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MATTERS

Day 15; Tax Insight Part 1

NATIONAL ANTI PROFITEERING AUTHORITY (NAA) IMPOSES PENALTY FOR PROFITEERING AMOUNT AND DIRECTED IT TO BE DEPOSITED IN CONSUMER WELFARE FUNDS IN THE CASE OF RAHUL SHARMA VS TANYA ENTERPRISES

1.1. BRIEF FACTS OF THE CASE

- M/s Vini Cosmetics Pvt. Ltd is a manufacturer of the product "Fogg Deo Fougere BX 150 ml"
- M/s TANYA ENTERPRISES (*hereinafter referred to as the respondent*), the trader who procured goods from Mfr.
- The **Standing Committee on Anti-profiteering** vide its communication dated 11.03.2019 had requested the DGAP to conduct a detailed investigation as per **Rule 129 (1)** of the above Rules on the allegation that:-
"M/s Vini Cosmetics Pvt. Ltd. had not passed on the benefit of tax reduction from 28% to 18% w.e.f. 15.11.2017 on "Fogg Deo Fougere BX 150 ml" which was supplied to M/s Big Bazaar, Inderlok on 09.11.2017 under Purchase Order (PO) No. 81149976814 with MRP of Rs. 299/- and on 19.12.2017 under PO No. 8115259654 with the same MRP of Rs. 299/-."
- The DGAP had issued Notice under Rule 129(3) of the CGST Rules, 2017 on 10.04.2019 to M/s Vini Cosmetics Pvt. Ltd., to submit his reply:-
 - a) As to whether he admitted that the benefit of reduction in the GST rate w.e.f. 15.11.2017, had not been passed on by him to his recipients by

way of commensurate reduction in price and if so, to suo moto determine the quantum thereof and indicate the same in his reply to the Notice as well as furnish all the documents in support of his reply.

- b) He was also afforded an opportunity to inspect the non-confidential evidence /information which formed the basis of the said Notice, during the period from 15.04.2019 to 17.04.2019 which M/s Vini Cosmetics Pvt. Ltd. did not avail.
- The DGAP mentioned that M/s Vini Cosmetics Pvt. Ltd. vide email dated 06.05.2019 referred to the PO's mentioned in the Application and submitted that:-
- a) He had not supplied the above good directly to M/s Big Bazaar, Inderlok.
- b) The DGAP then asked M/s Big Bazaar, Inderlok to provide copies of the above POs which he submitted vide his letter dated 24.05.2019.
- c) The DGAP has stated that the said POs had shown that the impugned good "**Fogg Deo Fougere BX 150 ml**" was supplied to M/s Big Bazaar by the Respondent, on 02.12.2017, under
- i) PO number 8115259654 with a base price of Rs. 190.04/-, on 11.2017,
- ii) PO number 8114996814 with a base price of Rs. 175.19/- and on 05.05.2018,
- iii) PO number 4517361778 with a base price of Rs. 173.14/-.
- The DGAP therefore, initiated proceedings against the Respondent and included him as a co-noticee on 06.06.2019 in the already issued notice dated 10.04.2019, for collecting the evidence necessary to determine whether the benefit of reduction in the rate of GST from 28% to 18%, had been passed on by M/s Vini Cosmetics Pvt. Ltd. and the Respondent to their recipients in respect of the supply of all the products impacted by such GST rate reduction w.e.f. 15.11.2017, by way of commensurate reduction in prices, in terms of Section 171 of the Central Goods and Services Tax Act, 2017.
- The time period of the present investigation was from **15.11.2017 to 31.03.2019**.
- The DGAP sought extension of the time limit to complete the investigation from this Authority under Rule 126 (6), which was granted to him.
- The DGAP has stated that M/s Vini Cosmetics Pvt. Ltd. had replied to the above Notice vide his letters/emails dated 17.04.2019, 01.05.2019, 05.2019, 24.05.2019, 14.06.2019, 09.08.2019, 18.09.2019 and 19.09.2019. The M/s Vini Cosmetics Pvt. Ltd. made the following submissions before DGAP:-
- a) *The product in respect of which his company was being alleged to*
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have profiteered viz. "Fogg Deo Fougere BX 150 ml" was a deodorant classified under HSN 3307.

- b) The rate of GST was reduced on this product from 28% to 18% vide **Notification No. 41/2017 — Central Tax (Rate)** dated 14th November 2017 effective from 15th November 2017.
 - c) This product was being meant to be supplied only to the super stockiest who sold it further to the Malls like M/s Big Bazaar through The pricing of such products varied from party to party which meant that the same product was sold at different rates to the different parties.

