

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

Case No.	69/2019
Date of Institution	11.06.2019
Date of Order	10.12.2019

In the matter of:

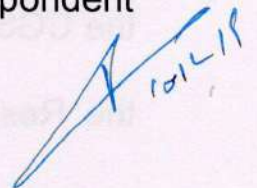
1. Sh. Santha Sivaram, A-10, Soundarya Apartments, 49 Mambalam High Road, T-Nagar, Chennai-600017.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Virgo Properties Pvt. Ltd., Old No.-3, New No.-5,
Thirumurthy Street, T - Nagar, Chennai, Tamil Nadu-600017.

Respondent


10.12.19

Quorum:-

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

Present:-

1. None for the Applicant No. 1.
2. Sh. Gayatri, Deputy Commissioner and Shri R. A. Rajneesh, Asst. Commissioner for the Applicant No. 2.
3. Sh. Prasanna Krishnan, CA & Sh. I.V. Krishna, CA, for the Respondent.

ORDER

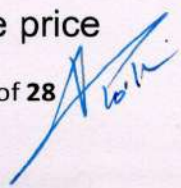
1. The present Report dated 15.02.2019 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that vide his application dated 05.04.2018 filed before the Tamil Nadu State Screening Committee on Anti-profiteering under Rule 128 (2) of the CGST Rules, 2017, the Applicant No. 1 had alleged profiteering by the Respondent in respect of purchase of Flat in the Respondent's project 'Bounty Acres', Unit No 3-406, Block-3, Bounty Acres, Kovilambakkam, Chennai, Tamil Nadu 600091. The above Applicant

had also alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) availed by him by way of commensurate reduction in the price of the above flat. The Tamil Nadu State Screening Committee on Anti-profiteering had examined the said application and upon being satisfied that the Respondent had contravened the provisions of Section 171 of the Central Goods and Services Tax Act, 2017, forwarded the same with its recommendation to the Standing Committee on Anti-profiteering on 29.06.2018 for further action, in terms of Rule 128 of the Central Goods and Services Tax Rules, 2017. The aforesaid reference was considered by the Standing Committee on Anti-profiteering, in its meeting held on 07th & 08th August 2018, wherein it was decided to forward the same to the DGAP to conduct detailed investigation as per the provisions of Rule 129 (1) of the CGST Rules, 2017.

2. The Applicant had furnished the following documents along with his application:-

- a) Duly filled in Form APAF-1.
- b) Copies of Payment Schedule of both pre-GST & post-GST periods.
- c) Copy of the Demand letters.
- d) Copy of identity proof (Aadhar Card).

3. On receipt of the recommendation from the Standing Committee on Anti-profiteering, the DGAP had issued Notice dated 11.09.2018 under Rule 129 (3) of the above Rules, asking the Respondent to intimate 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 the price



of the flat and in case it was so, to suo moto compute the quantum of the same and mention it in his reply to the Notice along with the supporting documents. The Respondent was given an opportunity to inspect the non-confidential evidence/information furnished by the above Applicant during the period between 17.09.2018 to 19.09.2018 in accordance with Rule 129 (5) of the above Rules and he availed of the said opportunity and inspected the documents on 17.09.2018. Vide e-mail dated 08.01.2019, the above Applicant was also given an opportunity to inspect the non-confidential documents/reply submitted by the Respondent on 14.01.2019 to 16.01.2019. However, the Applicant did not avail of the said opportunity and vide email dated 11.01.2019, expressed his inability to do so.

4. The DGAP has covered the period from 01.07.2017 to 31.08.2018 during the current investigation. The time limit to complete the investigation was extended by this Authority, vide its orders dated 29.01.2019. in terms of Rule 129(6) of the Rules.

5. The DGAP has further stated that the Respondent had submitted replies vide his letters/emails dated 24.09.2018, 10.10.2018, 23.10.2018, 31.10.2018, 17.11.2018, 27.12.2018, 31.12.2018, 04.01.2019, 07.01.2019, 08.01.2019, 09.01.2019, 11.01.2019 and 01.02.2019. The submissions of the Respondent were summed up by the DGAP as under:-

a) That he had made two separate Agreements for the flats booked in the pre-GST regime, one for land value and the other for construction value and he was charging GST @ 18% on the balance consideration of construction value. His land related

sale and registration were completed during the pre-GST period, while construction service was rendered and consideration related to construction was received during the pre-GST as well as post-GST periods. In other words, the supply of service did not involve transfer of land during the GST period. Thus, there was no case of deducting 1/3rd value (in lieu of land) from the gross value (land price plus construction price) and paying GST @ 18% on such balance 2/3rd value (effective GST @ 12%). He further submitted that if he had claimed abatement of 1/3rd value of his construction receipt during GST regime, it would have been improper since the entire consideration was related to construction only and therefore, GST collected @ 18% on the construction value was remitted to the Government account.

