

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

Case No. : 85/2020
Date of Institution : 23.03.2020
Date of Order : 11.12.2020

In the matter of:

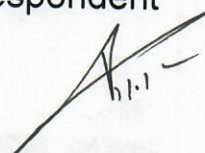
1. Sh. Mool Chand Mittal, 897, Sector-17, Faridabad, Haryana-122002.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s. Elan Ltd., 3rd Floor, Golf Course View Corporate Tower, Golf Course Road, Sector-42, Gurgaon, Haryana-122002.

Respondent



Quorum:-

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

Present:-

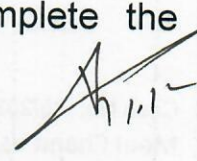
1. None for the Applicants.
2. None for the Respondent.

ORDER

1. The present Report dated 23.03.2020 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that an application was filed under Rule 128 of the Central Goods and Services Tax Rules, 2017 by the Applicant No. 1, alleging profiteering by the Respondent in respect of purchase of Shop No. GF-0131-A, in the Respondent's project "Mercado" situated in Sector-80, Gurugram. The above Applicant had also alleged that the Respondent had not passed on the benefit of input tax credit to him by way of commensurate reduction in price of the Shop and had also charged GST @12% on the instalments paid by him.



2. The above Applicant had also submitted copies of the Notices issued by the Central Board of Excise and Customs (CBEC) and Commercial Taxes Department of the State, published on 16th September, 2017 in leading English & Hindi Newspapers along with his application.
3. The aforesaid application was examined by the Standing Committee on Anti-Profiteering in its meeting and it had forwarded the same to the DGAP for detailed investigation in the matter.
4. Accordingly, the DGAP had issued notice dated 08.07.2019 after receipt of the aforesaid reference from the Standing Committee on Anti-profiteering under Rule 129 (3) of the above Rules calling upon the Respondent to reply as to whether he admitted that the benefit of input tax credit had not been passed on to the recipients by way of commensurate reduction in prices and if so, to *suo moto* determine the quantum thereof and indicate the same in his reply to the above Notice as well as furnish all documents in support of his reply. The DGAP has further stated that the Respondent was afforded opportunity to inspect the non-confidential evidence/information which formed the basis of the said Notice, during the period from 15.07.2019 to 17.07.2019 but he did not avail of the said opportunity. The DGAP also gave opportunity to the above Applicant to inspect the non-confidential documents/reply furnished by the Respondent on 04.03.2020 or 05.03.2020. However, the Applicant No. 1 did not avail of the said opportunity.
5. The period covered by the DGAP during the current investigation is from 01.07.2017 to 30.06.2019. The time limit to complete the

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investigation was extended up to 27.03.2020 by this Authority vide order dated 12.12.2019 in terms of Rule 129 (6) of the above Rules.

6. The DGAP has stated that the Respondent replied to the above Notice vide various letters/e-mails but did not furnish the complete and relevant documents required for investigation. Hence, the DGAP had issued Summons dated 09.10.2019 under Section 70 of the Central Goods and Services Tax Act, 2017 read with Rule 132 of the above Rules to Sh. Ravish Kapoor, Director of the Respondent, asking him to appear before the DGAP on 16.10.2019. In response to the Summons of the DGAP, Sh. Gaurav Khandelwal appeared before the DGAP on 16.10.2019 and submitted partial information vide letter dated 16.10.2019. Sh. Khandelwal asked the DGAP for some time to furnish the remaining documents.
7. The DGAP had issued another summons dated 23.12.2019 to Sh. Ravish Kapoor asking him to appear before the DGAP on 30.12.2019 and produce the remaining documents. In response to the Summons, the Respondent did not appear, however, he submitted details vide letter/e-mail dated 30.12.2019 & 07.01.2020.
8. In response to the above Notice dated 08.07.2019 of the DGAP and various reminders and summons, the Respondent replied vide letters/e-mails dated 19.07.2019, 05.08.2019, 16.08.2019, 26.09.2019, 16.10.2019, 05.12.2019, 30.12.2019, 07.01.2020 and 19.02.2020 and submitted the following documents/information:

- (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) Copies of VAT Returns for the period from April, 2016 to June, 2017.
- (e) TRAN-1 and TRAN-2 Statements not filed.
- (f) Copies of demand letters and receipts issued to the Applicant No. 1.
- (g) Tax rates - pre-GST and post-GST.
- (h) Copy of Balance sheets for FY 2016-17 & 2017-18.
- (i) Copy of 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) Details of turnover, output tax liability, GST payable and input tax credit availed for the project "Mercado".
- (l) List of home buyers in the project "Mercado".
- (m) Copies of VAT Assessment Order Nos. 285/2016-17 & 286/2017-18 dated 27.09.2019.

