

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

I. O. No. : 31 / 2020
Date of Institution : 19.03.2020
Date of Order : 27.11.2020

In the matter of:

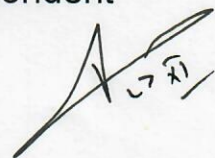
1. Sh. Hemant Kejriwal and Shri Vishnu Kumar Kejriwal, 493/B/2
GT Road (S), Gagandeep Apartments, B1A, F1-2E, Shibpur,
Howrah- 711 102.
2. Director-General of Anti-Profiteering, Central Board of Indirect
Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan,
Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s. Siddha Infradev LLP, Siddha Park, 99A, Park Street,
Kolkata- 700 016.

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. None for the Respondent.

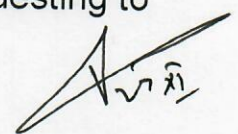
ORDER

1. The present Report dated 19.03.2020 has been received from 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 case are that the DGAP received a reference from the Standing Committee on Anti-profiteering on 28.06.2019 recommending a detailed investigation against the Respondent in respect of an Application filed by Applicant No. 1 under Rule 128 of the Central Goods and Services Tax Rules, 2017 alleging profiteering by the Respondent in respect of the purchase of a residential unit, i.e. Flat No. 904 in Block-3, in Respondent's project "Siddha Sky" located in Kolkata. Applicant No. 1 has alleged that the Respondent had not passed on the benefit of input tax credit (ITC) by way of commensurate reduction in prices despite having charged GST @12% on the payments made by him to the Respondent. The Applicant No. 1

also submitted that on having raised the said issue with the Respondent, he has received the following reply vide email dated 11.01.2018 from the Respondent which read as follows- *“As per the provisions of the GST Act in which the purchasers are entitled to receive benefit of lower prices on account any reduction in rate of tax on any supply of goods or services and benefit of Input Tax Credit, as put in place in the said Act. You will however appreciate that the said GST Act which came in force only on 01.07.2017 is in its nascent stage. There is no clarity with regard to the manner in which the benefit of input tax credit and any reduction of tax rate, shall be quantified. In the above circumstances, it is difficult for us to precisely estimate the benefit which we have to transfer to our buyers at this stage. We are in the process of working out the cost benefits both in our hands as also in the hands of the customers, but it will take time to work out the exact benefits if any that will accrue to the customers. If any benefit will arise, we shall definitely inform you on or before the time of possession and or final payment.”*

2. Applicant No. 1 has further submitted before the DGAP that although Respondent accepted the fact that the benefit of input tax credit should be passed on but, the manner of passing the credit was not clear, therefore, he had not passed on such benefit till the date of filing of the application. Further, the Applicant No.1 submitted the following documents along with his application:-

- a) E-mails of correspondence with Respondent requesting to pass on the benefit of the input tax credit.



- b) Copies of Demand Letters raised on him by the Respondent.
- c) Copy of an advertisement published on Respondent's website wherein it was advertised that- "Price increase from April 2019, Buy a Flat. NO GST and Save up to Rs. 15.11 Lakhs".
3. The DGAP, on receipt of the aforesaid reference from the Standing Committee on Anti-profiteering, issued a Notice under Rule 129 of the Rules on 09.07.2019, calling upon the Respondent to reply as to whether he admitted that the benefit of ITC has not been passed on to his recipients 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 to furnish all documents in support of his reply. Further, the DGAP allowed the Respondent to inspect the non-confidential evidence/information which formed the basis of the above-said Notice, during the period from 17.07.2019 to 19.07.2019. However, the Respondent did not avail of the said opportunity. Vide e-mail dated 27.02.2020, the Applicant No. 1 was also allowed to inspect the non-confidential documents/reply furnished by the Respondent on 03.03.2020 or 04.03.2020. However, Applicant No. 1 did not avail of the said opportunity.
4. The DGAP has reported that he has covered the period from 01.07.2017 to 30.06.2019 during the current investigation. The time limit to complete the investigation was extended up to

27.03.2020 by this Authority vide its order dated 23.12.2019, in terms of Rule 129(6) of the Rules.

5. The DGAP has stated that the Respondent has submitted his replies vide his various letters/ e-mails but he did not furnish the complete records/ information and relevant documents which were required for investigation. Hence, Summons under Section 70 of the Central Goods and Services Tax Act, 2017 read with Rule 132 of the Rules, were issued to Sh. Sanjay Jain, Designated Partner of the Respondent, asking him to appear before the DGAP on 14.11.2019. In response to the abovementioned Summons, the representatives authorized by the Respondent, Ms. Sonia Dube, Advocate and Ms. Surbhi Anand, Advocate appeared before the DGAP on behalf of Sh. Sanjay Jain on 14.11.2019 and requested the DGAP for 10 days to submit the requisite records/ documents. Thereafter, the Respondent submitted his response to the above said Notice and Summons vide his various letters and emails and furnished the following documents/ information before the DGAP:-

- a) Copies of GSTR-1 returns for the period from July 2017 to June 2019.
- b) Copies of GSTR-3B returns for the period from July 2017 to June 2019.
- c) Copies of ST-3 returns for the period from April 2016 to June 2017.
- d) A submission that as per the West Bengal Value Added Tax Rules, 2003, VAT laws did not apply to him.

