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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 12557/2022

L OREAL INDIA PRIVATE LIMITED Petitioner

Through: Mr.Mukul Rohatgi, Sr.Advocate with
Mr.V.Lakshmikumar, Mr.Karan
Sachdev and Mr.Agrim Arora,
Advocates.

versus

UNION OF INDIA & ORS. Respondents

Through: Ms.Uma Prasuna Bachu, Advocate
for R-1.
Mr.Zoheb Hossain, Sr.Standing
Counsel for the Revenue with
Mr.Vivek Gurnani and Ms.Niharika
Kuchhal, Advocates for R-2, 3 &
4/NAA and DGAP.

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Reserved On : 02nd September, 2022

Date of Decision: 06th October, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

MANMOHAN, J:

CM APPL.38028/2022

Exemption allowed, subject to all just exceptions.

Accordingly, the present application stands disposed of.

CM APPL.38027/2022

1. Accompanying writ petition has been filed challenging the order dated 23rd June, 2022 passed by the Respondent No.2 in order No. 26/2022 and the notice dated 1st June, 2022. Petitioner also seeks to challenge Section 171 of the CGST Act, Chapter XV of the CGST Rules, more particularly, Rules 126, 127 & 133 of the CGST Rules as unconstitutional, ultra vires and violative of Articles 14, 19(1)(g), 265 & 300A of the Constitution of India.
2. Learned senior counsel for the petitioner submitted that the National Anti-Profiteering Authority (NAA) has no suo moto powers and therefore, the application filed by the Secretary, NAA, to the Standing Committee seeking initiation of proceedings under Section 171, is not a valid initiation of proceedings against the petitioner for examining whether there is any profiteering or not.
3. He contended that NAA is not netting of the benefit of rate reduction extended in some products as against those where the petitioner has not extended the benefit of rate reduction qua the subject products, by way of commensurate reduction in prices, and therefore, while it is being punished for being a 'bad boy', it is not being rewarded for being a 'good boy'.
4. He stated that even though in some products they have not been able to grant commensurate reduction in prices, yet they have tried to pass on the benefit by way of increase in grammage of the product.
5. He also stated that petitioner has given post sale discount (Ex.GST) to the tune of Rs.73.59 crores, and therefore, this amount should be reduced from the total profiteered sum.

6. Learned senior counsel for the petitioner further contended that increase of customs duty on certain products should be excluded. In support of this argument, he gave certain illustrations from which it could be seen that when compared the invoices issued during the period 15th November, 2017 to 30th November, 2017 with the invoice raised in the month of March 2018, the actual sale price per unit including GST had remained same during both periods. He also prayed that the profiteering on account of GST collected by him, should be excluded.

7. *Per contra*, learned counsel for NAA contended that Section 171 of GST confers powers of wide amplitude upon the NAA to examine “any supply of goods or services” by any registered person and to examine whether the reduction in the tax rate or benefit of input tax credits have been passed on to the recipient by way of commensurate reduction in prices or not. He stated that even assuming that the rules provide for a mechanism by which a recipient or any other interested party or a Commissioner, can make a written application in a prescribed form which is required to be examined by the Standing Committee and the Screening Committee, however, this procedure in no way fetters the original power conferred upon the NAA by Section 171, to examine whether input tax credits availed by any registered person or the reduction in the rate of tax on any supply of goods or services, have been passed on to the recipient by way of commensurate reduction in prices or not. He submitted that whenever the word ‘any’ is used in a statutory provision, it has to be given its broadest connotation and the expression ‘any’ indicates ‘all’ or ‘every’. He submitted that the argument that NAA has no *suo moto* powers to make an application or to initiate investigation which would be in the larger consumer interest and public

interest, deserves to be rejected.

