

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

Case No. 19/2022
Date of Institution 26.02.2021
Date of Order 07.06.2022

In the matter of:

1. Sh. Priyanshu Pathak, B-9, 1401, Tulip Violet, Sector-69, Gurugram, Haryana-122018.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Forever Buildtech Pvt. Ltd., Signature Global, 101, GF, Tower A, Signature Towers, South City-1, Sector-29, Gurugram, Haryana-122001.

Respondent

Quorum:-

Sh. Amand Shah Chairman & Technical Member
Sh. Pramod Kumar Singh, Technical Member
Sh. Hitesh Shah Technical Member

Present:-

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



ORDER

1. The present Report dated 25.02.2021 received on 26.02.2021 has been received from the Director General of Anti-Profiteering (DGAP) after investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017.
2. The DGAP vide the above said Report dated 25.02.2021 has stated the following points:-
 - i. Standing Committee on Anti-profiteering, received an Application filed by the Applicant No. 1, under Rule 128 of the Central Goods and Services Tax Rules, 2017, alleging profiteering in respect of construction service supplied by the Respondent. The above Applicant alleged that the Respondent had not passed on the benefit of input tax credit to him by way of commensurate reduction in the price of Unit No. J-1804 in the Respondent's project "Roselia-2" situated at Gurugram, Haryana in terms of Section 171 of the Central Goods and Services Tax Act, 2017.
 - ii. The aforesaid application was examined by the Standing Committee on Anti-profiteering, in its meeting, the minutes of which were received by the DGAP on 24.11.2020, whereby it was decided to forward the same to the DGAP to conduct a detailed investigation in the matter.
 - iii. On receipt of the reference from the Standing Committee on Anti-profiteering, a Notice under Rule 129 of the Rules was issued by the DGAP on 17/18.12.2020, 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 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 supporting documents. Vide the said Notice, the Respondent was also given an opportunity to inspect the non-confidential evidences/information furnished by the above Applicant during the period 28.12.2020 to 30.12.2020. However, the Respondent did not avail of this opportunity.

- iv. Vide e-mail dated 04.02.2021, the Applicant No. 1 was afforded an opportunity to inspect the non-confidential documents/reply furnished by the Respondent on 10.02.2021 or 11.02.2021. The Applicant availed of the opportunity on 11.02.2021 and after inspection of the non-confidential documents submitted a letter dated 11.02.2021 wherein he stated that only balance sheets were shared with him and remaining documents have not been shown to him.
- v. The period covered by the current investigation was from 01.07.2017 to 30.10.2020.
- vi. The time limit to complete the investigation was 23.05.2021.
- vii. In response to the Notice dated 17.12.2020, the Respondent submitted his reply vide letter/e-mail dated 22.01.2021, 18.02.2021 and 22.02.2021. The Respondent placed the following facts to establish that he was not covered under the provision of Section 171 of CGST Act, 2017 and detailed submissions of the Respondent were as follows: -
 - (a) The provisions of Section 171(1) which had been placed in Chapter XXI of the Central Goods and

Service Tax Act pertaining to "Miscellaneous" provisions state the following: - *"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."*

On the reading of above provision of the section, it was clear that the provision of Section 171 of CGST Act, shall apply only in two cases:

- (i) Reduction in rate of tax, and
 - (ii) The benefit of ITC by way of commensurate reduction in price was to be passed on to the recipient.
- (b) The agreements between the Respondent and the buyers of residential project were executed on 06.02.2019, vide which the terms & condition for the allotment, consideration including taxes & other conditions had been mentioned.
- (c) All the events i.e. allotment of the Flats on 01.02.2019, agreements between the Respondent & the Buyers executed on 06.02.2019 and construction activities started on 10.04.2019, occurred within GST regime. The transaction between the Builder & the Buyer was covered by clause (b) of paragraph 5 of Schedule II of the CGST Act from the date the buyer was allotted the

flat i.e. 01.02.2019 or the date of signing of Builder-Buyer Agreement whichever was earlier.

