

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

<b>I. O. No.</b>	23/2020
<b>Date of Institution</b>	29.01.2020
<b>Date of Order</b>	13.10.2020

**In the matter of:**

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

Applicant

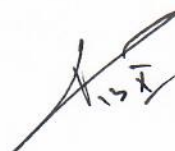
Versus

M/s Smookey Kitchen Foods OPC Pvt. Ltd. (Franchisee of M/s  
Subway Systems India Pvt. Ltd.), G07 & G08, Ground Floor,  
Newtech LaGracia, Crossing Republik, Ghaziabad, Uttar Pradesh-  
201016.

Respondent

**Quorum:-**

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



Present:-

1. None for the Applicant i.e. the DGAP.
2. Sh. Amit Kumar, Authorised Representative for the Respondent.

### ORDER

1. The present Report dated 28.01.2020 has been received on 29.01.2020 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 present case are that a reference was received from the Standing Committee on Anti-profiteering on 01.07.2019, to conduct a detailed investigation alleging profiteering despite a reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017 against the Respondent. The complainant had alleged that the Respondent had increased the base prices of his products and not passed on the benefit of reduction in the GST rate from 18% to 5% w.e.f. 15.11.2017, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 by way of commensurate reduction in prices in terms of Section 171 of the CGST Act, 2017.
2. The DGAP, in his report, has stated that on receipt of the aforesaid reference from the Standing Committee on Anti-profiteering on 01.07.2019, a Notice under Rule 129 (3) of the CGST Rules, 2017 was issued to the Respondent on 09.07.2019, calling upon him to reply as to whether he admitted that the benefit of reduction in GST rate w.e.f. 15.11.2017, had not been passed on to the 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 supporting documents to evidence the same. The Respondent was also allowed to inspect the non-confidential evidence/information which formed the basis of the said Notice, during the period 07.07.2019 to 19.07.2019, which was not availed by the Respondent.

3. The DGAP has reported that the period covered by the current investigation was from 15.11.2017 to 30.06.2019 and that this Authority, vide its Order dated 27.12.2019, had extended the time limit for completion of the investigation up to 31.03.2020, in terms of Rule 129 (6) of the Rules.
4. The DGAP has further stated that, in response to the Notice dated 09.07.2019 and subsequent reminders, the Respondent has submitted his replies vide his e-mails/letters dated 09.09.2019, 24.09.2019, 23.10.2019, 13.11.2019, 18.11.2019, 19.11.2019, 26.11.2019, 29.11.2019, 04.12.2019, and 13.01.2020. His contentions are summed up as follows: -
  - a) That no benefit had accrued to him as a result of the reduction in the rate of tax from 18% to 5% because there was an increase in the cost of raw material which was directly proportionate to the cost of sales and therefore he had increased the prices of his products to cover the increased costs; that his gross profit ratio for the period from 01.07.2017 to 14.11.2017 was 51.86% and for the period from

15.11.2017 to 31.03.2018, the gross profit ratio was 54.74 %, which implied an additional gross profit of Rs. 46,248/- as per Table-A below: -

**Table-A**

FIGURES IN INR

Period	Sale (A)	Direct Cost (B)	Gross Profit (C=A-B)	Gross Profit Ratio (D=C/A)	ITC Not available
01.07.2017 to 14.11.2017	1,845,269	888,382	956,887	51.86%	0
15.11.2017 to 31.03.2018	1,605,838	726,743	879,095	54.74%	88,612

b) That input tax credit (ITC) was disallowed in his case vide Notification No. 46/2017-Central Tax (Rate) with effect from 15.11.2017, as a result of which ITC of Rs 88,612/- arising from 15.11.2017 to 31.03.2018 was rendered unavailable and thus he needed to recover the same by increasing the sale price of his supplies; that thus the additional gross profit amounting to Rs. 46,248/- earned by him was utilized towards meeting the additional cost burden of the above-detailed Rs. 88,612/- and even after doing so, there was a loss of Rs. 42,364/- to him (i.e. Rs 46,248/ - Rs. 88,612/-); that thus there was no obligation on him to pass on any benefit to his recipients due to this additional cost burden, which is detailed in Table-B below:-

**Table-B**

FIGURES IN INR

GSTIN of supplier	Trade/Legal name of the Supplier	GST
06AADJC1224D1Z8	Jyoti International Foods Private Limited	52,530
06AAGCP5410J1ZI	Pisces Eservices Private Limited	7,969
07AAGCS5808M1ZX	Subway Systems India Private Limited	25,199
09AADCD4946L1Z8	Zomato Media Private Limited	2,914
Total		88,612



- c) That he had been operating 'sub of the day' (SOTD) offer to his recipients/ customers and since the price of the item sold by him under the SOTD scheme was lower than the normal price thereof, his customers/ recipients were being benefited.
- d) That apart from the above offer, he also offered attractive discounts to customers from time to time to benefit his customers.
5. The DGAP has further reported that the Respondent also submitted the following documents/information through his above correspondence:-
- (a) Copies of GSTR-1 Returns for the period July 2017 to June 2019.
  - (b) Copies of GSTR-3B returns for the period July 2017 to June 2019.
  - (c) Copies of Electronic Credit Ledger for the period July 2017 to June 2019.
  - (d) Copies of sample sale invoices and purchase invoices.
  - (e) Monthly invoice wise summary of item-wise sales for the period from July 2017 to June 2019.
  - (f) Details of ITC availed and utilized for the period July 2017 to 14.11.2017 by the Respondent.
6. The DGAP has reported that the Respondent was informed that if any information/documents provided by him were confidential, a non-confidential summary of such information/documents could be furnished by him. However, the Respondent did not classify any



information/documents furnished by him, as confidential in terms of Rule 130 of the CGST Rules, 2017.

