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

Case No.	04/2020
Date of Institution	17.06.2019
Date of Order	14.02.2020

In the matter of:

1. Sh. Manish Saini, House No 23-D, (New 313, Block-4), Shiwalik Vihar, Nayagoan, Distt. Mohali, Punjab-160103.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Ramaprastha Promoter & Developer Pvt. Ltd., Plot No 114, Sector-44, Gurugram-122002.

Respondent

14.2.2020

Quorum:-

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

Present:-

1. None for the Applicant No. 1.
2. None for the Applicant No. 2.
3. Sh. Lalit Vanjani CA, Sh. Vivek Sharma CA, Sh. B. K. Gupta, HOD Accounts, Authorised Representatives for the Respondent.

ORDER

1. The Present Report dated 14.06.2019, received on 17.06.2019 by this Authority, has been furnished by 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. The brief facts of the present case are that a complaint dated 26.09.2018 was filed before the Haryana State Screening Committee on Anti-Profiteering by the Applicant No. 1 alleging profiteering by the Respondent in respect of purchase of Flat No. K-1603 in the Respondent's project "Edge Towers", Ramprastha City, Sec-37-D, Gurugram, Haryana. The

above Applicant had alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) to him by way of commensurate reduction in the price. This Complaint was examined by the Haryana State Screening Committee and upon being prima facie satisfied that the Respondent had contravened the provisions of Section 171 of the CGST Act, 2017, forwarded the said application with its recommendation to the Standing Committee on Anti-profiteering for further action, in terms of Rule 128 of the CGST Rules, 2017 on 30.10.2019.

2. The above Complaint was examined by the Standing Committee on Anti-profiteering in its meeting held on 13.12.2018 and vide its minutes was forward to the DGAP for detailed investigation under Rule 129 (1) of the CGST Rules, 2017 on 07.01.2019.

3. The DGAP in his Report has stated that the Applicant submitted the following documents along with his application:

   (a) Duly filled in Form APAF-1.

   (b) Copies of the demand letters.

   (c) ID proof (Aadhar Card).

4. The DGAP on receipt of the said reference from the Standing Committee on Anti-profiteering, issued a notice under Rule 129 of the 14.01.2019, 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 supporting documents. Vide the above mentioned notice, the Respondent was also given an opportunity to inspect the non-confidential evidences/information submitted by the Applicant No. 1 from 21.01.2019 to 23.01.2019, which the Respondent availed of on 23.01.2019. The Applicant No. 1 vide e-mail dated 08.05.2019 was also given an opportunity to inspect the non-confidential documents/reply furnished by the Respondent on 15.05.2019 or 16.05.2019, which was not availed of by him.

5. The DGAP further stated that the period covered by the current investigation is from 01.07.2017 to 31.12.2018 and this Authority vide its Order No. F. No.22011/NAA/19/2018 dated 19.03.2019, had extended the time limit to complete the investigation upto 06.07.2019, in terms of Rules 129(6) of the CGST Rules.

6. The DGAP further stated that the Respondent, in response to the notice dated 14.01.2019, the Respondent has submitted replies vide letters/e-mails dated 04.02.2019, 20.02.2019, 22.02.2019, 01.03.2019, 13.03.2019, 18.03.2019, 19.03.2019, 27.05.2019 and 31.05.2019. Vide

the aforementioned letters, the Respondent submitted the following documents/information:-

(a) Copies of GSTR-1 Returns for the period July, 2017 to December, 2018.

(b) Copies of GSTR-3B Returns for the period July, 2017 to December, 2018.

(c) Copies of Tran-1 Returns for transitional credit availed by the Respondent.

(d) Copies of VAT & ST-3 Returns for the period April, 2016 to June, 2017.

(e) Electronic Credit Ledger for the period July, 2017 to December, 2018.

(f) Tax rates, pre-GST and post-GST.

(g) Copies of Balance Sheets for FY 2016-17 & 2017-18.

(h) Details of turnover and input tax credit in respect of the project "Edge Towers".

(i) List of home buyers in the project "Edge Towers".

In terms of Rule 130 of the CGST Rules, 2017, the Respondent had also submitted that his ITC register and home buyer's list were to be treated as confidential.

7. The DGAP has also stated that the subject application, the various replies of the Respondent and the documents/evidences on record had been carefully examined. The main issues for determination were whether there was reduction in the rate of tax or benefit of ITC on the supply of construction service by the Respondent after implementation of GST w.e.f. 01.07.2017 and if so,

whether the Respondent had passed on such benefit to the recipients, in terms of Section 171 of the CGST Act, 2017.

