

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

I.O. No. : 01/2020  
Date of Institution : 05.07.2019  
Date of Order : 01.01.2020

**In the matter of:**

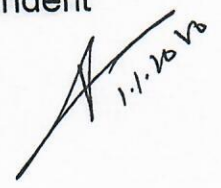
1. Shri Kishore Arjandas Udasi, Flat No 501, Mahavir Residency, Nr. Balrajeshwar Temple, LBS Marg, Mulund(W), Mumbai-400080.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2<sup>nd</sup> Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

Wheelabrator Alloy Castings Pvt. Ltd., Head Office: Runwal & Omkar ESquare, Off. Eastern Exp. Highway, 4<sup>th</sup> Floor, Sion(E), Mumbai-400022.

Respondent

  
1.1.2020



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 Applicants.
2. Sh. Prashant Mallya, AVP-Tax, Sh. Sumit Mundra, Accounts Manager and Sh. Prasanna Sudke, Consultant for the Respondent.

**ORDER**

1. This Report dated 26.06.2019 and the supplementary Report dated 14.10.2019 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 09.08.2018 filed before the Maharashtra 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 while he had purchased Flat No. T4-1004 OAK, in Tower-4 of the Respondent's project "Runwal Forests", near Mangatram Petrol Pump, LBS Marg, Kanjurmarg (W), Mumbai-400078. The above Applicant had also alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) although he had charged GST @ 12% w.e.f. 01.07.2017 from him. The above Committee had examined the application and after its prima facie satisfaction that the Respondent had violated the provisions of Section 171 of the CGST Act, 2017, had sent the same with its recommendation for necessary action to the Standing Committee on



Anti-profiteering as per the provisions of Rule 128 (2) of the CGST Rules, 2017. This application was duly considered by the Standing Committee on Anti-profiteering in its meeting held on 13.12.2018 and was referred to the DGAP for conducting detailed investigation on the allegations levelled by the Applicant No. 1.

2. The DGAP has stated in his Report dated 26.06.2019 that the above flat was booked by the Applicant No. 1 on 03.09.2016 before the GST had come in to force w.e.f. 01.07.2019 and the following demands had been raised on him by the Respondent as per the Table given below:-

S.No.	Particulars	Percentage of Installment	Amount (in ₹)
1	Booking Amount	19.9%	₹23,83,025
2	Commencement of Excavation	10%	₹11,97,500
3	Commencement of Plinth	10%	₹11,97,500
4	Commencement of 1st Floor	7%	₹8,38,250
5	Commencement of 5th Floor	7%	₹8,38,250
6	Commencement of 10th Floor	7%	₹8,38,250
7	Commencement of 15th Floor	7%	₹8,38,250
8	Commencement of 20th Floor	7%	₹8,38,250
9	Commencement of 25th Floor	7%	₹8,38,250
10	Commencement of 30th Floor	6%	₹7,18,500
11	Commencement of top Floor	6%	₹7,18,500
12	On Possession	6.1%	₹7,30,475
	Total	100%	₹1,19,75,000

3. The DGAP has also stated that the Applicant No. 1 had submitted the following documents along with his complaint:-

- (a) Duly filled in Form APAF-1.
- (b) Copy of demand letter dated 07.06.2018 issued by the Respondent to the Applicant No. 1.
- (c) Copy of Adhaar Card as proof of identity.

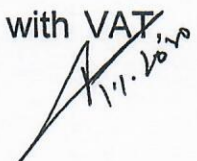
4. The DGAP had issued Notice under Rule 129 (3) of the CGST Rules, 2017 on 16.01.2019 asking the Respondent to intimate whether he admitted that the benefit of ITC had not been passed on to the above Applicant.



through commensurate reduction in the price of the flat and if so, to suo moto determine the quantum of such benefit and communicate the same with necessary evidence. An opportunity to inspect the non-confidential evidence/information submitted by the Applicant No. 1 was also afforded to the Respondent between 21.01.2019 to 23.01.2019, which he had not utilised. The Applicant No. 1 was also given an opportunity to inspect the non-confidential documents/reply furnished by the Respondent on 10.06.2019 or 11.06.2019, which he did not avail of.

5. In response to the Notice dated 16.01.2019, the Respondent has replied vide his letters/emails dated 31.01.2019, 01.02.2019, 02.04.2019, 03.04.2019, 10.05.2019, 14.05.2019, 18.06.2019, 21.06.2019 and 22.06.2019 and has intimated that the Respondent has submitted the following documents:-

- (a) Copies of GSTR-1 Returns for the period from July, 2017 to December, 2018.
- (b) Copies of GSTR-3B Returns for the period from July, 2017 to December, 2018.
- (c) Copies of Tran-1 and Tran-2 Statements.
- (d) Electronic Credit Ledger for the period from July, 2017 to December, 2018.
- (e) Copies of VAT & ST-3 Returns for the period from April, 2016 to June, 2017.
- (f) Copies of all demand letters, sale agreement/contract issued in the name of the Applicant No. 1.
- (g) Reconciliation of CENVAT/Input Tax Credit Register for the F.Y. 2016-17, 2017-18 and April, 2018 to December, 2018, with VAT ST-3 & GSTR-3B Returns.

