

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

Case No.	35 /2019
Date of Institution	28.03.2019
Date of Order	28.05.2019

In the matter of:-

1. Sh. Sahil Mehta, Flat No. 0203, Shrusthi Residency, 1C, Main 5th B Cross, Kasturi Nagar, Bangalore-560043.
2. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

1. M/s Salarpuria Real Estate Pvt. Ltd., 4th floor, Salarpuria Windsor, No. 3 Ulsoor Road, Bangalore- 560042, Karnataka.

Respondent

Quorum:-

1. Sh. B. N. Sharma, Chairman
2. Sh. J. C. Chauhan, Technical Member
3. Ms. R. Bhagyadevi, Technical Member
4. Sh. Amand Shah, Technical Member

Present:-

- 1) None for the Applicant No. 1.
- 2) Ms. Gayatri, Deputy Commissioner and Sh. Rana Ashok Rajneesh, Assistant Commissioner on behalf of the Applicant No. 2.
- 3) Sh. P. K. Mishra, Vice-President and Sh. S. Narayana Rangaiah, Senior General Manager (Finance) on behalf of the Respondent.

ORDER

1. This Report dated 06.11.2018, has been received from the Applicant No. 2, the Director General of Anti-Profitteering (DGAP), under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the present case are that an application dated 05.04.2018 was filed before the Standing Committee on Anti-profitteering under Rule 128 of the CGST Rules, 2017, by the Applicant No. 1 alleging profiteering by the Respondent in respect of purchase of a flat in the Respondent's project "East Crest" situated at No. 41, Bandapura Village, Bidarahalli Hobli, Bangalore- 560049. The Applicant No. 1 alleged that the Respondent had charged 12% GST on 2/3rd of the agreement value and 12% GST on the additional charges on which there was no Service Tax prior to GST and that the benefit of Input Tax Credit (ITC) had not been passed on to him by the Respondent by way of commensurate reduction in price of the flat after implementation of GST w.e.f. 01.07.2017.

2. The Applicant No. 1 had booked the flat on 31.07.2016 in the pre-GST period and had filed the payment details as has been shown in the Table A given below. The above application was examined by the

Standing Committee on Anti-profiteering in its meeting held on 25.05.2018, and its minutes were forwarded to the DGAP for a detailed investigation:-

Table-'A'

(Amount in Rs.)

Particulars	Land Value	Construction Value	Total Taxable Value	Service Tax & VAT (10% on Construction)	GST@12 %	Total
(1)	(2)	(3)	(4)=(2)+(3)	(5)= (3)*10%	(6)=(4)*12 %	(7)=(4)+(5)+(6)
Agreement Value (A)	26,38,840	33,95,900	60,34,740	3,39,590	-	63,74,330
Paid in Pre-GST era (B)	5,36,736	6,79,179	12,15,915	67,918	-	12,83,833
Balance to be paid Post GST (C)= (A)-(B)	21,02,104	27,16,721	48,18,825	2,71,672	-	50,90,497
Demanded by the noticee(D)	16,06,275	32,12,550	48,18,825	-	5,78,269	53,97,084
Excess Demand by the noticee (E)= (D)-(C)						3,06,587

3. On receipt of the above reference from the Standing Committee on Anti-profiteering, a notice under Rule 129 of the CGST Rules, 2017 was issued by the DGAP on 18.06.2018 calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the above Applicant 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 along with all the supporting documents. The Respondent was also given an opportunity to inspect the non-confidential evidences/information furnished by the Applicant No. 1 between 20.06.2018 to 22.06.2018 which was inspected by him on 08.08.2018.

4. The DGAP's investigation Report has covered the period from 01.07.2017 to 30.06.2018. Since the documents were voluminous, the DGAP had sought extension to complete the investigation which was extended upto 07.11.2018 by the Authority, vide its order dated 07.09.2018 in terms of Rule 129 (6) of the CGST Rules, 2017.

5. The DGAP in his Report has stated that the Respondent claimed that his project "East Crest" did not fall under the Affordable Housing Scheme but was a residential project attracting normal GST @ 12%. The project consisted of 667 apartments in 11 blocks, out of which 467 units belonged to the Respondent and has also claimed that upto 30.06.2017 he had sold 241 units out of his share. The above project was 55% complete before 01.07.2017, 79% complete as on 30.06.2018 and the estimated time of completion of the entire project was March, 2019. The Respondent also stated that he could not ascertain the exact impact of GST and the benefit accruing there from, which needed to be passed on to the customers. He also claimed that he had suo-moto sent communications to his customers on 08.11.2017 stating *"we are in discussion for the input tax benefit and will update you as soon as we receive any information on the same."*