9. The Respondent submitted before the DGAP that he was engaged in development of two Commercial projects i.e. "Mercado" and "Epic".

Project "Mercado" was launched in the pre-GST regime whereas "Epic" was launched in the post-GST regime. The Respondent had further submitted that the project "Mercado" consisted of total 531 units (comprising total area of 3,11,000 sq. ft.) out of which 409 units having an area of 2,15,457 sq. ft. had been sold as on 30.06.2020.

10. The DGAP has also stated that he has carefully scrutinised various replies of the Respondent and the documents/evidence placed on record. The DGAP has found the following issues which needed to be determined:

- (i) Whether there was benefit of reduction in the rate of tax or input tax credit on the supply of construction service by the Respondent, on implementation of GST w.e.f. 01.07.2017 and if so,
- (ii) 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.

11. The DGAP has further stated that the Respondent had submitted the payment plan (part of Builder Buyer agreement), demand letters and payment receipts for the sale of Shop No. GF-0131-A, to the above Applicant, measuring 210 sq. ft. (super area), at total basic sale price of Rs. 21,33,285/- (Rs. 8,500/- basic sale price per sq. ft., Rs. 637.50/- per sq. ft. for PLC Courtyard facing, Rs. 425/- per sq. ft. for PLC Corner, Rs. 446/- for EDC/IDC per sq. ft. and Rs. 150/- for IFMS per sq. ft.). The details of the amount and taxes paid by the above

Applicant to the Respondent have been furnished by the DGAP as is given in Table-'A' below:

Table-'A'

(Amount in Rs.)

S. No.	Payment Stage	Due Date	Basic %	BSP	Other Charges	Service Tax	GST	Total
1	On Application for Booking		10.00%	1,78,500	-	7,497	-	1,85,997
2	On Bhoomi Pujan		7.50%	1,33,875	-	5,623	-	1,39,498
3	On Excavation		7.50%	1,33,875	-	5,623	-	1,39,498
4	On Casting of 3 rd Basement Slab		5.00%	89,250	46,830 (EDC/IDC)	3,882	-	1,39,962
5	On Casting of Ground Floor Slab		5.00%	89,250	46,830 (EDC/IDC	3,930	-	1,40,010
6	On Casting of 2 nd Floor Slab		5.00%	89,250	1,11,562 (PLC)	19,635	-	2,20,447
7	On Casting of 4 th Floor Slab	30.12.20 17	5.00%	89,250	1,11,563 (PLC)	-	30,791	2,31,604
8	On Casting of 8 th Floor Slab	15.03.20 18	7.50%	1,33,875	-	-	16,065	1,49,940
9	On Casting of 10 th Floor Slab	15.05.20 18	7.50%	1,33,875	-	-	16,065	1,49,940
10	On Casting of 12 th Floor Slab	11.06.20 18	7.50%	1,33,875	-	-	16,065	1,49,940
11	On Casting of 14 th Floor Slab		7.50%	1,33,875	-	-	16,065	1,49,940
12	On Casting of top Floor Slab	28.09.20 18	7.50%	1,33,875	-	-	16,065	1,49,940
13	On Start of Brick Work	31.10.20 18	7.50%	1,33,875	-	-	16,065	1,49,940
14	On Completion of façade	Demand not yet due	5.00%	89,250	31,500 (IFMS)	-	10,710	1,31,460
15	On offer of Possession		5.00%	89,250	-	-	10,710	99,960
Total			100.00 %	17,85,000	3,48,285	46,190	1,48,601	23,28,076

12. The DGAP has also submitted 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 input tax credit pertaining to the residential units and commercial shops which were under construction but not sold was provisional input tax credit which would be required to be reversed by the Respondent, if such units remained unsold at the time of issue of the Completion Certificate (CC), in terms of Section 17 (2) & Section 17 (3) of the Central Goods and Services Tax Act, 2017, which read as under:

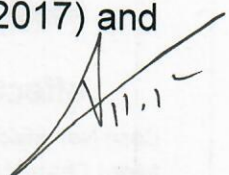
"Section 17 (2) "Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit 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 submitted that the input tax credit pertaining to the unsold units would not fall within the ambit of this investigation and the Respondent was required to recalibrate the selling prices of such units to be sold to the prospective buyers by considering the net benefit of additional input tax credit available to them post-GST.