  
11.11.2019



- (h) Applicable tax rates, pre-GST and post-GST.
- (i) Audited financial statement for the FY 2016-17 & 2017-18.
- (j) Copy of Project Report submitted to the RERA.
- (k) Details of VAT, Service Tax, ITC of VAT, CENVAT credit for period April, 2016 to June, 2017 and Output GST and ITC of GST for the period from July, 2017 to December, 2018.
- (l) List of home buyers in the project "Runwal Forests".

6. The DGAP after investigation has stated that the main issue for determination was whether there were benefits of reduction in the rate of tax or additional ITC on the supply of construction services provided by the Respondent after coming in to force of the GST w.e.f. 01.07.2017 and whether the Respondent had passed on the above benefits to the recipients in terms of Section 171 of the CGST Act, 2017 or not. The DGAP has further submitted that the ITC pertaining to the residential units which were under construction but not sold was provisional which may be required to be reversed by the Respondent, if such units remained unsold at the time of issue of the Completion Certificate (CC). The DGAP has also contended that his above submission were supported by para 5 of Schedule-III of the CGST Act, 2017 and Clause (b) of Paragraph 5 of Schedule II of the CGST Act, 2017, therefore, the ITC pertaining to the units which were under construction but not sold was provisional ITC which might be required to be reversed by the Respondent in terms of Section 17 (2) & Section 17 (3) of the CGST Act, 2017. Therefore, the DGAP has claimed that the ITC pertaining to the unsold units was outside the scope of this 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 him post-GST.

7. The DGAP has also observed that the Respondent's project "Runwal Forests" has two components, i.e., Towers T1 to T3 (Affordable), and Towers T4 to T11 (Other than affordable) and prior to 01.07.2017, i.e., before the GST was introduced, the Respondent was eligible to avail CENVAT credit of Service Tax paid on the input services. However, CENVAT credit of Central Excise Duty paid on the inputs was not admissible as per the CENVAT Credit Rules, 2004, which were in force at the material time, also the Respondent was paying VAT @1% under the Maharashtra VAT and he was not eligible to avail any input tax credit of VAT paid on the inputs. Further, post-GST, the Respondent could avail the input tax credit of GST paid on all the inputs and input services including the sub-contracts. From the information submitted by the Respondent for the period from April, 2016 to December, 2018, the details of the input tax credit availed by him, his turnover from the project "Runwal Forests", the ratio of input tax credit to the turnover, during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to December, 2018) periods, has been given by the DGAP in Table-B below:-





Table 'B'		( Amount in ₹.)	
S. No.	Particulars	(Pre-GST) April, 2016 to June, 2017	(Post-GST) July, 2017 to December, 2018
1	Credit of Service Tax Paid on Input Services (A)	12,06,86,135	-
2	Input Tax Credit of VAT Paid on Inputs (B)	-	-
3	Total CENVAT/VAT/Input Tax Credit Available (C)= (A+B)	12,06,86,135	-
4	Input Tax Credit of GST Availed (D)	-	52,54,64,132
5	Total Turnover from Residential Area (E)	3,15,38,92,375	3,66,30,31,634
6	Total Saleable Residential Area in sq. ft. (F)	16,13,379	16,13,379
7	Sold Area Relevant to Turnover in sq. ft. (G)	5,19,306	4,29,675
8	ITC proportionate to Sold Area (H)= (C) or (D) * G/F	3,88,45,822	13,99,41,577
9	Ratio of CENVAT/ VAT/Input Tax Credit to Turnover (I=H/E*100)	1.23%	3.82%

8. From the above Table, the DGAP has concluded that the input tax credit as a percentage of the turnover which was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 1.23% and during the post-GST period (July, 2017 to December, 2018), it was 3.82%. This indicated to the DGAP that post-GST, the Respondent has apparently benefited from additional input tax credit to the tune of 2.59% [3.82% (-) 1.23%] of the turnover. The DGAP has also mentioned that the Central Government, on the recommendation of the GST Council, had levied 18% GST on construction service (after one third abatement towards value of land, effective GST rate was 12% on the gross value), vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. The effective GST rate on construction service in respect of affordable and low-cost housing was further reduced from 12% to 8%, vide Notification No. 1/2018-Central Tax (Rate) dated 25.01.2018.
9. The DGAP has also reported that the Respondent's project "Runwal Forests" has two categories of units, affordable low cost housing and other than affordable housing. Out of total 11(eleven) towers in the project, three (3) towers fell in the category of affordable low-cost



housing comprising of a total of 640 units and the remaining eight (8) towers with a total of 1686 units fell in the category of other than affordable housing. The DGAP has also stated that in respect of change in the GST rate after 01.07.2017, the issue of profiteering has been examined in three parts, i.e., by comparing the applicable tax rate and the availability of input tax credit during the pre-GST period (April, 2016 to June, 2017) when Service Tax @4.5% and VAT @1% was payable on both the affordable housing and other than affordable housing with (1) the post-GST period from July,2017 to December, 2018, for other than affordable housing which attracted effective GST @12%; (2) the post-GST period from July,2017 to 24.01.2018,for affordable housing which attracted effective GST @12% and (3) the post-GST period from 25.01.2018 to 31.12.2018, for affordable housing which attracted effective GST @8%. Accordingly, the DGAP on the basis of Table-B above, has arrived at the comparative figures of tax rate and the ratio of input tax credit to the Respondent's turnover in the pre-GST and post-GST periods and the recalibrated basic price (on account of benefit of additional input tax credit) as well as the apparent excess collection (profiteering) during the post-GST period, which have been tabulated by the DGAP in Table-C below:-



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Table 'C'

(Amount in ₹.)

