

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

| | |
|----------------------------|------------|
| Case No. | 23/2020 |
| Date of Institution | 25.09.2019 |
| Date of Order | 05.05.2020 |

In the matter of:

1. Sh. Naresh K. Khetan, Balrampur Chini Mills Colony, Post Balarampur, Balarampur, UP-271201.
2. Director General of Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Azeagaia Development Pvt. Ltd., 505-B & 5056, 5th Floor,
Titanium Shalimar Cooperative Park, Plot No. TC/G-1/1,
Vibhuti Khand, Gomati Naar, Lucknow, UP-226010.

Respondent

Quorum:-

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

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Present:-

1. None for the Applicants No 1.
2. None for the Applicant No. 2.
3. Sh. Sahil Dua, CA & Sh. Ankit Bhargave, CA for the Respondent.

ORDER

1. The present Report dated 24.09.2019 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after a detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the present case are that the Applicant No. 1 had filed an application dated 21.01.2019 (Annex-1) before the Standing Committee on Anti-profiteering, under Rule 128 of the Central Goods and Services Tax Rules, 2017 alleging profiteering by the Respondent in respect of the purchase of Flat no. A-802 in Respondent's project "Azea Botanica", situated at Plot No. 11/GH/8, Vrindavan Yojana No.3, Sector-11, Lucknow and had also alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) by way of commensurate reduction in the prices of the apartment purchased by him, on implementation of the GST w.e.f. 01.07.2017. The said application was examined by the Standing Committee on Anti-profiteering in its meeting held on 11.03.2019 and upon being prima facie satisfied that the

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Respondent had contravened the provision of Section 171 (1) of the CGST Act, 2017, had forwarded the same with its recommendation to the DGAP for investigation to determine whether the benefits of reduction in the rate of tax or ITC had been passed on by the Respondent to his recipients. The minutes of the meeting were received by the DGAP on 27.03.2019 (Annex-2).

2. The DGAP has mentioned that alongwith the application the Applicant No. 1 had also submitted a copy of the flat buyer- seller agreement, copies of demand letters and copies of his communication with the Respondent.

3. Thereafter, the DGAP on receipt of the reference from the Standing Committee on Anti Profiteering, had issued notice to the Respondent on 04.04.2019 (Annex-3) under Rule 129(3) of the above Rules, calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the Applicant No. 1 by way of commensurate reduction in price and if so, to *suo-moto* determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all the supporting documents. The Respondent was also given an opportunity to inspect the non-confidential evidence/information furnished by the Applicant No. 1 during the period from 10.04.2019 to 12.04.2019. However, the Respondent did not avail of the said opportunity. Vide e-mail dated 20.08.2019 (Annex-4) the Applicant No. 1 was also given an opportunity to inspect the non-confidential

evidence/reply furnished by the Respondent on 26.08.2019 or 27.08.2019. However, he also did not avail of the said opportunity.

4. The DGAP in his above Report has stated that the period covered by the current investigation was from 01.07.2017 to 31.03.2019. Also, the time limit to complete the investigation was extended upto 26.09.2019 by this Authority vide its Order dated 19.06.2019 (Annex-5) in terms of Rule 129 (6) of the CGST Rules, 2017.
5. The DGAP has also stated that in response to the notice dated 15.01.2019, the Respondent has submitted replies vide letters 23.04.2019 (Annex-6), 14.05.2019 (Annex-7), 10.06.2019 (Annex-8), 09.08.2019 (Annex-9), and 05.09.2019 (Annex-10) and has stated:-

- a. That he had outsourced the construction work to a contractor named M/s Vensa Infrastructure Ltd. All the expenses on construction including material, labour and other expenses were to be borne by the contractor. The contractor on completion of various milestones had raised invoices based on the agreed rate and charged Service Tax/GST as applicable. In the pre-GST regime, out of the total Cenvat credit claimed by him, 75% was on Service Tax paid to the contractor for construction. Post implementation of GST, the applicable tax rate on works contract service had gone up from 6% to 18%. Despite an increase in the tax rate, he had not increased the

rates of existing home buyers. Therefore he had not benefitted on account of ITC.

b. That he had given the home buyers 4% (aprox) discount in the name of GST ITC, which had been given from his own margin.

6. The DGAP in his Report has further stated that vide the aforesaid letters, the Respondent had submitted the following documents/information:-

- a. GSTR-1 & GSTR-3B Returns for the period from July-2017 to March-2019.
- b. Copies of Tran-1 Returns for transitional credit availed by him.
- b. Copies of Service Tax and VAT Returns for the period from April, 2016 to June, 2017.
- c. Electronic Credit Ledger for the period from July, 2017 to March, 2019.
- d. Pre-GST and post-GST Applicable tax rates.
- e. Copy of Balance Sheets for FY 2016-17 & 2017-18.
- f. Details of turnover and ITC in respect of the project "Azea Botanica".
- g. List of home buyers in the project "Azea Botanica".



