

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

I.O. No. : 09/2020
Date of Institution : 25.09.2019
Date of Order : 17.02.2020

In the matter of:

1. Shri Samit Chakraborty, 14-B, Shyam Sunder Pally, Main Road
(Shankuntala Park), Kolkata -700061.
2. 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.

Applicants

Versus

M/s Cloudbtail India Pvt. Ltd., C/o Kuehne Nagel Pvt. Ltd., Dag No.8-
31, Dag No. 414-425 L R, Khatian No. 871, 798, Mouza-Shimla null
Satghara, JL No. 17-18, Shimla, Sreerampore, Hooghly, West
Bengal-712203.

Respondent

Quorum:-

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

Present:-

1. None for the Applicants.
2. Sh. V. Lakshmikumaran, Sh. Anshul Mathur, Smt. Arushi Jain and Smt. Nitum Jain, Advocates for the Respondent.

ORDER

1. This Report dated 24.09.2019 has been received from the Director General of Anti-Profiteering (DGAP) after a detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that the Standing Committee on Anti-profiteering vide its communication dated 11.03.2019 had requested the DGAP to conduct detailed investigation as per Rule 129 (1) of the above Rules on the allegation made by the Applicant No. 1 that the Respondent had not passed on the benefit of tax reduction from 12% to Nil which was notified vide Notification No.19/2018-Central Tax (Rate) dated 26.07.2018, in respect of the supply of "Stayfree Sanitary Napkins" w.e.f. 27.07.2018.

2. The DGAP had issued Notice under Rule 129 (3) of the CGST Rules, 2017 on 10.04.2019 to the Respondent, to submit his reply as to whether he admitted that the benefit of reduction in the GST rate w.e.f.

27.07.2018, had not been passed on by him to his recipients by way of commensurate reduction in prices and if so, to *suo moto* determine the quantum thereof and indicate the same in his reply to the Notice as well as furnish all documents in support of his reply. The Respondent was also afforded an opportunity to inspect the non-confidential evidence/information which formed the basis of the said Notice, during the period from 15.04.2019 to 17.04.2019, which the Respondent had availed on 22.04.2019.

3. The DGAP has mentioned that the time period of the present investigation was from 01.07.2018 to 31.03.2019 and he had also sought extension of the time limit to complete the investigation from this Authority under Rule 129 (6) which was granted to him.
4. The DGAP has stated that the Respondent has replied to the above Notice vide his letters dated 17.04.2019, 18.04.2019, 03.05.2019, 05.07.2019, 09.07.2019, 18.09.2019 and 20.09.2019 and raised objections against the investigation launched by the DGAP.
5. The DGAP has also stated that the Respondent has submitted the following documents/information:-
 - a. Invoice-wise details of outward taxable supplies of sanitary napkins during the period from 01.07.2018 to 31.03.2019.
 - b. Sample invoices, pre and post 27.07.2018.
 - c. GSTR-1 and GSTR-3B Returns for the period from 01.07.2018 to 31.03.2019.
 - d. Outward supply data of closing stock.
 - e. ASIN-wise details of credit reversal in respect of closing stock.

6. The DGAP has further stated that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on the

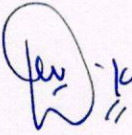

“Sanitary towels (pads) or sanitary napkins, tampons” from 12% to Nil w.e.f. 27.07.2018, vide S. No. 146A of the Schedule attached to Notification No. 19/2018-Central Tax (Rate) dated 26.07.2018 which has also not been contested by the Respondent.

7. The DGAP has also submitted that the Respondent has contended that in the case of M/s Unicharm India Pvt. Ltd. & M/s Apollo Hospitals Enterprise Ltd., the DGAP had limited the investigation of Apollo Hospitals Enterprise Ltd. (being retailer), to the closing stock of Sanitary Napkins available as on 26.07.2018 and in his case also as the Respondent was also a retailer, the investigation should be limited to the stock held as on 26.07.2018 and sold thereafter by him. The DGAP has further submitted that in the above case the profiteering was calculated at the manufacturer level i.e. at the level of M/s Unicharm India Pvt. Ltd. which was the supplier of the subject goods and profiteering on the closing stock of the retailer i.e. M/s Apollo Hospitals Enterprise Ltd. was also calculated. But, in the instant case, the Respondent being a retailer of various manufacturers, the entire profiteering at his level was required to be calculated as in the instant case, no manufacturer has been made co-Respondent as was done in the above case. Therefore, the DGAP has claimed that the facts and circumstances of the case of M/s Unicharm India Pvt. Ltd. & M/s Apollo Hospitals Enterprise Ltd. were entirely different from the instant case.