- (d) The Respondent requested to dispose-off the matter by passing speaking order, before proceeding with the investigation.
- (e) The issues raised for preliminary disposal was that "Whether the Anti-profiteering proceeding can be initiated on the project where Allotment/Builder Buyers Agreement & the construction activities are made/executed in GST period?"

Without prejudice to preliminary objection, in case the DGAP, still decided to proceed with the investigation, it was requested to dispose of the above mentioned objection by passing speaking order in view of well settle law in the case of M/s GKN Driveshafts (India) Ltd. Vs. (2002) 1 SCC 72. Relevant para of the judgment is reproduced below:

"However, we clarify that when a notice under Section 148 of the Income Tax Act was issued, the proper course of action for the Notice was to file return and if he so desires, to seek reasons for issuing Notice. The assessing officer was bound to furnish reasons within a reasonable time. On receipt of reasons, the Noticee was entitled to file objections to issuance of notice and the assessing officer was bound to dispose of the same by passing a speaking order. In the instant case, as

the reasons have been disclosed in these proceedings, the assessing officer had to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years”

- (f) The Respondent was engaged in the real estate business activities including development and sale of residential/commercial properties. The Respondent launched his Second Affordable Housing Project namely “The Roselia-2” & allotment of the flats was made on 01.02.2019 under the “Haryana Affordable Housing Policy 2013’. The first Builder Buyer Agreement (BBA) of residential project was executed on 06.02.2019. Similarly, BBA in respect of Commercial Units sold was first executed on 18.02.2019 i.e. during post GST period.
- (g) That the Respondent offered the rates for selling flats, before allotment, after due consideration of GST paid/payable on goods & services involved in the execution of the Contract as well as eligible GST credit, which can be set-off against output tax liability.
- (h) The consideration for the sale of Flat was duly agreed between the Respondent and the buyer @ 4,000/- per square feet on carpet area basis, besides balcony area @ 500/- per square feet.

Further, GST as applicable too was payable extra.

The Builder-Buyer agreement containing all the terms & conditions of allotment was duly executed on 06.02.2019 onwards between the Respondent & the successful applicant.

(i) The construction activities on the aforesaid project were started on 10.04.2019 and thereafter, during GST regime.

(j) Vide the aforementioned letters, the Respondent submitted the following documents/information :-

- Copies of GSTR-1 returns for the period July, 2017 to November, 2020.
- Copies of GSTR-3B returns for the period July, 2017 to November, 2020.
- GSTR-9 & 9C for the FY 2017-2018.
- Copy of Tran-I
- Electronic Credit Ledger for the period July, 2017 to November, 2020.
- Copies of VAT returns (including all annexures) and Service Tax returns for the period April, 2016 to June, 2017.
- Copies of all demand raised to the Applicant.
- Details of Applicable tax rates, Pre-GST and Post-GST.
- Copy of Balance Sheet for the year 2017-18 to 2019-20.
- Copy of RERA registration.
- Copy of Registry between the land owner and the Respondent.
- List of Home buyers for the project.
- Details of Sold and Unsold units for the project.

- x. The Respondent has also stated that all the above said documents were confidential in terms of Rule 130 of the Central Goods and Service Tax Rules, 2017 except copies of Balance Sheet.
- xi. Prior to implementation of GST w.e.f. 01.07.2017, Service Tax on construction service was chargeable @ 4.50% (vide Notification No. 14/2015-ST dated 19.05.2015). However, affordable housing had been exempt from the purview of Service Tax vide Notification No. 09/2016-ST dated 01.03.2016. After implementation of GST w.e.f 01.07.2017, GST on construction services was chargeable @ 18% (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 and the effective GST rate on construction service in respect of affordable and low-cost houses upto a carpet area of 60 square meters was further reduced to 12% GST (effective rate was 8% in view of 1/3rd abatement on value), vide Notification No. 1/2018-Central Tax (Rate) dated 25.01.2018.
- xii. On scrutiny of the documents submitted by the Respondent, it was observed that the Applicant No. 1 had booked/allotted the Unit No. J-1804 on 29.07.2019 after the introduction of GST.
- xiii. From the verification of documents submitted by the Respondent and his submissions, it appeared that there was no sale or even booking of the flats in the said project in the pre-GST regime. Further, the first booking made by the Respondent in this project was on 24.01.2019 i.e. in post-GST

