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

Case No.	51/2019
Date of Institution	24.04.2019
Date of Order	21.10.2019

In the matter of:

1. Sh. Vasantbhai Bhikabhai Patel, 202, Shree Shakti Tower, near Effiel Tower, L H Road, Surat-395006.
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 Shree Infra, River View Heights, Peddar Road, Opp. Valkeshwar Society, Mata Varachha, Surat-395105.

Respondent

Quorum:-

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

Present:-

1. None for the Applicants.
2. None for the Respondent.

ORDER

1. The brief facts of the case are that under Rule 128 of the Central Goods and Services Tax (CGST) Rules, 2017, an application was filed by the Applicant No. 1 against the Respondent before the Gujarat State Screening Committee on Anti-profiteering. The above Applicant had alleged that the Respondent had not passed on the benefit of input tax credit by way of commensurate reduction in price in respect of purchase of two flats bearing Nos. H/1/702 and H/1/802 in the Respondent's project "River View Heights".

2. The Gujarat State Screening Committee forwarded the said application to the Standing Committee on Anti-profiteering for further action which was examined by the Standing Committee on

Anti-Profiteering, in its meeting held on 08.10.2018, whereby it was decided to forward the same to the DGAP, to conduct a detailed investigation in the matter.

3. The DGAP after completing the investigation has submitted his report under Rule 129 (6) of CGST Rules, 2017 on 24.04.2019 pertaining to the period w.e.f. 01.07.2017 to 31.10.2018.

4. The DGAP has stated that a notice under Rule 129 of the CGST Rules, 2017 was issued on 02.11.2018, 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 supporting documents. The Respondent was also given an opportunity to inspect the non-confidential evidences/information furnished by the above Applicant which was not availed by him.

5. The DGAP in his Report has stated that the Respondent submitted that the flats booked by the above Applicant were still under construction and Occupancy Certificate of the said project was yet to be received by him from the competent authority and as the project was not completed, the Respondent was not able to exactly quantify the total amount of benefit of input tax credit which was to be passed on to the above Applicant, and thus, submission of the above Applicant that the project was completed in March 2018 was factually wrong. In support of this fact, the Respondent also submitted RERA registration certificate. The Respondent has also stated to the DGAP that the

above Applicant had paid the total consideration for both the units post-GST and not in the pre-GST era.

6. The DGAP on completion of his investigation has stated that the Respondent has submitted copies of the two sale agreements dated 15.03.2018, for the sale of flat nos. H/1/702 and H/1/802, to the above Applicant in his project "River View Heights", each measuring 228.09 square meters, at the basic sale prices of Rs. 25713/- per square meter. The details of amounts and taxes paid by the above Applicant to the Respondent are furnished in the table given below:-

Table(Amount in Rs.)

S. No.	Payment Stages	Demand Date	BSP	Service Tax	GST	Total
1	Payment for Flat No. H/1/702	16.03.2018	58,65,000	-	7,03,800	65,68,800
2.	Payment for Flat No. H/1/802	16.03.2018	58,65,000	-	7,03,800	65,68,800

The DGAP has also stated in his report that the Respondent contended that all the units were not sold till the time of completion of the investigation and also it was not known if all the units would be sold before receiving the occupancy certificate from the competent authority.

7. The DGAP in his Report has also mentioned that in respect of unsold unit, input tax credit proportionate to the unsold units has to be reversed once the occupancy certificate was received, as the input tax credit in respect of such unsold units would have been claimed in the relevant months when inward supplies were received by the Respondent which was supported by Para 5 of Schedule-III of the Central Goods and Services Tax 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 Central Goods and Services Tax 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 DGAP has claimed that the input tax credit pertaining to units which were under construction but not sold was provisional which might be required to be reversed by the Respondent if such units remained unsold at the time of issue of occupancy certificate in terms of Section 17 (2) & Section 17 (3) of the Central Goods and Services Tax Act, 2017 which read as under:

Section 17 (2) "Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies".