8. The DGAP has also contended that the discount offered by the Respondent was pursuant to a discretionary business strategy wherein the Respondent had willingly cut into his profit margins to offer appropriate discounts time and again. Section 15 (3) (a) of the CGST Act, 2017 provided that the value of the supply shall not include any

discount which was given before or at the time of the supply if such discount had been duly recorded in the invoice issued in respect of such supply. Thus, the GST was chargeable on actual transaction value after excluding any discount and therefore, for the purpose of computation of profiteering MRP could not be considered. The actual transaction value was the correct amount which was to be considered to determine whether any reduction in the rate of tax on any supply of goods or services has been passed on to the recipients by way of commensurate reduction in prices. He has further contended that the MRP was the maximum price at which an item might be sold but it was not the actual sale price. Therefore, for the purpose of determination of profiteering in the instant case, actual selling price or discounted price instead of MRP has been considered in accordance with the provisions of the Central Goods and Services Tax Act, 2017 and the Rules made thereunder.

9. The DGAP has also claimed that the Respondent has argued that this Authority in the case of M/s Flipkart Internet Pvt. Ltd., notably in the context of sales made online over e-commerce platforms as was the Respondent's case, has held that the withdrawal of discount did not amount to profiteering as the same was offered from the supplier's profit margin. Thus, since the Respondent never went beyond the reduced MRP affixed by the manufacturer, it could not be said that he has profited under Section 171 of the CGST Act merely because he chose to offer a lower discount at the time of second purchase by the

 Applicant No. 1. In this context The DGAP has observed that the  legislative intent behind Section 171 of the CGST Act, 2017 was to pass on the benefit of tax rate reduction by way of commensurate reduction in prices. Mere charging of GST at the reduced/nil rate was not sufficient to

pass on the benefit of tax rate reduction. Even when the GST was nil, the benefit which ought to have been passed on to the recipient, could still be denied by increasing the base price. He has further stated that the discounts were offered on the MRP which was the maximum price at which the goods could be sold in retail. The value of transaction between the manufacturer and the wholesaler or the wholesaler and the retailer would invariably be less than the MRP. Therefore, regardless of whether the MRP was printed/marked on the product or not, the pre and post-tax rate reduction transaction values were to be compared to determine the amount of profiteering. The DGAP has also claimed that in the case of closing stock carrying higher MRP, everybody in the supply chain was legally required to pass on the benefit of tax rate reduction by maintaining the same base prices or increasing the base prices commensurate with the denial of input tax credit and charging GST at the reduced/nil rate on such base prices. He has further claimed that every supplier of goods and services was free to increase the prices of his supplies depending upon the various components affecting the cost of production/supplies. But as per the provisions of the Section 171 of the CGST Act, 2017, no supplier could increase the base prices of the products overnight in such a manner that even with reduction in the rate of tax, the cum-tax selling price would remain unchanged or would increase.

10. The DGAP has also argued that to establish any profiteering, transaction value before and after the rate reduction was compared and there was no significance of MRP in establishing profiteering. Thus, GST was chargeable on actual transaction value after excluding any discount and therefore, for the purpose of computation of profiteering, MRP could

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not be considered. The actual transaction value was the correct value which was required to be considered while determining whether any reduction in the rate of tax on any supply of goods or services has been passed on to the recipients by way of commensurate reduction in prices or not. The DGAP has further argued that in the case of M/s Flipkart Internet Pvt. Ltd., the Applicant was seeking refund of excess payment made by him to M/s Flipkart Internet Pvt. Ltd. as the invoiced value was lower than that of the payment made to M/s Flipkart Internet Pvt. Ltd. Therefore, the facts of the case of M/s Flipkart Internet Pvt. Ltd. were completely different from the instant case.

11. The DGAP has also stated that the Respondent was asked to provide purchase data for the pre and post rate reduction period vide e-mail dated 17.09.2019 but the same was not provided by the Respondent. However, the average of purchase prices for the pre and post rate reduction period was provided and the same has been considered for computation of profiteering. The DGAP has also mentioned that from the sales data made available, it appeared that the Respondent has increased the base prices of the Sanitary Napkins when the GST rate was reduced from 12% to NIL w.e.f. 27.07.2018. The DGAP has illustrated that during the pre-rate reduction period (01.07.2018 to 26.07.2018), the Respondent has purchased the goods "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)" at an average base price of Rs. 66.91/- while the average selling price of the same goods during the said period was Rs. 67.99/-. Thus, the profit margin for the Respondent during the pre-rate reduction period was Rs. 1.08/- per unit.