6. The Report has also stated that the Respondent claimed that on introduction of GST from 01.07.2017, it had thrown open a lot of challenges and uncertainties in the indirect tax regime and hence the actual benefit on account of ITC could not have been ascertained immediately and he had to negotiate with the contractors, sub-contractors and vendors for price reduction due to ITC that needed to be passed on. The Respondent has also claimed that various parameters such as prices of inputs and input services, increase or decrease in input tax credits after introduction of GST, negotiations with the vendors, eligibility to avail credit, restrictions and blocked credits in terms of Sections 16 and 17 of the CGST Act, relevant rules and other

uncertainties due to interpretational nuances etc. needed to be considered before ascertaining the impact of GST. He has also claimed that the entire project would take a number of months to complete and hence, the impact of GST could be ascertained only upon completion or conclusion of the project and it would be premature to reach a conclusion on ITC benefit to be passed on based on assumptions and surmises. The Respondent contended that the provisions of Section 171 of the CGST Act, 2017 and the relevant rules could not be pressed into service as the project was yet to be completed.

7. The Report further stated that the Respondent's claim that in respect of any unsold units, corresponding ITC would have to be reversed once the Occupancy Certificate was obtained was correct. The Respondent has also claimed that a substantial portion (approx. 80%) of construction activities were outsourced to sub-contractors, and accordingly, the ITC was being availed by his sub-contractors and he was only procuring materials like steel, transformers, chillers and diesel generator units etc. He has also claimed that it would be prudent to declare the ITC benefit once the project was complete. The Respondent has further stated that he proposed to give an undertaking to each and every individual customer who had made booking that at the end of the project he would take steps to arrive at the ITC benefit to be passed on and would do so at the completion stage. The Respondent has also claimed that the assumption was that there was reduction in the construction cost on account of Central Excise Duty on which ITC was not available prior to

introduction of GST and credit of VAT was also unavailable due to composition scheme and the estimated cost of construction as on 30.06.2017 had been determined, thus requiring the Respondent to pass on the benefit to the consumers. The Respondent has also provided summary of benefit (confirmed and notional) to be passed on to the customers on account of ITC which has been furnished in the Table-'B' below and claimed that he had informed the customers about passing on of the ITC benefit vide letter/ email dated 19.09.2018:-

Table-'B'

Particulars	Factor	Amounts(Rs.)
Total Saleable area of the Project (sq. ft.)	A	8,71,189
Benefit on Works Order(WO) re-negotiated	B	2,15,47,792
Confirmed benefit per sq.ft.	(C)=(B)/(A)	25
Provisional Benefit on WO not executed	(D)	1,57,56,102
Provisional Benefit per sq.ft.	(E)=(D)/(A)	18
Trans-1 Benefit	(F)	2,74,234
Gross Benefit	(G)=(B+D+F)	3,75,78,128
Benefit per Sq. Ft.	(H)=(G)/(A)	43
Area Sold as on 30.06.2017(in sq.in)	(I)	2,92,366
Total Benefit to be passed on to the customers	(J)=(H)*(I)	1,26,11,003

8. The Report also stated that the Respondent had submitted the following documents:-

- (a) Copies of GSTR-1 returns for July, 2017 to June, 2018.
- (b) Copies of GSTR-3B returns for July, 2017 to June, 2018.
- (c) Copies of Tran-1 returns for transitional credit availed.
- (d) Copies of VAT & ST-3 returns for April, 2016 to June, 2017.
- (e) Copies of all demand letters and sale agreement/contract & construction agreement dated 30.11.2016 in the name of "Sheebeer Valiyakath Abdul Majeed" who is not an applicant in

the present proceedings as the applicant had initially requested to keep his name confidential.

- (f) Tax rates- pre-GST and post-GST.
- (g) Computation of GST benefit to be passed on.
- (h) Copy of Balance Sheet for FY 2016-17.
- (i) Copy of Electronic Credit Ledger for 01.07.2017 to 31.08.2018.
- (j) CENVAT/Input Tax Credit register for April, 2016 to June, 2018.
- (k) Details of taxable turnover and input tax credit for the project "East Crest".
- (l) List of home buyers in the project "East Crest" along with the details of land owners.

9. The DGAP in his Report has submitted that as per the payment schedule for the purchase of a flat measuring 1171 sq. ft. at the basic sale price of Rs. 5,153/- per sq. ft. the details of amount and taxes paid by the Applicant No. 1 to the Respondent were given as below in the Table-'C':-

Table-'C' (Amount in Rs.)

