

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

I.O. No. 01/2021
Date of Institution 31.08.2020
Date of Order 16.03.2021

In the matter of:

1. Deepak Naik V, D 701, Pride Spring Fields Apartments, Uttrahalli to Gubbalala Road, Near Subramanyaura Lake, Bengaluru, Karnataka-560061.
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 Prestige Estate Projects Ltd., The Falcon House, No. 1, Main Guard Cross Road, Bengaluru-560001. (GSTIN-29AABCP8096K1ZP).

Respondent



Quorum:-

1. Dr. B. N. Sharma, Chairman
2. Sh. Amand Shah, Technical Member
3. Sh. Navneet Goel, Technical Member

Present:-

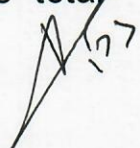
1. None for Applicants.
2. None for the Respondent.

ORDER

1. The present Report dated 28.08.2020 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after a detailed investigation, under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that the Applicant No. 1 had filed an application dated 30.07.2019 (originally examined by the Karnataka State Screening Committee on Anti-Profiteering) under Rule 128 (1) of the CGST Rules, 2017 against the Respondent alleging profiteering in respect of construction service supplied by him. The Applicant No. 1 had stated that he had purchased a flat in the Respondent's project "Prestige Lake Ridge" and had alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) to him by way of commensurate reduction in the prices.

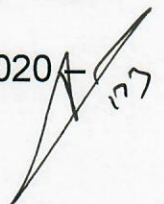


2. The Standing Committee on Anti-profiteering examined the application filed by the Applicant No. 1 in its meeting held on 13.09.2019 and upon being prima facie satisfied had referred the above application to the DGAP recommending a detailed investigation and to collect evidence necessary to determine whether the benefit of ITC had been passed on by the Respondent to the recipients in respect of the construction service supplied by the Respondent.
3. It has also been claimed by the DGAP that the Applicant No. 1 has submitted the following documents along with his application:-
 - a. Scanned copy of Aadhar Card as a proof of Identity.
 - b. Payment Schedule.
 - c. Construction Agreement.
 - d. Prestige Lake Ridge-Intimation of Allotment.
 - e. Account Statement as on 30.07.2019.
 - f. Demand Notes –Pre and Post GST.
 - g. Copy of Anti-Profiteering Application Form (APAF-1).
4. The DGAP has further reported that in the pre-GST era, the Applicant No. 1 had booked Flat No. 10043 in the project “Prestige Lake Ridge” of the Respondent on 14.08.2016 and the Applicant No. 1 was to pay the consideration in 21 installments and one additional installment at the time of possession, each linked with different stages.
5. The DGAP in his report has also stated that the documents and the Report of Karnataka State Screening Committee on Anti-profiteering has been examined and it appeared that the Respondent had demanded approximately 40% of the total amount payable which meant construction had been completed around 40% of the total



construction. The remaining construction of around 60% was to be completed after introduction of GST from 01.07.2017. On going through the demand note/tax and payment schedule pre and post GST, it was observed that the basic price of the apartment payable at each milestone had remained same at Rs. 2,83,623/- and hence, it appeared that the builder had not passed on the benefit of ITC to the Applicant No. 1 and contravened the provision of Section 171 of the CGST Act, 2017.

6. On receipt of the reference from the Standing Committee on Anti-profiteering, the DGAP had issued notice dated 23.10.2019 under Rule 129 (3) of the above Rules, calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to his recipients by way of commensurate reduction in prices of the flats 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 documents in support of his reply. The Respondent was also allowed to inspect the relied upon non-confidential evidence/information which formed the basis of the investigation between 30.10.2019 and 31.10.2019. However, the Respondent had not availed the said opportunity. The Applicant No. 1 was also given opportunity to inspect the non-confidential documents/reply furnished by the Respondent between 08.06.2020 and 09.06.2020, which was not availed by the Applicant No. 1.
7. The DGAP in his Report has stated that the last date prescribed under law for submission of the investigation Report to this Authority had expired on 08.04.2020. Further, in terms of Notification No. 35/2020

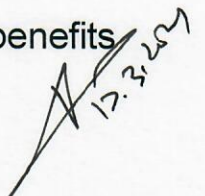


Central Tax dated 03.04.2020 as amended vide Notification No. 55/2020 – Central Tax dated 27.06.2020, issued by the Central Board of Indirect Taxes and Customs under Section 168 (A) of the Central Goods and Services Tax Act, 2017, where, any time limit for completion or compliance of any action, which fell during the period from the 20th day of March, 2020 to the 30th day of August, 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, would be extended upto the 31st day of August, 2020, including for the purpose for furnishing of any report under the provision of the CGST Act, 2017. Thus, in term of serial no. (i)(b) of Notification No. 35/2020- Central Tax dated 03.04.2020 as amended vide Notification No. 55/2020 – Central Tax dated 27.06.2020, the time limit for submission of the report stood extended up to 31.08.2020. However, the extension already granted as mentioned in this Authority's Order dated 24.03.2020 for further three months, in the present case stood extended by three months up to 30.11.2020.