13. The DGAP has also observed that prior to 01.07.2017 i.e. before the GST was introduced, the Respondent had availed credit of Service Tax paid on the input services and the credit of VAT paid on the purchase of inputs and also deduction of the payments made to the sub-contractors from the VAT turnover. However, CENVAT credit of the Central Excise Duty paid on inputs was not admissible as per the CENVAT Credit Rules, 2004, which were in force at the material time. Further, post-GST, the Respondent was entitled to avail input tax credit of GST paid on all the inputs and the input services including the sub-contracts. 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 "Mercado", the ratios of input tax credits to turnovers, during the pre-GST (April, 2016 to June, 2017) and



the post-GST (July, 2017 to June, 2019) periods, were as per the Table-
'B' 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 for Commercial Shops as per ST-3 (A)	76,09,324	62,98,588	1,39,07,912	-	-	-
2	Input Tax Credit of VAT Paid on Purchase of Inputs as per VAT Returns (B)	62,92,962	15,00,460	77,93,422	-	-	-
3	Less: Disallowances of ITC by VAT Assessing Authority (C)	62,803	-	62,803	-	-	-
4	Rebate of VAT(WCT) for the payment made to registered Sub-contractors (D)	25,16,156	16,89,115	42,05,271			
5	Input Tax Credit of GST Availed (E)	-	-	-	3,14,66,224	5,88,67,573	9,03,33,797
6	Total CENVAT/Input Tax Credit Availed (F)= (A+B-C+D) or (E)	1,63,55,639	94,88,163	2,58,43,802	3,14,66,224	5,88,67,573	9,03,33,797
7	Turnover for Commercial Shops as per Shop Buyers List (G)			37,53,15,213			36,98,45,829
8	Total Saleable Area (in SQF) (H)			3,11,000			3,11,000
9	Total Sold Area (in SQF) (I)			1,19,981			1,09,085
10	Relevant ITC [(J)= (F)*(I)/(H)]			99,70,306			3,16,85,088
	Ratio of Input Tax Credit Post-GST [(K)= (J)/(G)]			2.66%			8.57%

14. The DGAP has further 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 2.66% whereas during the post-GST period (July, 2017 to June, 2019), the percentage was 8.57%. Therefore, the DGAP has stated that post-GST, the Respondent has benefited from additional input tax credit to the tune of 5.91% [8.57% (-) 2.66%] of the turnover. Accordingly, the DGAP has examined the profiteering 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, levied vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Accordingly, on the basis of 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 the post-GST periods as well as the recalibrated base price, the excess realization (profiteering) during the post-GST period, has been tabulated by the DGAP as is 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	Ratio of CENVAT credit/ Input Tax Credit to Total Turnover as per Table - 'B' above (%)	C	8.57
4	Increase in input tax credit availed post-GST (%)	D= 8.57% less 2.66%	5.91
5	<u>Analysis of Increase in input tax credit:</u>		
6	Base Price raised/collected during July, 2017 to June, 2019 (Rs.)	E	36,98,45,829
7	GST @ 12% over Base Price	F=E*12%	4,43,81,499
8	Total amount to be collected/raised	G=E+F	41,42,27,328
9	Recalibrated Base Price	H= (E)*(1-D) or 94.09% of (E)	34,79,87,940
10	GST @12%	I=H*12%	4,17,58,553
11	Commensurate demand price	J=H+I	38,97,46,493
12	Excess Collection of Demand or Profiteering Amount	K=G-J	2,44,80,835

15. The DGAP has also stated from the Table-'C' that the additional input tax credit of 5.91% of the turnover should have resulted in the commensurate reduction in the base prices as well as cum-tax prices. Therefore, in terms of Section 171 of the Central Goods and Services Tax Act, 2017, the benefit of such additional input tax credit was

required to be passed on by the Respondent to the respective recipients.