7. The DGAP has also reported that the reference received from the Standing Committee on Anti-profiteering, various replies of the Respondent, and the documents/evidence on record were carefully scrutinized. The main issue to be examined was whether the rate of GST on the service supplied by the Respondent was reduced from 18% to 5% w.e.f. 15.11.2017 and if so, whether the benefit of such reduction in the rate of GST had been passed on by the Respondent to his recipients, in terms of Section 171 of the CGST Act, 2017.
8. The DGAP has further stated that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on 'restaurant services' from 18% to 5% w.e.f. 15.11.2017 vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 with the condition that the ITC on the goods and services used in the supply of the services was not to be available.
9. The DGAP has also stated that before inquiring into the allegation of profiteering, it was important to examine Section 171 of the CGST Act, 2017 which governs the anti-profiteering provisions under GST. Section 171(1) which reads as "*Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.*" Thus, the legal requirement was abundantly clear that in the event of a

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benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in the prices of the goods or services. And that such reduction should be in monetary terms only, so that, the final price payable by a consumer gets reduced. This was the legally prescribed mechanism for passing on the benefit of ITC or reduction in the rate of tax to the consumers under the GST regime. Moreover, it was also clear that the said Section 171 simply did not provide a supplier of goods or services, any other means of passing on the benefit of ITC or reduction in the rate of tax to the recipients/ consumers.

10. The DGAP reported that the assessment of the impact of denial of ITC, which was an uncontested fact, required determination of the ITC in respect of "restaurant service" as a percentage of the taxable turnover from the outward supply of "products" during the pre-GST rate reduction period. In his Report, the DGAP has also explained that if the ITC in respect of restaurant service was 10% of the taxable turnover of the Respondent till 14.11.2017 (which became unavailable w.e.f. 15.11.2017) and the increase in the pre-GST rate reduction base price w.e.f. 15.11.2017 was up to 10%, it could be concluded that there was no profiteering. However, if the increase in the pre-GST rate reduction base price w.e.f. 15.11.2017, was 14%, the extent of profiteering would be  $14\% - 10\% = 4\%$  of the turnover. Therefore, this exercise to work out the ITC in respect of the supply of restaurant service as a percentage of the taxable turnover of the

products supplied during the pre-GST rate reduction period has to be carried out by taking into consideration the period from 01.07.2017 to 14.11.2017. However, it was observed that there was no reversal of ITC reflected in the GSTR-3B Return of November 2017 on account of closing stock of inputs as on 14.11.2017, which was to be used after 14.11.2017. Therefore, the taxable turnover and ITC for the period 01.11.2017 to 14.11.2017 has not been taken into account for the calculation of the percentage of ITC available to the Respondent.

11. The DGAP in his report has further stated that the ratio of ITC to the net taxable turnover has been taken for determining the impact of denial of ITC (which was available to the Respondent till 31.10.2017). On this basis, it was found by the DGAP that ITC amounting to Rs. 99,582/- was available to the Respondent during the period July 2017 to October 2017 which was 6.03% of the net taxable turnover of restaurant service amounting to Rs. 16,50,592/- supplied during the same period. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the said ITC was not available to the Respondent. A summary of the computation of the ratio of ITC to the taxable turnover of the Respondent has been given in Table-C below:-





**Table-C****(Amount in Rs.)**

Particulars	Jul-17	Aug-17	Sept.- 2017	Oct.- 2017	Total
Total Outward Taxable Turnover as per GSTR- 3B (A)	4,84,207	4,11,860	3,75,948	3,78,577	16,50,592
ITC Availed as per GSTR-3B (B)	24,294	26,549	19,937	28,802	99,582
The ratio of ITC to Net Outward Taxable Turnover (C)= (B/A*100)					6.03%

12. The DGAP has further reported that the analysis of the details of item-wise outward taxable supplies during the period of 15.11.2017 to 30.06.2019, revealed that the Respondent had increased the base prices of different items supplied as a part of restaurant service to make up for the denial of ITC post GST rate reduction. The pre and post-GST rate reduction prices of the items sold as a part of restaurant service during the period 01.07.2017 to 14.11.2017 (Pre-GST rate reduction) and 15.11.2017 to 30.06.2019 (Post-GST rate reduction) were compared and it was established that the Respondent had increased the base prices by more than 6.03% i.e., by more than what was required to offset the impact of denial of ITC in respect of items sold during the same period and hence, the commensurate benefit of reduction in the rate of tax from 18% to 5% had not been passed on.



13. The DGAP has also reported that the next issue to be examined was to determine the quantum of profiteering made in this case and for this purpose, only those items where the increase in base prices was more than what was required to offset the impact of denial of ITC, had been considered and the DGAP has furnished the calculation in Table-D below in respect of item "6" Paneer Tikka" for which average base price had been calculated during the pre-GST rate reduction period of 01.11.2017 to 14.11.2017 and then profiteering had been calculated for post-GST rate reduction Invoice no. 1/A-9907 dated 15.11.2017:-

**Table-D**

**(Amount in Rs.)**

Name of the product (A)	"6" Paneer Tikka"
Total Quantity sold from 01.11.2017 to 14.11.2017 (B)	74
Sum of taxable Value during 01.11.2017 to 14.11.2017 (C)	9806
Average base price from 01.11.2017 to 14.11.2017 (D=C/B)	122.79
Base price with denial of ITC @ 6.03% (E=D+D *6.03%)	130.19
GST @ 5% (F=E*5%)	6.51
Total price to be charged(G=E+F)	136.70
Selling price per unit as per invoice no. 1/A-9907 dated 15.11.2017 (H)	165
Total profiteering (I=H-G)	<b>28.30 (165-136.70)</b>