- e) Screenshot of his Tran-1.
- f) Tax rates applicable in his case in the pre-GST and post-GST periods.
- g) Copies of his audited Balance sheet for FYs 2016-17 & 2017-18.
- h) Copy of all the Demand Letters and Sale Agreement/Contract issued by him to the Applicant.
- i) Copy of his Electronic Credit Ledger for the period from July 2017 to June 2019.
- j) CENVAT/ Input Tax Credit register for the period from April 2016 to June 2019.
- k) Copy of the Joint Development Agreement between him and landowners dated 15.09.2016.
- l) Details of his Service Tax and GST turnover, his output tax liability, and the ITC availed by him for the project "Siddha Sky".
- m) Blockwise Sales & Stock Summary as of 30/06/2019 of the project "Siddha Sky".
- n) List of homebuyers in his project "Siddha Sky".

6. The DGAP has summed up the various contentions of the Respondent as follows:-

- a) That the taxation laws applicable to the real estate sector had undergone several changes upon the introduction of GST and clarity was lacking on certain issues relating to the real estate sector.



- b) That he had always complied with the GST laws as applicable from time to time and was willing to comply with the provisions of Section 171 of the Central Goods and Services Tax Act, 2017; that the Applicant No. 1 had been informed that the benefit on account of ITC if any, will be calculated and the demands to be raised on Applicant No. 1 in the future will be suitably adjusted on the completion of the project.
- c) That the impugned project comprised of several blocks that were under different stages of construction at the time of the investigation; that these blocks were also under different stages of completion on the date of implementation of GST.
- d) That the ITC claimed by him by way of filling TRAN-1/ TRAN-2 had also not reached finality and there was considerable confusion in this regard.
- e) That the GST laws had been subsequently amended by withdrawing the availability of ITC to the service provider if he opted for a 5% rate of GST; that this change has made computation of the ITC benefit difficult in the intermediate period.
- f) That notwithstanding the above, he was committed to complying with all the provisions of the GST law including the provisions of Section 171 of the Central Goods and Services Tax Act, 2017.



- g) That there were some homebuyers from whom he had received advances but their units were not yet allotted and that their case should be treated as falling outside the scope of Section 171 of the Central Goods and Services Tax Act, 2017; that certain customers from whom he had received advances were in the process of cancellation of their bookings/ units.
- h) That he had executed an Agreement dated 15th September 2016 with the landowners that provided for revenue-sharing between him and the landowners; that since the unite belonged to him, he had availed the entire CENVAT credit/ ITC in respect of all the units.
- i) that for calculating the share of revenue between the landowners and him, the following basis had been agreed between them vide their aforementioned Agreement:-
- i. That no units/area was to be allocated to the landowners, who were entitled to the revenue arising out of the first 36,610 sq. ft. sold in the project.
 - ii. That he was entitled to revenue arising out of the 42,995 sq. ft. which would be sold after the sale of the share of the landowners.
 - iii. That the revenue out of the remaining 7,54,545 sq. ft. will be shared in the 44.5 : 55.5 ratio between him and the landowners, respectively.



- j) That since his Agreement with the landowners provided for sharing of revenue, he was entitled to the ITC in its entirety and was not required to pass on the ITC to the landowners.
- k) That he had opted for the 12% effective GST rate along with ITC under Notification No: 03/2019-Central Tax (Rate) dated 29th March 2019.
- l) That his "No GST" advertisement was in respect of his scheme that lasted for a limited period in March 2019; that under this scheme, he had offered to issue credit notes, covering the amount of GST, to any prospective customer on booking flat in the project; and the burden of GST was to be borne by the Respondent and no GST was evaded.

7. The DGAP has stated that the examination of the case records, including the complaint filed by Applicant No. 1, the reference from the Standing Committee on Anti-profiteering, the various replies of the Respondent and the documents/evidence on record, revealed that investigation was required to address the following issues:-

- a) Whether the Respondent was benefitted on account of ITC on account of the implementation of GST w.e.f. 01.07.2017 and if so,



b) Whether such benefit was passed on by the Respondent to the recipients, in terms of Section 171 of the Central Goods and Services Tax Act, 2017.

