

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

I.O. No. : 38/2020
Date of Institution : 31.08.2020
Date of Order : 11.12.2020

In the matter of:

1. Shri Sudhir Kumar Jain, H. No. 2514, Sector-D, Pocket-2, Vasant Kunj, New Delhi-110070.
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 DLF Limited, DLF Gateway Tower, R Block, DLF City, Phase-III, Gurugram, 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 31.08.2020 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after a detailed investigation in line with 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 under Rule 128 (1) of the CGST Rules, 2017 alleging profiteering by the Respondent in respect of purchase of Flat No. J-062, Tower-J, 6th Floor in the Respondent's project "The Sky Court", in the DLF Garden City, Sector-86, Gurugram. The Applicant No. 1 had alleged that he had purchased the flat when the Completion Certificate had already been received by the Respondent and possession was already given to many residents. Since, the sale of flats after issuance of Completion Certificate did not attract GST, the Applicant No. 1 had alleged that the Respondent had charged GST @18% on the Preferential Location Charges (PLC).
2. The DGAP has reported that the Haryana State Screening Committee on Anti-profiteering had examined the said application and forwarded the same with its recommendation, to the Standing Committee on

Anti-profiteering for further action, in terms of Rule 128 (2) of the Rules. Further the aforesaid reference was examined by the Standing Committee on Anti-profiteering and it was decided to forward the same to the DGAP, to conduct a detailed investigation in the matter. The Applicant No. 1 had submitted copy of demand letter along with his application.

3.The DGAP has also submitted that on receipt of the reference from the Standing Committee on Anti-profiteering, a notice under Rule 129 (3) of the Rules was issued by the DGAP on 23.08.2019, calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the Applicant No. 1 by way of commensurate reduction in price and if so, to *suo moto* determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all the supporting documents. Further, in the said notice dated 23.08.2019, the Respondent was given an opportunity to inspect the non-confidential evidence/information submitted by the Applicant No. 1 during the period from 26.08.2019 to 28.08.2019. However, the Respondent did not avail of the said opportunity. Vide e-mail dated 22.05.2020, the Applicant No. 1 was also given opportunity to inspect the non-confidential evidence/reply furnished by the Respondent on 03.06.2020 or 04.06.2020. The Applicant No. 1 replied vide e-mail dated 30.05.2020 and requested to e-mail the non-confidential documents submitted by the Respondent and the same were sent to the Applicant No. 1 vide e-mail dated 10.06.2020. The

period covered by the DGAP during the current investigation was from 01.07.2017 to 31.07.2019.

4.The DGAP has also submitted that the time limit to complete the investigation was extended up to 04.05.2020 by this Authority vide Order dated 28.01.2020 in terms of Rule 129 (6) of the Rules. However, due to prevalent pandemic of COVID-19 in the country, vide Notification No. 35/2020-Central Tax dated 03.04.2020, issued by the Central Board of Indirect Taxes and Customs, under Section 168 (A) of the CGST Act, 2017, where, any time limit for completion/furnishing of any report, had been specified in, or prescribed or notified under the CGST Act, 2017 which fell during the period from the 20th day of March 2020 to the 29th day of June 2020, and where completion or compliance of such action had not been made within such time, then, the time limit for completion or compliance of such action, was extended up to 30.06.2020. Further, as per the Notification No. 55/2020-Central Tax dated 27.06.2020 the time limit to complete the investigation by the DGAP would be 31.08.2020.

5.The DGAP has further submitted that in response to the notice dated 23.08.2019, the Respondent has replied vide letters/e-mails dated 27.08.2019, 30.08.2019, 27.09.2019, 27.11.2019, 29.11.2019, 17.12.2019, 20.12.2019, 16.01.2020, 31.01.2020, 02.03.2020, 23.03.2020, 15.05.2020, 01.06.2020, 08.06.2020, 19.06.2020, 24.06.2020, 21.08.2020 and 24.08.2020 and has stated:-