16. The DGAP has further stated that on the basis of the aforesaid CENVAT/Input Tax Credit availability in the pre and the post-GST periods and the details of the amount raised/collected by the Respondent from the Applicant No. 1 and the other shop buyers during the period from 01.07.2017 to 30.06.2019, the Respondent had benefited by an additional amount of input tax credit of Rs. 2,44,80,835/- which included GST @12% on the base profiteered amount of Rs. 2,18,57,888/-. The buyers and Unit No. wise break-up of this amount has been submitted by the DGAP vide Annexure-14 of his Report. This amount was inclusive of Rs. 66,463/- (including GST on the base profiteered amount of Rs. 59,342/-) which was the benefit of input tax credit required to be passed on to the Applicant No. 1, mentioned at Serial No. 62 of Annexure-14 of the DGAP's Report.
17. The DGAP has also intimated that the said service has been supplied by the Respondent in the State of Haryana only.
18. The DGAP has also claimed that the above computation of profiteering was with respect to 229 commercial shop buyers. Whereas the Respondent had booked 409 units till 30.06.2019, 180 customers who had booked the shops and also paid the booking amounts in the pre-GST period, have not paid any consideration during the post-GST period from 01.07.2017 to 30.06.2019. Therefore, if the input tax credit in respect of these 180 units was considered to calculate profiteering in respect of 229 shops where payments had been received after GST, the input tax credit as a percentage of turnover would be erroneous.

Therefore, the benefit of input tax credit in respect of these 180 units should be calculated when the consideration would be received from such units by taking into account the proportionate input tax credit in respect of such units.

19. The DGAP has further claimed that the allegation of profiteering by way of not passing on the benefit of reduction in the rate of tax or benefit of input tax credit stood confirmed against the Respondent. Further, the benefit of additional input tax credit to the tune of 5.91% of the turnover has accrued to the Respondent post-GST and the same was required to be passed on by the Respondent to the recipients. Provisions of Section 171 of the Central Goods and Services Tax Act, 2017 have been contravened by the Respondent, inasmuch as the additional benefit of input tax credit @ 5.91% of the base price received by the Respondent during the period from 01.07.2017 to 30.06.2019 has not been passed on by him to the buyers of the shops. On this account, the Respondent has been found to have profited an amount of Rs. 2,44,80,835/- which included profited amount of Rs. 66,463/- from the Applicant No. 1, @ 5.91% of the base price and GST on the said profited amount. Further, the Respondent has also realized an additional amount of Rs. 2,44,14,372/- which included both the profited amount @ 5.91% of the base prices and GST on the said profited amount, from 228 other recipients who were not Applicants in the present proceedings. These recipients were identifiable as per the documents provided by the Respondent which mentioned the names and addresses along with Unit Nos. allotted to

such recipients. Therefore, this additional amount of Rs. 2,44,14,372/- was required to be returned to such eligible recipients.

20. The DGAP has also contended that the present investigation covered the period from 01.07.2017 to 30.06.2019. Profiteering, if any, for the period post June, 2019, has not been examined as the exact quantum of input tax credit that would be available to the Respondent in future could not be determined when the Respondent was continuing to avail input tax credit in respect of the present project.
21. The DGAP has further contended 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", has been contravened by the Respondent in the present case.
22. The above Report of the DGAP was considered by this Authority in its meeting and it was decided that the Applicants and the Respondent be asked to appear before this Authority on 22.05.2020. 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 10.09.2020. The above submissions of the Respondent have been mentioned in the subsequent paras.
23. The Respondent has submitted that the incremental tax paid on services should not form part of profiteering. He has further elaborated that during the pre-GST period, the rate of Service Tax charged on the

input services was 15%, the credit of which was available, whereas, during the GST regime, the common GST rate for services has been increased from existing (pre-GST) 15% to 18%, the credit of which was also available in the post GST period. Therefore, no additional benefit has accrued to him in respect of input services as credit for the same was available in both the pre and post GST eras and the only difference was that the tax rate on services had been increased from 15% to 18%. The Respondent has submitted the following illustration to strengthen his contention:

	Pre- GST	Post- GST
Particulars	Amount (in Lacs)	Amount (in Lacs)
Expenses	1000	1000
Service Tax paid @15%	150	180
Cenvat Credit available	150	180
Turnover	5000	5000
CENVAT/Turnover	3.00%	3.60%
Incremental		.60%

The Respondent has also submitted that in the instant case, during the post-GST regime, he has availed ITC amounting to Rs. 6,51,33,595/- on input services, which meant that ITC amounting to Rs. 1,08,55,599 ($6,51,33,595 \times 3/18$) pertained to the incremental tax paid on procurement of input services and the same should be excluded from the total amount of profiteering calculated by the DGAP.