14. The DGAP has further stated that based on the aforesaid post GST rate reduction, the impact of denial of ITC and the details of outward supplies (other than zero-rated, nil rated and exempted supplies) during the period 15.11.2017 to 30.06.2019, as per the product-wise sales registers reconciled with the GSTR-1 and GSTR-3B Returns, the amount of net higher sale realization due to increase in the base price of the service, despite the reduction in GST rate from 18% to



5% (with denial of ITC) or in other words, the profiteered amount came to Rs. 6,49,397/- (including GST on the base profiteered amount). The DGAP has also stated that the said profiteered amount had been arrived at by comparing the average of the base prices of the impugned products sold during the period 01.11.2017 to 14.11.2017, with the actual invoice-wise base prices of such products sold during the period 15.11.2017 to 30.06.2019. The reference base prices of the products which were not sold during the period 01.11.2017 to 14.11.2017 were taken from the sales data for the period July 2017 to October 2017. The DGAP has also stated that 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 prices. The details of the computation have been furnished by the DGAP in the Annexure-14 of his report. The DGAP has also observed that the said service has been supplied by the Respondent in the State of Uttar Pradesh only.

15. The DGAP has concluded that the allegation of profiteering by way of either increasing the base prices of the products while maintaining the same selling prices or by way of not reducing the selling prices of the products commensurately, despite a reduction in GST rate from 18% to 5% w.e.f. 15.11.2017 stood confirmed against the Respondent. This additional amount of Rs. 6,49,397/- had been realized by the Respondent from the recipients which

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included both the profiteered amount and GST on the said profiteered amount.

16. The above Report was considered by this Authority in its sitting held on 30.01.2020 and it was decided to afford an opportunity of hearing to the DGAP and the Respondent on 14.02.2020. Notice was also issued to the Respondent directing him to explain why the Report dated 28.01.2020 furnished by the DGAP should not be accepted and his liability for violation of the provisions of Section 171 of the CGST Act, 2017 should not be fixed. Sh. Amit Kumar, Authorised Representative for the Respondent appeared in the hearing held on 03.03.2020.
17. The Respondent, vide his written submissions dated 03.03.2020, has made the following contentions against the DGAP's report: -
  - a. That the DGAP has compared the discounted average prices of the pre-tax reduction period from 01.11.2017 to 14.11.2017 with the actual prices post GST rate reduction for the subsequent period for computing the quantum of profiteering; that this approach adopted by the DGAP was arbitrary and there was no uniformity in the mechanism adopted by the DGAP.
  - b. That the special 50% discount he had offered to his customers on the occasion of World Sandwich Day on 3<sup>rd</sup> November 2017, which is celebrated by all Subway



franchisees every year as a means of business promotion has not been excluded from the calculation of the pre rate reduction average prices by the DGAP, whereas it ought to have been excluded as an exception or an outlier; that due to this inclusion of the discounted prices on 03.10.2017, for calculation of the average price pre-GST rate reduction, the computation has become flawed and has resulted in an inflated quantification of the profiteered amount; that in other words, it was very common in the restaurant business to offer discretionary discounts to customers based on the business and market practices such as sales, inventory position, competition, competitor strategy, market penetration, customer loyalty, and other similar factors; that as the supplier, he was not only offering these discounts but also had the right to withdraw the discounts and promotional offers anytime and that there was no rule governing that any deal or discount could not be withdrawn until the expiry of a specified period; that the DGAP has erred by computing the average pre rate reduction prices based on the total sales, by including the discounted as well as normal sales, during the period 01.11.2017 to 14.11.2017; that if the discounted prices of the World Sandwich Day had been excluded the



profiteered amount would stand reduced by Rs. 88,270/-

as detailed below: -

Impact on Profiteered Amount due to World Sandwich Day Sales				(Amount in Rs.)
Sl. No.	Product Name	Profiteered Amount as per DGAP (A)	Revised Profiteered Amount after excluding WSD Sale-(B)	Difference (C=A-B)
1	12"ChickenSliceEggBkfstS	1,537.87	688.94	848.92
2	12"ChickenTeriyakiSub	2,322.06	-	2,322.06
3	12"Egg&Cheese (Liquid)B	125.37	50.15	75.22
4	12"Turkey	47.49	23.74	23.74
5	6"AlooPattySub	35,124.64	2,057.51	33,067.13
6	6"B.M.T.	15,754.29	4,722.01	11,032.28
7	6"ChatpataChanaPatty	15,353.12	11,827.60	3,525.52
8	6"ChickenSliceEggBkfstS	180.94	89.98	90.96
9	6"ChickenTandooriSub	21,431.64	8,550.12	12,881.52
10	6"ChknTikkaFlatBd	57.14	28.57	28.57
11	6"Egg&Cheese(Liquid)B	47.90	23.95	23.95
12	6"HaraBharaKabab	10,984.45	2,861.46	8,122.99
13	6"MexicanBeanPattyFlat	87.86	43.93	43.93
14	6"PaneerTikkaFlatBd	176.89	50.54	126.35
15	6"Tuna	9,759.22	7,050.37	2,708.85
16	6"Turkey	2,913.14	-	2,913.14
17	6"VeggieDeliteFlatBd	121.68	-	121.68
18	6"VeggiePattySub	7,239.16	1,352.05	5,887.11
19	6"WestnOmlt (Liq)Bkfst	110.15	55.07	55.07
20	6inChatpataorCk	461.81	218.75	243.06
21	B.M.T. Add6in	43.36	17.35	26.01
22	ChickenTandooriAdd6in	26.04	13.02	13.02
23	ChknTikkaAdd6in	34.68	8.67	26.01
24	LiquidEggAdd6in	138.79	67.17	71.62
25	PaneerTikkaAdd6in	34.68	13.01	21.67
26	SOTD6inCknSliceorM	1,014.98	317.44	697.54
27	SOTD6inCknTikorCor	1,075.22	335.26	739.96
28	SOTD6inCorn&Peasor	1,979.92	614.78	1,365.14
29	SOTD6inVegShamiorC	1,694.40	530.99	1,163.41
30	VeggiePattyAdd6in	8.68	4.34	4.34
<b>Total</b>		129,887.58	41,616.79	88,270.79