Section 17 (3) "The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building".

Therefore, the DGAP has mentioned that the input tax credit pertaining to unsold units might not fall within the ambit of his 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 input tax credit available to them post-GST.

8. The DGAP has also mentioned that prior to 01.07.2017, i.e., in the pre-GST era, the Respondent was eligible to avail CENVAT credit of Service Tax paid on input services only (no credit was available in respect of Central Excise Duty paid on inputs and VAT paid on inputs). However, post-GST, the Respondent could avail input tax credit of GST paid on all inputs and input services and from the data submitted by the Respondent, duly verified from their GSTR-1 and GSTR-3B returns, the details of the input tax credit availed by the Respondent, and his turnover for the project "River View Heights" and the ratio of input tax credit to the turnover during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to October, 2018) periods, were as under:-

Table (Amount in Rs.)

Sr. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	July, 2017 to March, 2018	April, 2018 to October, 2018	Total (Post-GST)
1	CENVAT credit of Service Tax Paid on Input Services (A)	83,37,788	1,54,111	84,91,899			
2	Credit ofVAT on Inputs (B)						
3	Total CENVAT/VAT Credit Available (C)= (A+B)	83,37,788	1,54,111	84,91,899			
4	Input Tax Credit of GST (D)				64,37,792	48,96,364	1,13,34,156
5	Total Turnover (E)	4,77,000	1,50,51,000	1,55,28,000	3,14,04,800	3,66,65,200	6,80,70,000
6	Total Saleable Area of Flats in the project (in Square Feet) (F)			29,177			29,177
7	Area Sold relevant to Turnover as per Home buyers list (G)			1,266			4,639.89
8	Relevant CENVAT/Input Tax Credit (H)= [(C) or D*(G)/(F)]			3,68,466			18,02,418
9	Ratio of CENVAT/ Input Tax Credit to Turnover [(I)=(H)/(E)]*100			2.37%			2.65%

9. The DGAP has concluded in his report that the input tax credit as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 2.37% and during the post-GST period (July, 2017 to October, 2018), was 2.65% which confirmed that post-GST, the Respondent has benefited from additional input tax credit to the tune of 0.28% (2.65%-2.37%) of the total turnover. Further, the DGAP has stated that the profiteering has been examined by comparing the applicable tax and input tax credit available for the pre-GST period (April,2016 to June, 2017) when Service Tax @4.5% and VAT@1% was payable (total tax rate of 5.5%) with the post-GST period (July, 2017 to October, 2018) when the effective GST rate was 12% (GST @18% along with 1/3rd abatement on value) on construction service, which was fixed vide Notification No.11/2017-Central Tax (Rate) dated 28.06.2017. On the basis of this the DGAP has summarized the comparative figures of the applicable tax rate and ratio of input tax credit to the turnover during the pre-GST period and the post-GST period as well as has recalibrated the basic price and the excess realization (profiteering) during the post-GST period, which are tabulated in the table below:-

Table (Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST
	Period	A	April, 2016 to June, 2017	July, 2017 to October, 2018
1	Tax Rate	B	5.5%	12%
2	Ratio of CENVAT credit/ Input Tax Credit to Turnover as per Table B above (%)	C	2.37%	2.65%
3	Increase in input tax credit availed post-GST (%)	D= 2.65% less 2.37%	-	0.28%
	Analysis of Increase in input tax credit:			
4	Basic Price collected during July, 2017 to October,	E		6,80,70,000

	2018			
5	GST @ 12% on Basic Price	F= E*12%		81,68,400
6	Total Demand collected/raised	G=E+F		7,62,38,400
7	Recalibrated Basic Price	H= E*(1-D) or 99.72% of H		6,78,79,404
8	GST @12% on recalibrated Basic Price	I= H*12%		81,45,528
9	Commensurate Demand	J= H+I		7,60,24,932
10	Excess Realization or Profiteering Amount	K= G - J		2,13,468