8. The DGAP has further stated that the Respondent had submitted copy of the sale agreement dated 20.08.2010, for the sale of Flat No. K-1603 to the above Applicant in his project "Edge Towers", measuring 1340 square feet, at the basic sale price of Rs. 2683/- per square feet. The details of amounts and taxes paid by the Applicant No. 1 to the Respondent, has been furnished by the DGAP in Table-'A' below:-

Table-'A' (Amount in Rs.)

S.No.	Demand Date	Basic Sale Price	Other Charges	Service Tax/GST	Total
1	19-07-2010	12,73,862	6,87,201	38,937	20,00,000
2	30-08-2010	-	11,699	301	12,000
3	04-02-2011	9,749	-	251	10,000
4	04-02-2011	2,08,942	-	5,380	2,14,322
5	16-03-2011	1,06,324	-	2,738	1,09,062
6	26-05-2011	1,03,557	-	2,667	1,06,224
7	26-05-2011	295	-	8	303
8	12-07-2011	1,04,175	-	2,683	1,06,858
9	12-07-2011	3,900	-	100	4,000
10	25-08-2011	1,04,471	-	2,690	1,07,161
11	25-08-2011	1,481	-	38	1,519
12	17-10-2011	1,04,471	-	2,690	1,07,161
13	21-10-2011	2,925	-	75	3,000
14	21-11-2011	1,04,471	-	2,690	1,07,161
15	21-11-2011	2,690	-	69	2,759
16	17-12-2016	1,06,926	-	4,812	1,11,738
17	12-06-2018	13,40,642	-1,01,520	1,60,878	14,00,000
18	12-06-2018	-	70,500	-	70,500
19	16-06-2018	16,621	23,449	1,994	42,064
Total		35,95,502	6,91,329	2,29,001	45,15,832

9. The DGAP has further claimed 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, may be correct but the profiteering, if any, has to be established at a given point of time, in terms of Rule 129(6) of the CGST Rules. Therefore, the ITC available to the Respondent and the amount received by him from the Applicant No. 1 and other recipients till 31.12.2018, has to be taken into account for determining profiteering.

10. The DGAP has further stated that another aspect to be borne in mind while determining profiteering was that para 5 of Schedule-III of the Central Goods and Services Tax 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*". Further, clause (b) of Paragraph 5 of Schedule II of the Central Goods and Services Tax Act, 2017 reads as*"(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent*

authority or after its first occupation, whichever is earlier". Thus, the ITC pertaining to the residential units which were under construction but not sold was provisional ITC which may 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 was outside the scope of the 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 additional ITC available to them in the post-GST period.

11. The DGAP has also claimed that prior to 01.07.2017, i.e. before GST implementation, the Respondent was eligible to avail CENVAT credit of Service Tax paid on the input services (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 "Edge Towers" the ratio of ITC to the turnover during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to December, 2018) periods, has been furnished by the DGAP 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 December, 2018	Total (Post-GST)
1	CENVAT credit of Service Tax Paid on Input Services (A)	1,74,99,398	70,57,101	2,45,56,499			
2	Credit of VAT on Inputs (B)						
3	Total CENVAT/VAT Credit Available (C)= (A+B)	1,74,99,398	70,57,101	2,45,56,499			
4	Input Tax Credit				1,45,53,470	1,95,62,787	3,41,16,257

	of GST (D)						
5	Total Turnover (E)			9,20,67,445			34,24,63,472
6	Total Saleable residential Area in the project (in Sq. Ft.) (F)			21,97,644			21,97,644
7	Area Sold relevant to Turnover as per Home buyers list (in Sq. Ft.) (G)			1,41,510			5,83,135
8	CENVAT/Input Tax Credit relevant to turnover (H)= [(C) or D*(G)/(F)]			15,81,234			90,52,596
9	Ratio of CENVAT/ Input Tax Credit to Turnover [(I)=(H)/(E)]*100			1.72%			2.64%