24. The Respondent has further submitted that the profiteered amount should have been restricted to the ITC availed w.r.t. goods only. He has also argued that during the pre-GST regime, credit of taxes paid (Excise Duty and VAT) on goods was not available which has become available under the GST regime. Therefore, the benefit that actually

arose due to GST implementation was that of ITC of taxes paid on goods. The Respondent has further submitted that in the calculation of DGAP, the benefit which has accrued to him from the additional ITC has been taken into consideration for goods as well as for services. Out of total ITC of INR 9,03,33,797/-, INR 2,52,00,202/- was related to goods. Therefore, the amount of profiteering calculated by the DGAP should have been restricted to the ITC availed by the Respondent on procurement of goods only and that too in ratio of sold and unsold area because on completion of the project Respondent would be required to reverse the ITC related to the unsold portion.


25. The Respondent has also claimed that in the early stages of GST implementation, real estate sector was going through a rough phase. To overcome this situation, Respondent had to incur some additional expenses including marketing and payment of commissions which has resulted in overall project cost. Therefore, increased cost of the project should also have been considered while calculating the profiteered amount.
26. The above submissions of the Respondent were supplied to the DGAP for filing clarifications under Rule 133 (2A) of the CGST Rules, 2017. Accordingly, the DGAP has filed his clarifications dated 22.09.2020 which have been mentioned below:

Incremental Tax paid on Services should not form part of profiteering:



The DGAP has stated that Section 171(1) of Central Goods and Services Tax Act, 2017, reads as *"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"*.

Therefore, in terms of the above provisions, the input tax credit availed by the Respondent needed to be quantified and passed on to the recipients (the benefit of input tax credit post introduction of GST would be available only on the amount which bore higher tax incidence i.e. the amount paid/raised post introduction of GST), which has already been quantified in DGAP's Report dated 23.03.2020. Further in the above Report the increase in the input tax credit as a percentage of total turnover availed by the Respondent post-GST has also been quantified. Hence, there should be no extra liability on the Respondent on account of increase in the rate of GST as the suppliers of input services could now avail input tax credit on all the purchases made by them resulting in reduction in prices of the materials purchased by them which they would pass on to the Respondent. The DGAP has further stated that Section 171 of the Central Goods and Services Tax Act, 2017 obliged the suppliers to pass on the benefit of reduction in the rate of tax or the benefit of input tax credit availed by them to the recipients by way of commensurate reduction in prices. Therefore, it has been reiterated that the approach and methodology adopted by the DGAP was in consonance with the provisions of Section 171 of the Central Goods and Services Tax Act, 2017.



Profiteering amount should be restricted to Central Tax portion of

ITC availed w.r.t. Goods:

In this regard, the DGAP has submitted that in the erstwhile pre-GST regime, various taxes and cess were being levied by the Central Government and the State Governments, which got subsumed in the GST. Out of these taxes, the input tax credit of some taxes was not being allowed in the erstwhile tax regime. In case of construction service, while the input tax credit of Service Tax was available, the input tax credit of Central Excise Duty paid on inputs was not available to the service providers. Such input taxes, the credit of which was not allowed in the erstwhile tax regime, used to get embedded in the cost of the goods or services supplied, resulting in increased price. With the introduction of GST with effect from 01.07.2017, all these taxes have got subsumed in the GST and the input tax credit of GST was available in respect of all the goods and services, unless specifically denied. Further, there was no such one to one link that the Central Tax (CGST) subsumed erstwhile Service Tax and the Central Excise Duty while State Tax (SGST) subsumed erstwhile VAT and Works Contracts Tax. Therefore, the contention of the Respondent that Excise Duty was converted in central tax was not correct. Further, Section 171 of Central Goods and Services Tax Act, 2017 which governed the anti-profiteering provisions under the GST reads as *"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."* Thus, the legal requirement was abundantly clear that in the event of benefit of input tax credit or reduction in rate of tax,

there must be a commensurate reduction in the prices of the goods or services. Such reduction could obviously be in money terms only so that the final price payable by a consumer got reduced. This was the legally prescribed mechanism for passing on the benefit of input tax credit or reduction in the rate of tax to the consumers under the GST regime. Moreover, it was also clear that the Section 171 simply did not provide a supplier of goods or services, any other means of passing on the benefit of input tax credit or reduction in rate of tax to the consumers. Thus, the legal position was unambiguous which could be summed up as follows:

