

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

<b>Case No.</b>	06/2020
<b>Date of Institution</b>	03.09.2019
<b>Date of Order</b>	25.02.2020

**In the matter of:**

1. Shri Paramjeet Rathee, VPO Rohrai (230), Rewari-123401 (Email address-caparamrathee@gmail.com).
2. Director General of Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

**Applicants**

**Versus**

M/s Supertech Limited, Supertech House, B-28-29, Sector-58,  
Noida-201307.

**Respondent**

**Quorum:-**

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



Present:-

1. Sh. Paramjeet Rathee the Applicant No. 1 in person.
2. None for the Applicant No. 2.
3. Sh. Sunil K. Verma, Assistant Manager and Sh. D.K. Gupta, CFO for the Respondent.

**ORDER**

1. The present Report dated 30.08.2019 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after a detailed investigation under Rule 129(6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the present case are that the Applicant No. 1 had filed an application dated 03.07.2018 (Annexure-1) before the Standing Committee on Anti-Profiteering under Rule 128 of the Central Goods & Services Tax (CGST) Rules, 2017. The Applicant No. 1 had stated in his application that the Respondent had resorted to profiteering in respect of the supply of construction services related to the purchase of Flat J-66C, in the Respondent's project "Officer Enclave", Sector-2, Sohna Road, Gurugram. The Applicant No. 1 had also alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) by way of commensurate reduction in the price of the apartment purchased by him, on implementation of GST w.e.f. 01.07.2017.
2. The said application was examined by Standing Committee on Anti-Profiteering in its meeting held on 11.03.2019 and forwarded with its recommendation to the DGAP for detailed investigation



under Rule 129(1) of the CGST Rules, 2017 to investigate whether the benefit of reduction in the rate of tax or ITC had been passed on by the Respondent to his recipients. The DGAP had received the minutes of the meeting of the Standing Committee on Anti-Profiteering on 27.03.2019.

3. The DGAP has stated that the Applicant No. 1 had submitted a copy of the Application and copies of his written communication with the Respondent.
4. Thereafter, the DGAP had issued a notice to the Respondent on 09.04.2019 (Annex-3) under Rule 129 of the above Rules, calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the Applicant No. 1 by way of commensurate reduction in price with respect to the project mentioned in his Application dated 03.07.2019 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. The Respondent was also given an opportunity to inspect the non-confidential evidence/information furnished by the above Applicant No. 1 during the period 15.04.2019 to 17.04.2019. However, the Respondent did not avail of the said opportunity. Vide e-mail dated 07.08.2019 (Annex-4), the Applicant No. 1 was also given an opportunity to inspect the non-confidential evidence/reply furnished by the Respondent on 13.08.2019 or 14.08.2019. However, the Applicant No. 1 did not avail of the said opportunity. The DGAP has stated that the investigation in this case had been carried out for the period from 01.07.2017 to



31.03.2019 and the time limit to complete the investigation was extended up to 26.09.2019, by this Authority, in terms of Rule 129(6) of the Rules, vide Order F.No. 22011/NAA/19/2018/3819 dated 19.06.2019 (**Annex-5**).

5. In his Report the DGAP has stated that in response to the notice dated 09.04.2019, the Respondent replied vide letters/e-mails dated 10.05.2019 (**Annex-6**), 18.06.2019 (**Annex-7**), 22.07.2019 (**Annex-8**), 07.08.2019 (**Annex-9**) and 08.08.2019 (**Annex-10**). Vide the aforementioned letters, the Respondent also submitted the following documents/information:-

- (a) Copies of GSTR-1 & GSTR-3B Returns for the period July, 2017 to March, 2019.
- (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 March, 2019.
- (f) Tax rates, pre-GST and post-GST.
- (g) Copy of Balance Sheet for FY 2016-17 & 2017-18.
- (h) The payment plan of the Applicant alongwith agreement and demand letters.
- (i) Details of turnover and ITC in respect of the project "Officer Enclave".



(j) List of home buyers in the project "Officer Enclave".