12. Moreover, the DGAP further mentioned that as per Table-B above, 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 1.72% and during the post-GST period (July, 2017 to December, 2018), it was 2.64%. This clearly confirmed that post-GST, the Respondent had been benefited from additional ITC to the tune of 0.92% (2.64% - 1.72%) of the turnover. Accordingly, the profiteering has been examined by comparing the applicable tax and the ITC available for the pre-GST period (April, 2016 to June, 2017) when only Service Tax was leviable @4.5% with the post-GST period (July, 2017 to December, 2018) when the effective GST rate was 12% (GST @18% alongwith 1/3rd abatement for land value) on construction service, imposed vide Notification No.11/2017-Central Tax (Rate) dated 28.06.2017. 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 as well as the recalibrated basic price the excess realization (profiteering) during the post-GST period, has been tabulated 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 December, 2018
1	Tax Rate	B	4.5%	12%
2	Ratio of CENVAT credit/ Input Tax Credit to Turnover as per Table B above (%)	C	1.72%	2.64%
3	Increase in input tax credit availed post-GST (%)	D= 2.64% less 1.72%	-	0.92%
	Analysis of Increase in input tax credit:			
4	Basic Price collected during post-GST (July, 2017 to December, 2018) period.	E		34,24,63,472
5	GST @ 12% on Basic Price	F= E*12%		4,10,95,617
6	Total Demand collected/raised post-GST	G=E+F		38,35,59,089
7	Recalibrated Basic Price	H= E*(1-D) or 99.08% of E		33,93,12,808
8	GST @12% on recalibrated Basic Price	I= H*12%		4,07,17,537
9	Commensurate Demand price	J= H+I		38,00,30,345
10	Excess Realization or Profiteered Amount	K= G - J		35,28,744

13. The DGAP has further found that as per the Table-C, it was clear that the additional ITC of 0.92% of the turnover should have resulted in commensurate reduction in the basic price as well as cum-tax rate. Therefore, 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 had 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 benefits on account of additional ITC. In other words, by not reducing the pre-GST basic price by 0.92% on account of additional benefit of ITC and charging GST @ 12% on the pre-GST basic price, the Respondent had contravened the provisions of Section 171 of the of the Central Goods and Services Tax Act, 2017.

14. The DGAP has also stated that as regards the quantification of profiteering or the benefit not passed on by the Respondent, to his recipients, taking into account the aforesaid CENVAT/ITC availability pre and post-GST and the details of the amount collected from the home buyers during the period 01.07.2017 to 31.12.2018, the amount of benefit of ITC not passed on to the recipients or in other words, the profiteered amount came to Rs. 35,28,744/-(Annex-17) which included 12% GST on the base profiteered amount of Rs. 31,50,664/-. Further, the benefit to be passed on to the Applicant No. 1 for the Flat No. K-1603 worked out to Rs. 14,096/- which included both

the profiteered amount @0.92% of the basic price and 12% GST on the said profiteered amount

15. The DGAP in his Report has also stated that before concluding the investigation, it was pertinent to mention that the above computation of profiteering was with respect to 397 home buyers from whom payments had been received by the Respondent during the post-GST period covered by the investigation, i.e., 01.07.2017 to 31.12.2018, whereas the Respondent had booked a total number of 1242 flats till 31.12.2018. In respect of the remaining 845 flats, though the customers had booked the flats on or before 31.12.2018, they had not paid any consideration during the post-GST period from 01.07.2017 to 31.12.2018. If the ITC in respect of these 845 units was taken into account to calculate profiteering in respect of 397 units where payments had been demanded or received in the post-GST period, the ITC as a percentage of turnover would be distorted and erroneous. Therefore, the benefit of ITC in respect of these 845 units would have to be calculated when the consideration was received in the post-GST period 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

construction service had been supplied by the Respondent in the State of Haryana only.

16. The DGAP has further stated that the present investigation covered the period from 01.07.2017 to 31.12.2018. Profiteering, if any, for the period post December, 2018 had not been examined as the exact quantum of the ITC that would be available to the Respondent in future could not be determined at this stage, when the construction of the project was yet to be completed.

17. The DGAP has concluded that the provisions of Section 171(1) of the CGST Act, 2017 requiring that *"any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices",* **had been contravened** by the Respondent in the present case.

18. The above Report was considered by this Authority in its meeting held on 18.06.2019 and it was decided to hear the Applicants and the Respondent on 03.07.2019. Sh. B. K. Gupta, General Manager, Sh. Lalit Vanjani, Chartered Accountant and Sh. Vivek Sarma, Chartered Accountant, authorised representatives appeared on behalf of the Respondent.

19. The Respondent vide his written submissions dated 03.07.2019 has stated that he admitted to the profiteering

amount of Rs. 35,28,744/- computed by the DGAP in his Report in respect of 397 flats of the subject project. He has further stated that he would pay the profiteered amount to the 397 flat owners' alongwith the applicable interest as per the provisions of CGST Act, 2017 within 15 days by either issue of Credit Notes or Cheques.

20. Further, the Respondent vide his written submissions dated 20.08.2019 has stated that:-

i. He has issued credit notes to 397 flat owners of the project for transfer/payment of benefit of profiteered amount of Rs. 35,28,744/- alongwith the interest of Rs. 7,32,220/- and submitted sample copies of credit notes and cheque issued to all the flat owners.

ii. The above project has 1280 flats out of which 40 flats were unsold and the remaining 1240 flats have been booked on which advance was received. During the period from 01.01.2019 to 30.06.2019, he has raised demand on 94 flat owners, which included taxable amount of Rs. 2,46,67,958/- on which CGST & SGST of Rs. 44,40,232/- was levied and he was in the process of giving benefit of ITC to these flat buyers.

iii. There were 15 towers in the subject project out of which possession had been given to the flat buyers of 5 towers and the remaining 10 towers were still under construction.

iv. He would pass on the benefit of ITC through the demands raised for the balance 10 towers.