S. No.	Particulars	Pre-GST	Post- GST		
			01.07.2017 to 31.12.2018	01.07.2017 to 24.01.2018	25.01.2018 to 31.12.2018
1	Period	April,2016to June,2017	Other than affordable	Affordable	Affordable
2	Output tax rate (%)	5.50%	12.00%	12.00%	8.00%
3	Ratio of CENVAT/VAT/GST Input Tax Credit to Turnover as per Table - B above (%)	1.23%	3.82%	3.82%	3.82%
4	Increase in input tax credit availed post-GST (%)	-	2.59%	2.59%	2.59%
5	<b>Analysis of Increase in input tax credit:</b>				
6	Total Basic Demand during July, 2017 to December, 2018	E	2,03,28,97,757	83,09,17,491	79,92,16,386
7	GST @12% or 8%	F= E*12%	24,39,47,731	9,97,10,099	6,39,37,311
8	Total demand	G= E+F	2,27,68,45,488	93,06,27,590	86,31,53,697
9	Recalibrated Basic Price	H=E*(1-D) or 97.41% of E	1,98,02,45,705	80,93,96,728	77,85,16,682
10	GST @12% or 8%	I=H*12%	23,76,29,485	9,71,27,607	6,22,81,335
11	Commensurate demand price	J=H + I	2,21,78,75,190	90,65,24,335	84,07,98,016
12	Excess Collection of Demand or Profiteered Amount	K=G - J	5,89,70,298	2,41,03,255	2,23,55,681

10. The DGAP has also submitted from the Table-B above that the additional input tax credit of 2.59% of the turnover should have resulted in commensurate reduction in the basic 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 should have been passed on by the Respondent to the recipients. In other words, by not reducing the pre-GST basic price by 2.59% on account of additional benefit of input tax credit and charging GST @12% or 8% on the pre-GST basic price, the DGAP has stated that the Respondent appeared to have contravened the provisions of Section 171 of the Central Goods and Services Tax Act, 2017. The DGAP has further submitted that on the basis of the aforesaid CENVAT/input tax credit availability in the pre-GST and post-GST periods and the demands raised by the Respondent on the Applicant No. 1 and other home buyers on which GST liability @12% or 8%



or 8% was discharged by the Respondent during the period from 01.07.2017 to 31.12.2018, the amount of benefit of input tax credit not passed on to the recipients or in other words, the profiteered amount was Rs. 10,54,29,234/- which included GST on the base profiteered amount of Rs.9,48,72,519/-. This amount was inclusive of ₹ 21,190/- (including GST on the base amount of ₹ 18,919/-) which was the profiteered amounts in respect of the Applicant No. 1, mentioned at Serial No. 39 of Annexure-16 of the DGAP's Report. The DGAP has also stated that the Respondent has apparently supplied construction services in the State of Maharashtra only. The DGAP has further stated that the above computation of profiteering was with respect to 726 home buyers, whereas the Respondent had booked 1227 residential units till 31.12.2018, 501 buyers of residential units who had booked the flats and also made payments in the pre-GST period, had not paid any consideration during the post-GST period from 01.07.2017 to 31.12.2018 (period covered by the investigation), therefore, if the input tax credit in respect of these 501 units was considered for calculation of profiteering in respect of 726 units where payments have been received in the post-GST period, the input tax credit as a percentage of turnover might not be correct. Therefore, the benefit of input tax credit in respect of these 501 units should be calculated when the consideration is received from such units by taking into account the proportionate input tax credit in respect of such units.

11. The above Report was considered by the Authority in its sitting held on 09.07.2019 and vide notice dated 09.07.2019 the Respondent was directed to explain why the Report dated 26.06.2019 furnished by the DGAP should not be accepted and his liability for violation of the



provisions of Section 171 of the CGST Act, 2017 should not be fixed. He was also asked to show cause why penalty under Section 29 and 122-127 of the above Act read with Rule 21 and 133 of the CGST Rules, 2017 should also not be imposed on him. It was decided that the Applicants and the Respondent be asked to appear on 02.08.2019. Since, the Respondent had asked for adjournment of the hearing scheduled on 02.08.2019, further hearings took place on 09.08.2019, 29.08.2019 and 17.09.2019. During the course of the hearings the Respondent was represented by Sh. Prashant Mallya, AVP-Tax, Sh. Sumit Mundra, Accounts Manager and Sh. Prasanna Sudke, Consultant.

12. The Respondent has filed submissions dated 08.08.2019, 29.08.2019 and 17.09.2019 in which he has stated that the alleged profiteered amount computed by the DGAP as Rs. 10,54,29,234/- was not correct as the DGAP had overlooked the fact that in the case of most flats booked after 01.07.2017 the original agreement value had already been reduced by way of discounts and GST was demanded on the reduced agreement value and in case of customers/service receivers who had booked flats after 1<sup>st</sup> July 2017 (under both categories i.e. affordable and non-affordable), upfront discounts upto 5.8% on the original agreement value had been passed on at the time of sale by way of reduction in the original agreement value to reduce the impact of increase in cost owing to increase in the tax rate from 5.5% in the pre-GST regime to 12% once the GST was implemented, therefore, he has claimed that the original agreement values were reduced by giving discounts and GST at applicable rate was demanded from the customers on the reduced agreement value. The sample cost sheets bearing reference to the discounts offered to customers were shared with the DGAP by him and



the customer-wise list of discounts offered had also been provided to the DGAP which formed part of the annexures provided by the DGAP in his Report. He has also enclosed copies of the cost sheets and summary as Annexure-1 to his submissions.

