BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	30/2020
Date of Institution	07.10.2019
Date of Order	16.06.2020

In the matter of:

1. Kerala State Screening Committee on Anti-profiteering C/o Joint Commissioner GST, Tax Tower, Killpallam, Karmana PO, Thiruvananthapuram-695002, Kerala.
2. Director General of Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Whirlpool of India Ltd., Regd. Office A-4 MIDC, Ranjan Gaon, Taluka Shirur, Distt. Pune- 412220, Maharashtra.

Respondent

17.6.2020

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 Applicants.
2. Sh. Yatin Malhotra, Chief Financial Officer, Sh. Suresh Kumar, General Manager (Indirect Taxation), Sh. Manish Gaur and Smt. Disha Jain, Advocates for the Respondent.

ORDER

1. The brief facts of the case are that the Applicant No.1, vide minutes of its meeting held on 08.05.2018 had referred a case to the Standing Committee on Anti-profiteering against the Respondent alleging profiteering on the supply of "Refrigerator Whirlpool FP313D PROTTON ROY MIRROR" (HSN code 84182100) (hereinafter referred to as the product) by not passing on the benefit of reduction in the rate of tax w.e.f. 01.07.2017, by way of commensurate reduction in price, in terms of Section 171 of the Central Goods and Services Tax (CGST) Act, 2017. In this regard, the Applicant No. 1 had relied on two

invoices issued by the Respondent, the details of which are furnished in the Table given below:-

Table

Particulars		Pre-GST	Post-GST
Invoice No.	A	1214654736	913210006167
Invoice Date	B	11.09.2016	03.08.2017
Quantity Sold (No.)	C	2	5
MRP as per Annexure-7 (Rs.)	D	39,250	40,100
Basic price before discount per unit (Rs.)	E	32,576	29,824
Discount per unit (Rs.)	F	3,860	3,349
Basic price after discount per unit(Rs.)	G=E-F	28,716	26,475
Less Excise Duty @12.5% (35% abatement on MRP) (Rs.)	H=(D*65%) *12.5%	3,189	-
Basic Price (excluding duties & taxes) (Rs.)	I =G-H	25,527	26,475
VAT@14.5% (Rs.)	J=G*14.50%	4,164	-
GST@28% (Rs.)	K=G*28%	-	7,413
Total Tax (Rs.)	L=H+J or K	7,353	7,413
Total Tax (in %)	M=L/I	28.80%	28%
Selling Price (As per Invoice) (Rs.)	N=G+J or G-L	32,880	33,888
Increase in Basic price	Diff. of I	Rs. 948/- (3.71%)	

2. The above complaint was examined by the Standing Committee on Anti-profiteering in its meeting held on 02.07.2018, wherein it was decided to refer the matter to the Director General of Anti-Profiteering (DGAP) to initiate detailed investigation in the matter under Rule 129 (1) of the CGST Rules, 2017.

3. On receipt of the reference from the Standing Committee on Anti-profiteering, a Notice under Rule 129 (3) of the CGST Rules, 2017 was issued to the Respondent by the DGAP on 10.09.2018 asking him to reply whether he admitted that the benefit of reduction in the GST rate had not been passed on to the recipients by way of commensurate reduction in price. The Respondent was also asked to *suo moto* determine the quantum of benefit not passed on and indicate the same in his reply to the Notice along with the supporting evidence.

4. The period covered by the current investigation is from 01.07.2017 to 31.08.2018. The time limit to complete the investigation was extended upto 09.12.2018 by this Authority, in terms of Rule 129 (6) of the above Rules vide order dated 09.10.2018.

5. The Respondent had submitted his replies to the Notice vide his letters dated 01.10.2018, 09.10.2018, 12.10.2018, 15.10.2018, 16.10.2018, 05.11.2018, 12.11.2018, 16.11.2018, 29.11.2018, 01.12.2018 and 03.12.2018 stating: -

(a) That as a practice, he was operating on an All India constant Price List i.e. same Maximum Retail Price (MRP) and Dealer Price (DP) across all States. The DP was defined as the total Basic Price plus Value Added Tax (VAT)/ Goods & Services Tax (GST). In the pre-GST period, the VAT rates used to vary from State to State. Since the DP was constant on All India basis, the Basic Price also varied from State to State. However, in the post GST period, since the GST rate was constant, the Basic Price was also constant across the States. The Respondent had also used the term 'Net Basic Price' (NBP) which was the Basic Price less Excise Duty in the pre GST period and it was the same as the Basic Price in the post GST period. The Respondent had used the term 'Sales Realization' to reflect Net Basic Price less Discount.

(b) The DP effective on 11.09.2016 (pre-GST) for the impugned product was Rs. 37,300/- per unit and on 03.08.2017 (post-GST),

it was Rs. 38,175 per unit. The increase in DP of Rs. 875/- per unit in the two invoices was due to:-

(i) *Increase in Material Cost:* Impact of Rs. 365 per unit (on comparing effective Bill of Manufacture (BOM) cost as per the Systems Applications and Products (SAP) software).

(ii) *Increase in Freight Cost:* Impact of Rs. 29 per unit (on account of various market factors like availability driven by demand supply gaps, loading regulations and overall inflation etc.).

(iii) Reduction in Sales Realization due to GST : Impact of Rs. 441 per unit.

The Respondent has furnished comparison of the impact on the profit & loss due to transition to GST on the impugned product i.e. 'Refrigerator FP313D PROTTON ROY MIRROR', considering the pre-GST figures as mentioned in the Notice and by working out the post-GST Basic Price treating the DP as constant (same as pre-GST), as per the details furnished in Table- 'B' below:-

Table-'B' (Amount in Rs.)

Rs Per Unit	Pre GST Example (Inv 1214654736) Kerala Only VAT @ 14.5%	Pre GST Example All India VAT @ 13.82% Same DP	Post GST Example All India GST @ 28% Same DP	Change All India Same DP
MRP	39250	39250	39250	
Dealer Price	37300	37300	37300	
VAT / GST %	14.50%	13.82%	28.00%	
VAT/ GST Rs	4724	4529	8159	
Basic Price	**32576**	**32771**	**29140**	
Less : Excise	3189	3189		
Net Basic Price	**29387**	**29582**	**29140**	**-441**

The Respondent has claimed that it could be seen from the Table-B above that if the All India pre-GST Net Basic Price (Rs. 29,582/-) was compared with the All India post-GST Net Basic Price (Rs. 29,140/-), there was reduction of Rs. 441 per unit (~1.5%) which directly impacted his margins.

(c) That to bridge this gap and to maintain margins, there was a need to increase the price of the impugned product however, in the case of the impugned product, there had been no price increase between October, 2016 and August, 2017 when the DP was increased.

(d) That in the Table-'A' mentioned supra, there was gap in the discount offered on the Invoices in the Pre and Post GST columns (Rs. 3860/- in pre-GST and Rs. 3349/- in post-GST). The mechanism of passing on discounts in the industry depended on various market factors like sales momentum, festival timings, trade partner tie ups, volume discounts, share of on invoice and off invoice discounts etc. Therefore, for any comparison of the pre-GST and post-GST prices, the Respondent had equated the per unit discount value, as has been furnished in Table-'C' below:-

Table-'C' (Amount in Rs.)

Rs Per Unit	Column A **Pre GST Example** (Inv 1214654736) Kerala Only VAT @ 14.5%	Column B **Pre GST Example** (Inv 1214654736) All India VAT @ 13.82%	Column C **Post GST Example** (Inv 913210006167) All India GST @ 28% Discount as per actual invoice	Column D **Post GST Example** (Inv 913210006167) All India GST @ 28% Discount same as Pre GST Invoice
MRP	39250	39250	40100	40100
Dealer Price	37300	37300	38175	38175
VAT / GST %	14.5%	13.8%	28.0%	28.0%
VAT / GST Rs	4724	4529	8351	8351
Basic Price	**32576**	**32771**	**29824**	**29824**
Less : Excise	3189	3189	0	0
Net Basic Price	**29387**	**29582**	**29824**	**29824**
Less : Discount	3860	3860	3349	3860
Sales Realization	**25527**	**25722**	**26475**	**25964**

The Respondent has also stated that it could be seen from Table-C above that the real comparison of the impact of GST could be gauged by the amounts in Column B (Pre-GST All India) vis-a-vis the amounts mentioned in Column D (Post-GST with Constant Discount). Sales Realization in Column B was Rs. 25,722/- and in Column D, it was Rs. 25,964/-. It could be concluded that with a DP increase of Rs. 875/- per unit (Rs. 38,175- Rs. 37,300), the impact in Sales Realization was only Rs. 242/- (Rs. 25,964- Rs 25,722). However, the total impact on margins has been furnished in Table-'D' below:-

Table-'D'

Particulars	Amount in Rs.
Increase in Sale Realization	242
Less: Increase in Material Cost	365
Less: Increase in Freight Cost	29
Net Impact on Margins	(-)152

(e) The Respondent has also compared the total discounts passed on to M/s Pittappillil Agencies for the period July-December, 2016 and Jul

December, 2017. The summary has been furnished in Table-'E' given below:-

Table-'E' (Amount in Rs.)

	Jul ~ Dec 2016	Jul ~ Dec 2017	Change
Sales Volume	8360	8705	345
Sales Value Rs Lacs	1137	1117	-20
On Invoice Discount Rs Lacs	117	109	-8
On Invoice Discount %	10.3%	9.8%	-0.5%
Off Invoice Discount Rs Lacs	92	117	25
Off Invoice Discount %	8.0%	10.5%	2.4%
Total Discount Rs Lacs	208	226	18
Total Discount %	18.3%	20.2%	1.9%
Total Discount / Unit (Rs)	2493	2599	105

The Respondent has also contended that as could be seen from the Table-E above, the actual discount passed on to the trade partner has actually increased by Rs. 105/- per unit over the period.

(f) That the allegation made in the Notice that the benefit of reduction in the rate of tax has not been passed by commensurate reduction of price was not correct as there was no reduction in the total tax incidence (in %) and infact the total tax incidence as % of Net Basic Price has gone up from 26.1% to 28.0% as has been shown in the Table- 'F' below:-

Table-'F' (Amount in Rs.)

Rs Per Unit	Pre GST Example All India VAT @ 13.82% Same DP	Post GST Example All India GST @ 28% Same DP
MRP	39250	39250
Dealer Price	37300	37300
VAT / GST %	13.82%	28.00%
VAT/ GST Rs	4529	8159
Basic Price	**32771**	**29140**
Less : Excise	3189	
Net Basic Price	**29582**	**29140**
Total Tax	7718	8159
% to Net Basic Price	**26.1%**	**28.0%**

In absolute terms also, the total tax incidence has gone up by Rs. 441 per unit (Rs. 8159 – Rs. 7718).

6. The Respondent has also submitted the following documents: -

(i) List of all GSTINs.

(ii) GSTR-1 and GSTR-3B Returns for the period from July, 2017 to August, 2018 for all the GST registrations.

(iii) Invoice-wise details of the outward taxable supplies of the impugned product under investigation for the period from April, 2017 to August, 2018 for all the GST registrations.

(iv) Details of applicable tax rates, pre-GST & post-GST.

(v) Price lists of the impugned product, pre and post 01.07.2017.

(vi) Sample copies of the invoices, pre and post 01.07.2017.

7. The DGAP has stated in his Report that the Central Government, on the recommendation of the GST Council, had levied 28% GST on the "Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps other than air conditioning machines of heading 8415", vide S. No. 120 of Schedule- IV attached to Notification No. 01/2017-Central Tax (Rate) dated 28.06.2017. The impugned product viz. 'Refrigerator Whirlpool FP313D PROTTON ROY MIRROR' was covered under the aforesaid notification. He has also stated that the Respondent has contended that the total incidence of tax on the impugned product has increased from 26.1% (pre-GST) to 28% (post-GST). However, on examining the documents submitted by the Respondent he has observed that the impugned product was manufactured at Pune (Maharashtra) only while it was sold in Maharashtra and in other States. Therefore, it was

liable to Central Sales Tax @ 2% apart from the VAT (ranging between 12.50% to 15.95%) and the Central Excise Duty @12.50% on the abated MRP. In some States, Entry Tax (1% to 2%) was also levied on the impugned product. Therefore, the average tax incidence in pre-GST period was about 31.5% which had got reduced to 28% on the introduction of GST w.e.f. 01.07.2017. The State-wise details of pre-GST tax incidence have been furnished in **Annexure-19** by the DGAP. Therefore, the DGAP has claimed that the contention of the Respondent that the total tax incidence on the impugned product has increased in the post-GST period was not correct.

8. The DGAP has also submitted that the Respondent has contended that there was gap in the discounts offered on two Invoices relied upon by the Applicant No. 1 and the mechanism of passing on the discounts depended on various market factors and therefore, for any comparison of the pre-GST and post-GST scenario, the discount value should be equated or in other words, the same discount amount should be considered for both the periods. In this regard the DGAP has referred to Section 15 (1) of the CGST Act, 2017 which reads as "*The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.*" He has also referred to Section 15 (3) (a) of the above Act which provides that the value of the supply shall not include any discount which is given before or at the time of the supply if such discount has been duly recorded in the invoice issued

in respect of such supply. Accordingly, he has argued that the GST was chargeable on the actual transaction value after excluding any discount and therefore, for the purpose of establishing profiteering, if any, Basic Price before discount could not be considered and the Basic Price after discount (excluding duties) was the correct amount which should be taken into consideration.

9. The DGAP has further argued that as per Section 171 of the CGST Act, 2017 which governs the anti-profiteering provisions, in the event of a benefit of Input Tax Credit (ITC) or reduction in the rate of tax, there must be a commensurate reduction in prices of the goods or services. Such reduction could obviously only be in absolute terms and the final price payable by a consumer must get reduced commensurate with the reduction in the tax rate.

10. The DGAP has also claimed that the Respondent has submitted that on comparing the total discounts passed on to M/s Pittappillil Agencies (Recipient in the two invoices referred in Table-'A' supra) for the periods, Jul-Dec 2016 and Jul-Dec 2017, it could be seen that the actual discount has increased by Rs. 105/- per unit. However, the Respondent has admitted that this increase in discount was on account of various market factors and not on account of reduction in the rate of tax. Therefore, the DGAP has contended that the Respondent has not passed on the benefit of reduction in the rate of tax to his recipients in the form of discount.

11. The DGAP has further contended that from the details of the outward supplies made during the period from 01.07.2017 to 31.08.2018

furnished by the Respondent the amount of net higher sale realization due to increase in the basic price of the impugned product, despite the reduction in the GST rate or in other words, the profiteered amount came to **Rs. 5,06,921**/-. The details of transaction wise computation of the profiteered amount have been furnished by the DGAP vide **Annexure-20** attached to his Report dated 06.12.2018. The profiteered amount has been arrived at by comparing the State-wise average basic price (after discount) of the impugned product during the period from 01.04.2017 to 30.06.2017, with the transaction-wise basic price (after discount) during the period from 01.07.2017 to 31.08.2018.

12. The place of supply and the break-up of the total profiteered amount of Rs. 5,06,921/- has been furnished by the DGAP in Table-G below:-

Table –G (Amount in Rs.)

S.No.	State/Union Territory (Place of Supply)	No. of Units Sold	Amount of Profiteering (Rs.)
1	Andhra Pradesh	20	32,089
2	Assam	5	8,662
3	Delhi	31	4,547
4	Gujarat	51	52,485
5	Haryana	13	12,141
6	Jammu and Kashmir	7	3,914
7	Kerala	60	35,979
8	Madhya Pradesh	19	21,681
9	Maharashtra	48	55,380
10	Nagaland	7	15,131
11	Orissa	16	38,704
12	Puducherry	1	2,170
13	Punjab	9	15,495
14	Rajasthan	26	42,192
15	Tamil Nadu	10	5,997
16	Telangana	24	32,437
17	Tripura	3	5,310
18	Uttar Pradesh	62	57,498
19	Uttarakhand	1	735
20	West Bengal	38	64,374
	Grand Total	**451**	**5,06,921**

13. The DGAP has also alleged that the basic price (excluding tax) of the impugned product was increased by the Respondent although there was a reduction in the rate of tax after the introduction of GST w.e.f. 01.07.2017 as was evident from the details furnished in **Annexure-20** and thus, the commensurate benefit of reduction in the GST rate was not passed on to the recipients. Accordingly, the DGAP has submitted that the provision of Section 171 (1) of the CGST Act, 2017 requiring that *"a reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices"*, has been contravened by the Respondent in the present case.