21. This Authority vide Order dated 20.08.2019 had directed the Respondent to submit the following documents/information:-

a. Statement showing project-wise ITC/CENVAT Credit availed and Turnover as per the statutory Returns (GST, ST, VAT Returns) for the period from 01.04.2016 to 31.12.2018.

b. Details of all the Projects under the present Registration along with copies of Completion Certificate, if any.

c. Project-wise list of all payments received from each of his buyers along with the details of booking date & amount and ITC benefit passed on, if any, to them.

d. Ledger for the period from 01.04.2016 to 31.12.2018.

e. Details of the total number of apartments/flats/commercial units/residential units in the project with total area of each flat.

f. Tran-1 and Tran-2 Returns.

g. Details of Credit Reversal, if any.

h. Details of purchase of land alongwith agreements with Group Companies/partners of the subject project.

i. Bank Account Statement showing the debit entry of the payment of profiteered amount made to the flat owners.

j. Details of the booking date & amount of all the flat in the subject project.

22. Further, the Respondent vide his submissions dated 15.10.2019 and 23.10.2019 stated that:-

i. He proposed to bring the proceedings to an end to avoid any protracted litigation, but, suddenly and surprisingly, he had been directed to submit additional documents which were beyond the scope of the proceedings and these documents had no relationship whatsoever with the proceedings.

ii. The present proceedings initiated against him were on the basis of the complaint filed by the Applicant No. 1, who had purchased a flat in one of his projects i.e. 'Edge Towers', alleging not passing on the benefit of ITC by way of commensurate reduction in price. Therefore, the Order dated 20.08.2019 of the Authority seeking to investigate him beyond such complaint was completely without jurisdiction, arbitrary, unreasonable and without authority of law. The notice dated 19.06.2019 issued to him was only limited to the issue whether the Report of the DGAP should be accepted or not. Hence, the details of all

the projects under the present registration called for from him as per the Order dated 20.08.2019 were beyond the scope of the proceedings initiated in pursuance of above mentioned show cause notice and also not in conformity with the mandate of Section 171 of the CGST Act, 2017 read with Rule 133(5)(a) of the CGST Rules, 2017. Hence, he requested to withdraw the Order dated 20.08.2019 with immediate effect.

iii. In terms of the judgement of the Supreme Court in M/s GKN Driveshafts (India) Ltd. (2003) 1 SCC 72, the assessing officer was bound to dispose off the preliminary objections against existence of reason to believe, by passing a speaking order before proceeding with the reassessment. Relevant portion of the judgement was reproduced as:- "*However, we clarify that a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the notice is to file return and if he so desires, to seek reasons for issuing notice The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons*

have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years."

iv. The office of the DGAP had asked for various information/documents from him, which all had been duly submitted by him before the DGAP.

v. He has been engaged in the business of real estate in which the contracts were for long term duration and as per the GST law, he was required to reverse the ITC in respect of unsold units once the completion certificate was issued. Therefore, computation of the accurate quantum of ITC benefit which was required to be passed on to the recipients could only be computed when the completion certificate was issued and ITC in respect of the unsold units was reversed.

vi. That the law was ever changing and there was always a possibility in case of long term contracts that law may change over the period of time.

vii. The DGAP has itself noted in its Report in para 13 that "*At the outset, it is observed that the contention of the Noticee that the accurate quantum of input tax credit benefit would be passed on to the recipients*

once the project was fully complete and the Noticee had knowledge of the exact benefit of input tax credit, may be correct...." However, it proceeded to determine the quantification of the profiteering amount on average basis on the pretext that "*the profiteering, if any, has to be established at a given point of time, in terms of Rule 129(6) of the Rules. Therefore, the input tax credit available to the Noticee and the amount received by them from the Applicant and other recipients till 31.12.2018, have to be taken into account for determining profiteering.*"

viii. On the basis of the above mentioned reasoning given by the DGAP, he has further stated that the initiation of Anti-Profiteering proceedings against him before completion certificate of the above project was completely pre-mature, wrong, unreasonable and bad in law and the same should be dropped against him.