12. The DGAP has further stated that as on 26.07.2018, the Respondent had a closing stock of 47 units of the "Whisper Ultra Overnight Sanitary

Pads XL Plus wings (7 Count)". As the rate of tax on the "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)" was reduced from 12% to NIL w.e.f. 27.07.2018, the Respondent was not entitled to avail input tax credit on this closing stock. Hence, the commensurate price of the closing stock of "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)" as on 26.07.2018 should have been the sum total of Rs. 66.91/- (basic purchase price), Rs. 8.03/- (increase in cost due to denial of input tax credit @12% of the basic purchase price of Rs. 66.91/-) and Rs. 1.08/- (profit margin) i.e., Rs. 76.02/-. However, the Respondent had sold 9 units out of the closing stock of 47 units at a price above the aforesaid commensurate price. The total profiteering on the sale of the goods "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)", made out of the closing stock as on 26.07.2018, appeared to be Rs. 27.82/-. Further, the DGAP has claimed that during the post-rate reduction period (27.07.2018 to 31.03.2019), the purchase price of the goods "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)" for the Respondent increased to Rs. 73.61/-. Hence, the commensurate selling price of the Respondent for the stock purchased after rate reduction w.e.f. 27.07.2018 should have been the sum of Rs 73.61/- (basic purchase price) and Rs. 1.08/-(profit margin), i.e. Rs. 74.69/-. However, the Respondent had sold 75 units of the above-mentioned goods at a price above this commensurate price. The total profiteering on account of the sale of "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)", out of the stock purchased after reduction of the GST rate w.e.f. 27.07.2018, appeared to be Rs. 361.19/-.

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13. The DGAP has also submitted that he has analysed the outward supply of all the Sanitary Napkins (including "Whisper Ultra Overnight Sanitary Pads XL Plus wings (7 Count)") made by the Respondent and it was found by him that during the period from 27.07.2018 to 31.03.2019, i.e. after the reduction of the GST rate from 12% to Nil w.e.f. 27.07.2018, the amount of profiteering on account of the sales made from the closing stock as on 26.07.2018, was **Rs. 1,43,868/-**. The amount of profiteering on account of the sales made from the fresh stock was **Rs. 18,17,165/-**. Thus, the total profiteered amount in respect of all the units supplied by the Respondent during the period from 27.07.2018 to 31.03.2019, at a price above the commensurate price, came to **Rs. 19,61,033/-**. However, the profiteering in the case of the Applicant No. 1 was found to be nil by the DGAP. The place (State or Union Territory) of supply-wise break-up of the total profiteered amount of Rs 19,61,033/- as provided by the DGAP is furnished in the Table given below:-

Table (Amount in Rs.)

Sr.No.	State Code	Fresh Stock Profiteering	Closing Stock Profiteering	Total Profiteering
1	01-Jammu & Kashmir	6528	227	6755
2	02-Himachal Pradesh	9093	619	9712
3	03-Punjab	28330	1568	29898
4	04-Chandigarh	12910	1047	13957
5	05-Uttarakhand	17800	816	18615
6	06-Haryana	98001	7457	105458
7	07-Delhi	169397	13020	182417
8	08-Rajasthan	47283	2182	49465
9	09-Uttar Pradesh	121030	6751	127780
10	10-Bihar	23253	1245	24498
11	11-Sikkim	429	31	459
12	12-Arunachal Pradesh	617	2	619
13	13-Nagaland	1348	5	1353
14	14-Manipur	2770	75	2845
15	15-Mizoram	1933	46	1979
16	16-Tripura	1350	44	1394
17	17-Meghalaya	2701	114	2815

18	18-Assam	18318	814	19132
19	19-West Bengal	121261	8930	130191
20	20-Jharkhand	13035	519	13553
21	21-Odisha	23034	734	23768
22	22-Chhattisgarh	8371	290	8661
23	23-Madhya Pradesh	22602	1627	24229
24	24-Gujarat	37069	1730	38799
25	25-Daman & Diu	250	13	263
26	26-Dadra & Nagar Haveli	180	16	197
27	27-Maharashtra	335264	27816	363080
28	29-Karnataka	264250	24883	289134
29	30-Goa	11164	724	11889
30	31-Lakshdweep	143	0	143
31	32-Kerala	33392	1636	35027
32	33-Tamil Nadu	213109	23189	236298
33	34-Pondicherry	6113	546	6659
34	35-Andaman & Nicobar Islands	1820	258	2078
35	36-Telangana	130818	13056	143873
36	37-Andhra Pradesh	32199	1842	34041
Total		1817165	143868	1961033

14. Thus, the DGAP has concluded that the base prices of the Sanitary Napkins were increased by the Respondent when there was a reduction in the GST rate from 12% to Nil w.e.f. 27.07.2018, therefore, the commensurate benefit of GST rate reduction was not passed on to the recipients. The total amount of profiteering covering the period from 27.07.2018 to 31.03.2019, has been computed to be **Rs. Rs.19,61,033/- (Nineteen Lakh Sixty-One Thousand Thirty-Three only) (Rs. 1,43,868/-+ Rs. 18,17,165/-)** by the DGAP.