14. After perusal of the DGAP's Report dated 06.12.2018, this Authority in its meeting held on 11.12.2018 had decided to hear the Applicants and the Respondent on 03.01.2019 and accordingly notice dated 13.12.2018 was issued to them. The Respondent was also directed to explain why his liability for violating the provisions of Section 171 of the above Act should not be fixed. On behalf of the Applicant No. 1 none appeared, the DGAP was represented by Sh. Bhupender Goyal, Assistant Director (Cost) and the Respondent was represented by Mr. Yogesh Gaba (CA), Punit Bansal (CA), Yatin Malhotra, Chief Financial Officer and Suresh Kumar, General Manager-Indirect Taxation. On the request of the Respondent further

hearings were held on 17.01.2019, 01.02.2019, 08.02.2019 and 02.05.2019.

15. The Respondent has filed detailed written submissions on 11.01.2019, 18.01.2019, 21.01.2019, 06.02.2019, 11.02.2019 and 05.04.2019. The Respondent in his submissions has stated that he was a public limited company incorporated under the Companies Act, 1956 with registered office at Pune, Maharashtra. He has also claimed that he was manufacturing and marketing electronic goods and all his products to various dealers across India were sold on a standard pricing model. He has further claimed that his price remained identical for all the dealers irrespective of the location which included the basic price plus taxes. The Respondent has also stated that the impugned product was manufactured and sold from April 2014 and was discontinued in December 2017. He has provided details of the MRP and DP during this period as has been given in the Table below:-

Month and Year	MRP (Rs.)	Dealer's Price (Rs.)
April 2014	36,750/-	34,990/-
August 2014	36,875/-	35,115/-
December 2014	37,075/-	35,115/-
February 2015	37,575/-	36,200/-
October 2015	38,150/-	36,200/-
April 2016	38,300/-	36,850/-
July 2016	39,175/-	37,300/-
October 2016	39,250/-	37,375/-
July 2017	40,100/-	38,175/-
December 2017 onwards (Product discontinued)	42,550/-	38,675/-

16. The Respondent has also submitted that the contention of the DGAP that the rate of tax on the product was reduced from 31.5% to 28% w.e.f. 01.07.2017 was factually incorrect since the rate of tax had increased from 26.47% to 28% which has been explained by him through the Tables given below:-

Increase in tax incidence between pre-GST and post-GST had MRP remained the same

Particulars	Pre-GST (in ₹)	Post-GST (in ₹)
MRP	39,250/-	39,250/-
Excise Duty	3,189/-	-
Average VAT & CST on MRP (14.06%) GST (28 %)	4,838/-	8,586/-
VAT reversal	185/-	-
Entry Tax (Annexure 16)	45/-	-
Total taxes	8,257/-	8,586/-
Total	30,993/-	30,664/-
Total taxes (percent)	**26.64**	**28**

Increase in tax incidence between pre-GST and post-GST based on actual MRP

Particulars	**Pre-GST (in ₹)**	**Post-GST (in ₹)**
MRP	39,250/-	40,100/-
Excise Duty	3,189/-	-
Average VAT & CST on MRP (14.06 %) / GST (28 %)	4,838/-	8,772/-
VAT reversal	185/-	-
Entry Tax	45/-	-
Total taxes	8,257/-	8,772/-
Total	30,993/-	31,328/-
Total taxes (percent)	**26.64**	**28**

17. The Respondent has also stated that the Authority vide its order dated 24.12.2018 passed in the case of **M/s Panasonic India Pvt. Ltd.**, which was also trading in consumer durables has held that increase in the basic price did not amount to profiteering when the rate of tax incidence post-GST had increased.

18. The Respondent has also claimed that there were gross infirmities in the computation of the profiteered amount made by the DGAP and these infirmities were shown as ignorance of negative profiteering supplies, denial of benefit of VAT ITC reversal and the benefit of discounts. The Respondent has further claimed that when various prices were compared there were certain transactions where the prices of the product were much less than the commensurate prices calculated by the DGAP which has led to a negative profiteering. If these details were considered the positive profiteering would be Rs. 5,06,921/- and the negative profiteering would be Rs. 2,14,217/- and therefore the net benefit would be only Rs. 2,92,704/-. The Respondent has also contended that the DGAP has taken into account Rs. 497/- as VAT ITC reversal for each unit while actually it was only Rs. 185/- per unit. If this was considered the net benefit would be Rs. 1,28,167/-. The Respondent has further contended that the DGAP's Report has erred in not considering the discounts which were given

out of his own profit margin. He has also submitted that this Authority in the cases of **M/s Asian Paints Ltd.** vide order dated 27.12.2018, **Rishi Gupta v. M/s Flipkart Internet Pvt. Ltd.** vide order dated 18.07.2018 and **M/s Maruti Suzuki India Ltd.** vide order dated 02.01.2019 has held that reduction in the discount did not amount to profiteering. The Respondent has further submitted that if these discounts of Rs. 2,47,020/- were considered the net realisation would be Rs. (-) 1,18,853/-.

19. The Respondent has also stated that the DGAP has taken into account the Pre-GST invoice of September 2016 for comparison while the Respondent had undertaken price revision in October 2016. The DGAP had taken DP and the basic price as Rs. 37,300/- and Rs. 32,576/- respectively while the DP and basic price from October 2016, prior to introduction of GST was Rs. 37,375/- and Rs. 32,642/- respectively. Thus, there was an increase in the basic price to the extent of Rs. 66/- prior to the introduction of GST. The Respondent has also alleged that the DGAP has failed to appreciate the fact that reduction in the discount did not amount to profiteering and such reduction in discount to the tune of Rs. 511/- (Rs. 3,860 – Rs. 3,349) in the two invoices (as shown in the Table-A above) considered by the DGAP was due to increase in the cost of the product to the tune of Rs.

394/- between August 2016 and July 2017 and considering these factors, the change in realisation was Rs. 23/- (negative) per unit (Rs. 971- Rs. 948) against the allegation of profiteering. The Respondent has also argued that if the discounted price was taken in to account the pre GST rate of tax would be 26.92% and the post GST rate would be 28% as has been explained in the Table given below:-

Particulars		**Pre-GST**	**Post-GST**
Invoice No.	A	1214654736	913210006167
Invoice Date	B	11.09.2016	03.08.2017
Quantity Sold (No.)	C	2	5
MRP as per Annexure-7 (₹)	D	39,250/-	40,100/-
BP before discount per unit (₹)	E	32,576/-	29,824/-
Discount per unit (₹)	F	**0/-**	**0/-**
BP after discount per unit (₹)	G= E-F	32,576/-	29,824/-
Less: Excise Duty at the rate of 12.5% (35% abatement on MRP) (₹)	H= (D*65%*12.5%)	3,189/-	-
BP (excluding duties & taxes) (₹)	I= G-H	29,387/-	29,824/-
VAT at the rate of 14.5% (₹)	J= G*14.50%	4,723/-	-
GST at the rate of 28% (₹)	K= G*28%	-	8,350/-
Total tax (₹)	L= H+J or K	7,913/-	8,350/-
Total tax (percentage)	M= L/I	**26.92%**	**28%**

20. The Respondent has further stated that the product in question constituted 61% of his total sales and increase in the raw material cost and haulage cost which had a direct bearing on the price of the product had resulted in increase in the cost much more than the increase in price which the DGAP had failed to consider. The following

details were provided by the Respondent to substantiate his claim as have been given in the Table below:-

(in Lakhs)

Particulars	July-Sep.	Oct.-Dec.
Sales		
2016	95,753	91,990
2017	1,18,735	98,254
Income (Net of taxes)		
2016	5,907	5,616
2017	7,175	5,336
% (Income/Sales)		
2016	6.2%	6.1%
2017	6.0%	5.4%
Reduction in profits	0.2%	0.7%

21. The Respondent has also averred that the ITC of Maharashtra factory was Rs. 682/- which included the in-eligible credit of Rs. 185/-. The balance of Rs. 497/- which was the eligible ITC has been wrongly deducted from the pre-GST basic price as VAT credit reversal has no relation with the basic price at which the Respondent was selling his products. Therefore, the basic price mentioned in Annexure-19 of the DGAP's Report should be considered after excluding VAT credit reversal amount. He has also submitted that inadvertently in his earlier communication to the DGAP he has provided the eligible credit of Rs. 497/- instead of the reversed ITC of Rs. 185/-.

22. The Respondent has also stated that inter-state sales made by him in Assam and Gujarat have not been considered while computing the pre-GST tax incidence and therefore, the tax incidence should be

considered after including the aforesaid inter-state sales. Relying on this Authority's decision in the case of **M/s Panasonic India Pvt. Ltd.**, the Respondent has claimed that the indirect tax incidence (pre-GST) was 27.08% which was supported by the news report appearing in the Economics Times which stated that pre GST average indirect tax incidence in the consumer durables electronic industry was around 26.5%.

23. The Respondent has further stated that pricing decisions were being taken on the basis of MRP and the DP and this Authority on various occasions had consistently held that a seller gave discounts from his own profit margin and the discounts were not relevant for determining profiteering. The Respondent has also claimed that the VAT credit taken on inputs to the extent such inputs were used in the manufacture of the goods which were stock transferred by him on inter-state basis was reversed. According to him this VAT reversal was tax cost and based on that he had computed the tax incidence. He has further claimed that the VAT reversal had no link with the price and it was not relevant for determining commensurate reduction in the price as VAT reversal did not form part of the invoice. He has also stated that the DGAP has failed to consider that reduction of VAT reversal from the basic price would entail double effect of the tax incidence. The DGAP

has also not considered the CST sales from Assam and merged the CST sales from Gujarat in local sales, because of which pre-GST tax incidence has got reduced by 34 basis points. The Respondent has also stated that he was maintaining single MRP and DP across India, but due to different VAT rates and varying discounts in various States, there could be instances where post-GST price was less than pre-GST price and vice-versa but the DGAP has failed to consider that the Respondent could not have different DP for different customers.

24. In his submissions dated 11.02.2019 the Respondent has stated that:-

- The prices were reduced across all Stock Keeping Units (SKUs) w.e.f. July 27, 2018. Price Lists are enclosed as Annexure-1.
- The revised prices were displayed on his website, making consumers aware about the reduction in prices (Annexure-2).
- Letters were sent to the trade partners advising them to ensure that the reduction in prices was passed on to the consumers (Annexure-3).
- Revised MRP stickers to the extent of 7.2 lakhs were pasted on each SKU in 25 States within a limited period of time, which was widely publicised through Economic Times dated 27.07.2018 (Annexure-4).

25. The Respondent has further stated that Section 171 of the CGST Act, 2017 was inapplicable on reduction of tax incidence due to change in

the tax regime. He has also claimed that the penalty could not be imposed in the absence of substantive provision in the CGST Act because as per Rule 133 of the CGST Rules, 2017, penalty could be imposed if it was specified in the CGST Act. He has further claimed that Section 122 of the CGST Act, 2017 could be invoked only in the case of evasion of tax and violation of Section 171 did not amount to evasion of tax as he has duly paid the entire tax which was legally required to be deposited with the Government. He has further stated that Section 122 (1) (i) was not attracted as he has complied with all the requirement of a tax invoice specified under Rule 46 of the CGST Rules, 2017 and the 'value' mentioned in the tax invoice was in accordance with Section 15 of the CGST Act, 2017 read with CGST Rules with respect to 'determination of value of supply'. He has also mentioned that the Hon'ble Supreme Court, in plethora of judgments, has held that penalty could not be imposed in the absence of sanction by the parent Act. He has also relied on the following judgements:-

a. Khemka & Co. (Agencies) Pvt. Ltd. v. State of Maharashtra [1975] 2 SCC 22;

b. Collector Of Central Excise v. Orient Fabrics Pvt. Ltd. 2003 (6) SCR

26. In response to the above submissions of the Respondent the DGAP vide his supplementary Reports dated 05.02.2019, 08.03.2019 and 10.04.2019 has stated that the VAT credit reversal was in lieu of the Central Sales Tax (CST) which was cost to the Respondent in the pre GST regime and hence, it was reduced from the pre GST basic price. He has further stated that the amount of Rs. 497/- as ITC VAT reversal was intimated by the Respondent himself and hence, it was reduced from the pre GST basic price. He has also claimed that the Respondent had not produced evidence to prove that the amount of VAT reversal was Rs. 185/-. The DGAP has further claimed that the rate of tax was 31.50% during the pre GST period which was reduced to 28% during the GST period and since there was reduction in the rate of tax its benefit was required to be passed on to the customers by the Respondent as per the provisions of Section 171 (1) of the above Act. He has also contended that the claim of the Respondent that the pre GST incidence of tax was 27.31% was not correct as it had been calculated on the pre discounted base price. He has further contended that the profiteered amount has been computed invoice wise by taking into account the post GST basic price inspite of reduction in the rate of tax. The DGAP has also stated that increase in the cost and freight charges were independent factors which had no connection with the provisions of Section 171 (1) of the above Act.

27. This Authority vide its order dated 25.06.2019 had directed the DGAP to re-examine the following issues under Rule 133 (4) of the CGST Rules, 2017 as the Respondent had vehemently contested the issues of reversal of ITC and the incidence of tax during the pre and the post

GST regimes, which were required to be resolved before liability of the Respondent could be fixed for violation of the provisions of Section 171 of the CGST Act, 2017:-

1) Whether the credit reversals was Rs. 497/- or 185/-?
2) If Rs. 185/- were to be taken as ITC reversal would there be reduction in the rate of tax after the introduction of GST?
3) If yes to re-determine the profiteered amount after taking into account all the submissions made by the Respondent during the hearings before this Authority.

28. The DGAP has accordingly submitted his Report under Rule 133 (4) of the CGST Rules, 2017 which was received on 07.10.2019 in which he has stated that the Respondent has made various submissions before this Authority which were divergent to those made before his office during the investigation. He has also stated that after considering the workings submitted by the Respondent before this Authority, vide Annexure-15 at Page 123 of the Respondent's submissions dated 11.01.2019, it was observed that the ITC of VAT available to the Respondent was Rs. 682/- per unit out of which the Respondent has availed Rs. 497/- and reversed Rs. 185/- in lieu of the CST on the inter-state stock transfers. Further, the Respondent has also submitted the details of the Entry Tax of Rs. 45.45 per unit, vide Annexure-16 (Page 127) of his submissions dated 11.01.2019, before this Authority.

29. It has also been submitted by the DGAP that the Central

Government, on the recommendation of the GST Council, had levied 28% GST on the "Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps other than air conditioning machine of heading 8415", vide S. No. 120 of Schedule-IV attached to Notification No. 01/2017-Central Tax (Rate) dated 28.06.2017. The impugned product "Refrigerator Whirlpool FP313D PROTTON ROY MIRROR" was covered by the aforesaid Notification. The DGAP after considering the revised details of the VAT reversal in lieu of the CST, Entry Tax and the CST sales in Assam and Gujrat has stated that the average tax incidence in pre-GST period was about 30% which got reduced to 28% on introduction of GST. However, the tax incidence on introduction of GST has marginally increased in Delhi from 27.86% to 28% and in Haryana, from 27.96% to 28%.

30. The DGAP has further stated that the amount of profiteering made by the Respondent for failing to pass on the benefit of the reduction in the rate of tax to the recipients, in terms of Section 171 of the CGST Act, 2017, came to **Rs. 4,07,451/-** including the GST after considering the details of outward supplies during the period from 01.07.2017 to 31.08.2018 furnished by the Respondent and the various submissions made before this Authority the said profiteered amount has been arrived at by comparing the State-wise average basic price (after discount) of the impugned goods during the period from 01.04.2017 to 30.06.2017 with the transaction-wise basic price (after discount) during the period from 01.07.2017 to 31.08.2018 for all the States (except Delhi and Haryana where the tax incidence

has increased on introduction of GST). The place of supply wise break-up of the total profiteered amount of Rs. 4,07,451/-, as given by the DGAP is furnished in the Table-A below:-

Table-A

S. No.	State/Union Territory (Place of Supply)	State Code	No. of Units Sold	Amount of Profiteering (Rs.)
1	Andhra Pradesh	37	20	26,955
2	Assam	18	5	7,297
3	Gujarat	24	51	41,633
4	Jammu and Kashmir	1	7	3,039
5	Kerala	32	60	25,964
6	Madhya Pradesh	23	19	17,586
7	Maharashtra	27	48	57,184
8	Nagaland	13	7	12,743
9	Odisha	21	16	33,927
10	Pondicherry	34	1	1,828
11	Punjab	3	9	12,425
12	Rajasthan	8	26	36,051
13	Tamil Nadu	33	10	4,973
14	Telangana	36	24	24,805
15	Tripura	16	3	4,287
16	Uttar Pradesh	9	62	43,586
17	Uttarakhand	5	1	394
18	West Bengal	19	38	52,774
	Grand Total		**407**	**4,07,451**

31. On perusal of the DGAP's Report, this Authority in its meeting held on 11.10.2019 decided to hear the Applicants and the Respondent on 04.11.2019 and accordingly notice was issued to them. The Respondent was also directed to show cause why he should not be held liable for violation of the provisions of Section 171 (1) of the CGST Act, 2017. The Respondent had sought adjournment and accordingly the hearing took place on 25.11.2019. On behalf of the Applicants none appeared and the Respondent was represented by Sh. Yatin Malhotra, Chief Financial Officer, Sh. Suresh Kumar, General Manager (Indirect Taxation), Sh. Manish Gaur and Smt.

