

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

Case No. 31/2020

Date of Institution 05.11.2019

Date of Order 17.06.2020

In the matter of:

1. Shri Amarjeet Singh Yadav, D-1101, Pearl Court, Ramprastha Greens, Vaishali, Sector-7, Ghaziabad, Uttar Pradesh – 201010.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

1. M/s Radicon Infrastructure & Housing Private Limited, B-64, Sector-67, Noida, Uttar Pradesh-201301.

Respondent

Quorum:-

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



Present:-

- 1) None for the Applicant No. 1.
- 2) Shri Rana Ashok Rajneesh, Assistant Commissioner for the Applicant No. 2.
- 3) Sh. Chandesh Kumar, Advocate and Sh. Jitin, Assistant Manager (Accounts), Authorised Representative for the Respondent.

ORDER

1. A Report dated 05.12.2018, was received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP), under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017 in which it was stated that an application dated 26.12.2017 was filed before the Uttar Pradesh State Screening Committee on Anti-Profiteering by the Applicant No. 1, alleging profiteering by the Respondent in respect of purchase of a flat in the Respondent's project "Vedantam", located at Plot No. 1-B, Sector-16, Greater Noida, U.P. The above Applicant had alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) which had accrued to him, by commensurate reduction in the price of the flat, after implementation of GST w.e.f. 01.07.2017 and charged Goods & Services Tax (GST) on the full amount of instalments.



2. This application was considered by the above Screening Committee in its meeting held on 12.04.2018 and it was found by it that the Respondent had availed ITC from July 2017 to January 2018 as per his GSTR-3B Returns and had not paid his output tax liability by cash due to availability of sufficient ITC and hence the above Applicant had rightly claimed that he was entitled to the benefit of ITC and since the Respondent had failed to pass on this benefit he had contravened the provisions of Section 171 of the CGST Act, 2017. The above complaint was forwarded by the Screening Committee to the Standing Committee on Anti-profiteering on 16.04.2018 with its recommendations for initiating action against the Respondent.
3. The above application was considered by the Standing Committee on Anti-profiteering in its meeting held on 25.05.2018 and was recommended to the DGAP for detailed investigation under Rule 129 (1) of the CGST Rules, 2017.
4. The DGAP on receipt of the above reference had issued notice to the Respondent under Rule 129 (3) of the above Rules to submit reply as to whether the ITC benefit was passed on by him to his recipients and if not to suo-moto determine the quantum of benefit which was not passed on and intimate the same to him. The Respondent was also given opportunity to inspect the evidence produced by the above Applicant on 03.12.2018 but he did not avail the same. The Applicant No. 1 vide his email dated 13.07.2018 intimated the DGAP that the Respondent had agreed to provide him the benefit of ITC and adjust the same in his next instalment and hence the present proceedings should be stayed.



5. The present investigation has been conducted by the DGAP for the period w.e.f. 01.07.2017 to 31.08.2018 and the period for completing the investigation was extended by this Authority up to 07.12.2018 vide its order dated 28.08.2018 under Rule 129 (6) of the above Rules.
6. The DGAP has intimated that the Respondent had failed to provide the required information even after repeated requests and hence summons under Section 70 of the CGST Act, 2017 read with Rule 129 of the above Rules were issued against him however the Respondent had not put in an appearance nor supplied the required documents. Ultimately, vide his email dated 05.11.2018 he had supplied partial information and was again summoned to furnish the necessary record which was supplied by him vide his email dated 19.11.2018.
7. The Respondent had submitted replies vide his letters dated 10.07.2018, 12.07.2018, 01.08.2018, 09.08.2018, 15.10.2018, 05.11.2018, 19.11.2018 and 29.11.2018 and stated that he had not tried to avoid payment of GST or passing on the benefit of ITC and that he was following the prescribed method of accounting and the benefit of ITC had already been passed on to the Applicant No. 1 and he had been accordingly informed him by email dated 05.02.2018. However, due to wrongly typed address the above email had not been received by the above Applicant due to which the present complaint had been lodged by him. The Respondent had also claimed that he had passed 4% benefit of ITC amounting to Rs. 14,514/- (4% of base price collected on 20.12.2017) to the above

Applicant and he was informed vide letter dated 07.07.2018 which was acknowledged by the above Applicant vide his email dated 09.07.2018 and hence the present notice should be withdrawn.

8. The Respondent had also submitted the following documents along with his replies to the DGAP:-

- a) Copies of GSTR-1 Returns from July, 2017 to August, 2018.
- b) Copies of GSTR-3B Returns from July, 2017 to August, 2018.
- c) Copies of Tran-1 Statements.
- d) Copies of VAT & ST-3 Returns from April, 2016 to June, 2017.
- e) Electronic Credit Ledger from July, 2017 to August, 2018.
- f) Copies of all demand letters, receipts and sale agreement/contract and construction agreement dated 02.04.2012 in the name of the Applicant No. 1 Shri Amarjeet Singh Yadav.
- g) Tax rates- pre-GST and post-GST.
- h) Copy of Balance Sheet for FY 2016-17.
- i) Copy of Cost Audit Report for FY 2016-17.
- j) Copies of documents submitted to RERA.
- k) Details of taxable turnover and ITC of the project "Vedantam".
- l) List of home buyers in the project "Vedantam".

9. The DGAP in his Report has submitted that as per the copies of the demand letters and the payment schedule supplied by the Respondent for the purchase of a flat measuring 1495 square feet at the basic sale price of Rs. 2427/- per square feet, the details of the



amount and the taxes paid by the above Applicant to the Respondent were as has been given below in the Table 'A':-

Table-'A'

(Amount in Rs.)