15. After perusal of the DGAP's Report, this Authority in its meeting held on 25.09.2019 had decided to hear the Applicants and the Respondent on 23.10.2019 and accordingly notice was issued to all the interested parties. A Notice was also issued to the Respondent on 27.09.2019 asking him to reply why the Report dated 24.09.2019 furnished by the DGAP should not be accepted and his liability for profiteering under Section 171 of the CGST Act, 2017 should not be fixed. On the request of the Respondent hearing was adjourned to 07.11.2019. On behalf of

the Applicants none appeared whereas the Respondent was represented by Sh. V. Lakshmikumaran, Sh. Anshul Mathur, Smt. Arushi Jain and Smt. Nitum Jain, Advocates. Further hearing was held on 13.01.2020.

16. The Respondent has filed written submissions dated 11.11.2019 and raised a number of objections against the Report of the DGAP dated 24.09.2019 however, the said objections have not been discussed in the present order since the Respondent has vehemently argued that his preliminary objections raised through his submissions dated 13.01.2020 should be decided first, before proceeding further in the matter. Accordingly, the preliminary objections raised by the Respondent are being disposed of through the present order.

17. The Respondent vide his submissions dated 13.01.2020 has contended that the application dated 26.12.2018 had been filed by the Applicant No. 1 alleging profiteering in respect of the supply of "Stayfree Sanitary Napkins". The Standing Committee had examined the above application in its meeting held on 11.03.2019 and referred the same to the DGAP on 27.03.2019 to conduct a detailed investigation. In this regard, he has also contended that the examination by the Standing Committee was not within the time limit of two (2) months provided in Rule 128 (1) of the CGST Rules and hence, the reference made by the Standing Committee and consequential proceedings were liable to be set aside on this ground alone. Rule 128 and Rule 129 (1) of the CGST Rules are extracted below:-

128. Examination of application by the Standing Committee and Screening Committee.- (1) The Standing Committee shall, within a period of two months from the date of the receipt of a

written application ****[or within such extended period not exceeding a further period of one month for reasons to be recorded in writing as may be allowed by the Authority,]**** in such form and manner as may be specified by it, from an interested party or from a Commissioner or any other person, examine the accuracy and adequacy of the evidence provided in the application to determine whether there is prima-facie evidence to support the claim of the applicant that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has not been passed on to the recipient by way of commensurate reduction in prices.

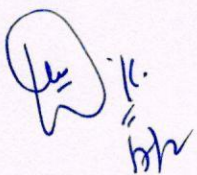
(2) All applications from interested parties on issues of local nature ****[or those forwarded by the Standing Committee]**** shall first be examined by the State level Screening Committee and the Screening Committee shall, ****[within two months from the date of receipt of a written application, or within such extended period not exceeding a further period of one month for reasons to be recorded in writing as may be allowed by the Authority,]**** upon being satisfied that the supplier has contravened the provisions of section 171, forward the application with its recommendations to the Standing Committee for further action.

129. Initiation and conduct of proceedings.-(1)Where the Standing Committee is satisfied that there is a prima-facie evidence to show that the supplier has not passed on the benefit of reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction

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in prices, it shall refer the matter to the Director General of Anti-profiteering for a detailed investigation.

The Respondent has also argued that as could be seen from Rule 129 (1), a reference to the DGAP for conducting detailed investigation could be made by the Standing Committee only when it was satisfied that there was prima facie evidence to recommend such investigation. The Standing Committee was required to determine whether there existed prima facie evidence or not by examining the accuracy and adequacy of the evidence provided in the application, within 2 months from the date of receipt of the written application, as per Rule 128 (1). He has further argued that it was only by way of amendment to Rule 128 (1) on 28.06.2019 that a further time period of 1 month was made available to the Standing Committee, that too based on the reasons to be recorded in writing and as allowed by this Authority. In the present case, undisputedly, the application filed by the complainant was dated 26.12.2018 which was examined by the Standing Committee in its meeting held on 11.03.2019, the minutes of which were received by the DGAP on 27.03.2019 (Sl. No. 7 of Annexure 1-B of minutes), as stated by the DGAP in paragraph 2 of his Report dated 24.09.2019 and hence, there was a gap of over 3 months between the date of application (complaint) and the date of examination by the Standing Committee. Therefore, the Respondent has claimed that the examination of the application by the Standing Committee was not made within the time period of 2 months as per the provisions of Rule 128 (1), as it existed prior to 28.06.2019.

