

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

I.O. No.	5/2019
Date of Institution	05.07.2019
Date of Order	03.01.2020

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

Respondent

Quorum:-

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

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Present:-

1. Sh. Bhupinder Goyal, Assistant Director (Cost) for the Applicant.
2. Sh. Anand Nagda, General Manager-Tax, Sh. V. Lakshmikumaran, Sh. K. Srikanth, Sh. G. Gokul Kishore, Sh. D. Macchar and Sh. Tushar Mittal, Advocates for the Respondent.

ORDER

1. This Report dated 05.07.2019 and the supplementary Reports dated 11.12.2019 and 23.12.2019 have been received from the above Applicant (here-in-after referred to as the 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 it was alleged that the Respondent had not passed on the benefit of reduction in the rate of GST on the Fast Moving Consumer Goods (FMCGs) being supplied by him, when the rate of GST was reduced from 28% to 18% w.e.f. 15.11.2017. The issue of not passing on the benefit of tax reduction was examined by the Standing Committee on Anti-Profiteering under Rule 128 (1) of the above Rules and it was decided to refer the matter to the DGAP to conduct a detailed investigation in the matter, in its meeting held on 13.12.2018.
2. The DGAP had issued Notice under Rule 129 (3) of the CGST Rules, 2017 on 15.01.2019 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 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 to furnish all the 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 21.01.2019 to 23.01.2019, which the Respondent had availed and inspected the documents on 23.01.2019.

3. The DGAP has conducted the present investigation from 15.11.2017 to 31.12.2018. He had 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 had replied to the Notice vide his letters/e-mails dated 22.01.2019, 08.02.2019, 18.02.2019, 19.06.2019, 20.06.2019, 21.06.2019, 25.06.2019, 26.06.2019, 27.06.2019 and 28.06.2019. The reply of the Respondent as intimated by the DGAP in his Report is as follows:-

a. That the Respondent was engaged in the manufacture and sale of more than 12,000 Stock Keeping Units (SKUs) under 5 major categories, which are furnished in Table given below:-

Table

Sr. No.	Product category	Types of products/brands	HSN Code	Impacted Category
1	Hair Color	L'Oreal Paris, Garnier	3305	Yes
2	Hair care	Shampoo, Condhisioner, Serum etc.	3305	Yes (except Hair Oil)
3	Makeup	Kajal, Maybelline, etc.	3304	Yes (except Kajal)
4	Skincare	Cream	3304	Yes
5	Luxury Products	Giorgio Armani, Diesel, etc.	3303	Yes

The Respondent was selling the above products to about 1,300 customers which included (a) General Trade (GT) or Distributors, (b) Modern Trade (MT), (c) E-commerce Platforms, (d) Canteen Stores Department (CSD) and the said products were manufactured either by him (at factories situated in Baddi and Chakan) or by his contract manufacturers. He was also importing goods from outside India. The manufactured as well as the imported products were stock-transferred to various locations from where they were sold to various distributors, modern retailers and Canteen Stores etc.

- b. That the Respondent has 20 GSTINs as supplier and 4 GSTINs as Input Service Distributor (ISD). Out of the said 20 GSTINs, he had stopped supplies to 7 GSTINs but these GSTINs were still registered for which he was filing NIL Returns.
- c. That neither Section 171 of the Central Goods and Services Tax Act, 2017 nor the Rules framed thereunder provided any guidelines as to how the benefit of reduction in the tax rate was to be passed on to the recipients. Accordingly, he had passed on the benefit of GST rate reduction to his recipients by adopting the following methods:-
 - (i) By reducing the prices of the impacted products.
 - (ii) By issuing Credit Notes to his distributors for supplies made post-rate reduction at the old prices. In respect of Modern Trade

and E-commerce customers, the claims of GST rate reduction benefit were settled by way of invoices raised by them.

(ii) By increasing the grammage / quantity of the products and maintaining the pre-rate reduction MRP/selling price.

d. That the Respondent requested that the following deductions should be considered while determining the quantum of profiteering, if any:-

(i) **Post Supply Price Reduction (Discount):** Respondent claimed that he had passed on the benefit of GST rate reduction amounting to Rs. 75.70 Crore by way of issuing Credit Notes to his customers, viz. distributors/modern retailers etc. Since the exercise of determining the revised MRPs was time-consuming which could be made effective only from January, 2018, till such time, the revised MRP based GST discount claim system was in place and the price reduction in the range of 5% to 12.5% of the sale price was given to the distributors/modern retailers. The reduced prices to be charged by his distributors/modern retailers were duly communicated to them by the Respondent. The direct reduction in the prices of the products impacted by the GST rate reduction was given effect to after the revised MRPs were reflected on the packages.

(ii) **Price reduction and MRP reduction on package:** The methodology adopted by the Respondent for calculating the

reduction in price and MRP was by comparing the pre-GST MRP less pre-GST taxes (VAT, Central Excise Duty/CVD on finished/imported products and Service Tax credit reversal on account of traded products etc.) with the post-GST MRP less GST @ 18%. The comparison was made between the pre-GST and the post-GST prices instead of GST @ 28% and GST @ 18%, as there was an increase in the effective rate of tax at the time of implementation of the GST w.e.f. 01.07.2017, which (GST @ 28%) had not been fully factored in by way of increased prices. Accordingly, in most of the cases, the required reduction in MRP worked out to be less than 7.8% when the GST rate was reduced from 28% to 18% w.e.f. 15.11.2017, which was undertaken after rounding them off. In some cases where the increase in tax rate between 01.07.2017 and 14.11.2017 had been fully factored in as additional cost, price reduction was made at the maximum rate of 7.8% of MRP.

- (iii) **Higher Grammage / Quantity Increase:** The Respondent had passed on the benefit of GST rate reduction on certain SKUs by increasing the quantity of the products while retaining the earlier MRPs. The increase in grammage required to compensate for reduction in the GST rate from 28% to 18% was 8.5%. However, he had increased the grammage by 10% or more in case of all the products. Hence, the benefit passed on by way of higher grammage / quantity in excess of 8.5%, might be adjusted against the benefit required to be passed on in respect of other products.

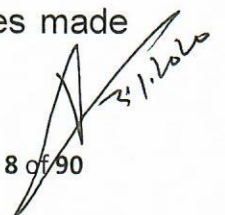
(iv) ***New Stock Keeping Units (SKUs) including supply of goods not impacted by GST rate reduction (Kajal, Hair oil):*** The Respondent continuously introduced new innovative products by changing formulation and by improving/ changing / adding / modifying the ingredients. Such products would normally have different packing and suitable indication on the packing himself to inform and educate the consumers about such new and improved products. For such products with new product codes, there were no pre-rate reduction identical products, the prices of which could be compared with the prices of the new products introduced post 14.11.2017.

(v) ***Increase in cost including increase in basic Customs Duty and levy of Social Welfare Surcharge:*** The effective rate of non-creditable Customs Duty was increased from 10.30% to 22% on the value of the imported products post 01.02.2018 which led to increased cost of the imported products. Besides, the costs of raw material, packing material, labour, transportation, rentals, advertising and other services had been continuously rising on account of factors like oil prices and foreign exchange rate fluctuations etc. Such increased costs were required to be factored in while determining the post GST rate reduction prices of the products.

(vi) ***Loss of benefit on account of Area-Based Fiscal Incentives:*** Under the erstwhile Central Excise Duty regime, the manufacturers were entitled to the benefit of area-based fiscal incentives in respect of units operating in certain States, where

the output Central Excise Duty was not payable, subject to the condition that no CENVAT credit would be allowed to such units on their procurements. The Respondent had set up a unit in Baddi, Himachal Pradesh and was availing the benefit of such area-based fiscal incentive. Further, his sub-contractors were also availing the benefit of these fiscal incentive. With the introduction of GST, upfront exemption from payment of tax was withdrawn and these units were required to pay GST, avail input tax credit and claim refund of a certain percentage of GST paid in cash. The Respondent submitted that with reduced rate of GST, the amount of refund got reduced, consequently resulting in increased cost and accordingly, the same should be considered for the purpose of quantification of profiteering. The Respondent had suffered a loss of Rs. 74.42 Crore on account of reduced refund in respect of his manufacturing plant in Baddi. This loss had been computed by comparing the reduced refund available to him under the GST regime (58% of output GST paid in cash, by adopting 90% of sale price as transaction value) and the refund which was available under the pre-GST regime (100% of Central Excise Duty was exempt).

(vii) ***Sales made to Canteen Stores Department (CSD)***: The Respondent submitted that his prices negotiated which the CSD were exclusive of tax i.e. the negotiated prices did not include the taxes and the taxes prevailing at the time of supply were charged on the prices so agreed. Given that taxes did not form part of the price negotiated which the CSD, the supplies made

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to the CSD should be excluded from the ambit of the ongoing investigation into alleged profiteering.

(viii) **Sales made to sub-contractor and scrap sales:** The Respondent submitted that prices negotiated for these sales were exclusive of GST and the GST applicable on the date of supply was charged on the negotiated prices. Therefore, the sales made to sub-contractors and scrap sales should be excluded from the scope of the present investigation.

(ix) **Company transfer:** The stock transfer of goods or supply of service by the Respondent's one GSTIN to another, should be excluded from the ambit of the present investigation.

e. The Respondent also submitted that his prices for different channels of customers, viz., General Trade, Modern Trade, Matrix Business Partners, Direct Salons, Institutional Sales and CSD etc. were different and hence, the pricing for one channel should not be adopted for the pricing for another.

f. The Respondent also claimed that in the FMCGs industry, periodic price revisions were usually undertaken every 5-6 months, considering the impact of various factors like change in costs and market outlook etc. Other industries which had not been affected by the GST rate change had been undertaking periodical price revisions, as and when necessary, whereas, the same liberty was sought to be taken away from the Respondent by requiring him to maintain the same prices perennially. The current investigation

covering a period of 13 months from November, 2017 to December, 2018, was restricting the right of the Respondent to carry on business and therefore, was violative of his fundamental right enshrined under Article 19 (1) (g) of the Constitution of India.

- g. The Respondent, vide his e-mail dated 25.06.2019, informed that he had revised the amount of net benefit passed on to his recipients by way of Post Supply Price Reduction (Discount), from Rs. 75.70 Crore to Rs. 73.59 Crore, due to review of his records.

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

- a. List of all GSTINs.
- b. GSTR-1 & GSTR-3B Returns for the period from October, 2017 to December, 2018 for all the registrations held all over India.
- c. Details of invoice-wise outward taxable supplies during the period from October, 2017 to December, 2018.
- d. Price Lists (pre and post November, 2017) for all the products, specifically indicating the SKUs impacted by GST rate reduction w.e.f. 15.11.2017.
- e. Sample copies of invoices issued to the dealers, pre and post 15.11.2017.
- f. Sample copies of Credit Notes issued by the Respondent to his customers.
- g. Sample copies of agreements entered into with the CSD and Sub-contractors.



6. The DGAP has stated that the main issues to be examined were whether the rate of GST on the goods supplied by the Respondent was reduced from 28% to 18% w.e.f. 15.11.2017 and if so, whether the benefit of such reduction in the rate of GST had been passed on by the Respondent to his recipients, in terms of Section 171 of the Central Goods and Services Tax Act, 2017. The Respondent has GST registrations in 20 States and Union Territories and his products were being sold in all of them except Lakshadweep. The total number of transactions covering the period from November, 2017 to December, 2018, which had been examined in the investigation, was approximately 52 Lakh.

