

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

Case No. : 43/2020  
Date of Institution : 27.05.2019  
Date of Order : 14.08.2020

**In the matter of:**

1. Sh. Varun Goel, FC-112, Tagore Garden, New Delhi-110027.
2. Director General of Anti-Profiteering, Indirect Taxes & Customs, 2<sup>nd</sup> Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

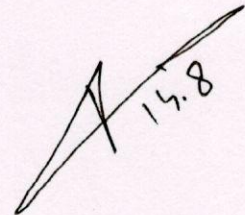
Versus

M/s Eldeco Infrastructure & Properties Ltd., 201-212, IInd Floor, Plot No. 3, Splendour Forum, Jasola District Centre, New Delhi-110025.

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 Applicants.
2. Sh. Kapil Kumar, Advocate and Sh. K. Kharbanda, Sr. General Manager for the Respondent.

**ORDER**

1. The brief facts of the present case are that the Applicant No. 2 (here-in-after referred to as the DGAP) vide his Report dated 28.11.2018, furnished to this Authority under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017, had submitted that he had conducted an investigation on the complaint of the Applicant No. 1 and found that the Respondent had not passed on the benefit of additional Input tax Credit (ITC) to the above Applicant as well as 124 other house and plot buyers who had purchased them in his Project "Eldeco County", as per the provisions of Section 171 (1) of the CGST Act, 2017. Vide his above Report the DGAP had also submitted that the Respondent had denied the benefit of ITC to the above buyers amounting to Rs. 41,82,198/-, pertaining to the period w.e.f. 01.07.2017 to 31.08.2018 and had thus indulged in profiteering and violation of the provisions of Section 171 (1) of the above Act.
2. This Authority after careful consideration of the Report dated 28.11.2018 had issued notice dated 07.12.2018 to the Respondent to show cause why the Report furnished by the DGAP should not be accepted and his liability for violation of the provisions of Section 171

(1) should not be fixed. After hearing both the parties at length this Authority vide its Order No. 34/2019 dated 24.05.2019 had determined the profiteered amount as Rs. 41,82,198/- as per the provisions of Section 171 (2) of the above Act read with Rule 133 (1) of the CGST Rules, 2017 pertaining to the period from 01.07.2017 to 31.08.2018 and also held the Respondent in violation of the provisions of Section 171 (1).

3. During the course of the proceedings the Respondent had accepted the findings of the DGAP's Report dated 28.11.2018 and vide his submissions dated 11.02.2019 supplied details of the ITC benefit passed on to the 125 buyers including the Applicant No. 1 till 31.01.2019 including 18% interest amounting to Rs. 59,57,306/-. The Respondent had given details of cheque numbers and the dates on which the ITC benefit was passed on to the buyers by him. The Applicant No.1 as per the submissions of the Respondent had received benefit of Rs. 3,44,455/- vide Cheque No. 004549 dated 05.02.2019.
4. This Authority in its above Order had also observed that the Respondent had not denied that the benefit of ITC had accrued to him which he was required to pass on to his buyers but it was passed on by him only in the month of February 2019 after the initiation of the proceedings against him and therefore, it was held that the Respondent had not only collected extra amount on account of price of the flat/plot from the buyers but he had also compelled them to pay more GST on the additional amount realised from them between the period from 01.07.2017 to 31.08.2018 which appeared to be deliberate and conscious violation of the provisions of Section

171 of the CGST Act, 2017 and therefore, he had apparently committed an offence under Section 122 (1) (i) of the CGST Act, 2017 and hence, he was liable for imposition of penalty under the provisions of the above Section.

5. The Respondent was issued notice dated 27.05.2019 asking him to explain why the penalty mentioned in Section 122 read with Rule 133 (3) (d) should not be imposed on him. In response to the above notice the Respondent vide his submissions dated 13.06.2019 has stated that the penal provisions under Section 122 of the Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be invoked and penalty imposed on him as he has not violated any of the above provisions. He has also submitted that being a law abiding and compliant corporate body, it had been his endeavour to comply with various provisions of the GST law including the anti-profiteering provisions contained in Section 171 of the above Act. He has further stated that even though there was no methodology prescribed to measure the benefit he had calculated the benefit based on his best assessment which showed that he intended to comply with the provisions of Section 171.
6. The Respondent has also acknowledged that there was difference in the calculation of the quantum of benefit to be passed on to the buyers as per the methodology adopted by him and the methodology approved by this Authority, however, the said difference was less than 1% as the methodology adopted by this Authority was not available to him at the time of implementation of the GST. He has also submitted that he had immediately accepted the amount which had been determined by this Authority and it was paid to all the

eligible buyers and proof of payment was also submitted to this Authority vide his letter dated 11.02.2019 which also depicted his bonafide intentions to comply with the provisions of Section 171 of the above Act. He has further submitted that no penalty should be levied as he had voluntarily agreed to pass on the benefit of ITC as per the provisions of the law.