S. N o.	Payment Stages	Due Date	Basic	Other Charges	Service Tax	VAT	GST	Total
1	At the time of Booking	08.08.2016	2,94,906	-	5,094	3,396	-	3,03,396
2	EMD	07.09.2016	6,02,041	-	35,656	23,771	-	6,61,469
3	On or before 03.06.2017	02.06.2017	3,18,968	-	-	-	-	3,18,968
4	On or before 10.04.2018	10.04.2018	42,15,349	-	-	-	5,05,842	47,21,191
6	On Completion of Painting	15.05.2018	3,01,737	-	-	-	36,208	3,37,945
7	On or before Completion of Possession	Demand not raised till 30.06.2018	3,01,737	7,56,861	-	-	1,48,204	12,06,802
Total			60,34,740	7,56,861	40,750	27,167	6,90,254	75,49,771

10. The Report further noted that the Respondent had accepted that there had been profiteering post GST and he was committed that the accurate quantum of ITC would be finally determined and the benefit

passed on to the recipients at the time of giving possession. But the DGAP has submitted that the profiteering, if any, had to be established at a point of time in terms of Rule 129 (6) of the CGST Rules, 2017 and therefore, the ITC available to the Respondent and the taxable amount received by him from the Applicant No. 1 and other recipients till 30.06.2018 had to be taken into account for determining the profited amount.

11. With reference to the submission of the Respondent that in respect of any unsold units, corresponding ITC will have to be reversed once the completion certificate was obtained as ITC in respect of such units had been claimed in the relevant month/s when inward supplies were received, the DGAP admitted that reversal had to be done in view of para 5 of Schedule-III of the CGST Act, 2017 (Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services) which reads as "*Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building*". Further, Clause (b) of Paragraph 5 of Schedule II of the CGST Act, 2017 reads as "*(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier*". Thus, the ITC pertaining to units which are under construction but not sold was provisional which was to be reversed in terms of Section 17 (2) & Section 17 (3) of the CGST Act, 2017. Therefore, the Report has

stated that the ITC pertaining to the unsold units was outside the scope of the investigation and the Respondent was required to recalibrate the selling price of such units to be sold to prospective buyers by considering net benefit of additional ITC available to them post-GST.

12. The Respondent has also contended that substantial portion (approx. 80%) of the construction activities were outsourced to sub-contractors, and accordingly the ITC was being availed by his sub-contractors and not by the Respondent. In this regard the DGAP has contended that this argument was not acceptable because the entire amount was available as ITC to the Respondent. Moreover, the sub-contractors were also eligible for additional ITC which was not available to them earlier and on account of rationalization of tax rates, many of the inputs were also now available at the reduced prices.

13. The DGAP has also submitted that the Respondent had *suo-moto* accepted that he did not pass on the benefit of ITC to his customers but was willing to give an undertaking that at the end of the project, he would arrive at the ITC benefit to be passed on. The DGAP however has claimed that the profiteering if any, has to be established at a given point of time in terms of Rule 129(6) of the CGST Rules, 2017. Accordingly taking into consideration the benefit of ITC available in the pre GST period in comparison to the post GST period the Report has arrived at the ITC ratio based on the taxable turnover. From the data submitted by the Respondent and on verification from the invoices

issued during the pre-GST period (April, 2016 to June, 2017) and the post-GST period (July, 2017 to June, 2018), the details of the ITC and rebate of VAT (WCT) availed by the Respondent and the taxable turnover during the said period, the rate of ITC to the taxable turnover is detailed in the Table-D below:-

Table-'D'

(Amount in Rs.)

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	July, 2017 to March, 2018	April, 2018 to June, 2018	Total (Post-GST)
1	CENVAT of Service Tax Paid on Input Services (A)	3,94,59,299	99,83,586	4,94,42,886	-	-	-
2	Rebate of VAT(WCT) paid to registered contractors or sub-contractors (B)	2,26,78,577	20,74,609	2,47,53,186	-	-	-
3	Total CENVAT/Input Tax Credit Available (C)= (A+B)	6,21,37,876	1,20,58,195	7,41,96,072	-	-	-
4	Input Tax Credit of GST Availed (D)	-	-	-	5,30,34,550	1,67,40,897	6,97,75,447
5	Total Taxable Turnover (E)	80,34,82,159	70,90,281	81,05,72,440	3,16,24,193	7,37,72,558	10,53,96,751
6	Total Saleable Area of Flats in the project (in Sqaure Feet) (F)			8,71,189			8,71,189
7	Area Sold relevant to Taxable turnover as per Home buyers list (G)			2,91,768			59,408
8	Relevant CENVAT/Input Tax Credit (H)= [(C)*(G)/(F)] or [(D)*(G)/(F)]			2,48,48,844			47,58,118
9	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover [(I)=(H)/(E)]			3.06%			4.51%

14. The Report has further submitted that as could be seen from the Table-'D', the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 3.06% and during the post-GST period (July, 2017 to June, 2018), it was 4.51%, which confirmed that post-GST the Respondent had benefited from additional ITC to the tune of 1.45% [4.51% (-) 3.06%] of the taxable turnover. Accordingly, vide Annexure-24 of the DGAP's Report, the profiteered amount has been computed by comparing the applicable tax rate and the ITC available for the pre-

GST period when Service Tax @6% and VAT@4% was payable with the post-GST period when the effective GST rate was 12%. On the basis of the figures contained in Table-'D' above, the comparative figures of ITC availed during pre-GST period and post-GST period have been tabulated in the Table-'E' below:-

