



BEFORE THE COMPETITION COMMISSION OF INDIA

(AUTHORITY UNDER SECTION 171 OF THE CENTRAL GOODS & SERVICES TAX ACT, 2017)

Case No.	08/2023
Date of Institution	01.03.2021
Date of Order	31.07.2023

In the matter of:

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

Applicant

Versus

M/s Subway Systems India Pvt. Ltd., Unit No. 20-24, 3rd Floor, MGF Metropolis, MG Road, Sector – 28, Gurgaon, Haryana - 122002.

Respondent

Coram:-

1. Smt. Ravneet Kaur, Chairperson
2. Dr. Sangeeta Verma, Member
3. Sh. Bhagwant Singh Bishnoi, Member

ORDER

1. The present Report dated 26.02.2021 has been received from the Director General of Anti-Profitsteering (DGAP) after a detailed investigation under Rule 133(5) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that the National Anti-Profitsteering Authority (NAA) vide its Order No. 14/2020 dated 11.03.2020 passed in the case of M/s Le Reve Pvt. Ltd. had directed the DGAP to examine M/s Subway Systems India Pvt. Ltd. for possible violation of Section 171 of the CGST Act, 2017 under Rule 133(5) of the CGST Rules, 2017 read with the provisions of Section 171(2) of the CGST Act, 2017.
2. Para No. 39 of the Order No. 14/2020 passed in the case of M/s Le Reve Pvt. Ltd. is reproduced as follows:-

"Furthermore, the DGAP vide his Supplementary Report dated 09.12.2019 has reported that M/s Subway Systems India Pvt. Ltd. (SSIPL) had also profiteered by charging royalty and advertisement expenses on the increased value of net taxable sales which was allowed to the franchisee (in this case, the Respondent) to offset the impact of denial of ITC. Further, M/s SSIPL was recommending the sales price of the products to his franchisees but was not involved in the purchase of goods/material or services for the supply of restaurant services. Therefore, given the above, there was effectively no denial of ITC to M/s SSIPL and it appeared to be resorting to profiteering by charging royalty and advertisement charges on the increased base price from the franchisee. Hence, the DGAP has sought directions to investigate the above-discussed issue, either from the Standing Committee under Rule

129(1) of the CGST Rules, 2017 or from this Authority under Rule 133(5) of the CGST Rules, 2017. In this regard, we observed that M/s SSIPL acts as a price monitoring authority for the products to be sold by the franchisee, provides his sale and purchase software to the franchisee and also charges royalty and advertisement charges on the increased base price charged by the franchisee. Therefore, this Authority finds no reason to differ with the finding of the DGAP that there may be chances of profiteering by M/s SSIPL in respect of charging of royalty and advertisement charges on the increased value of net taxable sales. Therefore, the Authority, in line with the provisions of Section 171(2) of the CGST Act, 2017 and as per the amended Rule 133 (5) (a) of the CGST Rules 2017 directs the DGAP to further examine M/s Subway Systems India Pvt. Ltd. for possible violations of the provisions of Section 171 of the CGST Act 2017 and to submit his report as per the provisions of Rule 133 (5) (b) of the CGST Rules, 2017 since there are adequate reasons to believe that M/s Subway Systems India Pvt. Ltd. may have profiteered by charging the royalty and advertisement charges on the increased net taxable sales."

3. The DGAP vide his Report dated 26.02.2021 had inter-alia submitted the following points: -
- i. On receipt of the above reference on 13.03.2020, a notice under Rule 129 of the Rules was issued by the DGAP on 15.05.2020 to the Respondent.
 - ii. The period covered by the current investigation was from 01.07.2017 to 31.03.2020.