S. No.	Payment Stages	Due Date	Base Price (%)	Base Price	Other Charges/IFMS	Service Tax including Cess	GST	GST benefit passed on	Total
1	At the time of Booking	02.04.2012	10%	3,62,870	-	11,213	-	-	3,74,083
2	Within 45 Days of Booking	17.05.2012	30%	10,88,610	-	33,638	-	-	11,22,248
3	At the time of PCC	01.10.2014	10%	3,62,870	-	11,213	-	-	3,74,083
4	At the time of 2 nd floor Casting	10.10.2015	10%	3,62,870	-	11,501	-	-	3,74,371
5	At the time of 5 th floor Casting	01.06.2016	10%	3,62,870	-	16,329	-	-	3,79,199
6	At the time of 8 th floor Casting	23.12.2017	10%	3,62,870	-	-	43,544	-	4,06,414
7	GST Benefit to be adjusted in Next Demand	GST benefit given	10%	12,959	-	-	1,555	(14,514)	-
8	At the time of 11 th floor Casting	Demand not raised till 31.08.2018		3,49,911	-		41,989		3,91,900
9	At the time of 14 th floor Casting		10%	3,62,870	-		43,544		4,06,414
10	At the time of Possession				1,49,500				
Total			100%	36,28,700	149500	83,894	1,30,632	(14,514)	39,78,212

10. The DGAP in his Report has also submitted that the Respondent had claimed that he had already passed on the benefit of ITC and paid the same to the Applicant No. 1 who had also requested the DGAP to defer the present proceedings and hence the same should be dropped. However, the DGAP had claimed that there was no legal provision of withdrawing the complaint and he was bound to complete his investigation as per Rule 129 of the above Rules and hence the present proceedings could not be dropped. The DGAP had further submitted that the Respondent had passed on an amount of Rs. 14,514/- as per Receipt No. 8457 dated 12.02.2018 to the above

18.6

Applicant as benefit of ITC which was 4% of the amount paid by him post GST however, he was required to affirm the correctness of the benefit of ITC so passed on by the Respondent by taking in to account the ITC and the amount collect by him from the above Applicant as well as from all other flat buyers post GST.

11. The DGAP had also intimated that para 5 of Schedule-III of the CGST Act, 2017 (Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services) reads as "*Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building*". He has further intimated that clause (b) of Paragraph 5 of Schedule II of the CGST Act, 2017 reads as "*(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier*". Thus, he had submitted that ITC pertaining to the residential units which were under construction but not sold was provisional which might be required to be reversed by the Respondent as per the provisions of Section 17 (2) & Section 17 (3) of the CGST Act, 2017 which read as under:-

Section 17 (2) "Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the

said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies”.

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

Therefore, the DGAP had stated that the ITC pertaining to the unsold units was not taken in to account by him during the present investigation and the Respondent was required to re-fix the selling price of such units by considering the net benefit of additional ITC which would be available to him post-GST.

12. The DGAP had also informed that before the GST was introduced w.e.f. 01.07.2017, the Respondent was entitled to avail the CENVAT credit of Service Tax paid on input services and credit of the VAT amount paid on the purchase of inputs but the CENVAT credit of the Central Excise Duty paid on inputs was not available as per the CENVAT Rules. He had further informed that the Respondent had not been charging VAT from his flat buyers and was discharging his output tax liability on deemed 10% value addition on the purchase value of the inputs paid in cash and hence there was no direct relation of turnover reported in the VAT Returns for the period from April, 2016 to June, 2017 filed by the Respondent with the amount so collected by him from the home buyers. The DGAP has also argued

that the credit of the VAT amount paid on the purchase of inputs and the VAT turnover were not required to be considered for computation of the ITC ratio to taxable turnover for the pre-GST period. The DGAP had also stated that the Respondent was eligible to avail ITC on the GST paid on inputs and input services including the ITC availed by the sub-contractors after coming in to force of the GST w.e.f. 01.07.2017. He had further submitted that it was clear from the information furnished by the Respondent which had been duly verified from his GSTR-1 and GSTR-3B Returns for the period from July, 2017 to August, 2018, the details of the ITC availed by the Respondent and his taxable turnover for the project "Vedantam" during the above period that the ratios of CENVAT/ITC to the Taxable Turnovers during the pre and post GST periods were as has been furnished in Table-B below:-

Table-'B'

(Amount in Rs.)

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	July, 2017 to March, 2018	April, 2018 to August, 2018	Total (Post-GST)
(1)	(2)	(3)	(4)	(5)=(3)+(4)	(6)	(7)	(8)=(6)+(7)
1	CENVAT of Service Tax Paid on Input Services as per ST-3 (A)	93,82,102	14,97,268	1,08,79,370	-	-	-
2	Input Tax Credit of GST Availed as per GST Return (B)	-	-	-	36,85,977	43,28,153	80,14,130
3	Total Taxable Turnover as per Returns (C)	15,70,24,581	8,40,42,025	24,10,66,606	1,73,24,555	5,25,48,719	6,98,73,274
4	Total Saleable Area of apartments in the project (Square Ft.) (D)			10,11,429.00			10,11,429.00

5	Area Sold relevant to Taxable turnover as per returns (E)	7,62,200.00		7,65,070.00
6	Relevant CENVAT/Input Tax Credit (F)= [(A)*(E)/(D)] or [(B)*(E)/(D)]	81,98,555		60,62,087
7	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover [(I)=(H)/(E)]	3.40%		8.68%

13. Therefore, the DGAP has claimed that it was established from the above Table that the ITC as a percentage of the total turnover which was available to the Respondent during the pre-GST period from April, 2016 to June, 2017 was 3.40% and during the post-GST period w.e.f. July, 2017 to August, 2018 it was 8.68% which showed that post-GST, the Respondent had benefited from additional ITC to the extent of 5.28% [8.68% (-) 3.40%] of the taxable turnover.