- b. That DGAP ought to have taken the pre-tax rate reduction average prices (without considering discounted sales) and compared the same with the post-tax rate reduction average prices so that the basis of comparison was the same; further



that for a few items which had not been supplied by him in the period from 01.11.2017 to 14.11.2017, the DGAP has inexplicably relied on the prices of supplies effected during the months of September 2017 & October 2017, which was improper; that the DGAP ought to have taken a uniform pre-tax rate reduction period for all items supplied by him.

- c. That the quantum of profiteering should have been calculated by the DGAP only up to the date of the next price revision affected by him (the Respondent) as any such price revision was on account of business reasons only; that while the tax rate has been reduced on restaurant service from 18% to 5% without the benefit of Input tax credit effective from 15.11.2017, the DGAP has calculated the profiteered amount of Rs. 6,49,397/- from 15.11.2017 till 30.06.2019, i.e. for a period of approximately 20 months which was improper as all the price revisions effected by him in this period of 20 months have been incorporated in the computation, ignoring the fact that he, as the supplier, had the right to increase his prices on account of various reasons other than tax; that on this account, the profiteered amount was incorrectly inflated as it has been computed taking into account the higher product prices since the prices had been increased by him in February 2019 on account of general inflation and other expenses; that consequentially, the average alleged quantum of profiteering



which was 8.22% of the monthly turnover for the period before February 2019, increased to 11.60% of the turnover in the period after February 2019, i.e. a jump of almost 3.50%, which is illustrated in the chart below:-

Month wise comparison chart

Profiteered Amount Analysis month-wise				(Amount in Rs.)			
Month	Total Profiteered Amount	Total Taxable Turnover	% of Profiteering amount versus Total Turnover	Month	Total Profiteered Amount	Total Taxable Turnover	Profiteered amount as a percentage of Total Taxable Turnover
Nov'17	24,863.04	195,108.11	12.74%	Sept'18	29,900.53	406,272.49	7.36%
Dec'17	38,794.96	386,302.89	10.04%	Oct'18	28,876.97	387,224.90	7.46%
Jan'18	44,763.96	344,997.59	12.98%	Nov'18	21,963.61	316,996.17	6.93%
Feb'18	31,547.89	316,006.96	9.98%	Dec'18	34,222.01	290,473.54	11.78%
Mar'18	15,677.52	355,363.39	4.41%	Jan'19	33,626.89	268,418.60	12.53%
Apr'18	29,027.85	355,187.21	8.17%	Feb'19	28,960.92	243,228.10	11.91%
May'18	17,455.38	363,894.97	4.80%	Mar'19	44,722.34	328,218.63	13.63%
Jun'18	23,177.30	367,404.78	6.31%	Apr'19	42,385.28	367,279.84	11.54%
July'18	24,145.18	385,546.04	6.26%	May'19	50,114.66	435,630.23	11.50%
Aug'18	23,951.51	399,421.22	6.00%	Jun'19	61,218.80	585,528.67	10.46%
Total	273,404.59	3,469,233.16			375,992.00	3,629,271.17	
Total Profiteering Amount	649,396.59		Feb'19 to June'19 total Profiteered Amount				227,401.99
Total Turnover	7,098,504.33		Feb'19 to June'19 Total Taxable Turnover				1,959,885.47
Profiteering as a percentage of Turnover	9.148358005		Profiteering as a percentage of Turnover				11.60282042

- d. That the right to trade is a fundamental right guaranteed under Article 19(1) (g) of the Constitution of India and the right to trade includes the right to determine prices and such right which has been granted by the Constitution of India can't be taken away without any explicit authority under the Law. Therefore, the way in which profiteering has been calculated by the DGAP for the entire period up to June 2019 is a violation of Article 19(1)(g) of the Constitution of India; that, in other words, though the



tax rate reduction from 18% to 5% became effective from 15.11.2017 and thereafter there was no change in the tax for restaurant service, the DGAP has calculated the quantum of profiteering for the entire period till June 2019, ignoring the fact that the Respondent had the fundamental right to increase the prices of his products, which he has exercised only after 15 months (approx) from the of tax rate reduction and thus the DGAP has worked like a price controlling authority improperly; that there were no guidelines in the statute itself that prescribed the mechanism to be followed by the Respondent for revision of price and up to what period, the prices of products should not be increased; that thus the profiteered amount ought not be calculated on the increased price of the products in his case.