6. The DGAP has reported that the Respondent had requested to treat all the data submitted by him as confidential except the allotment letter and the ledger of Applicant No. 1, in terms of Rule 130 of the Rules.
7. The DGAP has also reported that he has carefully examined the various replies of the Respondent and the documents/evidence placed on record. The main issues for determination were whether the Respondent had benefited from the reduction in the rate of tax or the ITC after implementation of the GST w.e.f. 01.07.2017 and if so, whether such benefit was passed on by the Respondent to the recipients, in terms of Section 171 of the CGST Act, 2017.
8. The DGAP has further reported that the Respondent had submitted a copy of the sale agreement dated 23.06.2016, for the sale of flat no. J-66C to Applicant No. 1 in his project "Officer Enclave", measuring 1375 square feet, at the basic sale price of Rs. 3550/- per square feet. The details of amounts and taxes paid by the Applicant to the Respondent has been furnished by the DGAP in Table-'A' below:-

**Table-'A'**

(Amount in Rs.)

Sl. No.	Payment Stages	Due Date	Basic Sale Price	Service Tax	GST	Total
1	At the time of Booking	23.05.2016	4,50,000	16,875	-	4,66,875
2	Within 90 days	21.08.2016	5,26,250	19,734	-	5,45,984



3	On completion of foundation	03.02.2017	4,88,125	18,305	-	5,06,430
4	On casting of ground floor slab	03.02.2017	4,88,125	18,305	-	5,06,430
5	On casting of first floor slab	03.03.2018	4,88,125	-	58,575	5,46,700
	<b>Total</b>		<b>24,40,625</b>	<b>73,219</b>	<b>58,575</b>	<b>25,72,419</b>

9. The DGAP in his Report has stated that another aspect to be borne in mind while determining the quantum of profiteering was that the ITC proportionate to the unsold units would have to be reversed once the completion certificate was obtained, as ITC in respect of such unsold units would have been claimed in the relevant months when inward supplies were received by the Respondent. He has also cited 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) which 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 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, the ITC pertaining to 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 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 DGAP has contended that the ITC pertaining to unsold units might not fall within the ambit of this investigation and the Respondent would be required to recalibrate the selling price of such units to be sold to prospective buyers by considering the proportionate benefit of additional ITC available to them in the post-GST period.

10. Further, the DGAP in his Report further stated that the issue of profiteering had been examined by comparing the ratio of ITC available relevant to the turnover. The rate of tax during the pre-GST period (April, 2016 to June, 2017) was Service Tax @4.5%



and VAT@1% (total tax rate was 5.5%) and the post-GST period (July, 2017 to December, 2018) the effective GST rate on construction service was 12% (GST @18% alongwith 1/3<sup>rd</sup> abatement on account of land value), vide Notification No.11/2017-Central Tax (Rate) dated 28.06.2017. This showed that upon the introduction of GST w.e.f. 01.07.2017, the applicable tax rate on the construction services supplied by the Respondent had gone up from 5.5% to 12%.

11. The DGAP in his Report has also mentioned that as per the details submitted by the Respondent, it appeared that prior to 01.07.2017, i.e., in the pre-GST era, the Respondent was eligible to avail CENVAT credit of Service Tax paid on the input services only and no CENVAT credit was available in respect of Central Excise Duty and VAT paid on the 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 from the project "Officer Enclave", the ratio of ITC to the turnover during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to March, 2019) periods, has been furnished by the DGAP in Table-'B' below:-

**Table-'B'**

(Amount in Rs.)

Sr. No.	Particulars	April, 2016 to June, 2017 (Pre-GST)	July, 2017 to March, 2019 (Post-GST)
1	CENVAT credit of Service Tax Paid on Input Services (A)	2,39,28,797	-
2	Credit of VAT paid on Inputs (B)	-	-



3	Total CENVAT/VAT Credit Available (C)= (A+B)	2,39,28,797	-
4	Input Tax Credit of GST (D)		95,45,185
5	Total Turnover as per Home buyers list (E)	52,18,93,588	8,08,48,071
6	Total Saleable Area of Flats in the project (in Sq. mt.) (F)	17,15,490	17,15,490
7	Area Sold relevant to Turnover as per Home buyers list (G)	3,50,360	56,385
8	Relevant CENVAT/Input Tax Credit (H)= [(C) or D*(G)/(F)]	48,87,054.52	3,13,732.67
9	Ratio of CENVAT/ Input Tax Credit to Turnover [(I)=(H)/(E)]*100	0.94%	0.39%