7. The Respondent has also argued that for imposing penalty, there should be an intention to evade payment of tax or there should be suppression or concealment. He has further argued that the penal provisions were only a tool to safeguard against the contravention of the rules, however, he had always been under the bonafide belief that he had not violated the provisions of Section 171 of the CGST Act, 2017 and therefore, no penalty was imposable on him. In support of his above argument the Respondent has placed reliance on the decision of the Hon'ble Supreme Court given in the case of ***Hindustan Steel Ltd. v. State of Orissa AIR 1970 (SC) 253*** in which it was held as under:-

"But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An Order imposing penalty for failure to carry out a statutory obligation is the result of quasi criminal proceedings, and the penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Where penalty should be imposed for

failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the Statute."

8. He has also pleaded that in the present case, there was neither any mala fide intention nor was there any intention to contravene the provisions of Section 171 of the CGST Act, 2017 and hence, the penal provisions could not be invoked against him.
9. The Respondent has also claimed that the issue in the present case involved interpretation of complex legal provisions with respect to anti-profiteering under the GST which in itself was a new law and was already a disputed subject in a number of cases. Further, being a new law, it was in the process of development and thus, it suffered from various lacunae which had created confusion in the mind of the Respondent and he was under a bona fide belief as to the interpretation adopted by him and hence, he could not be subjected to penalty. In this regard, he has cited the following cases, wherein it had been held that different interpretations of law could not be associated with mens rea:-

**a) *K. K. Appachan v. CCE Palakkad 2007 (7) STR 230 (Tri-Bang.)***

**b) Ispat Industries Ltd. v. CCE 2006 (199) ELT 509 (Tri. - Mum).**

**c) NIRC Ltd. v. CCE 2007 (209) ELT 22 (Tri. - Del.).**

**d) Chemicals & Fibres of India Ltd. v. CCE 1988 (33) ELT 551  
(Tri.).**

10. The Respondent has further claimed that Section 122 (1) (i) provided for imposition of penalty in the case of issuance of incorrect or false invoice. To determine what will be an incorrect false invoice, reliance has been placed on the dictionary meaning of the term 'incorrect' and 'false' as has been mentioned below:-

**"Oxford Dictionary:**

'incorrect'- not in accordance with particular standards or rules false'-  
not according with rules or law.

**Black's' law Dictionary:**

'False' – Untrue; erroneous; deceitful; contrived or calculated to deceive and injure. Unlawful. In law, this word means something more than untrue; means something designed untrue and deceitful and Implies an intention to perpetrate some treachery or fraud. Hatcher v. Dunn, 102 Iowa, 411, 71 N W. 343, 30 L. It. A. GS9; Mason v. Association, 18 U. C. C. P. 19; Batterman v. Ingalls, 48 Ohio St. 408. 28 N. 10. 108.

**The Malor Law Lexicon by P. Ramanatha Aiyar, 4<sup>th</sup> Edition 2010:**

'False' - Erroneous, untrue; the opposite of correct, or true. The term does not necessarily involve turpitude of mind. In the more important uses in jurisprudence the word implies something more than a mere untruth, it is an untruth coupled with a lying intent. (Wood v. State, 15 Am Rep 664), or an intent to deceive or to perpetrate some treachery or fraud.

**The Chambers' Dictionary:**

'False'-wrong; erroneous' deceptive or deceiving;

"Incorrect' - containing faults; not accurate: not correct in manner or character; improper, not regulated or corrected."