13. The Respondent has further stated that the increase in tax rate from 5.5% (Service tax @4.5% plus MVAT @ 1%) to 12% under the GST regime has resulted in higher cost incidence for customers, thereby negatively impacting his business as customer interest in booking apartments waned and he was left with no choice but to bear the incremental tax by offering discounts upto 5.8% of the original agreement value and thereby absorbing the incremental tax impact. He has also submitted that this was necessary to maintain sales momentum and liquidity which was under severe pressure due to cost escalation for the customers on account of increased taxes. He has also argued that discounts were offered despite his inability to assess the exact quantum of ITC benefit that would accrue to him. In view of this, he has further argued that, amount of Rs. 7,48,04,732/- had already been given as discount to the customers/receivers who had booked flats in the post-GST period. No further discount was required to be passed to these customers on progress billings, a fact overlooked by the DGAP at the time of quantifying the profiteered amount and therefore, the amount of Rs. 7,48,04,732/- could not be regarded as profiteering as he had already reduced the sale prices and given discounts to these customers/receivers.
14. He has also mentioned that he had collected GST after giving upfront discounts on agreement value and therefore there could not be any



profiteering in view of his reduction of sales price by upto 5.8% to minimise the impact of increased tax rate in the GST period and maintain tax and price levels for the customer at around the same level as in the pre-GST period. Therefore, he has further mentioned that the determination of profiteering by the DGAP on the flats which were booked on/after 1<sup>st</sup> July 2017 was not correct. He has also said that he had already given discount of Rs. 7,48,04,732/- for flats which were booked on/after 1<sup>st</sup> August 2017, therefore, the alleged profiteering of Rs. 10,54,29,234/- needed to be reduced further by Rs. 7,48,04,732/-.

15. The Respondent has further stated that as far as the flats booked prior to 01<sup>st</sup> Aug' 2017 were concerned, the observations made by the DGAP about non-passing of benefit was also not correct as supply to the customers/receivers was not yet completed and therefore time for passing of the benefit has not lapsed yet. He has further said that as per Section 171 of CGST Act, 2017 the time at which the benefit of ITC was to be passed has not been mentioned. He has also claimed that Chapter XV of CGST Rules 2017 dealt with the Anti-Profiteering provision and Rule 122 to 137 in the said Chapter dealt with the procedure and other formalities. In the said rules, the due date/time before which the supplier was required to pass on the benefit to the receiver has nowhere been prescribed. Therefore, he has further claimed that in the absence of any specific provision with reference to the timing for passing on of the ITC benefit a supplier might be required to pass on the benefit either, at the time of completion of supply or immediately after completion of supply and in the instant case, the DGAP had determined the ITC benefit even before the end of supply in this case and therefore DGAP's view that he had not



reduced the price was not appropriate more specifically due to absence of such specific provision in the law.

16. The Respondent has also contended that the benefit of additional input tax credit arising, if any due to implementation of GST could only be ascertained and quantified at the end of the completion of construction of the project as neither sales nor purchases were evenly spread. Further, milestones for billing to existing customers and receipt of inward supply in the project were not necessarily linked to each other in his case. He has further contended that the uneven distribution of sales, progress billings, consumption and availability of input tax credit resulted in fluctuation of the ITC ratio, i.e., the percentage of ITC benefit to be passed to customers, each month. He has also pleaded that agreement with a flat buyer was a long-term contract spreading into multiple years and flat buyer made payments which were provisional in nature as contract was not said to be fulfilled/concluded unless construction was completed and flat buyer had made full payment towards the agreement value. If any of these events did not get fulfilled then the contract would get terminated and supply would be said to have not taken place.
17. He has also mentioned that unlike the service and manufacturing sector, real estate sector had its unique complexity like long gestation period, delay in approvals/sanctions from regulators and possibility of non-payment by the flat buyers in future etc. Therefore, unlike manufacturing or trading, where supply got over once goods were supplied and invoice was issued and payment was collected which concluded in few days, in construction, supply was spread over very long period. Therefore, computing the additional credit in case of



manufacturing and trading was not difficult due to availability of exact quantity of sales, consumption, input credit available and time taken for manufacturing. However, the same was not possible as supply in construction sector was spread across years and procurement of services/materials was not evenly distributed.

18. The Respondent has further mentioned that the ITC availed by him was not final and he was required to reverse the ITC in future which would be in proportion to the unsold area of the flats remaining unsold on the date of obtaining of completion certificate. This was due to the recent amendment which had retrospective effect, made by the Government in Rule 42 of the CGST Rules 2017 which required reversal of ITC availed from 1<sup>st</sup> July 2017 till date of receipt of completion certificate. He has also averred that currently, he has unsold inventory of around 53% and the project was expected to be completed by December 2019, in view of this, if no fresh bookings happened before project's completion then there would be requirement of reversing more than half of the total ITC which was availed till date and therefore passing of the ITC benefit in between was not possible. He has also maintained that if ITC benefit would have been passed on during the issuance of respective demands as per DGAP's view then a situation would have arisen where he would have suffered heavy losses as ITC to be reversed would be then required to be done from his profit/margin which was not the intention of the Anti-Profiteering provision.