8. DGAP has reported that the Respondent, vide his letter dated 22.07.2019, has furnished a copy of the Sale Agreement dated 16.11.2016, the Booking Application form dated 25.10.2016, the demand letters issued by him and the payment receipts in respect of the sale of Flat No. SS/3/904, Block 3 to the Applicant, at a basic price of Rs. 1,76,09,500/-. Based on the above, the details of various amounts and taxes paid by Applicant No. 1 to the Respondent have been detailed by the DGAP in the Table-'A' below:-

Table-A (Amount in Rs.)

S. No.	Payment Stage	Due Date	Basic %	BSP	PLC & Club fee	Car Parking	Service Tax	GST	Total
1	Booking Amount	26.10.2016	10.00%	2,00,000	-	-	9,000	-	2,09,000
2	Within 30 days of Booking	16.11.2016	15.00%	20,72,500	1,43,925	2,25,000	1,24,977	-	25,66,402
3	Commencement of Piling	23.12.2016	10.00%	15,15,000	95,950	1,50,000	89,319	-	18,50,269
4	Completion of Ground Floor Slab	07.11.2017	5.00%	7,57,500	47,975	75,000	-	1,05,657	9,86,132
5	Completion of 3 rd Floor Slab	23.01.2018	5.00%	7,53,427	47,975	75,000	-	1,05,168	9,81,570
6	Completion of 6 th Floor Slab	20.04.2018	5.00%	7,57,500	47,975	75,000	-	1,05,657	9,86,132
7	Completion of 9 th Floor Slab	21.06.2018	5.00%	7,57,500	47,975	75,000	-	1,05,657	9,86,132
8	Completion of 12 th Floor Slab	16.09.2018	5.00%	7,57,500	47,975	75,000	-	1,05,657	9,86,132
9	Completion of 15 th Floor Slab	27.10.2018	5.00%	7,57,500	47,975	75,000	-	1,05,657	9,86,132
10	Completion of 18 th Floor Slab	16.01.2019	5.00%	7,57,500	47,975	75,000	-	1,05,657	9,86,132
11	Completion of 21 st Floor Slab	27.02.2019	5.00%	7,57,500	47,975	75,000	-	1,05,657	9,86,132
12	Completion of 24 th Floor Slab	15.04.2019	5.00%	7,57,500	47,975	75,000	-	1,05,657	9,86,132
13	Completion of 27 th Floor Slab	05.07.2019	5.00%	7,57,500	47,975	75,000	-	1,05,657	9,86,132
14	Completion of 30 th Floor Slab	Not yet due	5.00%	7,57,500	47,975	75,000	-	1,05,657	9,86,132
15	Completion of Ultimate Roof Slab		5.00%	7,57,500	47,975	75,000	-	1,05,657	9,86,132
16	Completion of Flooring of said flat		5.00%	7,57,500	47,975	75,000	-	1,05,657	9,86,132
17	Completion of the said flat		5.00%	7,57,500	47,975	75,000	-	1,05,657	9,86,132
18	On offer of possession of said flat		5.00% + Additional Charges	7,61,573	47,975	75,000	-	1,06,146	9,90,694
Total			100.00%	1,51,50,000	9,59,500	15,00,000	2,23,296	15,84,855	1,94,17,651

9. The DGAP has reported that notwithstanding the contention of the Respondent that he would compute and pass on the benefit on account of ITC at the end of the project, the extent of profiteering had to be determined at a given point of time in terms of Rule 129(6) of the CGST Rules 2017. Therefore, the additional ITC available to the Respondent and the amount received by him from the homebuyers, including the Applicant No. 1 in the port-GST were taken into account for working out the benefit that was required to be passed on by the Respondent to the homebuyers.
10. The DGAP has stated that as per Paragraph 5 of Schedule-III of the CGST Act, 2017, 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 the completion certificate, where required, by the competent authority or after its first occupation, whichever has earlier, would be treated neither as a supply of goods nor a supply of services. The DGAP has added that thus, the ITC in respect of those residential units which were under construction but not yet sold, was provisional and will 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 DGAP has stated that the ITC availed in respect of the unsold units was outside the scope of this investigation and the Respondent was required to recalibrate the selling prices of such units to be sold to the prospective buyers by taking into account the net benefit of additional input tax credit available to him post-GST.

11. The DGAP has reported that before 01.07.2017, i.e., before the GST was introduced, the Respondent was eligible to avail the credit of Service Tax paid by him on input services only since no credit was available to him in respect of Central Excise Duty paid on the inputs. The DGAP has added that the ITC of the VAT paid on inputs in the pre-GST period was also not available to the Respondent. Further, in the post-GST period, the Respondent became eligible to avail input tax credit of the GST paid on all the inputs and the input services, including sub-contracts. Further, from the information submitted by the Respondent for the period