7. The DGAP in his report has further stated that the Respondent had requested that the ITC Register and home buyers list were to be treated as confidential in terms of Rule 130 of the above Rules.
8. The DGAP has further stated that the various replies of the Respondent and the documents/evidence on record have been carefully examined and the main issues to be examined were (a) whether there was benefit of reduction in the rate of tax or ITC on the supply of construction service by the Respondent after implementation of the GST w.e.f. 01.07.2017 and if so, (b) Whether the Respondent has passed on such benefit to the recipients by way of commensurate reduction in prices, in terms of Section 171 (1) of the CGST Act, 2017.
9. The DGAP in his report has mentioned that the Respondent had submitted a copy of the sale agreement dated 20.05.2016, for the sale of Flat No. A-802 to the Applicant in his project "Azea Botanica", measuring 2055 square feet, at the basic sale price of Rs. 2800/- per square feet. The details of the payment schedule have been furnished by the DGAP in Table-'A' below:-

Table-A (Amount in Rs.)

| S No. | Payment Stages | Due Date | Basic % | Gross Amount (Excluding Taxes) | Service Tax including SBC & KKC | GST | Total |
|-------|------------------------|------------|---------|--------------------------------|---------------------------------|-----|----------|
| 1 | At the time of Booking | 24-02-2016 | 5% | 2,87,700 | 10,430 | - | 2,98,130 |
| 2 | On Agreement | 24-03-2016 | 5% | 2,87,700 | 10,430 | - | 2,98,130 |

| | | | | | | | |
|--------------|---------------------------|------------|-------------|------------------|-----------------|-----------------|------------------|
| 3 | On Start Of Excavation | 24-03-2016 | 10% | 5,75,400 | 23,327 | - | 5,98,727 |
| 4 | On Start of Basement Slab | 24-03-2016 | 10% | 5,75,400 | 25,893 | - | 6,01,293 |
| 5 | On Start of 1st Floor | 24-03-2016 | 5% | 2,87,700 | 12,947 | - | 3,00,647 |
| 6 | On Start of 2nd Floor | 01-07-2016 | 5% | 2,87,700 | 12,947 | - | 3,00,647 |
| 7 | On Start of 3rd Floor | 10-08-2016 | 5% | 2,87,700 | 12,947 | - | 3,00,647 |
| 8 | On Start of 4th Floor | 10-09-2016 | 5% | 3,95,176 | 25,215 | - | 4,20,391 |
| 9 | On Start of 5th Floor | 25-11-2016 | 5% | 2,87,700 | 12,947 | - | 3,00,647 |
| 10 | On Start of 6th Floor | 20-12-2016 | 5% | 2,87,700 | 12,947 | - | 3,00,647 |
| 11 | On Start of 8th Floor | 25-02-2017 | 5% | 3,95,176 | 25,215 | - | 4,20,391 |
| 12 | On Start of 10th Floor | 05-04-2017 | 5% | 2,87,700 | 12,947 | - | 3,00,647 |
| 13 | On Start of 12th Floor | 11-12-2017 | 5% | 3,12,700 | - | 37,524 | 3,50,224 |
| 14 | On Start of 14th Floor | 17-02-2018 | 5% | 3,95,176 | - | 44,340 | 4,39,516 |
| 15 | On Start of Brick Work | 21-04-2018 | 5% | 2,87,700 | - | 34,522 | 3,22,222 |
| 16 | On Start of Plastering | 01-12-2018 | 5% | 3,12,700 | - | 37,524 | 3,50,224 |
| 17 | On Start of Plumbing Work | - | 5% | 2,87,700 | - | 34,524 | 3,22,224 |
| 18 | On Offer of possession | - | 5% | 4,56,822 | - | 51,738 | 5,08,560 |
| Total | | | 100% | 62,95,550 | 1,98,192 | 2,40,172 | 67,33,914 |

10. The DGAP has reported that the contention of the Respondent that the accurate quantum of ITC benefit would be passed on to the recipients once the project was fully completed and the Respondent had knowledge of the exact benefit of ITC, might be correct but the profiteering, if any, had to be established at a given point of time, in terms of Rule 129 (6) of the Rules. Therefore, the ITC which was available to the Respondent and the amount received by him from the Applicant and other recipients till

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31.03.2019, had to be taken into account for determining the extent of profiteering.

11. The DGAP has also reported that another aspect that was kept in mind while determining the amount of profiteering was that the ITC proportionate to the unsold units would have to be reversed once the completion certificate was obtained, as ITC in respect of such unsold units would have been claimed in the relevant months when inward supplies were received by the Respondent. This finding was supported by para 5 of the Schedule-III of the CGST Act, 2017 (Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services) which reads as *"Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building"* read with clause (b) of Paragraph 5 of Schedule II of the Central Goods and Services Tax Act, 2017 which reads as *"(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier"*. Thus, The DGAP has thus found that the ITC pertaining to the residential units which were under construction but not sold was provisional ITC which might be required to be reversed by the Respondent, if such units remained unsold at the time of issue of the completion

certificate, in terms of Section 17 (2) & Section 17 (3) of the Central Goods and Services Tax Act, 2017, which read as under:-

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

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

Therefore, the ITC pertaining to the unsold units may not fall within the ambit of this investigation and the Respondent was required to recalibrate the selling price of such units to be sold to the prospective buyers by considering the proportionate benefit of additional ITC available to him post-GST.