19. The Respondent has also stated that the ITC which he has availed was not final and it would be subjected to reversal on account of non-payment of tax by the corresponding suppliers. In fact, he had been



served with a notice by the GST Department for reversal of input tax credit of Rs. 1,55,86,444/- due to non-payment by the supplier and this fact of non-payment of tax could not be ascertained at the time of availing credit and in case of non-payment by supplier, receiver's input credit was denied that too after many months from actual availing of the credit. In view of this, he has further stated that, ITC availed in the GST Returns was not final and sanctioned but was a conditional credit depending on certain events which were beyond his control.

20. The Respondent has also mentioned that the % of additional ITC benefit derived by the DGAP was simply on the basis of invoices booked in the project which had no reference to the actual consumption of materials and services, extent of work done and the uneven distribution of cost, sales booking and progress billing. In view of this, he has stated that the percentage was bound to vary every month and the variation range could be very high. Therefore, this method of ascertaining ITC benefit was not appropriate. He has further stated that in case of delay in project completion due to delay in obtaining approvals/permissions the project cost itself went up or sometimes due to change in development regulations, additional cost needed to be incurred which were over and above the budgeted cost. Apart from challenges on construction front, even on sales side, issues arise like cancellation of flats by the buyers before their completion, no fresh bookings happening even when project was nearing completion. In view of this, the discount/reduction in sale price was possible only at the end of the project by which the finality in terms of consumption of materials, services, its cost, sales etc., was reached and therefore, in the absence of any specific requirement as to the exact time for



passing on of benefit of discount, the same could be worked out towards the end of the project i.e., at the time of possession on receipt of occupation certificate and accordingly could be passed on to buyers at that point of time.

21. He has also claimed that if the ITC credit was passed on in intermediate stages by just comparing the input credit availed till date without taking into account the eventualities like reversal of credit on receipt of occupation certificate and non-deposit of tax by the suppliers then at later point of time, if the ITC credit which was finally allowed was much less as compared to the ITC availed then, he being registered with the Maharashtra Real Estate Regulatory Authority incorporated under the Real Estate (Regulation & Development) Act (RERA) would not be in a position to increase the flat cost and recover such reversed credits. Therefore, he has further claimed that it was not possible to rely on the ITC availed till date and start passing on the discount but there was a need to wait till the end of completion of the construction and then work out the ITC benefit based on the ITC which was actually available. He has also stated that the passing on of the ITC benefit at the time of possession would be in compliance of Section 171 of CGST Act as sale price got reduced in the last payment and the customer/receiver got the benefit at the time of completion of supply.
22. The Respondent has also questioned the quantification of additional ITC worked out by the DGAP as the DGAP has simply compared the ITC availed in the pre-GST and the post-GST periods from the Returns filed by him whereas while determining the additional credit, only those items which were not-creditable needed to be taken into consideration as only these taxes formed part of his cost structure and thereby the



sales price and items which were creditable in pre-GST period needed to be excluded. He has also stated that any reduction in the price on account of such incremental duty would affect his profit margins which was not the intent of the regulator through the Anti-profiteering provisions under the GST law. Reduction in sale price on account of anti-profiteering discount was expected to remain neutral as far as profit margins were concerned between the pre and post GST periods.

23. The Respondent has also submitted cost sheets wherein customers had acknowledged receipt of anti-profiteering discount by him. He has also submitted that with the introduction of GST the tax rate of outward supply was increased to 12% (Affordable houses 8%) as compared to 5.5% in the pre-GST regime and some of his inputs especially goods became eligible for input tax credit with introduction of GST. Accordingly, he has stated that the ITC benefit was passed on to the customers in the post-GST period. He has also attached details of the customers where demands were raised till 31<sup>st</sup> December 2018 along with details of discount to be passed @ 2.59% (As per DGAP's Report) which he strongly believed was incorrect as compared to the anti-profiteering discount passed to the customers by him.
24. The Respondent in his submissions dated 17.09.2019 has attached the list of customers to whom discount has already been passed along with demands raised during the period from 01<sup>st</sup> July, 2017 to 31<sup>st</sup> December, 2018 and 01<sup>st</sup> July, 2017 to 31<sup>st</sup> March, 2019 and in case of customers/service receivers who had booked flats after 1<sup>st</sup> July 2017 (under both categories i.e. affordable and non-affordable), upfront discount upto 5.8% on the original agreement value has been passed at the time of booking itself by way of reduction in the original



agreement value to reduce the impact of increase in the cost owing to increase in the tax rate from 5.5% in the pre-GST regime to 12% on account of introduction of GST. He has also claimed that an amount of Rs. 9,39,81,108/- (affordable category) and Rs. 15,76,14,471/- had already been passed on as discount to the customers in the post-GST period till December, 2018 and the corresponding figures for March, 2019 were Rs. 9,99,63,590/- (affordable category) and Rs. 17,19,68,931/- (other than affordable category). He has also claimed that as the construction activity in the project was still in progress the full agreement value had not yet been demanded. He has accordingly limited the discount amount to the extent of agreement value which had been demanded till the investigation period. Accordingly the amount of discount passed against demands raised in the investigation period worked out to Rs. 6,36,09,860/- (affordable category) and Rs. 9,83,57,243/- (other than affordable category) till December, 2018. The corresponding figures upto March, 2019 were Rs. 7,02,32,522/- (affordable category) and Rs. 10,89,37,538/- (other than affordable category). The total discount thus offered against demands raised in the investigation period till December, 2018 amounted to Rs. 16,19,67,103/- (corrected from Rs.7,48,06,433/- as per his submission dated 08<sup>th</sup> August, 2019) and Rs.17,91,70,060/- (if the period till 31<sup>st</sup> March, 2019 was considered). He has also argued that no further discount was required to be passed on to these customers on progress billings, a fact which was overlooked by DGAP at the time of quantifying the profiteered amount. Therefore, he has contended that the value of Rs. 16,19,67,103/- till 31<sup>st</sup> December 2018 and Rs.17,91,70,060/- (if the period upto 31<sup>st</sup> March, 2019 was