Disha Jain, Advocates. On the request of the Respondent further hearings were held on 03.01.2020 and 06.02.2020.

32. The Respondent has made submissions on 25.11.2019 and stated that in his Report, the DGAP has agreed that ITC reversal was Rs. 185/- and after considering the reversal of Rs. 185/- in two States Delhi and Haryana, the DGAP has noted that the tax incidence on introduction of GST had increased marginally. Accordingly, the DGAP has concluded that there was no profiteering in the above two States. In other States also, the incidence of tax, prior to introduction of GST as was shown by the DGAP in his Report dated 06.12.2018 has reduced and accordingly, the DGAP has re-determined the profiteered amount. He has also stated that while calculating the profiteering amount in the impugned Report, the DGAP has not considered the other submissions made by the Respondent before this Authority in the earlier proceedings even though the DGAP was specifically directed by this Authority to consider the same. He has further stated that the following submissions made by the Respondent have not been considered by the DGAP due to which the present Report needed to be rejected:-

a) Negative profiteering supplies have been ignored.

b) The amount of realization under GST regime has changed due to reduction in discounts.

c) Various other factors which impacted the cost of impugned product including change in direct bill of material cost and change in other variable costs like freight, warranty, installation.

d) The overall profitability of the Respondent has reduced post introduction of GST.

e) Basic Price considered for the purpose of 'profiteering' needs to be considered 'Pre-discount'.

f) There is an overall increase in prices prevailing in consumer durable electronic industry.

33. He has also submitted that in response to the Report dated 06.12.2018 he had raised various contentions vide his submissions dated 11.01.2019, 18.01.2019, 21.01.2019, 06.02.2019, 11.02.2019 and 05.04.2019 which were recorded by this Authority in its order dated 25.06.2019, however, the said submissions were not considered by it while passing the order dated 25.6.2019. This Authority had directed the DGAP to consider all the submissions made by the Respondent during the re-investigation as to whether there was reduction in the rate of tax after introduction of GST and whether the provisions of Section 171 of CGST Act were applicable or not which had not been done by the DGAP in his supplementary Report. Therefore, his submissions dated 11.01.2019, 18.01.2019, 21.01.2019, 06.02.2019, 11.02.2019, and 05.04.2019 should be considered as part and parcel of his present submissions.

34. The Respondent has further submitted that no guidelines or procedure has been framed by this Authority in order to determine whether profiteering has been undertaken by a supplier or not. In the absence of the same, it was open for each supplier including the Respondent to decide and undertake steps in order to ensure that provisions of

Section 171 of CGST Act were followed by passing on the commensurate benefits of GST rate reduction or availability of additional ITC.

35. The Respondent has also argued that the word "*commensurate reduction*" mentioned in the above Section denoted reduction in the price after taking into account all the factors which impacted pricing of goods. Had the legislative intention been otherwise, instead of the word 'commensurate', the word 'equal' or 'equivalent' would have been used in this Section. 'Commensurate' connoted proportionality and adequacy. The Respondent has further argued that while determining the required '*commensurate reduction*', the cost of raw materials, packing materials, overheads, market factors, labour cost, inflation and other such elements involving increase in the cost were to be factored in. However, the approach adopted by the DGAP for calculating the alleged profiteering undertaken by the Respondent had not considered such factors.

36. He has also claimed that the DGAP has analysed the fact of alleged profiteering undertaken by Respondent by comparing the average tax incidence (%) pre-GST vis-à-vis the average tax incidence (%) post-GST on a State level in his impugned Report. Pursuant to such analysis the DGAP has prepared the list of the States in respect of which the tax incidence (%) has increased under the GST regime as compared to the incidence of tax which was prevalent under the erstwhile indirect tax regime. In case the incidence of tax has increased the DGAP has excluded such State from the computation of the profiteered amount e.g. the DGAP has concluded that the tax

incidence with the introduction of GST has marginally increased in Delhi from 27.86% to 28% and in Haryana from 27.96% to 28% thus, the DGAP has excluded the States of 'Delhi' and 'Haryana' for computation of the alleged profiteering amount.

37. The Respondent has further claimed that the methodology adopted by the DGAP for calculating the profiteered amount was incorrect insofar as the comparison between the average tax incidence (%) pre-GST vis-à-vis the average tax incidence (%) post-GST was concerned as it should be computed on an overall basis (Entity Level) and not at the State level as the decision to ascertain product pricing was taken considering the Indian market as a whole. The Respondent has fixed the price of the impugned product at the national level i.e. the MRP of the impugned product was same across all the States in India and the rate of tax applicable in a State (which varied earlier) has not led to difference in the MRP.

38. He has also contended that with the introduction of GST, the consumer durable electronic industry had to revisit its pricing in the background of the revised rate of tax and ITC availability. Accordingly, he had ascertained the factors affecting his pricing including credits which were not available earlier, tax rates, overall tax incidence, increase/decrease in the price of the inputs and logistic costs etc. on overall basis rather than on the State level. He has further contended that he was supplying his products on standard pricing model i.e. the basic price along with applicable taxes was to remain identical for all his dealers (category specific) irrespective of their location. Thus, the

task of determining new pricing/MRP was also done at the national level.

39. The Respondent has also pleaded that when the pricing was decided by the Respondent at the national level as an entity, the calculation of the alleged 'profiteering' should also be done at an entity level. Thus, the methodology adopted by the DGAP to ascertain whether the Respondent has undertaken profiteering or not at a State level was incorrect and on this basis, alone the impugned report was liable to be rejected.

40. He has further pleaded that the basic prices (without any tax incidence) for the purpose of making comparison of average tax incidence (%) for the pre-GST and the post-GST periods (i.e. taxes/duties suffered ***divide by*** the basic price (without any tax incidence), should be considered as **pre-discount**. This was due to the fact that similar to all other business entities, the Respondent was also offering discounts to his distributors based on various commercial considerations like achievement of targets, sales trend in the market and festivities at different points of time etc. He has also submitted that these discounts could vary from dealer to dealer, period to period and State to State. Moreover, the said discounts were offered by the Respondent from his own profit margin. Thus, not considering the effect of discounts for the purpose of arriving at the average tax incidence (%) and eventually for ascertaining whether the Respondent had undertaken profiteering in terms of Section 171 of CGST Act was totally incorrect. In this regard, he has placed reliance on this Authority's decision given on 27.12.2018 in the case of ***Asian Paints***

Limited, wherein it was held that the impact of discount should be excluded from profiteering calculation as the same was offered by the taxpayer from his profit margin. Similar view was taken by this Authority in its order dated 18.07.2018 passed in the case of ***Rishi Gupta v. Flipkart Internet Private Limited*** and 02.01.2019 in the case of ***Maruti Suzuki India Limited***. Thus, it was settled legal position that discount was not a relevant factor for determining profiteering. Therefore, basic price should be considered after including discount.

41. He has further submitted that after considering the basic price pre-discount and if the calculation was made on an overall basis, the alleged profiteering, if any would come to the negative figure (***Minus Rs. 43,558/-***). He has also enclosed the detailed calculation for the same as Exhibit-4 with his submissions.

42. He has also averred that even if the methodology adopted by the DGAP (Annexure-19 of his Report dated 07.10.2019) to ascertain the States in which the Respondent has resorted to profiteering, was followed, the alleged profiteering should be computed for only 5 States *viz*. Assam, Bihar, Gujarat, Madhya Pradesh and Rajasthan, in case the basic price was considered 'pre-discount'. In respect of the said 5 States, the average tax incidence would be marginally less under the GST regime (i.e. pre-GST tax incidence in these states was 28.52%). The tax incidence of .52% was marginal and should not be considered to determine as to whether section 171 was applicable or not. He has further averred that in respect of these five states the profiteering

figure in the revised Annexure-20 of the revised DGAP Report should be reduced to **Rs. 1,02,567/-** from Rs. 4,07,451/- as per Exhibit-5.

43. The Respondent has also alleged that the DGAP has computed profiteering by comparing the State-wise average basic price (after discount) of the impugned product during the period from 01.04.2017 to 30.06.2017, with the transaction-wise basic price (after discount) during the period from 01.07.2017 to 31.08.2018 for all the States (except Delhi and Haryana where tax incidence has increased on introduction of GST). The calculation of "*State-wise average basic price (after discount) of the impugned product*" was based on the supplies made to the distributors other than E-commerce customers during the period from April,2017 to June, 2017. However, for the post GST period, the supplies made to E-commerce operators have been considered as well. By comparing the State-wise average basic price (after discount) pre-GST, which was based on supplies to the distributors other than E-commerce customers, with the supplies to E-commerce customers post-GST, the DGAP has erred while computing profiteering. He has further alleged that in the case of E-commerce operators no discount was given therefore application of post discount price for calculation of profiteering in case of E-commerce operators was unreasonable and unjustified. Accordingly, the profiteering computed by the DGAP in respect of the E-commerce customers to the tune of **Rs. 36,357/-** was liable to be set aside as per the details given in Exhibit-6.

44. The Respondent has also stated that in respect of the States of (a) Goa (b) Nagaland (c) Puducherry (d) Punjab (e) Tripura and (f)

Uttarakhand the DGAP has wrongly computed profiteering in the absence of comparable pre-GST basic price which could be substantiated from **Annexure-19 (revised)** of the DGAP Report dated 07.10.2019, wherein column (C) to (H) against rows (29) to (34) were intentionally left blank. In the absence of such comparable pre-GST basic prices, the DGAP has arbitrarily adopted pre-GST basic prices of other States for computing profiteering. For instance – the pre-GST base price for 'Goa' was the same as that of "Maharashtra'. The pre-GST base price for 'Nagaland' was same as that of "Assam'. He has further stated that in such a case, the approach adopted by the DGAP was incorrect on the following two counts:-

1. That without ascertaining the incidence of taxes pre-GST (%) and without comparing the same with the incidence of taxes post-GST (%), the DGAP has assumed that the Respondent has undertaken profiteering in the said States and has, thereafter computed profiteering, which was grossly incorrect.
2. That the calculation of profiteering was also incorrect for the reason that the pre-GST basic price for 'Maharashtra' was compared with the transaction-wise basic price for 'Goa' (in the absence of pre-GST basic price for 'Goa'), which was principally incorrect.

45. Accordingly, he has claimed that the profiteering computed by the DGAP in respect of the above States to the tune of **Rs. 31,677/-** was liable to be set aside as per the details given in Exhibit-7. He has also claimed that in any case, the Respondent did not have any

depot in the States of Nagaland and Tripura and all the supplies made to the said States were CST sales. Thus, he has further claimed that the DGAP has wrongly assumed profiteering in the above States by assuming that the incidence of taxes pre-GST (%) in these States was more than 28% and thus, profiteering computed by DGAP to the tune of **Rs. 17,030/-** was liable to be set aside as has been computed vide Exhibit-8.

46. He has also contended that there were various other factors that had a direct bearing on the price of the impugned product. None of these factors had been taken into account by the DGAP. These factors were as under:-

a) Change in direct bill of material ('BOM') cost.

b) Change in other variable costs like freight, warranty, installation.

47. He has further contended that the cost of manufacture of the impugned product had witnessed an increase since August 2016 (the base period taken for comparison in the investigations) on the following counts:-

1) <u>Increase in raw material cost:</u>

- The Respondent was purchasing various raw materials such as granules, hips, coils, polyol and isocynate. These raw materials were used in the manufacture of the impugned product and their cost formed part of the manufacturing cost of the impugned product.

- The Respondent was maintaining his accounts in 'SAP' and Enterprise Resource Planning ('ERP') soft wares. The BOM cost i.e. per product raw material cost was computed every month on moving average basis. Under the moving average mechanism, the value and quantity of new purchases was added to the opening value and quantity to arrive at the Moving Average Price ('MAP') at the end of each month. This value included import duties, freight and other associated costs.
- A perusal of MAP data revealed that the BOM saw an increase of ₹365/- per unit of the impugned product when compared between the pre-GST and the post-GST periods. In this regard, he has enclosed the comparison of BOM for the pre-GST period vis-à-vis the BOM when the MRP was increased under the GST regime vide Exhibit-9 and the Cost Accountant's certificate vide Exhibit-10 certifying such increase.

2) **Increase in haulage cost:**

- The Respondent has also submitted that he was receiving transportation services for making supply of the impugned product to the dealers. He was determining the average per product freight cost which was then loaded into the pricing of each product.
- The average freight cost for the Respondent in the year 2017 had witnessed an increase as compared to the year 2016 on account of various market factors like availability (driven by

demand supply gaps), loading regulations and overall inflation etc.

- ❖ Resultantly, the per unit freight cost has witnessed an increase of **₹ 29/- per unit** as was evident in Exhibit-11.

48. To substantiate his above submission the Respondent has reproduced below the details regarding pricing of the impugned product during its entire life cycle. The Respondent has submitted that he had commenced manufacture of the impugned product in 2014 and started selling the same in April 2014. The manufacturing of the impugned product was discontinued in December 2017. The MRP and DP of the impugned product underwent frequent changes depending upon market conditions and the same was tabulated as under:-

Month & Year	**MRP (₹)**	**DP (₹)**
April 2014	36,750/-	34,990/-
August 2014	36,875/-	35,115/-
December 2014	37,075/-	35,115/-
February 2015	37,575/-	36,200/-
October 2015	38,150/-	36,200/-
April 2016	38,300/-	36,850/-
July 2016	39,175/-	37,300/-
October 2016	39,250/-	37,375/-
July 2017	40,100/-	38,175/-
December 2017 onwards (Product discontinued)	42,550/-	38,675/-

49. He has also submitted that frequent price increase was very common in the consumer durable electronic industry. Keeping in mind the ever-

changing technology in Washing Machines, the Respondent and his competitors undertook frequent price revisions of the product. He has reiterated that various factors played a decisive role in it. However, the DGAP has not factored these reasons while coming to the conclusion of profiteering. Further, the increase in the cost of production of the product has also not been considered in his calculation.

50. He has further submitted that the DGAP has understood the provisions of Section 171 incorrectly and has followed an incorrect approach to calculate the alleged profiteering. Thus, the demand in respect of alleged profiteering insofar as the same pertained to the price increase was not sustainable. Accordingly, he has contended that the demand to the tune of **Rs. 1,24,356/-** was liable to be set aside. Detail calculation has been enclosed as Exhibit-12 by him.

51. He has also stated that if the basic price, as submitted above, was taken as pre-discount and the effect of price increase (MRP and DP) was also excluded from the computation of profiteering made by DGAP vide Annexure-20 of his Report dated 07.10.2010, the alleged profiteering would be **Rs. 70,653/-** as per Exhibit-13.

52. The Respondent has further stated that his business has witnessed increase in the costs during the relevant period which has not been considered by the DGAP. In this regard, the Respondent has submitted that the costs of raw material, packing material, advertisements and transportation costs etc. were increasing during the relevant period and hence, the Respondent was within his right to increase the price of the product to pass on the cost increase to the

customers. He has further submitted that such costs were very relevant for determination of price of the product supplied by the Respondent. Such cost increases compelled a business to revise its prices and hence, were inextricably linked to the pricing decisions.

53. He has also claimed that the DGAP has ignored the cost increases as being irrelevant for the purpose of determination of profiteering. However, the position adopted by DGAP was not in consonance with the various orders passed by this Authority. Inflation as a factor has been accepted as a reason for price increase by this Authority in the case of **Kumar Gandharv v. KRBL Ltd. 2018-VIL-02-AUTHORITY**. In the case of **M/s Hardcastle Restaurants Pvt. Ltd. 2018-VIL-11-AUTHORITY** and in the case of **M/s NP Foods 2018-VIL-08-AUTHORITY**, loss of ITC has been factored-in for determination of net profiteering. Thus, the other factors which affected the 'price' have been held to be valid factors for deciding the price.

54. The Respondent has further claimed that the investigation undertaken by the DGAP covering the relevant period and holding that the price increase undertaken by Respondent was effect of change in the tax rate and not due to other commercial factors, has the effect of placing unlawful restraint on the fundamental right of the Respondent to carry on his business and was therefore violative of Article 19 (1) (g) of the Constitution of India.