14. Based on the above factors the DGAP has computed the profiteered amount by comparing the applicable tax and the ITC available for the pre-GST period w.e.f. April, 2016 to June, 2017 during which Service Tax @4.5% was leviable with the post-GST period from July, 2017 to August, 2018 when the effective GST rate was 12% (GST @18% alongwith 1/3rd abatement on value) on construction service, as per the Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. The comparative computation of the ITC availed/available during the pre-GST period and the post-GST period and the profiteered amount has been tabulated by the DGAP in the Table-'C' below:-



Table-'C'

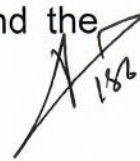
(Amount in Rs.)

	Particulars		Pre-GST	Post- GST
1	Period	A	April,2016 to June,2017	July,2017 to August,2018
2	Output tax rate (%)	B	4.50%	12.00%
3	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover as per Table - B above (%)	C	3.40%	8.68%
4	Increase in tax rate post-GST (%)	D= 12% less 4.50%	-	7.50%
5	Increase in input tax credit availed post-GST (%)	E= 8.68% less 3.40%	-	5.28%
6	<u>Analysis of Increase in input tax credit:</u>			
7	Base Price collected during July, 2017 to August, 2018	F		6,98,73,274
8	Less: Units Cancelled	G		6,75,925
9	Net Base Price collected during July, 2017 to June, 2018	H=F-G		6,91,97,349
10	GST Collected @ 12% over Basic Price	I= H*12%		83,03,682
11	Total Demand collected	J=H+I		7,75,01,031
12	Recalibrated Basic Price	K= H*(1-E) or 94.72% of H		6,55,43,729
13	GST @12%	L= K*12%		78,65,247
14	Commensurate demand price	M= K+L		7,34,08,976
15	Excess Collection of Demand or Profiteering Amount	N= J - M		40,92,054

15. The DGAP has also submitted that it was apparent from Table- 'C' given above that the additional ITC of 5.28% of the taxable turnover should have resulted in commensurate reduction in the base price as well as cum-tax price of the flat the benefit of which as per the provisions of Section 171 of the CGST Act, 2017, was required to be passed on to the recipients/flat buyers by the Respondent. The DGAP has accordingly calculated the amount of benefit of ITC which was required to be passed on by the Respondent to each flat buyer including the above Applicant or the profiteered amount as per **Annexure-18** of his Report as Rs. 40,92,054/- including GST @12% on the basic profiteered amount of Rs. 36,53,620/-. This amount includes an amount of Rs. 21,496/- including GST @12% on the base amount of Rs. 19,193/- which has been profiteered by the Respondent

from the Applicant No. 1. Thus, the DGAP has claimed that the Respondent has contravened the provisions of Section 171 of the CGST Act, 2017 in as much as the additional benefit of ITC @5.28% of the base price received by the Respondent during the period between 01.07.2017 to 31.08.2018, has not been passed on to the above Applicant and other recipients by him. However, he has also stated that the Respondent had *suo-moto* passed on an amount of Rs. 14,514/-, to the above Applicant therefore, the Respondent had profiteered an amount of Rs. 6,982/- [21,496/- (-) 14,514/-] in respect of the above Applicant. The DGAP had further stated that the Respondent had also realized an additional amount of Rs. 40,70,558/- which included both the profiteered amount @5.28% of the taxable amount (base price) and GST on the said profiteered amount from other recipients who were not party in the present proceedings. He had also submitted that these recipients/flat buyers were identifiable as per the documents supplied by the Respondent himself in which their names and addresses along with unit no. allotted to such recipients were duly mentioned and hence this amount of Rs. 40,70,558/- was required to be refunded to them. He has also intimated that the profiteering, if any, for the period post August, 2018, had not been computed by him as the exact quantum of ITC which would be available to the Respondent in future could not be determined at this stage.

16. The above Report was considered by the Authority in its sitting held on 11.12.2018 and it was decided to hear the Applicants and the



Respondent on 02.01.2019. The Respondent was also directed to explain why the Report dated 05.12.2018 filed by the DGAP should not be accepted and his liability for violation of the provisions of Section 171 of the above Act should not be fixed and penalty imposed. The hearing was postponed to 09.01.2019 on the request of the Respondent. The Respondent had again not appeared and he was directed to appear on 30.01.2019. He had put in appearance through Sh. Jitin, Assistant Manager (Accounts), his Authorised Representative on the above date. He was again asked to appear on 06.02.2019 but he again sought adjournment and he was directed to appear on 14.02.2019. He was present during the above hearing and had submitted copies of various approvals and the details of benefit passed on by him to the flat buyers. The Respondent during the hearing submitted that the project Vedantam has three phases and consisted of total 853 Flats. It was also submitted that out of the total benefit alleged in the DGAP's Report of 5.28%, benefit of 4% has been passed on to all the homebuyers.