from April 2016 to June 2019, the details of the input tax credit availed by him, his turnover from the project "Siddha Sky", the ratio of ITC to turnover during the pre-GST (April 2016 to June 2017) and post-GST (July 2017 to June 2019) periods, has been furnished in Table- 'B' by The DGAP is given 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 June 2019	Total (Post-GST)
(1)	(2)	(3)	(4)	(5)= (3)+(4)	(6)	(7)	(8)= (6)+(7)
1	CENVAT of Service Tax Paid on Input Services used as per ST-3 (A)	14,998,639	5,444,286	20,442,925	-	-	-
2	Input Tax Credit of VAT Paid on Purchase of Inputs (B)	-	-	-	-	-	-
3	Input Tax Credit of GST Availed as per GSTR- 3B (C)	-	-	-	28,622,619	50,023,590	78,646,209
4	Total CENVAT/Input Tax Credit Available (D)= (A+B) or (C)	14,998,639	5,444,286	20,442,925	28,622,619	50,023,590	78,646,209
5	Turnover for Residential Flats as per Home Buyers List (E)			574,314,205			686,739,307
6	Total Saleable Area (in SQF) (F)*			834,150			834,150
7	Total Sold Area relevant to turnover as per Home Buyers List (in SQF) (G)			186,600			236,760
8	Relevant ITC [(H)= (D)*(G)/(F)]			4,573,098			22,322,456
	Ratio of Input Tax Credit Post-GST [(I)=(H)/(E)]			0.80%			3.25%

12. The DGAP has submitted from the Table-'B' that the input tax credit as a percentage of the turnover that was available to the Respondent during the pre- GST period (April 2016 to June 2017) was 0.80% and during the post- GST period (July 2017 to June 2019), it was 3.25%. This confirmed that post-GST, the Respondent had benefited from additional input tax credit by 2.45% [3.25% (-) 0.80%] of the turnover. Accordingly, the profiteering had been examined by comparing the applicable tax rate and input tax credit available in the pre-GST period (April 2016 to June 2017) when Service Tax @4.50% was payable with

the post-GST period (July 2017 to June 2019) when the effective GST rate was 12% (GST @18% along with 1/3rd abatement for land value) on construction service, vide Notification No. 11/2017-Central Tax (Rate), dated 28.06.2017. Accordingly, based on the figures contained in Table- 'B' above, the comparative figures of the ratio of input tax credit availed/available to the turnover in the pre-GST and post-GST periods as well as the turnover, the recalibrated base price, and the excess realization (profiteering) during the post-GST period were tabulated by the DGAP as given in Table-'C' below:-

Table- C

(Amount in Rs.)

S. No.	Particulars		Post- GST
1	Period	A	After 01.07.2017
2	Output GST Rate (%)	B	12.00
3	The ratio of CENVAT credit/ Input Tax Credit to Total Turnover as per table - 'B' above (%)	C	3.25
4	Increase in input tax credit availed post-GST (%)	D= 3.25% less 0.80%	2.45%
5	<u>Analysis of Increase in input tax credit:</u>		
6	Base Price raised/collected from July 2017 to June 2019 (in Rs.)	E	68,67,39,307
7	GST @ 12% over Base Price	F=E*12%	8,24,08,717
8	Total amount to be collected/raised	G=E+F	76,91,48,024
9	Recalibrated Base Price	H= (E)*(1-D) or 97.55% of (E)	66,99,14,194
10	GST @12%	I=H*12%	8,03,89,703
11	Commensurate demand price	J=H+I	75,03,03,897
12	Excess Collection of Demand or Profiteering Amount	K=G-J	1,88,44,127

13. The DGAP has stated from the above Table-'C' that the additional input tax credit of 2.45% of the turnover should have resulted in the commensurate reduction in the base price as well as cum-tax price. Therefore, in terms of Section 171 of the Central Goods and Services Tax Act, 2017, the benefit on account of the additional

input tax credit was required to be passed on by the Respondent to the respective flat buyers.

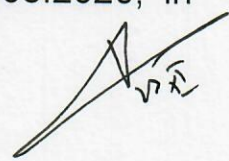
14. The DGAP has further stated that based on the aforesaid CENVAT/input tax credit availability in the pre and post-GST periods and the details of the amount raised/collected by the Respondent from Applicant No. 1 and other home buyers during the period from 01.07.2017 to 30.06.2019, the Respondent had benefited by an additional input tax credit, by an amount of Rs. 1,88,44,127/- which included GST @12% on the base profiteered amount of Rs. 1,68,25,113/-. The buyer-wise/ unit-wise break-up of this amount was given in Annexure-17 of the DGAP's Report. The DGAP has also stated that this amount was inclusive of Rs. 2,41,603/- (including GST on the base profiteered amount of Rs. 2,15,717/-) which was the benefit of input tax credit required to be passed on to Applicant No. 1, mentioned at serial no. 123 of the above said Annexure. The DGAP has also stated that that the said service had been supplied by the Respondent in the State of West Bengal only.
15. The DGAP has also stated that the current computation of profiteering pertained to 116 home buyers whereas the Respondent had booked 162 units till 30.06.2019. 46 customers who had booked the flats and also paid the booking amounts in the pre-GST period, had not paid any consideration during the post-GST period from 01.07.2017 to 30.06.2019 (period under investigation). Therefore, if the input tax credit in respect of these 46 units was considered to calculate profiteering in respect of 116

units where payments had been received after GST, the computation would have become erroneous. Therefore, the benefit of the input tax credit in respect of these 46 units should be calculated when the consideration was received from such units by taking into account the proportionate input tax credit in respect of such units.