- (a) A supplier of goods or services must pass on the benefit of ITC or reduction in rate of tax to the recipients by commensurate reduction in prices.
- (b) The law did not offer a supplier of goods and services any flexibility to suo moto decide on any other modality to pass on the benefit of ITC or reduction in rate of tax to the recipients.

Therefore, the DGAP has stated that in terms of Section 171 of the Central Goods and Services Tax Act, 2017, the claim of increase in cost on account of increase in marketing and commissions and the implementation and the compliance cost of GST could not be considered.

27. The above clarifications of the DGAP were supplied to the Respondent for filing re-joinder vide order dated 23.09.2020. Accordingly, the Respondent vide his e-mail dated 26.10.2020 has re-iterated his previous submissions and requested to pass suitable order. However,

it was observed from the submissions of the Respondent that there was huge difference in the turnovers for the post-GST period submitted by the Respondent through the Home-Buyer's List and the GST Returns. Therefore, the Respondent was directed to file submissions on the difference in the turnovers.

28. Accordingly, the Respondent vide his e-mail dated 13.11.2020 has stated that difference in the turnovers pertaining to the post-GST period as depicted in the Home-Buyer's List and GST Returns has arisen due to the turnovers of the another project of the Respondent namely "Epic" being included in them.
29. We have carefully considered all the submissions filed by the Applicants, the Respondent and the other material placed on record and find that the Applicant No. 1 had alleged that the Respondent was not passing on the benefit of ITC to him on the Shop No. GF-0131-A, which he had purchased in the "Mercado" Project being executed by the Respondent in Sector-42, Gurugram, in spite of the fact that he was availing ITC on the purchase of the inputs at the higher rates of GST which had resulted in benefit of additional ITC to him and was also charging GST from him @12%. This complaint was examined by the Standing Committee on Anti-Profiteering and was forwarded to the DGAP for investigation who vide his Report dated 23.03.2020 has found that the ITC as a percentage of the total turnover which was available to the Respondent during the pre-GST period was 2.66% and during the post-GST period this ratio was 8.57% as per the Table-B mentioned above and therefore, the Respondent has benefited from the additional ITC to the tune of 5.91% (8.57% - 2.66%) of the total

turnover which he was required to pass on to the buyers of this Project. The DGAP has also found that the Respondent has not reduced the base prices of his shops by 5.91% due to additional benefit of ITC and by charging GST at the increased rate of 12% on the pre-GST basic prices, he has contravened the provisions of Section 171 of the CGST Act, 2017. The DGAP has also submitted that the amount of benefit of ITC which has not been passed on by the Respondent or the profiteered amount came to Rs. 2,44,80,835/- which included 12% GST, as per the computations made vide Table-C of the Report. The DGAP has also intimated that this amount also included the profiteered amount of Rs. 66,463/- including 12% GST in respect of the Applicant No. 1 and Rs. 2,44,14,372/- including 12% GST in respect of 228 other shop buyers. He has also supplied the details of all the buyers who have purchased shops from the Respondent along with their unit numbers and the profiteered amount in respect of each buyer vide Annexure-14 attached with the Report.

