

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

I.O. No. 06/2022
Date of Institution 30.03.2021
Date of Order 26.07.2022

In the matter of:

1. Ms. Abha Tiwari, C-302, Samridhi Grand Avenue, Plot No.GH09D, Techzone 4, Greater Noida West, Uttar Pradesh-201306.
2. Sh. Hitesh Kumar Chauhan, 601, Tower – B, Samridhi Grand Avenue, Techzone 4, Greater Noida West, GB Nagar Uttar Pradesh- 201318.
3. 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. Samridhi Realty Homes Pvt. Ltd., 438, Jagriti Enclave, Delhi-110092.

Respondent

Quorum:-

1. Sh. Amand Shah, Technical Member
2. Sh. Pramod Kumar Singh, Technical Member
3. Sh. Hitesh Shah, Technical Member

Present:-

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

REPORT

1. The Present Report dated 30.03.2021 had been furnished by the Director General of Anti-Profiteering (DGAP) under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of this case are that a complaint was filed by the Applicant No. 1 alleging profiteering by the Respondent in respect of purchase of Flat no. C-302 in the Respondent's project "Samridhi Grand Avenue", situated at Plot No. GH09D, Techzone 4, Greater Noida West, Uttar Pradesh- 201306. The Applicant No. 1 has alleged that the Respondent had not passed on the benefit of ITC to her by way of commensurate reduction in price despite having charged GST @12% on the remaining payments due to him.
2. The DGAP has reported that the Applicant No. 1 had booked an under-construction Flat in May, 2017 and paid 40% of the Basic price under the Service Tax regime and 60% of the Basic price

under GST regime. The Respondent had charged 12% GST rate on the Basic Sale Price at the time of offer of possession of the Flat in March, 2019 but did not pass on the benefit of ITC to her. In support of her Application, the Applicant No. 1 submitted copy of Statement of Account in respect of her flat along with her Application.

3. In his Report, the DGAP has reported that on receipt of the reference from the Standing Committee on Anti- profiteering on 03.06.2020, a Notice under Rule 129 of the Rules was issued by the DGAP on 26.06.2020, calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on by him to the recipients by way of commensurate reduction in price and if so, to *suo moto* determine the quantum thereof and indicate the same in his reply to the notice as well as to furnish all the relevant documents in support of his reply.
4. Further, vide DGAP's e-mail dated 15.02.2021, the Applicant No. 1 was also requested to confirm the receipt of benefit of ITC passed on by the Respondent. In response, the Applicant No. 1 vide e-mail dated 21.02.2021 confirmed that the Respondent has passed on the benefit of ITC amounting to Rs. 6,335/- to her.
5. The DGAP has reported that the period covered by the current investigation was from 01.07.2017 to 31.05.2020 as the reference from the Standing Committee was received on 03.06.2020 and the Respondent had not received Occupancy Certificates (hereinafter referred to as 'OC') for all the towers in the project as

on 31.05.2020. Further, the statutory time limit to complete the investigation was 02.12.2020 which stood extended up to 31.03.2021 by virtue of Govt. of India Notification No. 35/2020-Central Tax dated 03.04.2020, Notification No. 55/2020-Central Tax dated 27.06.2020, Notification No. 65/2020-Central Tax dated 01.09.2020 and Notification No. 91/2020-Central Tax dated 14.12.2020 issued by Central Government under Section 168A of the CGST Act, 2017 where, "any time limit for completion or compliance of any action, by any authority, had been specified in, or prescribed or notified under Section 171 of the said Act, which falls during the period from the 20th day of March, 2020 to the 30th day of March, 2021, 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, shall be extended up to the 31st day of March, 2021."