Table-'E'

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April,2016to June,2017	July,2017 to June, 2018
2	Output tax rate (%)	B	10.00%	12.00%
3	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover as per Table - D above (%)	C	3.06%	4.51%
4	Increase in tax rate post-GST (%)	D= 12% less 10%	-	2.00%
5	Increase in input tax credit availed post-GST (%)	E= 4.51% less 3.06%	-	1.45%
	Analysis of Increase in input tax credit:			
6	Base Price collected during July, 2017 to July, 2018	F		12,13,04,881
7	GST Collected @ 12% over Basic Price	G= F*12%		1,45,58,586
8	Total Demand collected	H=F+G		13,58,61,466
9	Recalibrated Basic Price	I= F*(1-E) or 98.55% of F		11,95,45,960
10	GST @12%	J= I*12%		1,43,45,515
11	Commensurate demand price	K= I+J		13,38,91,475
12	Excess Collection of Demand or Profiteering Amount	L= H - K		19,69,991
13	Area sold relevant to above profiteering (in sq. ft.)	M		59,408
14	Profiteering per sq. ft.	N=L/M		33.16/-

15. The Report further submits that the additional ITC of 1.45% of the taxable turnover should have resulted in commensurate reduction in the base price. Therefore, in terms of Section 171 of the CGST Act, 2017, the benefit of the additional ITC that had accrued to the Respondent, was required to be passed on to the recipients. Though the Respondent has not contested that any such benefit would eventually have to be passed on to the recipients at the time of giving possession of the flats,

it was a fact that this had not been done so far. Thus, the payments being received from the Applicant No. 1 and other recipients did not take into account the benefit available to the Respondent, which implied that he had retained the benefit accruing on account of the ITC. In other words, by not reducing the pre-GST base price by 1.45% on account of additional benefit of ITC and charging GST at the rate of 12% on the pre-GST base price, the Respondent had contravened the provisions of Section 171 of the CGST Act, 2017.

16. Based on the ITC available pre and post-GST and the details of the amount collected by the Respondent from the Applicant No. 1 and other home buyers during the period 01.07.2017 to 30.06.2018, the DGAP had arrived at an amount of Rs. 19,69,991/- the benefit of which has not been passed on by the Respondent to the recipients, which included 12% GST on the base profiteered amount of Rs.17,58,921/- which pertained to only 51 home buyers (59,408 Sq. ft. Saleable Area). The Report also provided details of the home buyers and unit no. wise break-up of this amount as per **Annex-24** of the DGAP Report and this amount is inclusive of Rs. 67,816/- (including 12% GST on the base amount of Rs. 60,550/-) which was the profiteered amount in respect of the Applicant No. 1, mentioned at serial no. 15 of the Annex-24 of the DGAP's Report.

17. The DGAP has further stated that though the Respondent had booked 263 apartments till 30.06.2018, 212 apartments were booked in the pre-GST period on payment of the booking amount but these buyers had not paid any consideration during the period from 01.07.2017 to

30.06.2018 (Post-GST-period under investigation). However payments had been received only for 51 apartments. Therefore, according to the Report if the ITC in respect of the 212 apartments was calculated on account of the 51 units for which payment had been received after GST, the ITC as a percentage of turnover would be distorted and erroneous and therefore the Report has taken into consideration only the ITC that was relevant to the 51 apartments to arrive at the profiteered amount.

18. Finally the DGAP has submitted that the Respondent had benefitted with additional ITC of 1.45% of the taxable turnover which was required to be passed on to the Applicant No. 1 and other recipients. Thus the provisions of Section 171 of the CGST Act, 2017 had been contravened. The Respondent has realized an additional amount to the tune of Rs. 67,816/- from the Applicant No. 1 which included both the profiteered amount @1.45% of the taxable amount (base price) and GST on the said profiteered amount @12% which needed to be refunded to the Applicant No. 1. Further, the Report has stated that the Respondent had also realized an additional amount of Rs. 19,02,175/- which included both the profiteered amount @1.45% of the taxable amount (base price) and GST on the said profiteered amount @12% from 50 other recipients who were not applicants in the present proceedings. As these recipients are identifiable as per the documents on record, this additional amount of Rs. 19,02,175/- was required to be refunded to all such eligible recipients.

19. The DGAP's Report also stated that the present investigation covered the period from 01.07.2017 to 30.06.2018 and for the period

post June, 2018, as the exact quantum of ITC would be available only in the future as the construction of the project was yet to be completed. The Report also states that the Respondent had computed benefit of Rs. 43/- per sq. ft. for the entire post-GST life of the project (i.e. 01.07.2017 till completion of project), whereas his investigation had estimated the profiteered amount as Rs. 33.16 per sq. ft. in respect of 51 recipients covering the period from 01.07.2017 to 30.06.2018 as had been mentioned in the Table-'E' above and in respect of the remaining 212 home buyers the profiteered amount was required to be calculated only when the Respondent received payments from such home buyers in future during the post-GST period.