7. The DGAP has also stated that the Central Government, on the recommendation of the GST Council had reduced the GST rate on the goods supplied by the Respondent from 28% to 18% w.e.f. 15.11.2017, vide Sr. No. 57 A, 58, 59 and 60 A of the Schedule III attached to the Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017, a matter of fact which had also not been contested by the Respondent. Regarding the Respondent's claim that he had passed on the benefit of GST rate reduction to the extent of Rs. 73.59 Crore by way of issuing Credit Notes to his customers viz. distributors/modern retailers etc., a perusal of the claim documents (constituting 50% of total claim value) submitted by the Respondent revealed that these were invoices raised by the Respondent's trade partners for provision of services like advertising, sales promotion, sponsorship and brand promotion etc. to the Respondent, which the Respondent had reimbursed by issuing Credit Notes. Some of the

descriptions contained in these credit notes/invoices were mentioned by the DGAP in the Table given below:-

S. No.	Credit Note No.	Date	Trade Partner's Name	Nature/ Description of transaction	Amount (in Rs.)
1	5100028612	22-03-2018	Nykaa E-Retail Pvt. Ltd.	Advertising Services for the month of Dec-17	1,57,00,000
2	5100028622	22-03-2018		Advertising Services for the month of Jan-17	1,08,20,000
3	5100012736	06-02-2018		Advertising Services for the month of Nov-17	85,00,000
4	5100028617	22-03-2018		Advertising Services for the month of Jan-17	55,00,000
5	5100058956	05-07-2018		Promo Claim for the month of May-18	2,97,73,412
6	5100040266	18-05-2018		Promo Claim for the month of Feb-18	2,00,05,348
7	5100077608	29-08-2018	Cludtail India Pvt. Ltd.	Volume Incentive for the month of July-18	91,58,550
8	5100078260	05-09-2018		Volume Incentive for the month of June-18	85,00,000
9	5100058554	05-07-2018		Volume Incentive for the month of May-18	70,00,000
10	5100043401	03-05-2018	Shoppers Stop Ltd.	Sponsorship Service.	11,17,694
11	5100054358	14-06-2018	Lifestyle International Pvt. Ltd.	Brand Promotion Service	13,67,574

8. The DGAP has further stated that the said invoices/Credit Notes nowhere indicated that they 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 calculations and the details of the invoice wise outward supplies submitted by the Respondent and as such the deduction claimed on account of payments made by the Respondent towards advertising, sales promotion, sponsorship and brand promotion services supplied by his trade partners, could not be considered as the benefit of GST rate reduction w.e.f. 15.11.2017. The DGAP has also claimed that there was no proximity between the date of GST rate reduction and the date of the supply of the service and/or the Credit Notes. The method adopted by the Respondent for calculating the reduction in

price and MRP by comparing the pre-GST MRP less pre-GST taxes with the post-GST MRP less GST @ 18%, for the reason that there was no increase in the price at the time of implementation of GST, was also not consistent with the provisions of Section 171 of the Central Goods and Services Tax Act, 2017 read with Chapter XV of the above Rules.

9. The DGAP has also claimed that the Respondent's decision not to increase the MRPs when the tax rates had increased at the time of implementation of the GST, was his voluntary and conscious business decision which could not form the basis for not passing on the benefit of subsequent GST rate reduction w.e.f. 15.11.2017, as the provisions contained in Section 171 of the Central Goods and Services Tax Act, 2017 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 products while maintaining the earlier pre-rate reduction MRPs of such SKUs, was also not accepted by the DGAP.

10. The DGAP has further claimed that 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 and other services etc. could also not be accepted as such increase in the prices of the 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 did not provide any scope for adjustment of increase in the cost against the benefit of reduced tax rate. The increase in the cost of inputs/input services might be a factor for determination of price but this factor is independent of the output GST rate.

11. The DGAP has also intimated that It could not be argued that the elements of cost were affected by the downward revision of the output GST rate. With regard to the contention of the Respondent that as the reduced amount of refund (area based fiscal incentive) resulted in increase in cost, which was directly attributable to the reduced GST rate, the same should be considered for the purpose of the ongoing investigation into the alleged profiteering by him, it is contended by the DGAP that as per Notification No. 10(1)/2017-DBA-II/NER dated 05.10.2017, the eligible units were entitled to a refund of 58% of the CGST or 29% of the IGST paid through debit in the Cash Ledger Account, in terms of Section 49 (1) the Central Goods and Services Tax Act, 2017, after utilization of the input tax credit of the CGST or the IGST. Accordingly, prior to 15.11.2017, the Respondent was entitled to proportionate refund of CGST or IGST paid through Cash Ledger. W.e.f. 15.11.2017, the liability of the Respondent to make payment in cash might have got reduced due to reduction in the rate of GST, resulting in reduced refund in absolute terms. However, there was no loss to the Respondent in relative terms as he was still eligible to get the same proportionate refund of the

CGST/IGST paid in cash as was available prior to the reduction in the rate of GST. Moreover, such refund of CGST or IGST paid in cash was also a function of and dependent on the amount of input tax credit utilized by the Respondent for discharge of output GST liability and could not always be attributed to the output GST rate. In other words, even after the GST rate reduction, if the input tax credit utilization by the Respondent was reduced, the refund amount might remain the same or it may even increase. The DGAP has also submitted that if one goes by the logic adopted by the Respondent, the prices of goods had to be reduced in case there was an increase in the tax rate (because of availability of more refund). Therefore, the claim of the Respondent to set off the profiteered amount on account of reduction in the absolute amount of refund/incentive/subsidy, was also not acceptable. The Respondent had also sought to exclude the outward sale of the following from the scope of the present investigation:-

- (a) New SKUs introduced after 15.11.2017;
- (b) Goods not impacted by GST rate reduction, i.e. Kajal and Hair Oil;
- (c) Goods sold to Canteen Stores Department (CSD);
- (d) Stock Transfers within the Respondent's units;
- (e) Scrap Sales and
- (f) Sales made to the Sub-Contractor.

12. The DGAP on examination of the nature of the above sales and the copies of the agreements entered into by the Respondent, has found that the reduction in the rate of GST w.e.f. 15.11.2017 did not have any impact on the sales mentioned at point No. (a) to (e) above. However, on reviewing the agreement entered into by the Respondent with the sub-contractor M/s. Pritam International Pvt. Ltd. for the period from 01.02.2014 to 31.03.2020, it was observed that the agreement nowhere mentioned the price of the raw material or packing material supplied by the Respondent to the sub-contractor and as the price was not mentioned, there was no reference to the inclusion or exclusion of taxes in such price. Further, Clause 9.4 of the said agreement reads as "It is agreed between the parties that in the event the raw material and packing materials are procured by the sub-contractor from the Respondent, it shall issue an invoice to the sub-contractor for the price of such raw material / packing material and the sub-contractor shall pay the amount in full to the Respondent within 30 days from the date of the invoice." Therefore, from the above the DGAP has claimed that it appeared that the supply of raw material/ packing material which was impacted by the GST rate reduction w.e.f. 15.11.2017 (HSN- 3401 & 3402), would 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 Respondent has also contended that the FMCGs industry in which he operated, the units usually undertook periodic price revision every 5-6 months, considering the impact of various factors like change in costs and market outlook etc.

13. The DGAP has computed profiteering and stated that from the invoices made available by the Respondent, it appeared that the Respondent has 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 and 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 15.11.2017 to 31.12.2018, as furnished by the Respondent, 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 the profiteering amount came to Rs. 2,16,49,61,535/-. This said profiteered amount had been arrived at by the DGAP by comparing the customer type-wise average of the base prices of the impugned products sold during the period from 01.10.2017 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, was also included in the aforesaid profiteered amount as the excess price collected from the recipients also included the GST charged on the increased base price. The place (State or Union Territory) of supply wise break-up of the total profiteered amount of Rs. 2,16,49,61,535/- as computed by the DGAP is furnished in the Table given below:-

S. No.	Name of State	State Code	Profiteering (Rs.)		
			General Trade	Other than General Trade	Total Profiteering (Rs.)
1	Andaman & Nicobar Islands	35	9,70,435	-	9,70,435

2	Andhra Pradesh	37	1,78,17,194	52,46,049	2,30,63,243
3	Arunachal Pradesh	12	29,60,143	-	29,60,143
4	Assam	18	3,13,14,662	62,85,602	3,76,00,264
5	Bihar	10	3,15,31,119	93,93,204	4,09,24,323
6	Chandigarh	4	1,10,45,910	49,26,319	1,59,72,229
7	Chhattisgarh	22	1,67,55,482	46,43,521	2,13,99,003
8	Dadra and Nagar Haveli	26	4,23,829	-	4,23,829
9	Daman and Diu	25	6,48,325	-	6,48,325
10	Delhi	7	18,86,02,219	6,37,10,872	25,23,13,091
11	Goa	30	1,39,30,963	5,90,602	1,45,21,565
12	Gujarat	24	10,70,24,915	3,43,65,242	14,13,90,157
13	Haryana	6	8,29,15,573	2,80,91,041	11,10,06,614
14	Himachal Pradesh	2	54,44,855	41,08,458	95,53,313
15	Jammu & Kashmir	1	1,40,59,038	46,69,370	1,87,28,408
16	Jharkhand	20	2,28,81,405	55,51,323	2,84,32,728
17	Karnataka	29	11,06,96,404	6,44,22,022	17,51,18,426
18	Kerala	32	2,55,67,497	67,41,449	3,23,08,946
19	Madhya Pradesh	23	3,48,69,472	1,69,49,615	5,18,19,087
20	Maharashtra	27	29,56,33,071	14,34,19,734	43,90,52,805
21	Manipur	14	24,26,847	39,69,400	63,96,248
22	Meghalaya	17	51,02,941	7,93,658	58,96,599
23	Mizoram	15	25,87,030	19,46,324	45,33,353
24	Nagaland	13	89,88,373	-	89,88,373
25	Orissa	21	2,34,53,000	73,48,432	3,08,01,432
26	Puducherry	34	18,60,641	-	18,60,641
27	Punjab	3	6,06,53,330	3,65,10,997	9,71,64,327
28	Rajasthan	8	5,06,39,630	2,25,80,087	7,32,19,717
29	Sikkim	11	33,90,135	-	33,90,135
30	Tamil Nadu	33	4,93,77,808	2,40,93,400	7,34,71,209
31	Telangana	36	4,35,23,595	2,44,69,926	6,79,93,521
32	Tripura	16	25,75,247	11,12,857	36,88,103
33	Uttar Pradesh	9	11,18,10,948	5,47,89,889	16,66,00,837
34	Uttarakhand	5	1,13,07,779	56,71,751	1,69,79,530
35	West Bengal	19	12,53,36,512	6,04,34,066	18,57,70,577
	Grand Total		1,51,81,26,324	64,68,35,211	2,16,49,61,535

14. From the above, the DGAP has concluded that the Respondent has increased the base prices after rate reduction from 28% to 18% w.e.f. 15.11.2017 and has contravened the provisions of Section 171 of the CGST Act, 2017.

15. After perusal of the DGAP's Report, this Authority in its meeting held on 09.07.2019 decided to hear the DGAP and the Respondent on 02.08.2019 and accordingly notice was issued to both the parties. On

behalf of the DGAP Sh. Bhupinder Goyal, Assistant Director (Cost) was present and the Respondent was represented by Sh. Anand Nagda, General Manager-Tax, Sh. V. Lakshmikumaran, Sh. K. Srikanth, Sh. G. Gokul Kishore, Sh. D. Macchar and Sh. Tushar Mittal, Advocates. Further hearings were held on 30.08.2019, 01.10.2019, 30.10.2019 and 27.12.2019 and 01.01.2020.

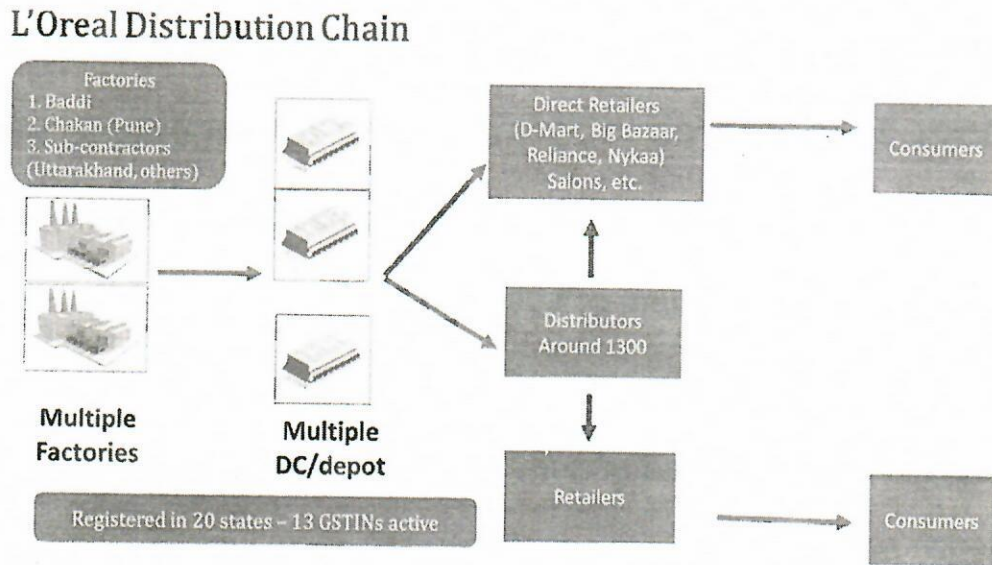
16. The Respondent has filed written submissions on 30.07.2019, 13.09.2019, 24.10.2019, 05.11.2019 and 27.12.2019 and stated that he was a leading cosmetics group worldwide and has been present in India as a wholly owned subsidiary of M/s L'Oréal S. A., since 1994. He was engaged in the manufacture and supply of various cosmetic products which were broadly grouped under the product categories viz. hair care, hair colour, make up, skin care and luxury products like perfumes and deodorants falling under various HSN codes, mainly HSN codes 3303, 3304 and 3305. He occupied the second position in the beauty industry with a strong portfolio of 14 powerful international brands across all distribution channels, which could be grouped as under:-

Divisions	Channels	Products
CPD Consumer Products Division	Mass market channels	L'Oréal Paris, Garnier, Maybelline New York, NYX Professional Make up
PPD Professional Products Division	Hair and Beauty Salons	L'Oréal Professional, Matrix, Kerastase, Cheryl Cosmeceuticals, Decléor
LPD Luxury Productions Division	Premium Products	Kiehl's Yves Saint Laurent, Giorgio Armani, Ralph Lauren and Diesel

17. He also claimed that he supported the progressive reforms undertaken by the Government of India especially the "Make in India" programme,

and presently 90% of his portfolio by volume was sourced and produced locally in the factories based in Pune and Baddi and at sub contract locations. Research and Innovation centres in Mumbai and Bengaluru had been created to meet the future requirements.