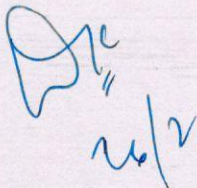
12. The DGAP further mentioned that in the impugned project under consideration, the total number of flats was 1446, out of which the Respondent had raised demand on 257 home buyers during the pre-GST era and in post-GST period covered by the investigation, i.e., 01.07.2017 to 31.03.2019, the Respondent had raised demands only on 39 home buyers, whereas the Respondent had booked total number of 334 flats till 31.03.2019. In respect of the remaining 295 flats, though the customers had booked the flats on or before 31.03.2019, the Respondent had not raised any demand during the post-GST period from 01.07.2017 to 31.03.2019. If the ITC in respect of these 295 units was taken into account to calculate profiteering in respect of 39 units where payments had been demanded in the post-GST period, the ITC as a percentage of the turnover would be distorted and erroneous. Further, on scrutiny of the reconciliation of returns of the project, it was observed that for the month of January to March, 2019, no ITC had been availed by the Respondent and the percentage of ITC from July, 2017 to December, 2018 was also very low in percentage.



13. The DGAP has further stated that as per the 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 0.94% and during the post-GST period (July, 2017 to March, 2019), it was 0.39%. It was also observed from the above narrated facts that the rate of tax in the post-GST period was higher than the rate of tax in the pre-GST period. Therefore, it appeared that the Respondent had neither benefited from additional ITC nor had there been a reduction in the tax rate in the post-GST period. Therefore, the provisions of Section 171 of the Central Goods and Services Tax Act, 2017 did not appear to be attracted to the present case. Based on the submissions made by the Respondent, it was also observed that the Respondent had supplied construction services in the State of Haryana only.

14. The DGAP has intimated that the Respondent has not contravened the provisions of Section 171.

15. The above investigation Report was received by this Authority from the DGAP on 03.09.2019 and was considered in its sitting held on 11.09.2019 and it was decided to accord an opportunity of hearing on 26.09.2019 to the Applicant No. 1 only. Applicant No. 1 appeared for the hearing and submitted his written submissions stating:-

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- a) That he had booked a flat for Rs. 48.81 Lacs (Base Price) with the Respondent for Unit No. J-66C, Third Floor, in his project 'Officer Enclave'. The payment plan in respect to his flat was construction linked.



- b) That the Respondent had offered the flats for sale to the Government employees of the Central and State Governments, Public Sector Companies and officials of any Ministry, Department, Commission, DRDO, Police, PSUs, Public Sector Banks, Government run educational institutions, Autonomous bodies etc. Both serving and retired employees were eligible under the Scheme. Further, relatives having blood relations with the above category of consumers could become joint applicants.
- c) That the Respondent had promoted 'Officer Enclave' inside his project, 'Hill Town'. The Officer enclave project was spread over around 17 acres of land in a project site having a total area of 140 acres.
- d) That the Respondent had offered the flats in the High Rise and the Low rise apartments in the said project
- e) That the High Rise project was scrapped later on by the relevant authorities because the requisite permissions for the construction of the project had not been obtained.
- f) That he had made payments as per the mutually agreed construction milestones and that for the last two years there was no construction taking place at the site and due to the stoppage of construction, there were no fresh sales in the project.
- g) That as per the investigation report, the DGAP had not taken into consideration the following:-

- i. The pre-GST impact of ITC on cost.



- ii. Cost Sheet Performa for Goods/Services for the pre GST and post GST periods.
- iii. Summary of purchased materials/inputs vs. Construction Stages.
- iv. Project Report Submitted to RERA.

h) That he had requested the DGAP for the inspection of the non-confidential documents on 20<sup>th</sup> or 21<sup>st</sup> August, 2019 and for scanned copies of the documents submitted by the Respondent, but the same were not supplied to him.

i) That as per the DGAP's investigation report, it had been established that no credit was admissible in respect of Central Excise Duty paid on inputs and no credit was available for VAT paid on inputs. However, in the post GST period, the Respondent could avail ITC of GST paid on all inputs and input services, which implied that free flow of credit was allowed.

j) That the DGAP had considered the 'net benefit of ITC' to compute the quantum of profiteering as per the Table mentioned in para No. 14 of the Report, but he has not considered the type of sale consideration i.e. Subvention plan or CLP Plan. Further, as was apparent from para No. 14 of the DGAP Report, in the GST regime, the Respondent could avail ITC of GST paid on all the inputs and the input services. However, the DGAP, while calculating profiteering has not considered the same through cost sheet pre GST and Post GST on the base price of Rs. 3550 in his case.