- e. That the DGAP has erred in including the 5% GST paid by him in the profiteered amount because the GST has been paid to the government was based on the base price charged to the customers. Since, according to the DGAP's report, the base price should have been reduced and hence accordingly, the GST amount payable should also be less than as compared to the actual GST amount collected from the customers. However, the collection of the GST amount on the increased base price from the customers has been already deposited with the Government of India along with monthly tax liability. Therefore, the addition of a 5% GST amount needed to be removed, and the profiteered



amount should be recovered from the Governments, and therefore, the calculated profiteered amount should be reduced further by Rs. 30,923/-. The Respondent has also attached the monthly summary of the same as hereunder: -

Impact due to Inclusion of GST Amount			(Amount in Rs.)
Month	Profiteered Amount as per DGAP Report-(A)	GST Amount Included in Profiteered Amount-(B)	Profiteered Amount excluding GST=(C=A-B)
Nov'17	24,863.04	1,183.95	23,679.08
Dec'17	38,794.96	1,847.38	36,947.58
Jan'18	44,763.96	2,131.62	42,632.34
Feb'18	31,547.89	1,502.28	30,045.61
Mar'18	15,677.52	746.55	14,930.97
Apr'18	29,027.85	1,382.28	27,645.57
May'18	17,455.38	831.21	16,624.17
Jun'18	23,177.30	1,103.68	22,073.62
Jul'18	24,145.18	1,149.77	22,995.41
Aug'18	23,951.51	1,140.55	22,810.96
Sept'18	29,900.53	1,423.83	28,476.70
Oct'18	28,876.97	1,375.09	27,501.87
Nov'18	21,963.61	1,045.89	20,917.73
Dec'18	34,222.01	1,629.62	32,592.39
Jan'19	33,626.89	1,601.28	32,025.61
Feb'19	28,960.92	1,379.09	27,581.83
Mar'19	44,722.34	2,129.64	42,592.70
Apr'19	42,385.28	2,018.35	40,366.93
May'19	50,114.66	2,386.41	47,728.24
June'19	61,218.80	2,915.18	58,303.62
Total	649,396.59	30,923.65	618,472.94

- k. That the increase in royalty expenses paid to M/s Subway India Private Limited @1.769% should be considered in the calculation of base prices after rate reduction; that as per franchise agreement, the Respondent was under a legal obligation to pay 8% on net sales towards royalty and 4.5% towards advertisement charges to M/s Subway Systems India



Private Limited; that the invoices relating to royalty and tax had been issued by M/s Subway India Private Limited after charging GST@12% on the royalty amount & 18% on advertisement expenses; that the calculation of royalty and advertisement charges was based on net taxable sales; that post 14.11.2017, the cost of royalty and advertisement charges, taken together, had increased by 1.769%, which has not been considered by the DGAP; that the details thereof are given in the Table below: -

(All Figures in Rs.)

Particulars	Before 15th Nov 2017 (A)	Post 15th Nov 2017 (B)	Impact (A-B)%
Basic Price – Sample for illustration	100	112.38	
Add: - GST@18%-before 14 <sup>th</sup> Nov	18	5.63	
Add: - GST@5% Post 14 <sup>th</sup> Nov			
Total Invoice Value	118	118	
Royalty Expenses @8% on Net Sale	8	8.99	
Add: - GST@12% on Royalty charged by Subway India	0.96	1.079	
Advertisement Expenses@ 4.5% on Net Sale	4.5	5.06	
Add: - GST@18% on Advertisement charged by Subway India	0.81	0.91	
Total Invoice Value including GST	14.27	16.039	1.769%

- I. That the DGAP, while calculating the profiteering amount, ought to have considered the increase in the royalty and advertisement expenses, as detailed in the month-wise calculation given below, which would have resulted in the reduction of the profiteered amount by Rs. 68,721/-:-





Impact due to Royalty and Advertisement Expenses (Amount in Rs.)			
Month	Total Profiteering Amount (DGAP Working)	Revised Profiteering after royalty and advertisement expenses adjustment	Difference due to Royalty Expenses adjustment
Nov'17	24,863.04	21,963.25	2,899.79
Dec'17	38,794.96	33,240.11	5,554.85
Jan'18	44,763.96	39,952.82	4,811.13
Feb'18	31,547.89	27,949.93	3,597.97
Mar'18	15,677.52	13,283.50	2,394.02
Apr'18	29,027.85	25,751.14	3,276.72
May'18	17,455.38	14,966.31	2,489.07
Jun'18	23,177.30	20,481.67	2,695.63
Jul'18	24,145.18	21,223.89	2,921.28
Aug'18	23,951.51	21,491.73	2,459.78
Sept'18	29,900.53	26,702.15	3,198.38
Oct'18	28,876.97	25,222.28	3,654.69
Nov'18	21,963.61	19,629.40	2,334.21
Dec'18	34,222.01	31,359.46	2,862.54
Jan'19	33,626.89	30,952.52	2,674.37
Feb'19	28,960.92	26,514.77	2,446.15
Mar'19	44,722.34	41,006.04	3,716.30
Apr'19	42,385.28	38,638.52	3,746.76
May'19	50,114.66	45,408.83	4,705.82
Jun'19	61,218.80	54,937.23	6,281.57
	649,396.59	580,675.56	68,721.03

- m. That he places reliance on the decision of this Authority given in the case of **Kumar Gandhrav v. KRBL Limited** (Case Number 03/2018 dated 04.05.2018) wherein an increase in the purchase price/cost of goods has been accepted by this Authority while determining the profiteered amount; that he invites attention to Para 7 of the above-said Order, which is as below: -

*"It is also revealed from the perusal of the tax Invoices submitted by the Respondent that there was an increase in the purchase price of paddy in the year 2017 as compared to its price during the year 2016 which constitutes major part of the cost of the above product....."*



*Therefore, due to the imposition of the GST on the above products as well as the increase in the purchase price of the paddy there does not appear to be denial of benefit of ITC as has been alleged by the applicant as there has been no net benefit of ITC available to the Respondent which could be passed on the consumers."*