20. The Authority in its sitting held on 13.11.2018, after considering the DGAP's Report dated 06.11.2018, decided to accord hearing to the Respondent. Accordingly notice for hearing was issued to the Respondent and the Applicants for 29.11.2018, which was adjourned to 06.12.2018 on the request of the Respondent. The hearing on 06.12.2018 was attended by Sh. P. K. Mishra, Vice-President and Sh. S. Narayana Rangaiah, Senior General Manager (Finance) on behalf of the Respondent, while Ms. Gayatri, Deputy Commissioner, Sh. Rana Ashok Rajneesh, Assistant Commissioner appeared on behalf of the DGAP. The Applicant No. 1 Sh. Sahil Mehta did not attend the hearing. Subsequently further hearings were held on 03.01.2019 and 31.01.2019.

21. The Respondent vide his written submissions dated 05.12.2018 had maintained that the contents of the DGAP's Report were legally



untenable and premature. He has also stated that the DGAP himself had admitted that the ITC availed was subject to restrictions/disallowance/reversals and since the project was under execution the final figures could not be computed. For the above reasons the DGAP should not have proceeded with computing of profiteering. He has further submitted that there was no attempt to make profit by not passing on the benefit of ITC but rather suo-moto communication had been sent to all the eligible customers on 19.09.2018 stating that "As an esteemed customer we hereby wish to inform you that sum of Rs. 25/- per sq. ft. on the super built areas would be passed on to you on account of GST benefit. The final figures of GST benefit would be known only after completion of project as there are several factors to be considered, including the GST benefits passed on to us by our vendors. However, we are passing on this benefit on a provisional basis and in case the final figures arrived at, show more or less benefit to be passed on, then suitable steps would be taken to pass on the differential benefit and will be dealt accordingly".

22. The Respondent has also submitted that as per Annex-24 of the DGAP's Report he had issued credit notes to all his customers where payments were received after 01.07.2017. He has also submitted the details of 51 customers showing profiteered amount to be passed on as Rs. 19,69,991/- and has undertaken to pass on the additional benefit arising on account of ITC in the subsequent payments to be received from the home buyers in respect of unsold flats. He has also submitted details of letters issued to the home buyers (recipients) giving the



details of the amount credited to their individual ledgers. On 01.01.2019 he has further submitted details of other ongoing projects along with details of payments made for 'East Crest' Project to all the 216 buyers providing details of installment paid prior to GST, post GST and balance installments to be paid. On 31.01.2019 the Respondent has filed further written submissions stating that with regard to the residential flats the sale price of the flat was determined based on the different parameters like surrounding developments, standard of life of that area, facilities such as hospitals, schools, public transport, accessibility, and pricing by competitors etc. and as a business practice in real estate industry the developer always aimed to achieve an overall betterment in prices of flats which were sold over a period of 4 to 5 years. He has further stated that the cost of constructing a flat or putting up the project was wholly irrelevant in the pricing mechanism, since cost had no role to play in pricing mechanism, hence, the provisions relating to profiteering on availability of benefit of ITC should not be considered. The Respondent has also submitted that major portion of the works was executed by him through the registered sub-contractors and the benefit of ITC on purchase of goods/services which were involved in the construction activities would be availed by these sub-contractors only. The following data as shown in Table F was submitted to explain the details of the project cost:-



Table-F

Particulars	Rs. In crores	Pre-GST	Post-GST
Overall project cost	214.14	120.04	94.09
Composition			
Sub-contractors	127.79	76.59	51.20
Direct purchase of materials	48.36	31.36	17.00
Services	20.69	3.74	16.95
Professional & consultancy	6.55	3.68	2.87
Statutory approvals	7.52	2.86	4.66
Administration cost	3.22	1.80	1.42
Total	214.14	120.04	94.09

23. Further the Respondent submitted that he was registered under the composition scheme under the Karnataka VAT Act which allowed him deduction of payments made to the sub-contractors from the total turnover and no ITC was allowed under the Karnataka VAT Act for a composition dealer, while Service Tax was paid on 40% of the construction value with the benefit of ITC. It is claimed that with introduction of GST there was no additional benefit of VAT on intra-state purchases as the entire project was sub-contracted and ITC was availed on the taxes paid on services, while CST benefit on inter-state purchases @2% had accrued to him. The Respondent has also submitted that 56% work of the project was completed prior to 30.06.2017 and procurement of all the goods was also completed before the implementation of GST. Therefore cost on services which was incurred post implementation of GST had resulted in additional



benefit to him as such transactions were liable to service tax and eligible for ITC even before implementation of GST.