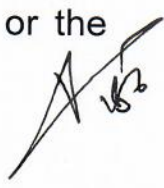
17. Vide his submissions dated 26.02.2019 the Respondent has submitted that under Phase-1 of the project, possession of 109 flats had already been handed over to the buyers majority of whom had already been given huge discount of Rs. 1,56,56,749- at the time of handing over the possession, the details of which had been mentioned by him in Annexure-1 of his submissions. The above discount was due to prompt and timely payments made through the life cycle of the project by the respective buyers. He has also claimed that he wanted to hand over possession at the earliest and therefore

it was decided that the possession charges and interest on late payments should be waived off. He has further claimed that he had been asked to refund a sum of Rs. 33,73,095/- to the home buyers however, he had paid a sum of Rs. 1,56,56,749/- against the full and final payments made to him. He has also stated that the benefit due in the case of Phase-2 and Phase-3 of the project wherein the possession was still to be given, shall be passed on as per the computation made vide Annexure-2 and Annexure-3 amounting to Rs. 1,11,292/- and Rs. 6,07,667/- respectively. He has also stated that no other housing or commercial project either in the name of the Respondent or otherwise had been launched by him. He has also claimed that no complaint was pending against him for not passing on the ITC benefit and the Applicant No. 1 had already withdrawn his complaint as was evident from Annexure-5. He has further claimed that as on date he had ITC credit of around Rs. 69,75,946/- (Annexure-6) and due to change in the law w.e.f. 01.04.2019, the same shall not be available for utilization which should be taken in to account while passing any directions. Vide Annexure-4, 7, 8 and 9 the Respondent has also submitted the copies of the Joint Development Agreement, details of sold and in stock units, CENVAT Chart and the RERA Construction Progress Reports.

18. In his submissions dated 01.03.2019 the Respondent has claimed that the calculations made in the Report dated 05.12.2019 filed by the DGAP, vide Table B and Table-C were not correct and he had recalculated the same as per the revised Tables annexed by him with his submissions which showed that the ratio of ITC to taxable

turnover during the pre GST period was 6.35% instead of 3.40% and he should be allowed the benefit of ITC on VAT which he had duly mentioned in his returns filed during the period from April, 2016 to June, 2017. He has further claimed that he had already given discount or benefit of reduction in the prices to the flat buyers amounting to Rs. 1,56,56,749/- in the post GST period as per Annexure-1 although the ITC @4% on payments received in this period amounted to Rs. 23,76,551/-. He has also stated that an amount of Rs. 28,14,798 had been given as discount after considering the customers payment history and promptness along with waiver of interest due on instalments amounting to Rs. 1,05,65,300/-. He has further stated that on Phase-2 (Annexure-2) and Phase-3 (Annexure-3) of the project wherein the possession had not been given, the benefit of ITC of Rs. 1,11,292/- and Rs. 6,07,667/- respectively had already been considered by him which would be adjusted in the next instalments.

19. The above submissions of the Respondent were sent to the DGAP for filing reply and vide his supplementary Report dated 27.02.2019 the DGAP has stated that the issue raised by the Respondent pertained to the calculation of interest to be paid on the benefit of ITC or the profiteered amount paid or to be paid on which he had no submissions to make. In his further Report dated 08.03.2019 the DGAP has stated that as per the provisions of Section 171 of CGST Act, 2017 which regulated the anti-profiteering measures "Any reduction in rate of tax on any supply of goods or services or the



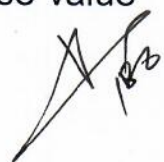
benefit of ITC shall be passed on to the recipient by the way of commensurate reduction in prices” and hence if there was any benefit of ITC or reduction in the rate of tax, there should be a commensurate reduction in the prices of the goods or services and the above Section did not provide any other method of passing on the benefit of ITC or reduction in the rate of tax to the consumers and hence the discount given by the Respondent to his recipients did not fall within the ambit of Section 171 of the above Act. In his final Report dated 01.04.2019 the DGAP has stated that the Respondent had requested to reconsider the issue of input ITC of VAT available to him in the pre-GST period which had already been addressed in para 19 of his Report dated 05.12.2018. The DGAP has further stated that vide his submissions dated 26.02.2019 the Respondent had claimed that he had given an amount of Rs. 1,56,56,749/- as discount to various customers on account of prompt and timely payment, waiver of possession charges and interest on late payments, details of which had been submitted by him customer wise however now he had gone back on his earlier stand and claimed that Rs. 23,76,551/- were given on account of ITC, for which he had not submitted any documentary evidence, such as, credit notes or cheques etc. The DGAP has also submitted that the issue of passing on the benefit of ITC in the case of the house buyers of Phase-2 and 3 had already been addressed in his Reports dated 05.12.2018 and 07.03.2019.

20. After considering the Reports furnished by the DGAP and the submissions of the Respondent vide order dated 26.06.2019 the case



was sent back to the DGAP under Rule 133 (4) of the above Rules for investigation on the following grounds as the Respondent had vehemently argued that the ITC availed by him on his purchases should be included for computation of the ratio of CENVAT/ITC on VAT to the Taxable Turnover during the pre GST period that:-

- (i) It has not been explained whether the Respondent was liable to charge VAT from his customers as per the provisions of the UP VAT Act, 2008 or not ?
- (ii) It has also not been mentioned whether the VAT was to be collected on the demands raised by the Respondent or on any other value to be realised by the Respondent from the home buyers ?
- (iii) It has also not been clarified whether the VAT was to be charged separately as it was not embedded in the sale consideration ?
- (iv) It has also not been explained whether addition of 10% in the purchase value of the inputs by the Respondent while discharging his VAT output tax liability was in accordance with the provisions of the UP VAT Act, 2008 read with the provisions of the UP Trade Tax Act, 1948 ?
- (v) It has also not been explained what amount of purchase value was paid in cash by the Respondent ?