- b) That the Respondent had requested to consider his Tamil Nadu VAT ITC which was available to him under the erstwhile law, while comparing the ITC benefit of pre-GST and post-GST periods. He had opted to pay TNVAT and had been permitted to collect VAT as well as avail the ITC of VAT on input materials purchased.
- c) That he had substantially reduced the price of the apartments sold by him in the post-GST period.

6. The Respondent had also submitted the following documents/information to the DGAP vide his above mentioned letters/e-mails during the course of the investigation:-

- (a) Copies of GSTR-1 returns for the period July, 2017 to August, 2018.
- (b) Copies of GSTR-3B returns for the period July, 2017 to August, 2018.
- (c) Copies of Tran-1.
- (d) Copies of VAT & ST-3 returns for the period April, 2016 to June, 2017.
- (e) Electronic Credit ledger for the period July, 2017 to August, 2018.
- (f) Copies of all demand letters, receipts and agreement/contract in the name of the Applicant Ms. Santha Sivaram.
- (g) Tax rates- pre-GST and post-GST.
- (h) Details of taxable turnover and input tax credit for the project "Bounty Acres".
- (i) List of home buyers in the project "Bounty Acres".

7. The DGAP has also stated that all the documents placed on record were carefully examined by him and he had found that the main issues for determination were whether there was reduction in the rate of tax or benefit of ITC on the supply of construction service by the Respondent after implementation of the GST w.e.f. 01.07.2017 and in case it was so, whether the Respondent had passed on the above benefits to the home buyers as per the provisions of Section 171 of the CGST Act, 2017 or not.

8. The DGAP has further stated that the Respondent vide email dated 10.10.2018, had submitted copies of demand letters and the payment schedule related to the purchase of an apartment by the Applicant, measuring 996 sq. ft., at the basic sale price of Rs. 4900/- per sq. ft. for the construction part and Rs. 2500 per sq. ft. for 476 sq. ft. towards

the land share of the Applicant. The details of amounts and taxes paid by the Applicant to the Respondent were furnished by the DGAP as in Table-'A' below.

Table-'A'

(Amount in Rs.)

S No.	Payment Stages	Due Date	Basic %	BSP	Other Cost breakup	Registration charges	Land Cost	Service Tax including SBC & KKC	GST	Total
1	At the time of Booking	11-06-2015								
2	At the time of Signing of Agreement	12-06-2015	20%	9,76,080	2,00,000			65,860		12,41,940
3	30 % of BSP on UDS Registration + Other Charges (EB, STP, etc)@ 250 per Sq ft	25-06-2015	30%	14,64,120	2,49,000	1,97,100	11,90,000	29,295		19,39,515
4	10% of BSP on Completion of Foundation	30-10-2015	10%	4,88,040				27,330		5,15,370
5	10% of BSP on Completion of Roof Slab	02-11-2016	10%	4,88,040				29,282		5,17,322
6	10% of BSP on Completion of Brick work	27-03-2017	10%	4,88,040				29,282		5,17,322
7	10% of BSP on Completion of Plastering work	13-11-2017	10%	4,88,040					87,847	5,75,887
8	7% of BSP on Completion of Floor Finishing Work	12-03-2018	7%	3,41,628					61,493	4,03,121
9	3% of BSP on Completion of Handing over+CorpusFund+Maintenance Cost	01-10-2018	3%	1,46,412	54,880				36,233	2,37,525
Total			100%	48,80,400	5,03,880	1,97,100	11,90,000	1,81,050	1,85,573	71,38,003

9. The DGAP has further stated that 18% GST charged by the Respondent on construction value of the flat booked in the pre-GST regime was correct since the Respondent had made two Agreements with the Applicant while selling the flat, one for the cost of land and the other for the cost of construction. The Respondent did not charge any Service Tax on the amount charged towards cost of land which was recovered in the pre-GST regime and charged Service Tax @ 6% (15% Service Tax on 40% of the cost of construction) in the pre-GST regime and GST @ 18% on the consideration received towards cost of construction which did not include the land value in the pre-GST & GST regimes. Further, the Respondent had charged GST @ 12% or

8% (18% or 12% GST with 1/3rd abatement on value) on construction service supplied in relation to the flats booked in the post-GST regime.

10. The DGAP has further stated that para 5 of Schedule-III of the Central Goods and Services Tax Act, 2017, defining activities or transactions which shall be treated neither as a supply of goods nor a supply of services, reads as "Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building". Further, Clause (b) of para 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". In the light of these provisions, the input tax credit pertaining to the units which were under construction but not sold was provisional input tax credit that may be required to be reversed by the Respondent, if such units would remain unsold at the time of issue of Completion Certification, in terms of Section 17(2) & Section 17(3) of the CGST Act, 2017 which read as under:

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.