8. It has also been stated by the DGAP that the period covered for the current investigation was from 01.07.2017 to 30.09.2019.
9. The DGAP has also submitted that in response to the notice dated 23.10.2019 and subsequent reminders dated 06.11.2019 & 08.01.2020, the Respondent had submitted his replies vide letters and e-mails dated 31.10.2019, 01.11.2019, 18.11.2019, 17.01.2019, 16.07.2020, 07.07.2020 and 05.08.2020, the summary of which has been furnished by the DGAP as has been mentioned below:-



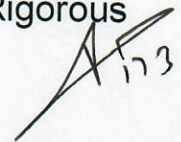
- a. That communications to the home buyers of 'Prestige Lake Ridge' have been sent in October 2017 stating that the effective prices had been reduced since the implementation of GST. The factors, on the basis of which the prices would undergo change, were also conveyed to the customers.
- b. That the exact impact was to be analyzed in detail and the Respondent would require time and clarity from all the suppliers and contractors so that the accurate amount of savings was passed on to the customers.
- c. That communication was also sent to the home buyers that the Respondent had initiated negotiations with the suppliers and contractors, to analyze the potential benefit on account of GST implementation which was to be passed on to all the customers.
- d. That at the time of final closure, the benefit of ITC and reduction in costs on account of GST implementation would be adjusted. Hence, the allegation in the notice dated October 23, 2019 alleging profiteering was incorrect and was liable to be set aside. The application filed by the Applicant No. 1 was unwarranted and liable to be dismissed as the Respondent has not evaded from complying with anti-profiteering provisions. Further, in the light of written confirmation / communication that the benefits arising on account of GST implementation would be passed on, there was no occasion to come before this Authority. For these reasons, the complaint filed by the Applicant was liable to be dismissed as pre-mature. He undertook to pass on the benefits


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- of increase in ITC / cost reduction when the current statutory timelines were complete and the benefits were realized by him.
- e. That the following demonstration steps have already been taken and those that were underway to comply with the anti-profiteering provisions of the GST law. That as on June 30, 2017, he had already billed to the extent of 40% (Approx.) of the apartment sale price on which the applicable VAT and Service Tax was already discharged by him in the erstwhile tax regime. That he has sub-contracted completely the construction and other works to various contractors except to the extent of purchasing Steel and other minor items. Therefore, being a part of a large public group of Companies and always being compliant of various Central and State laws, the Respondent has ensured that it has lawfully complied with all the taxation laws as well.
- f. That several communications have also been sent to the Applicant No. 1 stating that the benefit of ITC would be passed on before billing the possession charges and before handing over the apartment unit to him. At this stage, the cloud of uncertainty on the exact savings on account of ITCs and cost reduction looms large on him and any logic based estimation of savings on account of ITC passed on in a hurried manner to the customers could be grossly wrong and erroneous on the part of him and may require upward or downward revision again at the time of final settlement / handing over.



- g. That post GST implementation he has initiated negotiation with all the Suppliers and the Contractors on the effect of GST implementation. The supplier contracts and contractor's agreements existing as on 30th June 2017 were under revision and the exact amount of savings realized in the project would be known upon project completion and at the time of handing over the apartment units to the customers. That post GST implementation he has also worked out the effective prices of various goods such as Steel etc. which has also on account of GST implementation impacted the construction cost.
- h. That pursuant to the GST implementation, many suppliers and contractors had been blacklisted by the local VAT Department and a lot of transitional credits under SGST had been lost as the deduction pertaining to these suppliers had not been allowed by the VAT Department. The impact of such suppliers existing under the GST regime was also being analyzed and this would also impact the benefit that would be passed on to the Customers.
- i. That there were many suppliers who had not passed on the benefit of ITC in GST regime. That was to say, they had not uploaded their invoices in GSTR-1 on the Common portal. These credits had not been passed on to the Respondent and were currently not reflecting in the GSTR-2A on the common portal. The impact of such suppliers existing under the GST regime was also being analyzed and this would also impact the benefit that would be passed on to the customers. Rigorous

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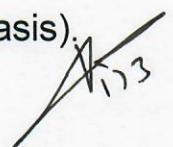
efforts were being made by the Respondent so as to ensure that all GST credits were reflected in his GSTR – 2A on the common portal.