18. The Respondent has also stated that the goods manufactured by the him were distributed from the factory to the customers in the following manner:-



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 has reduced the rate of CGST on many consumer goods including the goods supplied by the Respondent from 14% to 9%. Simultaneously, the State Governments have 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, as provided by the Respondent:-

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 Respondent has further stated that he was supplying the above 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.

19. The above products were either being manufactured by him in his factories located at Baddi and Chakan (Pune) or by his contract manufacturers. The Respondent also imported goods from outside India and the customers of the Respondent either directly sold his products to the consumers or further sold them to other wholesalers and distributors in the market and products eventually reached the consumers through a chain of such distributors, wholesalers and retailers.

20. The Respondent has further stated that with 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 the

business considerations to avoid massive business disruption and confusion among customers and consumers. Effective from 15.11.2017, the Respondent had charged GST at the applicable rate of 18% on the invoices issued for supply of the above goods to his recipients thereby fully complying with the GST laws including Section 171 of Central Goods and Services Tax Act (“CGST Act”). As the Respondent was required to pass on the benefit of reduction in the 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 15 th 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 supplies made effective from November 15, 2017.
10.11.2017 to 30.11.2017	<p>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).</p> <p>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.</p> <p>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.</p> <p>The Respondent also ensured mass awareness about price reductions by publishing advertisements in leading newspapers.</p> <p>Thus, the Respondent made all efforts to communicate to its</p>

Date	GST Rate Reduction Execution Plan - Efforts and measures taken by L'Oréal for passing on the GST benefits to its recipients
	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. Sample photographs evidencing display of various products at reduced prices in retail stores as advised by the Respondent.
Jan 2018 onwards	<p>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.</p> <p>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.</p>

21. The Respondent has also claimed that he did not agree with the conclusions drawn by the DGAP and has challenged the DGAP's Report on the ground that the period covered under the investigation was from 15.11.2017 to 31.12.2018, which covered the business operations of the Respondent for thirteen months and sixteen days. There was no reason adduced by the DGAP as to the date of 31.12.2018 being reckoned for conducting the investigation. The Report was silent on the grounds or reasons based on which such period was selected by the DGAP for investigation. The period covered under investigation did not have any statutory basis and the Report was silent on the period till what time the Respondent would be investigated for alleged profiteering, if any. This could lead to an inference that in the absence of any specified time period, increase in the price, if any, undertaken by the Respondent would be considered as profiteering till the time Respondent was in business. It could even imply that in case if, in future, the Respondent decided to increase

prices of his goods (due to any commercial reason) it would attract anti-profiteering provisions. He has further claimed that such exercise was contrary to the true intent and spirit of the anti-profiteering provisions contained in the CGST Act which by their very essence were transitional in nature and therefore, could not be applied in perpetuity. Thus, he has submitted that the manner in which the provisions pertaining to anti-profiteering were being applied by the DGAP in his Report by arbitrarily selecting period of investigation and alleging profiteering has the effect of restricting the right of the Respondent to do business, a cherished fundamental right guaranteed by the Constitution of India.

22. The Respondent has also submitted that after the GST rate reduction from 28% to 18% for most of the products, he has undertaken a massive exercise to determine the prices to be charged in the light of the revised rate of tax and reflect the same on the packages by way of reduced MRPs and the methodology adopted for calculating the reduction in the price and the 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 and 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 the imported products.

c. Comparison was made between the pre-GST and the 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 the MRP.

23. He has also argued that the above exercise was carried out in November and December, 2017 and the new MRPs and prices were given effect from January, 2018 onwards. He has further argued that once the MRP was revised by the Respondent considering the above factors and also taking into consideration the various other

commercial factors affecting the pricing and MRPs 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 the products sold by the Respondent. Since the production of these goods with new MRPs came into effect from January 2018, the sale of these products would have started by around January/February/March 2018. Accordingly, he has contended that the period of investigation should be restricted to a period of up to March 2018 as by this time the effect of new prices had already come into effect. The Respondent has further contended that in a number of instances, this Authority had passed orders covering period of investigation of 2 to 5 months as has been explained by him in the following Table:-

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

Accordingly, he has submitted that the period of investigation should be restricted to a shorter period.

24. The Respondent has also pointed out discrepancies resulting in reduction of alleged profiteering amount which are tabulated as under:-



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 DGAP computation)	0.65
6	Computation of profiteering for sales not impacted by rate reduction (based on DGAP 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

He has further pointed out that while the DGAP has stated in Para 22 of the Report that the profited amount had been arrived at by comparing the customer type-wise average of the base prices of the impugned products sold during the period from 01.10.2017 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, it had been observed by the Respondent that there were numerous instances where instead of adopting an average base price, the DGAP had adopted the lowest base price for an SKU in the pre-rate reduction period leading to a situation of artificial profiteering where there could not be any profiteering had the average base price been considered.

The Respondent has also stated that it could be inferred that where

the product having same goods code was sold between 01.10.2017 and 14.11.2017 and subsequent to rate reduction (i.e. from 15.11.2017), for calculating profiteering on sales made from 15.11.2017, the DGAP has adopted the customer type-wise average of the base prices available between 01.10.2017 and 14.11.2017. Once the above step was performed, wherever the DGAP could not find the same goods code, i.e. where the sale was made after 14.11.2017 but with a different goods code than the one prevailing up to 14.11.2017, the DGAP as a second step has matched the description of said goods sold after 14.11.2017 with the description of goods prevailing up to 14.11.2017. It was the Respondent's understanding that the DGAP first performed Step 1, and where it could not find pre-rate reduction price based on Step 1, it performed Step 2. Similarly, where the pre-rate reduction price was not available even after performing Step 2, the DGAP went ahead with Step 3, and so on.

25. The Respondent has also submitted that while the DGAP has in his Report stated that he has adopted the average prices, the same was not true when it came to comparison on the basis of description. Instead of comparing the weighted average of all line items with same description, the DGAP has adopted the prices as per the first line item with the same description, for instance, the Respondent had supplied product GAR COL NAT SHADE 1 (having product code CNCFR100-DC) from his Gujarat registration to his customer in Gujarat (being a General Trade customer) at a per unit price of Rs. 127.17 excluding GST. Since the product code CNCFR100-DC was

not sold in pre-rate reduction period of 01.10.2017 to 14.11.2017, the DGAP went to Step 2, which was by comparing the sale price post 14.11.2017 with the average pre-reduction sale price of product having same description during the period from 01.10.2017 to 14.11.2017. Prices of products sold during the period from 01.10.2017 to 14.11.2017 with the same description GAR COL NAT SHADE 1 as per the DGAP's file "Pre-rate reduction pivot" were as follows:-

S.No	Goods Code	Goods Description	HSN	MR P	General Trade		
					Quantity	Taxable Amount	Average Price
425	CNCFR100-9B	GAR COL NAT SHADE 1	3305904 0	175	1,116	127,199	113.98
426	CNCFR100-A0	GAR COL NAT SHADE 1	3305904 0	180	2,267	265,770	117.23
427	CNCFR100-B0	GAR COL NAT SHADE 1	3305904 0	190	68,763	8,478,331	123.30
428	CNCFR100-D0	GAR COL NAT SHADE 1	3305904 0	190	448,600	55,435,512	123.57
429	CNCFR100-DA	GAR COL NAT SHADE 1	3305904 0	190	70,444	8,670,157	123.08

From the above, the Respondent has claimed that the product GAR COL NAT SHADE 1 was sold under 5 different product codes and the average sale price of each of those products was Rs. 113.98, Rs. 117.23, Rs. 123.30, Rs. 123.57 and Rs. 123.08. The average price at description level GAR COL NAT SHADE 1 could be computed by adding all the sales of the said description and dividing the same by addition of all the quantities. In the instant case, the total sales value at description level of GAR COL NAT SHADE 1 was Rs. 7,29,76,970/- and total quantity was 5,91,190, which would result in average price of Rs. 123.44 (excluding GST). However, the Respondent has argued that while the DGAP has in his Report stated

that he had adopted the average price at description level, it had instead adopted the price available at the very first line item of the same description instead of adopting an average price. He has also submitted that the price actually adopted by the DGAP was not even the average at that description level and hence, rectification was required in the computation made by the DGAP.

26. The Respondent has also mapped the date of product code creation against each of the line items in the pre-rate reduction pivot provided by the DGAP and took an example of the product with description GAR COL NAT SHADE 1 discussed earlier, which is as follows:-

S.No.	Goods Code	Goods Description	HSN	MRP	Date of Creation	General Trade		
						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

From the above, the Respondent has stated that based on the date of creation of the code, the latest product with the description GAR COL NAT SHADE 1 which came to be sold by the Respondent was CNCFR100-DA which had a price of Rs. 123.30, Rs. 123.57 and Rs. 123.08 p. u. respectively and MRP of Rs. 190/-. He has also submitted that this was the price which was the latest prevailing price of the Respondent and not the prices of Rs. 113.98 or Rs. 117.23 which were prevailing for earlier SKUs which had become remnant and were being sold only till the time stocks lasted. He has further

submitted that these prices of Rs. 123.30, Rs. 123.57 and Rs. 123.08 were the price which the Respondent intended to recover from his customers going forward, and accordingly, instead of adopting a weighted average of all the products with same description, the weighted average price of products with latest MRP prevailing in the pre-rate reduction period should be adopted as the comparable price. In the above example, the weighted average price of product with latest MRP was Rs. 123.48 p. u., which was calculated by adding the sales value and dividing the same by quantity sold of Serial Nos. 427 to 429.

27. The Respondent has requested that the highest of the prices with latest MRP (Rs. 123.57 p. u.), should be considered since the said price was actually charged to customers in the pre-rate reduction period. Alternatively, the latest price of RS. 123.08 p. u. of the latest product code introduced immediately prior to rate reduction might be considered as the pre-rate reduction price. He has further submitted that these prices should be considered instead of the weighted average price of all the products in the pre-rate reduction period, since the investigation was into a serious allegation of profiteering and not a mere mathematical calculation/comparison between the pre- and post-rate reduction prices.

28. He has also contended that adoption of weighted average price of products with latest MRP along with rectification of above discrepancy of non-averaging of base prices alone would result in a substantial reduction in the alleged profiteering by Rs. 30.52 Crore.

The Respondent has also computed the latest and the weighted

average prices of the products with the latest MRPs and mapped the same against each line items in 35 excel sheets and also mapped the difference between the profiteering as per DGAP's formula (recalculated for weighted average price) and profiteering as per his revised formula applied for latest and average of latest prices. He has first calculated the weighted average prices of the products with latest MRPs at description level and stated that the total amount of Rs. 30.52 Crore could be computed by following this method.

29. He has further submitted that from an examination of the methodology adopted by the DGAP in arriving at the base price, it appeared that while working on excel files DGAP has erroneously used the excel formula "vlookup" from base price master. As a result of this excel formula error, the outcome was the first average price used from base price master instead of weighted average price at description level. As a result, the value used by DGAP was erroneously reflected as the first selling price from the base price master.
30. The Respondent has also stated that where the price was not available for the time period (01.10.2017 to 14.11.2017 product description), the DGAP has adopted price as per the time period (01.09.2017 to 30.09.2017 product description). The Respondent has further stated that the DGAP has identified certain products as comparable for computing profiteering without taking any inputs from the Respondent. For instance, the Respondent had sold product GN MEN Acnofight FW 50 ml with product code SYMAF050-70 at a per unit price of Rs. 61.93 (excluding GST). Since the said product code or sale of that description was not available in pre-rate reduction

period, the DGAP has mapped product code SYMAF050-00 (having product description AcnoFight Facewash 50 ml) as comparable whose pre-reduction price was Rs. 53.92 p. u. (excluding GST) and accordingly computed a profiteering of Rs. 8.01 p. u. (excluding GST) or Rs. 9.45 p. u. including GST. The details of pre-rate reduction price of product code SYMAF050-00 having product description AcnoFight Facewash 50 ml as also details of other products having same product description in DGAP's pre-rate reduction pivot sheet are as follows:-

S.No	Goods Code	Goods Description	HSN	MRP	General Trade		
					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	194,034	12,184,724	62.80

On the basis of the above he has submitted that if the said product code SYMAF050-00 having product description AcnoFight Facewash 50 ml was 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 comparables and accordingly, the average prices of all the codes having same comparable description must be considered, instead of considering the price of 1 product code alone. Therefore, the Respondent has argued that while the price of comparable code taken by DGAP was Rs. 53.92 p. u., the average price of the products with latest MRP with comparable description must be

considered, which in this case was Rs. 62.80 p. u. (for product with MRP of Rs. 99 sold at the price of Rs. 62.80). If the said price of Rs. 62.80 was used as comparable in the given case where actual sale price was Rs. 61.93, the resultant profiteering as per DGAP's calculation would become Nil. In fact, the Respondent in this case had passed on more than what was required to be done. He has also claimed that the reduction in alleged profiteering on account of this factor alone was Rs. 5.72 Crore.