ix. He has also stated that the State level Screening Committee as well as the Standing Committee constituted under the CGST Rules, 2017, had not recorded any satisfaction/reasons which could reflect the he had acted in contravention of Section 171 of the CGST Act, 2017 read with the allied Rules. Hence, the entire proceedings were without

jurisdiction, arbitrary, unreasonable and ultra vires of the Article 14 and 19 of the Constitution of India..

x. That in the reference made by the Screening Committee to the Standing Committee by its letter dated 30.10.2018 no such satisfaction was recorded with respect to the complaint filed against him. The State Level Screening Committee had only stated the general principles related to Anti-Profiteering and had forwarded 30 complaints against 14 builders to the Standing Committee mechanically and without examination of complaints on case wise basis for having the satisfaction that a genuine case had been made out against him on the basis of evidence submitted to the Authorities by the Applicant No. 1.

xi. In view of the above, he has stated that the Screening Committee had acted completely without jurisdiction, opposed to the mandate of law, and had forwarded the complaints. Hence, the initiation of proceedings on the basis of the reference of Screening Committee was opposed to the mandate of law, which was bad in law and was liable to be quashed.

xii. Further, he has stated that the bare reading of Rule 128 provides the Standing Committee should examine the accuracy and adequacy of the evidence

provided in the application to determine whether there was prima-facie evidence to support the claim of the applicant that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of ITC had not been passed on to the recipient by way of commensurate reduction in prices. However, nowhere in the minutes of the meeting of the Standing Committee, the above requirement was met. The Standing Committee had merely decided to forward the complaint for further investigation without discussing any evidence on record and without recording any satisfaction whatsoever regarding the evidence, which could give the Standing Committee the right to forward the complaint. Therefore, neither the Screening Committee nor the Standing Committee provided any opportunity of hearing to the Respondent to present its case before them as such proceedings had civil consequences for him. Hence, it had violated the principles of natural justice and had caused prejudice to him. It was well settled that the authorities were required to offer a hearing to the person adversely affected by their decisions, before taking such decisions.

xiii. That Section 171 of the CGST Act, 2017 did not provide any methodology/procedure according to which the Authority shall examine whether 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. Rule 126 of the CGST Rules, which had been enacted in the exercise of delegated power of legislation, also did not provide methodology and procedure for determination as to whether reduction in the rate of tax on the supply of goods or services or the benefit of ITC had been passed on by the registered person to the recipients by way of commensurate reduction in prices. However, the said Rule also further delegated the said function to the this Authority in complete violation of the principles of law that delegatee cannot further sub-delegate the essential legislative functions.

xiv. He has further stated that the "procedure and methodology" issued by the Authority under Rule 126 of the CGST Rules also nowhere provided the methodology for determination as to whether the reduction in the rete of tax on the supply of goods or services or the benefit of ITC had been passed on by the registered person to the recipients by way of

commensurate reduction in prices. The "procedure and methodology" would come into force with effect from the issuance of the Notification by the Authority. However, no such Notification has been issued in the Official Gazette of India and as such; the same was not enforceable till date. Being not notified, the same also had no legal basis.

xv. He further stated that despite repeatedly asking the authorities how the amount was to be computed for the purposes of S. 176, no response has been received by him.

xvi. It was trite law that for a taxing statutes, to provide a mechanism for computation of value on which tax was to be paid. It had been repeatedly held that in case the provisions of law did not provide for complete machinery provision, with respect to levy, the levy itself would fail. Reliance in this regard was placed on the following cases:-

a. B.C. Srinivasa Setty [1981(128) ITR 294(SC)].

b. National Mineral Development Corporation 2004 (6) SCC 281.

c. Govind Saran Ganga Saran v. Commissioner of Sales Tax 1985 (60) STC 1 (SC).

d. Mathuram Agrawal v. State of Madhya Pradesh, (1999) 8 SCC 667.

Hence, in absence of any method/manner/basis for defining profiteering or for determining the manner in which the amount was to be computed, the provisions of Section 171 of the CGST Act, 2017 became unenforceable and therefore, the procedure and methodology adopted by the DGAP was completely wrong, arbitrary, unreasonable and without authority of law on the ground that the Report had proceeded to calculate the profiteering amount on average basis, which was neither provided in the Act not in the Rules, and same had been adopted by the DGAP unilaterally and according to its own whims and fancies. In the present case, the DGAP in the absence of procedure and methodology provided in the CGST Act read with the allied Rules had proceeded to determine the amount of profiteering on the basis of methodology for computation self-framed by it. In the absence of the same in the Act as also in the Rules, it was also erroneous and had neither any legal nor rational basis. Thus, the Report had been prepared against the principles of law laid down in plethora of judgements that computation machinery had to be provided in law and in absence of it, no

levy could be made. Further, he stated that the computation of the profiteered amount on average basis was completely wrong, incorrect, arbitrary and unreasonable because in the average method period selected for comparison also made the difference. If some more period was selected for the purpose of comparing ratio of credit to turnover, the figures would vary significantly. Hence, the method of calculation on average basis as adopted by the DGAP for determining the profiteering amount was completely wrong, incorrect, unreasonable and bad in law.