8. He pointed out that Section 172(2) read with Clause 9 of the methodology and procedure states “(9) *The Authority may inquire into any alleged contravention of the provisions of Section 171 of the Central Goods & Services Tax Act, 2017 on its own motion or on receipt of information from any interested party as defined in the Rule 137(c), person, body association or on a reference having been made to it by the Central Government or the State Government*”, clearly shows that NAA has suo moto powers to initiate proceedings under Section 171(2) read with Rules thereunder. He submitted that the language of Rule 127 of the CGST indicates that duties of the NAA are broad enough to confer suo moto powers on the NAA:-

127. Duties of the Authority.— It shall be the duty of the Authority, –
...

(ii) to identify the registered person who has not passed on the benefit of reduction in the rate of tax on supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices;

(iii) to order,

(a) Reduction in prices;

(b) Return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen per cent from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount not returned, as the case may be, in case the eligible person does not claim return of the amount or is not identifiable, and depositing the same in the Fund referred to in Section 57;

(c) Imposition of penalty as specified in the Act; and

(d) Cancellation of registration under the Act.

9. He stated that Section 171 which is an anti-profiteering measure, must be seen from the prospective of every consumer who receives the supply of goods or services and not from the prospective of registered person or entity for the reason that the object of the Act is to ensure that the sacrifices made by Governments by forgoing their share of taxes from the public exchequer, must reach every consumer on every supply, and not selectively, as per the whims and fancies of the suppliers. Therefore, according to him, the benefit of tax reduction has to be passed on at the level of each supply of Stock Keeping Unit (SKU) to each buyer of such SKU and in case it is passed on the profiteered amount has to be calculated on each SKU. Further, according to him, the above Section mentions “any supply” i.e. each taxable supply made to each recipient thereby clearly indicating that netting off of the benefit of tax reduction by a supplier is not allowed.

10. He submitted that a taxing statute has several goals and collection of taxes may not be the only goal. A taxing statute has many regulatory aspects to it as well, and it would be apparent from Section 171 of the CGST Act that the Governments intend to forego their share of taxes in favour of the public, so that the common public, who bears the burden of the indirect tax, directly benefits by way of commensurate reduction in the prices of the product, and is able to enjoy the extra cash in its hand. Such a legislative goal will get defeated if the petitioner’s argument is accepted that he can pass on the benefit of tax rate reduction by way of extra or additional grammage of the product.

11. He further stated that the petitioner was only required to pass on the benefit of tax reduction by not increasing his base prices on the date of

reduction in the rate of tax w.e.f. 15th November, 2017 which he has not done and has instead increased them, hence the argument of passing on the benefit by discount is farfetched and not maintainable as no such discount was required to be given by the petitioner.

12. He stated that the petitioner has not only collected excess base prices 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 these excess base prices which they should not have paid. He contended that the petitioner has thus defeated the objective of both the Central and State Governments to provide the benefit of rate reduction to the ordinary customers by sacrificing their tax revenue. He contended that the petitioner was legally not required to collect the excess GST and therefore, he has not only violated the provisions of the CGST/SGST Acts, 2017, but has also acted in contravention of the provisions of Section 171(1) of the above Acts as he has denied the benefit of tax reduction to the ordinary buyers by charging excess GST. He stated that had the supplier not charged the excess GST, the customers would have paid less price while purchasing goods from the petitioner and hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit denied by the above petitioner. He emphasised that price includes GST also. Thus, according to him, the profiteered amount cannot be paid from the GST deposited in the amount of the Central and the State Governments by the petitioner 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. He stated that even the DGAP had observed that: (i) though there has been an increase in Customs Duty, actual selling price per unit has not undergone any change

during the period November 2017 to March 2018, (ii) increase in the base price could not have happened overnight to exactly coincide with the GST rate reduction w.e.f. 15th November, 2017 and (iii) increase in the cost of raw material/input services, if any, has no relevance in the context of GST rate reduction w.e.f. 15th November, 2017 and Section 171 of the CGST Act, 2017 does not provide for any scope for adjustment of increase in cost against the benefit of reduced tax rate. He further stated that it could be seen from the illustrations that selling rates of the products have remained the same during the month of November, 2017 and March, 2018. Consequently, according to him, the Authority found that the petitioner had been economical with the truth and had been submitting information and data which is inadequate, unreliable and unsubstantiated.