31. The Respondent has also submitted that during the normal course of his business, he was issuing Credit Notes on account of return of goods from his recipients or on account of incorrect invoicing. In respect of supplies made after 14.11.2017, there had been cases of Credit Notes being issued by the Respondent. On the perusal of the computations made by the DGAP in the 35 files, it had been observed by the Respondent that for some line item invoices for which Credit Notes had been issued, the DGAP had not computed profiteering whereas for some line items, the DGAP had gone on to compute profiteering. In this regard, he submitted that once the goods were returned / incorrect invoicing was rectified, the original invoice value receivable from customer got reduced to the extent Credit Note had been issued. Accordingly, no profiteering should be computed in respect of invoices to the extent Credit Note had been issued for the same.

32. The Respondent has identified the original invoices pertaining to each of the Credit Notes and also the profiteering computed by the DGAP in respect of the invoices to the extent of Credit Notes issued for the

same and submitted that alleged profiteering computed in respect of these items amounting to Rs. 65,20,961/- should be reduced from the total alleged profiteering. He has further submitted that the DGAP had computed profiteering in respect of some line items not impacted by reduction in the rate of GST w.e.f. 15.11.2017. In respect of these products namely Hair Oil (HSN: 33059011) and Brushes (HSN: 96033020), the rate of GST prior to 15.11.2017 was 18% and the same continued thereafter. The rate of GST for these products was notified @ 18% vide Notification No. 1/2017-Integrated Tax (Rate) dated 28.06.2017. The relevant entries in Schedule III (goods attracting GST @ 18%) of this Notification are as follows:-

A.1. Schedule.III – 18%

A.2. S. No.	A.3. Chapter Heading Subheading Tariff item	A.4. Description of goods
A.5. 59.	A.6. 3305 9011, 3305 90 19	A.7. Hair oil
A.8. 443.	A.9. 9603 [other than A.10. 9603 10 00]	A.11. Brushes (including brushes constituting parts of machines, appliances or vehicles), hand operated mechanical floor sweepers, not motorised, mops and feather dusters; prepared knots and tufts for broom or brush making; paint pads and rollers; squeegees (other than roller squeegees) [other than brooms and brushes, consisting of twigs or other vegetable materials bound together, with or without handles]

Accordingly, he has submitted that there was no reduction in the rate of GST from 28% to 18% in respect of these products. However, the DGAP had still gone on to compute profiteering in respect of such products amounting to Rs. 14,45,267/-.

33. He has also contended that in respect of 1 line item of sale from Maharashtra to J & K, the quantity was incorrectly mapped as 0.07 instead of 432, which has led to alleged profiteering computation of Rs. 1,69,308/- whereas the actual sale amount including GST itself was only Rs. 1,69,335/-, which would result into reduction of the amount of profiteering by Rs. 1,63,884/-. He has further contended that rectification of all the above discrepancies in the base price calculation sheet alone would lead to a substantial reduction in the alleged profiteering computed by DGAP to the tune of Rs. 42.33 Crore (including the discrepancies relating to Credit Notes and non-impacted goods).

34. The Respondent has also stated that it was felt necessary to analyse the pros and cons of various methods by which the Respondent could pass on the benefit in respect of stock manufactured with old MRP written on the pack so that it would be most effective and at the same time could accommodate the same in the existing processes/systems put in place by the Respondent. Accordingly, the Respondent had held internal meetings to analyse the pros and cons of various methods, checked the practices followed by the competitors in the industry etc., to find a way to pass on the benefit. This meeting was attended by the personnel from the various teams which included the CFO, division heads, members from supply chain team and the tax team etc. It was a co-ordinated effort on the part of the personnel from various departments to identify a solution. 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

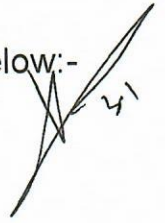
new artwork with revised MRP became ready. The process by which Respondent has granted post supply price reduction was as follows:-

- a. sales to customers.
 - b. Customers make further sale to their customers at a discounted price to pass on the benefit of reduction in rate of GST.
 - c. Such discount was claimed back by customers, effectively ensuring compliance for both the Respondent and the customer.
35. The Respondent has also submitted that in order to ensure that the reduced prices were passed on to the ultimate consumers and did not stay with the distributors / MT customers, he had introduced a system of price reduction in the form of GST discount claims, wherein sales by the Respondent to his customers were 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 the Respondent on account of GST rate reduction, they would become eligible to claim the said GST discount from Respondent by way of claims. The Respondent has further submitted that the reduced prices to be charged by the distributors/MT customers were also communicated to them. As reduced MRP was not reflected on packages for some time, he chose to adopt a system of GST claim discount so that benefit reached beyond direct customers of the Respondent and was not retained within the supply chain. He has further submitted that direct reduction in the prices of the products impacted by the GST rate reduction was made once the revised MRP was reflected on packages. 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.

36. The Respondent has also stated 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 the supply invoices issued by the Respondent to his customers, it had clearly been mentioned that considering the anti-profiteering provisions under the GST, the Respondent would pass on the benefit by way of claims in respect of the stock manufactured/imported with old MRP. Further, the declaration of old MRP and reduced MRP was also made on the invoices. The declaration as to post-supply discounts 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.” The relevant declarations from the Respondent’s invoice are extracted below:-



ORIGINAL FOR RECIPIENT		L'OREAL INDIA PRIVATE LIMITED											
Division :CPD Address: Sahi Enterprises Begumpur Kotala Road, Behrampur Indl Estate, 38th KM Mile Stone, Jaipur Highway, 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		SGST /UTGST	
BLLCK005-51	CHERRY 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

“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.”

Thus, from the above, the Respondent has claimed that he had passed on the benefit to his recipients by way of Credit Notes as required, while also ensuring that the benefit was further passed down the line even though the Respondent was not obligated to do so. In respect of modern trade/e-commerce, the claim was raised by them by way of service invoices. Accordingly, he has submitted that the benefit was passed on by him in this manner and the total amount of benefit passed on by the Respondent was Rs. 73.59 Crore.

37. The Respondent has also stated that in the submissions dated 25.06.2019 given to the DGAP, he had clearly explained with complete chain of documents for one transaction (running in to more than 500

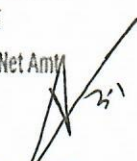
pages) as to how GST rate reduction benefit has been passed on by way of post-supply discounts to distributors and modern retail customers but the above submissions were not considered by the DGAP and in his Report. The DGAP had rejected an amount of Rs. 73.59 Crore passed by way of such discounts on the ground that there was no one-to-one correlation between the supplies made and the discounts given which was not correct. He has also explained with an example that in the claim file submitted to the DGAP for one of his customers (Delhi Trading Co.), it could be clearly seen that the discount was based on the actual sale made by distributor to the retailer for a given product. He has further stated that the discount offered in respect of one invoice by the customer to the retailer for product DGAPL Eye Liner Studio Gel and the related claim made by the customer on the Respondent was as follows:-

Customer to retailer invoice

Invoice, as given by the Respondent in his submissions showed the MRP, Reduced MRP and the Scheme Discount (Sch Disc) which was calculated based on the rate per unit of product, as applicable based on the difference between the old and the reduced MRP. Discount per unit given by the customer to retailer was – Rs. 1723.47/48 (qty.) = Rs. 35.91 per unit as has been shown below:-

<p>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</p>	<p>Billed To. PRABHA COLLECTION KAMLA NAGAR KAMLA NAGAR NEW DELHI PH No. GSTIN No. 07AAGFP9769H1ZL State Code & Name: 07 Delhi</p>	<p>Invoice No : LCBL041341701898 Invoice Dt : 11/01/2018 Salesman : ANKIT Route : KAMLA NAGAR Doc Ref No</p>
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S.No	Product Description	HSN	MRP	Reduced MRP	Rate	Qty	Sch Disc	Taxable Amount	CGST% IGST%	CGST Amt IGST Amt	SGST% UTGST%	SGST Amt UTGST Amt	Net Amt
<p>I.O., No.: 5/2020 DGAP v. M/s L'Oreal India Pvt. Ltd</p>													


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

The claim made by the customer on the Respondent showed the very same invoice line item sold by customer to the retailer as under:-

Bill Date	Bill No	Retailer Name	Shipping Address	Product Code	Product Name	Sales Qty	GST Scheme Discount
11-01-2018	LCBL04 1341701 898	PRABHA COLLECTI ON	KAMLA NAGAR --> KAMLA NAGAR --> NEW DELHI	DMEEL001- D0	DGAPL Eye Studio Gel Liner Blackest	48.0	1,723.47

On the basis of the above the Respondent has stated that the claim made by the customer for the above product worked out to Rs. 35.91 on a p. u. basis. This was the same product sold by the Respondent to the customer which could be seen from the invoice of the Respondent as follows:-

L'Oréal to customer invoice

ORIGINAL FOR RECEIPT		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: 12, 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: 12, BASEMENT FLOOR, EAST PATEL NAGAR ROAD, PATEL NAGAR, CENTRAL DELHI, NEW DELHI 110008 State: Delhi GSTIN: 07ANTPS1493B1ZO Your Reference			PO No.: OUT/2017/1690-3733 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.GRN No.: 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: 214,746.465 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	

DMEEL001-DO	DGL Eye Studio Gel Liner	33042000	55000	100	30.1	15.0507	300	33042000	33042000
	Blackest								

From the above Table, the Respondent has stated that there was clear correlation between the product sold by the customer to the retailer on which claim was made on the product sold by him to the customer. He has also stated that in the above invoice for the said product supplied by him, the DGAP had computed a p. u. profiteering of Rs. 33.69 which was incorrect and he was wrongly being accused of having profited by following the said methodology.

38. The Respondent has also stated that he had passed on the claim in respect of distributors by way of issuance of Credit Notes post claim made by the distributors and such Credit Notes contained specific description that the amount was for passing on the GST rate reduction benefit. A screenshot of the credit note issued by the Respondent to his distributor is as follows:-

ORIGINAL FOR RECIPIENT

L'OREAL INDIA PRIVATE LIMITED
 Division : CPD
 Address: Navbharat Enterprise
 Khasra No. 70, Village sandulajab, Near Gyan Jyoti Vidhya Niketan, Sandulajab, New Delhi 110030 Delhi
 GSTIN: 07AAACL0738K1Z

CREDIT NOTE

Credit Note No. CTS1700073	Credit Note Date 16.02.2018	Date of Supply	Contact No. 124-4770090
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 : 07ANTPS1493B1Z0	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 : 07ANTPS1493B1Z0 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	Time: 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 U)	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	1.00	1.00	0.00
CPDTGST	GST PRICE REDUCTION -CPD	998599	0	0	0	4,870.91	4,870.91	0.00	0.00	0.00	1.00	1.00	0.00
CPDTGST	GST PRICE REDUCTION -CPD	998599	0	0	0	702.27	702.27	0.00	0.00	0.00	1.00	1.00	0.00
CPDTGST	GST PRICE REDUCTION -CPD	998599	0	0	0	6,177.79	6,177.79	0.00	1.00	0.00	0.00	0.00	0.00
CPDTGST	GST PRICE REDUCTION -CPD	998599	0	0	0	1,209.70	1,209.70	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	1.00	0.00

(Handwritten Signature)

In this regard, he has further submitted that the desired copies of Credit Notes (505 out of 12,214 credit notes) were already submitted to the DGAP vide e-mail dated 25.06.2019 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, the DGAP in his report has not given any finding on the passing of the benefit through the Credit Notes. This exercise has been clubbed by the DGAP with the invoices raised by the MT customers for claiming post-supply discounts extended on account of GST rate reduction. The said description of GST price reduction on credit notes was captured once the system design for Credit Notes 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 Notes.

39. The Respondent has further submitted that in respect of modern trade / modern retail customers, discounts were extended by way of settlement of invoices raised by such MT customers on him and his recipients had 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, he had taken position to accept the claims for price reductions from the recipients with tax as it was revenue neutral, being

creditable in the hands of the Respondent. The Respondent has further submitted that the amount paid was towards price reduction passed on by modern retail customers on account of GST only.