- (i) That he had various commercial and residential projects in the states of Haryana, Delhi, Uttar Pradesh etc. The Respondent's operations were spanned in all aspects of real estate, from the identification and acquisition of land, to planning, execution, construction and marketing of projects. He was also engaged in other services such as leasing, maintenance etc. The development business of the Respondent was involved in the sale of residential spaces, selected commercial offices and commercial complexes.
- (ii) That one of the many projects of the Respondent included a project "The Sky Court" which was in Sector-86, Gurgaon, Haryana. The project was located in a township named "DLF Garden City" which also included other projects. "The Sky Court" was a residential project and the Respondent had sold apartments under the project before and after receipt of Occupation Certificate/Completion Certificate and had charged taxes accordingly.
- (iii) That he had started the booking for the project "Sky Court" in the year 2012, and the said project was not registered under RERA. He had received Completion Certificate on 17.07.2017 for the project "Sky Court". Further, as per his records, the Applicant No. 1 had purchased the apartment after receipt of Occupation/Completion Certificate. Therefore, as per the GST Rules, the Respondent had not charged GST on the Basic Sale Price (BSP) charged from the customer. However, he had

charged GST on Preferential Location Charges (PLC) even on post Occupation/Completion Certificate sales. In this regard, there was a negative ruling by the West Bengal Appellate Authority for advance ruling in the case of Bengal Peerless Housing Development Company. He had also filed advance ruling on the said issue on which clarification was awaited.

- (iv) That on implementation of GST he had made sale/booking only post receipt of Occupation Certificate/Completion Certificate. No fresh sale had been made between the period from 1st July 2017 till 17th July 2017. He had charged GST only against the balance demand raised on the customers who had purchased/ booked flats before receipt of Occupation/Completion Certificate. Further, he had submitted that no demand letter had been issued to the Applicant No. 1 by him as the Applicant No. 1 after booking had opted for one time down payment option. Further the Applicant No. 1 had purchased/booked the apartment post receipt of Occupation Certificate and in his view anti-profiteering did not arise at all for the reason that the purchase of apartment had taken place by the Applicant No. 1 after receipt of Occupation Certificate against which neither ITC was admissible, nor GST was payable except on PLC & other service charges (if any).
- (v) That DLF Garden City was a township which included two projects "The Sky Court" and "The Ultima". Since the Applicant No. 1 belonged to the project "The Sky Court", the

investigation should have been restricted/limited to the project "The Sky Court" only. Further, the Respondent has stated that the non-taxable services like external development charges, delayed interest, electrical connection charges, PLC etc. in the list of home-buyers and the said services were as per the agreement and did not form part of the price of apartment/unit. Thus in his view Anti-Profiteering provisions should not have been applicable on such charges.

6. The DGAP has also reported that vide the aforementioned letters/e-mails the Respondent has submitted the following documents/information:-

- (a) Brief profile of the Respondent.
- (b) Copies of GSTR-1 Returns for the period from July 2017 to July 2019.
- (c) Copies of GSTR-3B Returns for the period from July 2017 to July 2019.
- (d) Copies of Tran-1 Returns for transitional credit.
- (e) Copies of VAT & ST-3 Returns for the period from April 2016 to June 2017.
- (f) Copy of Sale Agreement/Contract issued to the Applicant No. 1.
- (g) Pre-GST and post-GST Tax rates.



- (h) Copies of Balance Sheets (including all Annexures and profit/loss account) and Cost Audit Reports for FY 2016-17, 2017-18 & 2018-19.
- (i) Copy of Electronic Credit Ledger for the period from July 2017 to July 2019.
- (j) CENVAT/ITC Register for the FY 2016-17, 2017-18, 2018-19 and from April 2019 to July 2019 reconciled with VAT, ST-3 and GSTR-3B Returns.
- (k) Details of VAT, Service Tax, ITC of VAT, CENVAT credit for the period from April 2016 to June 2017 and output GST and ITC for the period from July 2017 to July 2019 for the project "The Sky Court".
- (l) List of home buyers in the project "The Sky Court".
- (m) Project-wise input tax register.

7. The DGAP has further reported that all the details/ information submitted by the Respondent was to be treated as confidential except the documents related to the Applicant No. 1 in terms of Rule 130 of the CGST Rules, 2017.

8. The DGAP has further submitted that the reference from the Standing Committee on Anti-profiteering, various replies of the Respondent and the documents/evidence on record has been carefully scrutinised.