12. The DGAP has further reported that prior 01.07.2017, i.e., in the pre-GST era, the Respondent was eligible to avail CENVAT credit of Service Tax paid on input services only (no credit was

available in respect of Central Excise Duty paid on inputs and VAT paid on inputs). However, post-GST, the Respondent could avail ITC of GST paid on all inputs and input services. From the data submitted by the Respondent, the details of the ITC availed by the Respondent, his turnover for the project "Azea Botanica", the ratio of ITC to the turnover during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to March, 2019) periods, has been furnished by the DGAP in Table-'B' below:-

Table-B (Amount in Rs.)

| Sr. No. | Particulars | April, 2016 to June, 2017 (Pre-GST) | July, 2017 to March, 2019 (Post-GST) |
|---------|-------------------------------------------------------------------------|-------------------------------------|--------------------------------------|
| 1 | CENVAT credit of Service Tax paid on input services (A) | 2,88,12,927 | - |
| 2 | Credit of VAT on Inputs (B) | - | - |
| 3 | Total CENVAT/VAT Credit Available (C)= (A+B) | 2,88,12,927 | - |
| 4 | ITC of GST (D) | - | 8,07,24,336 |
| 5 | Total turnover as per home buyers list (E) | 72,38,10,202 | 69,64,97,850 |
| 6 | Total saleable residential area in the project (in Sq. Ft.) (F) | 10,27,462 | 10,27,462 |
| 7 | Area Sold relevant to Turnover as per Home buyers list (in Sq. Ft.) (G) | 3,43,360 | 4,58,535 |
| 8 | CENVAT/ITC relevant to turnover (H)= [(C) or D*(G)/(F)] | 96,28,781 | 3,60,25,599 |
| 9 | Ratio of CENVAT/ ITC to Turnover [(I)=(H)/(E)]*100 | 1.33% | 5.17% |

13. The DGAP has also claimed that as per the Table-B, the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 1.33% and during the post-GST period (July-2017 to

December, 2018), it was 5.17%. This clearly confirmed that post-GST, the Respondent had been benefited from additional ITC to the tune of 3.84% (5.17% - 1.33%) of the turnover. Accordingly, the profiteering had been examined by comparing the applicable tax and ITC available for the pre-GST period (April, 2016 to June, 2017) when only Service Tax was leviable @4.5% to the post-GST period (July, 2017 to March, 2019) when the effective GST rate was 12% (GST @18% alongwith 1/3rd abatement for land value) on construction service, vide Notification No.11/2017-Central Tax (Rate) dated 28.06.2017 (Annex-11). On the basis of the figures contained in Table-'B' above, the comparative figures of the applicable tax rate and ratio of ITC to the turnover during the pre-GST and the post-GST periods, the recalibrated base price and the excess realization (profiteering) during the post-GST period, has been furnished by the DGAP in Table-'C' below:-

Table-C (Amount in Rs.)

| S. No. | Particulars | | Pre-GST | Post- GST |
|--------|-------------------------------------------------------------------------------------------------------------------------------------------|---------------------|---------------------------|---------------------------|
| | Period | A | April, 2016 to June, 2017 | July, 2017 to March, 2019 |
| 1 | Tax Rate | B | 4.5% | 12% |
| 2 | Ratio of CENVAT credit/ ITC to Turnover as per Table B above (%) | C | 1.33% | 5.17% |
| 3 | Increase in ITC availed post-GST (%) | D= 5.17% less 1.33% | - | 3.84% |
| | Analysis of Increase in ITC: | | | |
| 4 | Base Price raised during post-GST period (July, 2017 to March, 2019) | E | | 69,64,97,850 |
| 5 | Less: Base Price raised during July, 2017 to March, 2019 (Flats sold after 01.07.2017 and agreement done after adjusting benefit GST ITC) | F | | 6,35,56,734 |
| 6 | Net Base Price raised during post-GST period (July, 2017 to March, 2019) | G=E-F | | 63,29,41,116 |
| 7 | GST @ 12% on Base Price | H= G*12% | | 7,59,52,934 |

| | | | | |
|----|------------------------------------------|--------------------------------|--|--------------|
| 8 | Total Demand raised post-GST | $I=G+H$ | | 70,88,94,050 |
| 9 | Recalibrated Base Price | $J= G*(1-D)$ or 96.14% of E | | 60,86,36,177 |
| 10 | GST @12% on recalibrated Base Price | $K = J*12\%$ | | 7,30,36,341 |
| 11 | Commensurate Demand price | $L = J+K$ | | 68,16,72,518 |
| 12 | Excess Realization or Profiteered Amount | $M= I - L$ | | 2,72,21,532 |

14. The DGAP in his report has claimed that as per Table-‘C’, the additional benefit of ITC of 3.84% of the turnover should have resulted in commensurate reduction in the base prices as well as cum-tax prices. In terms of Section 171 of the CGST Act, 2017, the benefit of the additional ITC was required to be passed on to the recipients. Whereas the Respondent had contended that any such benefit would eventually be passed on to the recipients at the time of giving possession of the flats, but as observed earlier, the profiteering has to be determined at a given point of time, in terms of Rule 129 (6) of the Rules. For the present, the Respondent had retained the benefit on account of additional ITC. In other words, by not reducing the pre-GST base price by 3.84% on account of additional benefit of ITC and charging GST @ 12% on the pre-GST base price, the Respondent appeared to have contravened the provisions of Section 171 of the of the CST Act, 2017.

15. The DGAP in his report has also contended that on the basis of aforesaid CENVAT/ITC availability in pre-GST and post-GST periods and the amount collected by the Respondent from the Applicant No. 1 and other buyers of the flats and commercial shops during the period from 01.07.2017 to 31.03.2018, the

amount of benefit of ITC that needed to be passed on by the Respondent to the recipients or in other words, the profiteered amount came to Rs. 2,72,21,532/- which included 12% GST on the base profiteered amount of Rs. 2,34,04,939/-. The home buyer wise break-up with the flat/ unit number was given in Annex-12. Further, as per Sl. No. 130 of Annexure-12, the benefit to be passed on to the Applicant No. 1 worked out to Rs. 56,266/- which included both the profiteered amount @3.84% of the base price and 12% GST on the said profiteered amount.