- j. That the turnover reported in the audited financials of the Respondent was based on the Accounting Standards which required reporting of turnover based on the percentage of completion method whereas the turnover reported in the VAT, Service Tax and GST Returns was based on the provisions relating to of time of supply as mentioned in those Acts. Further, the amount of ITCs flowing to the Respondent was also based on the amount of construction work undertaken by the sub-contractors and the amount of input materials received at site. Therefore, the amount of ITC availed on year-on-year basis was not comparable under construction contracts such as the ones undertaken by the Respondent. This aspect would also affect the amount of ITC that would be realized by the Respondent and passed on to the customer.
- k. That vide email dated 05.08.2020, the Respondent submitted that he had passed on the benefit of ITC total amounting Rs 8,28,91,520/- and submitted Credit Notes, Ledgers, Customers' communication letters, Customers' Master List and Acknowledgements (sample basis) and details of ITC as supporting documents.



10. The DGAP has further intimated that vide the aforementioned letters and statement, the Respondent has submitted the following documents/information:-

- a. Copies of GSTR-1 Returns for the period July 2017 to September 2019.
- b. Copies of GSTR-3B Returns for the period July 2017 to September 2019.
- c. Copies of Tran-1 filed.
- d. Electronic Credit Ledger for the period July 2017 to September 2019.
- e. Copies of VAT& ST-3 Returns for the period April 2016 to June 2017.
- f. Copies of all demand letters, sale agreement/contract issued in the name of the Applicants.
- g. Details of applicable tax rates, pre-GST and post-GST.
- h. Copy of Balance Sheet and Cost Audit Report for financial year 2016-17 and 2017-18.
- i. Details of VAT, Service Tax, ITC of VAT, Cenvat Credit for the period April 2016 to June 2017, Output GST and ITC for the period July 2017 to September 2019 for the Project "Prestige Lake Ridge".
- j. Cenvat/ITC Ledger for the financial year 2016-17, 2017-18, 2018-19 and 2019-20 (up to September, 2019) reconciled with VAT, ST-3 and GSTR-3B Returns.
- k. List of home-buyers for the impugned Project.
- l. Project details submitted to RERA.
- m. Copies of Credit Notes, Ledgers, Customers' communication letters, Customers' Master List and Acknowledgements (sample basis).

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11. It has also been stated by the DGAP that the Respondent has not claimed confidentiality of any of the details/information furnished by him in terms of Rule 130 of the CGST Rules, 2017.
12. The DGAP has further reported that the reference received from the Standing Committee on Anti-Profiteering, various replies of the Respondent and the documents/evidence placed on record have been carefully examined and it emerged that the main issues for determination were whether there was reduction in the rate of tax or benefit of ITC on the supply of construction service availed by the Respondent after implementation of GST w.e.f. 01.07.2017 and if so, whether the Respondent had passed on such benefit to the recipients by way of commensurate reduction in prices, in terms of Section 171 of the CGST Act, 2017.
13. The DGAP in his report has also stated that vide letter dated 18.11.2019, the Respondent has submitted a copy of agreement to sell dated 18.01.2017 and demand letters for the sale of Unit no. 10043 measuring 1571 square feet, at the rate of Rs. 4560/- per square feet. The details of Payment Schedule including amounts and taxes paid/payable by the Applicant No. 1 to the Respondent has been furnished by the DGAP in the Table-'A' below:-

Table- 'A'

(Amount in Rs.)

S. No.	Installment Date	Installment No.	Amount	Tax	Total
1	14.08.2016	On Booking	14,92,752	1,02,145	15,94,897
2	12.09.2016	Installment 1	2,83,623	19,407	3,03,030
3	12.11.2016	Installment 2	2,83,623	19,407	3,03,030

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4	12.01.2017	Installment 3	2,83,623	19,407	3,03,030
5	12.03.2017	Installment 4	2,83,623	19,407	3,03,030
6	12.05.2017	Installment 5	2,83,623	19,407	3,03,030
7	12.07.2017	Installment 6	2,83,623	34,034	3,17,658
8	12.09.2017	Installment 7	2,83,623	34,034	3,17,658
9	12.11.2017	Installment 8	2,83,623	34,034	3,17,658
10	12.01.2018	Installment 9	2,83,623	34,034	3,17,658
11	12.03.2018	Installment 10	2,83,623	34,034	3,17,658
12	12.05.2018	Installment 11	2,83,623	34,034	3,17,658
13	12.07.2018	Installment 12	2,83,623	34,034	3,17,658
14	12.09.2018	Installment 13	2,83,623	34,034	3,17,658
15	12.11.2018	Installment 14	2,83,623	34,034	3,17,658
16	12.01.2019	Installment 15	2,83,623	34,034	3,17,658
17	12.03.2019	Installment 16	2,83,623	34,034	3,17,658
18	12.05.2019	Installment 17	2,83,623	34,034	3,17,658
19	12.07.2019	Installment 18	2,83,623	34,034	3,17,658
20	12.09.2019	Installment 19	2,83,623	34,034	3,17,658
21	12.11.2019	Installment 20	2,83,623	34,034	3,17,658
22	12.01.2020	Installment 21	2,83,623	34,034	3,17,658
23	12.02.2020	On possession	14,926	1,7991	16,719
		Total	74,63,760	7,45,530	82,09,290

14. The DGAP had also claimed that 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" and 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 had been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever was earlier". Thus, the ITC pertaining to the residential units which were under construction but not sold was provisional ITC

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which would 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 CGST Act, 2017, which read as under:-

Section 17 (2) "Where the goods or services or both were 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 Act, the amount of credit shall be restricted to so much of the input tax as was 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 was liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building".