16. The DGAP has concluded that the benefit of additional input tax credit to the tune of 2.45% of the turnover has accrued to the Respondent post-GST and the same was required to be passed on by the Respondent to the Applicant No.1 and other recipients. Section 171 of the Central Goods and Services Tax Act, 2017 appeared to have been contravened by the Respondent, in as much as the additional benefit of input tax credit @2.45% of the base price received by the Respondent during the period from 01.07.2017 to 30.06.2019, had not been passed on by the Respondent to the Applicant No. 1 and other recipients. On this account, the Respondent had realized an additional amount to the tune of Rs. 2,41,603/- from Applicant No. 1 which included both the profiteered amount @ 2.45% of the base price and GST on the said profiteered amount. Further, the investigation has revealed that the Respondent had also realized an additional amount of Rs. 1,86,02,524/- which included both the profiteered amount @2.45% of the base price and GST on the said profiteered amount, from 115 other recipients who were not Applicants in the present proceedings. These recipients were identifiable as per the documents provided by the Respondent,

giving the names and addresses along with unit nos. allotted to such recipients. Therefore, this additional amount of Rs. 1,86,02,524/- was required to be returned to such eligible recipients. The DGAP has further stated that the present investigation has covered the period from 01.07.2017 to 30.06.2019. Profiteering, if any, for the period post-June 2019 was not examined as the exact quantum of input tax credit that would be available to the Respondent in the future could not be determined at this stage, when the Respondent was continuing to avail input tax credit in respect to the present project.

17. The DGAP has also stated that Section 171(1) of the Central Goods and Services Tax 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 and it was decided that Applicant No.1 and the Respondent be asked to appear before the Authority on 01.06.2020. The Respondent was issued a notice on 05.05.2020 to explain why the above Report of the DGAP should not be accepted and his liability for violating the provisions of Section 171 of the CGST Act, 2017 should not be fixed. During the course of the proceedings, the Respondent has filed written submissions dated 26.08.2020, in which he has submitted as under:



a) That the saleable area and number of units in the project 'Siddha Sky' undertaken were as below:-

Launch Period	Saleable Area (in sq. ft.)	Number of Units	HIRA ID
Pre-GST regime	8,34,150	426 – Residential	HIRA/P/KOL/2018/000118

b) That the details of units booked in the project 'Siddha Sky' in the pre-GST and post-GST periods were mentioned below:-

Siddha Sky		
A.	Number of Units booked in the pre-GST regime i.e. booked units as on 30.06.2017 ¹	92
B.	Number of Units booked in the relevant post-GST period i.e. between 01.07.2017 to 30.06.2019	70
C.	Number of Units booked as on 30.06.2019	162

c). That the details of the turnover of the said project in the two periods were as below:-

Particulars for Siddha Sky	Pre-GST Regime	GST Regime
	01.04.2016 to 30.06.2017	01.07.2017 to 30.06.2019
Turnover from the units booked in earlier regime i.e. booked units as on 30.06.2017	55,53,30,915	18,88,06,700
Turnover from the Units booked in GST regime i.e. between 01.07.2017 to 30.06.2019	1,89,83,290	49,79,32,607
Advances in respect of the unallotted units and units in the process of cancellation	50,00,000	-
Turnover pertaining to cancelled units	52,939,667	97,20,732
Total	63,22,53,872	69,64,60,039
As per ST-3/ GSTR-3B	63,22,53,872	69,64,60,039

19. Further, the Respondent has made the following submissions before this Authority-

a) that the supplies provided solely in the GST regime were not covered by the anti-profiteering provisions.