- iii. In response to the notice dated 15.05.2020, the Respondent replied vide letters/e-mails dated 22.08.2020, 28.08.2020, 11.11.2020, 05.02.2021, 09.02.2021, 10.02.2021 and submitted the requisite documents.
- iv. The Respondent in response to said notice submitted detailed reply dated 22.08.2020. The relevant portion of the submissions is reproduced as follows:
 - a. While M/s Le Reve Pvt. Ltd. might be a franchisee of the Respondent, both were distinct persons under the GST Act and a complaint or proceedings against M/s Le Reve Pvt. Ltd. could not be made a proceeding against the Respondent under Rule 133(5)(b) of the CGST Rules, 2017.
 - b. The Respondent did not have any control on the base price offered by his franchisees to their Customers. Franchisees were never instructed, nor they had ever asked for any permission or were they obligated contractually to increase the base value of products sold to offset the impact of denial of ITC.
 - c. The consideration for sale of products was not received by the Respondent from the Customers. It was retained by the individual franchisees and was accounted for as revenue in their individual books of accounts.
 - d. The Respondent only collected the Royalty and Advertisement charges on the net sales (not the base price) declared by individual franchisees to the

Respondent, for a given period. The rate of Royalty was mutually (contractually) agreed with the franchisee and had nothing to do with the individual products sold to customers or the ability to pass on additional discounts to customers of each franchisee.

e. Advertisement charges were reimbursement of Advertisement Expenses incurred by the Respondent on behalf of his franchisees and such charges were also mutually (contractually) agreed with the franchisees. Advertisement charges also had nothing to do with individual prices of products sold by the franchisee or his ability to pass the discounts in terms of Section 171 of the CGST Act to customers.

v. Further, the DGAP has stated that in the present case the main issues for determination were:-

a. Whether the Respondent had profiteered by prescribing sales prices of the products to all his franchises, disproportionate to the loss of ITC and charging Royalty and Advertisement charges on such increased net taxable sales value from his franchises, who were denied the benefit of input tax credit, subsequent to reduction in the GST rate from 18% to 5% (on restaurant service) w.e.f. 15.11.2017 with the condition that the ITC on the goods and services used in supplying the service was not taken

as per Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 and if so,

- b. Whether the Respondent had passed on such benefit to the recipients, in terms of Section 171 of the CGST Act, 2017.
- vi. The DGAP has further submitted that sub-section (1) of Section 171 of the CGST Act states that- *"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"*.
- The rate of GST in respect of Royalty Services was 12% and the rate of GST on Advertisement Charges was 5% in case of Print media and 18% for other than Print media since implementation of GST and there had been no change in the rates of tax in respect of these services. Therefore, the provisions of Section 171 of the Act were not applicable with respect to these services.
- vii. On examination of submissions made by the Respondent and as seen from the copy of Agreement between the Franchisee and Franchisor, it had been observed that there was no clause that indicated that the Franchisor was fixing prices or that the Franchisor had been supplying the material and had been retaining the ITC. The Franchisee was only supposed to pay the Royalty Charges at 8% and Advertisement Charges at 4.5% as the case might be on the net sales.
- viii. The DGAP has also stated that as seen from the sample Agreement between the Franchisee and the Franchisor, the following clause was reproduced as below:-

"c. You will be solely responsible for all costs of building and operating

the Restaurant, including, but not limited to, sales or use tax, goods and services tax, value added tax, excise tax or other similar tax (sales tax), other taxes, fees, customs, stamp duty, other duties, governmental registrations, construction costs and permits, equipments, furniture, signs, advertising, insurance, food products, labor, utilities, salaries, fees and rent.....”.

The brief profile submitted by the Respondent stated that:-

“Subway Franchisees are independent parties that wish to operate a Restaurant under a Subway Franchise Agreement, using both the System and the SUBWAY brand name. Although supported by SUBWAY, ultimately the franchisee is responsible for making his own business a success. Franchisees should be capable to independently run a business.”

- ix. On the basis of above discussion and the evidences on record, the DGAP has found that the Respondent was not involved in determining the prices at which the outlets had to sell their goods and the franchisees were free to decide their prices. This was further substantiated by the Order No. 44/2020 dated 17.08.2020 passed by the NAA in the case of M/s Lite Bite Travel Foods Pvt. Ltd. wherein it was held that *“Upon perusal of the agreement between the Respondent and M/s Subway Systems India Pvt. Ltd. i.e. the franchisor, it is revealed that there isn’t any clause related to the control of the prices or MRP of the products supplied by the Respondent. The Respondent was free to fix the prices of his products. Further, the*

provisions of Section 171 of the CGST Act, 2017 required a registered person under GST to pass on the benefit of additional ITC or reduction in the rate of tax by way of commensurate reduction in the prices of the goods or services supplied by him. Hence, it is the responsibility of the Respondent to comply with the provisions of Section 171 of the CGST Act, 2017. Therefore, the contention made by the Respondent is not correct."