- n. that increase in the delivery expenses paid to online E-Commerce platforms and online food delivery providers ought to have been considered by the DGAP while calculating the base prices after rate reduction; that online food delivery has emerged as one of the most fast-paced developments in the e-commerce space; that this sector has revolutionized the entire outlook towards the food industry as consumers now have the privilege to choose from a wide variety of cuisines, anywhere, anytime from a range of restaurants listed online; that this has happened due to the emergence of the concept of 'aggregator business model', wherein the business players provide a single online window to customers for ordering food online from a wide variety of restaurants registered on the portal. The aggregators were collecting a fixed margin of the order amount received by the restaurant from the customer as service charge and in turn, handled the actual delivery of food itself; that he had started working with aggregators like Swiggy, Zomato, Uber Eats, etc. from April 2018 onwards, which

*32/*



charge 12-15% service fee for delivery of products; that his online sales amounted to around 45% of his total sales and that he accordingly paid them Rs. 9,18,627/- on account of the delivery fee, inclusive of GST amounting to Rs. 1,40,129.59/-, which was not considered by the DGAP, although it was a market-driven change in his business practice which had resulted in increased costs related to the sale of his products, month-wise details of which are given below: -

Details of Online sales delivery expenses with GST Amount					(Amount in Rs.)
Month	Zomato Sales	Swiggy Sale	Total Online Sales	Service Fee	GST@18% on Service Fee
April'18	96,502.10		96,502.10	10,068.48	1,812.33
May'18	163,327.21	2,046.03	165,373.24	22,685.26	4,083.35
June'18	156,483.99	61,100.80	217,584.79	31,933.40	5,748.01
July'18	156,895.81	116,933.02	273,828.83	41,630.69	7,493.52
Aug'18	190,870.01	108,532.00	299,402.01	45,342.89	8,161.72
Sept'18	169,682.48	145,542.00	315,224.48	38,102.52	6,858.45
Oct'18	123,473.01	249,167.00	372,640.01	24,439.97	4,399.19
Nov'18	151,382.33	243,539.00	394,921.33	58,116.28	10,460.93
Dec'18	116,701.04	126,906.00	243,607.04	38,871.24	6,996.82
Jan'19	133,115.29	79,496.00	212,611.29	33,196.88	5,975.44
Feb'19	140,181.59	51,214.41	191,396.00	28,065.37	5,051.77
March'19	155,879.00	40,295.00	196,174.00	28,754.38	5,175.79
April'19	171,888.62	135,315.00	307,203.62	64,166.29	11,549.93
May'19	225,602.33	189,264.00	414,866.33	177,441.13	31,939.40
June'19	336,764.00	297,948.00	634,712.00	135,682.91	24,422.92
Total	2,488,748.81	1,847,298.26	4,336,047.07	778,497.69	140,129.58

- q. That the DGAP, while calculating the profiteering, had only considered those products/ SKUs where the base prices had increased and had ignored those products/ SKUs where more than commensurate benefit had been passed on; that the said



method of calculation was against the stand taken by the Government of India at the World Trade Organisation (WTO) against a similar methodology of calculation of dumping under the Anti-dumping laws; that the argument taken by India in that forum was that while determining the dumping margin, all SKUs should be taken into consideration rather than only those which showed positive dumping; that the stand taken by Govt. of India was later upheld by the WTO Appellate Body; hence in the present case, the excess benefit passed on by him (Respondent) through a greater-than-commensurate reduction in the basic prices of some of his products ought to have been appropriately considered as negative values, rather than zero, by the DGAP while calculating the aggregate profiteered amount, which has not been done; that accordingly, the column "Difference in Value %" in Annexure 14 of the DGAP's Report merited to be modified and an amount of Rs. 2,16,411/-, which was the aggregate of such negative values, ought to be reduced from the profiteered amount based on the Table given below:-





Impact on Profiteered amount due to reduction in prices								(Amount in Rs.)
Month	Total Profiteering Amount as per DGAP	Total Profiteering Amount as per his Calculation	Difference	Month	Total Profiteering Amount as per DGAP	Total Profiteering Amount as per his Calculation	Difference	Total Impact
Nov'17	-	(334.86)	(334.86)	Sept'18	-	(19,145.91)	(19,145.91)	(19,480.77)
Dec'17	-	(2,466.70)	(2,466.70)	Oct'18	-	(10,484.58)	(10,484.58)	(12,951.28)
Jan'18	-	(2,917.82)	(2,917.82)	Nov'18	-	(16,140.34)	(16,140.34)	(19,058.16)
Feb'18	-	(6,373.93)	(6,373.93)	Dec'18	-	(7,260.62)	(7,260.62)	(13,634.54)
Mar'18	-	(24,120.23)	(24,120.23)	Jan'19	-	(6,774.62)	(6,774.62)	(30,894.85)
Apr'18	-	(19,916.16)	(19,916.16)	Feb'19	-	(4,233.88)	(4,233.88)	(24,150.04)
May'18	-	(24,415.28)	(24,415.28)	Mar'19	-	(2,427.42)	(2,427.42)	(26,842.70)
June'18	-	(15,442.96)	(15,442.96)	Apr'19	-	(3,597.65)	(3,597.65)	(19,040.61)
July'18	-	(15,358.48)	(15,358.48)	May'19	-	(4,213.05)	(4,213.05)	(19,571.53)
Aug'18	-	(26,450.92)	(26,450.92)	Jun'19	-	(4,336.00)	(4,336.00)	(30,786.92)
Total	-	(137,797.33)	(137,797.33)		-	(78,614.07)	(78,614.07)	(216,411.40)