16. The DGAP has also claimed that the Respondent had submitted that he had passed on the benefit of Rs. 2,04,77,678/- to 134 home buyers who have booked their flats upto 31.03.2019. A summary of category-wise profiteering and the benefit passed on has been furnished by the DGAP in the Table-'D' below:-

Table-D (Amount in Rs.)

| S. No. | Category of Customers | No. of Units | Area (in Sqf) | Amount Raised Post GST | Profiteering Amt. as per Annex-12 | Benefit claimed to have been Passed on by the Respondent | Difference | Remark |
|--------|-----------------------|--------------|---------------|------------------------|-----------------------------------|----------------------------------------------------------|------------|--------------------------------------------------------------------------------|
| A | B | C | D | E | F | G | H=F-G | I |
| 1 | Applicant | 1 | 2,055 | 13,08,276 | 56,266 | - | 56,266 | Further Benefit to be pass on |
| 2 | Other Than Applicant | 166 | 2,68,258 | 34,72,94,554 | 1,49,36,444 | 76,31,422 | 73,05,022 | Further Benefit to be pass on |
| 3 | | 95 | 1,66,877 | 28,43,38,286 | 1,22,28,822 | 1,28,46,256 | -6,17,436 | Excess Benefit passed on |
| 4 | Other Than Applicant | 11 | 21,345 | 6,35,56,734 | - | - | - | Flats sold after 01.07.2017 and agreement done after adjusting benefit GST ITC |
| 5 | Other Than Applicant | 36 | 60,356 | - | - | - | - | No Consideration raised Post-GST |
| 6 | Other Than Applicant | 321 | 5,08,571 | - | - | - | - | Unsold Units as on 31.03.2019 |
| 7 | Total | 630 | 10,27,462 | 69,64,97,850 | 2,72,21,532 | 2,04,77,678 | - | - |

17. The DGAP has further claimed that as per the Table-D above, the benefit claimed to have been passed on by the Respondent was less than what he should have passed on in 167 cases including the Applicant (Sr. 1 & 2 of the above table) amounting to Rs. 73,61,288/- (Rs. 73,05,022 + Rs. 56,266). Further, benefit claimed to have been passed on by the Respondent was higher, compared to what he should have passed on in respect of 95 recipients of residential flats (Sr. 3 of the above table) amounting to Rs. 6,17,435/-. However, these amounts of the excess benefit, claimed to have been passed on, could not be set off against the additional benefit to be passed on to other recipients but might be adjusted against the future demands from such home buyers.
18. The DGAP has further reported that the above computation of profiteering was with respect to 262 home buyers from whom construction value had been received by the Respondent during the period 01.07.2017 to 31.03.2019 (excluding flats sold after 01.07.2017 on which agreements were executed after adjusting benefit of GST ITC. Whereas the Respondent had booked 319 flats till 31.03.2019, he had claimed that effective from 01.07.2017, he had sold 11 flats at the rates agreed by the customers on all-inclusive prices after considering market conditions, escalations, demand-supply balance, GST ITC benefit, development in the locality, location of the land, proximity to education institution/ hospitals/ airport etc. and the price so fixed was mutually negotiated and agreed upon. The Respondent had also submitted

the declaration letter given by these 11 home buyers to the Respondent with the agreement. This argument of the Respondent has merit and therefore, ITC pertaining to the above 11 units was outside the scope of this investigation as the selling price of such units was negotiated between the home buyers and the Respondent taking into consideration the benefit of ITC or change in the rate of GST. Further, out of the remaining 298 flats [(309) - (11)], 36 customers had booked the flats in pre-GST period and also paid amounts in pre-GST period but they had not paid any consideration towards construction during the post-GST period from 01.07.2017 to 31.03.2019 (the period covered by investigation). If ITC in respect of these 36 units was taken into account to calculate profiteering in respect of 262 units where payments towards construction value had been received post-GST, the ITC as a percentage of turnover would be distorted and erroneous. Therefore, the benefit of ITC in respect of these 36 units should be calculated when the consideration towards construction was received from the concerned home buyers, by taking into account the proportionate ITC in respect of such units. On the basis of the details of outward supplies submitted by the Respondent, it was observed that he had supplied the construction service in the State of Uttar Pradesh only.

19. The DGAP has further submitted that the benefit of additional ITC of 3.84% of the turnover had accrued to the Respondent for the project "Azea Botanica". This benefit was required to be

passed on to the recipients but this was not done. Section 171 of the CGST Act, 2017 appeared to have been contravened by the Respondent, in as much as the additional benefit of ITC @3.84% of the base price received by the Respondent during the period 01.07.2017 to 31.03.2019, had not been passed on by the Respondent to 167 recipients including the Applicant No. 1. Although the Respondent claimed to have passed on the excess amount of Rs. 6,17,436/- to 95 home buyers as mentioned in Sr. No. 3 of Table- 'D' above and Para- 17 supra, the investigation revealed that the Respondent had realized an additional amount of Rs. 56,266/- as mentioned at Sr. No. 1 of the Table- 'D' from the Applicant No. 1 and Rs. 73,05,022/- as mentioned at Sr. No. 2 of the Table- 'D' from 166 other recipients (who were not Applicants in the present proceedings). These recipients were identifiable as per the documents provided by the Respondent, giving the names and addresses along with Unit No. allotted to such flat buyers/ customers/ recipients. Therefore, the total additional amount of Rs. 73,61,288/- was required to be returned to the Applicant and such eligible recipients.