Therefore, the ITC pertaining to the unsold units might not fall within the ambit of the DGAP's investigation and the Respondent was required to recalibrate the selling price of such units to be sold to the prospective buyers by considering the net benefit of additional ITC available to him post-GST.

15. The DGAP has further claimed that the present case pertained to supply of construction service and the investigation was limited to one



project i.e. "Prestige Lake Ridge" only, in which the Applicant No. 1 has booked his Unit no. 10043.

16. It has been stated by the DGAP that prior to 01.07.2017, i.e., before GST was introduced, the Respondent was eligible to avail CENVAT credit of Service Tax paid on the input services. However, CENVAT credit of Central Excise Duty paid on the inputs was not admissible as per the CENVAT Credit Rules, 2004, which were in force at the material time. Further, upon examining the VAT Returns, invoices etc. submitted by the Respondent, it appeared that he was paying VAT under Karnataka VAT under normal scheme and was eligible to avail any ITC of VAT paid on the inputs purchased by him. The Respondent submitted VAT Returns and the breakup of the purchases made for the project "Rise" to justify the credit of VAT for the impugned project and details of VAT turnover for the project were provided.
17. Further, the DGAP has reported that during the pre-GST era, the Respondent was eligible to avail CENVAT credit of Service Tax paid on input services and deduction of the payments made to the registered contractors and sub-contractors (from the taxable turnover under VAT) on which VAT @4% was being levied. 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. However, post-GST, the Respondent could avail the ITC of GST paid on all the inputs and input services including the sub-contracts. From the information submitted by the Respondent for the period April 2016 to September 2019, the details of the ITC availed by him his total turnover from the project "Prestige Lake Ridge", the ratios

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of ITCs to the turnovers during the pre-GST (April 2016 to June 2017) and post-GST (July 2017 to September 2019) periods have been furnished by the DGAP in Table-'B' below:-

Table -B **(Amount in Rs.)**

S.No.	Particulars	April,2016 to June,2017(Pre-GST)	July,2017 to Sept. 2019 (Post-GST)
1	Credit of Service Tax Paid on Input Services (A)	248,17,672	
2	ITC of VAT paid on Inputs (B)	198,10,567	
3	Total CENVAT/VAT/ITC Available (C=A+B)	446,28,239	
4	ITC of GST Availed (D)		2461,48,335
5	Total Turnover from Residential Area (E)	4348,25,336	18295,58,518
6	Total Saleable Area (F)	14,93,301	14,93,301
7	Sold Area relevant to Turnover in Sq Ft. (G)	2,26,055	6,02,049
8	Relevant ITC proportionate to Sold Area (H= (C or D)* G/F)	67,55,796	992,38,773
9	Ratio of Cenvat/ITC to Turnover (I=H/E*100)	1.56%	5.42%

18. The DGAP had further stated that from the Table-'C', it was clear that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April 2016 to June 2017) was 1.56% and during the post-GST period (July 2017 to September 2019), it was 5.42% which clearly confirmed that post-GST, the Respondent had been benefited from additional ITC to the tune of 3.86% [5.42% (-) 1.56%] of the taxable turnover.

19. Further it has also been stated 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 for land value) on construction service vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Accordingly, the profiteering has been

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examined by comparing the applicable tax rate and ITC available for the pre-GST period (April 2016 to June 2017) when Service Tax 6% and VAT @ 4 % were payable (total tax rate of 10 % of the construction value) with the post-GST period (July 2017 to September 2019) when the effective GST rate was 12% on construction service. On the basis of the figures contained in Table-'B' above, the comparative figures of the ratio of ITC availed/available to the turnover in the pre and post GST periods, recalibrated base price and the excess collection (profiteering) during the post-GST period has been tabulated by the DGAP in Table-'C' below:-