period. On scrutiny of the documents submitted by the Respondent, it was also observed that the project "**Roselia-2**" was indeed launched in the post-GST era and there was also no evidence given by the Applicant No. 1 to prove otherwise. There was no unit sold in the pre-GST era which could be compared with the post-GST base price to determine whether there was any profiteering. In the instant case, **RERA registration** showed, approval of project for a period commencing from October, 2018 and ending with 30th October, 2021 unless extended by the RERA in accordance with the Act and Rules made there under subject to compliance of provision of Rule 5 (1) of the Haryana Real Estate (Regulation and Development) Rules, 2017.

- xiv. The date of first tax invoice for demand cum allotment letter i.e. 01.02.2019, allotment of units, Builder Buyers Agreements, start of construction activities, receipt of payments etc. have taken place in post-GST. Neither the above Applicant nor the Respondent had given any document to prove that any booking for the project was done in pre-GST period. Therefore, there was no pre-GST tax rate or input tax credit structure which can be compared with the post-GST tax rate and input tax credit. There was no availability of CENVAT to compare Input tax credit which was available to him post GST era. Hence, the base price in pre-GST era could not be computed to compare price charged in post-GST. It was also observed that the price charged for the said residential flat

was for a new project developed and constructed by the Respondent after implementation of GST.

- xv. Section 171 of the Central Goods and Services Tax Act, 2017 comes into play in the event when there was a reduction in the rate of tax or there was an increase in the benefit of input tax credit. In the present case, since the project itself was launched after implementation of GST w.e.f. 01.07.2017, there was no pre-GST tax rate or input tax credit availability that can be compared with the post-GST tax rate and input tax credit, to determine whether there was any benefit that was required to be passed on by way of reduced price.
- xvi. The DGAP concluded that the anti-profiteering provisions are not applicable to the impugned project under investigation. Further, on the basis of the details of outward supply of Construction service submitted by the Respondent, it was also observed that the service was supplied in the State of Haryana only.
3. The above Report was considered by this Authority in its sitting held on 10.03.2021 and it was decided to accord opportunity to make submissions to the Applicant No. 1 by 23.03.2021 to explain why the Report dated 25.02.2021 submitted by the DGAP should not be accepted. Further opportunities were also given on 08.04.2021, 27.05.2021, 15.07.2021, 10.04.2022 and 05.05.2022. However, inspite of all the opportunities no submissions were made by the Applicant No. 1.
4. The quasi-judicial proceedings in the matter could not be completed earlier by the Authority due to lack of required quorum of members in

the Authority during the period 29.04.2021 till 23.02.2022, and that the minimum quorum was restored only w.e.f. 23.02.2022 and hence the matter was taken up for proceedings vide Order dated 28.03.2022 and the Applicant No. 1 was given opportunities to file written submissions against the DGAP's Report dated 25.02.2021. However, no submissions have been submitted by the above Applicant.

5. We have carefully considered the DGAP's Report and find that the following issues are required to be settled in the present proceedings:-

- I. Whether there is benefit of additional ITC available to the Respondent which has not been passed on by him to the Applicant?
- II. Whether there was any violation of the provisions of Section 171 (1) of the CGST Act, 2017 by the Respondent?

6. The Applicant No. 1 had not made any submissions against the DGAP's Report dated 25.02.2021 inspite of 06 opportunities given on 23.03.2021, 08.04.2021, 27.05.2021, 15.07.2021, 10.04.2022 and 05.05.2022, hence, we have no other option than to proceed with the matter ex-parte against him.