30. The Respondent has contended that the incremental tax paid on the services should not form part of the profiteered amount. In this regard it would be pertinent to mention that the Respondent has availed full benefit of ITC on the 18% tax which he has paid on the services during the GST period. Not even a single penny has been paid by the Respondent from his own pocket while discharging his output tax liability on the purchase of services and therefore, he cannot adjust the incremental ITC of 3%, which he has availed on account of enhanced rate of GST from 15% to 18% against his profit, since additional benefit of ITC has accrued to the Respondent from the concession

granted to him from the precious tax revenue by the Central and the State Government. The benefit of additional ITC has to be computed by comparing the amount of ITC which has become available to the Respondent in the post GST period with the amount of CENVAT and VAT credit which he has availed during the pre GST period and accordingly, the amount of additional ITC has to be passed on by the Respondent to his buyers. Therefore, the ITC amounting to Rs. 1,08,55,599 ($6,51,33,595 \times 3/18$) claimed to have been paid by the Respondent as incremental tax on the procurement of input services cannot be excluded from the total amount of profiteering as it has not been paid by the Respondent from his own account. Accordingly, the above claim of the Respondent cannot be accepted.

31. The Respondent has also contended that the profiteered amount should have been restricted to the ITC availed in respect of goods only. In this regard it would be relevant to mention that the Respondent has not only availed benefit of ITC on the purchase of goods but he has also availed it on the purchase of services. Therefore, the whole amount of ITC which has additionally become available to him in the post GST period as compared to the pre GST period has to be taken in to account while passing on the benefit of ITC in terms of Section 171 (1). Any additional ITC earned on account of increase in the tax rate from 15% to 18% on the purchase of services also comes from the public exchequer and the Respondent cannot claim that only the ITC which has become available to him on the Central Excise Duty and VAT, which was not available to him during the pre GST period on the purchase of goods, should be considered. It is also clear from the

perusal of Table-B supra that the ITC of Rs. 77,93,422/- had become available to the Respondent on account of the VAT, while purchasing goods during the pre GST period, which has been duly taken in to consideration by the DGAP while computing the ratio of ITC to turnover for the above period and hence, the claim of the Respondent that he has not availed benefit of ITC on VAT is incorrect. The DGAP has also taken the sold and the unsold area in to account while calculating the benefit of ITC and hence, the Respondent should have no objection on this ground. Therefore, the amount of ITC cannot be taken to be Rs. 2,52,00,202/- claimed to be relating to the purchase of the goods for computation of the profiteered amount, as has been asserted by the Respondent. Accordingly, all the above contentions of the Respondent are fallacious and hence they are not tenable.

32. The Respondent has further contended that due to slump in the real estate sector he has incurred additional expenses on marketing and payment of commissions which has resulted in overall increase in the project cost which should have been considered while calculating the profiteered amount. In this connection it would be appropriate to mention that every builder launches marketing campaigns and pays commission for selling his flats/houses/shops in the normal course of his business which is already built in the cost of every project and hence, the Respondent cannot claim any concession on this ground. Moreover, there is no provision under Section 171 (1) to consider the costs incurred by the Respondent while calculating the profiteered amount. Hence, the above claim of the Respondent cannot be accepted.

33. It is established from the perusal of the above facts that the Respondent has benefited from the additional ITC to the extent of 5.91% of the turnover during the period from July, 2017 to June, 2019 as is evident from Table-B supra. It is also apparent from the above that the provisions of Section 171 of the CGST Act, 2017 have been contravened by the Respondent as he has not passed on the benefit of ITC to his buyers. Accordingly, the profiteered amount is determined as Rs. 2,44,80,835/- inclusive of GST @ 12% as has been mentioned in Table-C supra, in terms of Section 171 (1) read with Rule 133 (1). The Respondent has realized an additional amount of Rs. 66,463/- which includes both the profiteered amount @ 5.91% of the taxable amount (base price) and 12% GST on the said profiteered amount from the Applicant No. 1. He has also realized an additional amount of Rs. 2,44,14,372/- which includes both the profiteered amount @ 5.91% of the taxable amount (base price) and 12% GST on the said profiteered amount from the 228 shop buyers other than the Applicant No. 1. The details of the profiteered amount and the buyers have been mentioned by the DGAP in Annexure-14 of his Report dated 23.03.2020. These buyers are identifiable as per the documents placed on record. Therefore, as per the provisions of Section 171 (1) read with Rule 133 (3) (b) the Respondent is directed to pass on an amount of Rs. 2,44,80,835/- and an amount of Rs. 66,463/- to the other flat buyers and the Applicant No. 1 respectively along with the interest @ 18% per annum from the dates from which the above amount was collected by him from them till the payment is made, within a period of 3 months from the date of passing of this order as

per the details mentioned in Annexure-14, attached with the Report dated 23.03.2020.