24. The Respondent has further submitted that the ruling given by the Authority in the case of Pyramid Infratech Private Limited vide case no. 7/2018 decided on 18.09.2018 was not applicable to the real estate business. He has also emphasised that the Hon'ble High Court of Delhi has given an interim stay over the methodology adopted to compute the alleged profiteering in the above case. The Respondent has also submitted that there was no effective increase in the ITC that needed to be passed on and the definition of profiteering as well as methodology for its computation needed to be relooked and submitted that interpretation of Section 171 of the CGST Act, 2017 should also consider the increase in the raw material costs. The Respondent has also distinguished his case from the case of Pyramid Infratech Pvt. Ltd. supra by stating that the total turnover, taxable turnover and corresponding output tax was lower and not comparable to the input credits on year on year basis. He has also claimed that the sale of residential flats after obtaining the occupancy certificate will not be liable for GST which would result in reversal of ITC and since the project spanned over 3 to 4 years, the comparison of the ITC with output tax should be for the entire project covering the entire life span.

25. The Respondent has also made written submissions dated 05.12.2018 for not imposing penalty on the following grounds:-

i) The Respondent has claimed that Section 29 of the CGST Act, 2017 could not be invoked as none of the ingredients in the said section were

fulfilled warranting cancellation of his registration which was a drastic measure that affected his right to carry on business. He has also submitted that considering the fact that he had voluntarily informed the customers through circular about passing on the ITC benefit after the project was completed and since the project was still in progress and final figures were not available as had been admitted by the DGAP and further considering that he had cooperated with the anti-profiteering investigations there should not be any levy of penalty. If the registration was cancelled the Respondent would not be in a position to discharge his tax dues and comply with other procedural formalities, which would be detrimental to the interest of the revenue as well.

ii) He has also submitted that Section 122 of the CGST Act, 2017 was also not to be invoked as there was no proof adduced by the DGAP regarding violations contemplated in section 122 of the above Act. None of the ingredients stated in the above section had been violated warranting penal action thereof and the specific violation of section 122 had not been mentioned in the notice and the charge was vague and unclear. The said section did not apply to the alleged anti-profiteering contraventions.

iii) It is also submitted that Section 123 of the CGST Act, 2017 could not be invoked as this section applied only when a person failed to provide information in the return as per Section 150 of the CGST Act, 2017. There was no such allegation made out against the Respondent in the Report or notice and hence the said provision would not apply to the present case.



iv) it is also claimed that Section 124 of the CGST Act, 2017 was not attracted as this section applied when there was failure to furnish statistics in terms of section 151 of the CGST Act, 2017 and since there was no such allegation made out against the Respondent in the Report or notice hence the said provision would not apply to the present case.

v) He has also claimed that in the absence of mens rea or guilty mind Section 125 of the CGST Act, 2017 could not be invoked as this provision would not apply in the cases involving alleged profiteering. It was further submitted that even assuming without conceding that this provision was applicable there was a discretion to wave penalty, which was indicated by the words 'extend to twenty-five thousand rupees' in the light of the facts and circumstances of the case and the Respondent would implore the Authority to refrain from invoking these provisions.

vi) He has also stated that Section 126 of the CGST Act, 2017 laid down general disciplines related to penalty and that it should not be imposed in case of minor breaches as has been defined in the said provision.

vii) It is also stated that Section 127 of the CGST Act, 2017, applied only when the proper officer was of the view that a person was liable to penalty and the same was not covered by any proceedings under Section 62, 63, 64, 73, 74, 129 or 130 of the CGST Act, 2017 and the present case would not fall under any of those provisions and hence this penalty was inapplicable, moreover there was no mens rea or guilty mind warranting imposition of penalty under this provision.



viii) It is also claimed that Rule 21 of the CGST Rules, 2017 was ultra vires the Act as it provided for a situation different from Section 29 of the CGST Act, 2017 and hence could not be enforced. He has relied on the following decisions to support the above claim.

a. Commissioner Central Excise V. Ashok Arc, 2005 (179) ELT 513 (SC).

b. Laghu Udhog Bharati V. Union of India, 1999 (112) ELT 365 (SC).

c. ITW Signode India Ltd. V. Commissioner of Central Excise, 2003 (158) ELT 403 (SC).

d. Union of India V. Intercontinental Consultants and Technocrats Pvt. Ltd. 2018 (10) G.S.T.L 401 (SC).

e. Life Insurance Corporation V. Escorts Limited & Others, 1986 (8) ECC 189 (SC).

ix) The Respondent has also stated that Rule 133 of the CGST Rules, 2017 was ultra vires of the Act and hence could not be enforced and there could not be imposition of penalty or cancellation of registration in the facts and circumstances of the present case.

26. The DGAP in his supplementary Report dated 04.01.2019 has stated that he had no additional submissions to be made on the pleadings of the Respondent filed on 03.01.2019 and further the DGAP in his Report dated 27.03.2019 has stated that he had no comments on imposition of penalty and on the issue of applicability of GST on the additional charges in view of Service Tax. It was also stated that it was outside the statutory mandate to provide any comments on the above issue.