The main issues for determination were:-



- (i) Whether there was benefit of reduction in the rate of tax or ITC 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 CGST Act, 2017.

9. The DGAP has also claimed that the Respondent, vide letter dated 27.09.2019 has submitted a copy of the agreement to sell dated 07.03.2019 and demand letter for the sale of Flat No. SCJ-062, measuring 1,937 square feet, at the basic sale price of Rs. 8,750/- per square feet. The details of amounts and taxes paid by the Applicant No. 1 to the Respondent have been furnished by the DGAP in Table- 'A' below:-

Table-'A'

(Amount in Rs.)

S. No.	Payment Stage	Basic %
1	On Booking	7.50 Lakhs
2	Within 2 months from the date of booking	10% of Basic Price
3	Within 6 months from the date of booking	15% of Basic Price
4	Within 24 months from the date of booking/ on possession	75% of Basic Price

10. It has been further claimed by the DGAP that the contention of the Respondent that the Applicant No. 1 belonged to the project "The Sky Court" in the DLF Garden City, Gurgaon appeared to be correct and the same had been verified from the documents enclosed with the complaint. Thus, the DGAP has restricted the investigation to the

project "The Sky Court" only, as the DLF Garden City was a township in Gurgaon which included other projects like "The Ultima" etc.

11. The DGAP has also contended that on perusal of the documents and list of home buyers submitted by the Respondent, his contention that the Applicant No. 1 had booked a flat after receipt of Occupancy Certificate and that he had not charged GST on Basic Sale Price (BSP) of the flat appeared to be correct. Since, GST was not charged by the Respondent on BSP, therefore, the anti-profiteering proceedings did not arise in the case of the Applicant No. 1.

12. The DGAP has further contended that in 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) 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 DGAP has claimed that the ITC pertaining to the units which were under construction but not sold was provisional ITC which might be required to be reversed by the Respondent, if such units remained unsold at the time of issue of the CC, in terms of Section 17 (2) & Section 17 (3) of the Central Goods and Services Tax Act, 2017. Therefore, the ITC 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 proportionate benefit of additional ITC available to him post-GST.

13. The DGAP has also stated that prior to 01.07.2017 i.e. before the GST was introduced, the Respondent was eligible to avail Credit of Service Tax paid on input services only (no credit was available in respect of Central Excise Duty paid on the inputs) and also ITC of VAT paid on inputs was not available to the Respondent as he was paying VAT under composition scheme of the Haryana VAT. Further, post-GST, the Respondent could avail ITC 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 July 2019, the details of ITCs availed by him and his turnovers from the project "The Sky Court" during the pre-GST (April 2016 to June 2017) and post-GST (July 2017 to July 2019) periods, duly reconciled with his ST-3 and GSTR-3B Returns and credit registers, the ratios of ITCs to turnovers has been furnished by the DGAP in Table-'B' below:-

Table-'B'

(Amount in Rs.)

S. No.	Particulars	Total (Pre-GST) 01.04.2016 to 30.06.2017	Total (Post-GST) 01.07.2017 to 31.07.2019
1	CENVAT of Service Tax Paid on Input Services used (A)	13,77,35,721	
2	Input Tax Credit of GST Availed (B)		18,65,28,554
3	Total CENVAT/Input Tax Credit Availed (C)= (A) or (B)	13,77,35,721	18,65,28,554
4	Total Turnover as per list of Home	35,02,37,352	56,24,37,457

	Buyers (D)		
5	Total Saleable Area (in SQF) (E)	12,97,786	12,97,786
6	Total Sold Area (in SQF) relevant to turnover (F)	8,86,196	10,22,925
7	Relevant ITC [(G)= (C)*(F)/(E)]	9,40,53,137.43	14,70,23,254.30
8	Ratio of CENVAT/ Input Tax Credit to the Turnover [(H) = (G)/(D)*100]	26.85%	26.14%

From the Table-'B', it was observed by the DGAP that the ITC as a percentage of the turnover that was available to the Respondent during the pre-GST period (April 2016 to June 2017) was 26.85% and during the post-GST period (July 2017 to July 2019), it was 26.14%. Therefore, post-GST, the Respondent has not been benefited from any additional ITC and in fact, the ITC availed by the Respondent post introduction of GST was lower by 0.71% [26.85% (-) 26.14%] of the turnover as compared to the pre-GST period.