55. The Respondent has also submitted that the period covered under the investigation was from July, 2017 to August, 2018 which covered the business operations of the Respondent of 14 months. While the GST regime had come in to effect from July 2017 onwards, there was no

reason adduced by the DGAP as to why the investigation has been extended to 31.08.2018. He has further submitted that the Report was silent on the grounds or reasons based on which such a long period has been selected by the DGAP for investigation. The period covered under investigation did not have any statutory basis and the manner of deciding the period was arbitrary.

56. He has further submitted that the alleged profiteering has been calculated upto the month of August, 2018 without considering the fact that the prices of the products undergo change on frequent basis. The ad-hoc approach of the DGAP implied that with each event of price change by the Respondent, DGAP's eyebrows would be raised.

57. The Respondent has also submitted that undertaking investigation for such a long period without any basis, was contrary to the true intent and spirit of the anti- profiteering provisions contained in the CGST Act which by their very essence were transitionary in nature and therefore, could not be applied in perpetuity. The DGAP with such an act has become a "Profit Checking" body. Thus, the manner in which the provisions pertaining to anti-profiteering were being applied by the DGAP by arbitrarily selecting the period of investigation and alleging profiteering have the effect of restricting the right of the Respondent to do business, a cherished fundamental right guaranteed by the Constitution of India.

58. The Respondent has further submitted that the period of investigation should be confined to a maximum of three months, as in such volatile market conditions the cost of doing business changed in around every 3 months. Accordingly, the requirement of revision of price on the

basis of cost arose in every 3 months. He has reiterated that a supplier was considering various factors like direct and indirect costs, demand and supply, customer perception, competition, product positioning, legal compliances and profit, etc. while determining the price of his goods. If the period of investigation was beyond 3 months, the effect of increased costs should be taken into account while calculating the alleged profiteering.

59. He has also stated that the correct methodology to compute profiteering, if at all, would be by comparing the tax incidence (%) pre and post GST and applying the difference to the supplies post-GST (taxable value). The said working as suggested by him is given below:-

S. No.	State (A)	Total Tax/duties incidence (in %) - Pre GST *(Ref - Ann-19 to DG Report – Column X)* (B)	Total Tax/duties incidence (in %) - Post GST (C)	Profiteering (%) (D = B – C) (Approx.)	Taxable supplies post-GST – State-wise (E)	Profiteering (Amount) (F = D *E)
1	Andhra Pradesh	30.39%	28.00%	2.39%	5,10,818	12,232
2	Assam	30.93%	28.00%	2.93%	1,26,545	3,710
3	Assam-CST Sale	15.70%	28.00%	-12.30%		
4	Bihar	29.24%	28.00%	1.24%	72,682	900
5	Chhattisgarh	31.00%	28.00%	3.00%	22,606	678
6	Delhi	27.86%	28.00%	-0.14%	7,54,742	(1,036)
7	Gujarat	30.84%	28.00%	2.84%	12,90,293	36,604
8	Gujarat-CST Sale	15.59%	28.00%	-12.41%		
9	Haryana	27.96%	28.00%	-0.04%	3,37,616	(151)
10	Jammu and Kashmir	28.92%	28.00%	0.92%	1,84,442	1,703
11	Jharkhand	29.94%	28.00%	1.94%	-	-
12	Karnataka	30.20%	28.00%	2.20%	72,980	1,602
13	Kerala	29.81%	28.00%	1.81%	15,11,848	27,333
14	Madhya Pradesh	30.91%	28.00%	2.91%	4,66,935	13,605
15	Maharashtra	28.59%	28.00%	0.59%	11,84,349	6,964
16	Orissa	30.77%	28.00%	2.77%	4,07,883	11,282

17	Rajasthan	31.10%	28.00%	3.10%	6,49,065	20,105
18	Tamil Nadu	30.09%	28.00%	2.09%	2,49,644	5,216
19	Telangana	30.86%	28.00%	2.86%	5,93,207	16,985
20	Uttar Pradesh	29.74%	28.00%	1.74%	16,09,755	27,937
21	West Bengal	31.44%	28.00%	3.44%	9,15,698	31,530
22	Goa	29.57%	28.00%	1.57%	43,257	681
23	Nagaland	29.98%	28.00%	1.98%	1,88,191	3,734
24	Puducherry	30.09%	28.00%	2.09%	26,544	555
25	Punjab	27.86%	28.00%	-0.14%	2,35,075	(323)
26	Tripura	29.98%	28.00%	1.98%	79,736	1,582
27	Uttarakhand	29.74%	28.00%	1.74%	26,007	451
						223,880

Accordingly, he has claimed that the profiteering, if at all, should be **Rs. 2,23,800/-** as per Exhibit-14.

60. The Respondent has further stated that he had not undertaken any activity which tantamounted to 'profiteering'. He has also argued that an explanation has been added to Section 171 of the CGST Act vide Finance (No. 2) Act, 2019, which provided for the definition of the expression "profiteered" used in the said Section in terms of non-passing of benefit of GST rate reduction to the recipient by way of commensurate reduction in the prices of goods or services or both. The said explanation is reproduced below:-

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

He has submitted that perusal of the above explanation did not throw any light vis-a-vis the scope of 'profiteering' as it merely reproduced

the language of the Section. In any case, the interpretation given to Section 171 and rules made thereunder by the DGAP without considering the 'marginal notes' appended to Section 171 and heading of Chapter XV of CGST Rules, was untenable. He has also mentioned that the text of Section 171 did not use the term 'profiteering' and it has been mentioned in the marginal notes to Section 171 and in the heading of Chapter XV of CGST Rules. He has also stated that in order to understand the scope of Section 171, it was pertinent to understand the meaning of the term 'profiteering' which has been used in the marginal notes.

61. He has also contended that it was a settled principle of law that marginal notes were used as an internal aid of interpretation to address any ambiguity in the provision. In this regard, he has placed reliance on the case of ***Indian Aluminium Company v. Kerala State Electricity Board (1975) 2 SCC 414*** wherein the Hon'ble Supreme Court has held that the marginal notes could be relied upon to show what the section was dealing with. In the case of ***Union of India v. Harbhajan Singh Dhillon (1971) 2 SCC 779*** it was observed by the Hon'ble Supreme Court that marginal notes could serve as guidance when there was ambiguity or doubt about the true meaning of the provision. Similar observations were made by the Hon'ble Supreme Court in the case of ***SP Gupta v. Union of India AIR 1982 SC 149.*** He has also made reference to the common parlance meaning of the term 'profiteering' from the following dictionaries:-

a) The Chambers Dictionary, Allied Chambers (India) Ltd., New Delhi

Profiteer is a person who takes advantage of an emergency to make exorbitant profits.

b) **The Collins Cobuild English Dictionary for Advanced Learners - Harper Collins Publication**

Profiteering involves making large profits by charging high prices for goods that are hard to sell.

c) **Oxford English Reference Dictionary - Oxford University Press**

Profiteer means to make or seek to make excessive profits, esp. illegally or in black market conditions.

62. He has further contended that on the basis of the aforementioned meanings it was clear that only where an entity made exorbitant or large profits in an unlawful manner, it could be referred to be a Profiteer. He has also submitted that the Respondent in the instant case has not made exorbitant profits in an unlawful manner as was evident from the comparison of operating profits of FY 2016-17, 2017-18 and 2018-19.

63. The Respondent has also submitted that the DGAP has computed profiteering (Annexure-20) in respect of the impugned product by comparing the State-wise average basic price (after discount) during the period from 01.04.2017 to 30.06.2017, with the transaction-wise basic price (after discount) during the period from 01.07.2017 to 31.08.2018 for all the States (except Delhi and Haryana where tax incidence has increased after introduction of GST). The said computation was made on the assumption that the tax incidence has decreased in certain States on introduction of GST, however despite the decrease, the Respondent has increased the DP and MRP of his product. In this regard, he has stated that profiteering, if any, has to be

computed, considering the cases/ invoices *qua* the supply of impugned product, where the Respondent has passed on the benefit more than the commensurate GST rate reduction as well. He has also claimed that in such cases, the customers have received more benefit than they were eligible for. However, while calculating the alleged profiteering on the product as a whole, the DGAP has ignored such cases where excess benefit was passed on by the Respondent.

64. The Respondent has also alleged that the DGAP has selectively applied the anti-profiteering provisions in the present case. In the cases where the Respondent has passed on benefit to the customer in excess of the required amount, the DGAP has ignored such measures (treating these as zero (0) for profiteering calculations). On the other hand, the DGAP has insisted that where the benefit to the customer was less than what was the required amount, regardless of other measures, the differential amount was to be treated as allegedly profiteered by the Respondent. This methodology of 'Zeroing' has been held to be incorrect as the Government of India had itself objected to this concept of 'zeroing-in' at the World Trade Organization (WTO). He has also submitted that while calculating the alleged profiteering amount, the DGAP has incorrectly applied a methodology similar to 'Zeroing' which was used by the anti-dumping authorities in certain countries including the European Union (EU). According to the said methodology, while calculating the dumping margins only those SKUs were considered which were being dumped and those SKUs which were not being dumped were not considered. The Government of India had disputed this practice and had taken a stand against such

methodology at the WTO and argued that while determining the dumping margins, all SKUs should be taken into consideration rather than only those which showed positive dumping. In this regard, he has invited attention to ***Report No. WT/DSI41/AB/R dated 01.03.2001*** of the Appellate Body of the WTO regarding Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India. In the instant case, the Indian exporters were facing an anti-dumping action by the EU as they were exporting different varieties of bed linen to the EU. In some cases, the exporters were exporting at the positive dumping margins, wherein in many cases there were negative dumping margin i.e. the export price was more than the normal value at which goods were being sold in India. The European Commission had applied its usual practice of not netting off the positive and negative dumping margins. In fact, it had applied 'Zero' (0) for negative dumping margins and cumulated only positive dumping margins and thereby arrived at higher dumping margins for Indian exporters. The Government of India had objected to this approach of the European Commission and the matter was taken to the Dispute Settlement Body of the World Trade Organisation which held in favour of Government of India. In an appeal filed by the EU before the Appellate Body, the Appellate Body held that the practice of not 'netting off' of the positive dumping margins and negative dumping margins was not correct. Thus, the Government of India had succeeded before the WTO Appellate Body which ensured that the positive and negative dumping margins must be taken together and therefore lower dumping margin were allowed for the Indian exporters. The European Commission had accepted the above

decision and revised dumping margins not only for bed linen cases but also for all other cases against India. On the basis of the above decision the Respondent has argued that a different approach could not be adopted by the DGAP in his case. Accordingly, the negative price variations (in respect of those invoices of product, where the reduction in price has been more than what was considered necessary by DGAP) should also be considered for determining alleged profiteering (if any.) Accordingly, the value of excess benefit passed on by this measure which aggregated to **Rs. 2,50,832/-** should be reduced from the alleged profiteering computation as per Exhibit-16.

65. He has also submitted that if the negative price variations (in respect of those invoices of product, where the reduction in price has been more than what was considered necessary by the DGAP) was considered for determining alleged profiteering (if any) on the basis of 'Pre-discount' base prices, the alleged profiteering would be reduced to **Rs. 36,124/-** as has been shown in Exhibit-17.

66. He has further submitted that if the negative price variations (in respect of those invoices of product, where the reduction in price has been more than what was considered necessary by DGAP) was considered for determining alleged profiteering (if any) and where the effect of MRP price-increase was also excluded, the alleged profiteering would be **Negative Rs. 75,368/-** as per Exhibit-18. If the negative price variations (in respect of those invoices of product where the reduction in price has been more than what was considered necessary by the DGAP) was considered for determining alleged profiteering (if any) and where base-price was considered to be 'Pre-discount', along with

exclusion of impact of (MRP) price-increase, the alleged profiteering would be **Negative Rs. 16,326/-** as has been computed vide Exhibit-19.

67. The Respondent has also contended that while arriving at the total alleged profiteering amount, the DGAP has incorrectly added 28% to the alleged profiteered amount without adducing grounds as to why this amount has been added and such computation was *ab initio* incorrect. It was an undisputed fact that the amount charged as GST by the Respondent has been duly deposited in the Government account. There has been no allegation that the amount termed as excess GST in the Report was not GST *per se* and that such excess tax has not been paid to the Government and once it has been accepted that this amount was also tax and the public exchequer was not deprived of this sum, it failed to appeal to reason that the same tax amount could be demanded again from the Respondent or deposit of such tax amount in the Consumer Welfare Fund (CWF) could be ordered. It was an undisputed fact that the Respondent has charged GST from his customers, over and above the value of goods supplied by it i.e. on ex-tax basis. Therefore, the amount of GST collected by the Respondent from his customers on the alleged profiteering amount stood paid to the Government exchequer. Even if it was assumed that the Respondent has profiteered and the GST has been collected thereon and the said GST was to be paid in the CWF then instead of him, the Government could transfer the amount equivalent to the GST on the profiteered amount to the CWF.

68. He has also submitted that the term 'Profiteering' always had reference to a registered person. It implied that the profiteered amount was retained by the registered person. Therefore, with respect to the alleged excess GST paid by the recipient but not retained by the Respondent and promptly paid to the Government as tax (on which there is no dispute), the Respondent could not be alleged to have profiteered. He has further submitted that addition of 28% would have been correct if the case of DGAP had been that the amount has been collected and retained by the Respondent and not deposited with the Government. In this regard, he has placed reliance on the case of ***R. S. Joshi Sales Tax Officer Gujarat v. Ajit Mills Limited (1977) 4 SCC 98*** wherein the Hon'ble Supreme Court has analysed what the term 'collected' meant in the context of the sales tax legislation of Gujarat. The Hon'ble Court had observed as under:-

"34. Section 37 (1) uses the expressions, in relation to forfeiture any sum collected by the person.....shall be forfeited'. What does collected' mean here? Words cannot be construed effectively without reference to their context. The setting colours the sense of the word. The spirit of the provision lends force to the construction that 'collected" means "collected and kept as his" by the trader. If the dealer merely gathered the sum by way of tax and kept it in suspense account because of dispute about taxability or was ready to return if eventually it was not taxable, it is not collected. 'Collected., in an Australian Customs Tariff Act, was held by Griffth C.J., not .to include money deposited under an agreement that if it was not legally payable it will be

returned' (Words & Phrases p. 274). We therefore, semanticise Collected' not to cover amounts gathered tentatively to be given back if found non-exigible from the dealer."

69. He has also stated that since the amount collected as GST by the Respondent from the recipients on the alleged profiteering amount had already been deposited with the Government and there was no factual dispute on this aspect, addition of 28% GST to calculate the alleged profiteering amount was not sustainable. He has further stated that on re-computation of the alleged profiteering amount extending the benefit of cum-tax to the Respondent, the alleged profiteering amount would be further reduced by **Rs. 79,403/-** as per Exhibit-20.

70. The Respondent has also submitted that the calculation of profiteering arrived at by the DGAP was incorrect due to the reason that benefit of credit notes on account of sales returned was not extended. He has further submitted that he has provided details of credit notes with respect to the cases where sold goods were returned by his customers. However, the same had not been considered by the DGAP. He has also claimed that the DGAP while comparing the average basic price has considered all the invoices which also contained cases where the product was not finally supplied and was returned to the Respondent. As the same did not form part of the supplies undertaken by the Respondent, such returns should be excluded from the calculation of the alleged profiteering amount and accordingly, the alleged profiteering should be reduced to the tune of **Rs. 7,619/-** as per Exhibit-21.

71. The Respondent has also pleaded that the CGST Act read with the CGST Rules did not provide the procedure and mechanism for determination and calculation of profiteering. In the absence of the same, the calculation and methodology used in the Report was arbitrary and was in violation of the principles of natural justice. He has further argued that the Central Government vide Notification No. 10/2017-Central Tax dated 28.06.2017 (amending Notification No. 3/2017-Central Tax) has notified anti-profiteering rules which provided for constitution of this Authority, Standing Committee and Steering committees, power to determine the methodology and procedure, duties of this Authority, examination of application, order of this Authority, compliance by the registered person etc. As per Rule 126, this Authority has the power to determine the methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of ITC has been passed on by the registered person to the recipient by way of commensurate reduction in prices. However, as on date, the CGST Rules have not prescribed any procedure/ methodology/ formula/ modalities for determining/ calculating 'profiteering'. He has also added that this Authority under the Goods and Service Tax Methodology and Procedures, 2018 issued on 19.07.2018 has only provided the procedure pertaining to investigation and hearing. However, no method/formula has been notified/prescribed pertaining to calculation of profiteering amount.