- b) That Section 171 of the CGST Act aimed to provide the benefit of reduction in the rate of tax or input tax credit to the recipients; that, however, if the contract of supply itself has been entered in the GST regime after 1.07.2017 the provisions of Section 171 of the Act could not be applied.
- c) That in case of the real estate industry, the price of a unit fluctuated continuously depending upon market conditions such as demand and supply; that GST has only one of the several factors that determined the price of units; that in respect of units booked after 1.07.2017 the price agreed by him with his homebuyers had already factored the benefit of ITC; That Section 171 of the CGST ought to be applied only on those units wherein the price was agreed before 01.07.2017; that bookings made after 1.07.2017 were at negotiated prices with a specific provision in the Contract/ Agreement that benefit of ITC as per Section 171 had already been factored into the agreed price; that in support of his contention, he wishes to cite the Order of this Authority passed in the case of **Ms. Hermeet Kaur Bakshi Vs. Conscient Infrastructure Pvt. Ltd**; that he also placed reliance on the Order of this Authority in the case of **M/s. Bhartiya City Developers Pvt. Ltd**; Case No. decided on that accordingly, an amount of INR 1,36,63,271/- should be excluded from the total profiteering computed by the DGAP, as per Table below:-



TABLE

A	Turnover for Units booked in GST regime i.e. between 01.07.2017 to 30.06.2019	Rs. 49,79,32,607
B	Anti-profiteering % computed by DG	2.45%
C	Additional GST also alleged to be collected from customers	12%
D	Amount of profiteering computed by DG for the units booked in GST regime $[A*B*(1+C)]$	Rs. 1,36,63,271/-

- d) That the comparison of the ratios of ITC to Turnover in the pre-GST with the post-GST period for quantification of profiteering was not appropriate.
- e) That since the cost of land was not includible for assessment of GST in terms of clause (b) of paragraph 5 of Schedule II of the CGST Act 2017, the law provided for abatement of 1/3rd of the total consideration of a residential unit and the same yardstick ought to have been adopted by the DGAP for computing the amount of profiteering also; that he relied on the Order of this Authority in the case of **M/s. Bhartiya City Developers Pvt. Ltd Order No. 49/2019** and **M/s. Fusion Buildtech Pvt. Ltd Order No. 71/2019** in support of his **contention**; that accordingly, an amount of INR 34,53,904/- needed to be excluded from the total profiteering computed by the DGAP as has been explained in the Table below:-

A	Turnover for units booked in earlier regime i.e. booked units as on 30.06.2017	Rs. 18,88,06,700
B	Value of Land (1/3 rd)	Rs. 6,29,35,567
C	Anti-profiteering % computed by Ld. DG	2.45%
D	Additional GST also alleged to be collected from customers	12%
E	Amount of profiteering computed by Ld. DG for the units booked in GST regime $[(A-B)*C*(1+D)]$	Rs. 34,53,904/-



- f) That the CGST Act 2017 and the CGST Rules 2017, both, did not provide the procedure and mechanism for calculation of profiteering and hence the methodology adopted by the DGAP was thus arbitrary and violative of the principles of natural justice.
- g) That the investigation could not have gone beyond the application filed by Applicant No.1 in terms of Rule 126 and Rule 128 of the CGST Rules 2017
- h) That this Authority could not *suo-moto* assume jurisdiction in respect of the other homebuyers who did not file any application.

20. The above submissions of the Respondent were supplied to the DGAP for filing his clarifications under Rule 133 (2A) of the CGST Rules, 2017. Accordingly, the DGAP has filed his clarifications dated 16.09.2020 which have been detailed below:-

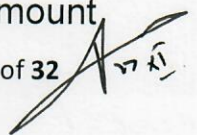
- i. DGAP has stated on the contention of the Respondent that Section 171 of the CGST Act could be applied only to units, the prices of which have been agreed before 01.07.2017 i.e. pre-GST customers, and not to those units which have been booked after 1.07.2017 that the copies of agreements for sale submitted by the Respondent were not submitted during the investigation before DGAP. Further, on examination of Exhibit 3 attached to the letter dated 26.08.2020, it was observed that in the case of 3 units out of 70, the Respondent has received certain consideration in the pre-GST regime as well, which

evidenced that the Respondent has negotiated the prices in the pre-GST regime itself.

- ii. In response to the Respondent's submission relating to his reliance on Order no. 33/2019 dated 24.05.2019 passed by this Authority in the case of **Harmeet Kaur Bakshi Vs. M/s Conscient Infrastructure Pvt. Ltd.**, the DGAP has further clarified that the Respondent's project was launched in the pre-GST regime and the first booking was received in July 2013 whereas in the case cited by the Respondent, the project was itself launched after the implementation of GST and was not in existence in the pre-GST period and therefore the ratio of that Order can not be applied in the instant case.
- iii. In response to the contention of the Respondent that comparison of the ratio of ITC to the turnover in the pre-GST period with the post-GST period was not the correct mechanism for calculation of profiteering, the DGAP has clarified that there was a direct relation between ITC availed by the Respondent and turnover of as the GST liability depended upon the turnover and ITC could only be used for making payment of the output liability.
- iv. In response to the contention of the Respondent that the land value should be excluded from the calculation of profiteering, the DGAP has reported that in the instant case, there was a common agreement executed between the customers and the Respondent, which showed the agreed price of a unit as also

the bifurcation of components thereof, i.e. the value of land and the value of construction. Further, the DGAP in his Report dated 19.03.2020 has considered GST @ 12% (after abatement for land). Therefore, the claim of the Respondent was not acceptable.