6. The DGAP has reported that the Respondent replied to the said Notice vide his various letters/e-mails but did not furnish the complete and relevant documents required for investigation. Hence, 2 Summons under Section 70 of the CGST Act, 2017 read with Rule 132 of the Rules, were issued on 15.01.2021 & 23.02.2021 to Sh. Pawan Kumar Aggarwal, Director of M/s. Samridhi Realty Homes Private Limited, asking him to submit the relevant documents to the DGAP by Speed Post/Courier or through e-mail on or before 22.01.2021 & 01.03.2021 respectively. In response to the Summons, the Respondent

submitted certain documents vide his e-mail dated 20.01.2021 and 01.03.2021. Thus, in response to the Notice dated 26.06.2020 and various reminders and Summons, the Respondent vide letters/e-mail dated 17.07.2020, 30.07.2020, 20.08.2020, 25.09.2020, 09.10.2020, 22.10.2020, 11.11.2020, 18.12.2020, 05.01.2021, 20.01.2021, 29.01.2021, 31.01.2021, 19.02.2021, 01.03.2021, 02.03.2021, 08.03.2021, 17.03.2021 and 23.03.2021 inter-alia stated:-

- (a) That he was a real estate developer, engaged in the construction of residential flats under the project name "Samridhi Grand Avenue" and he had only a single construction site.
- (b) That w.e.f. 01.04.2019, he had not opted to pay taxes under new GST rate scheme i.e. 5% GST without ITC with effect from 01.04.2019 in terms of Notification No. 03/2019- Central Tax (Rate) and had continued to pay tax at the existing 12% GST rate with full benefit of ITC.

7. The DGAP has further reported that the aforementioned letters/e-mails, the Respondent has submitted the following documents/information:

- (a) Copies of GSTR-1 Returns for the period July, 2017 to May, 2020.
- (b) Copies of GSTR-3B Returns for the period July, 2017 to May, 2020.

- (c) Copies of GSTR-9 & 9C for the FY 2017-18
- (d) Copies of ST-3 and VAT Returns for the period April, 2016 to June, 2017.
- (e) Copy of Tran-1 for the period July, 2017 to December, 2017.
- (f) Tax rates - pre-GST and post-GST.
- (g) Copy of audited Balance sheet for FY 2016-17, 2017-18 & 2018-19 along with form 3CD.
- (h) Copies of Sale agreement/Contract, all Demand Letters, Statement of Accounts and Possession Letter issued to the Applicant No. 1 along with sample copies for 165 other home buyers.
- (i) Copy of Electronic Credit Ledger for the period July, 2017 to March, 2020.
- (j) Declaration in Annexure-IV to the Notification No. 3/2019-CT (Rate) dated 29.03.2019 for opting old scheme of paying GST. N
- (k) CENVAT/ ITC register for the period April, 2016 to May, 2020.
- (l) Details of VAT, Service Tax and GST turnover, output tax liability payable and ITC availed for the project "Samridhi Grand Avenue".
- (m) Copy of RERA registration Certificate along with Project Report submitted to RERA.

- (n) Copy of Sub-Lease Deed dated 17.06.2013 for purchase of land from M/s. Amrapali Dream Valley Pvt. Ltd.
- (o) Status of the Project "Samridhi Grand Avenue" as on 30.11.2019 in terms of Tower-wise sold and unsold Units along with copies of Occupancy Certificates.
- (p) List of home buyers & commercial shop buyers in the project "Samridhi Grand Avenue" along with details of benefit passed on to the buyers.
- (q) Sample Copies of receipts and breakup of Cost of units vide which benefit claimed to be passed on to the customers.
8. The DGAP has further reported that the Respondent had requested to consider all the documents/information submitted as confidential in terms of Rule 130 of the CGST Rules, 2017 except the information and documents related with the concerned buyers.
9. It has also been mentioned by the DGAP that the reference received from the Standing Committee on Anti- profiteering, the various replies of the Respondent and the documents/evidences on record had been carefully scrutinized and it was found that the main issues for determination in the case were:-
- (i) Whether there was benefit of reduction in the rate of tax or ITC on the supply of construction service by the Noticee, 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.

10. The DGAP has reported that the Respondent, vide his e-mail dated 05.01.2021, submitted copies of demand letters, payment receipts and sale agreement for the sale of Flat No. 302, Tower-C, pertaining to the Applicant No. 1 which measured 1080 square feet and had been sold at a base price of Rs. 36,67,460/-. The schedule of payment of the Applicant No. 1 has been furnished by the DGAP in Table-A while other charges applied to the case of the Applicant No. 1 are at Table-B of his Report:-

Table-'A' (Amount in Rs.)