Table-C

(Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April,2016 to June,2017	July,2017 to Sept, 2019
2	Output tax rate (%)	B	6.00%	12.00%
3	Ratio of CENVAT/VAT/GST ITC to Total Turnover as per Table - B above (%)	C	1.56%	5.42%
4	Increase in ITC availed post-GST (%)	D	-	3.86%
5	<u>Analysis of Increase in ITC:</u>			
6	Total Basic Demand during July, 2017 to Sept, 2019	E		18295,58,518
7	GST @12%	F= E*12%		2195,47,022
8	Total demand	G= E+F		20491,05,540
9	Recalibrated Basic Price	H=E*(1-D) or 96.14% of E		17589,37,559
10	GST @12%	I=H*12%		2110,72,507
11	Commensurate demand price	J=H + I		19700,10,066
12	Excess Collection of Demand or Profiteered Amount	K=G - J		7,90,95,474

20. The DGAP had further stated that from the Table- 'C' above, it was quite clear that the ITC of 3.86% of the turnover should have resulted in commensurate reduction in the base prices. Therefore, in terms of Section 171 of the CGST Act, 2017, the benefit of the additional ITC that had accrued to the Respondent, was required to be passed on to the recipients. However, the Respondent has not contested that any such benefit would eventually have to be passed on to the recipients. In fact, the Respondent has claimed that he has passed on an amount of Rs. 8,28,91,520/- which has been duly verified with the Credit Notes, Ledgers, Customers' communication letters, Customers' Master List and Acknowledgements (sample basis) submitted by the Respondent.

21. The DGAP has also furnished a summary of category-wise profiteering and the benefit of ITC passed on by the Respondent in the below mentioned Table-'D':-

Table-'D' **(Amount in Rs.)**

S. No.	Category of Customers	No. of Units	Area (in Sqf)	Amount Raised Post GST (July, 2017 to June, 2019)	Profiteering Amt. as per Annex-	Benefit already Passed on by the Noticee	Difference (Benefit to be passed on)	Remark
A	B	C	D	E	F	G	H=F-G	I
1	Applicant	1	1,571	39,70,720	1,71,662	1,75,850	-4,188	Excess Benefit of ITC passed on
2	Other Than Applicant	447	5,94,628	18013,44,450	778,77,724	816,61,815	-37,84,091	Excess Benefit of ITC passed on
3	Other Than Applicant	4	5,850	242,43,348	10,48,088	10,53,855	-5,767	Land Owner share Units, Excess benefit of ITC passed on
4	Other Than Applicant	2	2,411	-	-	-	-	No Consideration raised Post-GST
	Total	454	6,04,460	18295,58,518	790,97,474	828,91,520	-37,94,046	Excess Benefit of ITC passed on

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5	Other Than Applicant	420	553266					Unsold Units as on 30.09.2019
6	Other Than Applicant	245	3,35,575					Unsold Land Owner share Units as on 30.09.2019
	Total	665	8,88,841					
	Grand Total	1119	14,93,301					

22. It has also been reported by the DGAP that as per the above Table "D", the benefit of ITC of Rs. 8,28,91,520/- already passed on by the Respondent was higher than Rs. 7,90,97,474/- which he should have passed on in 452 cases including the Applicant No. 1. The details of these amounts were given in **Annexure-13** of the Report of the DGAP. However, the excess benefit claimed to have been passed on to some recipients, could not be set off against the additional benefit required to be passed on to some other recipients and it could only be adjusted against any future benefit that might accrue to such recipients who had received excess benefit.

23. Further, the DGAP has stated that the additional ITC benefit of 3.86% of the turnover had accrued to the Respondent and the same was required to be passed on by him to the Applicant No. 1 and other recipients. The provision of Section 171 of the CGST Act, 2017 would have been contravened, if the Respondent had not passed on the benefit of additional ITC @ 3.86% of the base price received by him during the period 01.07.2017 to 30.09.2019, to the Applicant No. 1 and other recipients. The Respondent was required to pass on the benefit of ITC in respect of demands raised up to 30.09.2019, to the tune of Rs. 7,90,97,474/-. However, the Respondent had actually passed on an amount of Rs. 8,28,91,520/-, thereby passed on an

extra amount of Rs. 37,94,046/-. This extra benefit passed on by him to the home buyers could be adjusted against the payments to be received from such home buyers in future or the benefit of ITC to be passed on to them by the Respondent in future. Therefore, the allegation that the Respondent has contravened the provision of Section 171 of the CGST Act, 2017, did not appear to be sustainable with regard to the benefit of additional ITC received by them and passed on to the recipients till 30.09.2019. Further, on the basis of the aforesaid CENVAT/ITC availed in the pre and post-GST periods and the details of the amount demanded till 30.09.2019, by the Respondent from the Applicant No. 1, the existing home buyers as on 30.06.2017 and the new home buyers who made bookings during the period 01.07.2017 to 30.09.2019, the amount of benefit of ITC which was required to be passed on to the Applicant No. 1 came to Rs. 1,71,162/- which included both the profiteered amount @3.86% of the turnover (base price) and GST on the said profiteered amount. However, the Respondent had already passed on Rs. 1,75,850/- to the Applicant No. 1. Further, the Respondent was required to pass on the benefit of ITC to the other recipients and Land Owners (LO) to the tune of Rs. 7,78,77,724/- and Rs. 10,48,088/- respectively. However, he had already passed on an amount of Rs. 8,16,61,815/- and Rs. 10,53,885/- to the other recipients and Land Owners (LO) respectively which was higher than what he was required to pass on.