40. The Respondent has also claimed that as a part of his regular trade practice, he was running various schemes for his recipients, wherein the recipients were selling the goods at a reduced price to their customers and such price reduction was reimbursed to the recipients by the Respondent. This had resulted in reduction in the net realization by the Respondent from his recipients. Since the same was towards reduction in price of goods supplied earlier, the Respondent had adjusted such price reductions from his sales turnover and reported only the net turnover in his books of accounts as well as Financial Statements (viz. Profit and Loss Account). He has further claimed 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 had been specifically accounted in the Respondent's books of accounts as "GST price reduction claims" and the said discounts were netted off against the sale revenue of the Respondent. In fact, the Respondent's books of accounts had been audited and there was no objection by the auditors towards such accounting, as the said discounts were purely relating to the passing on the benefit of GST rate reduction. The Respondent has also submitted accounting for the Credit Notes and grouping of GST price reduction claims in the sale of products.

41. The Respondent has also contended that the method of passing on the reduction in the rate by way of post supply discounts was the most

appropriate and feasible method wherein not only his immediate recipient received the benefit but the same was also passed on through the supply chain to the customers at the next stage. He has further contended that in common parlance discount was nothing but reduction in the price. It was settled law that the discounts known in advance to the customers were deductible from the value, irrespective of their form or nomenclature and any benefit passed on by him in whatever form to the recipients must be taken into consideration. It was the policy of the Respondent that while price reduction scheme was made known in advance to the recipients, the claims were allowed only when the Respondent was assured of the fact that the benefit of such price reduction was passed on further to the trade partners below in the supply chain, after carrying out appropriate verification. He has also 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 which alone reflected the net realization of the Respondent. He has further submitted that once discount was allowed as per established practice, the same should be allowed to be deducted from the sale price of the goods.

42. The Respondent has also claimed that the GST charged to the customers was available as credit to them which could be utilized against their output tax liability and accordingly, there was no need to separately refund the GST portion as well. Further, as and when the customers sold the goods, they had reduced the discount amount passed on (and claimed from the Respondent) 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. Accordingly, 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 represented 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 reflected the actual consideration towards the supply realized by the Respondent. The Respondent has further claimed that the computation of alleged profiteering made by the DGAP be reduced by an amount of Rs. 73.59 Crore which had been passed on by the Respondent by way of post-supply price reduction on account of GST rate reduction.

43. The Respondent has also argued that in the absence of any prescribed methodology for passing on 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 the GST rate reduction had passed on the benefit through higher grammage on certain SKUs. In this regard, the Respondent claimed that this Authority in respect of FMCGs industry had taken the view that the benefit of GST rate reduction in the form of extra quantity / higher grammage for the same price definitely was a benefit to the consumers and that passing on extra quantity could be one of the modes of passing on the benefit.

44. The Respondent has further stated that in the present case, the Respondent had 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. As an illustration, the Respondent has submitted the following:-

Customer type	Product code	Description	Selling price incl. tax	Base price as per DGAP incl. tax	Profiteering as per DGAP	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

From the above illustration, he has stated that if the price comparison was made on per ml basis, the price of Rs. 0.528 charged after 15th November, 2017 was lower than the price of Rs. 0.533 charged before 15th November, 2017.

45. The Respondent has computed the actual benefit passed on by way of increase in the quantity of products and based on weighted average prices of the products with latest MRP which amounted to Rs. 82,97,36,596/- (Rs. 26,96,31,164/- if restricted to profiteering at line item level). He has also submitted that this Authority during the course of the hearing on 30.10.2019 had handed over a template in excel format to the Respondent to corroborate the grammage benefit as a non-profiteering measure and directed the Respondent to provide the data and supporting information in the said format. Accordingly, the Respondent has once again mapped the data relating to the 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 the DGAP Report). From the above, he has submitted that the he has passed on benefit of GST rate reduction by way of increase in the quantity of the products which should be reduced from the alleged profiteering computation.

46. The Respondent has also pleaded that as provided in 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 (BCD) from 10% to 20% for products imported by him and from the above date, the Education Cess (EC) and the Secondary and Higher Education cess (SHEC) was also replaced by the Social Welfare Surcharge @ 10% of the aggregate duties/taxes which has led to increase in the effective rate of non-creditable Customs Duty from 10.30% to 22% of the value of imported products. He has further pleaded that the increased Customs Duty has led to increased cost of doing business in respect of the imported products w.e.f. 1st February, 2018. He has also said that in his submissions made before the DGAP, he had sought allowance for reduction in the alleged profiteering, if any, to the extent of such increase in the Customs Duty. The list of SKUs impacted by the increase in the Customs Duty rate and the increase in the Duty on per unit basis was provided in separate annexure to the 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 the outward supply which was also provided as per the relevant annexure. In the

cases where the prices were revised subsequent to such increase in the Customs Duty and considering other factors, the Respondent had asked for relief from computation of profiteering on those line items in his submissions but the same had not been considered by the DGAP. He has further submitted that an amount of Rs. 19,18,68,113/- representing the amount of profiteering (recalculated based on the average prices of products with latest MRPs) computed on these line items was required to be reduced from the total alleged profiteering computed by the DGAP. The difference in the Customs Duty rate had resulted in additional cost of Rs. 14,10,48,577/- which was a significant change in the business environment in respect of such imported products and hence, such SKUs must be removed from the computation of profiteering at least from the date of increase in the Customs Duty rate. He has also submitted that in the previous 5 years, there was no increase in the Customs Duty and when it was reduced, the market forces would come into picture and based on the competition and the demand in the market, new prices were determined.

47. The Respondent has also averred that Section 171 (1) of the CGST Act mandated that any reduction in the rate of tax has to be passed on to the recipients by way of commensurate reduction in prices and according to the provisions of the above Section this Authority was mandated to investigate through the DGAP and determine the quantum of commensurate benefit arising out of reduction in the tax rate which had not been passed on by a supplier. Therefore, allegation of profiteering (if any) could only be to the extent of reduction in the GST rate. In the instant case there had been reduction in the tax rate by 10% which as

per the DGAP's computation methodology could be given effect by keeping the pre-tax price (base price) constant, which would have resulted in a reduction of 7.8% in the cum tax price charged to the customers.

48. He has further averred that the allegation of profiteering (if at all) could only be to the extent of the said 7.8%, which reflected the reduction in the tax rate. In other words, there could be no allegation of profiteering in excess of the said 7.8% reduction as any amount charged in excess thereof represented the profit of the supplier over which Section 171 of the CGST Act did not confer jurisdiction on this Authority. He has also claimed that in the above illustration it appeared that the Respondent was supplying the product BB Cream Miracle Skin Perfector 18 ml for Rs. 69.14 in the period prior to the GST rate reduction and was charging applicable 28% GST on the price of Rs. 69.14. Accordingly, cum-tax price for the supply of such SKU was Rs. 88.50 in the pre-rate reduction period. Based on the calculation methodology adopted by the DGAP, it appeared that the Respondent was required to maintain the base price of Rs. 69.14 and thereafter charge applicable GST of 18%. Accordingly, the ideal cum-tax price as per the DGAP could only be Rs. 81.59. It was the understanding of the Respondent that if he had not reduced the cum-tax price to Rs. 81.59, he could be charged for profiteering under Section 171 of the CGST Act to the extent of Rs. 6.91 (that is, the difference between Rs. 88.50 and ideal cum-tax price of Rs. 81.59). Similarly, if the Respondent had reduced the cum-tax price to Rs. 85/-, allegation of profiteering on such product could have been to the extent of Rs. 3.41 (difference between Rs. 85/- and ideal cum-tax price of Rs. 81.59). In the

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

49. The Respondent has also submitted that if the business profits were also treated as profited amount, the same might amount to 'price control' which was neither intended nor mandated by Section 171 of the CGST Act. The Respondent has further submitted that the computation of aggregate reduction in the amount alleged as profited due to the above error committed by the DGAP based on the weighted average price of products with latest MRP came to Rs. 14,39,46,529/- and the above difference in the pre-rate reduction price and actual sale price was mainly occurring due to the usage of description as one of the basis for comparison of prices. He has also stated that there were SKUs where due to the price of promotional SKU with same description where price was low, due to which excess profiteering has been computed. Price of promotional SKU was always lower than the regular price of a product.

The price of said promotional SKUs could not be considered as comparable to prices of normal SKUs charged post GST rate reduction. After the consumer promotion time period had expired the price of the product returned back to the regular price as a usual business practice. The Respondent has also submitted a list of SKUs on which he was running promotions in the months of October-November 2017 in the Price List submitted vide Annexure-6 attached to his letter dated 18.02.2019 submitted to the DGAP and had also made an averment in this regard in para 5.20 of his submission dated 21.06.2019 that products under consumer promotion schemes must not be used as comparables. He has further claimed 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.

50. The Respondent has also 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 has also reduced the rate of GST charged from his customers from 28% to 18% in the invoices issued to them. The provisions of Section 171 of the CGST Act and rules made thereunder were very clear that such benefit was to be passed on at an entity level and not at an SKU level. While the report of DGAP alleged profiteering at the SKU level, the Respondent had ensured passing of the benefit using various means. The Respondent has also said that he had 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 and stated that when looking from a different angle, the recipients who were his distributors had received the GST rate reduction benefit from

Respondent sometimes slightly more and sometimes slightly less. However, while determining alleged profiteering on the other impacted SKUs, the DGAP has ignored such excess benefit passed on by the Respondent.

51. The Respondent has also contended that the DGAP has selectively applied the Anti-Profiteering provisions in the present case, where the Respondent had passed on benefit to the customers in excess of the required amount. The DGAP has ignored such measures (treating these as zero (0) for profiteering calculations). On the other hand, the DGAP had insisted that where the benefit to the customer was less than what was required amount, regardless of other measures, the differential amount was alleged as profiteered amount. The Government of India itself had objected to the concept of 'zeroing' at the World Trade Organization (WTO). The Respondent has also argued that the DGAP had 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 Respondent has further contended that he has passed on more than required amounts by following means:-

- a. **Higher reduction in per unit price of the goods sold:** There was a flat reduction in the prices of the goods by more than 7.8% which was reflected on the invoice itself. For instance, if the Respondent was selling the goods at Rs. 100 + 28% GST = Rs. 128/- and as per the DGAP's methodology, the commensurate

price should have been Rs. 100 + 18% GST = Rs. 118/-, the Respondent has sold these goods at a price of say Rs. 95 + 18% GST = Rs. 112.1, thereby reducing the price by Rs. 5.9 (118-112.1) more than that the commensurate reduction computed by the DGAP. The amount passed on by this measure alone was Rs. 68,59,12,188/-, considering weighted average price of the products with latest MRPs.

- 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 resulted in a higher price reduction when comparison was made between prices per ml/gm. For instance, if the price of the goods was Rs. 100 (ex-GST) for 100 ml pack (per ml price of Rs. 1), instead of increasing the grammage to only 108.5 ml (with a sale price excluding GST of Rs. 108.5 thereby resulting in per ml price of Rs. 1), the Respondent has increased the grammage to say 110 ml, thereby passing on 1.5 ml (Rs. 1.5 equivalent) in excess of what might be considered as commensurate by the DGAP. Amount passed on by this measure alone was Rs. 56,01,05,432/-, considering weighted average price of products with latest MRPs.
- c. **Price reduction more than required in cases where fiscal incentives have reduced:** The Respondent has claimed that he has suffered reduced realization in cases where the fiscal incentives had reduced on account of reduction in GST rate from 28% to 18%. However, the Respondent has reduced prices of certain supplies more than required after considering the impact of

reduced fiscal incentives. For instance, the Respondent was earlier realizing Rs. 100 from customer + Rs. 2 from Government by way of budgetary support. Although the budgetary support might have reduced to Rs. 0.5 due to GST rate reduction from 28% to 18%, the Respondent did not increase the prices or increased the prices less than Rs. 1.5 - reduction in the fiscal incentives (for instance, say price was increased to Rs. 101/- and no increase was taken to the extent of Rs. 0.5). The amount passed on by this measure alone was Rs. 15,37,84,257/-, considering weighted average price of the products with latest MRPs.

52. The Respondent has also submitted that if a customer was charged Rs. 2/- extra for 1 SKU and was provided a higher than required price reduction of Rs. 3/- for another SKU, as long as the amount on a totality basis had been returned to the customer and had not been charged extra, it should not matter that an extra amount of Rs. 2/- was charged. As long as the customer received the benefit (whether on 1 SKU or another), it could not be construed that the Respondent had profiteered to the extent of Rs. 1/-. Accordingly, the Respondent has submitted that 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 aggregated to Rs. 139,98,01,877/- which should be reduced from the alleged profiteering computation.