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.

Since the Respondent's aforesaid project was completed and the Completion Certificate had been obtained on 08.05.2018, the proportionate input tax credit pertaining to the unsold units was required to be reversed on 08.05.2018 and the computation of the same was furnished as in Table-B below.-

Table-'B'

(Amount in Rs.)

Particulars	Factor	Amount
Total Saleable Area of Flats (in sq. ft.)	A	2,55,800
Area Sold before completion certificate is obtained (in sq. ft.)	B	1,31,387
Area sold before completion certificate is obtained (in Percentage)	C=B/A	51.36%
Area remaining unsold when completion certificate is obtained (in sq. ft.)	D=A-B	1,24,413
Area remaining unsold when completion certificate is obtained (in Percentage)	E=D/A	48.64%
ITC available for the period between July, 2017 till August, 2018 as per GSTR-3B (in Rs.)	F	2,58,17,372
Proportionate ITC to be reversed (in Rs.)	G=F*E	1,25,56,750
Input Tax Credit availed post GST pertaining to sold units (in Rs.)	H=F-G	1,32,60,622

11. Further, the DGAP has observed that prior to 01.07.2017, i.e., before the GST was introduced, the Respondent was eligible to avail credit of Service Tax paid on input services and credit of VAT paid on the purchase of inputs. However, the CENVAT credit of Central Excise duty paid on inputs was not admissible as per the CENVAT Credit Rules, 2004, applicable at the material time. It was also noticed that the Respondent was not collecting VAT from his customers and discharging his output VAT liability on deemed 20% value addition to

the purchase value of the inputs and hence, there could be no comparison between the turnover reported in the VAT returns during the period April, 2016 to June, 2017 filed by the Respondent and the amount actually collected from the home buyers. Therefore, the credit of VAT paid on the purchase of inputs and the VAT turnover were not to be considered for computation of the ratio of input tax credit to total turnover for the pre-GST period. Further, post-GST, the Respondent could avail input tax credit of GST paid on inputs and input services including the sub-contracts. From the information submitted by the Respondent, duly verified from his ST-3, GSTR-1 and GSTR-3B returns for the period April, 2016 to August, 2018, the details of the CEVAT/input tax credit availed by him, his turnover for the project "Bounty Acres" and the ratio of the CEVAT/input tax credit to the turnover during the pre-GST and post-GST periods were furnished as is given in Table-C below:

Table-'C'

(Amount in Rs.)

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	July, 2017 to August, 2018
(1)	(2)	(3)	(4)	(5)=(3)+(4)	(6)
1.	CENVAT of Service Tax Paid on Input Services as per ST-3 (A)	6,90,582	27,62,798	34,53,380	-
2.	Input Tax Credit of GST Availed as per GSTR-3B Returns (B)	-	-	-	2,58,17,372
3.	Total Turnover as per Returns (C)	16,66,41,140	10,66,73,803	27,33,14,943	25,09,09,317
4.	Total Saleable Area of flats in the project (Sq. ft.) (D)			2,55,800	2,55,800
5.	Area Sold relevant to turnover (Sq. ft.) (E)			85,283	96,789
6.	Relevant CENVAT/Input Tax Credit (F)= [(A)*(E)/(D)] or [(B)*(E)/(D)]			11,51,347	97,68,716
7.	Ratio of CENVAT/ Input Tax Credit to Turnover [(G)=(F)/(C)]			0.42%	3.89%

12. The DGAP has submitted from the above Table-'C' 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 0.42% and during the post-GST period (July, 2017 to August, 2018), it was 3.89%. This clearly confirmed that post-GST, the Respondent had benefited from additional input tax credit to the tune of 3.47% [3.89% (-) 0.42%] of the turnover.

13. Accordingly, the matter of profiteering had been examined by the DGAP by comparing the applicable tax rate and input tax credit available for the pre-GST period (April, 2016 to June, 2017) when Service Tax @ 6% was payable with the post-GST period (July, 2017 to August, 2018) when the effective GST rate was 12% or 8% (GST @ 18% or 12% alongwith 1/3rd abatement on value) on construction service, vide Notification No.11/2017-Central Tax (Rate), dated 28.06.2017 and Notification No. 01/2018-Central Tax (Rate), dated 25.01.2018. On the basis of the figures contained in Table-'C' above, the comparative figures of input tax credit availed/available during the pre-GST period and the post-GST period and the excess collection as a result of the benefit of input tax credit, having not been passed on, were tabulated by the DGAP as in Table-'D' below.