Stages	Due Date	Percentage	Basic Price	Other Charges	IFMS	Service Tax	GST	Total
At the time of booking	16.05.2017	40 %	14,66,984	-	-	66,014	-	15,32,998
At the time of Possession	04.03.2019	60 %	22,00,476	75,200	27,000	-	2,74,389	25,77,065
Total		100 %	36,67,460	75,200	27,000	66,014	2,74,389	41,10,063

Table-'B' (Amount in Rs.)

S.No.	Nature of Charges	Basic Amount	GST	Total
1	IGL Gas Charge	7,800	0	7,800
2	Maintenance	32,400	5,832	38,232
3	Dual Meter Charges	25,000	4,500	29,500
4	Electricity Prepaid Recharge	10,000	0	10,000
	Total	75,200	10,332	85,532

11. The DGAP has stated that the Respondent had a single real-estate project, "Samridhi Grand Avenue", which was registered under Uttar Pradesh Real Estate (Regulation and Development) Act, 2016 with Registration No. UPRERAPRJ2634 and that this project consisted of 1152 residential flats (in 13 towers) and 36 commercial shops. The Status of the project has been furnished by the DGAP in Table-'C' of his Report mentioned below:-

Table-'C'

Name	Date of Occupancy Certificate	No. Of Units Per Tower	Saleable Area	Unit Sold till 31.05.2020 (excluding Units sold Post-OC)	Area Sold till 31/05/2020 (excluding area sold Post-OC)	Unit Sold Post receipt of OC till 31.05.2020
Tower -A	02.03.2019	84	90,720	71	76,680	12
Tower -B		84	90,720	67	72,360	12
Tower -C		84	90,720	69	74,520	11
Tower -D	28.02.2018	90	1,15,000	71	90,780	15
Tower -E		90	1,15,400	65	82,500	22
Tower -F		82	97,160	71	83,180	8
Tower -G		82	88,760	69	74,020	8
Tower -H		82	88,760	70	75,800	11
Tower -I		81	95,780	69	80,420	7
Tower -J	09.01.2019	81	1,09,210	67	89,320	11
Tower -K		82	1,10,820	76	1,02,220	4
Tower-L	Under Construction	146	2,40,385	95	1,49,635	-
Tower-M	06.01.2020	84	90,720	75	81,000	4
Commercial Shops	28.02.2018	25	10,012	-	-	23
	06.01.2020	11	9,895	-	-	6
Total		1,188	14,44,062	935	11,32,435	154

DGAP has added that, since the Respondent had received only the partial Occupancy Certificates and the project was still under construction as on 31.05.2020, the period of investigation was considered upto 31.05.2020.

12. The DGAP has reported 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) which read 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 had been received after issuance of completion certificate, where required, by the competent authority or after his first occupation, whichever was earlier*".

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Thus, from the above, it was inferred that the sale of the units which remained unsold at the time of receipt of Completion/Occupancy Certificate (whichever was earlier), shall be neither treated as a supply of goods nor a supply of services. Therefore, the sale of unsold units after receipt of Completion/Occupancy Certificate would not fall within the ambit of GST and supplier of service could not charge GST on such sale of units. Since, no GST was chargeable on these units, no ITC

could be availed against such units as there would be no liability to discharge GST against such units. Accordingly, the ITC pertaining to the residential units which remained unsold at the time of receipt of Completion/Occupancy Certificate, was provisional ITC which was required to be reversed by the supplier 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 was 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 exempted supplies under the said Acts, 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 exempted supply under sub-section (2) shall be such as might 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".

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Therefore, the ITC pertaining to the unsold units might not fall within the ambit of this 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. However, the units sold prior to Completion/Occupancy Certificate would continue to fall within the purview of GST and on all the demands raised by the supplier against such units after receipt of Completion/Occupancy Certificate would attract GST also. Therefore, the ITC available to the Respondent could be availed for discharging his GST liability against such units.