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k) That as construction has been stalled in the present scenario, so, post GST period, the Respondent had not raised demands on homebuyers, as there were cases of construction linked plan, so, exact quantum of ITC in present scenario by concept of "net benefit of ITC" based on sales would be wrong and it should be compared based on construction work which has happened in the pre GST and post GST period and the same could be checked from HRERA reports, as builder was bound to submit the same to RERA office on quarterly basis.

l) That the total saleable area of 17,15,490 sq. mt. appeared to be wrong as the project was in 17 acres and the total saleable area was approx. 1,70,000 sq. mt.

m) That the Subvention scheme flat sale should be excluded for calculation of the ratio of CENVAT/ITC to turnover and the computation should take into account the comparison between the CLP and the stage of completion of the project.

n) That as per Section 171 (1) of GST act, any reduction in the rate of tax on any supply of goods or services or the benefit of ITC should be passed on to the recipient by way of commensurate reduction in prices, so, In the present case Base Rate should be recalculated to take into effect the reduction in price due to free flow of ITC allowed in the GST regime.

o) That the term "Profiteering" as defined under various dictionaries was as follows:-



- Black's Law Dictionary- The taking advantage of unusual or exceptional circumstances to make excessive profits
- Law Lexicon- To seek or obtain excessive profits, one who is given to making excessive profits
- Shorter Oxford English Dictionary – Make or seek to make an excessive profit
- Mount Vs Welsh- Any conduct or practice involving the acquisition of excessive profit
- Islamic Academy of Education vs. State of Karnataka- Profiteering would mean taking advantage of unusual or exceptional circumstances to make excessive profits.

Hence, in the present case, the builder had been allowed free flow of credit, but the benefit arising therefrom had not been passed to homebuyers like him by way of commensurate reduction in the base price.

p) The Applicant has quoted the judgement passed by this Authority in the case of M/s Theco India Pvt. Limited and M/s Pyramid Infratech Pvt. Ltd and has requested to initiate the proceedings in the same manner.

q) He has requested that in this case the DGAP's Report dated 30<sup>th</sup> August 2019 be rectified and the correct calculation of profiteering be undertaken based on the demands raised in the post GST period keeping in mind the stage of completion of the project.

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16. Supplementary Report was sought from the DGAP on the issues raised by the Applicant No. 1 through submissions dated 25.09.2019, under Rule 133(2A) of the CGST Rules, 2017. The DGAP vide his Report dated 14.10.2019 has stated:-

- a) That the Respondent has stated the facts which related to the booking and construction activities and hence they have no impact on profiteering.
- b) That during the post-GST era (i.e. the period covered under investigation), the construction activities were minimum and it was also corroborated by the fact that the demand raised in the post-GST was much lesser than the pre-GST period.
- c) That ratio of CENVAT/ITC availed by the Respondent had been compared with the total turnover for the period from April, 2016 to June, 2017 (i.e. pre-GST) and July, 2017 to March-2019 (i.e. post-GST) to work out the additional benefit of ITC available with the Respondent.
- d) That the Respondent had declared all the data submitted by him as confidential except allotment letter and ledger of the Applicant No. 1.
- e) That in para 11 of the DGAP Report dated 30.08.2019, the area had been mentioned in square feet. However, due to typing error, the total saleable area in Table-B had been incorrectly mentioned in square meters and the same should be read as square feet.

17. This Authority vide its Order dated 16.10.2019 directed the

Respondent to file written submissions on point No. 13 raised



by the Applicant No. 1 in his submissions dated 25.09.2019 and accordingly, accorded a hearing on 08.11.2019.

18. Sh. Sunil K. Verma, Assistant Manager and Sh. D.K. Gupta, CFO appeared for the hearing. Vide submissions dated 08.11.2019 the Respondent has stated that in the present matter, he was in agreement with the DGAP Report. He has further stated that the construction of the subject project was very slow and only 20% of the construction activities had been completed and that he was always bound with the Builder Buyer Agreement/Allotment Letter.
19. This Authority has carefully examined the DGAP's Report, the written submissions of the above Applicants as well as the Respondent's placed on record. The issues to be decided by the Authority are as under:-
- 1) Whether there was any violation of the provisions of Section 171 of the CGST Act, 2017 in this case?
  - 2) If yes then what was the quantum of profiteering?
20. A 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."