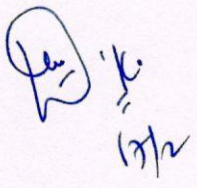


18. He has also pleaded that the time limit of 2 months within which the application needed to be examined was to be strictly adhered to and could not be condoned as the word used was "shall" before the words "within a period of two months". It was also clear from the amendment made on 28.06.2019 that adherence to this time limit has been reinforced, in as much as even this Authority has not been given powers to condone the delay of a period beyond 1 month after the end of 2 months time period available to the Standing Committee. The Respondent has therefore further pleaded that once the mandatory time limit provided in the CGST Rules was not adhered to, no further proceedings could have been initiated and the proceedings initiated in violation of the said mandatory time limit were not legal and therefore, were liable to be set aside.

19. In this regard, the Respondent has placed reliance on the judgment of the Hon'ble Supreme Court passed in the case of ***Oil and Natural Gas Corporation Limited v. Gujarat Energy Transmission Corporation Limited and Others (2017) 5 Supreme Court Cases 42*** wherein it was held that the prescription with regard to the limitation had to have binding effect and the same had to be followed regard being had to its mandatory nature. He has also claimed that in the above case, the Hon'ble Supreme Court has held that recourse could not be had to Article 142 of the Constitution of India (which *inter alia* provides that the Supreme Court in exercise of its jurisdiction may pass such decree or order as was necessary for doing complete justice), to condone delay beyond period provided to the Court as per the statute. The relevant extract is as follows:-

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"15. From the aforesaid decisions, it is clear as crystal that the Constitution Bench in Supreme Court Bar Assn. has ruled that there is no conflict of opinion in Antulay case or in Union Carbide Corpn. Case with the principle set down in Prem Chand Garg v. Excise Commr. **Be it noted, when there is a statutory command by the legislation as regards limitation and there is the postulate that delay can be condoned for a further period not exceeding sixty days, needless to say, it is based on certain underlined, fundamental, general issues of public policy** as has been held in Union Carbide Corp. case. As the pronouncement in Chhattisgarh SEB lays down quite clearly that the policy behind the Act emphasizing on the constitution of a special adjudicatory forum, is meant to expeditiously decide the grievances of a person who may be aggrieved by an order of the adjudicatory officer or by an appropriate Commission. **The Act is a special legislation within the meaning of Section 29(2) of the Limitation Act and, therefore, the prescription with regard to the limitation has to be the binding effect and the same has to be followed regard being had to its mandatory nature. To put it in a different way, the prescription of limitation in a case of present nature, when the Statutes commands that this Court may condone the further delay not beyond 60 days, it would come within the ambit and sweep of the provisions and policy of legislation.** It is equivalent to Section 3 of the Limitation Act. Therefore, it is uncondonable

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and it cannot be condoned taking recourse to Article 142 of the Constitution.”

20. The Respondent has also submitted that the legal position was well settled that once the statutory provisions prescribed a time-limit the same could not be extended, particularly when the statute provided for further time period upto which the delay could be condoned. In this regard, the Respondent has relied on the judgment of the Hon'ble Supreme Court given in the case of **Singh Enterprises v. CCE, Jamshedpur 2008 (221) ELT 163 (SC)** wherein referring to the provisions of the Central Excise Act, 1944 it was held as below:-

“The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal.”

21. The Respondent has further relied on the judgment of the Larger Bench of the Hon'ble Supreme Court passed in the case of **Commissioner of Customs & Central Excise v. Hongo India (P) Ltd. 2009 (236) ELT 417 (SC)**. In this case, the Apex Court has upheld the order of the High Court dismissing reference application on the ground of limitation after holding that the High Court had no power to condone the delay in filing the reference application filed by the Commissioner under unamended Section 35H (1) of the Central Excise Act, 1944 beyond the prescribed period of 180 days. He has also submitted that as

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per Section 143 (2) of the Income Tax Act, 1961, the notice seeking evidence before rejecting any claim made in the return of income shall be issued by the assessing officer within the prescribed period from the end of the month in which return was furnished. He has also argued that in the case of **Commissioner of Income Tax v. Gitsons Engineering Co. [2015] 53 taxmann.com 108 (Madras)** such notice was not issued within the said time-limit. The Hon'ble Madras High Court has held that when notice issued on a subsequent date was beyond the period of limitation, further proceedings of the Income Tax Department were non-est in law. The relevant portion of the judgment is as below:-

“Even though the department claims to have sent a notice under Section 143(2) of the Act on 17.9.2008, the Revenue failed to produce any records to show that the said notice was dispatched and served on the assessee. However, it is stated that the department subsequently issued another notice under Section 143(2) of the Act on 27.8.2009, which, on the face of it, is beyond the period of limitation prescribed under Section 143(2) of the Act.

8. The basic requirement of Section 143(2) of the Act having not been satisfied, the department's further proceedings, in our considered opinion, become non-est in law.”