72. He has also submitted that Rule 127 of the CGST Rules, provided for the duties of this Authority whereby it could order reduction in prices,

return to the recipient an amount equivalent to the amount not passed on as benefit, imposition of penalty and cancellation of registration under the CGST Act. The duties of this Authority as enumerated in Rule 127 included determination whether benefits consequent to reduction in the rate of tax or allowance of ITC were being passed on to the recipients, identification of registered persons who have not passed on the benefits to the recipients and passing of orders effecting reduction in prices. However, under the CGST Act or the Rules made thereunder, there was no indication, let alone description as to how to conclude that there was profiteering due to change in the rate of tax. Whether such computation has to be done invoice-wise, product-wise, business vertical-wise or entity-wise etc. Thus, in absence of the same, there was lack of transparency and the results could vary from case to case resulting in arbitrariness and violation of Article 14 of the Constitution of India. It would be impossible for the Respondent to defend his case and explain how the observations and findings of the DGAP with respect to profiteering were incorrect, thus, violating the principles of natural justice.

73. The Respondent has further submitted that absence of mechanism or framework within which this Authority/ DGAP must discharge their duties, would also lead to arbitrariness. In this regard he has made reference to other countries where GST was in place and claimed that in order to control rise in inflation on account of implementation of the GST, the Malaysian Government has introduced the 'Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High Profit) (Net Profit Margin) Regulations 2014 which provided mechanism to

calculate whether any company has profiteered on account of GST or not. The anti-profiteering measures in Australia revolved around the 'Net Dollar Margin Rule' serving as the fundamental principle for its guidelines which stipulated that if the new tax scheme - GST in this case - caused taxes and costs to fall by $1, then prices should fall by at least $1. At the same time if the cost of the business rose by $1 under the new tax scheme, then prices might rise by not more than $1. These regulations have been set as barometers for calculating profiteering. He has also argued that no such procedure for calculation of profiteering has been provided under the CGST Act and the CGST Rules. Absence of the same violated the principle of natural justice and thus, the present investigation was liable to be set aside.

74. In this regard, he has placed reliance on the case of ***Eternit Everest Ltd.*** v. ***Union of India 1997 (89) E.L.T. 28 (Mad.)***, where the Hon'ble Madras High Court has held that in the absence of machinery provisions pertaining to determination and adjudication upon a claim or objection, the statutory provision would not be applicable. In the case of ***Commissioner of Income Tax Bangalore*** v. ***B. C. Srinivasa Setty (1981) 2 SCC 460***, the Hon'ble Supreme Court has held that charging section was not attracted where corresponding computation provision was inapplicable. He has further argued that relying on the case of **B. C. Srinivas Shetty supra**, the Hon'ble Allahabad High Court in the case of ***Samsung (India) Electronics Pvt. Ltd. v. Commissioner of Commercial Taxes U. P. Lucknow 2018[11] G.S.T.L. 367*** had observed that in the absence of any procedure or provision in the UP VAT Act, 2008 conferring such authority, in the case of a sale of

composite packages bearing a singular MRP, the authorities under the Act could not possibly assess the components of such a composite package separately. He has also claimed that such an exercise, if undertaken, would also fall foul of the principles enunciated by the Hon'ble Supreme Court.

75. He has also submitted that this Authority was itself using different methodologies to ascertain 'profiteering' in the cases filed before it. In some cases, this Authority had restricted itself to the goods mentioned in the application, while in some other cases it has considered business as a whole, which showed that there was no defined procedure being adopted by this Authority which was leading to arbitrariness. In the absence of a well-defined procedure/methodology regarding calculation of profiteering, the DGAP was adopting an ad-hoc and arbitrary methodology. In the absence of prescribed method/formula for calculation of profiteering, following a method on case-to-case basis was arbitrary and thus, the Report was liable to be rejected.

76. The above submissions of the Respondent were forwarded to the DGAP for his reply and the DGAP vide his Report dated 06.12.2019 has stated that his office had considered all the submissions of the Respondent and calculated the profiteered amount. The DGAP has also stated in respect of calculation of wrong profiteering in respect of E-commerce customers that it was a new fact which was never raised by the Respondent.

77. The DGAP has also claimed that in pre-GST regime the tax was being charged and collected by the seller's State (origin based tax), however

the GST was a destination based tax where it was levied and collected by the State where recipient was located and as the GST was uniform across the States, comparison of seller's State pre-GST tax incidence and prices with that of GST rate was correct and appropriate. The DGAP has further claimed that the legal requirement was abundantly clear in Section 171(1) that in the event of tax reduction there must be a commensurate reduction in prices of any supply of goods and services. Anti-profiteering provisions must benefit each and every consumer and the transactions where basic price was not increased were excluded from the computation of the profiteering amount.

78. In respect of incorrect computation of profiteering done by the DGAP, he has stated that this submission of the Respondent was wrong and in the case of Invoice No. 912810002141 dated 14.08.2017, 2 units were sold out of which, one was returned on 07.11.2017 and therefore, profiteering was computed in respect of one unit only. Similarly in the case of Invoice No. 911910005579 dated 24.08.2017, 4 units were sold out of which, one was returned on 26.08.2017 and therefore, profiteering was calculated in respect of three units.

79. The Respondent has made further submissions on 07.01.2020 and stated that the DGAP has ascertained the fact of alleged profiteering undertaken by him, at the State level, by comparing the average tax incidence in percentage (%) pre-GST vis-à-vis the rate of tax (%) under the GST. In this regard, he has submitted that Section 171(1) of CGST Act, 2017 contemplated reduction in the "rate of tax" and not reduction in the "incidence of tax". Thus, the methodology followed by

the DGAP in his Report dated 07.10.2019 was incorrect and on this basis alone the Report was liable to be rejected.

80. He has also stated that for the pre-GST period, the tax rates (%), as prescribed under the relevant law for the time being in force, should be added together to arrive at the pre-GST tax rate applicable on the impugned product and the same should be compared with the tax rate prescribed under the GST law, in order to ascertain whether the Respondent was covered under the ambit of Section 171 of CGST Act, 2017. He has also submitted the details of pre and post GST rates of tax as under:-

The computation of pre-GST rate of taxes (%) shall be computed as follows –

Sl. No.	State	Pre-GST rate of Taxes (%)				
		Central Excise Duty[1] (A)	State VAT[2] (B)	CST/VAT Reversal[3] (C)	Entry Tax[4] (D)	Total Taxes (%) (A+B+C+D)
1	Andhra Pradesh	12.50%	14.50%	0.75%	-	27.751%
2	Assam	12.50%	15.00%	0.75%	-	**28.250%**
3	Assam-CST Sale	12.50%	2.00%	0.73%	-	15.227%
4	Bihar	12.50%	15.00%	0.67%	-	**28.170%**
5	Chhattisgarh	12.50%	14.50%	0.78%	1.00%	**28.780%**
6	Delhi	12.50%	12.50%	0.74%	-	25.739%
7	Gujarat	12.50%	15.00%	0.75%	-	**28.245%**
8	Gujarat-CST Sale	12.50%	2.00%	0.72%	-	15.221%
9	Haryana	12.50%	13.13%	0.71%	-	26.334%
10	Jammu and Kashmir	12.50%	14.50%	0.68%	-	27.682%
11	Jharkhand	12.50%	14.50%	0.73%	-	27.730%
12	Karnataka	12.50%	14.50%	0.74%	-	27.742%
13	Kerala	12.50%	14.50%	0.72%	-	27.723%
14	Madhya Pradesh	12.50%	15.00%	0.75%	2.00%	**30.249%**
15	Maharashtra	12.50%	13.50%	0.00%	-	26.000%
16	Orissa	12.50%	14.50%	0.77%	2.00%	**29.769%**
17	Rajasthan	12.50%	15.00%	0.76%	-	**28.257%**
18	Tamil Nadu	12.50%	14.50%	0.74%	-	27.737%
19	Telangana	12.50%	14.50%	0.77%	-	27.773%
20	Uttar Pradesh	12.50%	14.50%	0.72%	-	27.720%
21	West Bengal	12.50%	14.50%	0.80%	1.00%	**28.801%**
22	Goa	12.50%	12.50%	0.77%	-	25.766%

23	Nagaland - CST sale from Assam	12.50%	**2.00%**	0.73%	-	15.227%
24	Puducherry	12.50%	14.50%	0.74%	-	27.737%
25	Punjab	12.50%	15.95%	0.74%	-	**29.189%**
26	Tripura - CST Sale from Assam	12.50%	**2.00%**	0.73%	-	15.227%
27	Uttarakhand	12.50%	14.50%	0.72%	-	27.720%
	Average Pre-GST tax rate					**25.991%**

Thus, the Respondent has claimed that on addition of rates of applicable duties/taxes and VAT/CST reversal, it could be seen that the rates of taxes were nominally more than 28% only in 9 States. On application of Section 170 of the CGST Act (Rounding off provision), this number would be reduced to only 5 States. He has also submitted the details of the tax rates during the pre GST period as per the Table given below:-

Alternatively rate of tax in %, on a State level, can be computed in the following manner –

Sl. No.	State	Pre-GST rate of Taxes (%)				
		Central Excise duty (Excise Duty on Depot price) (A)	State VAT (B)	CST/VAT Reversal (C)	Entry Tax (D)	Total Taxes (%) (A+B+C+D)
1	Andhra Pradesh	10.83%	14.50%	0.75%	-	26.08%
2	Assam	10.88%	15.00%	0.75%	-	26.63%
3	Assam-CST Sale	11.07%	2.00%	0.73%	-	13.79%
4	Bihar	10.88%	15.00%	0.67%	-	26.55%
5	Chhattisgarh	10.83%	14.50%	0.78%	1.00%	27.11%
6	Delhi	10.62%	12.50%	0.74%	-	23.86%
7	Gujarat	10.88%	15.00%	0.75%	-	26.63%
8	Gujarat-CST Sale	10.88%	2.00%	0.72%	-	13.60%
9	Haryana	10.68%	13.13%	0.71%	-	24.52%
10	Jammu and Kashmir	10.83%	14.50%	0.68%	-	26.01%
11	Jharkhand	10.83%	14.50%	0.73%	-	26.06%
12	Karnataka	10.83%	14.50%	0.74%	-	26.07%
13	Kerala	10.83%	14.50%	0.72%	-	26.05%
14	Madhya Pradesh	10.88%	15.00%	0.75%	2.00%	**28.63%**
15	Maharashtra	10.72%	13.50%	0.00%	-	24.22%
16	Orissa	10.83%	14.50%	0.77%	2.00%	**28.10%**
17	Rajasthan	10.88%	15.00%	0.76%	-	26.64%

18	Tamil Nadu	10.83%	14.50%	0.74%	-	26.06%
19	Telangana	10.83%	14.50%	0.77%	-	26.10%
20	Uttar Pradesh	10.83%	14.50%	0.72%	-	26.05%
21	West Bengal	10.83%	14.50%	0.80%	1.00%	27.13%
22	Goa	10.62%	12.50%	0.77%	-	23.88%
23	Nagaland - CST sale from Assam	10.83%	**2.00%**	0.73%	-	13.55%
24	Puducherry	10.83%	14.50%	0.74%	-	26.06%
25	Punjab	10.98%	15.95%	0.74%	-	27.67%
26	Tripura - CST sale from Assam	10.72%	**2.00%**	0.73%	-	13.45%
27	Uttarakhand	10.83%	14.50%	0.72%	-	26.05%
	Average Pre-GST tax rate					**24.32%**

81. Thus, the Respondent has claimed that on addition of the rates of applicable duties/taxes and the VAT/CST reversal, it could be seen that the rates of taxes were nominally more than 28% in only 2 states. In Orissa, the earlier rate was 28.10% which on application of Section 170 of the CGST Act (Rounding off) was to be read as 28%. Thus, the only State where the pre-GST rate was more than 28% was Madhya Pradesh where it was **28.63%.** He has also submitted that applying the principal of rounding off, the rate of tax would be 28% in one of these States. Further this decrease in tax rate in other States would be very nominal.

82. He has also reiterated that the methodology followed by the DGAP was incorrect as the comparison, if at all, for the purpose of computation of alleged profiteering amount, should be between the average commensurate price, at the dealer's level, during pre-GST period vis-à-vis the transaction-wise actual price during the GST period as Section 171 of the CGST Act envisaged benefit on account of reduction in tax rates to be passed on to the recipients. Therefore, the computation should also be at the recipient's level (i.e. dealer's level), and accordingly, if the computation of alleged profiteering

amount was made as per afore-discussed methodology, the profiteering amount would be reduced to **Rs. 1,50,122/-** from **Rs. 4,07,451/-** .

83. The above submissions of the Respondent were forwarded to the DGAP who vide his Report dated 23.01.2020 has stated that the tax rate comparison could not be made as the price on which these were calculated were different e. g. the VAT was calculated on the sale price whereas the Excise Duty was calculated on the MRP after giving abatement, hence submission of the Respondent could not be accepted.

84. The DGAP has also stated that the Respondent vide his letter dated 16.10.2018 (Annex-11 of his Report dated 06.12.2018) had submitted that the "All India Dealer price is same", therefore, according to the price list of the impugned good, it could be observed that the DP was same, hence, he has correctly taken State wise average basic price (after discount) for the period from 01.04 2017 to 30.06.2017 and compared it with the transaction wise basic price (after discount) during the period from 01.07.2017 to 31.08.2018.

85. The Respondent vide his submissions dated 06.02.2020 has stated that as explained in his submissions dated 07.01.2020, Section 171 of CGST Act only contemplated profiteering, when there was reduction in the "**rate of tax**" and not on reduction in the "**incidence of tax**". Thus, DGAP's method of computing reduction in "**incidence of tax**", which was derived from the given data, was incorrect. He has also stated that as regards the DGAP's contention that the computations made by the Respondent vide **Table-1 (Ground-A)** of his submissions dated

07.01.2020 could not be made as the price on which these were calculated were different was also not sustainable as the said computations had not considered any given data to arrive at the pre-GST (%) and the percentage of rate was arrived at by adding all the pre-GST tax rates which were applicable on the impugned product. Therefore, he has claimed that the DGAP's observation was not relevant. He has also submitted that it was pertinent to note that even though the "**All India Dealer price is same**", the price at which the goods were sold to the dealers were different in the Pre-GST regime due to various factors such as difference in the tax rates (VAT), differences in negotiations and discounts thereof etc., therefore, for the purpose of computing profiteering amount, **a single average price** for the **respective State** could not be taken as the base. Instead, the dealer level comparison should be made i.e. the average commensurate price, at the dealer's level, during pre-GST period should be compared with the transaction-wise actual price during the GST period for the respective dealer, due to the reason that Section 171 of CGST Act envisaged benefit on account of reduction in the tax rate to be passed on to the recipients. Therefore, the computation should also be at the recipient's level (i.e. dealer's level). He has further stated that in any case, even if the DGAP's observation was regarded as correct that the **All India Dealer price is same**, the computation should be made accordingly as the DGAP has erred in comparing **State-wise average basic price (after discount)** with the transaction-wise basic price (after-discount) during the impugned period.

86. We have carefully considered the various Reports furnished by the DGAP, all the submissions made by the Respondent including the submissions made by him on 11.01.2019, 18.01.2019, 21.01.2019, 06.02.2019, 11.02.2019 and 05.04.2019 and the documents placed on record and it is revealed that the Respondent is engaged in the manufacture and marketing of the consumer electronic goods which he is supplying through the all India net work of his dealers as well as on E-commerce platforms. It is also revealed that the Applicant No. 1 vide minutes of its meeting held on 08.05.2018 had lodged a complaint under Rule 128 (2) of the above Rules with the Standing Committee on Anti-profiteering against the Respondent alleging profiteering on the supply of "Refrigerator Whirlpool FP313D PROTTON ROY MIRROR" (HSN code 84182100) that he had not passed on the benefit of reduction in the rate of tax w.e.f. 01.07.2017, by way of commensurate reduction in the price of the above product as per the provisions of Section 171 of the CGST Act, 2017. In this regard, the Applicant No. 1 had cited the two invoices issued by the Respondent, the details of which have been mentioned in Table-A mentioned supra. The Standing Committee had referred the above complaint to the DGAP for detailed investigation as per Rule 129 (1) of the above Rules. The DGAP after investigation had reported on 06.12.2018 under Rule 129 (6) of the above Rules that the Respondent had not passed on the benefit of tax reduction w.e.f. 01.07.2017 to 31.08.2018 and had thus violated the provisions of Section 171 (1) of the above Act. Accordingly, the DGAP had computed the profiteered amount as Rs. 5,06,921/- vide Annexure-20 of his Report dated 06.12.2018. The

Respondent had raised a number of objections against the above Report of the DGAP and this Authority after taking in to account the issues raised by the Respondent had directed the DGAP to re-investigate the case under Rule 133 (4) of the above Rules vide its order dated 25.06.2019. Accordingly, the DGAP has furnished his fresh Report on 07.10.2019 after re-investigation whereby he has computed the profiteered amount as **Rs. 4,07,451/-** as per the revised **Annexure-20**.