xvii. He has further stated that the show cause notice dated 19.06.2019 had been issued by the Authority in a mechanical manner and without mentioning prima facie view taken by the Authority; and also that the notice generally mentioned all the penal provisions without specifically mentioning the specific provision contravened by the him. Therefore, the same was against law laid down in various judgements including Amrit Foods, (2005) 13 SCC 419 and HMM Ltd., 1995 (76) ELT 497 (SC). Hence, the show cause notice was ineffective and bad in law and the entire proceedings conducted in pursuance of such notice were also bad in law.

23. The Respondent vide his submissions dated 26.11.2019 has also submitted the following information/documents:-

i. Screen shot of Tran-1 filed by him.

ii. Bank Account statement showing the debit entry of the payment of profiteering amount made to the flat owners.

24. The Respondent has also filed Writ Petition No. 12847/2019 in the Hon'ble High Court of Delhi challenging this Authority's Order dated 20.08.2019. The Hon'ble High Court in its Order dated 09.12.2019 has stated that:-

"Issue notice. Learned counsels for the respondents accept notice. Counter-affidavit be filed within eight weeks. Rejoinder, if any, be filed before the next date.

List on 14.01.2020.

In the meantime, the proceedings may go on and orders may be passed by the respondent No. 3. The Respondent No. 3 shall deal with the submissions of the petitioner.

Since the petitioner has raised a fundamental issue of jurisdiction of respondent No. 3 to proceed in the matter, the respondent No. 3 shall pass a reasoned order, firstly, on the aspect of jurisdiction. In case the respondent No. 3 passes a reasoned order holding that they have jurisdiction, it shall be open to respondent No. 3 to pass an order on merits."

25. As per the above directions of the Hon'ble High Court, despite a time bound procedure, the Respondent was given an opportunity to appear for the hearing on 16.12.2019. However, the Respondent despite the directions of the Hon'ble High Court did not appear for the hearing. Instead, vide his e-mail dated 16.10.2019 he had informed that he would not be able to appear for the hearing and had requested for adjournment of one week. Therefore, to ensure compliance of the Hon'ble High Court the Respondent was again given an opportunity to appear before this Authority on 24.12.2019. The Respondent appeared for the hearing on 24.12.2019 and without filing his written submissions orally requested to allow him more time to file written submissions. Accordingly, request of the Respondent was accepted by this Authority and he was directed to file his written submissions by 28.12.2019. The Respondent has filed his submissions dated 26.12.2019 on 27.12.2019.

26. As per the directions of the Hon'ble Delhi High Court, the submissions of the Respondent have been dealt with and a reasoned order dated 17.01.2020 has been passed by this Authority on the aspect of jurisdiction of this Authority.

27. We have carefully considered the Report of the DGAP, submissions made by the Respondent and the Applicant

No. 1. On examining the various submissions we find that the following issues need to be addressed:-

a. Whether there was any violation of the provisions of Section 171 (1) of the CGST Act, 2017 in this case?

b. If yes what was the additional benefit that had to be passed on to the recipients?

28. The Perusal of Section 171 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 input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."

(2). The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him."

29. The Respondent has contended in his submissions that State level Screening Committee as well as the Standing Committee constituted under the CGST Rules, 2017, had

not recorded any satisfaction/reasons which could reflect that he had acted in contravention of Section 171 of the CGST Act, 2017 read with the allied Rules. Perusal of Rule 123 of the CGST Rules, 2017 shows that the Standing Committee and the Screening Committees at the State level shall only prima facie examine the allegations of profiteering which are to be investigated by the DGAP in detail under Rule 129 (1) of the Rules. Hence, the contention raised by the Respondent is not correct in as much as prima facie the above committees have found evidence to the effect that the ITC benefit has not been passed on.