20. The DGAP has further stated that in the present case, the Respondent had contravened the provisions of Section 171 of the CGST Act, 2017.

21. The investigation Report was received by this Authority from the DGAP on 25.09.2019 and was considered in the sitting held on 26.09.2019 and it was decided to accord opportunity of

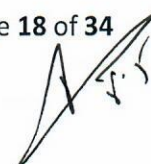
hearing to the Applicants and the Respondent on 24.10.2019. Notice was also issued to the Respondent directing him to explain why the Report dated 24.09.2019 furnished by the DGAP should not be accepted and his liability for violation of the provisions of Section 171 of the CGST Act, 2017 should not be fixed.

22. The Respondent vide his submissions dated 13.11.2019 contended as under:-

- a. That there was no benefit of ITC on supplies received by him as the costing (including taxes) had increased in the GST regime.
- b. That the basic sale price was agreed by him and the home buyers in the pre-GST Service Tax era after considering the CENVAT available to the Respondent. Now in the GST era since the same benefits were available to him, there was no additional benefit of ITC that had accrued to him.
- c. That during the Service Tax period, most of the CENVAT/ ITC was accruing to him from receipt of works contract service. Since the rate paid to the contractor had remained the same pre and post GST and there had been no benefit on account of the reduction in tax rate thereon, the additional ITC accruing to him was mainly on account of higher rate of GST charged by the contractor. Further, post GST the cost of construction material like sand, coarse sand and grit stones had increased resulting in significant decline in the margins and no benefits being available in the GST regime.

As such, there was no additional ITC in respect of the material/ goods during the GST period.

- d. That the unutilized ITC on the completion of the project if any would not be refunded in accordance with Notification No. 15/2017 – Central Tax Rate dated 28-06-2017. This implied that the benefit of ITC should be reduced to that extent as he would have paid GST on inward supplies but in the end it might neither be adjusted against outward supplies nor a refund of the same would be available resulting in higher cost to him.
- e. That in accordance with the provisions of Section 17(2) read with Rule 42 he was required to reverse ITC proportionate to the exempt supply. The sale of flats subsequent to completion of the project should not be chargeable to GST since he would have to reverse the proportionate ITC in the manner laid down in Rule 42 of the CGST Rules. The sale of flats was dependent on external factors and was beyond the control of the Respondent. It was on account of this fact that a reliable estimate of the reversal of ITC at the time of completion of the project could not be made. Therefore the amount of ITC that would be required to be reversed at a future date could not be determined. The reversal of ITC at a future date should correspondingly result in a lower benefit being passed on to the existing home buyers. It might be possible that on account of the above factors, a higher



amount of credit would be passed on to the buyers which he might not be able to recover from the home buyers thereby resulting in losses to him.

- f. That the DGAP in his report while calculating the ratio of CENVAT/ ITC to turnover for the pre-GST era had considered a period of 15 months i.e. April 2016 to June 2017 and compared it with a period of 21 months i.e. July 2017 to March 2019. The ratio of CENVAT to Turnover in the initial years of the project was significantly higher than the ratio for the period April 2016 to June 2017. If the CENVAT of the period prior to April 2016 was not considered, it might result in an incorrect computation of profiteering. Table-1 below depicts the ratio of Total CENVAT to Total Turnover (calculated in the manner as laid down in the report of DGAP) if the entire CENVAT prior to April 2016 was also considered:-

Table-1 (Amount in Rs.)

| S.No. | Particulars | Upto Mar 2016 | Apr 16 to Jun 17 | Total Pre- GST |
|-------|----------------------------------------------------------------------------------|---------------|------------------|----------------|
| 1 | Total CENVAT Credit of Service Tax Paid on Input Services (Refer annexure 2) (A) | 2,23,32,968 | 2,88,12,927 | 5,11,45,895 |
| 2 | Total Turnover as per Home Buyers List (B) | 18,84,06,472 | 72,38,10,202 | 91,22,16,674 |
| 3 | Total Saleable Residential Area in the project (Sq Ft) (C) | 10,27,462 | 10,27,462 | 10,27,462 |
| 4 | Area Sold relevant to Turnover as per Home Buyers List (Sq Ft) (D) | 2,22,011 | 3,43,360 | 3,43,360 |

| | | | | |
|---|----------------------------------------------------------------|-----------|-----------|-------------|
| 5 | CENVAT relevant for Turnover (E) = (B) * (D) / (C) | 48,25,643 | 96,28,781 | 1,71,63,007 |
| 6 | Ratio of CENVAT / Input Tax Credit to Turnover (I)=(H)/(E)*100 | 2.56% | 1.33% | 1.88% |

g. That it was evident from the above Table that the period during which major construction activities (i.e. upto March 2016) were undertaken, had not been considered while computing the ratio of CENVAT to Turnover. Had the same been considered, the ratio of Total CENVAT to Total Turnover Pre-GST would have increased to 1.88% and the profiteering calculated as per Table '2' below:-

Table-2

(Amount in Rs.)

| | | |
|-----------------------------------------------------------------|-----------------------------------|--------------|
| Net Base price post GST as calculated in DGAP Report | A = S. No. 4 of Table C of Report | 63,29,41,116 |
| GST on Base Price @ 12% | B = A * 12% | 7,59,52,934 |
| Total Demand raised post GST | C = A + B | 70,88,94,050 |
| Recalibrated Base price calculated after considering ITC Credit | D = A * (1 - (5.17% - 1.88%)) | 61,21,17,353 |
| GST on recalibrated Base Price @ 12% | E = D * 12% | 7,34,54,082 |
| Commensurate Demand price | F = E + D | 68,55,71,436 |
| Excess demand as per methodology | G = C - F | 2,33,22,614 |