considered) could not be regarded as profiteering as he had already reduced the sale price and given discount to these customers/receivers.

25. The Respondent has further argued that there seemed to be some clerical error in the ITC amount of Rs. 52,54,64,132/- for the GST period till 31<sup>st</sup> December, 2018 as has been claimed by the DGAP in his Report. The opening balances of CENVAT credit seemed to have been double counted by the DGAP to arrive at the ITC credit in the post-GST regime. The correct amount of ITC as claimed by him in his Returns during the period between 1<sup>st</sup> July, 2017 to 31<sup>st</sup> December, 2018 was Rs. 24,29,56,019/-. He has also claimed that the correct amount of turnover for live customers was Rs. 317,01,51,245/- and Rs. 371,38,60,019/- respectively and he has also provided the GSTR-1 Returns for the period from July, 2017 to March, 2019 along with reconciliation between the turnover for the live customers claimed in the customer-wise list of demands sent. He has also provided the ST-3 Returns for the Service Tax period along with the reconciliation between the turnover for the live customers. He has further submitted that the Service Tax audit by the Department had been completed till 30<sup>th</sup> June, 2017 and the figures of turnover claimed by him in the Returns had been accepted by the Department except an addition of commission income of Rs. 41,63,938 received by him on which Service Tax of Rs. 6,24,590/- had been inadvertently not discharged. The tax liability was subsequently discharged by him with interest in December, 2018. Penalty on the same had been waived by the Department as the omission was not on account of any fraudulent or malafide intent.



26. The Respondent has also submitted that the Service Tax rate on sale of affordable and non-affordable flats was the same and the rate was 15% with abatement of 30%. An exemption was given to affordable flats in a project approved under the Housing for All Mission or Pradhan Mantri Awas Yojana or scheme of the State Govt. WACL's project was not eligible for the said exemption and the tax rate applicable on construction of flats was 18% and effective rate was 12% on agreement value. W.e.f. 25<sup>th</sup> January, 2018, the CGST Notification No. 11/2017 -CT (Rate) dated 28.06.2017 which provided for the rate of GST on services has got amended and entry at Sr. No. 3(v)(da) was inserted to provide for GST rate for construction of low cost houses in a housing project which had been given infrastructure status by the Govt. and the tax rate prescribed was 12% and the effective rate on agreement value was 8%.
27. The Applicant No. 1 vide his e-mails dated 16.09.2019 and 26.09.2019 has stated that no discount on account of ITC benefit was given to him. He has further stated that nobody from the DGAP's side was present during the hearings.
28. The submissions of the Respondent were sent to the DGAP and the DGAP vide his Report dated 14.10.2019 has stated that the discounts passed on to the customers who have booked apartments in the GST period have not been taken into account has been as claimed by the Respondent as after looking into the cost sheets and the summary made available in his submission filed before this Authority it was evident that the methodology employed by the Respondent had calculated the quantum of upfront discounts by comparing the increase in tax rate across tax regime. Tax incidence upon the recipients was



5.5% (4.5% Service Tax +1% MVAT) in pre-GST period, which was increased to 12% in the post-GST era. As the exact quantum of ITC benefit that would accrue to him over the period was not available, the Respondent chose to absorb the incremental tax impact by passing upfront discount to the tune of approximate incremental tax so that there was no cost escalation on account of increased tax rates for home-buyers. Though, his reasoning behind offering such approximate discount to the new home-buyers in absence of knowledge of exact quantum of ITC appeared to be logical, the DGAP has mentioned that the quantum of benefit so offered by the Respondent to the home-buyers had not been uniform. It was 6.5% (12% - 5.5%) for the normal home-buyers, in case of affordable houses, wherein effective GST rate was reduced w.e.f. 25.01.2018 from 12% to 8%, the discount offered varied in the range of 2.5-3% (8%- 5.5%), for the units booked after the rate reduction. The DGAP has further stated that, regarding the issue on amount of benefit claimed to have been passed on by the Respondent, its eligibility could not be verified by him during the investigation due to non-submission of the documentary evidence to substantiate the claims. However, the amount of benefit as provided by the Respondent to his home-buyers was duly mentioned in Annexure-15 & 16 of his Report dated 26.06.2019. The DGAP has admitted that in the light of the documentary submissions made by the Respondent before this Authority during the hearings new facts had arisen which required relooking into the investigation