- v. In response to the contention of the Respondent that procedure and mechanism for calculation of profiteering has not been specified, the DGAP has stated 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. 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 was untenable. Further, the above Section mentioned "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 was not allowed. A supplier could not claim that he has passed on excess (more than commensurate) benefit to one customer, therefore, he could pass less benefit to another customer than the benefit which was actually due to that customer. Each customer was entitled to receive the benefit of tax reduction on each product purchased by him. The word "commensurate" mentioned in the above Section gave the extent of benefit to be passed on by way of reduction in the prices which has to be computed in respect of each supply based on the benefit of the input tax credit as well as the existing base price (price without GST) of the supply. The computation of commensurate reduction in prices was purely a mathematical exercise which was based upon the above parameters and hence it would vary from product to product and hence no fixed mathematical methodology could be prescribed to determine the amount of benefit which a supplier was required to pass on to a recipient or the profiteered amount. However, to give further clarifications and to elaborate upon the legislative intent behind the law, this Authority has been empowered to determine the Procedure and Methodology in detail. However, one formula which fits all cannot be set while determining such a "Methodology and

Procedure” as the facts of each case were different. In one real estate project, date of start and completion of the project, price of the house/commercial unit, mode of payment of the price, stage of completion of the project, the timing of the purchase of inputs, rates of taxes, amount of ITC availed, total saleable area, area sold and the taxable turnover realized before and after the GST implementation would always be different from 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 were issued. Therefore, no set parameters could be fixed for determining methodology to compute the benefit of additional ITC which would be required to be passed on to the buyers of such units. DGAP has added that the facts of the cases relating to the Fast Moving Consumer Goods (FMCGs), restaurants, construction, and cinema houses, were completely different and therefore, the mathematical methodology employed in the case of one sector could not be applied in the other sector otherwise it would result in denial of the benefit to the eligible recipients. Further, applying the same mathematical methodology of the FMCG sector to a supplier of a cinema sector will lead to erosion of justice in the name of uniformity. DGAP has also added that in light of the above facts, the quantum of profiteering has been computed by the

DGAP correctly by taking into account the particular facts of each case. It is pertinent that there cannot be a one-size-fits-all mathematical methodology for computation of the quantum of profiteering.

- vi. In response to the contention of the Respondent that the investigation of the DGAP could not go beyond the application submitted by Applicant No. 1, the DGAP has stated that provisions of Section 171 of the CGST Act, 2017 required that benefit of reduction in the rate of tax or benefit of additional ITC should result in a commensurate reduction in prices of *any Supply* and accordingly, DGAP was justified in examining all the supplies made by the Respondent beyond the application filed by the Applicant.

21. The above clarifications of the DGAP were supplied to the Respondent for filing re-joinder vide order dated 17.09.2020. Accordingly, the Respondent has filed a rejoinder dated 15.10.2020. The Respondent has re-iterated his previous submissions and submitted some additional contentions on the clarifications filed by the DGAP. The additional contentions of the Respondent are summed up as follows:

- a) That since for the units which have been booked in the GST regime, the comparative ratio of turnover and input tax credit was not available, accordingly, the units booked

in GST regime should be held outside the scope of Section 171 of the CGST Act similar to projects launched in GST regime. Further, it was submitted that DGAP has not replied to the submissions made by Respondent in so far as reliance on the order of **M/s Bhartiya City Developers Pvt. Ltd.** was concerned.

b) That the distinction created by DGAP between **Bhartiya City Developers (discussed supra)** and Respondent's case was unreasonable since the Respondent has supplied construction services as well as land. The consideration collected by the Respondent also included the value of construction services and the value of the land. The mere difference was that in Respondent's case a single agreement has been entered for construction services and sale of land and in another case, two separate agreements were entered. However, the nature of the transaction in both these cases was that under-constructed units were being sold. However, the methodology adopted by DGAP in both cases has led to totally different values of profiteering due to unreasonable and artificial differences. The same has leading to a different amount of profiteering in both cases. It was also submitted that clarification of the DGAP that after computation of profiteering, GST @ 12% (after abatement of land value) has been added was not valid as the profiteering has been computed by DGAP on the entire

value raised from customers, which included the value of land and consequently, after computation of the quantum of profiteering sans the tax element, DGAP has incorporated GST @12%. The manner of calculation and the submissions made by the DGAP indicated that DGAP has computed profiteering on the value of land also.