- r. That he had also been supplying a few MRP based products like soft drinks that attracted GST @28% plus 12% Cess; that in the post-rate reduction period, his costs had increased because the ITC on 28% GST and 12% Cess was not available to him anymore; that in such cases of supply of MRP based products where the tax incidence on him had increased due to denial of ITC, needed to be excluded from the profiteered amount.
- s. That the calculation of the profiteered amount should only have been up to 31.03.2018 and not up to June 2019 as was done by the DGAP; that neither the provisions of Section 171 of the CGST Act 2017 and the relevant CGST Rules 2017, nor the notified methodology and procedure, prescribed any period up to which a registered person has to keep the base



prices unchanged; that since he was operating restaurant service and was not holding inventory for more than one week due to perishable nature of the items and in view of the daily price variations of the cost of his raw materials, especially vegetables, the period of investigation ought to have been limited and not 20 months; that the period of investigation ought to be limited also because pricing of products in his business was a complex exercise, being dependent on various factors such as competition pricing, long term strategies for market penetration, profit margin for sustaining in the market, life cycle of the product, economic and social conditions, cost of the products and capital expenditure, inflation in man power cost, general year on year inflation etc; that the GST law was a new law and it did not prescribe any method of computation or the period of investigation; that while everyone was trying to understand the implications of the new law, the taxation provisions applicable to restaurant service had been again changed within a short period of time of four months of the roll out of GST; that thus the impact of changes effected with effect from 15.11.2017 should be considered only for a certain period; that in his case, considering the nature of his business, the period for the calculation of profiteering should be limited to 4 months i.e. up to the period of March 2018 from the date of tax rate reduction, i.e. 15.11.2017; that in the



absence of a computation methodology and a prescribed period of anti-profiteering investigation in the statute, the 20 month long period of investigation adopted by the DGAP, i.e. from 15.11.2017 to 30.06.2019 was arbitrary and improper and needed to be curtailed only up to 31.03.2018.

- t. That a considerate approach should be adopted in his case and the current proceedings ought to be dropped since he was in deep loss ever since he started his restaurant service as a franchisee in 2017; that in the year ending March 2018, he had incurred losses @36.27% and in the year ending March 2019, his losses had increased to 43.89%; that as a result of the losses, he had received instructions from his franchisor, M/s Subway India, either to relocate his store or to close down; that the profiteered amount should be calculated at the entity level based on his Profit & Loss (P&L) account and not item (SKU) wise; that accordingly, he has placed on record a chart of his Profit & Loss Account as a percentage of his Turnover, which is as below: -

Sl. No.	Total Turnover	Total Expenses	Net Profit	% of Turnover
Year Ended March 2018	Rs.42,23,300	Rs.57,55,216	Rs (15,31,916)	(36.27%)
Year Ended March 2019	Rs.42,54,848	Rs.55,64,855	Rs (18,67,577)	(43.89%)

- u. That as per the DGAP Report, the percentage of the profiteered amount to his net sales turnover was 9.91%; that



this calculation has been worked out based on only those products/ SKUs where the commensurate benefit was not passed on without adjusting those cases where a higher than commensurate benefit was passed on to the customers; that discounts offered by him to his customers were ignored in the computation; that the computation by the DGAP has not taken into consideration the increase in his royalty and advertising expenses as also the expenses incurred on capital goods purchased by him; that for the period from February 2019 to June 2019, the profiteered amount calculated by the DGAP was on the higher side of net sales turnover as compared to the overall Average percentage calculated by the DGAP which was because he had increased prices in the month of February 2019 to account for several other business factors. The DGAP has incorrectly calculated the quantum of profiteering on the higher prices after he had increased his product prices in Feb 2019.

- v. That due to competition with other identical franchisees in his vicinity he had no option but to maintain pricing similar to the other Subway franchisees; that however, he had kept customers' interest in mind while arriving at his selling price and that the pricing data submitted by him in respect some of his main products before and after the tax rate reduction showed that the final impact on the customers was very

minimal and, in some cases, even negative and that his pricing decisions were based on various business factors and his costs.

- w. That several writ petitions have been filed in various High Courts challenging the constitutional validity of anti-profiteering provisions under the CGST Act 2017; that in some of these writ petitions, the computation method/procedures adopted by this Authority for calculating profiteering amount has also been challenged; that these writ petitions included *WP (C) 378 of 2019 (Hindustan Unilever Ltd. v. Union of India)*, *WP (C) 2347 of 2019 (Jubilant Food works Ltd. v. Union of India)* and *WP (C) 4213/2019 (Abbott Healthcare v. Union of India)*; that the proceeding in his case should be deferred till the above issues relating to the constitutional validity and the computation methodology are settled by the courts.
- x. That he was an extremely small taxpayer having a turnover less than Rs. 50 Lakh and had been merely following the market trend and industry practices while making his pricing decisions; that he had no control over the market and hence he followed the pricing decisions taken by the bigger market players in this business.
18. The Respondent submitted additional submissions vide his e-mail dated 17.05.2020 whereby he reiterated his earlier submissions and



also contended that the subject proceedings were without jurisdiction and barred by limitation. He substantiated his above claim stating that as per Rule 128 (2) of CGST Rules, 2017, all applications from interested parties, on issues of local nature or those forwarded by the Standing Committee, were required to be first examined by the State Level Committee and then the Screening Committee should, within two months from the date of receipt of the written application or within such extended period not exceeding a further period of one month, for reasons to be recorded in writing, as might be allowed by this Authority, upon being satisfied that the supplier had contravened the provisions of Section 171, forward the Application with its recommendations to Standing committee for further action; that in the DGAP Report, nothing was mentioned either about the complaint or the examination of the Application by the State Level Screening Committee and as to when the complaint was forwarded by the State Level Screening Committee to the Standing Committee recommending further investigation; that therefore it was not clear to him whether the Standing Committee had considered the written complaint within the period of limitation prescribed under Rule 128 (1) of the CGST Rules, 2017 and as to whether the State Level Screening Committee had completed its preliminary scrutiny within the prescribed period; that the Standing Committee could not have started its scrutiny in line with Rule 129 of CGST Rules 2017 beyond the prescribed period of limitation.



