid total amount, on account of an obvious calculation error. Alternatively, he has also submitted that irrespective of the above contention, if the abovementioned stock transfers were taken into consideration for the purposes of calculation of the profiteering amount, the same would lead to a situation of 'double counting' as the same stocks would once again be counted against the actual sales of such stock transferred goods made by the Respondent to his Recipients during the relevant period.

(ii) An amount of Rs.14,39,199/- related to goods returned by the 'recipient', in relation to which there had been no ultimate sale to the 'recipient'. Therefore, this amount of Rs.14,39,199/- was also liable to be excluded from the total amount.

(iii) An amount of Rs.1,18,99,834/- related to Stock Keeping Units (SKUs) which was sold by the Respondent under the brand name of "SAVLON MOISTURE HAND WASH". This SKU was sold by the Respondent to his recipient i.e. the WD for the first time on 22.11.2017 i.e. a week after the reduction of rate of tax w.e.f.

15.11.2017. Thereafter, the stocks had moved downward in the supply chain and the above SKU was launched for sale to the ultimate consumers sometime in the month of December, 2017. This would be approximately around the time when the TV commercial and the newspaper advertisement were commissioned by the Respondent for the said SKU, for the first time. In this regard, he stated that prior to reduction of GST rate w.e.f. 15.11.2017, the Respondent had only made stock transfer of the said SKU to his own warehouses. No sale of the said SKU to any 'recipient' was made prior to 15.11.2017. For the purpose of stock transfer, the Respondent had fixed the "gross basic price" as Rs.170.990 of the said SKU. After 15.11.2017 the "gross basic price" of the said SKU has remained altered. When the said SKU was sold for the first time on 22.11.2017, the "gross basic price" of Rs.170.990 has remained the same. As such, not only there was no sale prior to 15.11.2017 in relation to the above SKU, even the "gross basic price" pre and post rate reduction remained the same.

(iv) An amount of Rs.6,12,21,375/- related to an anomaly in calculation of base price. The DGAP had taken a lower base price for comparison, when he ought to have taken a higher base price for comparison. The lower base price considered by the DGAP consisted of a weighted average base price of not only General Trade but also that of Modern Trade and Institutional customers etc. These different trade channels were obviously distinct and therefore not comparable. As against this the higher base price which ought to have been considered by the DGAP was the weighted average base price of General Trade alone. On account of taking of weighted average of all the trade channels as

against the trade channel relating to General Trade only, the DGAP had fallen into an another obvious error of calculation, resulting into excess amount to the tune of Rs.6,12,21,375/-.

(v) An amount of Rs. 1,68,47,075/- was attributable to differential GST component pertaining to the alleged increase in the net basic price which in any case was liable to be excluded. It was obvious that the comparison, if any, could only be between two prices, exclusive of GST and not inclusive of GST. In other words, the alleged profiteering amount could not be calculated based on cum-tax prices but could only be calculated based on prices net of taxes. In para 16 of the DGAP's Report, the aforesaid differential GST component had been specifically accepted to have been included in the total amount in following words:

"The excess GST so collected from the recipients, is also included in the aforesaid profiteered amount as the excess price collected from the recipients also includes the GST charged on the increased base price."

(vi) He has also mentioned that from such differential GST amount, only the Government stood to profiteer and not the Respondent, inasmuch as, the said amount had already gone to the kitty of exchequer. Therefore, this amount of Rs.1,68,47,075/- relating to differential GST component was liable to be excluded from the total amount.

(vii) The Respondent therefore has contended that upon exclusion of all the aforesaid items, as detailed above, the total amount of Rs.

32,28,47,142/- in any case, would stand reduced to Rs.9,35,94,864/- as has been illustrated in the Table given below:-

Particular		Amount
	Profiteering Amount as per DGAP Report	32,28,47,142
Less:	*Stock Transfer*	-13,78,44,795
	Sales Return	-14,39,199
	SKU where 1st Sale was made post 15th Nov 17	-1,18,99,834
	Revision in Base Price	-6,12,21,375
	Revised Amount	**11,04,41,939**
Less:	**GST Component in Revised Amount *(Revised Amount/1.18 * 0.18)***	**-1,68,47,075**
		9,35,94,864

33. The above submissions of the Respondent were forwarded to the DGAP for his Report under Rule 133(2A) of the CGST Rules, 2017. The DGAP vide his Reports dated 15.10.2019 and 27.11.2019 has stated that in respect of the issue related to the stock transfers, goods returned by the recipients, profiteering with regard to SKU "SAVLON MOISTURE HAND WASH" and anomaly due to error in calculation of the base price, he would have to look afresh in the data, in view of the new submissions filed by the Respondent. The DGAP has also mentioned that he might undertake this exercise as per the directions given by this Authority.