24. It has also been stated by the DGAP that the above computation of profiteering was with respect to 452 units as mentioned in the home-buyers list. Whereas the Respondent had booked total 454 units as

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per the data submitted. In the pre-GST period, demands were raised from only 173 buyers who had booked the units, and the net total of demands raised from such units only had been taken into consideration. Similarly, in the post-GST period, demands were raised from 452 buyers who had booked the units and the net total of demands raised from such units only had been taken into consideration. If the ITC in respect of those units from whom no demands had been raised in the concerned period was considered for calculation of profiteering in respect of units where demands had been raised in the relevant period, the ITC as a percentage of turnover would be distorted and erroneous. Therefore, the benefit of ITC in respect of these 02 (454-452) units should be calculated when the demands were raised from such units by taking into account the proportionate ITC in respect of such units.

25. The DGAP has concluded that the benefit of additional ITC of 3.86% of the total amount demanded by the Respondent from the Applicant No. 1 and other home buyers who made bookings on or before 30.09.2019, has accrued to the Respondent and the same was required to be passed on to the Applicant No. 1 and other recipients. As per Para 22 and Para 23 as well as Table 'C' and Table 'D' above, the Respondent was required to pass on the benefit of ITC in respect of demands raised up to 30.09.2019, to the tune of Rs. 7,90,97,474/-. However, he had actually passed on an amount of Rs. 8,28,91,520/-, thereby passing on an extra amount of Rs. 37,94,046/- [(Rs. 8,28,91,520 /-) - (Rs 7,90,97,474/-)]. This extra benefit passed on by the Respondent to the home buyers could be adjusted against the



demand to be raised on such home buyers or against the benefit of ITC to be passed on to them, post 30.09.2019. Therefore, the allegation that the Respondent has contravened the provision of Section 171 of the CGST Act, 2017, did not appear to be sustainable, with regard to the demands raised and benefit of ITC passed on by the Respondent during the post-GST period upto 30.09.2019. Therefore, no additional profiteered amount was required to be returned to such eligible recipients. Hence, the profiteering amount in this case might be treated as NIL.

26. The DGAP in his report has further mentioned that the present investigation covered the period from 01.07.2017 to 30.09.2019. Profiteering, if any, for the period post October, 2019, has not been examined as the exact quantum of ITC that would be available to the Respondent in future could not be determined at this stage, when the construction of the project was yet to be completed. Further, it was observed that the Respondent had supplied construction services in the State of Karnataka only.

27. The DGAP has further reported that Section 171 (1) of the CGST Act, 2017 was not attracted in the present case and that in the present Report any reference to the CGST Act, 2017 and the CGST Rules, 2017, would also include reference to the corresponding provisions of the relevant SGST/UTGST/IGST Acts and the Rules.

28. The above Report of the DGAP was considered by this Authority in its sitting held on 31.08.2020 and it was decided to direct the Respondent and the Applicant No. 1 to file their consolidated written submissions in respect of the report of the DGAP by 18.09.2020.

However, the Applicant No. 1 did not file his written submissions. The Respondent has filed his written submissions dated 03.10.2020, vide which he has stated:-

- a. That he had sent communications to his customers stating that the effective prices have been reduced since the implementation of the GST and that the benefit of additional ITC accrued to him on account of GST implementation would be adjusted before the final closure of the account. He has enclosed the copies of the communication sent to the customers as Exhibit-1.
- b. That he had already passed on an amount of Rs. 8,28,91520/- to his customers by way of reduction in the prices. The Apartment-wise breakup of the benefit passed on to the customers has also been enclosed as Exhibit-2.
- c. That he had not contravened the provisions of Section 171 of the CGST Act, 2017, instead he had passed on the benefit of ITC to the tune of Rs. 8,28,91,520/- to his customers which was more than the profiteered amount of Rs. 7,90,97,474/-, computed by the DGAP. He has also enclosed copy of the confirmation letters received from the customers evidencing receipt of the benefit of additional ITC as Exhibit-3.
- d. That he had passed on an amount of Rs. 1,78,251/- to the Applicant No. 1 and copy of the confirmation receipt from the Applicant No. 1 evidencing the receipt of the benefit of ITC has also been enclosed as Exhibit-4.