7. Perusal of the record reveals that, the complaint of profiteering was in respect of purchase of flats in the Respondent's project "Roselia-2", Gurugram, Haryana by Applicant No. 1. The project was an Affordable Housing project as per the "Haryana Affordable Housing Policy, 2013" notified by Town & Country Planning Department, Government of Haryana vide Notification dated 19.08.2013. The

Licences for the project No. 63/2017 dated 03.08.2017 was granted by the Town and Country Planning and RERA vide No. 18/2018 dated 12.10.2018 in the post GST period. The DGAP vide his Report dated 25.02.2021 has submitted that The Applicant No. 1 had been allotted flat no. 1804 in Tower J of the Project on 29.07.2019 and the first tax invoice issued for demand cum allotment to the Applicant No. 1 was also 29.07.2019, these fact have also not been opposed by the Applicant No. 1. The first draw of lots for allotment of flats was conducted on 01.02.2019 in the presence of the committee constituted under the Affordable Housing Policy, 2013. The first Builder Buyer agreement (BBA) between the homebuyers and the Respondent was executed on 06.02.2019 i.e in the post GST period. Also the construction activities in the said project were started on 10.04.2019. The chronology of above events shows that the service rendered by the Respondent by way of construction and development of the project was not in existence during the pre-GST regime.

8. The Authority finds that all the events i.e. the Licences, RERA Certificate, booking, the draw, allotment of flats, BBA, construction activity and receipt of payments has taken place in the post-GST era. It is also clear that the Applicant No. 1 was allotted flat only after coming in to force of the GST w.e.f. 01.07.2017 as the first tax invoice for demand cum allotment to him was raised on 29.07.2019, hence apparently there was no pre-GST tax rate or input tax credit availability that could be compared with the post-GST tax rate and the input tax credit, to determine whether there was any benefit that was required to be passed on by way of reduced price.

9. From the above facts, the Authority finds that, it is established that there had been no additional benefit of ITC to the Respondent and hence he was not required to pass on the benefit to the Applicant No. 1 by reducing the price of the flat. The Applicant No.1 could have availed the above benefit only if the above project was under execution/implementation before coming into force of the GST as the Respondent would have been eligible to avail ITC on the purchase of goods and services after 01.07.2017 on which he was not entitled to do so before the above date. Since there was no basis for comparison of ITC available before and after 01.07.2017, the Respondent was not required to recalibrate the price of the flat due to additional benefit of ITC. Hence, the allegations of the Applicant No. 1 made in this behalf are incorrect and therefore, the same cannot be accepted.
10. Based on the above facts the Authority finds that the Respondent has not contravened the provisions of Section 171 (1) of the CGST Act, 2017 and we find no merit in the Application filed by the above Applicant and the same is accordingly dismissed. N
11. Further, the Hon'ble Supreme Court, vide its Order dated 23.03.2020 in Suo Moto Writ Petition (C) no. 3/2020, while taking suo moto cognizance of the situation arising on account of Covid-19 pandemic, had extended the period of limitations prescribed under general law of limitation or any other specified laws (both Central and State) including those prescribed under Rule 133(1) of the CGST Rules, 2017, as was clear from the said Order which states as follows:-
- "A period of limitation in all such proceedings, irrespective of the Limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March

2020 till further order/s to be passed by this Court in present proceedings.”

Further, the Hon'ble Supreme Court, vide its subsequent Order dated 10.01.2022 had extended the period(s) of limitation till 28.02.2022 and the relevant portion of the said Order was as follows:-

“The Order dated 23.03.2020 was restored and in continuation of the subsequent Orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it was directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.”

Accordingly this Order having been passed today falls within the limitation prescribed under Rule 133(1) of the CGST Rules, 2017.

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

Sd/-
(Amand Shah)
Chairman & Technical Member

Sd/-
(Pramod Kumar Singh)
Technical Member

Sd/-
(Hitesh Shah)
Technical Member



Certified Copy

Dinesh Meena
(Secretary, NAA)

F. No. 22011/NAA/38/Forever Buildtech/2021-22 /5564-587 Date: 07.06.2022
Copy to:-

1. M/s Forever Buildtech Pvt. Ltd., Signature Global, 101, GF, Tower A, Signature Towers, South City-1, Sector-29, Gurugram, Haryana-122001.

2. Priyanshu Pathak, B-9, 1401, Tulip Violet, Sector– 69, Gurugram, Haryana-122018.
3. Directorate General of Anti-Profitteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
4. Guard File.