27. We have carefully considered the Reports submitted by the DGAP, the Respondent's submissions and all other material placed on record and it is revealed that the Respondent is engaged in the business of construction and selling of residential houses, having his corporate office at Bangalore which is duly registered under the GST. His only plea is that the construction service projects are to be treated differently as the prices of the flats were market driven and each and every project was spread over a period of 4 to 5 years. He has also claimed that he was registered under the composition scheme under the Karnataka VAT Act and under this scheme he was not eligible for any ITC but as far as Service Tax was concerned he had paid it on 40% of the construction value and had claimed the eligible credits. With the introduction of GST the only benefit he had got was CST @2% and the Central Excise Duty paid on the purchases from registered dealers. Thus overall there has been ITC benefit with the introduction of GST to him has not been denied. With regard to the present project his claim is that 50% of the work was completed prior to 01.07.2017 and only few activities were pending during the GST era which entitled him to ITC. As can be seen from the record it is noticed that the Respondent had constructed 667 flats of which 447 belong to him and rest 220 belong to the land owner. Out of the 447 flats 260 were sold by him and 42 by the land owner as on 30.01.2019. He has also admitted that on 19.09.2018 a letter was issued by him to the effect that Rs. 25 per sq. ft. on the super built area would be passed on to the customers on account of ITC benefit. He had also undertaken to pass on the additional benefit arising



out of the net ITC benefit to the existing home buyers and for unsold flats if sold before the issuance of occupancy certificate.

28. Section 171 of the CGST Act, 2017 read with the relevant rules mandates this Authority to examine as to whether any reduction in rate of tax on any supply of goods or services or the benefit of Input tax credit had been passed on to the recipient by way of commensurate reduction in prices or not. As seen from the Table-D above it is found that the ITC benefit to the Respondent had been to the tune of 3.06% in the pre GST era when compared to 4.51% benefit in the post GST era resulting in the net benefit of ITC to the tune of 1.45% of the taxable turnover, which needed to be passed on to all the home buyers who had booked flats prior to 01.07.2017 but made payments after 01.07.2017. The benefit of ITC will also have to be passed on to all the buyers who have booked flats post GST and made payments before issuance of the occupancy certificate to the Respondent. Accordingly as seen from Table-E above the benefit to be extended to 51 home buyers for the period from July 2017 to June 2018 is determined as Rs. 19,69,991/- which is also part of the DGAP's Report as Annex-24. The Respondent has admitted that this benefit had been passed on and has produced the credit notes issued to all the customers for an amount of Rs. 19,69,991/- which has been filed as Annex-A to his letter dated 05.12.2018 which is taken on record.

29. The Respondent has claimed that the order passed by this Authority in the case of Pyramid Infratech Pvt. Ltd. had been stayed by the Hon'ble Delhi High Court and had requested to keep the proceedings

pending till the final order was passed. In the case of Pyramid Infratech Pvt. Ltd. the Hon'ble High Court had directed the Respondent to deposit 5,11,60,450/- without giving any findings on merits. So the question of keeping the case pending does not arise. Moreover in the present case admittedly net benefit of ITC had accrued and partial amount has already been passed on to the home buyers. The records and the DGAP's Reports and various submissions made by the Respondent categorically show that there had been a net benefit to the extent of 1.45% which is purely based on the data submitted by the Respondent himself.

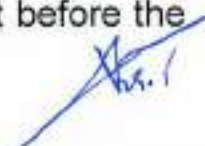
30. In view of the above facts the amount of profiteering in terms of Rule 133 (1) of the CGST Rules, 2017 is determined as Rs. 19,69,991/- including the GST @12% on the base profiteered amount of Rs. 17,58,921/- as per details furnished by the DGAP and admitted by the Respondent. He has also profiteered an amount of Rs. 67,816/- from the Applicant No. 1 which includes both the profiteered amount @ 1.45% and GST on the said profiteered amount @ 12%. Accordingly under Rule 133 (3) (a) of the CGST Rules, 2017 the Respondent shall reduce the price to be realised from the buyers of the flats commensurate to the benefit of ITC availed by him as has been discussed above. The Respondent has already refunded an amount of Rs. 67,816/- (including 12% GST) to the Applicant No. 1 and Rs. 19,02,175/- to all other 50 buyers thus total amount of Rs. 19,69,991/- has been paid to all the 51 home buyers on 30.06.2018. The Authority



further directs the Respondent to pay interest @18% to all those 51 home buyers to whom the benefit of net ITC has already been paid.