(vi) It has also not been described that in case 10% value was added as per the provisions of the UP VAT Act, 2008 read with the provisions of the UP Trade Tax Act, 1948 why the correlation between the turnover reported in the VAT Returns filed for the period from April, 2016 to June, 2017 and the amount collected from the home buyers could not be established in accordance with the provisions of the above Acts ?

21. The DGAP has submitted his Report in compliance of the order dated 26.06.2019 passed under Rule 133(4) on 05.11.2019 and submitted that many of the issues contained in para-22 of the said order related to the points of law which needed to be decided by the VAT Authorities viz. whether the Respondent was liable to charge VAT from his customers as per the provisions of the UP VAT Act, 2018 or not was a law point which did not require to be explained, rather it called for decision by the Appropriate Authority or was a matter to be decided by referring to the provisions of the law on this point and hearing the Respondent. He has further submitted that the issue contained at point (V) of the said order that what amount of purchase value was paid in cash by the Respondent seemed to have no bearing on the provisions of the CGST Act, 2017 and the Rules made there under as the relevant provisions hardly distinguished the purchases made by cash or by making payment in any other mode



e.g. Cheque, electronic transfer etc. The other findings of the DGAP on the above order are as follows:-

- a) Notwithstanding the provisions contained in the Uttar Pradesh Value Added Tax Act and the Uttar Pradesh Trade Tax Act, the fact was that the Respondent had discharged his output VAT liability on a notional/deemed taxable value which was 110% of the purchase price of the inputs and the VAT so paid by the Respondent has not been recovered from the home buyers. Since the taxable value for the purpose of output VAT liability of the Respondent was distinct/different from the actual base price raised/collected from the home buyers the taxable value reflected in the VAT Returns of the Respondent has not been considered for computation of profiteering and instead, the demand shown to have been raised in the home buyers list has been taken into account as any variation in the credit/VAT liability of the Respondent had no impact on the consideration demanded or received by the Respondent from the home buyers.
- b) In respect of the credit of any Input Tax availed to discharge the output tax liability of the tax payer the DGAP has stated that though the Respondent had discharged the output VAT liability on national deemed taxable value, he had not recovered the VAT so paid separately from the home buyers. Hence, the pre-GST base price of the Respondent has to be treated as inclusive of the VAT paid by him and for the purpose of comparison of pre GST base price with the post-GST base price, such VAT amount was required to be

excluded from the pre-GST base price. The exercise to exclude the VAT amount from the pre-GST base price would involve apportioning of the total VAT amount among the home-buyers, depending on the consideration received from them over a period of 15 months, which was quite complex. Therefore, while on the one hand, the pre-GST base price has not been reduced by the VAT amount, the Input Tax Credit of VAT has not been taken into account, on the other so that the comparison of the pre-GST cum tax price (inclusive of VAT and Service Tax) with the post-GST commensurate price (inclusive of GST on the recalibrated base price) was just and fair. He has further submitted that the benefit of credit of ITC of VAT should not be allowed.

22. After due consideration of the above Report by this Authority, it was decided to hear the Applicants and the Respondent on 20.11.2019, which was further postponed to 05.12.2019, 02.12.2019 and 13.01.2020 on the request of the Respondent. Neither the Respondent nor the Applicants appeared in any of the 04 hearing opportunities given to them however, the Respondent vide his submissions dated 13.01.2020 intimated that taking the benefit of VAT into consideration the percentage ratio of ITC was 2.032% however, he had pass on the benefit of ITC to his customers more than that. He has also attached documents in support of his claim.
23. We have carefully considered all the Reports filed by the DGAP, submissions of the Respondent and the other material placed on record and find that a complaint dated 26.12.2017 was preferred

before the Uttar Pradesh State Screening Committee on Anti-Profiteering by the Applicant No. 1, alleging profiteering against the Respondent in respect of purchase of a flat in the Respondent's project "Vedantam", located at Plot No. 1-B, Sector-16, Greater Noida, U.P. The above complaint mentioned that the Respondent had not passed on the benefit of ITC which had become available to him, by reducing the price of the flat commensurately, after coming in to force of the GST w.e.f. 01.07.2017. It was also alleged that the Respondent had charged GST on the full amount of the instalments paid by the Applicant No. 1. After preliminary consideration in its meeting held on 12.04.2018 the complaint was forwarded by the Screening Committee to the Standing Committee on Anti-profiteering on 16.04.2018. The above complaint was considered by the Standing Committee on Anti-profiteering in its meeting held on 25.05.2018 and was referred to the DGAP for detailed investigation under Rule 129 (1) of the CGST Rules, 2017.