87. It is further revealed from the record that the Central Government, on the recommendation of the GST Council, had levied 28% GST on the "Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps other than air conditioning machine of heading 8415", vide S. No. 120 of Schedule- IV attached to Notification No. 01/2017-Central Tax (Rate) dated 28.06.2017. The impugned product "Refrigerator Whirlpool FP313D PROTTON ROY MIRROR" was covered by the aforesaid Notification. Therefore, the Respondent is liable to pass on the benefit of tax reduction to the buyers of his above product in terms of Section 171 of the above Act.

88. It is also evident from the methodology adopted by the DGAP for computation of profiteered amount that he has compared the State wise average basic price of the product after discount during the period from 01.04.2017 to 30.06.2017 with the transaction wise basic price after discount during the period from 01.07.2017 to 31.08.2018. The DGAP vide Annexure-19 of his Report dated 07.10.2019 has also computed the prevalent rate of tax which was applicable in a State during the pre GST period as there were different rates of VAT and

Entry Tax in each State and compared it with the uniform post GST rate of 28% and wherever the rate of tax has been found to have been reduced w.e.f. 01.07.2017 the DGAP has calculated the profiteered amount. The above mathematical methodology of the DGAP appears to be correct, reasonable, justifiable and in consonance with the provisions of Section 171 of the CGST Act, 2017 as it was not possible to compare the actual basic price prevalent during the pre and the post GST periods due to the reasons that the Respondents was (i) selling his product at different rates to different customers in the same channel and State based on the various factors such as demand and supply, sales momentum, festival timings, trade partner tie ups and the volume of sales etc. (iii) a customer may have purchased the product during the pre rate reduction period and may not have purchased it in the post rate reduction period or vice versa and (iii) the average base price computed for a period of 3 months w.e.f. 01.04.2017 to 30.06.2017 provides highly representative and justifiable comparable average basic price. However, the average pre rate reduction basic price was required to be compared with the actual post rate reduction basic price as the benefit is required to be passed on each SKU to each customer. In case average to average basic price is compared for both the periods, the customers who have purchased the product on the basic price which was less than the average basic price but which was more than the commensurate basic price, would not get the benefit of tax reduction. Such a comparison would be against the provisions of Section 171 as well as Article 14 of the Constitution which require that each customer has to be passed on the benefit of

tax reduction on each purchase made by him. From the invoices and the details of the outward supplies made available by the Respondent it has been found that the Respondent has increased the basic price of his product when the rate of GST was reduced to 28% w.e.f. 01.07.2017, therefore, the commensurate benefit of GST rate reduction was not passed on to the recipients. There was no reason for the Respondent to increase his basic price exactly equal to the rate of tax reduction w.e.f. 01.07.2017. Such a coincidence is incomprehensible, wrong and unheard off which shows that the Respondent has deliberately tried to pocket the benefit of tax reduction to enrich himself at the expense of the vulnerable customers. Accordingly, on the basis of the pre and post reduction tax rates and the details of the outward taxable supplies of the impacted product made during the period from 01.07.2017 to 31.08.2018 the profiteered amount in respect of the Respondent has been rightly computed as **Rs. 4,07,451/-** including the GST, the details which have been mentioned in **Annexure-20 (Revised) of** the Report dated 07.10.2019 submitted by the DGAP. The State wise profiteered amount has been mentioned in **Table-A** of the above Report.

89. The Respondent in his submissions has claimed that no principles or guidelines or methodology or procedure or formula or modalities have been framed by this Authority or in the CGST Act or the Rules in order to determine whether profiteering has been undertaken by a supplier or not in the absence of which the Respondent was free to decide how the benefit of tax reduction was to be passed on as per the provisions of Section 171 of CGST Act. The above contention of the Respondent

is frivolous as the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and ITC has been outlined in Section 171 (1) of the CGST Act, 2017 itself which provides that "*Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" It is clear from the plain reading of the above provision that it mentions "reduction in the rate of tax or benefit of ITC" which means that if any reduction in the rate of tax is ordered by the Central or the State Governments or a registered supplier avails benefit of additional ITC as a result of coming in to force of the GST the same have to be passed on by him to his recipients since both the above benefits are being given by the above Governments out of their tax revenue. It also provides that the above benefits are to be passed on any supply i.e. on each SKU or unit of construction or service to every buyer and in case they are not passed on, the quantum of denial of these benefit or the profiteered amount has to be computed for which investigation has to be conducted in respect of all such SKUs/units/services by the DGAP. What would be the 'profiteered amount' has been clearly mentioned in Sub-Section 171 (3A) and the explanation attached to Section 171. These benefits can also not be passed on at the entity/organisation/branch/ invoice/product/business vertical level as they have to be passed on to each and every buyer at each SKU/unit/service level by treating them equally. The above provision also mentions "any supply" which connotes each taxable supply made to each recipient thereby making it evident that a supplier cannot claim that he has passed on more

benefit to one customer on a particular product therefore he would pass less benefit or no benefit to another customer than what is actually due to that customer, on another product. Each customer is entitled to receive the benefit of tax reduction or ITC on each SKU or unit or service purchased by him subject to his eligibility. The term "commensurate" mentioned in the above Sub-Section provides the extent of benefit to be passed on by way of reduction in the price which has to be computed in respect of each SKU or unit or service based on the price and the rate of tax reduction or the additional ITC which has become available to a registered person. The legislature has deliberately not used the word 'equal' or 'equivalent' in this Section and used the word 'Commensurate' as it had no intention that it should be used to denote proportionality and adequacy. The benefit of additional ITC would depend on the comparison of the ITC/CENVAT which was available to a builder in the pre-GST period with the ITC available to him in the post GST period w.e.f. 01.07.2017. Similarly, the benefit of tax reduction would depend upon the price and quantum of reduction in the rate of tax from the date of its notification. Computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from SKU to SKU or unit to unit or service to service and hence no fixed mathematical methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a buyer. Similarly, computation of the profiteered amount is also a mathematical exercise which can be done by any person who has elementary knowledge of accounts. However,

to further explain the legislative intent behind the above provision, this Authority has been authorised to determine the 'Procedure and Methodology' which has been done by it vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017 and not on 19.07.2018 as has been claimed by the Respondent. However, no fixed formula, in respect of all the Sectors or the SKUs or the services, can be set for passing on the above benefits or for computation of the profiteered amount, as the facts of each case are different. In the case of one real estate project, date of start and completion of the project, price of the flat/shop, mode of payment of price or instalments, stage of completion of the project, rates of taxes pre and post GST implementation, amount of CENVAT and ITC availed/available, total saleable area, area sold and the taxable turnover received before and after the GST implementation would always be different from the other project and hence the amount of benefit of additional ITC to be passed on in respect of one project would not be similar to the other project. Therefore, no set procedure /methodology /guidelines/ principles/modalities/formula can be framed for determining the benefit of additional ITC which has to be passed on to the buyers of the units. Moreover, this Authority under Rule 126 has been empowered to 'determine' Methodology & Procedure and not to 'prescribe' it. Similarly, the facts of the cases relating to the sectors of Fast Moving Consumer Goods (FMCG), restaurant service, construction service and cinema service are completely different from each other and therefore, the mathematical methodology adopted in the case of one sector cannot be applied in the other sector. Moreover, both the above

benefits have been given by the Central as well as the State Governments as a special concession out of their tax revenue in the public interest and hence the suppliers are not required to pay even a single penny from their own pocket and therefore, they are bound to pass on the above benefits as per the provisions of Section 171 (1) which are abundantly clear, unambiguous, mandatory and legally enforceable. The true intent behind the above provisions, made by the Central and the State legislatures in their respective GST Acts is to pass on the above benefits to the common buyers who bear the burden of tax and who are unorganised, voiceless and vulnerable. The Respondent is trying to deliberately mislead by claiming that he was required to carry out highly complex and exhaustive mathematical computations for passing on the benefit of tax reduction which he could not do in the absence of the principles / guidelines/ procedure/ methodology/ modalities/ formula framed by this Authority or under the above Act and the Rules. However, his claim is absolutely wrong as he was only required to maintain the same basic price of his product which he was charging before the tax reduction was notified w.e.f. 01.07.2017 and charge 28% GST on the basic price. Accordingly, MRP of his impacted product was required to be the re-fixed and stickered by him as manufacturer and conveyed to his dealers. However, as is evident from the invoices mentioned in Table-A supra the Respondent had increased his basic pre GST price from Rs. 25,527/- to post GST basic price amounting to Rs. 26,475/- and the MRP from Rs. 39,250/- to Rs. 40,100/- and had also not re-fixed his MRPs which he was bound to do in terms of Section 171 of the CGST

Act, 2017 as well as the Legal Metrology Act, 2009 after the rate of tax was reduced to 28% w.e.f. 01.07.2017. Hence, no principles, methodology and procedure or guidelines or elaborate mathematical calculations are required to be prescribed separately for passing on the benefit of tax reduction. The Respondent cannot deny the benefit of tax reduction to his customers on the above ground and enrich himself at the expense of his buyers as Section 171 provides clear cut methodology and procedure to compute the benefit of tax reduction. Therefore, the above plea of the Respondent cannot be accepted.

90. The Respondent has also argued that the word "*commensurate reduction*" mentioned in the above Section denoted reduction in the price after taking into account all the factors which impacted pricing of goods. In this connection it would be relevant to mention that Section 171 requires passing on the benefit of tax reduction and it nowhere states that while doing so the cost of raw materials, packing materials, overheads, market factors, labour cost, inflation and other such elements involving increase in the cost was required to be factored in. Had it been the intention of the legislature it would have made appropriate provisions in the above Section. If the above claim of the Respondent is accepted then no supplier would pass on the benefits of rate reduction and ITC on the ground that his costs have increased on account of the above factors as has also been claimed by the Respondent hence, the very aim of the above provision will stand defeated. The cost factors are independent of the reduction in the rate of tax and they have no bearing on passing on of the above benefit. Therefore, the above contention of the Respondent is untenable.

91. The Respondent has also stated that the methodology adopted by the DGAP for calculating the profiteered amount was incorrect insofar as the comparison between the average tax incidence (%) pre-GST vis-à-vis the average tax incidence (%) post-GST was concerned as it should be computed on an overall basis (Entity Level) and not at the State level as pricing was done at the national level. The above claim of the Respondent is wrong as the rates of VAT, Entry Tax as well as the Central Excise Duty before coming in to force of the GST were different in all the States and hence the basic prices would also be different in each State. The amount of benefit would therefore, be different in each State due to difference in the rate of taxes and hence the due benefit cannot be passed on to the customers. Moreover, the benefit of tax reduction has to be passed on to each customer on each purchase which cannot be done if the benefit is computed at the entity level as it would deny the required benefit. Therefore, the benefit has to be computed at the State level and not at the national level.

92. He has also contended that with the introduction of GST he had to revisit his pricing in the background of the revised rate of tax and ITC availability. The above argument of the Respondent is untenable as there was no ground to refix the price of the impugned product as the Respondent was required to maintain the basic price which he was charging during the pre GST period and charge GST @28% after coming in to force of the GST which had no connection with his cost of production and ITC. There was no cause for the Respondent to increase his price w.e.f. 01.07.2017 the date from which the rate of tax had been reduced. Such a coincidence is deliberate and unheard off

and shows that the Respondent had no intention of passing on the benefit of tax reduction and he had illegally appropriated the same.

93. He has also claimed that the basic price for the purpose of making comparison of average tax incidence (%) for the pre-GST and the post-GST periods should be considered pre-discount. In this connection it would be appropriate to refer to the provisions of Section 15 (1) of the CGST Act, 2017 which read as "*The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.*" Further , Section 15 (3) (a) of the above Act provides that the value of the supply shall not include any discount which is given before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply. Keeping in view the above provisions it is abundantly clear that the GST is chargeable on the actual transaction value after excluding any discount and therefore, for computing profiteering basic price before discount cannot be considered. Moreover, the Respondent has himself admitted that he was offering different discounts to his dealers based on various commercial considerations and hence there is no uniform rate of discount and hence, the pre discount basic price cannot be considered for computing the average basic price pre GST. There is also no provision in the CGST Act or the Rules which states that the benefit of tax reduction can be passed on by way of discounts as it can be passed on only by commensurate reduction in the prices. Therefore,

the above claim of the Respondent cannot be accepted. In this regard, he has cited the order dated 27.12.2018 passed in case No. 29/2018 by this Authority in the case of ***Kerala State Screening Committee and another v. M/s Asian Paints Limited***. Perusal of the above case shows that there was insignificant increase of 0.24% in the basic price which was not material in attracting the anti-profiteering measures. The Respondent has also cited the order dated 18.07.2018 passed in Case No. 5/2018 in respect of ***Rishi Gupta v. M/s Flipkart Internet Private Limited*** in which the Respondent was found not to be supplier of the complained product and hence he was not liable under Section 171. He has also relied upon the order dated 02.01.2019 passed in Case No. 01/2019 in respect of ***Kerala State Screening Committee and another v. M/s Maruti Suzuki India Limited*** in which the rate of tax had been increased and hence the anti-profiteering provisions were not attracted in the above case. Accordingly, the orders passed in the above cases are of no help to the Respondent. As has been discussed above the basic price cannot be computed pre-discount and therefore, the profiteered amount cannot be considered as (-) ***Rs. 43,558***/- as per Exhibit-4 attached by the Respondent with his submissions.

94. The Respondent has also submitted that even if the methodology adopted by the DGAP as per Annexure-19 of his Report dated 07.10.2019 is accepted the profiteering should be computed for only 5 States *viz*. Assam, Bihar, Gujarat, Madhya Pradesh and Rajasthan, in case the basic price was considered pre-discount. It would be pertinent to mention here that the basic price cannot be computed pre

discounts on the grounds mentioned supra and hence profiteering in respect of all the 18 States as per Annexure-19 has to be computed including the States of Assam, Bihar Gujarat, Madhya Pradesh and Rajasthan. Accordingly, in respect of these five States the profiteering amount as computed in the revised Annexure-20 of the revised DGAP Report dated 07.10.2019 cannot be reduced to **Rs. 1,02,567/-** from Rs. 4,07,451/- as per Exhibit-5.

95. The Respondent has further submitted that the DGAP has computed profiteering by calculating the State-wise average basic price after discount on the supplies made to the distributors other than E-commerce customers during the period from April, 2017 to June, 2017. However, for the post GST period, the supplies made to the E-commerce customers have also been considered in respect of which no discount was given. In this regard it would be appropriate to mention that the DGAP while computing the average basic price for each State during the pre rate reduction period vide Annexure-19 (Revised) has taken the values of total basic before discount, total discount, total basic after discount, total VAT, total invoice value and total quantity as per the VAT register maintained by the Respondent and then calculated the average basic price, hence, the value and quantity of the supplies made to the E-commerce customers has been duly taken in to account while calculating the average basic price for each State as the VAT register contains details of all the supplies made by the Respondent including the E-commerce customers. It is also apparent from the perusal of Annexure-20 (Revised) that there were only 23 supplies made by the Respondent to the E-commerce

customer viz. M/s Flipkart India Private Limited in the States of Gujarat, Haryana, Karnataka, Tamilnadu, Telangana, Uttar Pradesh and West Bengal out of which profiteering amounting to Rs. 36,357/- has been computed in respect of 9 supplies only pertaining to the States of Telangana and West Bengal after comparing the pre rate reduction average base prices computed for the above States with the supply wise basic prices post rate reduction. Since both the basic prices have been computed after the discount it has no impact on the profiteered amount in case discount was not given during the post rate reduction period to the E-commerce customers. The Respondent has not furnished any proof to establish that the pre rate reduction basic price did not included the supplies made to the E-commerce customers. There is also no evidence to prove that no discount was given to the above customers in the post rate reduction period when it is a common trade practice that discount is ordinarily given on these E-commerce platforms. Therefore, the above claims of the Respondent cannot be accepted on his mere assertion. Accordingly, the profiteered amount in respect of the E-commerce customers to the tune of **Rs. 36,357/-** cannot be reduced as per the details given in Exhinit-6.