53. The Respondent has further submitted that he was having a unit in Baddi, Himachal Pradesh where he was availing the benefit of area-

based exemption under the erstwhile Central Excise regime. The Respondent was also getting goods manufactured through his sub-contractors located in Baddi. Under the above exemption, the Respondent was not required to pay Central Excise Duty on the goods manufactured in such units 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 were 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. The Respondent has also stated that the implementation of the GST w.e.f. 01.07.2017 has resulted in taking away a substantial portion of the tax benefit which was available to the Respondent under the excise regime and a loss of Rs. 74,41,87,041/- in respect of his own manufacturing plant in Baddi had been suffered by him which was computed by comparing the reduced refund available to him under the GST regime (which was 58% of the amount paid in cash, by adopting 90% of sale price as transaction value) with the refund which was available under the pre-GST regime (100% of Excise Duty paid in cash was available as refund/exemption as 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 the Respondent. The Respondent has also suffered loss due to substantial reduction in the benefit available on introduction of GST, for the products manufactured by the sub-contractors. This loss on account of implementation of the GST during the period of investigation was Rs. 38,72,53,979/-. However, the same has been rejected by the DGAP on the ground that the Respondent was entitled to the same proportion of 58% of CGST component paid in

cash as earlier and hence, the amount of refund had not reduced in relative terms. The DGAP had also stated that reduction in the refund could also be possible due to increased utilization of ITC without any factual finding on the same. It was incorrect on the part of the DGAP to have assumed reduction in cash payout and consequently reduced refund due to increased utilization of ITC.

54. He has also argued that due to reduction in the rate of tax from 28% to 18%, there was considerable reduction in the output GST paid by the Respondent. Further, the raw materials had also undergone a reduction in rate of GST from 28% to 18%. The Respondent has also given illustration showing the reduced refunds in absolute terms by comparing the refund available in the pre-reduction period with the refund available in the post-reduction period and claimed that the refund available under the new scheme in the GST regime was restricted to specified percentage of tax paid by cash after utilizing input tax credit. Accordingly, if the tax payout in cash was reduced, the amount of refund allowable also got reduced. He has also submitted that the loss could not be considered in relative terms as there was a clear reduction in refund when compared on a per unit basis.

55. The Respondent has also submitted that in order to negate any impact due to fluctuation in the ITC, he has calculated the refund on a per unit basis by taking the data for a period of 4-5 months each pre- and post GST rate reduction, which was a sufficiently long period to negate any impact of ITC. In fact, in the case of the Respondent, there was only a reduction in the rate of tax on the raw materials and the ITC has been reduced. A reduced ITC in the post-rate reduction period would result in

increased cash outflow and consequently increased refund, which ultimately resulted 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 was only claiming the net loss on account of reduced GST rate. The Respondent has also reworked the quantum of reduced refund solely on account of reduction in the rate of tax from 28% to 18% without considering loss on account of refund restricted to 58% of CGST/29% of IGST instead of his 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% worked out to Rs. 16,75,98,492/-, which should be adjusted while arriving at profiteering, if any.

56. The Respondent has also claimed that with the reduction in GST rates w.e.f. 15.11.2017, the tax payout has been directly reduced, resulting in reduced refund in absolute terms. Hence, the absolute reduction in refund allowable (even though refund was still allowed at the same proportion of 58% of CGST paid in cash) was directly attributable to the 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.

57. The Respondent has also submitted that the DGAP in the course of computation of profiteering has covered certain luxury products sold by the Respondent and that there were certain products/markets/services which were priced based on perception in the market and brand positioning and therefore these products should be excluded from computation of profiteering, if any.

58. He has further submitted that the DGAP vide para 22 of his Report has observed that the profiteered amount of Rs. 2,16,49,61,535 has been arrived at by comparing the customer type-wise average of the base prices of the impugned products sold during the period from 01.10.2017 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 in the aforesaid profiteering amount. The Respondent has stated that while arriving at the total alleged profiteering amount, the DGAP had incorrectly inflated the pre-rate reduction price by adding 18% GST to it and compared it with the actual sale price including 18% GST, without adducing grounds as to why this amount has been added. The Respondent has further stated that such computation was incorrect. Whatever amount was charged as GST by the Respondent, the same has been duly deposited in the Government account. There has been no allegation that the amount termed as excess GST in the Report was not GST per se and that such excess tax has not been paid to the Government. Once it was accepted that such amount was also tax and the public exchequer was not deprived of such sum, the same tax amount could not be demanded again from the Respondent or deposit of such tax amount in Consumer Welfare Fund (CWF) could be ordered. He has also claimed that it was an undisputed fact that the Respondent has charged GST from his customers, over and above the value of goods supplied by him i.e. on ex-tax basis. It was also undisputed that the Respondent has reduced the rate of GST charged from his customers from 28% to 18%, effective from the midnight of 15.11.2017. Therefore, the amount of GST collected by the Respondent from his customers stood paid to the Government

exchequer. He has further stated that assuming, without admitting, that the Respondent has profiteered and GST has been collected thereon and said GST was to be deposited in the CWF then instead of the Respondent, the Government could transfer the amount equivalent to the GST on the profiteered amount to the CWF. He has also submitted that the term 'Profiteering' always had reference to a registered person. It implied that the profiteered amount was retained by the registered person. Therefore, with respect to the alleged excess GST paid by the recipient not retained by the Respondent but promptly paid to the Government as tax (on which there is no dispute), the Respondent could not be alleged to have profiteered. He has further submitted that addition of 18% GST would have been correct if the case of the DGAP had been that the amount has been collected and retained by the Respondent and not deposited with the Government. He has also contended that the amount charged from the recipients as GST which was available as input tax credit to them was only an advance tax paid by the Respondent on behalf of the recipients and did not represent the price for supply of the goods. He has further contended that since the amount collected as GST by the Respondent from the recipients on the alleged profiteering amount has already been deposited with the Government and there was no factual dispute on this aspect, hence addition of 18% GST to calculate the alleged profiteering amount was incorrect. Accordingly, an amount of Rs. 33.02 Crore (Rs. 216.49 Crores * 18/ 118) representing the GST collected and deposited with the Government should be reduced from the alleged profiteering amount.



59. The Respondent has also argued that in the absence of any guidelines issued by this Authority, the Respondent understood that passing of the benefit of GST rate reduction through the above methods was in full compliance of Section 171 of CGST Act. He has also submitted that the word "commensurate reduction" in the Section denoted reduction in the price after taking into account all the factors which impacted pricing of goods and had the legislative intention been otherwise, instead of the word 'commensurate', the word 'equal' or 'equivalent' would have been used in this Section. 'Commensurate' connoted proportionality and adequacy. The law did not prescribe as to how to determine whether a particular amount was commensurate as the legislature was conscious of the fact that pricing of goods was a complex exercise involving numerous factors and the price was based on contract and terms as agreed between the seller and the buyer. The price might be tentative and may get finalized at a later date which might be post supply. The price was not determinable i.e. at the time of supply the price might not be final and it might vary based on a future event. He has also added that there might 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 was finalized based on terms of sale like discounts or price reductions based on schemes and turnover, etc. and to cover such situations, the word 'prices' was used in Section 171. The law has also used the word 'any' before supply of goods and the same has been used to denote singular as against the plural for price. Therefore, for the same supply, existence of tentative and final prices had been recognized and consequently, all post-supply price reductions passed on should be factored in while



examining whether commensurate reduction in prices has taken place or not.

60. He has also stated that commensurate reduction was not restricted to passing of benefit of tax rate reduction in monetary terms which was normally the price. Section 171 did not use the words 'pass on the benefit by reduction in price'. The effect of commensurate reduction in price was increased benefit to the recipient due to tax rate reduction. It should be seen whether the objective of Section 171 was being achieved or not. If the recipient got the benefit in monetary or non-monetary form proportionate to tax rate reduction, Section 171 was complied with. Price in this regard was the consideration paid or payable for the supply and as per Indian Contract Act, 1872, consideration included any act or abstinence. While consideration for supply was generally measured in monetary terms, the same could also include non-monetary elements. Thus, price was not only what was reflected in the invoice. The monetary component might already be factored in the invoice price. However, the parties could also choose to settle the consideration partly in non-monetary terms. In the present case, the Respondent has reduced the price by way of reduction in the price itself post-supply and also by way of additional quantity and by these methods, the Respondent has ensured full and total compliance with Section 171.

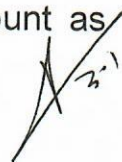
61. The Respondent has also claimed that by the use of the word 'commensurate', cost of raw material, packing material, overheads and other such elements involving increase in cost was required to be factored in while examining whether Section 171 was applicable or not. Further, increase in the quantity or grammage of goods supplied should

also be considered while considering whether the benefit passed on was commensurate or not. It was for this such purpose that the word 'commensurate' has been used in Section 171. The word 'any' has been used twice in Section 171 (1) which would mean tax reduction could be any percentage and it could be ad valorem, specific rate or combination of both i.e. any type of reduction. Any supply did not necessarily mean SKU level supply and at the most it may be interpreted as goods classified under a particular tariff heading / HSN code. He has also mentioned that Section 171 used the words 'registered person' and when the same were read along with 'supply', it denoted that Section 171 was applicable to the persons registered under CGST Act. The Respondent has not obtained registration SKU wise and the form GST REG-01 which was specified under the CGST Rules for obtaining registration sought details of the goods supplied and the words used were 'Please specify top 5 goods' and the table thereunder sought description of goods along with HSN code. He has claimed that when the registration was obtained based on the goods supplied which were classifiable under particular tariff headings, applying Section 171, SKU wise was neither legally sanctioned nor correct and that in place of SKU wise calculation of profiteering, HSN code could be considered in the light of above submissions for the purpose of calculating alleged profiteering.

62. The Respondent has also submitted that he has not undertaken any activity which tantamounted to 'profiteering'. The interpretation given to Section 171 and rules made thereunder, by the DGAP without considering the 'marginal notes' to Section 171 and heading of Chapter XV of CGST Rules, was untenable and not correct. He has also

maintained that the text of Section 171 did not use the term 'profiteering'. In order to understand the scope of Section 171, it was pertinent to understand the meaning of the term 'profiteering' which had been used in the marginal notes.

63. He has also submitted that he has not violated Section 171 and the rules made thereunder and the allegation of profiteering consequent to GST rate reduction was not sustainable and in the unlikely event of this Authority holding that some amount had been profited by him, then the same would be refunded by the Respondent to his recipients. This was without prejudice to the right of the Respondent to challenge the proceedings before higher forums. He has also claimed that Rule 133 of CGST Rules provided that where this Authority determined that a registered person has not passed on the benefit of the reduction in the rate of tax, it may order return to the recipient of an amount equivalent to the amount not passed on. It further provided for deposit of such amount in the CWF constituted under Section 57 of CGST Act where the eligible persons did not claim return of the amount or where such persons were not identifiable. He has further claimed that Rule 133 mandated that any amount held as profited should be returned to the recipient wherever such person was identifiable. This Authority could not direct amount held as profited to be deposited in the CWF if the recipient was identifiable. The Respondent has submitted that the recipients of the Respondent were identifiable as they were his distributors, modern retailers and e-commerce customers etc. and therefore, in the unlikelihood of this Authority holding any amount as



profiteered, appropriate orders might be passed to enable the Respondent to return such amount to his recipients and not the CWF.

64. The Respondent has also submitted that at the time of import or manufacture, the importer or manufacturer was under obligation to comply with various laws. Legal Metrology Act, 2009, cast obligation and placed a ban that the MRP could not be altered. While revision of MRP by affixing sticker was restricted in case of increase in such MRP, in the case of reduction in MRP, the law provided a window. He has also submitted that the CGST Act and the Rules made thereunder did not deal with affixation of MRP. Affixation of stickers with revised MRP and allied compliances were provided under the Legal Metrology Act, 2009 and the Legal Metrology (Packaged Commodities) Rules 2011. As per the provisions of Rule 6 (3) of the above Rules in respect of reduction in the MRP, it was permissible to affix sticker with revised lower MRP and ensure that the revised MRP did not cover the MRP declared earlier. The said rule provided discretion to the supplier regarding affixation of sticker as the words used were 'may be affixed'. Therefore, he has stated that in case of reduction in MRP, there was no compulsion to affix sticker with revised MRP. In terms of Rule 33 (1) of the aforesaid Rules, the Central Government could relax any of the conditions in the rules. In exercise of the said powers, the Legal Metrology Division of the Department of Consumer Affairs had 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. The Respondent has also submitted that Rule 6 (3) dealt with the affixation of sticker with revised lower MRP without reference to a person who was empowered in this regard. The only condition was that such sticker should not cover the MRP declaration already made by the manufacturer or packer. Therefore, it could be said that such sticker could be affixed also by persons like distributors, dealers or retailers. The law recognized that the product might be anywhere in the distribution channel and all such persons like dealers and retailers may affix sticker to show reduced MRP. In the 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 had been provided the discretion to affix stickers as per Rule 6 (3). In respect of reduction of MRP on the goods lying with the dealers and others, law had taken into account practical considerations. 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. The manufacturers were not liable to affix stickers with reduced MRPs when GST rate was reduced in respect of goods lying with others. Accordingly, he has submitted that a commensurate reduction in price of supply of goods was the only mandate under section 171 of the CGST Act and affixing of stickers with reduced MRP was not a mandatory provision but a discretion provided in the Legal Metrology Act and the rules framed thereunder.