31. Further during the hearing it was submitted that the Respondent had sold 209 flats and the land owner had sold 42 flats as on 30.01.2019 before issuance of the occupancy certificate. Accordingly the net benefit of ITC had to be passed on to these home buyers also. The Respondent had in fact given an undertaking that the net benefit of ITC to all the home buyers will be passed on by adjustment in the customer's credit ledgers and admitted that the net benefit of ITC will also be passed on to the land owner in order to enable the land owner to pass on the net ITC benefit to his home buyers. In his written submissions dated 31.01.2019 he has also intimated that the ITC benefit of Rs. 53/- per sq. ft. would be extended to the remaining home buyers, of which Rs. 25/- per sq. ft. had already been passed on which amounts to Rs. 72,94,200/-.

32. The DGAP had submitted Report for the project 'East Crest' which consists of 667 units out of which 467 units belong to the Respondent and the investigation was for the period 01.07.2017 to 30.06.2018. During this period only 51 flats were sold and the profiteered amount was limited to these 51 home buyers and accordingly total profiteered amount was arrived at Rs. 19,69,991/- which has been discussed and confirmed by the Authority. The Respondent has admitted that 209 flats were sold by him and 42 flats were sold by the land owner after June 2018 and that the ITC benefit as estimated by him could be to the extent of Rs. 53/- per sq. ft. Since these facts were not before the



DGAP and during the hearings documents have been produced admitting net benefit of ITC for the remaining home buyers of the project 'East Crest', the Authority under Rule 133 (4) of the CGST Rules, 2017 directs the DGAP to investigate the benefit of ITC to be passed on for the balance flats sold by the Respondent and the 42 flats sold by the land owner and submit his Report accordingly within a period of 3 months from the date of receipt of this order.

33. It is evident from the above facts that the Respondent has denied the benefit of the ITC to the buyer of the flats being constructed by him in contravention of the provisions of Section 171 (1) of the CGST Act, 2017, where he had not only collected more price than the entitled amount but also collected more GST on the increased amount. The Respondent though aware of the fact that the net benefit of ITC had to be passed on to his buyers had not passed on the entire benefit till the completion of the investigation by the DGAP. The above act of the Respondent appears to be deliberate and conscious violation of the provisions of the CGST Act, 2017, thus he has committed an offence under Section 122 (1) of the CGST Act, 2017 and therefore he is liable for imposition of penalty. The Respondent has also submitted that the Show Cause Notice issued to him on 29.08.2018 has merely mentioned the provisions of Section 122-127 of the CGST Act, 2017 and Rule 133 of the CGST Rules, 2017 without specifying the exact allegations against him and the above Sections were not attracted in his case except for Section 125 which was general in nature. Perusal of the notice dated 29.08.2018 issued to the Respondent shows that



he has been intimated that it was proposed to impose penalty under Section 122-127 of the CGST Act, 2017 read with Rule 133 of the CGST Rules, 2017 and also to cancel his registration if the allegation of profiteering was proved against him, however, no specific instances of violation of the above Sections have been mentioned in the above Notice. Therefore, the proposed imposition of penalty under the above Sections and cancellation of his registration is not sustainable unless specific allegations how he had violated the provisions of the above Sections are levelled against him. Therefore, the above notice is ordered to be withdrawn to the extent that it proposes to impose penalty on him as per the provisions of the above Sections and the Rule. Accordingly a fresh notice be issued to him as to why the penalty prescribed under Section 122 (1) of the CGST Act, 2017 read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him as he had issued incorrect tax invoices to the flat buyers by charging more amount than what he could have charged and further charged additional GST on this amount. The Respondent would have sufficient opportunity to state his defence on the above charge and he can also raise his other objections during the course of the hearing on the issue of imposition of penalty.

34. The Authority as per Rule 136 of the CGST Rules, 2017 directs the Commissioners of CGST/SGST of Karnataka State to monitor this order under the supervision of the DGAP by ensuring that the profiteered amount as ordered by the Authority is passed on to all the home buyers by the Respondent.



35. A copy each of this order be supplied to the Applicants, the Respondent and Commissioners CGST/SGST of Karnataka state for necessary action. File be consigned after completion.


Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(R. Bhagyadevi)
Technical Member

Sd/-
(Amand Shah)
Technical Member

Certified copy


(A.K. Goel)
Secretary, NAA



Copy to:-

1. Sh. Sahil Mehta, Flat No. 0203, Shruthi Residency, 1C, Main 5th B Cross, Kasturi Nagar, Bangalore-560043.
2. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
3. M/s Salarpuria Real Estate Pvt. Ltd., 4th floor, Salarpuria Windsor, No. 3 Ulsoor Road, Bangalore- 560042, Karnataka.
4. Commissioner of Commercial Taxes, Vanijya Therige Karyalaya, 1st Main Road, Gandhinagar, Bangalore- 560 009
5. Principal Chief Commissioner Central Excise and Central Tax (GST), Bengaluru Zone, C.R Building, Queens Road, Bengaluru-560001
6. NAA Website.
7. Guard File.