COURT'S REASONING

13. This Court is of the prima facie view that Section 171 is not a charging or a taxing provision. On the contrary, it is an incidental provision in the CGST/SGST Acts, for the purpose of ensuring that the object of these Acts, namely, eliminating the cascading effect of taxation on the consumer is achieved and any benefit of rate reduction of taxes or input tax credit benefit is passed on to the recipient without the middleman taking advantage of the Governments forgoing their taxes for the end consumer. In that sense, this provision is in the nature of a consumer welfare provision. Consequently, the aforesaid provision would have to be liberally construed and constructed in a manner which is directed towards furthering consumer and public interest.

14. Rule 128 of the CGST Rules permits '*a commissioner or any other person*' to make a written application that the benefit of reduction in the rate of tax, on any supply of goods or services or the benefit of input tax credit has not been passed on to the recipient by way of commensurate reduction in prices. The Rule nowhere prescribes that the applicant who is making the written application/complaint must also be the recipient of the goods or services, on which commensurate reduction in prices have not taken place. Consequently, *prima facie*, the Secretary, NAA, would qualify to make an application under Rule 128 which permits '*any other person*' to make such an application. Also, in the case of *Patanjali Ayurveda Ltd. vs. Union of India & Ors. W.P.(C) 4375/2020*, the issue of suo moto powers of NAA was raised, but even Patanjali was directed to deposit the entire profiteered sum.

15. Further, Section 171 of the CGST Act, 2017 casts an obligation of every supplier of goods and services/registered person to pass on the benefit of rate reduction of GST or the benefit of ITC on every supply and not on some supplies. Consequently, *prima facie*, a supplier cannot claim that he has passed on more benefit to one customer therefore he could pass less or no benefit to another customer than the benefit which is actually due to that customer.

16. This Court is also of the *prima facie* view that the post-sale discount has not been granted on account of GST rate reduction and therefore, does not qualify as commensurate reduction in prices as required under Section 171 of the Act.

17. The 35 Excel sheets placed on record qua customs duty do not have any heading of bills of entry number, date, value, duty, description of goods,

etc. In addition, it is not clear as to whether the imported goods were raw material or finished goods. If the imported goods were raw material, they must be going into the process of manufacture with other raw material and/or ingredients. To work out the impact of the increase in Customs Duty, one would need to examine whether any other raw material/ingredient or other factor has shown increase in rate or decrease in rate and their consumption/utilisation has to be supported by proper manufacturing composition. Consequently, *prima facie*, any purported increase in Customs Duty on certain raw material with effect from 01st December, 2018 cannot be examined at this stage.

18. *Prima facie*, this Court is also of the view that the under Section 171 any benefit of reduction in rate of taxes or benefit of input tax credit on any supply of goods or services can only be by way of commensurate reduction in prices. When a statute clearly provides for a manner in which something is to be done, and a duty is cast upon the supplier to extend the benefit of rate reduction by way of commensurate reduction in prices, the supplier cannot insist that instead of reducing prices, he will give extra grammage of the product.

19. Keeping in view the aforesaid as well as the orders passed by this Court in *Phillips India Limited Vs. Union of India & Ors. [W.P.(C) No.3737/2020]* as well as *M/s Samsonite South Asia Pvt. Ltd. Vs. Union of India & Ors. [W.P.(C) No.4131/2020]* and *M/s Patanjali Ayurved Ltd. Vs. Union of India & Ors. [W.P.(C) No.4375/2020]*, this Court directs the petitioner to deposit the principal profiteered amount after deducting the GST imposed on the net profiteered amount (which has already been deposited by the petitioner with the Department) in six equated instalments

commencing 10th October, 2022. The interest amount directed to be paid by the respondents as well as the penalty proceedings and further investigation by NAA in respect of other products sold by the petitioner are stayed till further orders. At the cost of repetition, it is emphasised that the views in the present order are *prima facie* and shall not prejudice either of the parties at the final hearing of the present case.

20. Learned counsel for the parties are also directed to complete the pleadings before the next date of hearing.

21. List on 19th October, 2022.

MANMOHAN, J

DINESH KUMAR SHARMA, J

OCTOBER 06, 2022
js/AS/TS