- x. The DGAP in view of the above has concluded that both the conditions envisaged under Section 171(1) of the Act were not applicable in the instant case.
4. This Commission has carefully considered the DGAP's Report dated 26.02.2021 and the documents/information placed on record and it has been revealed that the National Anti-Profiteering Authority (NAA) vide its Order No. 14/2020 dated 11.03.2020 passed in the case of M/s Le Reve Pvt. Ltd. had directed the DGAP to examine M/s Subway Systems India Pvt. Ltd for possible violation of Section 171 of the CGST Act, 2017 under Rule 133(5) of the CGST Rules, 2017 read with the provisions of Section 171(2) of the CGST Act, 2017. As per the directions of the NAA vide the above Order, the DGAP has submitted his Report.
5. Upon perusal of the Report of the DGAP, we observe that the Respondent was working on a Franchisee-Franchisor agreement and was providing its business model to various operators and he was only collecting Royalty and Advertisement Charges from his Franchisees for selling proprietary products of Subway, on the net sales declared by individual Franchisees. The rate of Royalty and Advertisement Charges were mutually agreed with the Franchisee and the Respondent had nothing to do with the individual products

sold to the customers. The Franchisee was only supposed to pay the Royalty Charges @ 8% and Advertisement Charges @ 4.5% as the case might be on the net sales. The Respondent did not have any control on the base price offered by his Franchisees to their customers and the amount of Input Tax Credit availed by his Franchisees. As per the Agreement between the Franchisee and Franchisor, there was no clause that indicated that the Respondent was fixing prices or that he had been supplying the material and was retaining the ITC. Further, the Respondent had imposed no restriction on his Franchisee to offer discount to their customers in compliance with Section 171 of the CGST Act, 2017. Further, the consideration for sale of products was not received by the Respondent from his Franchisee and it was retained by the individual Franchisees and accounted for as revenue in their individual books of accounts.

6. The sample Agreement between the Respondent and the Franchisee mentions that:-

"c. You will be solely responsible for all costs of building and operating the Restaurant, including, but not limited to, sales or use tax, goods and services tax, value added tax, excise tax or other similar tax (sales tax), other taxes, fees, customs, stamp duty, other duties, governmental registrations, construction costs and permits, equipments, furniture, signs, advertising, insurance, food products, labor, utilities, salaries, fees and rent.....".

Therefore, it is clear that the Franchisees were free to operate their business and were also liable to pay the taxes and obtain necessary permissions.

7. It is further observed that the rate of GST in respect of Royalty Services was

- 12% and the rate of GST on Advertisement Charges was 5% in case of Print media and 18% (other than Print media) since implementation of GST and there had been no reduction in the rates of tax in respect of these services.
8. Since, there had been no reduction in the rate of tax in respect of the services i.e. Royalty Service and Advertisement Services provided by the Respondent, the provisions of Section 171 of the Act were not applicable with respect to these services.
9. In view of the above findings, we find that the instant case does not fall under the ambit of Anti-Profiteering provisions of Section 171 of the CGST Act, 2017 as there had been no reduction in the rate of tax in respect of the services provided by the Respondent nor he was supplying the various products to the customers.
10. Accordingly, the present proceedings being conducted against the Respondent are dropped.
11. A copy of this order be supplied to all the parties free of cost and file of the case be consigned after completion.

Sd/-
(Ravneet Kaur)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

Certified Copy

(Jyoti Jindgar Bhanot)
Secretary

File No. 22011/NAA/43/Subway Systems/2021

439 - 441
Date:- 31.07.2023

Copy To:-

1. M/s Subway Systems India Pvt. Ltd., Unit No. 20-24, 3rd Floor, MGF Metropolis, MG Road, Sector – 28, Gurgaon, Haryana - 122002

2. Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
3. Guard File.