22. The Respondent has also claimed that the above judgment was followed in the case of **Krishna Kumar Saraf v. Commissioner of Income Tax [2017] 83 taxmann.com 331 (Delhi - Trib.)** wherein it was held that when the notice under Section 143 (2) of Income Tax Act, 1961 was issued beyond the limitation period, the assessment order

made subsequently was non-est in law and the Commissioner exercising power under Section 263 could not revise such an assessment order. The relevant portion of the order is reproduced below:-

“16. Admittedly the notice u/s 143(2) was issued beyond time and, therefore, the assessment order was bad in law...

...u/s 263 the Id. Commissioner cannot revise a non est order in the eye of law. Since the assessment order was passed in pursuance to the notice u/s 143(2), which was beyond time, therefore, the assessment order passed in pursuance to the barred notice had no legs to stand as the same was non est in the eyes of law. All proceedings subsequent to the said notice are of no consequence.

23. The Respondent has further claimed that it was a settled legal proposition that if initial action was not in consonance with law, subsequent proceedings would not sanctify the same. The legal maxim *sublato fundamento cadit opus* was applicable in the present case, meaning thereby that in case the foundation was removed, the superstructure would fall. He has also. Stated that the same was also observed by the Hon'ble Gujarat High Court in the case of **Gujarat Paraffins Pvt. Ltd. v. Union of India 2012 (282) ELT 33**, which was maintained by the Hon'ble Supreme Court **2015 (322) ELT A179 (SC)**. The relevant extract is as follows:-

“37. It is a settled legal proposition that if initial action is not in consonance with law, subsequent proceedings would not sanctify the same. In such a fact situation, the legal maxim

sublato fundamento cadit opus is applicable, meaning thereby, in case of foundation is removed, the superstructure falls. Similar principle of law, in our opinion, can be extended in the present case too.”

24. The Respondent has also averred that the basis of investigation and furnishing of report by the DGAP was the reference by the Standing Committee and once it was held that the reference itself was not in accordance with law, the investigation conducted by the DGAP and the subsequent Report dated 24.09.2019 furnished by him was liable to be set aside on this ground alone. Therefore, the Respondent has reiterated that the present proceedings initiated against him were liable to be dropped and the reference made by Standing Committee vide Sl. No. 7 of Annexure 1-B of the minutes of the meeting held on 11.03.2019 and consequent Report submitted by the DGAP with Reference 22011/API/42/2019/1847 dated 24.09.2019 be quashed.

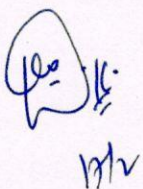
25. On the above submissions of the Respondent relevant record was summoned from the Standing Committee which vide its Report dated 23.01.2020 has stated that the Committee had received the subject application from the Applicant No. 1 against the Respondent after it was forwarded to the Committee by this Authority vide email dated 23.01.2019 on its official email id. It has also been stated that during the period between 22.01.2019 to 21.02.2019, the Standing Committee on Anti-profiteering was not in existence as the erstwhile members of the Committee had been transferred/promoted. As a consequence, the Standing Committee had to be reconstituted which was done by the GST Council, as per Rule 123 (1) of the CGST Rules, 2017, vide its OM

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dated 21.02.2019 and three new members Sh. Sanjay Mangal, Sh. Pranesh Pathak and Sh. Amit Kr. Agarwal were nominated out of a total four members of the Committee.

26. It has further been stated by the above Committee that the newly constituted Standing Committee, in its meeting held on 11.03.2019, had considered and examined the said application/complaint and found that there was sufficient prima facie evidence to indicate profiteering by the Respondent and hence, it was decided to forward the above complaint to the DGAP for a detailed investigation as per Rule 128 (1) of the CGST Rules, 2017. It has also been claimed that since there was no Standing Committee in existence between the period from 22.01.2019 to 21.02.2019 the above complaint was duly considered/examined in the meeting of the Committee held on 11.03.2019 and hence, the statutorily prescribed time-limit under Rule 128 of the said Rules has been sacrosanctly followed and there has been no lapse at the end of the Standing Committee in this regard. The Committee has also produced the relevant record.

27. We have carefully considered the submissions made by both the parties and the material placed on record and it is revealed that the Respondent has vehemently contended that in the present case, as per the Report of the DGAP the application/ complaint was made on 26.12.2018 and it was examined by the Standing Committee in its meeting held on 11.03.2019 i.e. after a lapse of a period of more than 2 months from the date of receipt of the application. He has further contended that the time limit of 2 months within which the application was required to be examined was to be strictly adhered to and the same

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could not be condoned as the word used was "shall" in Rule 128 (1) before the words "within a period of two months. Thus, he has claimed that the belated examination of the application/ complaint by the Standing Committee was barred by limitation of 2 months prescribed under Rule 128 (1) of the CGST Rules, 2017 and hence, such a reference having been received by the DGAP from the Standing Committee could not have been acted upon by him under Rule 129 (1) of the above Rules and therefore, consequential proceedings/investigation conducted by the DGAP were liable to be set aside on this ground alone.