30. The Respondent has also contended that Section 171 of the CGST Act, 2017 does not provide any methodology/procedure according to which this Authority shall examine whether 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. He further contended that the methodology and procedure would have come into force with effect from the issuance of the notification by this Authority. In this connection it would be pertinent to mention that the main contours of the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and the benefit of ITC are enshrined in Section

171 (1) of the CGST Act, 2017 itself which states that "***Any reduction*** *in rate of tax on* ***any supply*** *of goods or services or the benefit of input tax credit* ***shall be passed on to the recipient*** *by way of* ***commensurate reduction in prices.***" It is clear from the perusal of the above provision that it mentions "reduction in the rate of tax on any supply of goods or services" which does not mean that the reduction in the rate of tax is to be taken at the level of an entity/group/company for the entire supplies made by it. Therefore, the benefit of tax reduction has to be passed on at the level of each supply of Stock Keeping Unit (SKU) to each buyer of such SKU and in case it is not passed on the profiteered amount has to be calculated on each SKU. Therefore, the contention that the profiteered amount should be computed at the entity/group/company level is untenable. Further, the above Section mentions "any supply" i.e. each taxable supply made to each recipient thereby clearly indicating that netting off of the benefit of tax reduction by any supplier is not allowed. A supplier cannot claim that he has passed on more benefit to one customer therefore he could pass less benefit to another customer than the benefit which is actually due to that customer. Each customer is entitled to receive the benefit of tax reduction on each product purchased by him. The word "commensurate" mentioned in the above Section

gives the extent of benefit to be passed on by way of reduction in the prices which has to be computed in respect of each product based on the tax reduction as well as the existing base price (price without GST) of the product. The computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from product to product and hence no fixed mathematical methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a recipient or the profiteered amount. However, to give further clarifications and to elaborate upon this legislative intent behind the law, this Authority has been empowered to determine/expand the Procedure and Methodology in detail.

It is also submitted that the "Methodology and Procedure" has been notified by this Authority vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, one formula which fits all cannot be set while determining such a "Methodology and Procedure" as the facts of each case are different. In one real estate project, date of start and completion of the project, price of the house/commercial unit, mode of payment of price, stage of completion of the project, timing of purchase of inputs, rates of taxes, amount of ITC availed, total saleable

area, area sold and the taxable turnover realised before and after the GST implementation would always be different than the other project and hence the amount of benefit of additional ITC to be passed on in respect of one project would not be similar to another project. Issuance of Occupancy Certificate/ Completion Certificate would also affect the amount of benefit of ITC as no such benefit would be available once the above certificates are issued. Therefore, no mathematical formulae can be fixed for determining the benefit of additional ITC which would be required to be passed on to the buyers of such units.

Further, the facts of the cases relating to the Fast Moving Consumer Goods (FMCGs), restaurants, construction and cinema houses are completely different and therefore, the mathematical methodology employed in the case of one sector cannot be applied in the other sector otherwise it would result in denial of the benefit to the eligible recipients. Moreover, both the above benefits have been granted by the Central as well as the State Governments by sacrificing their tax revenue in the public interest and hence the suppliers are not required to pay even a single penny from their own pocket and hence they have to pass on the above benefits as per the provisions of Section 171 (1).

31. He has also cited the judgement passed in the case of *Commissioner of Income Tax v B. C. Srinivasa Setty (1981) 128 ITR 294 (SC)* in his support. Perusal of this judgement shows that it involved valuation of the goodwill for computation of income tax which is not the issue in the present case. Hence, it is respectfully submitted that the above case does not help the Respondent. The Respondent has also cited the judgement passed in the case of *National Mineral Development Corporation v. State of M. P. and another (2004) 65 SCC 281* in his support in which the issue of levy of royalty on 'slimes' was involved. Hence, the above case is of no help to the Respondent as no such issue is involved in the present case. He has also cited the judgement passed in the case of Govind Saran Ganga Saran v. Commissioner of Sales Tax 1985 (60) STC 1 (SC). It is submitted that the above case cannot be followed in the present case as it is not possible to define taxability in such cases as profiteering varies in each case as facts and conditions of each case change as amount of ITC availed in each case is different.

32. The Respondent has also relied upon the case of Mathuram Agrawal v. State of Madhya Pradesh, (1999) 8 SCC 667. Perusal of the judgement of Hon'ble Supreme Court shows that it involved the issue of levy of Property Tax under the provisions of the Madhya Pradesh

Municipalities Act, 1961. It can be clearly concluded that the issue involved in the above mentioned case has no relation with the present proceedings of Anti-Profiteering. Hence, the above case is of no help to the Petitioner.

33. 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 1.72% and during the post-GST period (July-2017 to December-2018), it was 2.64%. This confirms that, post-GST, the Respondent has been benefited from additional ITC to the tune of 0.92% (2.64%-1.72%) 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. 35,28,744/- on the basis of the information supplied by the Respondent, which

the Respondent had himself admitted and hence the amount of profiteering computed by the DGAP is hereby accepted as correct.

34. In view of the discussions in para 33 above, it is clear that the Respondent has profiteered by an amount of Rs. 35,28,744/-(Annex-17) during the period of investigation i.e. 01.07.2017 to 31.12.2018. The above amount of Rs. 35,28,744/- (including 12% GST) that has been profiteered by the Respondent from his home buyers, including Applicant No. 1, shall be refunded by him, along with interest @18% thereon, from the date when the above amount was profiteered by him till the date of such payment, in line with the provisions of Rule 133 (3) (b) of the GCST Rules 2017.