24. Accordingly, the DGAP had called for the record and after its examination he has furnished his Report dated 05.12.2018 in which he has stated that it was evident from Table-B prepared by him that the ratio of ITC as a percentage of the total turnover which was available to the Respondent during the pre-GST period from April, 2016 to June, 2017 was 3.40% and during the post-GST period w.e.f. July, 2017 to August, 2018 it was 8.68% which showed that post-GST, the Respondent had benefited from additional ITC to the extent of 5.28% [8.68% (-) 3.40%] of the taxable turnover. The DGAP has also stated that it was apparent from Table-C prepared

by him that the additional ITC of 5.28% of the taxable turnover should have resulted in commensurate reduction in the base price as well as cum-tax prices of the flats the benefit of which as per the provisions of Section 171 of the CGST Act, 2017, was required to be passed on to the recipients/flat buyers by the Respondent. Both the above Tables have been prepared by the DGAP on the basis of the Returns and the details of flat buyers submitted by the Respondent himself which have been duly verified by the DGAP. The mathematical methodology employed by the DGAP to compute the benefit of additional ITC which is required to be passed on by the Respondent to his buyers is appropriate, logical, reasonable and in consonance with the provisions of Section 171 (1) of the CGST Act, 2017 hence, the same can be relied upon. The above mathematical methodology has also been carefully considered and approved by this Authority in all such cases where benefit of additional ITC is required to be passed on.

25. Vide his submissions dated 13.01.2020 the Respondent has again claimed that the additional benefit of ITC @ 2.32% of the turnover was to be passed on which he has passed on. He has also attached list of the beneficiaries and the receipts issued by them in token of having received the benefit of ITC. In this regard it would be relevant to mention that as has been discussed above the benefit of 2.32% has been wrongly computed by the Respondent by adding the amount of ITC of VAT to which he was not entitled. The Respondent has himself admitted that he had given discount to his buyers due to timely and prompt payment during the lifecycle of the project.

Therefore, he cannot claim that he has passed on the benefit of ITC. Hence, the list and the receipts submitted by him cannot be relied upon. Accordingly, the above contention of the Respondent is not tenable.

26. Accordingly, the amount of benefit of ITC which was required to be passed on by the Respondent or the profiteered amount has been computed as Rs. 40,92,054/- including the GST @12% on the basic profiteered amount of Rs. 36,53,620/- as has been mentioned in Annexure-18. This amount includes an amount of Rs. 21,496/- including GST @12% on the base amount of Rs. 19,193/- which has been profiteered by the Respondent from the Applicant No. 1. It has also been established from the record that the Respondent had *suo-moto* passed on an amount of Rs. 14,514/- to the above Applicant therefore, the Respondent had profiteered an amount of Rs. 6,982/- [21,496/- (-) 14,514/-] from him. It is further established that the Respondent had also realized an additional amount of Rs. 40,70,558/- which included both the profiteered amount @5.28% of the taxable amount (base price) and GST on the said profiteered amount from the other flat buyers who were not party in the present proceedings. These recipients/flat buyers were identifiable as per the documents supplied by the Respondent himself in which their names and addresses along with unit no. allotted to such recipients were duly mentioned and hence this amount of Rs. 40,70,558/- was required to be refunded to them. The profiteering, if any, for the period post August, 2018, has not been computed by the DGAP as



the exact amount of ITC which would be available to the Respondent in future was not available at this stage.

27. Vide his submissions dated 26.02.2019 the Respondent has claimed that under Phase-1 of the project, possession of 109 flats had already been handed over to the buyers majority of whom had been given huge discount of Rs. 1,56,56,749/- the details of which had been given in Annexure-1 of his submissions. Perusal of Annexure-1 shows that it no where mentions that the Respondent has passed on any amount on account of benefit of additional ITC. He has not produced even a single voucher, invoice, cheque or bank statement to show that he has passed on the benefit of additional ITC. He has himself admitted in his submissions that he had given discount to his buyers due to prompt and timely payments made through the life cycle of the project. He has also admitted that he had waived off the possession charges and the interest on late payments which cannot be construed as passing on the benefit of ITC. Therefore, the above claim of the Respondent is fallacious and hence, the same cannot be accepted in view of there being no cogent and reliable evidence.
28. He has also claimed that the benefit due in the case of Phase-2 and Phase-3 of the project shall be passed on as per the computation made vide Annexure-2 and Annexure-3 amounting to Rs. 1,11,292/- and Rs. 6,07,667/- respectively. Perusal of Annexure-2 and 3 shows that the Respondent has not explained the methodology on the basis of which he has computed the above amount. Therefore, the computation of the profiteered amount is arbitrary, unreasonable, unjustified and is not in consonance with the provisions of Section

171 (1) of the above Act and hence, the same cannot be accepted.

The Respondent is required to pass on the benefit of additional ITC after its computation as per Table-B and C of the Report dated 05.12.2018.

29. He has also attached copy of the JDA vide Annexure-4 of his submissions and claimed that no ITC benefit arose from the above agreement. Perusal of the JDA shows that it has been executed between M/s Jyotirmay Infracon Private Limited and the Respondent in which the former is lessee of the land on which the Respondent is executing the project. In this connection it would be relevant to mention that the above JDA has no connection with the benefit of ITC. The benefit of ITC is being enjoyed by the Respondent as per the provisions of Section 16 of the CGST Act, 2017 as he is making purchases of the goods and services to execute the above project and is utilising the same to discharge his tax liability. As per Section 171 (1) of the above Act he is required to pass on the benefit of additional ITC to his buyers as he cannot appropriate the same as this benefit has been given by the Central and the State Government out of their tax revenue in favour of the flat buyers. Not even a single penny is required to be paid as ITC benefit by the Respondent from his own pocket. Therefore, the above contention of the Respondent is untenable.