10. The DGAP has further concluded that the amount of benefit of input tax credit not passed on to the recipients or in other words, the profiteered amount came to Rs. 2,13,468/- which included 12% GST on the base profiteering amount of Rs. 1,90,596/-, and the computation of profiteering was in respect of 26 home buyers from whom payments had been received by the Respondent during the post-GST period from 01.07.2017 to 31.10.2018. The DGAP has also observed that construction service has been supplied by the Respondent in the State of Gujarat only.

11. After perusal of the DGAP's report, the Authority in its sitting held on 25.04.2019 decided to hear the Applicants and the Respondent on 09.05.2019 and accordingly notice was issued to them. But none appeared on behalf of the Applicant No.1 as well as the Respondent. But, in his mail dated 08.05.2019, the Respondent stated that he did not require any personal hearings and agreed with the profiteered amount as calculated by the DGAP in his report. However, during the course of the hearing of the case, the Respondent was called to furnish some additional documents vide Order dated 13.08.2019, which were received vide his submissions dated 11.09.2019.

12. In his submissions dated 11.09.2019; the Respondent submitted the following:-

a) The year wise statement of ITC/CENVAT Credit availed and turnover as per the statutory returns for the period from 01.04.2016 to 31.12.2018.

b) RERA Registration Certificate.

c) List of payments received from each of the buyers and ITC benefits passed on, if any.

d) The copy of balance sheet for the year 2016-17 and 2017-18.

e) ITC Ledger for the period 01.04.2016 to 31.10.2018.

f) Details of total number of units in the project with total area of each unit.

g) Copy of the Land Agreement for the land purchased by the firm.

13. We have carefully considered the Report of the DGAP, the submissions of the Respondent and all the documents placed on record. From the perusal of the DGAP's Report it is revealed that the ratio of ITC to the taxable turnover during the pre-GST period was to the extent of 2.37% as compared to post-GST period of 2.65% thus, there was net benefit of 0.28% of ITC to the Respondent. Based on this net benefit and the amounts collected from the home buyers during the post GST period, an amount of Rs. 2,13,468/- has been computed as the profiteered amount as per Annexure-13 of the DGAP report. The Respondent has raised no objection against the

computation of the above amount made by the DGAP vide Annexure-13 and hence it can be relied upon.

14. The Respondent has also not denied the fact that there has been net benefit of ITC during the post GST period and has vide submissions dated 04.05.2019, suo-moto decided to pass on the benefit as computed by the DGAP in his Report dated 24.04.2019, which is Rs. 2,13,468/- within due period as was mentioned in the Report.

15. Accordingly, an amount of Rs. 2,13,468/- computed by applying the additional benefit @0.28% is determined as the profiteered amount including the GST as per the provisions of Rule 133 (1) of the above Rules. The Applicant No. 1 shall be entitled to the ITC benefit of Rs. 36,786/- including the GST and rest of the house buyers would be eligible to get ITC benefit of Rs. 1,76,682/- including the GST along with the interest to be calculated @18% from the date of realisation of the above amount till it is paid within a period of 3 months from the date of passing of this order, failure of which it shall be recovered by the concerned Commissioner of SGST/CGST with interest and paid to the eligible buyers. The Respondent shall not adjust the amount of discount or the SGST & CGST credit offered by him out of their own profit margins on account of the reduction in the cost or due to slow down in the market against the ITC benefit to be paid to the house buyers. The DGAP shall accordingly, re-compute the amount to be passed on to all the eligible house buyers and convey the same to the

Respondents and the Commissioner SGST and CGST as well as this Authority.