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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, the DGAP in his Report, has stated that ITC as a percentage of the turnover which was available to the Respondent during the pre-GST period (April-2016 to June-2017) was 0.94% and during the post-GST period (July-2017 to March-2019), it was 0.39%. On this basis, the DGAP has reported that the Respondent had neither benefited from additional ITC nor had there been a reduction in the tax rate in the post-GST period and therefore it does not qualify to be a case of profiteering.

We find no reason to differ from the Report of DGAP and we therefore agree with his findings that the provisions of Section 171 of the CGST Act 2017 have not been contravened in this case.

21. The Applicant No. 1 vide his above submissions has stated that the documents supplied by the Respondent to the DGAP during the investigation period had not been supplied to him. It is evident from the DGAP Report dated 30.08.2019 and supplementary Report dated 14.10.2019 that the Respondent in terms of Rule 130 has requested that all the data submitted by him except allotment letter and Applicant's ledger, were to be



treated as confidential. Therefore, the confidential documents submitted by the Respondent had correctly not been supplied by the DGAP to the Applicant No. 1.

22. The Applicant No. 1 has further contended that while calculating profiteering, the DGAP has not considered the type of sale consideration i.e. Subvention Plan or CLP Plan, pre-GST impact of ITC on cost, Cost Sheet Performa for Goods/Services pre-GST and post-GST, Summary of purchased materials/inputs versus Construction Stages and the Project report submitted to RERA. The above claim of the Applicant is not sustainable because to determine the quantum of profiteering, the ratio of ITC to the turnover during the pre-GST (April-2016 to June-2017) and post-GST (July-2017 to March-2019) periods has been compared by the DGAP as per the data submitted by the Respondent and it was found that the percentage of ITC availed by the Respondent in the post-GST period was very low in comparison to pre-GST period and hence, provisions of Section 171 of the Act have not been contravened in the present case.

23. The above Applicant has further stated that the claim of the DGAP that the total saleable area was 17,15,490 square meter appeared to be wrong as the project is in 17 acres. However, the DGAP in his supplementary report dated 14.10.2019 has stated that it was a typographical error and it may be read as square feet instead of square meter.

*OK 24/2*



24. The Applicant No. 1 has also mentioned definition of "Profiteering" as per various dictionaries. However, the word "profiteered" has been duly defined in the explanation attached to Section 171 and hence there is no ambiguity on anti-profiteering or profiteering provisions. The provisions of explanation to Section 171 are quoted as under:-

*"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."*

25. The Applicant has also relied upon the orders passed by this Authority in the case of M/s Theco India Pvt. Ltd. and M/s Pyramid Infratech Pvt. Ltd. Upon perusal of the above cited orders, it is observed that the provisions of Section 171 of the Act had been contravened. However in the present case, as evident from the DGAP Report, the Respondent has not contravened the provisions of Section 171 of the Act. Therefore, the above cited orders are of no use to the Applicant No. 1.

26. In view of our above findings, we conclude that the instant case does not fall under the ambit of Anti-Profiteering provisions of Section 171 of the CGST Act, 2017. Therefore, the allegation that the Respondent has not passed on the benefit of ITC in this case is not found sustainable. Accordingly, the application



filed by Applicant No. 1, requesting action against the Respondent for alleged violation of the provisions of Section 171 of the CGST Act, is dismissed as not maintainable.

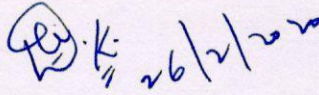
27. A copy of this order be sent to the Applicants and the Respondent free of cost. File of the case be consigned after completion.

Sd/-  
(B. N. Sharma)  
Chairman

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

Sd/-  
(Amand Shah)  
Technical Member

Certified Copy

o/c  
  
(Dev Kumar Rajwani)  
(Deputy Commissioner, NAA)

File No. 22011/NAA/67/Supertech/2019/1125-1125 Dated: 26.02.2020  
Copy to:-

1. Shri Paramjeet Rathee, VPO Rohrai (230), Rewari-123401 (Email address-caparamrathee@gmail.com).
2. M/s Supertech Limited, Supertech House, B-28-29, Sector-58, Noida-201307.
3. Director General Anti-Profitteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. NAA Website/Guard File.