30. The Respondent has further claimed that the Applicant No. 1 has withdrawn his complaint as was evident from Annexure-5 and hence, the present proceedings were not maintainable. Perusal of Annexure-5 shows that it is copy of the e-mail dated 13.07.2018

sent by the above Applicant to the DGAP in which he has stated that the Respondent vide his letter dated 07.07.2018 had informed that the ITC benefit would be adjusted in his next demand and therefore, the proceedings should be closed. In this connection it would be appropriate to mention that once the investigation has been started by the DGAP to ascertain whether the benefit of tax reduction or ITC has been passed on there is no provision in the above Act or the Rules to stop the same or to withdraw the complaint. The DGAP has to investigate the matter and furnish his Report to this Authority as per Rule 129 (6) to determine whether the above benefits have been passed on or not as per the provisions of Section 171 (2) read with Rule 127 and 133 of the above Rules. Perusal of the above e-mail shows that the Applicant No. 1 under the undue influence of the Respondent has requested for closure of the proceedings. Accordingly, the above plea of the Respondent cannot be accepted.

31. The Respondent has also contended that as on date he had ITC credit of Rs. 69,75,946/- as per Annexure-6 and due to change in the law w.e.f. 01.04.2019, the same shall not be available for utilization. In this regard it would be pertinent to mention that the present investigation pertains to the period from 01.07.2017 to 31.08.2018 on which the changes made in the law w.e.f. 01.04.2019 have no impact and hence, the Respondent is under legal obligation to pass on the benefit of ITC which is available to him during the above period. Since, the project is still under execution the excess payment of ITC can always be adjusted keeping in view the provisions of the law however, the buyers cannot be compelled to

wait for the benefit indefinitely when the Respondent is utilising the ITC to pay his tax liability every month. Therefore, the above claim of the Respondent is untenable.

32. Vide Annexure-8 the Respondent has submitted the details of the CENVAT which was available to him w.e.f. 01.04.2016 to 30.06.2017. The DGAP has already considered the eligible amount of CENVAT available during the above period while calculating its ratio to the taxable turnover vide Table-B of his Report dated 05.12.2018. The Respondent has also submitted Annexure-7 and 9 giving details of the sold and in stock units and the RERA Construction Progress Reports. The Respondent has not raised any objections in respect of the above Annexures and hence, no findings are required to be recorded on them.

33. In his submissions dated 01.03.2019 the Respondent has claimed that the calculations made by the DGAP, vide Table-B and Table-C of his Report dated 05.12.2018 were not correct. He has submitted revised Tables which show that the ratio of ITC to taxable turnover during the pre GST period was 6.35% instead of 3.40%. He has also contended that he should be allowed the benefit of ITC on VAT which he had duly mentioned in his Returns filed during the period from April, 2016 to June, 2017. In this regard perusal of Table-B prepared by the Respondent shows that he has included an amount of Rs. 94,44,084/- as ITC on VAT which he has claimed to have availed during the period from 01.04.2016 to 30.06.2017 pertaining to the pre-GST period. He has not disputed rest of the figures taken by the DGAP for computing the ratios of CENVAT/ITC to the taxable

turnover for the pre and the post GST periods. Since he has added the ITC on VAT amounting to Rs. 94,44,084/- in his calculations the ratio of CENVAT to ITC for the pre GST period has been computed by him as 6.35% when it has been computed by the DGAP as 3.40% as he has not included the above amount of ITC on VAT in the Table-B prepared by him. This Authority vide its order dated 26.06.2019 had specifically directed the DGAP to furnish his findings whether the amount of ITC on VAT claimed to have been utilised by the Respondent during the period from 01.04.2016 to 30.06.2017 could be allowed to him or not. The DGAP vide his Report dated 04.11.2019 has submitted that notwithstanding the provisions of the Uttar Pradesh Value Added Tax Act and the Uttar Pradesh Trade Tax Act, the Respondent had discharged his output VAT liability on a notional/deemed taxable value which was 110% of the purchase price of the inputs and the VAT so paid by the Respondent has not been recovered from the home buyers. Since the taxable value for the purpose of output VAT liability of the Respondent was distinct/different from the actual base price raised/collected from the home buyers the taxable value reflected in the VAT Returns of the Respondent has not been considered for computation of profiteering and instead, the demand shown to have been raised in the home buyers list has been taken into account as any variation in the credit/VAT liability of the Respondent had no impact on the consideration demanded or received by the Respondent from the home buyers. The DGAP has also stated that though the Respondent had discharged the output VAT liability on notional/

deemed taxable value, he had not recovered the VAT so paid separately from the home buyers. Hence, the pre-GST base price of the Respondent has to be treated as Inclusive of the VAT paid by him and for the purpose of comparison of pre GST base price with the post-GST base price, such VAT amount was required to be excluded from the pre-GST base price. The exercise to exclude the VAT amount from the pre-GST base price would involve apportioning of the total VAT amount among the home-buyers, depending on the consideration received from them over a period of 15 months, which was quite complex. Therefore, while on the one hand, the pre-GST base price has not been reduced by the VAT amount, the input tax credit of VAT has not been taken into account, on the other so that the comparison of the pre-GST cum tax price (inclusive of VAT and Service Tax) with the post-GST commensurate price (inclusive of GST on the recalibrated base price) was just and fair. The above contention of the DGAP is reasoned and justified and is in consonance with the provisions of the UP VAT Act as well as the CGST Act, 2017. Since, the Respondent has discharged his VAT liability on notional/deemed value and has not recovered VAT from his buyers the DGAP has rightly not taken the amount of VAT on ITC while calculating the above ratio for the pre GST period as per Table-B. He has also rightly not taken the taxable turnover as per the Returns filed by the Respondent and has taken the amount of demands raised by the Respondent for computing the above turnover. Hence, the above amount of Rs. 94,44,084/- on account of ITC on VAT cannot be