29. The DGAP has further responded on the contention of the Respondent that time for passing on benefit had not lapsed yet, as the supply to the



customers was not yet completed and has stated that although it might be a fact, but could not be considered in the present case as profiteering, if any, had to be determined at a given point of time, in terms of Rule 129(6) of the Rules. Therefore, the additional input tax credit available to the Respondent and the amounts received by him from the Applicant No. 1 and other recipients post implementation of GST, had to be taken into account to determine the benefit of input tax credit that was required to be passed on during the period from 01.07.2017 to 31.12.2018. Also, Section 171 of the CGST Act 2017 which dealt with the Anti-profiteering measure, has to be read along with other relevant sections to determine how the benefit has to be passed on. As per Section 49(9) of the Central Goods and Services Act, 2017 "Every person who has paid the tax on goods or services or both under this Act shall, unless the contrary was proved by him, be deemed to have passed on the full incidence of such tax to the recipient of such goods or services or both." Further, as per Section 13 (2) (a) read with Section 31 of the Central Goods and Services Act, 2017, the time of supply of service shall be the date of issue of invoice. Thus, the DGAP has submitted that the Respondent's contention made above did not appear to be proper that time at which benefit had to be passed on had not been mentioned as it was the time of issue of invoice or when the advance was received.

30. The DGAP has further stated that it was a fact that the Real Estate Sector has long gestation period and proportionate reversal on account of unsold flats would have to be made, upon receipt of Completion Certificate. However, profiteering at a given point of time



had to be calculated in terms of Section 171 of CGST Act, 2017 and Rules made therein within the time frame enshrined in the said provisions. Further, in terms of Rule 42 of the CGST Rules, 2017, the amount of credit reversal upon completion was for the unsold area only, and the same did not affect the profiteering computed in the DGAP Report dated 26.06.2019 on the following grounds:-

a) In the light of Rule 42 of the Central Goods and Service Tax Rules, 2017, proportionate credit for units against which there was any demand had been taken into consideration for calculation of profiteering. Hence, reversal of Input tax Credit, if any, upon completion of the project given that there were still unsold units would be in proportion to the unsold units only, which was already excluded from profiteering calculation.

b) The computation of profiteering in the Report dated 26.06.2019 covered only the period from 01.07.2017 to 31.12.2018. For further period, the Respondent might choose to pass the benefits based upon the calculation made by the DGAP if approved by this Authority and the final amount of benefits to be passed on shall be known only upon completion of the project.

31. In respect of the contention of the Respondent that the methodology of working out additional ITC was not proper, the DGAP has clarified that the extent of profiteering was arrived at, on case to case basis, by adopting suitable method based on the facts and circumstances of each case as well as the nature of the goods or services supplied. There could not be any fixed methodology for determination of the quantum of benefit to be passed on. In this case, for calculation of profiteering, the increase



in the Input Tax Credit as a percentage of total taxable turnover had been taken and the increase in input tax credit as a percentage of total taxable turnover availed by the Respondent post GST had been quantified. The input or input service wise availability or non-availability of input tax credit prior to and post implementation of GST had not been examined. The DGAP has further stated that presently the Respondent's contractor (Supplier) could avail credit of goods used to provide the services, and further, there should be no extra liability on the Respondent on account of increase in rate of GST compared to the Services Tax as the supplier of input services were now also enjoying input tax credit on all the purchases made by them, thus resulting in reduction in effective cost of the materials purchased by them, which should pass on to the Respondent.

32. The DGAP in respect of the claim of the Respondent that there appeared to be clerical error in the ITC amount considered by the DGAP, stated that upon checking it has come to light that the opening balance of CENVAT credit had been double counted which was due to the reconciliation of CENVAT and the turnover provided by the Respondent in his submissions dated 31.01.2019 to the DGAP (Annexure-6 of the DGAP's Report dated 26.06.2019). Further, the DGAP has stated that the Respondent had provided corrected turnover figures for his live home-buyers for the period covered under investigation and its reconciliation with home-buyers data with the respective Returns. The Respondent has further claimed that the corrected turnover for pre-GST period had been accepted by department in Audit and hence the same should be accepted. In respect of both the points as have been



mentioned above, the DGAP has stated that the profiteering calculation and its redistribution will have to be reconciled with new home-buyers data made available.

33. The Respondent vide his e-mails dated 23.09.2019, 25.09.2019 and 13.12.2019 has reiterated his submissions regarding passing on of the discounts to his customers. He has also provided details of the output tax liability discharged by way of cash and credit. He has further provided comparison of the agreement values of units sold in the pre-GST period against the ones sold after the GST was introduced and also provided agreements executed with his customers to corroborate his claim that the sale price was reduced in the GST period on account of Anti-Profiteering discount.
34. We have carefully considered both the Reports filed by the DGAP on 26.06.2019 and 14.10.2019, the submissions made by the Respondent, the Applicant No.1 and have also perused the material placed on record and it is revealed that the Respondent is executing a residential project known as "Runwal Forests" under which both affordable and non-affordable flats are being constructed. It is also revealed that the Applicant No. 1 has purchased Flat No. T4-1004 OAK in Tower No. 4 of the above project and has alleged vide his application dated 09.08.2018 that the Respondent has not passed on the benefit of ITC to him. The above application was examined by the Maharashtra State Screening Committee on Anti-Profiteering under Rule 128 (2) of the CGST Rules, 2017 and after having prima-facie satisfied itself that the Respondent has violated the provisions of Section 171 (1) of the CGST Act, 2017 had forwarded it to the Standing Committee on Anti-Profiteering for further