65. The Respondent has also argued that the CGST Act or this Authority's Methodology and Procedure, 2018 did not prescribe any procedure and mechanism for determination and calculation of profiteering which amounted to violation of principles of natural justice. The 'Procedure and Methodology' issued on 19.7.2018 by this Authority only provided the procedure pertaining to the investigation and hearing. He has further argued that the most vital element under Section 171 of the CGST Act was to determine whether benefit of reduction of tax rate or availability of input tax credit has been passed on by the registered person or not. This could be ascertained only by computing the impact of difference in the rate of tax or credit availability. The said impact could be ascertained product wise, service wise and entity wise etc. However, the said section or rules made there under or procedure laid down by this Authority were completely silent on this aspect of calculation/computation. In the absence of any framework or guidelines laid down by Section 171 or the Rules made thereunder, different approaches might be followed by this Authority and the DGAP. Such unfettered discretion would lead to uncertainty, arbitrariness and whimsical approach on case to case basis. He has also stated that in the absence of any methodology or guidelines for computing profiteering, the registered persons were following different methods for passing on the benefit of reduction in the tax rate or benefit of input tax credit to the recipients as per their own understanding. The Respondent has also considered that the profiteering would be computed on the legal entity basis and accordingly he has passed on the benefit to his customers. He has further stated that if the methodology or the guidelines would have been prescribed, then the Respondent would

have passed on the benefit to his customers according to such methodology or guidelines and the present proceedings would have been avoided.

66. The Respondent has also pleaded that the present proceedings had been initiated in violation of the principles of natural justice as show cause notice has not been issued to the Respondent proposing the action to be taken by this Authority. Moreover, the investigation was initiated on the basis of the reference of the Secretary of this Authority to the Standing Committee, which has unilaterally misinterpreted the submissions made by the Respondent in his communications to erroneously conclude admission of profiteering by the Respondent. The Respondent was not given any chance to clarify or explain his communication. He has also submitted that the Report consequent to the investigation by DGAP was neither a show cause notice nor could it be treated as substitute to a show cause notice. However, from the hearing notice received by the Respondent, it appeared that this Authority has considered the above Report of the DGAP as a show cause notice, which was not correct. He has submitted that this Authority should have issued a show cause notice before examining the alleged profiteering. Such show cause notice should have contained the following:-

- i. description of the goods and services in respect of which the proceedings have been initiated;
- ii. grounds / reasons on the basis of which profiteering has been alleged;
- iii. issues proposed to be examined by this Authority and



iv. action proposed to be taken by this Authority against the Respondent invoking applicable statutory provisions.

67. He has also submitted that from an examination of the methodology adopted by the DGAP in arriving at the base price, it appeared that while working on the excel files the DGAP has erroneously used the excel formula "vlookup" from base price master. As a result of this excel formula error, the outcome was the first average price used from base price master instead of weighted average price at description level. As a result, the value used by the DGAP was erroneously reflected as the first selling price from the base price master. While for most of the line items of sales where DGAP has computed profiteering as per Annexure-15 of DGAP's Report he has diligently followed the sequence but there were line items where the said sequence has not been followed, leading to inconsistency in the steps actually specified by the DGAP in his Report vis-à-vis the steps actually followed. For instance, the DGAP has specified that in Step 2, he has used the average price from 01.10.2017 to 14.11.2017 based on the description and in Step 3, he has used the average price from 01.09.2017 to 30.09.2017 based on product code. However, the Respondent has noticed that for few line items, while the price as per Step 2 (i.e. average at description level from 01.10.2017 to 14.11.2017) was available, the DGAP has gone to Step 3 and adopted the price as per 01.09.2017 to 30.09.2017 product code. He has also submitted that in order to align the approach as specified by the DGAP in his Report with the actual calculations made in Annexure-15 rectification of these line items was required, which could lead to reduction in the alleged profiteering computation.

Similarly, there were other inconsistencies wherein while the price was available in Step 2 (01.10.2017 to 14.11.2017 product description), the DGAP has adopted price as per Step 4 (01.09.2017 to 30.09.2017 product description). Further, in some line items, the DGAP has adopted price as per Step 5 - Comparable Base Code Price (01.10.2017 to 14.11.2017) whereas the price as per Step 2 itself was available. These line items with inconsistencies could be identified in each of the 35 excel sheets by filtering following line items which showed difference of Rs. 4,80,88,937/- in the profiteered amount. The DGAP has in his Step 5 and 6 identified certain products as comparable for computing profiteering without taking any inputs from the Respondent. For instance, in row number 131216 of 12. Gujrat_GT file, it could be seen that the Respondent has sold product GN MEN Acnofight FW 50 ml with product code SYMAF050-70 at a per unit price of Rs. 61.93 (excluding GST). Since the said product code or sale of that description was not available in the pre-rate reduction period, the DGAP has mapped product code SYMAF050-00 (having product description AcnoFight Facewash 50 ml) as comparable whose pre-reduction price was Rs. 53.92 p. u. (excluding GST) and accordingly computed a profiteering of Rs. 8.01 p. u. (excluding GST) or Rs. 9.45 p. u. including GST. He has also claimed that without getting into any dispute as to the correctness of using product SYMAF050-00 (having product description AcnoFight Facewash 50 ml) as the comparable for determining profiteering on the sale of product code SYMAF050-70, if the said product code SYMAF050-00 having product description AcnoFight Facewash 50 ml was 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 comparables and accordingly, the average prices of all the codes having same comparable description must be considered, instead of considering the price of 1 product code alone. The reduction in alleged profiteering on account of this factor alone would be Rs. 5.19 Crore which could be identified in each of the 35 excel sheets.

68. The Respondent has also mapped the data of product code creation against each of the line items in the pre-rate reduction pivot provided by the DGAP and took an example of the product with description GAR COL NAT SHADE 1 and claimed that the latest product with the description GAR COL NAT SHADE 1 which came to be sold by the Respondent was CNCFR100-DA which had a price of Rs. 123.08 p. u. He has also submitted that this was the price which was the latest prevailing price of the Respondent and not the prices of Rs. 113.98 or Rs. 117.23 which were prevailing for earlier SKUs which had become remnant and were being sold only till the time stocks lasted. He has further submitted that this price of Rs. 123.08 was the price which the Respondent intended to recover from his customers and accordingly, instead of adopting a weighted average of all the products with same description, the latest price prevailing in the pre-rate reduction period should be adopted as the comparable price. In fact, in the above example, while the weighted average was Rs. 123.44 p. u., the latest price was Rs. 123.08 p. u. and accordingly, the latest price and not the weighted average should be adopted when comparison was made based on the description of the product, including comparable product code, instead of adopting the weighted average price. Alternatively, he

has suggested that instead of adopting the weighted average or the latest price, the weighted average price of all products with latest MRPs should be considered as comparable price. The price prevalent just before the tax rate reduction was required to be compared with the post-rate reduction price. In the alternative, weighted average of latest prices, should have been taken into account. He has also claimed that the practice adopted by the DGAP was not fair as hunting for the least price and using the same as base price so that the difference was maximum and the alleged profiteering amounts got inflated, was neither provided in the law nor was in consonance with the anti-profiteering principles. In all the transactions subjected to scrutiny by the DGAP involving thousands of SKUs with supplies made over 18 months, such error in reckoning base prices has crept in and the same was required to be corrected which would result in substantial reduction of alleged profiteering amounting of 40.82 Crore and 41.67 Crore respectively.

69. The Respondent has also argued that during the normal course of his business he has issued Credit Notes on account of return of goods from his recipients or on account of incorrect invoicing. In respect of supplies made after 14.11.2017 there had been cases of Credit Notes being issued by the Respondent. On perusal of computation made by the DGAP in the 35 files, he has observed that for some line items of invoices for which Credit Notes had been issued, the DGAP has not computed profiteering whereas for some line items, the DGAP had gone on to compute profiteering. He has also cited the instance of such computation in file name 27. Punjab_other than GT and contended that once the goods were returned / incorrect invoicing was rectified, the

original invoice value receivable from customer got reduced to the extent Credit Note had been issued. Accordingly, he has claimed that no profiteering should be computed in respect of invoices to the extent Credit Note had been issued for the same. The Respondent has identified the original invoices pertaining to each of the Credit Notes and also the profiteering computed by the DGAP in respect of invoices to the extent of Credit Notes issued for the same and claimed that an amount of Rs. 65,20,961/- should be reduced from the total alleged profiteering.

70. He has also submitted that the DGAP has computed profiteering in respect of some line items of sales not impacted by the reduction in the rate of GST w.e.f. 15.11.2017. In respect of these products namely Hair Oil (HSN: 33059011) and Brushes (HSN: 96033020), the rate of GST prior to 15.11.2017 was 18% and the same continued thereafter and accordingly, there was no reduction in the rate of GST from 28% to 18% for these products. However, the DGAP has gone on to compute profiteering in respect of such products amounting to Rs. 14,45,267/- which should be reduced from the profiteered amount. He has also submitted that in respect of one line item of sale from Maharashtra to J & K, the quantity was incorrectly mapped as 0.07 instead of 432, which has led to alleged profiteering computation of Rs. 1,69,308/- whereas the actual sale amount including GST itself was Rs. 1,69,335/-, which would result into reduction of the amount of profiteering by Rs. 1,63,884/-.

71. The above submissions of the Respondent were sent to the DGAP for clarifications and the DGAP vide his Reports dated 11.12.2019 and

23.12.2019 has replied to the above submissions of the Respondent which has been mentioned in the subsequent paras.

72. In respect of the period of Investigation having not been prescribed either in the Central Goods and Services Tax Act, 2017 nor in the corresponding Rules/Notifications the DGAP has stated that he had received the reference from the Standing Committee on Anti-profiteering on 07.01.2019 to investigate the matter and hence 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 which has already been stated in para-6 of his Report dated 05.07.2019.
73. With regard to incorrect quantity in 1 line item of Sale (Annexure 1 & 4 in the CD submitted on 25.10.2019) he has stated that the error has been rectified. The DGAP has also claimed that his Report dated 05.07.2019 had been prepared on the basis of data and information submitted by the Respondent during the course of investigation. Vide letter dated 21.06.2019, the Respondent had submitted the details of outward taxable supplies containing *Inter-alia* details of invoice No. MH1814006635 dated 22.06.2018 consisting 0.07 quantity and having base price of Rs. 1,43,504.08/- which was duly considered by him during the Investigation. As the quantity has been rectified to 432 instead of 0.07, the profiteering for that transaction has been reduced to Rs. 5,426/-.
74. On the issue of benefits passed on to recipients by way of price reduction post-supply (discounts/ other benefits) the DGAP has submitted that provisions contained in Section 171 of the Central Goods and Services Tax Act, 2017 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. It was the Respondent's own business decision to extend the period of consumer promotion schemes, the cost of which could not be set off against the benefit that the Respondent ought to have passed on to his recipients on account of GST rate reduction w.e.f. 15.11.2017. He has also stated that he had examined some sample documents of Credit Notes which revealed that these were invoices raised by the Respondent's trade partners for provision of services like advertising, sales promotion, sponsorship and 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 had mentioned an amount of Rs. 64,90,000/- (Base Price: Rs. 55,00,000/- plus 18% Rs. 9,90,000/-) against the Invoice raised by M/s. Nykaa E-Retail Pvt. Ltd. for the Advertising Services for the month of January, 2017 and hence, the claim of the Respondent that the above Credit Note was issued on account of passing of benefit of reduction in the rate of tax which was absolutely incorrect and therefore denied.

75. On the issue of impact of Customs Duty Increase on the pricing the DGAP has submitted that the concern of the Respondent has been addressed in Para 18 of his Report dated 05.07.2019.

76. The DGAP has also submitted that the Respondent's claim that the business profits had also been treated as profiteered amount was not correct as the profiteered amount of each product had been calculated with reference to a base price which included the profit margin, if any on any product on the basis of the data provided by the Respondent.

77. On the issue of not considering the higher benefit passed on in respect of certain SKUs and applying 'zeroing methodology' the DGAP has submitted that in terms of Section 171 of the Central Goods and Services Tax Act, 2017 which governed the Anti-Profiteering provisions under the GST reads as *"Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."* Thus, the legal requirement was abundantly clear that in the event of a benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in prices of the goods or services. Such reduction could obviously only be in absolute terms such that the final price payable by a consumer must get reduced. This was the legally prescribed mechanism for passing on the benefit of ITC or reduction in the rate of tax under the GST regime to the consumers. Moreover, it was clear that the said Section 171 simply did not provide a supplier of the goods or services any other means of passing on the benefit of ITC or reduction in the rate of tax to the consumers.