Table-'D'

(Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April, 2016 to June, 2017	July, 2017 to August, 2018
2	Output tax rate (%)	B	6.00%	12.00%
3	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover as per Table - D above (%)	C	0.42%	3.89%
4	Increase in input tax credit availed post-GST (%)	D= 3.89% less 0.42%	-	3.47%
5	Analysis of Increase in input tax credit:			
6	Basic Price realised during July, 2017 to August, 2018 (Pre-GST Booked GST @ 18%)	E		2,99,60,085
7	Basic Price realised during July, 2017 to August, 2018 (Post-GST Booked GST @ 12%)	F		16,81,62,156
8	Basic Price realised during July, 2017 to August, 2018 (Post-GST Booked GST @ 8% Affordable Housing)	G		5,27,87,076

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9	Total Taxable Value raised during July, 2017 to August, 2018	H=E+F+G	25,09,09,317
10	GST Collected @ 18% on Pre-GST Booked Unit	I=E*18%	53,92,815
11	GST Collected @ 12% on Post-GST Booked Unit	J=F*12%	2,01,79,459
12	GST Collected @ 8% on Post-GST Booked Unit (Affordable Housing)	K=G*8%	42,22,966
13	Total GST Collected	L=I+J+K	2,97,95,240
14	Total Demand collected	M=H+L	28,07,04,557
15	Recalibrated Basic Price of Pre-GST Booked Unit	N= E*(1-D) or 96.53% of E	2,89,20,470
16	GST @18% on pre-GST Booked Unit	O=N*18%	52,05,685
17	Recalibrated Basic Price of Post-GST Booked Unit	P=F*(1-D) or 96.53% of F	16,23,26,929
18	GST @12% on post-GST Booked Unit	Q=P*12%	1,94,79,232
19	Recalibrated Basic Price of Post-GST Booked Unit (Affordable Housing)	R=G*(1-D) or 96.53% of G	5,09,55,364
20	GST @ 8% on post-GST Booked Unit (Affordable Housing)	S=R*8%	40,76,429
21	Commensurate demand price	T=N+O+P+Q+R+S	27,09,64,109
22	Excess Collection of Demand or Profiteered Amount	U=M-T	97,40,448

14. The DGAP has observed from Table-'D' that the additional input tax credit of 3.47% of the turnover should have been resulted in commensurate reduction in the base price as well as cum-tax price. Therefore, in terms of Section 171 of the Central Goods and Services Tax Act, 2017, the benefit of the additional input tax credit was required to be passed on to the recipients.

15. Further, on the basis of the aforesaid CENVAT/input tax credit availability pre and post-GST and the details of the amount collected by the Respondent from the Applicant and other home buyers during the period 01.07.2017 to 31.08.2018, the amount of benefit of input tax credit not passed on or in other words, the profiteered amount has been quantified by the DGAP as Rs. 97,40,448/- which included GST @ 18%, 12% & 8%, on the base profited amount of Rs. 87,06,553/-. The home buyer and unit no. wise break-up of this amount has been given in Annexure-23 of the DGAP report. This amount was inclusive

of Rs. 33,972/- (including GST @18% on the base amount of Rs. 28,790/-) which was the profiteered amount in respect of the Applicant, mentioned at serial no. 17 of Annexure-23 of the DGAP report. It was also observed that the Respondent had supplied the construction services in the State of Tamil Nadu only.

16. The DGAP has further stated that the Respondent had sold 119 flats out of which 90 home buyers had made payments in the post-GST period till 31.08.2018. The above profiteering had been computed in respect of those 90 flats where payments had been received in the post-GST period. The profiteering in respect of the remaining 29 home buyers would be calculated when payments would be received from them, by taking into account the benefit of proportionate input tax credit.

17. The DGAP has observed that the benefit of additional input tax credit of 3.47% of the turnover had, in fact, accrued to the Respondent and the same was required to be passed on to the Applicant and other recipients. Thus, the Respondent had contravened the provisions of Section 171 of the Central Goods and Services Tax Act, 2017 inasmuch as the additional benefit of input tax credit @3.47% of the turnover (base price) received by the Respondent during the period 01.07.2017 to 31.08.2018, had not been passed on to the Applicant and other recipients. On this account, the Respondent had realized an additional amount to the tune of Rs. 33,972/- from the Applicant which included both the profiteered amount @3.47% of the turnover (base price) and 18% GST on the said profiteered amount. Further, the

investigation had revealed that the Respondent had also realized an additional amount of Rs. 97,06,476/- (Rs. 97,40,448/- (-) Rs. 33,972/-) which included both the profiteered amount @3.47% of the turnover (base price) and GST on the said profiteered amount, from other recipients as well who were not Applicants in the present proceedings. These recipients were identifiable as per the documents on record provided by the Respondent giving the names and addresses along with unit no. allotted to such recipients. Therefore, this additional amount of Rs. 97,40,448/- was required to be returned to such eligible recipients.