action. The above Committee had considered this application in its meeting held on 13.12.2018 and sent it to the DGAP for investigation under Rule 128 (1) of the above Rules. It is further revealed that the DGAP has conducted detailed investigation in the allegation levelled by the Applicant No. 1 under Rule 129 and furnished his Report under Rule 129 (6) on 26.06.2019. Perusal of the above Report shows that the DGAP has found that the Respondent has not passed on the benefit of additional ITC to the tune of 2.59% of the turnover for the period from 01.07.2017 to 31.12.2018 to the flat buyers and therefore, he has computed the profiteered amount as Rs.10,54,29,234/- including the GST charged on the base profiteered amount of Rs.9,48,72,519/-. He has also claimed that the Respondent has not passed on benefit of Rs. 21,190/- to the Applicant No. 1 which included the GST on the base amount of Rs. 18,919/-. The flat buyer and Unit No. wise break-up of the profiteered amount in respect of the affordable and non-affordable houses has been given by the DGAP vide Annexure-15 and 16 of his Report dated 26.06.2019.

35. It is further revealed that the Respondent vide his submissions dated 17.09.2019 has attached the list of his customers and claimed that the benefit of ITC has already been passed on to them along with the demands raised on them during the period from 01.07.2017 to 31.12.2018. He has also provided the details of the buyers who have booked flats after 01.07.2017 and claimed that upfront discount upto 5.8% was passed on to them on the original agreement value at the time of booking itself so as to reduce the impact of increase in the cost due to increase in the tax rate from 5.5% in the pre-GST regime to 12% in the post-GST period. He has also claimed that an amount of Rs. <sup>17</sup>



16,19,67,103/- has been passed on by him to his buyers till December, 2018. The DGAP vide his Report dated 14.10.2019 has stated that the claim of the Respondent regarding passing on of the benefit of ITC could not be verified during the course of his investigation due to non-submission of the documentary evidence by the Respondent, however, the amount of benefit passed on was mentioned in Annexure-15 and 16 of his Report dated 26.06.2019. He has further submitted that in view of the fresh documentary evidence produced by the Respondent during the course of the present proceedings the investigation carried out by the DGAP was required to be relooked.

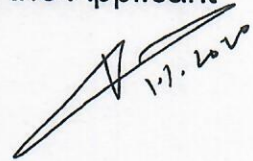
36. It is also evident from the submissions of the Respondent that he has claimed that there was error in the ITC amount of Rs. 52,54,64,132/- for the GST period till 31.12.2018, computed by the DGAP. he has also claimed that the opening balance of CENVAT credit has been double counted by the DGAP to arrive at the ITC credit in the post-GST regime and the correct amount of ITC as claimed by him in his Returns filed during the period from 01.07.2017 to 31.12.2018 was Rs. 24,29,56,019/-. While replying to his above claim the DGAP vide his Report dated 14.10.2019 has admitted that there was error in the ITC amount considered by him as the opening balance of the CENVAT credit has been counted twice due the reconciliation of CENVAT and turnover provided by the Respondent in his submissions filed before the DGAP on 31.01.2019 which were attached as Annexure-6 with his Report dated 26.06.2019. He has also submitted that the Respondent has also furnished corrected figures of turnover for his live home-buyers for the period from 01.07.2017 to 31.12.2018 and their reconciliation with the home-buyers data with the respective Returns.



He has further submitted that the Respondent has claimed that the corrected figures of turnover have been accepted by the GST Department after audit and hence they should be accepted by the DGAP. The DGAP has therefore, stated that in view of both the above claims made by the Respondent the computation of the profiteered amount and its distribution was required to be reconciled with the home-buyer's data furnished by the Respondent now.

37. Based on the above facts it is established that the following issues are required to be reinvestigated by the DGAP:-

- (i) Whether the Respondent has passed on the benefit of ITC to his buyers as has been claimed through the documentary evidence furnished by him during the course of the present proceedings?
- (ii) In case the Respondent has passed on the ITC benefit then what is the amount of the benefit passed on?
- (iii) What is the amount of ITC the benefit of which is required to be passed on by the Respondent to his recipients after correctly considering the figures of CENVAT credit?
- (iv) What is the amount of turnover to be taken in to account during the period from 01.07.2017 to 31.12.2018?
- (v) What is the profiteered amount and entitlement of benefit of ITC to be passed on to each eligible home-buyer including the Applicant No. 1?



1.1.2020



38. Accordingly, as per the provisions of Rule 133 (4) of the CGST Rules, 2017 the DGAP is directed to reinvestigate the above issues and submit his Report accordingly.

39. A copy of this order be supplied to the Applicants and the Respondent. File of the case be consigned after completion.




Sd/-  
(B. N. Sharma)  
Chairman

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

Sd/-  
(Amand Shah)  
Member(Technical)

Certified Copy

  
(A. K. Goel)  
Secretary, NAA

F. No. 22011/NAA/65/Wheelabrator/2019 /26

Date: 01.01.2020

Copy To:-

1. M/s Wheelabrator Alloy Castings Pvt. Ltd., Head Office: Runwal & Omkar ESquare, Off. Eastern Exp. Highway, 4<sup>th</sup> Floor, Sion(E), Mumbai-400022.
2. Shri Kishore Arjandas Udasi, Flat No 501, Mahavir Residency, Nr. Balrajeshwar Temple, LBS Marg, Mulund(W), Mumbai-400080.
3. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2<sup>nd</sup> Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. Guard File.