- e. That the methodology adopted by him to arrive at the actual profiteering amount and the basis thereof (work orders) has also been enclosed as Exhibit-5 and Exhibit-7.
- f. That he had gone through the report of the DGAP dated 28.08.2020 and had no objection to the said report.
29. Copy of the above submissions dated 03.10.2020 of the Respondent was supplied to the Applicant No. 1 to file his rejoinder if any. However, the Applicant No. 1 has not submitted any written submissions in respect of the above submissions of the Respondent. Supplementary report was sought from the DGAP on the above submissions of the Respondent under Rule 133(2A) of the CGST Rules, 2017. The DGAP filed his supplementary report dated 28.10.2020 and has stated that the Respondent vide Para 10 of his submissions dated 03.10.2020 has accepted his report dated 28.08.2020 without raising any objection on the same. Since, the Respondent has not raised any objection on his report; no clarification was to be submitted on the Respondent's submissions.
30. The above supplementary report of the DGAP was supplied to the Respondent to file his consolidated written submissions, if any. The Respondent vide his submissions dated 03.12.2020 has stated that he has no objections to the report of the DGAP considering the fact that the benefit of additional ITC has already been passed on and the same has been considered in the report of the DGAP.
31. Further, vide e-mail dated 11.02.2021, the Applicant No. 1 has confirmed the acknowledgement regarding the receipt of Rs. 1,78,251/- as the benefit of additional ITC from the Respondent.

32. We have carefully considered the Report of the DGAP and the material placed on record. On examining the Report we find that the following issues need to be addressed:-

- a. Whether there was any violation of the provisions of Section 171 (1) of the CGST Act, 2017 in this case?
- b. If yes then what was the quantum of profiteering?

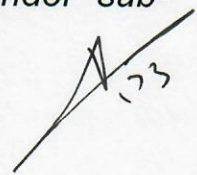
33. In this connection it would be relevant to refer to Section 171 of the CGST Act, 2017 which provides as under:-

“(1). Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.”

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

(3). The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.

(3A) Where the Authority referred to in sub-section (2) after holding examination as required under the said sub-section comes to the conclusion that any registered person has profiteered under sub-



section (1), such person shall be liable to pay penalty equivalent to ten percent of the amount so profiteered:

PROVIDED that no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority.

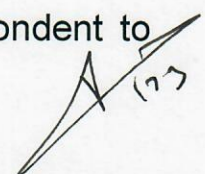
Explanation:- For the purpose of this section, the expression "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services of both."

34. It is revealed from the plain reading of Section 171 (1) that it deals with two situations one relating to the passing on the benefit of reduction in the rate of tax and the second pertaining to the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from the DGAP's Report that there has been no reduction in the rate of tax in the post GST period; hence the only issue to be examined is as to whether there was any additional benefit of ITC with the introduction of GST availed by the Respondent or not. On this issue, we observe from the DGAP's Report that the ITC, as a percentage of the turnover, that was available to the Respondent during the pre-GST period (April-2016 to June-2017) was 1.56%, whereas, during the post-GST period (July-2017 to September, 2019), it was 5.42%. This confirms that in the post-GST period, the Respondent has been benefited from additional ITC to the tune of 3.86% (5.42%-1.56%) of his turnover and the same is required to be

passed on by him to the eligible flat buyers, including the Applicant No. 1. We observe that the computation of the amount of ITC benefit to be passed on by the Respondent to the eligible flat buyers works out to Rs.7,90,95,474/-. We also observe that the said computation of the amount of profiteering worked out by the DGAP is based on the data and information supplied by the Respondent himself. We also take note of the fact that the Respondent has not challenged the said mathematical computation and has agreed to pass on the ITC benefit to the recipients. Hence we observe that the amount of profiteering computed by the DGAP is correct.

35. It is also revealed from the above Report of the DGAP that the Respondent was required to pass on the benefit of the additional ITC to the tune of Rs. 7,90,95,474/- to his eligible flat buyers. However, the Respondent has claimed that he has already passed on an amount of Rs. 8,28,91,520/- to the eligible home buyers, thereby passing on an extra amount of Rs. 37,94,046/-.

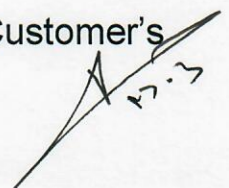
36. We are of the considered opinion that once the Respondent has claimed that he had passed on the benefit of ITC to his customers/flat buyers/recipients, and claimed the benefit of such amount, the onus to prove that the benefit of ITC was actually passed on to the eligible buyers was on the Respondent. The sample checking of the evidence by the DGAP by contacting the customers can at best give provisional indication of passing on the benefit of ITC, however, it would not provide true and complete picture. In the present case the amount of ITC benefit claimed to have been passed on was huge – Rs 8,28,91,520/-. Hence it was the responsibility of the Respondent to

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submit proper and complete evidence. The evidence should have included the details of payments, how such payments were made (through cheque/ draft/ credit note etc.), that it was relatable to GST benefit (because of additional ITC) and a third party verification certificate validating such claim.