28. In this context perusal of the record submitted by the Standing Committee shows that the Applicant No. 1 through his email dated 13.12.2018 had made the following complaint to this Authority:-

"This is for your kind information that I purchased 3 packets of Stayfree napkin from Amazon, sold by Cloutail India on 06/07/2018 by Rs. 246/- . Then MRP was 110/-, sold by Cloutail India through Amazon by Rs. 82/- (Price break up is unit price =73.22 and GST was 12%).

On 11/12/2018, I purchase same product (3 packets) from seller by Rs. 249/-. Now Government GST rate reduce to 0%, but I surprise to see the invoice that MRP is 108/- (Rs. 2 less by stay free company), sold by Cloutail India through Amazon by Rs. 83/- (Price break up is unit price =83/- and GST was 0%).

After reduction of GST when price should be go down, then seller suddenly increase their selling unit price from Rs. 73.22 to Rs. 83.00 and I have to purchase the same product by paying Rs. 3/- more.

In the above fact and circumstances kindly look after the matter.

Pl. see the attached file.”

29. The above Applicant had also attached Tax Invoice issued vide No. SCCA-1406180 dated 11.12.2018 by the Respondent which at Sr. No. 6 showed that the Applicant No. 1 had purchased 3 units of Stayfree Secure XL Cottony soft (with wings, 20 pads) I B01CJVUFF2 (B01CJVUFF2) HSN:9619 @ Rs. 83.00 per unit by paying Rs. 249.00 on which no GST was charged. The above Applicant had also attached Tax Invoice issued vide No. SCCA-489213 dated 07.07.2018 issued by the Respondent which at Sr. No. 5 showed that the Applicant No. 1 had purchased 3 units of Stayfree Secure XL Cottony soft (with wings, 20 pads) I B01CJVUFF2 (B01CJVUFF2) HSN:9619 @ Rs. 73.22 per unit by paying Rs. 219.00 on which GST @ 12% was charged. The above Applicant had also attached photos of wrappers of the product.

30. The above email dated 13.12.2018 along with its attachments was forwarded by the Secretary of this Authority vide his email dated 23.01.2019 to Sh. Himanshu Gupta, Principal Commissioner CGST who was one of the Members of the Standing Committee. A written communication in this regard was also sent to Sh. Himanshu Gupta by the Secretary of this Authority vide File No. 22011/NAA/26/2018/Vol.-III dated 10.01.2019 which was attached with the email dated 23.01.2019.

31. Perusal of the record also shows that the above Applicant had separately filed a complaint dated 26.12.2018 on the prescribed performa on the portal of this Authority along with the invoices mentioned above by claiming that the benefit of tax reduction had not been passed on to him. It is also revealed from the Record that this complaint was forwarded to the Standing Committee by the Technical

Team of this Authority on 31.01.2019. It is further revealed from the perusal of the minutes of the meeting of the Standing Committee that the above complaint/application was discussed in detail by the Committee in its meeting held on 11.03.2019 and was forwarded to the DGAP for investigation under Rule 129 (1) of the above Rules vide Serial No. 7 of the Annexure-1B. Therefore, it is abundantly clear that the above application/complaint was received by the Standing Committee on 23.01.2019 and was discussed and considered by it in its meeting held on 11.03.2019 and was referred for investigation to the DGAP which is well within the prescribed limitation of 2 months in terms of Rule 128 (1) of the CGST Rules, 2017. Therefore, the objection raised by the Respondent in this regard is incorrect and hence the same cannot be accepted.

32. The Respondent has also claimed that the Standing Committee did not have prima facie accurate and adequate evidence to forward the above complaint for investigation. However, perusal of the record shows that the above Applicant had submitted the Tax Invoice dated 07.07.2018 which was issued to him by the Respondent before the rate of tax was reduced w.e.f. 27.07.2018 vide Notification No. 19/2018-Central Tax (Rate) dated 26.07.2018 from 12% to 0% in which the per unit price was charged as Rs. 73.22. per unit without GST. He had also submitted the Tax Invoice dated 11.12.2018 issued by the Respondent after the rate of tax was reduced in which the per unit price charged was shown as Rs. 83.00 by charging GST @ 0%. Therefore, it is evident that the Respondent had increased the per unit price of the above product after the rate of tax was reduced w.e.f. 27.07.2018 and the benefit of such reduction had apparently not been passed on by him to the above

Applicant. Hence, there is no doubt that the Standing Committee prima facie had accurate and adequate evidence to examine whether the benefit of tax reduction had been passed on by the Respondent to the above Applicant by commensurate reduction in the price of the above product or not. Hence, the allegation made by the Respondent in this regard is wrong and hence the same is untenable.