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| | | | |
|-------------------------------------|--------------------------|--|--|
| adopted by DGAP after entire period | considering construction | | |
|-------------------------------------|--------------------------|--|--|

h. That the DGAP in his report has in Table 'C' computed the excess realisation as Rs. 2,72,21,532/- which was higher than Rs. 38,98,918/- [Rs. 2,72,21,532 – Rs. 2,33,22,614]. Had the earlier period been considered by the DGAP then the profiteering amount would have been Rs. 34,62,370 [Rs. 73,61,268 – 38,98,918].

i. That he had estimated and passed on the benefit of ITC amounting to Rs. 2,04,77,678/- to all the home buyers whose basic sale prices exceeded the threshold fixed by him. He had fixed the threshold considering the margins available on the agreed rate at which the booking had been made. The benefit was passed on by reducing it from the demand of the home buyers. He contended that it was evident from Table 'D' of the Report of DGAP that he had passed on the benefit on the basis of his estimation.

j. That in order to avoid further litigation, he agreed to pass on the ITC benefit determined by this Authority.

23. The Respondent has also contended the following:-

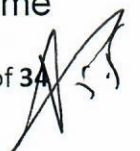
a. That post implementation of GST he had passed on the benefit of ITC to the home buyers by way of reduction in the amount demanded from the home buyers at the time

of raising the demands on them in accordance with the payment schedule agreed with the home buyers.

- b. That alongwith his submissions he has submitted the list of home buyers to whom the benefit had been passed on along with copies of the credit notes that he had issued to the home buyers. He also prayed that this list and the details of the credit notes issued be kept confidential.
- c. That he has submitted a copy of his agreement with his contractor, i.e. M/s Vensa Infrastructure Ltd., alongwith his submissions.

24. The Respondent vide his submissions dated 18.12.2019 has further stated as follows:-

- a. That the DGAP in para 15 of his report had compared the ratio of ITC available to turnover during the pre-GST (April 2016 to June 2017) and post-GST (July 2017 to March 2019) periods. The Construction of Azea Botanica project was continuing since 2012-2013. The pre-GST period excluded the previous period data (i.e. upto March 2016). This implied that the ratio of ITC available to turnover in the initial years was substantially higher than the period considered (April 2016 to June 2017).
- b. That the increase in ratio of ITC available to the turnover post implementation of GST could be attributed to higher tax on inward supplies in post GST era. That the construction cost excluding taxes had remained the same



however, the construction cost including taxes had increased post GST which was evident from the invoices of sub-contractor raised pre and post GST (Annexure - 1 of submission dated 13-11-2019). It was on account of the higher taxes paid on inward supplies post GST which had resulted in higher ITC being available to him as the tax on works contract service had increased from 6% (pre-GST) to 18% (post-GST). The method adopted by DGAP did not consider this aspect while computing the ratio of ITC availed to the turnover.

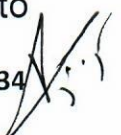
- c. That he has further submitted that the he would pass on the additional ITC benefit as computed by the DGAP but subject to adjustment as mentioned in preceding paragraphs above or as may be directed by this Authority.

25. Supplementary Report was sought from the DGAP on the issues raised by the Respondent vide his above written submissions, under Rule 133 (2A) of the CGST Rules, 2017. The DGAP has submitted his report on 02.01.2020 against the issues raised by the Respondent and has stated:-

- a. That in his report dated 24.09.2019, the increase in the ITC availed by the Respondent as a percentage of the Respondent's turnover in the post GST period has been quantified. The input or input service wise availability or non-availability of ITC, prior to and post implementation of GST, had not been examined. Further, there should be no

extra liability on the Respondent on account of GST charged by the contractor as the said contractor was also enjoying ITC on the purchases made by him resulting in reduction in prices of the materials purchased by him which he would have passed on to the Respondent.

- b. That the contention of the Respondent that the accurate amount of ITC benefit would be passed on to the recipients once the project was fully completed and the Respondent had complete knowledge of the exact benefit of ITC, but profiteering, if any, had to be arrived at a given point of time in terms of Rule 129 (6) of the Rules. Therefore, the ITC available to the Respondent and the amount demanded by him from the Applicant No. 1 and the other recipients till 31.03.2019, was taken into account for the same. The ITC pertaining to unsold units was already excluded from the computation of profiteering.
- c. That profiteering was computed for the period July-2017 to March-2019 for which comparison was made with the ITC available in the pre-GST period of 01.04.2015 to 30.06.2017. Therefore, the period considered in DGAP's Report was reasonable and comparable.
- d. That for computation of profiteering, he had considered the total demand raised to all the home buyers during the period July-2017 to March-2019. Once the demand had been raised by the Respondent, the home buyers needed to



pay the amount according to the schedule/date mentioned in demand letter. Therefore, the recovery of the amount mentioned in the demand letter is entirely the Respondent's discretion.