34. Accordingly, this Authority under Rule 133 (3) (a) of the CGST Rules, 2017 orders that the Respondent shall reduce the prices to be realized from the buyers of the shops of the above project commensurate with the benefit of ITC received by him as has been detailed above. Since the present investigation is only up to 30.06.2019 any benefit of ITC which accrues subsequently shall also be passed on to the buyers by the Respondent. The Commissioner CGST/SGST Haryana are directed to ensure that the Respondent passes on the benefit of ITC till the Completion Certificate is received by the Respondent.
35. It is also evident from the above narration of the facts that the Respondent has denied the benefit of ITC to the buyers of the shops being constructed by him in his above project w.e.f. 01.07.2017 to 30.06.2019, in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and he has thus resorted to profiteering. Hence, he has committed an offence under Section 171 (3A) of the CGST Act, 2017, and therefore, he is liable for imposition of penalty under the provisions of the above Section. However, perusal of the provisions of Section 171 (3A) under which penalty has been prescribed for the above violation shows that it has been inserted in the CGST Act, 2017 w.e.f. 01.01.2020 vide Section 112 of the Finance Act, 2019 and it was not in operation during the period from 01.07.2017 to 30.06.2019 when the Respondent had committed the above violation and hence, the penalty prescribed under Section 171 (3A) cannot be imposed on the

Respondent retrospectively. Accordingly, notice for imposition of penalty is not required to be issued to the Respondent.

36. The Respondent in his submissions made before the DGAP, which have been mentioned in Para 9 of the Report of the DGAP dated 23.03.2020, has himself admitted that he has been constructing one more project namely "Epic". The Respondent vide his e-mail dated 13.11.2020 sent to this Authority has also admitted that difference in the turnovers pertaining to the post-GST period as depicted in the Home-Buyer's List and the GST Returns furnished by him in respect of his "Mercado" project, which is subject matter of the present proceedings, has arisen due to the turnovers of another project of the Respondent namely "Epic" being included in them. Keeping in view the above self-admissions of the Respondent, the liability of the Respondent to pass on the benefit of additional ITC as per the provisions of Section 171 of the above Act, is required to be investigated in respect of his "Epic" project, as there are sufficient reasons to believe that the Respondent is required to pass on the benefit of additional ITC to the eligible buyers which he may not have passed on, as has been established in the present case. Accordingly, this Authority is bound to examine and take suo moto cognizance of the benefit of ITC which the Respondent is apparently liable to pass on to the buyers of the "Epic" project, as per the provisions of Section 171 (2) of the CGST Act, 2017, once it has been brought to its notice. Accordingly, the DGAP is directed to investigate the "Epic" project being executed by the Respondent and submit his Report under Rule 129 (6) stating whether the Respondent is liable to pass on the benefit

of ITC to the buyers of the above project and their entitlement thereof.

The Respondent is directed to extend full co-operation to the DGAP during the course of the investigation.

37. This Authority as per Rule 136 of the CGST Rules 2017 directs the 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 this 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 through the DGAP within a period of 4 months from the date of receipt of this order.

38. A copy each of this order be supplied to both the Applicants, the Respondent and Commissioners CGST/SGST, Haryana for necessary action. File be consigned after completion.

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

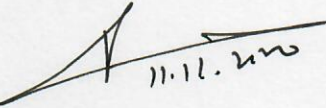
Sd/-
(J. C. Chauhan)
Technical Member



Sd/-
(Amand Shah)
Technical Member

Certified Copy

o/c


11.12.2020

(A.K. Goel)
Secretary, NAA

F. No. 22011/NAA/153/Elan/2020 /6450-52

Date: 11.12.2020

Copy To:-

1. M/s Elan Ltd., 3rd Floor, Golf Course View Corporate Tower, Golf Course Road, Sector-42, Gurgaon, Haryana- 122 002.

2. Commissioner of Commercial Taxes, vanijya bhavan, plot no. 1-3, sector-5, panchkula. Pin - 134 151.
3. Chief Commissioner of Central Goods & Services Tax Delhi zone C.R. Building, I.P. Estate, New Delhi-110109.
4. 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.
5. Sh. Mool Chand Mittal, 897, Sector-17, Faridabad, Haryana- 122 002.
6. NAA Web/Guard File.


A. K. GOEL
SECRETARY, NAA