(However, the price for the supply of a specific product to a specific buyer/recipient was fixed.)
 - d) As per Section 2 (93) of the CGST Act, 2017, the person who was liable to pay consideration was a recipient. M/s Vini Cosmetics Pvt. Ltd. had not supplied the goods to M/s Big bazaar and therefore the question of passing on of benefit of rate reduction to M/s Big bazaar being recipient did not arise.
 - e) Moreover, the PO was a document which was being issued by the purchaser of the goods (M/s Big Bazaar in this case) and not by the supplier of goods and therefore there was no corroborative evidence that the supply of goods was made at the same MRP during pre and post rate change period.
 - f) In line with the provisions of Section 171 of the CGST Act, 2017, he had passed on the benefit of rate reduction on the impugned product, "Fogg Deo Fougere BX 150 ml" by reducing the base price of the product and that the same could be verified from the price list issued by him for the supply of "Fogg Deo Fougere BX 150 ml" from a different super stockist in pre and post rate change regimes.
 - g) Over and above the reduction of even base price during the post rate change, he had simultaneously reduced the MRPs of all the impacted products.
 - h) In case of the impugned product i.e. Fogg Deo Fougere BX 150 ml", the MRP of Rs. 299/- in the pre-reduction period was revised to Rs. 275/-, whereas the commensurate reduction required that the revised MRP should have been Rs. 64 (Rs. 299*1.18/1.28). Thus he had complied with the anti-profiteering provisions.
 - i) In respect of the stock that had already been supplied to the recipients/stockiest/super stockists in the further supply chain but not yet sold to the final consumers till 15th of November, 2017 reduction in the price was communicated to all the super stockiest through electronic mail, copies of which had been furnished before the DGAP to prove his intention to pass on the benefits to the end-user/actual consumer.
 - j) He had also forwarded stickers with the reduced MRPs to his super
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stockists/stockists/distributors for being affixed on the impacted goods which had remained unsold to the end-users/final consumers as on 15th November 2017.

- k) He had also furnished a copy of the invoice of the vendor who had supplied the new MRP stickers to him as also all the correspondence he had made with his super stockists/stockists/distributors.
- l) That his above submissions should be taken into account and the proceedings against him should be dropped in as much as he had not supplied any goods to M/s Big Bazaar and that he had already passed on the benefit of tax reduction, to his recipients in the supply chain and onward to the end-users/final consumers.
- M/s Vini Cosmetics Pvt. Ltd. also submitted the following documents/information:
- (1) GST Certificates of all the three registered units.
 - (2) GSTR-1 and GSTR-3B Returns of all his registered units for the period from October-17 to March-18. GSTR-9 Return was not been filed yet for any unit.
 - (3) Pre and Post MRP List of the Products.
 - (4) Sample Invoices pre and post rate reduction showing decreased MRPs and base prices for the impacted products.
- The Respondent replied to the notice vide letters/emails dated 25.07.2019, 10.08.2019, 14.08.2019, 02.09.2019, 05.09.2019 and 20.09.2019 and submitted following documents/information:-
- (1) *GST Certificate.*
 - (2) *GSTR-1 Return from Oct 2017 to March 2019.*
 - (3) *GSTR-3B Returns from Oct 2017 to March 2019.*
 - (4) *Sample Invoices.*
 - (5) *Invoice wise Sale details.*

1.2. DGAP FINDINGS

In Respect of M/s Vini Cosmetics Pvt.

The DGAP has reported that the main issues for determination were:-

- (1) Whether the rate of GST on the product "Fogg Deo Fougere BX 150 ml" supplied by M/s Vini Cosmetics Pvt. Ltd. and the Respondent was reduced w.e.f. 15.11.2017?
and if so,

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- (2) Whether M/s Vini Cosmetics Pvt. and the Respondent had passed on the benefit of such reduction in GST rate to their recipients, in terms of Section 171 of the Central Goods and Services Tax Act, 2017?
- The DGAP has also observed that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on the product "Fogg Deo Fougere BX 150ml" from 28% to 18% w.e.f. 15.11.2017, vide Notification No. 41/2017 – Central Tax (Rate) dated 14.11.2017, was a matter of fact which had not been contested by M/s Vini Cosmetics Pvt. Ltd. and the Respondent.
 - DGAP agreed to the contentions made by M/s Vini Cosmetics Pvt. Vide impugned mails.