allowed to be included for computation of the ratio of ITC to taxable turnover for the pre GST period and hence, the ratio of 3.40% computed by the DGAP for the above period is held to be correct. While preparing the Table-C the Respondent has taken ratio of CENVAT to taxable turnover as 6.35% for the pre GST period which has been calculated by him by adding the ITC on VAT which has not been allowed to be added. After taking the ratio of ITC on GST to taxable turnover during the post GST period as 8.68% he has accordingly computed the additional benefit of ITC as 2.32% of the taxable turnover whereas the DGAP has computed it as 5.28%. Accordingly, the Respondent has calculated the Re-calibrated price as Rs. 6,75,90,165/- instead of 6,55,43,729/- as per Table-C, GST @12% as 81,10,820/- instead of Rs. 78,65,247/-, Commensurate Demand Price as Rs. 7,57,00,985/- in place of Rs. 7,34,06,976/- and Excess Collection as Rs. 18,00,046/- instead of Rs. 40,92,054/-. Since, the Respondent is not eligible to claim the benefit of ITC on VAT available during the pre GST period the revised computations made by the Respondent cannot be taken cognizance of and therefore, the calculations made by the DGAP as per Table-C are held to be correct. Accordingly, both the above contentions of the Respondent are untenable and hence they cannot be accepted.

34. He has also claimed that he has already given discount or benefit of reduction in the prices to the flat buyers amounting to Rs. 1,56,56,749/- in the post GST period as per Annexure-1. He has further claimed that the benefit of ITC on Phase-2 (Annexure-2) and Phase-3 (Annexure-3) of the project wherein the possession had not

been given, amounting to Rs. 1,11,292/- and Rs. 6,07,667/- respectively had already been considered by him which would be adjusted in the next instalments. Both these issue have already been settled in the paras supra and hence no findings are being recorded here.

35. In view of the above facts this Authority hereby determines the profiteered amount as Rs. 40,92,054/- in terms of Rule 133 (1) of the CGST Rules, 2017 and directs the Respondent to pass on the benefit of Rs. 6,982/- [21,496 – 14,514] to the Applicant No. 1 and an amount of Rs. 40,70,558/- to the other buyers as per the details given in Annexure-18 of the DGAP's Report dated 05.12.2018 along with interest @18% per annum to the flat buyers from the dates from which the above amount was collected by him from the buyers till the payment is made as per the provisions of Rule 133 (3) (b) of the above Rules. The Respondent is also directed to reduce the prices of his flats commensurately as per the details mentioned above in terms of Rule 133 (3) (a) of the above Rules.
36. It is also clear from the facts of the case that the Respondent has been directed to pass on the benefit of ITC till 31.08.2018. Any benefit of ITC which may become available to the Respondent post 31.08.2018 would also be passed on by the Respondent to the eligible buyers. The Concerned Commissioner GST shall ensure that the above benefit is passed on to the eligible buyers and report submitted to this Authority.
37. It is also evident from the above narration of facts that the Respondent has denied the benefit of ITC to the buyers of the flats

being constructed by him in his Project 'Vedantam' in contravention of the provisions of Section 171 (1) of the CGST Act, 2017. Therefore, he is apparently liable for imposition of penalty as per the provisions of Section 171 (3A) read with Rule 133 (3) (d) of the CGST Act, 2017. Therefore, notice be issued to him to explain why penalty should not be imposed on him. Accordingly, the notice dated 11.12.2018 whereby the Respondent was asked to explain why penalty should not be imposed on him under Section 29, 122-127 of the CGST Act, 2017 read with Rule 21 and 133 of the CGST Rules, 2017 should not be imposed, is partially withdrawn to that extent.

38. This Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST UP to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by the Authority is passed on to all the eligible buyers. A report in compliance of this order shall be submitted to this Authority by the Commissioners CGST/SGST UP through the DGAP within a period of 4 months from the date of receipt of this order.
39. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was to be passed on or before 04.05.2020 as the investigation Report was received from the DGAP on 05.11.2019. However, due to the COVID-19 pandemic prevailing in the Country the order could not be passed on or before the above date. Hence, the same is being passed today 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 & Customs under Section 168 A of the CGST Act, 2017.

40. A copy each of this order be supplied to both the Applicants, the Respondent, Commissioners CGST/SGST Uttar Pradesh as well as the Principal Secretary (Town & Planning), Government of Uttar Pradesh for necessary action. File be consigned after completion.

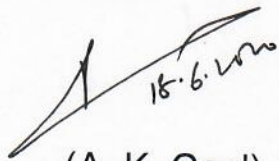


Sd/-
(Dr. B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Technical Member

Certified copy


18.6.2020

(A. K. Goel)
Secretary, NAA

o/c

File No. 22011/NAA/119/Radicon/2018 /3420-3425 Dated: 22.06.2020

Copy To:-

1. M/s Radicon Infrastructure & Housing Private Limited, B-64, Sector-67, Noida, Uttar Pradesh-201301.
2. Shri Amarjeet Singh Yadav, D-1101, Pearl Court, Ramprastha Greens, Vaishali, Sector-7, Ghaziabad, Uttar Pradesh – 201010.
3. Commissioner, Commercial Tax, Commercial Tax Head Office, Vibhuti Khand, Gomti Nagar, Lucknow.

4. Pr. Chief Commissioner, CGST & C.Ex. Lucknow Zone, 7-A, Ashok Marg, Lucknow -226001.
5. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
6. Guard File.

 18/6