18. The DGAP has further stated that the present investigation has covered the period from 01.07.2017 to 31.08.2018. Profiteering, if any, for the period post August, 2018, had not been examined, as the exact quantum of input tax credit that would be available to the Respondent in future could not be determined at the stage, when the construction of the project was yet to be completed. Further, the provisions of Section 171(1) of the Central Goods and Services Tax Act, 2017 requiring that "a reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices", had been contravened by the Respondent in the present case.

19. The above Report was considered by the Authority in its meeting held on 21.02.2019 and it was decided that the Applicants and the Respondent be asked to appear before the Authority on 07.03.2019.

The Respondent was issued notice on 21.02.2019 to explain why the

above Report of the DGAP should not be accepted and his liability for violating the provisions of Section 171 of the CGST Act, 2017 should not be fixed along with imposition of penalty as per Section 122-127 of the above Act read with Rule 21 & 133 of the CGST Rules, 2017 and his registration under the above Act should also not be cancelled. During the course of the hearings no one appeared for the Applicant No. 1, the DGAP was represented by Smt. Gayatri, Deputy Commissioner and Sh. R. A. Rajneesh, Asst. Commissioner and the Respondent was represented by Sh. Prasanna Krishnan, CA & Sh. I.V. Krishna, CA. The Respondent has filed his written submissions on 06.03.2019, 13.04.2019, 20.05.2019 and 28.05.2019. The contentions raised by the Respondent vide above mentioned submissions are discussed in subsequent paras.

20. The Respondent in his written submissions referring to Para 15 and Table C of the DGAP report with reference to Sl. No. 5 – Particularly column E relates to Area sold relevant to turnover as 96,789 Sq.ft. has claimed that the area was 84,332 Sq.ft. only. As a result the modified figures were submitted by him as follows:-

S NO	Particulars	July 2017 to Aug 2018
6	Relevant CENVAT/ITC (F) = $B * (E/D) = 2,58,17,372 * (84,332 / 2,55,800)$	85,11,456
7	Ratio of CENVAT / ITC to TO [G = F/C] = $85,11,456 / 25,09,09,317$	3.39

21. The Respondent has further submitted that the DGAP had ignored the Tamil Nadu VAT ITC which was available to him under the erstwhile law while comparing the ITC benefit of yesteryears and the GST

period. The Respondent has quoted para 15 of the DGAP report as follows:

“It was also noticed that the Noticee were not collecting VAT from their customers and discharging their output VAT liability on deemed 20% value addition to the purchase value of the inputs and hence there could be no comparison between the turnover reported in the VAT returns during the period April 2016 to June 2017 filed by the Noticee and the amount actually collected from the home buyers. Therefore the credit of VAT paid on the purchase of inputs and the VAT turnover are not to be considered for computation of the ratio of input tax credit to the total turnover for the pre GST period...”

He further submitted that such interpretation made by the DGAP could be legal and logical only in respect of Compound Levy Tax payers under Section 6 of the TNVAT Act 2006. Non collection of VAT and non-availing of VAT ITC were among the restrictions imposed by the statute on such construction contractors. He further added that he had opted to pay TNVAT, Under Section 5 of the above Act by identifying value thereof and he had been permitted to collect VAT as well as avail the VAT ITC on input material purchases too. The following was the VAT ITC availed by the Respondent:

Years	VAT ITC availed (as per VAT returns) - In Rs
2016-17	68,13,357
2017-2018 (Apr17-Jun17)	10,51,109
	78,64,466

22. The Respondent has further submitted that the report nowhere denied the facts

- a) that he enjoyed the legitimate VAT ITC benefit during Pre GST period.
- b) that his VAT returns explicitly evidence such benefit.
- c) that he was permitted by TNVAT Act, 2016 to follow VAT inclusive price method and pay VAT by offering Purchase Plus estimated Gross Profit (to ensure that VAT was fairly levied on material component only and not on service portion of consideration).

However, an observation *sans* legal sanction as well as logic, was made in the report that if the turnover disclosed in VAT return did not match, VAT ITC taken (though explicitly available in the VAT returns) should not be considered for profiteering analysis. In works contract industry, expecting material turnover to match with the gross turnover (material plus service) was quite vexatious and unfair. Under the above mentioned situation, it shall be unlawful and unfair to ignore the VAT ITC value while doing a comparison between ITC benefit during pre GST period and ITC benefit during the GST period.