33. Based on the above facts it is clear that the Standing Committee has examined the above complaint as per the provisions of Rule 128 (1) of the CGST Rules, 2017 and hence it has rightly referred the same for detailed investigation to the DGAP in terms of Rule 129 (1) of the above Rules. Therefore, the investigation carried out by the DGAP against the Respondent is perfectly legal and in consonance with Rule 129 of the above Rules. Hence, the present proceedings are legally maintainable against the Respondent.

34. In this regard, the Respondent has placed reliance on the judgment of the Hon'ble Supreme Court passed in the case of ***Oil and Natural Gas Corporation Limited v. Gujarat Energy Transmission Corporation Limited and Others (2017) 5 Supreme Court Cases 42*** supra. However, as has been mentioned above the Standing Committee has disposed of the application filed by the Applicant No. 1 within the prescribed period of 2 months as has been provided under Rule 128 (1) of the above Rules and hence, it is respectfully submitted that the above judgement is not applicable.

35. The Respondent has also cited the law settled by the Hon'ble Supreme Court in the case of ***Singh Enterprises v. CCE Jamshedpur 2008 (221) ELT 163 (SC)*** mentioned above. However, since there has

been no violation of the period of limitation in the present case the above case does not help the above Respondent.

36. The Respondent has further relied on the judgment of larger Bench of the Hon'ble Supreme Court passed in the case of **Commissioner of Customs & Central Excise v. Hongo India (P) Ltd. 2009 (236) ELT 417 (SC)** supra. Since, the Standing Committee has disposed of the application within a period of 2 months as provided under Rule 128 (1) of the CGST Rules, 2017 the above case cannot be relied upon.

37. The law pronounced in the cases of **Commissioner of Income Tax v. Gitsons Engineering Co. 2015 (53) taxmann.com 108 (Madras)** and **Krishna Kumar Saraf v. Commissioner of Income Tax [2017] 83 taxmann.com 331 (Delhi - Trib.)** quoted above, is also of no assistance to the above Respondent as the Standing Committee has not acted beyond the provisions of Rule 128 (1). Moreover, no notice has been issued by it to the above Respondent.

38. The Respondent has also referred to the judgement passed by the Hon'ble Gujarat High Court in the case of **Gujarat Paraffins Pvt. Ltd. v. Union of India 2012 (282) ELT 33** in his support and claimed that the legal maxim *sublato fundamento cadit opus* was applicable in the present case which implied that in case the foundation was removed, the superstructure fell. However, as has been held above the Standing Committee has rightly referred the above complaint of the Applicant No. 1 to the DGAP after prima facie having satisfied itself that there was accurate and adequate evidence to refer the allegation of not passing on the benefit of tax reduction by the Respondent within the prescribed period of limitation of 2 months as per the provisions of Rule 128 (1) of the CGST Rules, 2017, therefore, the present investigation and the

Report dated 24.09.2019 furnished by the DGAP cannot be held to be illegal and hence the law settled in the above case cannot be relied upon.

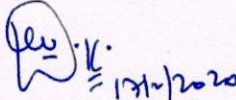
39. Based on the above discussion the preliminary objections raised by the Respondents have been found to be incorrect and untenable and hence the same cannot be accepted. However, these findings shall have no effect on the other merits of the preset case which have not been considered in this order. The final order in these proceedings shall be passed after considering all the other pleadings relied upon by the Respondent and the Applicants.
40. A copy of this order be supplied to the Applicants and the Respondent.

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Member(Technical)
Certified Copy

ofc


Dev Kumar Rajwani
(Secretary, NAA)



F. No. 22011/NAA/83/cloudtail(sn)/2019 A 66-970 Date:17.02.2020

Copy To:-

1. M/s Cloudtail India Pvt. Ltd., C/o Kuehne Nagel Pvt. Ltd., Dag No.8-31, Dag No. 414-425 L R, Khatian No. 871,798, Mouza-Shimla null Satghara, JL No. 17-18, Shimla, Sreerampore, Hooghly, West Bengal - 712203
2. Sh. Samit Chakraborty, 14-B, Shyam Sunder Pally Main Road (Shakuntalam Park), Kolkata-700061.
3. Directorate General of Anti-profiteering.
4. Sh. Sanjay Mangal, Commissioner, CGST (Audit), Gurugram, Member of Standing Committee On Anti-Profiteering, GST Bhavan, Plot NO. 36-37, Sector-32, Gurugram, Haryana-122001.
5. Guard File.