14. It has also been reported by the DGAP that the Central Government, on the recommendation of the GST Council, had levied 18% GST (effective rate was 12% in view of 1/3rd abatement on value) on construction service vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Accordingly, the allegation of profiteering had also been examined from the rate of tax angle, by comparing the applicable tax rates in the pre-GST and post-GST periods. In the pre-GST period (April 2016 to June 2017), Service Tax @4.5% and VAT @1% (under composition scheme of Haryana VAT) was payable on the construction value/BSP and in the post-GST period (July 2017 to July 2019), the effective GST rate was 12% on construction service.

Therefore, the applicable tax rate on construction services in pre-GST period was 5.5% (Service Tax @4.5% + VAT @1%). Hence the effective tax rate in construction services had increased from 5.5% in the pre-GST period to 12% in the post-GST period.

15. The DGAP has further reported that as there was an increase in the rate of tax and there was no additional benefit of ITC, on implementation of GST w.e.f. 01.07.2017, the provisions of Section 171 of the CGST Act, 2017 were not attracted. It was also observed that the Applicant No. 1 had purchased the flat from the Respondent after issue of the Occupancy Certificate of the project "The Sky Court". Since the rate of tax had been increased and also there was no additional benefit of ITC in post-GST period, no profiteering could have been established in the case of Applicant No. 1 in terms of Section 171 of the CGST Act, 2017.

16. The DGAP has also submitted that there was no benefit of additional ITC that has accrued to the Respondent post introduction of GST. In fact, the ITC as a ratio of Respondent's turnover has decreased from 26.85% to 26.14%. Moreover, the effective rate of tax has also gone up from 4.5% to 12%, post introduction of GST. Section 171(1) of the CGST Act, 2017 dealing with profiteering could have been invoked in the event there was a *reduction* in the rate of tax or there was an increase in the ITC. Since neither of the conditions prescribed under the aforesaid Section 171(1) had been met, the

said statutory provision was not applicable to the present case of the project "The Sky Court".

17. The above investigating report was received by this Authority from the DGAP on 31.08.2020 and was considered in its sitting and it was decided to ask the Respondent and the Applicant No. 1 to file their consolidated written submissions in respect of the report of the DGAP. Notice dated 07.09.2020 was also issued to the Respondent directing him to explain why the Report dated 31.08.2020 furnished by the DGAP should not be accepted.
18. The Respondent has replied vide his submissions dated 18.09.2020 and stated that he accepted the report of the DGAP and did not want to file any submissions against the report.
19. The Applicant No. 1 has also filed his written submissions vide his e-mails dated 27.09.2020 and 29.09.2020 and stated that it has not been established in the Investigation report that the Respondent was within his right and also compliant with the GST Rules while charging 18% GST on the PLC on the sale of the apartment post receipt of Occupancy Certificate, which should have been nil as per the premise of the Respondent. He has also stated that there was a big loophole in the investigation that had been carried out by the DGAP and the matter has remained unsolved.
20. This Authority has carefully examined the DGAP's Report, the written submissions of the above Applicant as well as that of the Respondent and it is revealed that the Respondent is in the real-estate business and has developed his project "The Sky Court" in

Gurugram. It is also on record that the Applicant No. 1 has filed a complaint alleging that the Respondent has charged GST @18% on the PLC even after the issue of the Completion Certificate in respect of the purchase of a flat in the Respondent's above project. It is also revealed that the DGAP, after a detailed investigation, has found that the Respondent has not contravened the provisions of Section 171 of the CGST Act, 2017 as there was an increase in the rate of tax and there was also no additional benefit of ITC to the Respondent, on implementation of the GST w.e.f. 01.07.2017, which was required to be passed on to the flat buyers.