23. The Respondent has further submitted that an amount of Rs 78 lakh had totally been ignored in the report while computing the pre GST ITC. If the same had been considered, Table C would have been read as follows:



S NO	Particulars	July 2017 to Aug 2018
6	Relevant CENVAT/ITC (F) = A * (E/D) = (34,53,380+78,64,466) * (85,283 / 2,55,800)	37,73,338
7	Ratio of CENVAT / ITC to TO [G = F/C] = 37,73,338 / 27,33,14,943	1.38%

Whereas the report the above figure was mentioned as 0.42%. Thus, the additional ITC benefit has been reduced by 0.96% [1.38% Minus 0.42%].

24. The Respondent has submitted that the Non-Taxable Land value was considered during Pre GST period unduly in the report. He referred to the Table C, entry shown at Sr. No. 3 which was Rs. 27,33,14,943 for pre GST period in which the land value was included in the above mentioned figure was as follows:

Years	Value of land included in the turnover figures mentioned in Report (in Rs)
2016-17	4,57,07,500
2017-18 (3 months)	1,46,10,800
	6,03,18,300

He further added that land was not a subject matter for Service Tax levy at all. The very definition of Service Under Section 65 B (44) of the Finance Act 1994 excluded the same as follows:

“service” means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

(a) an activity which constitutes merely,—

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution;

Or

(iii) a transaction in money or actionable claim

No eligible ITC could be related to Land by any stretch of imagination too, as per the provisions of CENVAT Credit Rules 2004. But, the report had considered the value of land also as 'total turnover as per returns'. Neither the returns (ST 3) nor the statute had considered the land as taxable or reportable. Neither the CENVAT credit Rules nor the CENVAT register shown that any CENVAT credit was available or availed respectively. He further added that if non-taxable land value could be added in the 'turnover' figure, even the interest income and profit on sale of old asset could also be added. Thus, there was no justification in adding the land value in the turnover and unduly arriving at lower ratio of ITC of pre GST period to turnover of pre GST period.

25. The Respondent has submitted that there had been cases of direct reduction in his prices to pass on the benefit of GST ITC much more than the actual ITC benefit that he had gained. Such bonafide action from his side could not simply be brushed away by stating that there was some other commercial reason for reducing the price. He further added that the Authority shall certainly and positively consider his genuine request in the interest of natural justice and drop further proceedings against him.

26. The Respondent has referred the Para 14 of the DGAP report which showed some calculations in respect of GST ITC reversal. The report was referring to Section 17 (3) of the Act fairly which reads as follows:

“The value of exempt supply under sub section 2 shall be such as may be prescribed...”

The Respondent has submitted that what was the prescription of statute in this regard while at the time of taking GST ITC it was perfectly eligible credit only. The report did not throw any light on the legal sanction used in the methodology uniquely followed by the DGAP without referring to any statutory prescription provided by Rules or any notification issued by the CBIC. In the absence of legal sanction such workings may not have legal validity. Even if such reversible ITC was found, the report did not adjust the same against the eligible ITC of GST period in Table C and Table D. He further mentioned that the State GST officials had issued notice to him for possible reversal with different workings too with potential possibility to change the eligible ITC figure during the GST period considered in the Report.

27. In his submissions dated 13.04.2019, 20.05.2019 and 28.05.2019 the Respondent has reiterated the submissions which were made by him on 06.03.2019 and further added that he had distributed to his customers much more than the above mentioned GST ITC benefit by way of price reduction and also GST ITC benefits was passed to the customers. When the entire industry as well as his company was in great financial stress, he had done his business with utmost honesty and with due regard to the legal provisions in letter and spirit.

28. The Respondent has submitted that it could be derived from the submissions made herein that there were many errors in the DGAP's calculation of Profiteered figure in his case. If his submissions could positively be considered, the quantification should have been changed completely as follows:-

Table C (Revised*)

S No	Particulars	April 2016 to March 2017	April 2017 to June 2017	Total (Pre GST)	Gross Total (Pre GST)	GST period (July 2017 to Aug 2018)
(1)	(2)	(3)	(4)	(5)		(6)
1	CENVAT of Service Tax paid on Input Services as per ST 3	6,90,582	27,62,798	34,53,380	1,12,83,433	
	VAT on Inputs as per STO certificate (A)	68,16,357	10,13,696	78,30,053		
2	Input Tax Credit of GST availed as per GSTR 3B Returns - (B)	-	-			2,58,17,372
3	Total Turnover as per Returns - (C)	16,66,41,140	10,66,73,803	27,33,14,943	21,29,96,643	25,09,09,317
	Less: Land Value during Pre GST period	-4,57,07,500	-1,46,10,800	-6,03,18,300		
4	Total Saleable Area of flats in the project (Sq Ft) - (D)				2,55,800	2,55,800
5	Area Sold relevant to turnover (Sq.Ft) - (E)				85,283	96,789
6	Relevant CENVAT/Input Tax Credit (F) = [(A) * (E) / (D)] or [(B) * (E) / (D)]				37,61,865	97,68,716
7	Ratio of CENVAT / Input Tax Credit to Turnover [(G) = (F) / (C)]				1.77%	3.89%