78. The issue of loss due to reduced fiscal incentives under the budgetary support scheme has been addressed by the DGAP by stating that the concern raised by the Respondent has duly been addressed in Para 19 of his Report dated 05.07.2019.

79. The Respondent has also claimed that profiteering should not be computed for luxury products. In this regard the DGAP has submitted that Section 171 of the Central Goods and Services Tax Act did not make any differentiation between the necessity and the luxury products and his investigation Report has covered all the products which were impacted by the GST rate reduction w.e.f. 15.11.2017 which attracted

the provisions of Section 171 of the Central Goods and Services Tax Act, 2017 read with Chapter XV of the Rules as they were to be treated as supply of goods by the Respondent. The transactions excluded by him were addressed in para 20 of his Report dated 05.07.2019.

80. The Respondent has alleged that the profiteered amount has been incorrectly inflated in the Report by adding GST. The DGAP has stated that the above claim of the Respondent was contradictory to the submissions made by him wherein it has been submitted that the base price had been calculated by excluding the applicable GST. The DGAP has also submitted that Section 171 of the CGST Act, 2017 and Chapter XV of the CGST Rules, 2017, required 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 included both, the base price and the tax paid on it. If any supplier had 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 CWF, regardless of whether such extra tax collected from the recipient had been deposited in the Government account or not. Besides, any extra tax returned to the recipients by the Respondent by issuing Credit Notes could be declared in the return filed by him 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.

81. The Respondent has also stated that the interpretation of Section 171 of CGST Act made by the DGAP was not correct. The DGAP in reply has

stated that Section 171 of the CGST Act, 2017 was very clear according to which benefit commensurate to the amount of reduction in the rate of 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" was also a synonym of the word "commensurate" and the intention of the law was 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 that 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 which could not be applied on suppliers who were not registered under the GST Act, and it was clear from the word "recipient" (in singular) that the benefit has to be passed to 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 was very clear according to which the benefit of reduction in the rate of tax has to be passed on to each recipient on every supply. Thus, there was no scope for interpretation of the marginal notes.

82. On the contention of the Respondent that the profiteered amount could be refunded to his distributors, the DGAP has submitted that the benefit must be passed on to the recipients who had borne the incidence of such amount i.e. the end customers. In the present case the recipients of the Respondent were the re-sellers who should have passed on the

burden of such excess amount collected from them by the Respondent to the end customers.

83. In reply to the contention of the Respondent that the manufacturer was not under legal obligation to affix stickers for change of MRP on the goods lying in the distribution chain the DGAP has contended that 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 15.11.2017 and not on the goods lying in the distribution chain.

84. In response to the claim of the Respondent that no methodology for calculation of profiteering has been prescribed the DGAP has stated that 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 was abundantly clear that in the event of a benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in *prices* of the *any supply of goods or services*. Therefore, the Respondent was under legal obligation to pass on the benefit. Anti-profiteering provisions were for the benefit of the recipients and each recipient must get benefit of reduction in the rate of tax or increase in the ITC on each and every supply of goods or services or both. Therefore, he was justified in applying the provisions of anti-profiteering at Product/SKUs level.

85. The Respondent has also stated that the DGAP has not applied 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.)): In this regard, the DGAP has submitted that

he 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 the post-rate reduction period. However, in case one product having same description was sold in multiple product code, then he had adopted the average base price available at first place in the same product.

86. The Respondent has also contended that instead of taking average price at the 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, the 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 was adopted or by Rs. 30,51,84,398/- in case approach (c) was adopted.

87. In this regard, the DGAP has submitted that the Respondent had sold some products with same description in multiple product codes with different MRPs. However, these MRPs were prevailing in the pre-rate reduction period and were not obsolete. For this the DGAP has taken an example of the product with description "MAJIREL (NEW) SHADE

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NO. 4", for General Trade Channel, the details of which are furnished in the table given 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

88. In the post rate reduction period, the DGAP had 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 and this product was sold post-rate reduction period with MRP of Rs. 310/- only and accordingly he has determined profiteering of Rs. 27,72,970/- (for the state Delhi- General Trade). However, Respondent has 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/- and profiteering should be only Rs. 1,34,191/- [Rs. 27,72,970/- (-) Rs. 26,38,779/-].

89. The DGAP has claimed that the above submission of the Respondent did not seem to be appropriate as the Respondent had sold 73,906 units @ Rs. 310/- MRP and only 30,465 units @ Rs. 335/- MRP during the pre-rate reduction period, which showed that both the MRPs were in market and neither was obsolete. The DGAP has submitted that if this Authority decided, it might consider approach (a) where Weighted Average Base Price of the product having same description with all the MRPs was 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/- and the revised profiteering will be Rs. 20,02,733/- [Rs. 27,72,970/- (-) Rs. 7,70,237] for the State- Delhi_General Trade, the DGAP has claimed.

90. The DGAP has also contended that similarly, approach (b) did not hold good as adopting average price of the product with latest MRP was not appropriate when old/other MRPs were also prevailing in pre-rate reduction period. The DGAP has taken another example of the product with description "MAJIREL (NEW) SHADE NO.3", for General Trade Channel, the details of which are furnished in the 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

91. He has stated that in the post rate reduction period, he had adopted the pre-rate reduction base price as Rs. 220.83/- (available at first place) and determined the profiteering for product sold in the post-rate reduction period as Rs. 28,81,815/- (for the state Delhi- General Trade). However, the Respondent has 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/- and profiteering should be only Rs 2,64,303/- [Rs. 28,81,815/- (-) Rs. 26,17,512/-]. The DGAP has claimed that the above submission of the Respondent did not seem to be appropriate as the Respondent had sold 1,01,851 units @ Rs. 310/- MRP and only 23,106 units @ Rs. 335/- MRP during the pre-rate reduction period which showed that both the MRPs were in the market and neither was obsolete. However, the DGAP has submitted that if this Authority decided, it might consider approach (a) where Weighted Average Base Price of the product having same description with all the MRPs could 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 would reduce by Rs. 4,83,997/- and the revised profiteering would be Rs. 23,97,818/- [Rs. 28,18,815/- (-) Rs. 4,83,997/-] for the State- Delhi_General Trade. He has further submitted that in case, approach (a) was to be considered, the total profiteering amount might get reduced by Rs. 19,75,12,265/- as against the amount of Rs. 30,51,84,398/- as claimed by the Respondent, for approach (c).

92. The Respondent has also suggested rectification of inconsistency in the sequence followed for some line items. The DGAP has stated in this regard that the methodology adopted by him had been explained in para 22 of his Report dated 05.07.2019 read with "Summary Sheet" of Annexure-15 of the said Report and he has diligently followed the same without any inconsistency. However, due to adoption of the average base price available at the first place in the same product

(having multiple product codes), if the price was not obtained at Step-2 then, he had gone for Step-3 and so on. The DGAP has further submitted that the claims made by the Respondent before this Authority have merit and might be considered. The DGAP has further stated that to address the issue of adopting first line item or following incorrect sequence for few line items identified by the Respondent, this Authority as discussed above, might consider 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 has been suggested. He has also submitted that the total profiteering might further reduce by an amount of Rs. 4,80,88,937/- as against Rs. 5,28,32,173/- as claimed by the Respondent, for approach (c).

93. On the issue of adoption of average price of description wherever comparable product code was used, the DGAP has stated that as already discussed in detail above, in case this Authority decided, the DGAP might consider approach (a) where Weighted Average Base Price of the product having same description with all the MRPs was to be adopted for the pre-rate reduction base price. The total profiteering might further reduce by an amount of Rs. 5,18,75,235/- as against Rs. 5,72,41,346/- as claimed by the Respondent, for approach (c).

94. On the claim of the Respondent regarding calculation of the profiteering in respect of the line items for which credit notes have been issued, the DGAP has stated that he had excluded all the transactions for which Credit Notes were issued for sales return by mapping the Credit Notes with the original sale invoices. However, for certain transactions as highlighted by the Respondent, the DGAP has accepted that he

had inadvertently computed the profiteering amounting of Rs. 65,20,961/- for the transactions for which Credit Notes were issued later on due to non-availability of linkage between them. However, the same has been verified and this Authority might like to consider the same.

95. The Respondent has also alleged computation of profiteering on the sales not impacted by rate reduction. In this regard, the DGAP has submitted that in principle, he had not determined and computed profiteering for the items not impacted by Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017 (Kajal & Hair Oil). However, the he had inadvertently included certain transactions not impacted by the rate reduction notification and computed profiteering amounting to Rs. 14,45,267/- as the Respondent had not classified them as "Non-Impacted" transactions in his submission made during the investigation. However, the same had been verified and this Authority might like to consider the same.

96. The DGAP has further stated that on re-examination of all the 35 sheets as enclosed in the Respondent's submissions, he has observed that, inadvertently, he had adopted pre-rate reduction MRP instead of pre-rate reduction base price from the Price List for a few transactions in the State of Delhi for Modern Trade Channel and compared it with the actual selling price and reported nil profiteering for such transactions. However, on correcting the error, profiteering to the tune of Rs. 46,02,070/- (after adjusting correct price adopted from Respondent's Price List for some line items) would be added to earlier reported profiteering amount. Although, the Respondent has identified such

inadvertent mistake he had not pointed it out in his submission before this Authority.

97. The DGAP has further stated that on the basis of the above clarifications, if this Authority decided any or all the above submissions, the profiteering reported in his office Report dated 05.07.2019 might be revised as is given in the table below:-

Table (Amount in Rs.)

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

98 We have carefully considered all the Reports filed by the DGAP, the submissions of the Respondent and the other material placed on record and it is revealed that the DGAP vide his Report dated 05.07.2019 has computed the profiteered amount as Rs. 2,16,49,61,535/- which has been shown at Sr. No. 1 of the above Table given in his Report dated 23.12.2019. However, vide Sr. No. 2 of the above Table, the DGAP has submitted that an amount of Rs. 19,75,12,265/- can be reduced from the above profiteered amount on account of rectification of the non-

averaging of the 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.

99. Vide Sr. No. 3 of the above Table the 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. This Authority cannot pass any order on the above issue unless all the facts are placed before it by the DGAP alongwith the reasons why this inconsistency has taken place.

100. The DGAP has also stated vide Sr. No. 4 of the above Table 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.

101. It is clear from the above narration of the facts that the DGAP has left the rectification of the above claims on this Authority however; no grounds have been mentioned on the basis of which this Authority can decide why the above recommendations of the DGAP should be accepted. In the absence of clear cut findings on the above issue this Authority cannot pass reasoned and just order.

102. In view of the above the Reports dated 05.07.2019 and 23.12.2019 furnished by the DGAP cannot be accepted and he is directed to cause further investigation on the above issues and furnish fresh Report in terms of Rule 133 (4) of the CGST Rules, 2017.

103. Perusal of the Respondent's submissions also shows that he has not furnished the following details pertaining to his claim of having passed on the benefit of rate reduction by increasing the grammage/volume of his products:-

(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

Accordingly, the Respondent is directed to supply the above information to the DGAP within a period of 30 days from the date of this order in terms of the Order dated 20/2018 passed by this Authority on 24.12.2018 in the case of M/s Hindustan Unilever Limited. The above information shall be examined by the DGAP and his findings shall be included in the fresh Report to be filed by him in

consequence of this Oder. The Respondent is further directed to supply the required information and extend all cooperation to the DGAP during the course of the fresh investigation.

104. The DGAP is also directed to supply detailed list of the SKUs impacted by the rate reduction w.e.f. 15.11.2017 along with the pre rate reduction base price and the commensurate reduced base price post rate reduction with percentage of increase/reduction made by the Respondent in respect of such SKU.

105. A copy of the submissions filed by the Respondent on 02.01.2020 be also supplied to the DGAP for including it in his Report.

106. A copy of this order be supplied to the DGAP and the Respondent.

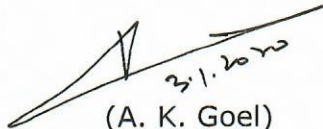


Sd/-
(J. C. Chauhan)
Member(Technical)

Sd/-
(B. N. Sharma)
Chairman

Sd/-
(Amand Shah)
Member(Technical)

Certified Copy


21.01.2020

(A. K. Goel)
Secretary, NAA

F. No. 22011/NAA/64/Loreal/2019/105

Dated: 03.01.2020

1. M/s L'Oreal India Pvt. Ltd., A-Wing, 8th Floor, Marathon Futurex, N.M.Joshi Marg, Lower Parel, Mumbai - 400013, to attend the hearing on the stipulated date & time.
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.

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