21. The Applicant No. 1 has contended that the Respondent has wrongly charged GST @18% on the PLC on the sale of flat to him after issue of Completion Certificate. In this regard, it is pertinent to mention that as per the provisions of Section 171 of the CGST Act, 2017 read with Rule 127 and 133 of the CGST Rules, 2017, this Authority has only been mandated to ensure that both the benefits of tax rate reduction and ITC are passed on to the customers. Therefore, this Authority has no mandate to look into the matter whether the Respondent has wrongly charged GST from the Applicant No. 1 on the PLC. Therefore, the Applicant No. 1 may take up the matter with the jurisdictional CGST/ SGST Authorities to settle his above grievance.

22. It is also apparent from the perusal of Table-'B' supra that the DGAP has calculated the ratio of CENVAT Credit to turnover as 26.85% for the pre-GST period w.e.f. 01.04.2016 to 30.06.2017 and ratio of ITC

to turnover for the post-GST period from 01.07.2017 to 31.07.2019 as 26.14%. It is also revealed from the above Report of the DGAP that the Respondent has received the Completion Certificate on 17.07.2017 in respect of the above project. Since, the Respondent has received the Completion Certificate on 17.07.2017, the period of investigation should have been restricted up to 16.07.2017 and the investigation should not have been conducted up to 31.07.2019 unless there were justifiable grounds to do so. However, no such grounds have been mentioned by the DGAP in his Report.

23. It is also evident from Table-B supra that the DGAP while computing the ratio of ITC to turnover for the post-GST regime has considered the ITC availed by the Respondent for the period from 01.07.2017 to 31.07.2019. Since, the Completion Certificate was received by the Respondent on 17.07.2017, the amount of ITC availed/available to the Respondent in the post-GST regime should have been considered up to 16.07.2019 and not up to 31.07.2019.

24. Based on the above grounds the ratio of ITC to turnover for the period w.e.f. 01.07.2017 to 31.07.2019 for the post-GST period computed by the DGAP cannot be relied upon. Accordingly, the ratio of ITC to turnover w.e.f. 01.07.2017 to 16.07.2019 for the post GST period is required to be recomputed by the DGAP. In case it is to be computed up to 31.07.2019 the grounds thereof are required to be mentioned.

25. It has also been observed from the submissions of the Respondent that he is executing another project viz. "The Ultima" in the same

“DLF Garden City”, situated in Gurugram, Haryana in respect of which the DGAP has not conducted any investigation to ascertain whether the Respondent is liable to pass on the benefit of ITC to the recipients of this project or not. Since the execution of the above project has been admitted by the Respondent himself therefore, there are sufficient reasons to believe that the Respondent is apparently liable to pass on the above benefit as per the provisions of Section 171 (1). Further, the Respondent also has a single GST registration and is maintaining a joint ITC Register and is availing ITC on all the projects which he is executing from a common pool of ITC, to discharge his GST output liability on these projects through the combined GSTR-3B Returns. Therefore, all the projects on which the Respondent is availing ITC from the common pool are required to be investigated to determine whether he has passed on the benefit of ITC to the buyers of each project, which are being executed by him. Accordingly, this Authority as per the provisions of Section 171 (2) of the above Act after taking suo moto cognizance, directs the DGAP to conduct investigation in respect of the above project and submit Report to this Authority for determination whether the Respondent is liable to pass on the benefit of ITC in respect of the above project to the buyers or not as per the provisions of Section 171 (1) of the above Act.

26. Due to the above reasons the Report dated 31.08.2020 furnished by the DGAP cannot be accepted. Therefore, in terms of the provisions of Rule 133 (4) and Section 171 (2) of the CGST Act, 2017 the

DGAP is directed to further investigate the present case on the above issues and submit his Report under Rule 129 (6) of the above Rules. The Respondent is directed to extend all assistance to the DGAP and furnish him necessary documents or information as required during the course of the investigation.

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

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



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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

o/c

(A.K Goel)
NAA, Secretary

File No. 22011/NAA/202/DLF/2020 / 6474 - 6477 Date:- 11.12.2020
Copy To:-

1. M/s DLF Limited, DLF Gateway Tower, R Block, DLF City, Phase-III, Gurugram, Haryana-122002. (GSTIN- 06AAACD3494N1ZC).
2. Sh Sudhir Kumar Jain, H. No. 2514, Sector-D, Pocket-2, Vasant Kunj, New Delhi-110070.
3. Director General Anti-Profitteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. Guard File.

A. K. GOEL
SECRETARY, NAA