22. We have carefully considered all the submissions filed by the Applicants, the Respondent, and the other material placed on record. We find that Applicant No. 1, vide his complaint, has alleged that the Respondent was not passing on the benefit of ITC to him even though he was availing ITC on the purchase of the inputs at the higher rates of GST which had resulted in the benefit of ITC to him and that the Respondent was also charging GST from him @12%. These complaints were examined by the Standing Committee and forwarded to the DGAP on 28.06.2019 for investigation. The DGAP, vide his Report dated 19.03.2019 has found that the ITC as a percentage of the total turnover which was available to the Respondent during the pre-GST period was 0.80% and during the post-GST period this ratio was 3.25%, details of which are given in Table-B of the DGAP's Report. We observe that the DGAP has reported that the Respondent has benefited from ITC to the tune of 2.45% (3.25% - 0.80%) of his total turnover during the post-GST period which he was required to pass on to the flat buyers of his project. The DGAP has also

found that the Respondent had not reduced the basic prices of his flats by 2.45% on the account of benefit from ITC although he had been charging his homebuyers, GST at the increased rate of 12% on the pre-GST basic price. The DGAP has also reported that the Respondent has thus contravened the provisions of Section 171 of the CGST Act, 2017. The DGAP has also reported that the amount of benefit of ITC which has not been passed on by the Respondent, i.e. the aggregate profiteered amount, came to Rs. 1,88,44,127/- including the GST applicable to the basic profiteered amount of Rs. 1,68,25,113/-. The DGAP has also reported that the above aggregate amount of profiteering also included the profiteered amount of Rs. 2,41,603/- (inclusive of GST as applicable) for Applicant No. 1.

23. It is clear to us from the documents placed on record that the Respondent has claimed to have sold 70 flats after the introduction of GST and also claimed that he had freshly negotiated the prices of these flats after considering the benefit of the input tax credit. On this issue, the DGAP vide his clarificatory Report dated 16.09.2020 has himself stated that this claim of the Respondent needed to be further examined as the same was made before this Authority and not before him.
24. Accordingly, the Report dated 19.03.2020 furnished by the DGAP needs to be revisited by him. Thus the DGAP is directed to further investigate the present case under Rule 133 (4) of the CGST Rules, 2017 up to 30.10.2020 or till the date of issuance of Completion/Occupancy Certificate whichever is earlier and to

verify the claim of the Respondent that 70 (Seventy) flats have been sold after the introduction of GST, i.e. 01.07.2017 and to ascertain as to whether the benefit of the input tax credit has been passed on by the Respondent to the eligible flat buyers by way of commensurate reduction in prices or not.

25. It is also directed that a detailed Report shall be submitted under Rule 129 (6) of the above Rules. If required the DGAP shall be at liberty to take the assistance of the field Tax Authorities of the Central and the State Government who are directed to extend all cooperation to the DGAP in terms of Rule 136 of the CGST Rules, 2018 and Para 38 of the "Methodology & Procedure" framed under 126 of the CGST Rules, 2017 and notified on 28.03.2018 by this Authority. The respondent is also directed to extend all assistance to the DGAP during the course of further investigation of the present case.
26. Therefore the DGAP is also directed to ascertain whether the Respondent has been constructing any other projects during the pre-GST and post-GST regimes and if so, the DGAP is also directed under Section 171 (2) of the CGST Act to verify whether the provisions of Section 171 have been followed by the Respondent in the case of other projects being constructed by him and submit a comprehensive Report under Rule 129 (6) of the CGST Rules, 2017.
27. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was required to be passed within a period of 6 months from the date of receipt of the Report from the DGAP under Rule

129 (6) of the above Rules. Since the present Report has been received by this Authority on 19.03.2020 the order was to be passed on or before 18.09.2020. However, due to the prevalent pandemic of COVID-19 in the Country, this order could not be passed on or before the above date due to force majeure. Accordingly, this order is being passed today in terms of the Notification No. 65/2020-Central Tax dated 01.09.2020 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes & Customs under Section 168 A of the CGST Act, 2017.

28. A copy each of this order be supplied to both the Applicants, the Respondent for necessary action. File be consigned after completion.

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

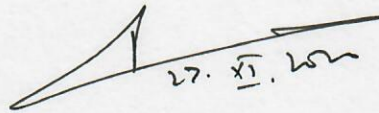
Sd/-
(J. C. Chauhan)
Technical Member



Sd/-
(Amand Shah)
Technical Member

Certified Copy

o/c


27. 11. 2020

(A.K. Goel)
Secretary, NAA

F. No. 22011/NAA/154/Siddha/2020 /6419-22 Date: 27.11.2020

Copy To:-

1. M/s Siddha Infradev LLP, Siddha Park, 99A, Park Street, Kolkata-700 016.
2. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

3. Sh. Hemant Kejriwal and Shri Vishnu Kumar Kejriwal, 493/B/2 GT Road (S), Gagandeep Apartment, B1A, F1-2E, Shibpur, Howrah- 711 102.
4. Guard File/NAA Website.



A. K. GOEL
SECRETARY, NAA