35. We also take note of the fact that the Respondent has admitted to having profiteered by the above amount before this Authority vide his submissions dated 03.07.2019. Further, we observe that vide his submissions dated 20.08.2019, he has submitted sample credit notes and cheques as evidence to establish his claim of having passed on the benefit, amounting to Rs. 35,28,744/- along with interest thereon amounting to Rs. 7,32,220/- to 397 home buyers of 'Edge Tower'. Accordingly, this Authority

takes on record the said claim of the respondent, but the said payments need to be verified.

Thus the DGAP is directed to verify the above passing on of the ITC benefit and submit report within a period of 03 months from the passing of this order.

36. Further, this Authority orders that the Respondent shall reduce the price per unit/ flat to be realized from the other home buyers by an amount commensurate with the benefit of ITC, as provided under Rule 133 (3) (a) of the CGST Rules, 2017.

37. Also, we observe that the present investigation of the DGAP was only up to 31.12.2018. Hence, any additional benefit of ITC, which shall accrue subsequently to the respondent, shall also be passed on to the eligible home buyers by the Respondent. Further, the total additional ITC that will be finally available to the Respondent cannot be determined at this stage, in as much as the construction of the project is yet to be completed. Therefore, we order that the DGAP shall carry out a comprehensive investigation at the time of issue of occupancy certificate. In case this additional benefit is not passed on to the eligible homebuyers, they shall be at liberty to approach the State Screening Committee Haryana for initiating fresh proceedings under Section 171 of the above Act against the Respondent. The concerned CGST or SGST

Commissioner shall take necessary action to ensure that the benefit of additional ITC is passed on to the eligible house buyers in future.

38. Finally, we observe that since the Respondent has denied benefit of ITC to his homebuyers in his Project 'Edge Towers' in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has thus committed an offence under Section 171 (3A) of the above Act, he is liable to be penalized 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. Accordingly, the notice dated 19.06.2019 vide which it was proposed to impose penalty under Sections 29 and 122-127 of the above Act read with Rule 21 and 133 of the CGST Rules, 2017 is withdrawn to that extent.

39. It is clear to us that the Respondent has profiteered in the project 'Edge Tower'. Therefore, as per the provisions of Section 171(2) of the CGST Act, 2017, this Authority has reasons to believe that there is a need to verify all the Input Tax Credits of the Respondent so as to arrive at the aggregate profiteering of the Respondent, since profiteering on the part of the Respondent has already been established in the case of "Edge Towers" project of

the Respondent as also the fact that supplies from various projects of the Respondent are being made through a single GST registration and the same ITC Pool/Electronic Credit Ledger is being used for all the supplies being made from that registration. Therefore, the Authority, in line with the provisions of Section 171(2) of the CGST Act, 2017 and as per the amended Rule 133 (5) (a) of the CGST Rules 2017 directs the DGAP to further examine all the other projects of the said Respondent for possible violations of the provisions of Section 171 of the CGST Act 2017 and to submit his Report as per the provisions of Rule 133 (5) (b) of the CGST Rules, 2017, since there are adequate reasons to believe that the Respondent may not have passed on the benefit of ITC to his recipients in terms of Section 171(1) of the Act ibid, in the same manner as in the project in hand, i.e. 'Edge Towers".

40. The Authority as per Rule 136 of the CGST Rules 2017 directs the jurisdictional Commissioners of CGST/SGST Haryana 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 within a period of 4 months from the date of receipt of this order.

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

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

14.2.2020

(A.K Goel)
(Secretary, NAA)

File No. 22011/NAA/46/Ramprastha/2019 Dated: 14.02.2020
Copy to:-

1. M/s Ramaprastha Promoter & Developer Pvt. Ltd., Plot No 114, Sector-44, Gurugram-122002.
2. Sh. Manish Saini, House No 23-D, (New 313, Block-4), Shiwalik Vihar, Nayagoan, Distt. Mohali, Punjab-160103.
3. Director General Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. The Commissioner of State Tax, Vanijya Bhavan, Plot No. 1-3, Sector-5, Panchkula, Haryana-134151.

5. The Commissioner, CGST Gurugram, Plot No. 36 & 37, Sector-32, Gurugram, Haryana-122001.
6. Principal Secretary to Govt. of Haryana, Town and Planning Department, Plot No. 3, Sec-18A, Madhya Marg, Chandigarh-160018.
7. NAA Website/Guard File.

14.2

A. K. GOEL
SECRETARY, NAA