11. From the above dictionary meanings, the Respondent has contended that the term 'incorrect or false' in itself contained an element of deceit or intent to lie i.e. mens rea, however, In the instant matter, he was under a bona fide belief that all the particulars mentioned in the invoices issued by him were correct. Thus, there was no violation of clause (i) of Section 122 (1).
12. We have carefully considered the submissions of the Respondent and all the material placed before us and it has been revealed that the Respondent has not passed on the benefit of additional ITC to the buyers of his flats/plots w.e.f. 01.07.2017 to 31.08.2018 which he was required to pass on every month as he was availing the benefit of ITC every month to discharge his GST liability. It is also revealed that he has passed on the above benefit in the month of February, 2019 as is evident from the details furnished by him vide his submissions dated 11.02.2019, after this Authority had initiated



proceedings against the Respondent vide its notice dated 07.12.2018. Therefore, there is no doubt that the Respondent has violated the provisions of Section 171 (1) of the CGST Act, 2017.

13. It is also revealed from the perusal of the CGST Act and the Rules framed under it that no penalty had been prescribed for violation of the provisions of Section 171 (1) of the above Act, therefore, the Respondent was issued show cause notice to state why penalty should not be imposed on him for violation of the above provisions as per Section 122 (1) (i) of the above Act as he had apparently issued incorrect or false invoice while charging excess consideration and GST from the buyers. Section 122 (1) (i) states as under:-

**“122 (1) Where a taxable person who**

- (i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;**

**XX**

**he shall be liable to pay a penalty of ten thousand rupees or an amount equal to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax availed or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.”**



14. It is apparent from the perusal of Section 122 (1) (i) that the violation of the provisions of Section 171 (1) is not covered under it as it does not provide penalty for not passing on the benefits of tax reduction and ITC. It only provides for imposition of penalty for not issuing an invoice or for issuing an incorrect or false invoice in respect of any supply of goods or services or both. Perusal of proviso attached to this Section also shows that it provides for imposition of penalty of ten thousand rupees or equal to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax availed or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher. Since, the profiteered amount is not a tax imposed under the CGST Act, 2017, the above penalty cannot be imposed for violation of the anti-profiteering provisions made under Section 171 of the above Act.
15. It is further revealed that vide Section 112 of the Finance Act, 2019 specific penalty provisions have been added for violation of the provisions of Section 171 (1) which have come in to force w.e.f. 01.01.2020, by inserting Section 171 (3A) which provides as under:-

*“(3A) Where the Authority referred to in sub-section (2) after holding examination as required under the said sub-section comes to the conclusion that any registered person has profiteered under sub-section (1), such person shall be liable to pay penalty equivalent to ten per cent. of the amount so profiteered:*

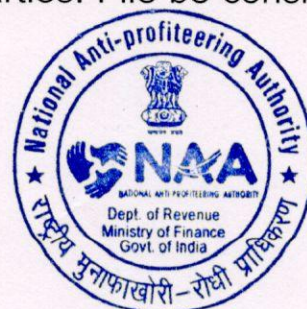
*PROVIDED that no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority.*

*Explanation:- For the purpose of this section, the expression "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services of both."*

16. Since, no penalty provisions were in existence between the period w.e.f. 01.07.2017 to 31.08.2018 when the Respondent had violated the provisions of Section 171 (1), the penalty prescribed under Section 171 (3A) can not be imposed on the Respondent retrospectively. Accordingly, the notice dated 27.05.2019 issued to the Respondent for imposition of penalty under Section 122 (1) (i) is hereby withdrawn and the present penalty proceedings launched against him are accordingly dropped.
17. Copy of this order be supplied to both the parties. File be consigned after completion.

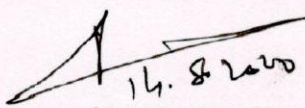
Sd/-  
(Dr. B. N. Sharma)  
Chairman

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



Sd/-  
(Amand Shah)  
Member(Technical)

Certified Copy

  
14.8.2020  
(A. K. Goel)  
Secretary, NAA

F. No. 22011/NAA/117/Eldeco/2018 /4/28-30

Date: 14.08.2019

Copy To:-

1. M/s. Eldeco Infrastructure & Properties Ltd., 201-212, IInd Floor, Plot No. 3, Splendour Forum, Jasola District Centre, New Delhi- 110 025.
2. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2<sup>nd</sup> Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
3. NAA Website/Guard File.

  
14.8.2019  
A. K. GOEL  
SECRETARY, NAA