Difference (Post GST ITC ratio minus Pre GST ITC ratio)

2.13%

97.87%

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Table D (Revised*)

21	Commensurate Demand Price (Recalibration factor = 96.53%) - As per DGAP report		27,09,64,109
Revised 21	Revised Commensurate Demand Price (Recalibration factor = 97.87%) --- T		27,47,25,550
22	Revised (Alleged) Excess Collection of Demand or Profiteered Amount [U = M - T = 28,07,04,557 - 27,47,25,550]		59,79,007

29. In his submissions dated 28.07.2019 the Respondent has reiterated the submissions which were made by him earlier. Further the Respondent has submitted vide Annexure-2 of the submissions that he had duly passed on ITC benefit of an amount of Rs. 92,38,515/- (Rs. 65,41,634 upto 01.08.2018 and Rs. 26,96,881/- after 01.08.2018 till the date of submissions) to the eligible customers.

30. The submissions of the Respondent dated 06.03.2019 were forwarded to the DGAP on 07.03.2019, during the hearing, for his Report. The DGAP vide his Report dated 27.03.2019 replied on the issues raised by the Respondent as follows:

a) On the issue of the total area sold in the post-GST period, relevant to turnover which was erroneously taken as 96,789 sq. ft. instead of 84,332 sq. ft. the DGAP has replied that he had taken the actual total area of 96,789 sq. ft. as per the home buyer list submitted by the Respondent during the course of investigation and the same was also evident from Annexure-23 of the DGAP's report dated 14.02.2019.

b) On the issue of the omission of Respondent's input tax credit of VAT available in the pre-GST period the DGAP has stated that

this objection had already been addressed in the Para-15 of his report dated 14.02.2019.

c) On the issue of non-taxable land value which had been considered during the pre-GST period the DGAP has replied that he had compared the total turnover (inclusive of land value) of the Respondent for the pre as well post-GST periods and the value of land was also included in post-GST turnover as the Respondent was paying GST at the effective rate of 12% on the total turnover (after taking the 1/3rd as abatement and paying 18% on 2/3rd value of the demand raised).

d) On the issue of the reversal of input tax credit in respect of the area unsold which was not adjusted against eligible input tax credit in the post-GST period the DGAP has replied that out of total saleable area of 2,55,800 sq. ft. the Respondent was required to reverse the proportionate input tax credit in respect of the area which remained unsold as on 08.05.2018 (i.e. 1,24,413 sq. ft.), when the Completion Certificate was obtained and the Respondent had to pass on the benefit of additional input tax credit availed by him, to the home buyers of an area of 96,789 sq. ft. from whom payment had been received in the post-GST period covered in the investigation report (July, 2017 to August, 2018), by way of commensurate reduction in prices.

31. We have carefully considered all the submissions filed by the Applicant No. 1, the Respondent and the other material placed on record and find that the Applicant No. 1, vide his complaint dated 05.04.2018 had alleged that the Respondent was not passing on the benefit of ITC to

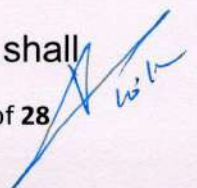
him in spite of the fact that he was availing ITC on the purchase of the inputs at higher rates of GST which had resulted in benefit of additional ITC to him and was also charging GST from him @12%. The above complaint was investigated by the DGAP and vide his Report dated 15.02.2019, he has found that the ITC as a percentage of the total turnover which was available to the Respondent during the pre GST period was 0.42% and during the post GST period the ratio was 3.89% as per the Table C mentioned above and therefore, the Respondent had benefited from additional ITC to the tune of 3.47% (3.89% - 0.42%) of the total turnover which he was required to pass on to the flat buyers of this project. The DGAP has also found that the Respondent has not reduced the basic prices of his flats by 3.47% due to additional benefit of ITC and by charging GST at the increased rate of 12% on the pre GST basic price, he has contravened the provisions of Section 171 of the CGST Act, 2017. The DGAP has further submitted that the amount of benefit of ITC which has not been passed on by the Respondent or the profiteered amount came to Rs. 97,40,448/- which included GST (@ 18%, 12%, 8%) on the basic profiteered amount of Rs. 87,06,553/-. The DGAP has also intimated that this amount of profiteering also included the profiteered amount of Rs. 33,972/- including 18% GST on the base amount of Rs. 28,790/- in respect of the Applicant No. 1. He has also supplied the details of all the buyers who have purchased flats from the Respondent along with their unit numbers and the profiteered amount vide Annexure-23 attached with the Report.