IN RESPECT OF THE RESPONDENT

- the DGAP has reported that perusal of the outward sales data made available by the Respondent indicated that the Respondent had increased the base prices of the impugned product "Fogg Deo Fougere BX 150 ml" while the rate of GST was reduced from 28% to 18% w.e.f. 15.11.2017, for some time.
 - The Respondent contended that:-
 - (1) He had to supply the goods based on the PO issued by the buyers, and MRPs for the products as well as purchase prices were already mentioned in the POs itself.
 - (2) He had also submitted that the pricing of products varied from party to party which meant that the same product was being sold at different prices to the different parties.
 - (3) As a super stockist, he was supplying products only to different super-markets and channels of modern trade, and e-commerce retailers, wherein the rates and margins were pre-decided and invariably varied from one distributor to another, although the price for a specific product for a specific buyer was fixed and since the supply of goods was effected only on the basis of the POs, any higher rates quoted in the PO could not be termed as profiteering on his part.
 - The DGAP has also claimed that notwithstanding the above contentions of the Respondent if he had kept the base prices across channels constant, it would have led to passing on of the benefit of rate reduction to the buyers.
 - Further. M/s Vini Cosmetics Pvt. Ltd. had not only revised downwards his prices of the impacted products commensurately, but he had also communicated the same to all his super-stockists to re-sticker the product and pass on the benefit to end users/final consumers and had thus not contravened the provisions of Section 171 of the CGST Act, 2017.
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- On the other hand, however, the Respondent had increased the base prices of the products when they were sold to distributors/modern trade, and hence had not passed on the benefit of rate reduction to his recipients and hence the benefit had not been passed to the end-users/final consumers.
 - The DGAP, on the basis of aforesaid pre and post-reduction GST rates and the details of outward taxable supplies (other than zero-rated, nil rated and exempted supplies) of the Respondent for the products supplied by M/s Vini Cosmetics Pvt. Ltd. to him during the period 15.11.2017 to 31.03.2019, has computed the profiteered amount by comparing the average of the base prices of the impacted products sold during the pre-rate revision period, i.e. from 01.07.2017 to 14.11.2017, with the actual invoice-wise base price of such products sold after the rate reduction, i.e. during the period 15.11.2017 to 31.03.2019. The DGAP has detailed the computation methodology adopted for arriving at the quantum as below:-
 - a) Product – DEO FOGG FOUGERE 125GM (in Rs.)
 - b) Pre-rate reduction average base price during 01.11.2017 to 14.11.2017 **(A) 175.19/-**
 - c) Post-rate reduction base selling price during **(B) 190.04/-**
 - d) Commensurate Price (C=A x 1.18) is Rs. 206.73/-**
 - e) Post-rate reduction selling price (Invoice No. and Date)
(D=B x 1.18) **224.25/-**
 - f) Profiteering **(E=D-C) 17.52/-**

The DGAP has thus concluded that the amount of net higher sales realization on account of the increase in the base price of the product, despite the reduction in the GST rate from 28% to 18%, came to 8,50,442/- inclusive of the excess GST so collected by the Respondent from Recipient.

1.3. NAA HEARING OUTCOME, AFTER INVESTIGATION OF DGAP

The Respondent as is evident from his invoices provided by the DGAP had not passed on the benefit of rate reduction to his recipients and this fact has also been accepted by the Respondent.

Accordingly, the Respondent is directed to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules. The Respondent is also directed to deposit an amount of 8,50,442/- in the Consumer Welfare Fund of the Central and the Delhi State Governments, where the Respondent has made his supplies, as the recipients are not identifiable, as per the provisions of Rule 133 (3) (c) of the above Rules along with 18% interest payable from the dates from which the above amount was realized by the Respondent from his recipients till the date of its deposit. The above amount shall be deposited within a period of

3 months from the date of passing of this order failing which it shall be recovered by the concerned Commissioners CGST/SCST.

Interestingly, the delay caused due to lockdown also mentioned:-

25. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was required to be passed within a period of 6 months from the date of receipt of the Report from the DGAP under Rule 129 (6) of the above Rules. Since the present Report has been received by this Authority on 26.09.2019 the order was to be passed on or before 25.03.2020. However, due to the prevalent pandemic of COVID-19 in the Country, this order could not be passed on or before the above date due to force majeure. Accordingly, this order is being passed today in terms of the Notification No. 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.

1.4. CONSTITUTIONAL VALIDITY OF THE PROVISIONS IN RESPECT OF NAA

To be discussed in the next insight....

CA Udit Swami

For the detailed procedure/queries in respect of the said issue, please feel free to contact us at Contact@taxtru.in