96. The Respondent has also stated that in respect of the States of (a) Goa (b) Nagaland (c) Puducherry (d) Punjab (e) Tripura and (f) Uttarakhand the DGAP has wrongly computed profiteering in the absence of comparable pre-GST base prices which could be substantiated from **Annexure-19 (revised)** of the DGAP Report dated 07.10.2019 wherein column (C) to (H) against rows (29) to (34) were intentionally left blank. In the absence of such comparable pre-GST

base prices, the DGAP has arbitrarily adopted the pre-GST base prices of other States for computing profiteering. For instance – the pre-GST base price for 'Goa' was the same as that of "Maharashtra'. The pre-GST base price for 'Nagaland' was same as that of "Assam'. In this regard it is revealed from the perusal of Table-A of the Report dated 07.10.2019 that no profiteered amount has been computed for the State of Goa and hence the pre GST rate of tax in respect of the above State has no impact on the liability of the Respondent. In respect of the States of Nagaland, Puducherry, Punjab, Tripura and Uttarakhand, perusal of Annexure-20 (Revised) shows that the DGAP has computed the profiteered amount after taking into consideration the values of the invoices, quantity and rates of taxes in respect of the supplies made by the Respondent during the pre and the post rate reduction periods which has no adverse effect even if the % of the rate of tax in the pre-GST period has not been mentioned in Annexure-19 (Revised) of the Report dated 07.10.2019. It is also revealed from the Table submitted by the Respondent vide his submissions dated 25.11.2019 that he has admitted that the pre GST rate of tax in respect of State of Goa was 29.57%, for the State of Nagaland it was 29.98%, for the State of Puducherry it was 30.09%, for the State of Tripura it was 29.98% and for Uttarakhand it was 29.74%, which is more than the rate of 28% post implementation of GST. He has also admitted vide his submissions dated 07.01.2020 that the rate of tax in respect of State of Punjab was 29.189%. In view of the above it is clear that the DGAP has computed the profiteered amount correctly as the pre rate reduction rate of tax applicable in the above States was higher which

was reduced to 28% w.e.f. 01.07.2017 and hence the above claims of the Respondent are not correct. Accordingly, the profiteering computed by the DGAP in respect of the above States to the tune of **Rs. 31,677/-** cannot be reduced from the profiteered amount as per the details given in Exhibit-7.

97. He has also claimed that he did not have any depot in the States of Nagaland and Tripura and all the supplies made to the above States were CST sales thus, the DGAP has wrongly assumed profiteering. However, as mentioned above the profiteered amount has been computed by the DGAP on the basis of the prices charged by the Respondent pre and post GST in the above States. The rates of tax during the pre GST period have been admitted to be 29.98% for both the above States by the Respondent himself vide his submissions dated 25.11.2019 which were more than the post GST rate of 28% and thus, profiteering computed by DGAP to the tune of **Rs. 17,030/-** cannot be reduced from the profiteered amount as per Exhibit-8.

98. He has also contended that the cost of manufacture (BOM) of the impugned product had witnessed an increase since August 2016 due to increase in raw material cost which was computed every month to arrive at the 'MAP' at the end of each month. There was an increase of ₹365/- per unit of the impugned product when compared between the pre-GST and the post-GST periods from August 2016 to July 2017 which was included in the MRP of the product. The comparison of the BOM for the pre-GST period vis-à-vis the BOM when the MRP was increased under the GST regime has been given by the Respondent vide Exhibit-9 and the Cost Accountant's Certificate vide Exhibit-10

has also been attached certifying such increase. In this connection it would be relevant to mention that there was no ground for the Respondent to increase his basic price on the very date from which the rate of tax was reduced. There is also no justification to establish why the Respondent had not increased his price during the period from August 2016 to June 2017 every month when he was computing the MAP every month. It is also apparent from the details of the life cycle of the product submitted by the Respondent that he has increased the MRP and DP of the product during the months of July and October 2016 which falsifies the claim of the Respondent that he had not increased his prices from August 2016 to June 2017. It is further apparent from the perusal of Exhibits-9 and 10 that the whole exercise has been carried out to deny the benefit of tax reduction as there was no reason for the Respondent to increase his basic price from the very date from which the rate of tax was reduced and hence the above claim of the Respondent cannot be admitted.

99. The Respondent has further contended that the average freight cost in the year 2017 had witnessed an increase as compared to the year 2016 of ₹ 29/- per unit as was evident from Exhibit-11 which was required to be added in the price. As discussed supra the Respondent had no reason to increase his price on the eve of the tax reduction and hence the above contention of the Respondent is frivolous and not bonafide which has been made with the ulterior motive of appropriating the benefit of tax reduction. Accordingly, an amount of Rs. 1,24,356/- and Rs. 70,653/- cannot be reduced from the profiteered amount as per Exhibit-12 and 13.

100. The Respondent has also argued that inflation has been accepted as a reason for price increase by this Authority in the case of **Kumar Gandharv v. KRBL Ltd. 2018-VIL-02-AUTHORITY** and in the cases of **M/s Hardcastle Restaurants Pvt. Ltd. 2018-VIL-11-AUTHORITY** and **M/s NP Foods 2018-VIL-08-AUTHORITY** loss of input tax credit has been factored-in for determination of net profiteering. In this regard it would be pertinent to mention that in the case of **Kumar Gandharv supra** there was no reduction in the rate of tax hence, the provisions of Section 171 (1) were not attracted in the above case. In the cases of **Hardcastle** and **NP Foods** the benefit of ITC had been denied which is not the issue in the present case. Therefore, the above cases are of no assistance to the Respondent.

101. The Respondent has further argued that the price increase could not be made due to other commercial factors had the effect of placing unlawful restraint on his fundamental right and was therefore violative of Article 19 (1) (g) of the Constitution of India. In this connection it would be relevant to state that Section 171 (1) only requires the Respondent to pass on the benefit of tax reduction to the buyers and does not require him to fix his prices as per the directions of any authority. The above benefit has been granted to the ordinary buyers by the Central and the State Governments by sacrificing their precious tax revenue which the Respondent cannot be allowed to misappropriate and enrich himself at the expense of the common buyers who are unorganised, voiceless and vulnerable. The Respondent is free to exercise his right to trade and fix his prices keeping in view his cost of goods, market conditions, competition and

his business strategy but he cannot deny the above benefit under the pretext that it infringes his right to trade. Neither the DGAP nor this Authority has mandate to direct the Respondent to fix his prices as per their directions nor they have directed so and hence all such claims made by the Respondent are farfetched and are not tenable.

102. The Respondent has also submitted that the period covered under the investigation was from July, 2017 to August, 2018 covering 14 months and no grounds have been given by the DGAP for selecting such a long period which should be restricted to 3 months. In this regard it would be appropriate to note that the rate of tax on the products being supplied by the above Respondent was reduced w.e.f. 01.07.2017 and therefore, he was legally required to pass on the benefit of tax reduction from the above date as per the provisions of Section 171 (1) of the above Act. During the course of the investigation it has been found that the Respondent instead of reducing his prices commensurately had infact increased them from the above date. Therefore, as per the provisions of Section 171 (1) he is liable to be investigated till the time he passes on the benefit of tax reduction as he cannot misappropriate the above benefit. The Respondent has failed to produce any evidence which could show that he has passed on the above benefit till 31.08.2018 and hence he has been rightly investigated till the above date. Had he produced evidence to the effect that he has passed on the benefit before the above date the DGAP would not have investigated him beyond that date. Since, the DGAP had received the complaint against the above Respondent from the Standing Committee on 17.07.2018 and issued notice for

investigation on 10.09.2018 he has correctly investigated him till 31.08.2019 as there was no evidence till that date that the Respondent has passed on the benefit of tax reduction and a date was required to be fixed for conducting investigation. It would be further relevant to mention here that keeping in view that a registered person may not reduce the prices commensurately at any time this Authority has been given power under Rule 133 (3) (a) of the above Rules to direct such a registered person to reduce his prices. In case there is no ground for the DGAP to investigate the Respondent over a period of 14 months there is also no ground for the Respondent to claim that the investigation should be restricted to 3 months. Hence, the above contention of the Respondent is frivolous and therefore, it cannot be accepted.

103. The Respondent has also submitted that such a long investigation was contrary to the intent of the anti-profiteering provisions which were transitionary in nature and therefore, the DGAP could not become a "Profit Checking" body. In this connection it is mentioned that the Respondent is labouring under the wrong impression that the anti-profiteering measures as transitory which is not the case as provisions of Section 171 are permanent and enforceable perpetually till they are repealed by the Parliament and all the State legislatures. The DGAP is only an agency charged with the responsibility of investigating whether the benefits of tax reduction and ITC have been passed on or not and therefore, the claim of the Respondent that it is a profit checking body is wrong and untenable.

104. He has further submitted that the correct methodology to compute profiteering would be by comparing the tax incidence (%) pre and post GST and applying the difference to the supplies post-GST (taxable value). Accordingly, he has claimed that the profiteering should be Rs. 2,23,800/- as per Exhibit-14. He has also furnished details of computation of the profited amount in the Tables prepared by him. Perusal of the Tables prepared by the Respondent shows that he has computed the profiteered amount on the basis of the total taxable supplies made in each State multiplied by the reduction in the rate of tax. Such a methodology adopted by the Respondent is not in consonance with the provisions of Section 171 (1) as profiteered amount has to be computed on each supply so that the benefit could be passed to every buyer. In case the above methodology is applied the eligible buyers would not be able to get the due benefit as the Respondent has charged different prices to different dealers by giving them different discounts on the basis of various considerations. Any denial of benefit will be hit by the provisions of Section 171 as well as Article 14 of the Constitution and hence the above plea of the Respondent is unjustified. Therefore, the profiteering amount cannot be treated to be Rs. 2,23,800/- as per Exhibit-14.

105. The Respondent has also stated that perusal of the Explanation attached to Section 171 did not throw any light vis-a-vis the scope of 'profiteering' and the interpretation given to Section 171 and rules made thereunder without considering the 'marginal notes' appended to Section 171 and heading of Chapter XV of CGST Rules, was not correct. He has also made reference to the common parlance meaning

of the term 'profiteering' from **The Chambers Dictionary, The Collins Cobuild English Dictionary** and the **Oxford University Press.** However, the above contention of the Respondent is wrong as what would constitute the 'profiteered' amount has been elaborately defined in Section 171 of the CGST Act, 2017 as under:-

"(1). 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."

(2). The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether Input Tax Credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

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

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

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

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

(Emphasis supplied)

106. Therefore, it is evident from the perusal of Sub-Section 171 (1), 171 (3A) and the Explanation attached to this Section that profiteering pertains to the amount of benefit which has been denied to the recipients by a registered person by not reducing the prices of his products commensurately on which the rate of tax has been reduced. Hence, the definitions quoted by the Respondent from the various dictionaries are not applicable. Similarly, his contention that the above term refers to excessive, exorbitant and unjustifiable profits arising due to supply of essential goods is also not correct. The argument of the Respondent that the marginal notes on anti-profiteering measures attached to Section 171 of the CGST Act, 2017 and Chapter XV of the CGST Rules, 2017 were required to be considered while interpreting the anti-profiteering measures is also not relevant as profiteered

amount has been clearly, concisely and appropriately defined in the above Section. Marginal note was only required to be considered in case the above provision of anti-profiteering measures was ambiguous and not clear. Hence, the above contention of the Respondent is untenable.

107. He has also placed reliance on the cases of ***Indian Aluminium Company v. Kerala State Electricity Board (1975) 2 SCC 414, Union of India v. Harbhajan Singh Dhillon (1971) 2 SCC 779*** and ***SP Gupta v. Union of India AIR 1982 SC 149*** in this regard. However, since the profiteered amount has been clearly defined in Section 171 of the above Act the law settled in the above cases is not being relied upon.

108. The Respondent has also submitted that the DGAP has applied the methodology of 'zeroing' while computing the profited amount which was incorrect. The above contention of the Respondent is wrong as no 'netting off' can be applied in the cases of profiteering as the benefit has to be passed on to each customer which has to be computed on each SKU. Netting off implies that the amount of benefit not passed on certain SKUs will be subtracted from the amount of benefit passed on other SKUs and the resultant amount shall be determined as the profiteered amount. If this methodology is applied the Respondent would be entitled to subtract the amount of benefit which he has not passed on one SKU or to one buyer from the amount of benefit which he has claimed to have passed on the other SKU or to other buyer, which will result in complete denial of benefit to the customer who has purchased a particular product on which no benefit or less benefit has

been passed on. Hence, the methodology of 'netting off' cannot be applied in the case of FMCGs and the methodology of 'Zeroing' has to be applied as the customers have to be considered as individual beneficiaries and they cannot be netted off against each other. This Authority has also clarified in its various orders that the benefit cannot be computed at the product, invoice, service, branch or the entity level as the benefit has to be passed on each SKU and service to each buyer as per the provisions of Section 171 (1). Hence, the above contention of the Respondent is not correct as the Respondent cannot insist of not applying the above methodology of 'netting off' as it would amount to violation of the provisions of Section 171 of the above Act as well as Article 14 of the Constitution. Therefore, an amount of Rs. 2,50,832/-, Rs. 36,124/- and negative profiteering of Rs. 75,378/- and 16,326/- cannot be reduced/considered from the alleged profiteering computation as per Exhibit-16, 17, 18 and 19.

109. The Respondent has also contended that while computing the profiteered amount the DGAP has incorrectly added 28% GST which has already been deposited with the Government. In this regard it is mentioned that the Respondent has not only collected excess basic price from his customers which they were not required to pay due to the reduction in the rate of tax but he has also compelled them to pay additional GST on the excess basic price which they should not have paid. The Respondent has thus defeated the objective of both the Central and the State Governments to provide the benefit of rate reduction to the ordinary customers by sacrificing their tax revenue. The Respondent was legally not required to collect the excess GST

and therefore, he has not only violated the provisions of the CGST Act, 2017 but has also acted in contravention of the provisions of Section 171 (1) of the above Act as he has denied the benefit of tax reduction to the ordinary buyers by charging excess GST. Had he not charged the excess GST the customers would have paid less price while purchasing goods from the Respondent and hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit which has been denied by the above Respondent which is squarely covered under the Explanation attached to Section 171. It would also be appropriate to state here that the price includes GST also. The profiteered amount can also not be paid from the GST deposited in the account of the Central and the State Governments by the Respondent as the above amount is required to be deposited in the CWFs as per the provisions of Rule 133 (3) (a) of the CGST Rules, 2017 along with the interest. Therefore, the above contention of the Respondent is untenable and hence it cannot be accepted. Accordingly, an amount of Rs. 79,403/- as per Exhibit-20 representing the GST cannot be reduced from the profiteered amount. The above Respondent has also referred to the case of ***R. S. Joshi Sales Tax Officer Gujarat v. Ajit Mills Limited*** **(1977) 4 SCC 98** in his support, however, in view of the fact that the GST collected by the above Respondent amounts to denial of benefit of tax reduction to the customers the above case cannot be relied upon.

110. The Respondent has also submitted that he has not been given the benefit of credit notes which he had issued due to the retuned sales and hence the calculation of profiteered amount by the DGAP was

incorrect. However, perusal of para F of the Report dated 06.12.2019 furnished by the DGAP shows that he has duly considered all the sale returns and accordingly computed the profiteered amount. He has specifically made mention of Invoices No. 912810002141 dated 14.08.2017 and 911910005579 dated 24.08.2017 in respect of which credit of retuned units has been duly given. Therefore, the above claim of the Respondent cannot be accepted. Accordingly, the profiteering cannot be reduced by **Rs. 7,619/-** as per Exhibit-21.

111. The Respondent has further submitted that the Malaysian and the Australian Governments have introduced the 'Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High Profit) (Net Profit Margin) Regulations 2014 and the 'Net Dollar Margin Rule' which provided the mechanism for determination of profiteering whereas no such provisions have been made under the CGST Act. It would be pertinent to mention here that the Government of Malaysia has already repealed the 'Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High Profit) (Net Profit Margin) Regulations 2014 as they were not properly working and has also withdrawn the GST. These provision were also regulating and controlling the prices in Malaysia. As far as the 'Net Dollar Margin Rule' framed by the Government of Australia is concerned the same also regulates the prices. The intention and objective of the provisions of Section 171 (1) of the above Act is only to pass on the above two benefits and they do not propose to control and regulate the prices. It is strange that the Respondent is not willing to pass on the benefit of tax reduction which he is not to pay from his own pocket as it is being given out of the tax

revenue of the Central as well as the State Governments but is advocating fixing of prices of his products by the Government. Therefore, the above contention of the Respondent is frivolous and hence, it cannot be taken in to consideration.