19. Supplementary Reports were sought from the DGAP on the submissions of the Respondent. In response, the DGAP vide his Reports dated 18.03.2020 and 24.06.2020 has furnished his clarificatory reports rebutting the various contentions raised by the Respondent. In respect of one of these contentions of the Respondent, the DGAP has interalia, reported that in the present case, for the calculation of the quantum of profiteering, the average prices of different products supplied by the Respondent during the pre-tax rate reduction period from 01.11.2017 to 14.11.2017 were taken as the base prices and that for calculation of the product-wise (SKU wise) base prices, the sales data pertaining to World Sandwich Day (WSD), i.e. 03.11.2017, was excluded since the transaction prices pertaining to that day were an exception. While the DGAP has submitted clarifications on several other issues, however, we find it necessary to intervene in the matter in the interest of justice on the issue which is discussed in detail in the paragraphs below.
20. We have carefully considered the Reports furnished by the DGAP, the contentions of the Respondent, and the other material placed on record. We observe that this case pertains to a franchisee of M/s Subway India Private Limited in Ghaziabad (Uttar Pradesh) who is supplying various food products to his recipients/ customers. We also find that there has been a reduction in the rate of tax from 18% to 5% w.e.f. 15.11.2017 on the restaurant service being supplied by the



Respondent, effected vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017, with the conditionality of denial of ITC. Therefore, it is a case wherein the Respondent was liable to pass on the benefit of tax reduction to his customers in terms of Section 171 (1) of the above Act. It is also apparent that the DGAP has carried out the present investigation w.e.f. 15.11.2017 to 30.06.2019 and that the investigation has found this case to be one where the provisions of Section 171 of the CGST Act 201 have indeed been contravened.

21. However, we observe that the DGAP, vide its clarificatory report dated 14.06.2020, has reported that while computing the quantum of profiteering, the sales data of the World Sandwich Day (WSD) on 03.11.2017 has been excluded while working out the product-wise base prices for the pre-tax rate reduction period, i.e. from 01.11.2017 to 14.11.2017. We find that under this offer, the Respondent was offering one similar product free for every product purchased by a customer on 03.11.2017. We also observe that the DGAP has reported that the sales data of the World Sandwich Day (WSD) was excluded because the sales data of 03.11.2017 (WSD) was an outlier and hence an exception. We find this exclusion improper because in several similar cases pertaining to other franchisees of M/s Subway India, the sales data of WSD or sales data related to a similar "Buy One Get One" scheme, was not excluded by the DGAP while computing profiteering in similar cases of franchisees of M/s



Subway India. It is apparent that this exclusion of the sales data of 03.11.2017 makes the computation of profiteering in this case different from the computation made in the case of Order Nos. 14/2020, 17/2020, 18/2020, and 36/2020 wherein the DGAP has not excluded the sales data of Buy One Get One (BOGO) offer or the WSD offer offered by those Respondents while working out the product-wise base prices for the period from 01.11.2017 to 14.11.2017. Hence the method used for computation of profiteering, in this case, becomes an aberration and thus unacceptable.

22. In terms of the above observation and without dwelling upon any other aspect of the case and without going into any other contentions of the Respondent, this Authority, under the powers conferred on it under Rule 133(4) of the CGST Rules read with Section 171 of the CGST Act 2017, directs the DGAP to reinvestigate this case and recompute the quantum of profiteering by duly incorporating the sales data of the World Sandwich Day as on 03.11.2017 in the calculation of the pre-tax rate reduction prices. While reinvestigating the matter on the above lines, all other contentions made by Respondent before this Authority during the course of the hearings may also be considered.
23. The DGAP shall submit his Report after reinvestigation on the above lines. The Respondent is directed to extend all necessary assistance to the DGAP and furnish him necessary documents or information required during the course of the investigation.





24. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was required to be passed within a period of 6 months from the date of receipt of the Report from the DGAP under Rule 129 (6) of the above Rules. Since the present Report has been received by this Authority on 29.01.2020 the order was to be passed on or before 28.07.2020. However, due to the prevalent pandemic of COVID-19 in the Country, this order could not be passed on or before the above date due to force majeure. Accordingly, this order is being passed today in terms of the Notification No. 65/2020-Central Tax dated 01.09.2020 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes & Customs under Section 168 A of the CGST Act, 2017.

25. A copy of this order be supplied to all the parties and file of the case be consigned after completion.

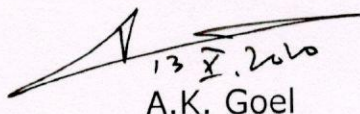
Sd/-  
(Dr. B. N. Sharma)  
Chairman

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

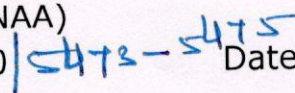


Sd/-  
(Amand Shah)  
Technical Member

Certified Copy

  
13.10.2020  
A.K. Goel

(Secretary, NAA)

F. No. 22011/NAA/126/Smokey Kitchen/2020  Date: 13.10.2020  
Copy To:-

1. M/s Smookey Kitchen Foods OPC Pvt. Ltd., (Franchisee of M/s Subway Systems India Pvt. Ltd.), G07 & G08, Ground Floor, Newtech LaGracia, Crossing Republik, Ghaziabad, Uttara Pradesh-201016.
2. Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
3. NAA website/Guard File