16. In view of the above facts this Authority under Rule 133 (3) (a) of the CGST Rules, 2017orders that the Respondent shall reduce the prices to be realized from the buyers of the flats commensurate with the benefit of ITC received by them as has been detailed above. Since the present investigation is only up to 31.10.2018 any benefit of ITC which accrues subsequently shall also be passed on to the buyers by the Respondents. In case this benefit is not passed on the above Applicant or any other buyer, he shall be at liberty to approach the State Screening Committee Gujarat for initiating fresh proceedings under Section 171 of the above Act against the Respondent. The concerned CGST or SGST Commissioner shall take necessary action to ensure that the benefit of additional ITC is passed on to the eligible house buyers in future.

17. It is also evident from the above narration of facts that the Respondent has denied benefit of ITC to the buyers of the flats being constructed by him in his "River View Heights Project" in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and 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, a Show Cause Notice be issued to him directing 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 him.

18. On perusal of the DGAP Report dated 24.04.2019 and the annexures attached with it, it has been observed that the RERA Registration Certificate of the Project provided by the Respondent to the DGAP as well as to this Authority mentions "River View Heights (Phase-II)", from which it can be inferred that the investigation has been only restricted to Phase –II of the project ignoring the other phases. We have also observed that the documents related to the total area of the project provided by the Respondent to the DGAP do not match with the Gujarat RERA website www.gujrera.gujarat.gov.in. Keeping in view the facts that the subject investigation covers only Phase II of the project as per the nomenclature of the project given by the Respondent himself and that the Respondent has himself admitted that he was liable to pass on the benefit of Additional ITC as per provisions of Section 171 of the CGST Act, 2017, therefore, there are sufficient reasons to believe that there might be some phases of the whole project "River View Heights", which have not been investigated. Accordingly, the DGAP is directed to investigate the issue of passing on the benefit of additional ITC in respect of the whole project and submit his Report in terms of Rule 133 (5) of the CGST Rules, 2017 which reads as under:-

"(5)(a) Notwithstanding anything contained in sub-rule (4), where upon receipt of the report of the Director General of Anti-profiteering referred to in sub-rule (6) of rule 129, the Authority has reasons to believe that there has been contravention of the provisions of section 171 in respect of goods or services or both other than those covered in the said report, it may, for reasons to be recorded in writing, within the time limit specified in sub-rule (1), direct the Director General of Anti-profiteering to cause investigation or inquiry with regard to such other goods or services or both, in accordance with the provisions of the Act and these rules.

(b) The investigation or enquiry under clause (a) shall be deemed to be a new investigation or enquiry and all the provisions of rule 129 shall mutatis mutandis apply to such investigation or enquiry."

19. The Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Gujarat to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by the Authority is passed on to all the eligible buyers. A report in compliance of this order shall be submitted to this Authority by the Commissioners CGST /SGST within a period of 4 months through the DGAP from the date of receipt of this order.

20. A copy each of this order be supplied to both the Applicants, the Respondents, Commissioners CGST/SGST as well as the Principal Secretary (Town & Planning), Government of Gujarat 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

21.3.19

A.K. Goel

(Secretary, NAA)

F. No. 22011/NAA/36/shreeinfra/2019/5868-5874 Date: 21.10.2019

Copy To:-

1. M/s Shree Infra, River View Heights, Peddar Road, Opp Valkeshwar Society, Mata Varachha, Surat-395105.
2. Sh. Vasantbhai Bhikabhai Patel, 202, Shree Shakti Tower, near Effiel Tower, L H Road, Surat-395006.
3. 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.
4. Commissioner of Commercial Taxes, Gujarat, C-5, Rajya Kar Bhavan, Near Times of India, Ashram Road, Ahmedabad-380009.
5. Chief Commissioner, Central GST, Vadodara Zone, 2nd Floor, GST Bhavan, Race Course Circle, Vadodara,390007(Gujarat).
6. Office of the Chief Town Planer, Opp. St. Xaviers School, Road no. 3, Sector-10/A, Gandhinagar-382010
7. Guard File/Website of NAA.