37. We further find that in the present case, the Respondent vide Para 3 & 4 of the submissions dated 03.10.2020 has enclosed apartment wise break up of ITC benefit passed on to the customers as Exhibit-2. Upon perusal of Exhibit-2 enclosed by the Respondent, it has been found that the Respondent has provided a list of 454 customers showing the amount of ITC benefit passed on to them. Thus Respondent has furnished complete list of persons to whom he had passed on the benefit and the amount passed on to them. As evidence, the Respondent has submitted copies of confirmation letters received from the customers evidencing receipt of benefit of ITC as Exhibit-3. However, upon perusal of the Exhibit-3, we observe that the Respondent has provided the evidence of actual passing on of the ITC benefit in respect of only four customers namely Sh. Mohan & Sahan Kulkarni (PLRD-11141), Sh. Steven Laveena (PLRD-12016), Sh. Anand Joshi (PLRD-4045) and Sh. Preejesh (PLRD-11111). Further, these acknowledgement receipts do not mention of the amount of ITC benefit passed on by the Respondent to them. Thus evidence in respect of only 4 out of 454 customers has been submitted and even that too is not sufficient.

38. The DGAP Report states that the above claim of the Respondent was verified by the DGAP with the Credit Notes, Ledgers, Customer's



communication letters, Customer's Master List and Acknowledgements received from the recipients on a sample basis. The Report of the DGAP doesn't indicate how those samples were selected, how many customers/recipients/flat buyers were contacted, how many of them actually responded and how the verification was done. Further, it is also not clear whether sample customers were selected by the DGAP himself or these samples were provided by the Respondent.

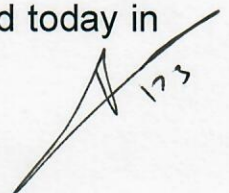
39. On the basis of the above reasons and without going into the merits of the other submissions filed by the Applicants and the Respondent at this stage, we find this to be a fit case where the Respondent's claim of having passed on the benefit to his recipients/homebuyers requires to be verified against third party evidence in the form of written acknowledgements receipts from the homebuyers evidencing the receipt of the benefit, including its quantum and also evidencing that the said benefit is in terms of Section 171 (1) of the CGST Act, 2017 which states that "*Any reduction in the 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*". Needles to state that the claim made by the Respondent of having passed on the benefit has to be supported by acknowledgements which the Respondent shall procure from the homebuyers alongwith their contact details i.e. e-mail & Phone/Mobile No., failing which his claim will have to be considered as not established. The Respondent shall submit the homebuyer wise evidence, as detailed above within a period of 30 days of this Order and the same shall then be verified by



the DGAP. Accordingly, the matter is sent back to the DGAP for further investigation as per the provisions Section 171(2) of the CGST Act, 2017 read with Rule 133(4) of the CGST Rules 2017. This Authority directs the DGAP to verify the evidence submitted by the Respondent to evidence the passage of ITC benefit from the Respondent to the homebuyers and submit his Report, alongwith all the relied upon documents/evidence. The DGAP is accordingly directed to reinvestigate the above issue and furnish his Report under Rule 129 (6) of the CGST Rules, 2017.

40. It has also been observed that the Report of the DGAP is silent on the issue whether the Respondent has paid applicable interest to all the eligible recipients/flat buyers/customers or not. In view of the above, we direct the DGAP to investigate and verify whether applicable interest on the profiteered amount, which the Respondent has already claimed to have passed on to his customers/flat buyers, has been paid by him or not from the date from the above amount was profiteered till the date of passing on/payment, as per the provisions of Rule 133 (3) (b) of the CGST Rules, 2017.

41. 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 31.08.2020 the order was to be passed on or before 28.02.2020. However, due to 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. 91/2020-Central Tax dated 14.12.2020 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.

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


Sd/-
(Amand Shah)
Technical Member



Sd/-
(Navneet Goel)
Technical Member

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

Certified Copy


17.3.21
(A.K. Goel)
Secretary, NAA

File No. 22011/NAA/203/Prestige/2020/147-1410 Dated: 16.03.2021
Copy To:-

1. M/s Prestige Estate Projects Ltd., The Falcon House, No. 1, Main Guard Cross Road, Bengaluru-560001. (GSTIN-29AABCP8096K1ZP).
2. Deepak Naik V, D 701, Pride Spring Fields Apartments, Uttrahalli to Gubbalala Road, Near Subramanyaura Lake, Bengaluru, Karnataka-560061.
3. 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.
4. Guard File/Website.


17.3
A. K. GOEL
SECRETARY, NAA