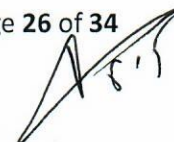
e. That the Respondent vide submissions dated 02.12.2019 has submitted all the demand letters issued to the home buyers in which total benefit of ITC amounting to Rs. 2,04,77,678/- had been passed on at the time of issuance of these demand letters. The demand letters had been duly verified with the worksheet submitted by the Respondent and upon verification, it was observed that the Respondent had already passed on the benefit of Rs. 2,04,77,678/- by reducing the amount from the demand letters. The summary of benefit already passed on and to be passed on, to all the home buyers had already been explained in Table-D and para-20 of the DGAP's report dated 24.09.2019. Further, as per para-22 of the DGAP's Report, the benefit already passed on to the home buyers by the Respondent was already adjusted in the further benefit to be passed on by the Respondent to these home buyers.

26. The Respondent vide submissions dated 22.01.2020 has also submitted acknowledgement from 40 home/flat buyers alongwith the details of ITC benefit passed.

27. The Respondent further vide submissions dated 25.01.2020 has stated that he in order to buy peace of mind and avoid future

litigations had agreed to pass on the benefit of ITC to the complainant and 166 other home buyers. That he was not contesting the clarifications given by the DGAP vide report dated 02.01.2020. He had also no further submissions to be made against the DGAP Report.

28. The Respondent vide submissions dated 10.02.2020 has further stated that it was evident that the DGAP had calculated total profiteering amount of Rs. 2,72,21,532/- out of which an amount of Rs. 2,04,77,678 has already been passed on to the home buyers by way of reduction in the demanded amount, Rs. 6,17,436/- was added as excess benefit passed on and net additional benefit of Rs. 73,61,290/- was required to be passed on. It has been stated by the DGAP vide report dated 02.01.2020 that the demand letters raised by the Respondent to the customers in respect of passing on of the ITC benefit had been duly verified and upon verification, it was observed that the Respondent had already passed on the additional ITC benefit of Rs. 2,04,77,678/- by reducing the amount from the demand letters. He had provisionally, in order to comply with the DGAP's Report had issued credit notes to the home buyers to whom the additional benefit was required to be passed on to save the interest that might be payable on the profiteered amount. The list of such credit notes was attached as Annexure 'A'. Further, the copies of acknowledgements from a few home buyers regarding



the receipt of credit notes for passing on of the additional ITC benefit had also been attached as Annexure 'B'.

29. The Respondent vide his submissions dated 24.02.2020 has further stated that as per the directions of this Authority passed vide order dated 10.02.2020, he had submitted the copies of the acknowledgements from the home buyers regarding the receipt of the credit notes issued for passing on of the additional ITC benefit.

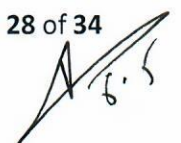
30. This Authority has carefully examined the DGAP's Reports, the written submissions of the above Applicants as well as the submissions of the Respondent. The issues to be decided by this Authority in the present case are as under:-

- 1) Whether the Respondent has availed the benefit of additional ITC during the period between 01.07.2017 to 31.12.2018 which he was liable to pass on to his buyers?
- 2) Whether there was any violation of the provisions of Section 171 of the CGST Act, 2017 committed by the Respondent?
- 3) If yes, then what was the quantum of profiteering and whether the benefit, if any, has been passed on to the customers/ recipients/ flat buyers by the Respondent along with interest as applicable.

31. A perusal of Section 171 (1) of the CGST Act shows that it provides as under:-

(1). “Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.”

It is clear from the plain reading of Section 171 (1) mentioned above that it deals with two situations one relating to the passing on the benefit of reduction in the rate of tax and the second pertaining to the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from the DGAP’s Report that there has been no reduction in the rate of tax in the post GST period; hence the only issue to be examined is as to whether there was any net benefit of ITC with the introduction of GST. On this issue it has been revealed from the DGAP’s Report that the ITC as a percentage of the turnover that was available to the Respondent during the pre-GST period (April-2016 to June-2017) was 1.33% and during the post-GST period (July-2017 to December-2018), it was 5.17%. This confirms that, post-GST, the Respondent has been benefited from additional ITC to the tune of 3.84% (5.17% - 1.33%) of his turnover and the same was required to be passed on to the Applicant No. 1 and the other flat buyers. The DGAP has calculated the amount of ITC benefit to be passed on to all the flat buyers as Rs. 2,72,21,535/- which was availed by the Respondent vide Table- C Supra on the basis of the information supplied by the Respondent, which the Respondent has himself accepted that he was in agreement with



the DGAP Report dated 24.09.2019 and hence the amount of profiteering computed by the DGAP is hereby accepted as correct.

32. We observe that the Respondent, vide his submissions before us, has himself admitted that he has resorted to profiteering in as much as the ITC benefit that has accrued to him was not passed on to his customers/ flat buyers/ recipients, by way of commensurate reduction in the prices of the flats/ units. We also observe that the Respondent is in agreement with the DGAP's report and that he has stated that he is ready to pass on the said benefit to his customers/ flat buyers/ recipients.

33. We further observe that the DGAP has calculated the total profiteered amount as Rs. 2,72,21,532/- for the period from 01.07.2017 to 31.03.2019, out of which, an amount of Rs. 2,04,77,678/- was claimed to be passed on by the Respondent to the home buyers by way of reduction in the demand raised by him on his customers/ flat buyers/ recipients. The DGAP, vide his report dated 02.01.2020, has also reported that the claim of the Respondent that he had passed on the ITC benefit amounting to Rs. 2,04,77,678/- to his customers/ flat buyers by way of reducing the amount from their demand letters, has been duly verified by the DGAP with the data submitted by the Respondent and had been found to be correct as per the calculations made in the table-D & para-22 of the DGAP Report dated 24.09.2019. Table-D of the DGAP Report dated 24.09.2020 reveals that the amount of

ITC benefit required to be passed on by the Respondent to the customers/flat buyers was Rs. 2,72,21,532/-, out of which an amount of Rs. 2,04,77,678/- had been claimed to have been passed on to his customers by the Respondent. The same has been verified by the DGAP. Hence, only the balance profiteered amount of Rs. 73,61,290/- is still required to be passed on by the Respondent, which was in the process of being passed on by him to his customers/ flat buyers/ recipients.