34. With regard to the issue of differential GST component raised by the Respondent, the DGAP has stated that the profiteering has been determined by comparing the commensurate price of the impacted item, with the actual cum-tax selling price of the line item. For the purpose of calculation, net price was taken into account and not the gross basic price. Variation, if any, in the net price which was more than the commensurate price should amount to profiteering. However, the Respondent's submission that gross basic price was kept same during the period, as the net price has changed, profiteering had been calculated. The issue that whether gross price was kept same and profiteering was on account of change in net price owing to variation in effective discounts was a point of law that can be decided only by this Authority.

35. We have carefully considered the Reports furnished by the DGAP and the submissions made by the Respondent and all other documents placed on record and it is revealed that that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on the FMCGs supplied by the Respondent from 28% to 18% w.e.f. 15.11.2017, vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017. It is also revealed that the DGAP has calculated the amount of net higher sales realization due to increase in the base prices of the impacted goods by the Respondent, despite the reduction in the GST rate from 28% to 18%, or the profiteered amount as Rs. 32,28,47,142/- The details of the computation of the profiteered amount have been given by the DGAP in **Annexure-11** of his Report dated 02,07,2019 and the said amount is the sum total of profiteered amounts arrived at separately for

different channels of the Respondent's customers (Wholesale Dealers, Modern Trade and Institutional Sales), by comparing the average of the base prices of the impacted products sold during the period from 01.11.2017 to 14.11.2017 (or during the period from 01.07.2017 to 31.10.2017 for the products not sold during the period from 01.11.2017 to 14.11.2017), with the actual invoice-wise base prices of such products sold during the period from 15.11.2017 to 31.12.2018. The excess GST so collected from the recipients has also been included by the DGAP in the aforesaid profiteered amount as the excess price collected from the recipients also included the GST charged on the increased base price.

36. It is further revealed that the Respondent has claimed that due to the following reasons his profiteering should come down to Rs. 9,35,57,111/-, which are:-

a) AN amount of Rs. 13,78,44,795/- was ex-facie liable to be excluded from the total profiteered amount on account of the fact that it related to mere stock transfers by the Respondent to himself.

b) An amount of Rs. 6,12,65,944/- related to the anomaly in the calculation of base the price as the DGAP has taken a lower base price for comparison, when he ought to have taken a higher base price for comparison.

c) An amount of Rs. 1,18,99,834/- related to SKU of brand "SAVLON MOISTURE HAND WASH" which was actually launched by the Respondent for the first time on 22.11.2017 (post GST rate reduction).

d) An amount of Rs. 14,39,179 related to the goods returned by the recipients in relation to which there has been no ultimate sale to the recipients.

37. The DGAP vide his Reports dated 15.10.2019 and 27.11.2019 has admitted that he would have to look into the data afresh as per the new submissions of the Respondent.

38. In view of the above facts, this Authority under rule 133(4) of the CGST Rules 2017 directs the DGAP to further investigate the following issues and furnish his Report accordingly under Rule 129 (6) of the CGST Rules, 2017:-

(1) What was the quantum of the stock transfer transactions made by the Respondent to his branches/sub offices and whether the amount of such transfers was required to be excluded from the computation of the profiteered amount?

(2) What was the quantum of sale returns and whether this amount was required to be excluded from the profiteered amount?

(3) Whether there was anomaly in the computation of the base prices of the SKUs and if so whether the same were required to be recalculated and in respect of how many SKUs?

(4) Whether the Respondent has launched the SKU of brand "SAVLON MOISTURE HAND WASH" for the first time on 22.11.2017 after the tax reduction and if so what would the amount which needed to be excluded from the profiteered amount?

1.1.2020

(5) What is the stand of the DGAP on the issue of whether the gross price was kept same by the Respondent and the profiteering was on account of change in the net price owing to variation in the effective discounts which should be excluded from the profiteered amount?

(6) Whether there is reliable and irrebuttable evidence to establish that the Respondent has increased the basic prices of Confectionery items w.e.f. 26.09.2018 and whether the profiteered amount computed on these items was to be included in the gross profiteered amount?

39. It is further directed that the Respondent shall fully cooperate during the course of the investigation to be carried out by the DGAP and shall supply the data/information required by the DGAP promptly.

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

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Member(Technical)

Certified Copy

(A. K. Goel)
Secretary, NAA

F. No. 22011/NAA/63/ITC/2019/29 Date: 01.01.2020

Copy To:-

1. M/s ITC Ltd.,Virginia House, 37, Jawaharlal Nehru Road,Kolkata-700071.
2. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
3. Guard File.