32. Further, we observe that the DGAP vide his reports dated 14.02.2019, 27.03.2019 and 11.06.2019 has addressed all the objections raised by the Respondent and the explanations given by the DGAP are correct and can be relied upon. Though some of the major contentions of the Respondent are discussed in subsequent paras.
33. We note that one of his prime contentions against the DGAP's report is that the credit of VAT paid on inputs has not been considered. We find that this claim of the Respondent is incorrect since though the Respondent had claimed credit of VAT paid on the inputs, but he had not discharged any output VAT liability. Further, Respondent also did not charged/paid VAT in the pre-GST period from the home-buyers. Thus, for determining the profiteering amount, neither the credit of VAT paid on the inputs, nor the output VAT liability had been taken into consideration by the DGAP and thus, DGAP has rightly computed the profiteering in this aspect.
34. Further, we observe that the objection raised by the Respondent to exclude Land value from the turnover of post-GST period is not correct as the DGAP had compared the total turnover (inclusive of land value) of the Respondent for the pre as well as post-GST periods and the value of land was also included in post-GST turnover as the Respondent had been paying GST at the effective rate of 12% on the total turnover. Therefore, the objections raised by the Respondent are not sustainable and cannot be accepted.
35. Further, the Respondent has claimed that he had duly passed on ITC benefit of an amount of Rs. 92,38,515/- (Rs. 65,41,634 upto 01.08.2018 and Rs. 26,96,881/- after 01.08.2018 till the date of

submissions) to the eligible customers. However, the computation of calculating this amount has not been provided by the Respondent. The Respondent has also not supplied any reliable and cogent proof that the above benefit has been received by the eligible buyers nor his claim has been verified by the DGAP and hence the above claim of the Respondent cannot be accepted.

36. We find that it is established from the perusal of the above facts that the provisions of Section 171 of the CGST Act, 2017 have been contravened by the Respondent as he has profiteered an amount of Rs. 97,40,448/- inclusive of GST (@ 18%, 12%, 8%) on the base profiteered amount of Rs. 87,06,553/-. Further, the Respondent has realized an additional amount of Rs. 33,972/- which includes both the profiteered amount @3.47% of the taxable amount (base price) and 18% GST on the said profiteered amount from the Applicant No. 1. Further, he has realized an additional amount of Rs. 97,06,476/- which includes both the profiteered amount @3.47% of the taxable amount (base price) and GST (@ 18%, 12% 8%) on the said profiteered amount from the flat buyers other than the Applicants in the present proceedings as per Annexure-23 of the Report. These buyers are identifiable as per the documents placed on record and therefore, the Respondent is directed to pass on this amount of Rs. 97,40,448/- along with interest @18% per annum to these flat buyers from the dates from which the above amount was collected by him from these buyers till the payment is made, within a period of 3 months from the date of passing of this order.

37. In view of the above facts this Authority under Rule 133 (3) (a) of the CGST Rules, 2017 orders that the Respondent shall reduce the prices to be realized from the buyers of the flats commensurate with the benefit of ITC received by him as has been detailed above. Since the present investigation is only up to 31.08.2018 any benefit of ITC which accrues subsequently shall also be passed on to the buyers by the Respondent.
38. It is also evident to us from the above narration of the facts that the Respondent has denied benefit of ITC to the buyers of the flats being constructed by him in his Bounty Acres 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. Accordingly, the notice dated 21.02.2019 vide which the Respondent was directed to show cause why action under Section 29 and 122-127 of the CGST Act, 2017 should not be taken against him is hereby withdrawn.
39. The Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST, Tamil Nadu to monitor this order under the supervision of the DGAP by ensuring that the amount profited 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 from the date of receipt of this order.

40. A copy each of this order be supplied to both the Applicants, the Respondent, Commissioners CGST/SGST, Tamil Nadu for necessary action. File be consigned after completion.

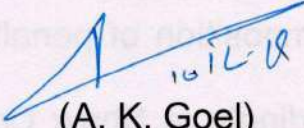
Sd/-
(B. N. Sharma)
Chairman



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

Sd/-
(Amand Shah)
Technical Member

(Certified Copy)


(A. K. Goel)
Secretary, NAA

F. No. 22011/NAA/03/Virgo/2019 | 7007-7012 Date: 10.12.2019

Copy To:-

1. M/s. Virgo Properties Pvt. Ltd., Old No.-3, New No.-5, Thirumurthy Street, T - Nagar, Chennai, Tamilnadu-600017.
2. Sh. Santha Sivaram, A-10, Soundarya Apartments, 49 Mambalam High Road, T-Nagar, Chennai-600017.
3. Director General, Directorate General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. Chief Commissioner, CGST, 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai - 600034.
5. Commissioner, Commercial Taxes, Office of the Commissioner of State Taxes, PAPJM Building, Greams Road, Chennai - 600006.
6. Guard File/NAA Website.