34. We find no reason to differ from the above-detailed computation of profiteering and hence the profiteered amount for the period from 01.07.2017 to 31.03.2019, in the instant case, is determined as Rs. 2,72,21,532/-. 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/shops commensurate with the benefit of ITC received by him as has been detailed above.

35. Further, out of the total profiteered amount of Rs. 2,72,21,532/- (inclusive of GST), the balance amount of benefit of Rs. 73,61,288/- shall be passed on, forthwith, by the Respondent to the customers/ flat buyers/ recipients, including Applicant No. 1, in accordance with Annexure-12 of the DGAP Report dated 24.09.2019.

36. The Respondent is also liable to pay interest as applicable on the entire amount profiteered, i.e. Rs. 2,72,21,532/-. Hence the Respondent is directed to also pass on interest @18% to the



customers/ flat buyers/ recipients, including Applicant No. 1, on the entire amount profiteered, starting from the date from which the above amount was profiteered till the date of passing on/ payment, as per provisions of Rule 133 (3) (b) of the CGST Rules 2017.

37. We also order that the balance amount of profiteering of Rs. 73,61,288/- and the entire interest on the total profiteered amount shall be paid by the Respondent within a period of 3 months from the date of this order, failing which the same shall be recovered by the concerned jurisdictional CGST Commissioner (where the Respondent is filing his GST Returns) as per the provisions of the CGST Act, 2017, under the supervision of the DGAP. We also direct the DGAP to take the requisite action, through the jurisdictional CGST Commissioner, to ensure that the benefit amounting to Rs. 73,61,288/- and the applicable interest on the total profiteered amount of Rs. 2,72,21,532 is actually passed on by the Respondent to his customers/ flat buyers/ recipients.

38. It is also observed that the present investigation is only up to 31.03.2019 and any additional benefit of ITC which shall accrue subsequently shall also be passed on to the customers/ flat buyers/ recipients by the Respondent. In case this additional benefit is not passed on to the Applicant No. 1 or any other buyer they shall be at liberty to approach the State Screening Committee Uttar Pradesh for initiating fresh proceedings under Section 171 of the above Act against the Respondent.

39. Further, in line with Rule 136 of the CGST Rules 2017, this Authority directs the jurisdictional CGST Commissioners to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by this Authority is passed on to all the eligible buyers along with applicable interest. A report in compliance of this order shall be submitted to this Authority by the jurisdictional Commissioner CGST within a period of 4 months from the date of receipt of this order

40. It is also evident from the above narration of facts that the Respondent has denied benefit of ITC to the buyers of the flats being constructed by him in his Project 'Azea Botanica' in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and he has thus apparently committed an offence under Section 171 (3A) of the above Act and therefore, he is liable for imposition of penalty under the provisions of the above Section. Accordingly, a notice be issued to him directing him to explain as to 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.

41. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was required to be passed within a period of 6 months from the date of receipt of the Report furnished by the DGAP under Rule 129 (6) of the above Rules. Since, the present Report has been received by this Authority on 25.09.2019 the order was

to be passed on or before 24.03.2020. However, due to prevalent pandemic of COVID-19 in the Country this order could not be passed before the above date due to *force majeure*. Accordingly, this order is being passed today on 05.05.2020 in terms of the Notification No. 35/2020- Central Tax dated 03.04.2020 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes and Customs under Section 168 A of the CGST Act, 2017.

42. A copy of this order be sent to the Applicants, the Respondent, Commissioner CGST/SGST Uttar Pradesh as well as the Principal Secretary (Town and Country Planning), Government of Uttar Pradesh free of cost for necessary action. File of the case be consigned after completion. hahahahah

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



Sd/-
(Dr. B. N. Sharma)
Chairman

Sd/-
(Amand Shah)
Technical Member

Certified Copy

(A.K Goel)
(Secretary, NAA)

File No. 22011/NAA/88/Azeagaia/2019
Copy to:-

Dated: 05.05.2020

1. M/s Azeagaia Development Pvt. Ltd., 505-B & 506, 5th Floor, Titanium Shalimar Cooperative Park, Plot No. TC/G-1/1, Vibhuti Khand, Gomati Naar, Lucknow, UP-226010.

2. Sh. Naresh K. Khetan, Balrampur Chini Mills Colony, Post Balarampur, Balarampur, UP-271201.
3. Director General Anti-Profitteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. The Commissioner of commercial Taxes, U.P. Commercial Tax head office Vibhuti Khand, Gomti Nagar, Lucknow-226010(U.P.).
5. The Principal Chief Commissioner, CGST & Central Excise, Lucknow Zone, 7-A, Ashok Marg, Lucknow-226001 (U.P).
6. Principal Secretary Govt. of Uttar Pradesh, Town and Planning Department, TCG/1-A-V/5, Vibhuti Khand, Gomti Nagar, Lucknow-226010(U.P).
7. NAA Website/Guard File.

 20/20