112. In this regard, the Respondent has also placed reliance on the cases of ***Eternit Everest Ltd.*** v. ***Union of India 1997 (89) E.L.T. 28 (Mad.)***, ***Commissioner of Income Tax Bangalore*** v. ***B. C. Srinivasa Setty (1981) 2 SCC 460*** and ***Samsung (India) Electronics Pvt. Ltd. v. Commissioner of Commercial Taxes U. P. Lucknow 2018[11] G.S.T.L. 367.*** In this connection it is respectfully submitted that the law settled in the above cases cannot be followed in the present case as no tax has been imposed under Section 171 of the above Act and hence no machinery is required to assess and compute the same. However, to implement the anti-profiteering provisions Standing and Screening Committees have been constituted under Rule 123 of the above Rules, this Authority has been constituted under Sub-Section 171 (2) read with Rule 122, investigation agency in the form of DGAP has been established under Rule 129, duties of this Authority have been defined under Rule 127. Under Rule 133 this Authority has been empowered to determine whether the benefit of tax reduction or ITC has been passed on and also to provide relief to the persons who have been denied the above benefits. Under Rule 136 this Authority can get its orders monitored through the tax authorities of the Central and the State Governments. Therefore, there is more than sufficient machinery available to implement the anti-profiteering measures and therefore, the above cases are of no help to the Respondent.

113. He has also claimed that this Authority was itself using different methodologies to ascertain profiteering as in some cases it has restricted itself to the goods mentioned in the application while in some other cases it has considered business as a whole. In this regard it is mentioned that this Authority is following consistent policy of determining profiteering in case both the above benefits have not been passed on. In respect of the cases of tax reduction all the goods on which the rate of tax has been reduced are being investigated and if the benefit has not been passed on the same the profiteered amount is being determined and the concerned registered person is being directed to pass on the same. In case during the course of the proceedings it comes to the notice of this Authority that all the goods which have been impacted by tax reduction have not been investigated the DGAP is being asked to investigate them as per the provisions of Rule 133 (5) of the above Rules. The mandate of this Authority under Section 171 (2) of the Act is to examine all such cases where reduction in the rate of tax has been made or benefit of ITC has been provided irrespective of the fact whether any complaint is received or not and whether all the impacted goods are mentioned in the complaint or not. However, the profiteered amount has to be calculated on the facts of each case as has been mentioned supra. Therefore, the above contention of the Respondent is frivolous.

114. The Respondent has also contended that Section 171(1) of CGST Act, 2017 contemplated reduction in the "rate of tax" and not reduction in the "incidence of tax" and thus, the methodology followed by the DGAP was incorrect. In this regard it would be appropriate to note that

the DGAP has computed the profiteered amount on the basis of the actual tax charged by the Respondent in each State during the pre GST period as is clear from the perusal of Annexure-20 (Revised). The above amount has not been calculated on the basis of the incidence of tax but on the basis of the actual amount of tax charged during the pre and the post GST periods and hence the above argument of the Respondent is not tenable.

115. He has also stated that for the pre-GST period, the tax rates (%) should be added to arrive at the pre-GST tax rate applicable on the impugned product and the same should be compared with the tax rate prescribed under the GST law. He has also submitted the details of pre and post GST rates of tax in the Tables prepared by him and claimed that on addition of the rates of applicable duties/taxes and VAT/CST reversal, the rate of tax was nominally more than 28% only in 9 States and in case it was rounded off this number would be reduced to only 5 States. He has further stated that on addition of the rates of applicable duties/taxes and VAT/CST reversal, the rate of tax was nominally more than 28% in only in 2 States. In Orissa, the earlier rate was 28.10%, which on rounding off was to be read as 28%. Thus, the only State where the pre-GST rate was more than 28% was Madhya Pradesh where it was **28.63%** and by applying the principal of rounding off, the rate of tax would be 28%. In this connection it is to be noted that the computation of the profiteered amount cannot be done by adding the pre GST rates of taxes as there were different rates of VAT in the States. The amount of VAT charged in each State would be different as it would be based on the sale price which would be further

different for various customers as the Respondent was giving different discounts. Similarly, the Central Excise Duty would also be different as it would be levied on the basis of the MRP after giving abatement. Therefore, the DGAP has rightly calculated the average State wise basic price keeping in view the above factors. Hence, the above claim of the Respondent in not tenable.

116. He has also reiterated that the comparison should be between the average commensurate price at the dealer's level during the pre-GST period vis-à-vis the transaction-wise actual price during the GST period at the dealer's level. In this connection it is mentioned that the Respondent being manufacturer of the product is liable to fix the basic price and the MRP. It is also on record that he is fixing the basic price and the MRP and is also determining the amount of discount which he is giving to his dealers. Therefore, the Respondent is liable for passing on the benefit of tax reduction by not increasing his pre GST basic price and by charging GST @28%. Under the Legal Metrology Act, 2009 he is also responsible for fixing the MRP which he was required to re-fix after the rate of tax was reduced. However, instead of reducing the same he has increased his basic price as well as the MRP with an intention to deny the benefit of tax reduction. The Respondent cannot fasten his liability on his dealers. In case he does not pass on the benefit of tax reduction there is no possibility of its getting passed on to the ultimate customer down the supply chain. Therefore, the above contention of the Respondent is wrong and hence it cannot be accepted. Accordingly, the profiteering amount cannot be reduced to **Rs. 1,50,122/-** from **Rs. 4,07,451/-**.

117. The Respondent has also stated that even though the "All India Dealer price is same", the price at which the goods were sold to the dealers were different in the Pre-GST regime due to various factors therefore, for the purpose of computing profiteering amount the dealer level comparison should be made. As discussed in para supra the comparison has to be made at the level of the Respondent as he is fixing the basic price and the MRP and the same cannot be made at the level of the dealers.

118. The Respondent has further stated that penalty could not be imposed on him in the absence of substantive provision in the CGST Act. He has also claimed that Section 122 of the CGST Act, 2017 could be invoked only in the case of evasion of tax and violation of Section 171 did not amount to evasion of tax as he had duly paid the entire tax which was legally required to be deposited with the Government. In this connection perusal of the notice dated 13.12.2018 shows that the Respondent was directed to show cause why penal provisions mentioned under Section 29, 122, 123, 124, 125, 126, 127 of the CGST Act, 2017 read with Rule 21 and 133 of the CGST Rules, 2017 should not be invoked against him. Since, specific penalty provisions for profiteering under Section 171 (3A) have been made in the above Act the notice dated 13.12.2018 is withdrawn to the extent under which the penal provisions under the above Sections were proposed to be invoked against the Respondent. The Respondent has also relied on the judgements passed in the cases of ***Khemka & Co. (Agencies) Pvt. Ltd. v. State of Maharashtra [1975] 2 SCC 22*** and ***Collector of Central Excise v. Orient Fabrics Pvt. Ltd. 2003 (6) SCR*** in his

support. Since, the notice to impose penalty has been withdrawn the above cases are not being relied upon.

119. Therefore, on the basis of the facts narrated above the profiteered amount is determined as **Rs. 4,07,451/-** including the GST as per the provisions of Rule 133 (1) of the CGST Rules, 2017, the details which have been mentioned in **Annexure-20 (Revised)** of the Report dated 07.10.2019 submitted by the DGAP. The State wise profiteered amount has been mentioned in **Table-A** of the above Report as under:-

Table-A

S. No.	State/Union Territory (Place of Supply)	State Code	No. of Units Sold	Amount of Profiteering (Rs.)
1	Andhra Pradesh	37	20	26,955
2	Assam	18	5	7,297
3	Gujarat	24	51	41,633
4	Jammu and Kashmir	1	7	3,039
5	Kerala	32	60	25,964
6	Madhya Pradesh	23	19	17,586
7	Maharashtra	27	48	57,184
8	Nagaland	13	7	12,743
9	Odisha	21	16	33,927
10	Pondicherry	34	1	1,828
11	Punjab	3	9	12,425
12	Rajasthan	8	26	36,051
13	Tamil Nadu	33	10	4,973
14	Telangana	36	24	24,805
15	Tripura	16	3	4,287
16	Uttar Pradesh	9	62	43,586
17	Uttarakhand	5	1	394
18	West Bengal	19	38	52,774
	Grand Total		**407**	**4,07,451**

120. Accordingly, the Respondent is directed to reduce the price of the above product as per the provisions of Rule 133 (3) (a) of the CGST Rules, 2017, keeping in view the reduction in the rate of tax so that the benefit of tax reduction is passed on to the recipients. The Respondent

is also directed to deposit the profiteered amount mentioned above along with the interest to be calculated @ 18% from the date from which the above amount was collected by him from the recipients till the above amount is deposited, in terms of the Rule 133 (3) (b) of the CGST Rules, 2017. Since, the recipients in this case are not identifiable, the Respondent is directed to deposit the above amount of profiteering along with interest in the CWFs of the Central and the concerned State Governments as per the provisions of Rule 133 (3) (c) of the CGST Rules, 2017 in the ratio of 50:50 along with interest @ 18%, till the same is deposited as per the details mentioned in Table-A mentioned above.

121. The above amount shall further be deposited within a period of 3 months by the Respondent, from the date of receipt of this order, failing which the same shall be recovered by the concerned Commissioners of the Central and the State GST, as per the provisions of the CGST/SGST Acts, 2017 under the supervision of the DGAP and shall be deposited as has been directed vide this order. A detailed Report shall also be filed by the concerned Commissioners of the Central and the State GST through the DGAP indicating the action taken by them within a period of 4 months from the date of this order.

122. It is also evident from the above that the Respondent has denied the benefit of rate reduction of the GST to the consumers in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and he has thus resorted to profiteering. Hence, he has committed an offence under Section 171 (3A) of the CGST Act, 2017 and therefore, he is apparently liable for imposition of penalty under the provisions of the

above Section. Accordingly, Show Cause Notice be issued to him to explain why the penalty prescribed under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on them.

123. It is also revealed from the submissions of the Respondent dated 11.02.2019 that he has made the following claims:-

- The prices were reduced across all Stock Keeping Units (SKUs) w.e.f. July 27, 2018. Price Lists are enclosed as Annexure-1.
- The revised prices were displayed on his website, making consumers aware about the reduction in prices (Annexure-2).
- Letters were sent to the trade partners advising them to ensure that the reduction in prices was passed on to the consumers (Annexure-3).
- Revised MRP stickers to the extent of 7.2 lakhs were pasted on each SKU in 25 States within a limited period of time.
- Perusal of Annexure-1 comprising of 66 pages shows that the Respondent has attached a long list of the products on which he has claimed to have passed on the benefit of tax reduction w.e.f. 27.07.2017 by reducing their MRPs. Vide Annexure-2 he has claimed that he had also hoisted the details of the tax reduction from 28% to 18% on his website. Vide Annexure-3 he has enclosed copies of the letters written by him to his distributors asking them to pass on the benefit of tax reduction.

He has further claimed that revised MRP stickers to the extent of 7.2 lakhs were pasted on each SKU in 25 States within a limited period of time. However, it is has been established from the facts of the present case that the Respondent has not passed on the benefit of tax reduction and the claim made by the Respondent in this regard is incorrect. Therefore, there are sufficient reasons to believe that the Respondent has apparently not passed on the benefit of tax reduction on the products mentioned in Annexure-1. Accordingly, the DGAP under Rule 133 (5) of the CGST Rules, 2017 is directed to further investigate whether the Respondent has passed on the benefit of tax reduction to his recipients in terms of Section 171 of the above Act or not in respect of the products on which the rate of tax was reduced and submit his Report as per the provisions of Rule 129 (6) of the above Rules

124. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was to be passed on or before 06.04.2020 as the investigation Report was received from the DGAP on 07.10.2019. However, due to the COVID-19 pandemic prevailing in the Country the order could not be passed on or before the above date. Hence, the same is being passed today in terms of the Notification No. 35/2020-Central Tax

dated 03.04.2020 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.

125. A copy of this order be sent to the Applicants and the Respondent free of cost. 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

17.6.2020

(A.K. Goel)
Secretary, NAA

F. No. 22011/NAA/125/whirlpool/2018 Date: 17.06.2020

Copy To:-

1. M/s Whirlpool of India Ltd., Regd. Office A-4, MIDC, Ranjan Gaon, Taluka Shiror, Distt. Pune- 412220, Maharashtra.
2. Kerala State Screening Committee on Anti-profiteering, GST Bhavan, Press Club Road, Statue, Thiruvananthapuram-695001.
3. Director General of Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.Commissioner of commercial Taxes, office of the chief Commissioner of state Tax, eedupugallu, krishna district, Andhra Pradesh.
4. Commissioner of commercial Taxes, office of the Commissioner of Taxes, Government of Assam, kar bhawan, ganeshpuri, dispur, Guwahati - 781 006.
5. Commissioner of commercial Taxes, c-5, Rajya kar bhavan, near times of India, ashram road, Ahmedabad.
6. Commissioner of commercial Taxes, Excise & Taxation complex, rail head Jammu.

7. Commissioner of commercial Taxes, Government secretariat, Thiruvananthapuram -695001.
8. Commissioner of commercial Taxes, Moti Bangla compound, m.g. Road, Indore.
9. Commissioner of commercial Taxes, GST bhavan, mazgaon, Mumbai- 400 010.
10. Commissioner of Commercial Taxes, Office of Commissioner of Commercial Taxes, Opposite DC Court, Dimapur- 797 112.
11. Commissioner of commercial Taxes, office of the Commissioner of state Tax, banijyakar bhawan, old secretariat compound, cuttack - 753 001.
12. Commissioner of commercial Taxes, office of Excise and Taxation Commissioner, bhupindra road, patiala- 147 001.
13. Commissioner of commercial Taxes, kar bhavan, ambedkar circle, jaipur, rajasthan - 302 005.
14. Commissioner of commercial Taxes, papjm building, greams road, chennai – 600 006.
15. Commissioner of commercial Taxes, o/o the Commissioner of state Tax, ct complex, nampally station road, hyderabad - 500 001.
16. Commissioner of commercial Taxes, office of the Commissioner of Taxes & Excise, head of the Department, revisional authority, p.n. Complex, gurkhabasti, agartala - 799 006.
17. Commissioner of commercial Taxes, office of the Commissioner, commercial Tax, u.p. Commercial Tax head office vibhuti khand, gomti nagar, lucknow (u.p)
18. Commissioner of commercial Taxes, state Tax Department, head office uttarakhand, ring road, near pulia no. 6, natthanpur, dehradun.
19. Commissioner of commercial Taxes, 14, beliaghata road, kolkata - 700 015.
20. Commissioner of commercial Taxes, first floor, 100 feet road, ellapillaichavady, pondicherry - 605 005.
21. Chief Commissioner of central Goods & Services Tax, Bhopal zone 48, administrative area, arera hills, hoshangabad road, Bhopal M.P. 462 011.
22. Chief Commissioner of central Goods & service Tax c.r.building rajaswa vihar, bhubaneswar-751007.
23. Chief Commissioner of central Goods & service Tax Chandigarh zone C.R. Building, plot no.19a, sector17c, chandigarh-160017.
24. Chief Commissioner central Goods & service Tax , cochin zone C.R.building, i.s.press road, Ernakulum cochin682018

17/6

25. Chief Commissioner of central Goods & Services Tax Delhi zone C.R. Building, I.P. Estate, new delhi110 109.
26. Chief Commissioner of central Goods & service Tax, Hyderabad zone GST bhavan, I.B.stadium road, basheer bagh, Hyderabad 500 004
27. Chief Commissioner of central Goods & Services Tax Jaipur zone, new central revenue building, statue circle, Jaipur 302 005
28. Chief Commissioner of central Goods & Services Tax, Meerut zone opp. Ccs university,mangal pandey nagar, meerut-250 004.
29. Chief Commissioner of central Goods & Services Tax, Mumbai zone GST building, 115 m.k. Road, opp. Churchagate station, mumbai-400020
30. Chief Commissioner of central Goods & Services Tax, Telangkhedi road, civil lines, Nagpur 440001
31. Chief Commissioner of central Goods & Services Tax Panchkula sco 407408, sector-8, Panchkula
32. Chief Commissioner of central Goods & Services Tax, Pune zone GST bhawan ice house, 41a, sasoon road, opp. Wadia college, pune411001
33. Chief Commissioner of central Goods & Services Tax, (Ranchi zone) 1st floor, C.R. Building, (annex) veer chand patel path Patna, 800001
34. Chief Commissioner of central Goods & Services Tax, Shillong zone north eastern, 3rtd floor, crescens building, MG Road, shillong-793 001
35. Chief Commissioner of central Goods & Services Tax, Vadodara zone 2nd floor, central Excise building, race course circle, Vadodara 390 007
36. Chief Commissioner of central Goods & Services Tax Visakhapatnam zone GST Bhavan, port area, visakhapatnam530 035.
37. NAA website/Guard file.

17.6.2020

(A.K. Goel)
Secretary, NAA