13. The DGAP has further reported 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 and credit of VAT paid on purchase of inputs. The CENVAT credit of the Central Excise Duty paid on inputs was not admissible as per the CENVAT Credit Rules, 2004, which was in force at the material time. However, the Respondent was not collecting VAT from customers and discharging his output tax liability on deemed value addition on purchase value in cash and there was no direct relation of turnover reported in VAT Returns with the amount collected from home buyers. Therefore, credit of VAT paid on purchase of inputs and the VAT turnover was not considered in the working for computation of ITC ratio to taxable turnover in pre-GST regime. Further, post-GST, the Respondent was entitled to

avail ITC of GST paid on all the inputs and the input services including the sub-contracts. As per the information submitted by the Respondent for the period from April, 2016 to May, 2020, the details of the ITC availed by them, his turnover from the subject project "Samridhi Grand Avenue" and the ratio of ITC to turnover, during the pre- GST (April, 2016 to June, 2017) and post-GST (July, 2017 to May, 2020) periods, has been furnished by the DGAP in Table-D of his Report below:-

Table-'D' (Amount in Rs.)

S. No.	Particulars	April, 2016 to June, 2017 (Pre-GST)	July, 2017 to May, 2020 (Post-GST)
(1)	(2)	(3)	(4)
1	CENVAT of Service Tax Paid on Input Services as per ST-3 (A)	5,68,37,213	-
2	Input Tax Credit of VAT Paid on Purchase of Inputs (B)	-	-
3	Input Tax Credit of GST available as per GSTR-3B (before reversal on account of unsold units on receipt of OC) (C)	-	26,52,86,766*
4	Total CENVAT/Input Tax Credit Availed (D)= (A+B) or (C)	5,68,37,213	26,52,86,766
5	Total Turnover as per List of Home Buyers & Commercial Shop Buyers (Net of Cancellation) excluding Post-OC Sold Units (E)	91,73,77,513	1,63,85,24,343
6	Total Saleable Area (in SQF) (F)	14,44,062	14,44,062
7	Total Sold Area relevant to Turnover (G)	6,07,235	11,28,690
8	Relevant CENVAT/ITC [(H)= (D)*(G)/(F)]	2,39,00,321	20,73,50,183
Ratio of CENVAT/Input Tax Credit to Turnover [(I)= (H)/(E)]		2.61%	12.65%

*Note:- The total saleable area without excluding the unsold area on receipt of partial OCs is considered at Sr. No. 6 of above table, since total ITC available before reversal on account of unsold units in Post-GST period is considered at Sr. no. 3 of above table.

14. The DGAP has also reported that as per the above Table- 'D' of his Report, ITC, as a percentage of the turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 2.61% whereas during the post-GST period (July, 2017 to May, 2020), the percentage was 12.65%. This clearly confirmed that post-GST, the Respondent had been benefited from additional ITC to the tune of 10.04% [12.65% (-) 2.61%] of the turnover.
15. Accordingly, the DGAP has reported that he had examined the matter by comparing the applicable tax rate and ITC available in the pre-GST period (April, 2016 to June, 2017) when Service Tax @4.50% was payable with the post- GST period (July, 2017 to May, 2020) when the effective GST rate was 12% (GST @18% along with 1/3rd abatement for land value) on Construction Service, vide Notification No.11/2017-Central Tax (Rate), dated 28.06.2017. Accordingly, on the basis the figures contained in Table- 'D' above, the comparative figures of the ratio of ITC availed/available to the turnover in the pre-GST and post-GST periods as well as Turnover, the recalibrated base price and the excess realization (profiteering) during the post-GST period, has been furnished by the DGAP in Table-'E' of his Report below:-

Table-'E'

(Amount in Rs.)

S. No.	Particulars		Post- GST
1	Period	A	01.07.2017 to 31.05.2020
2	Output GST Rate (%)	B	12.00

3	Ratio of CENVAT credit/ ITC to Total Turnover as per table - 'D' above (%)	C	12.65%
4	Increase in ITC availed post-GST (%)	D= 12.65% less 2.61%	10.04%
5	<u>Analysis of Increase in input tax credit:</u>		
6	Total Base Price raised/collected during July, 2017 to May, 2020 (net of cancellation) excluding Units sold Post receipt of partial OCs (Rs.)	E	1,63,85,24,343
7	GST @ 12% over Base Price	F=E* 12%	19,66,22,921
8	Total amount to be collected/raised	G=E+ F	1,83,51,47,264
9	Recalibrated Base Price	H= (E)*(1- D) or 89.96% of (E)	1,47,40,16,499
10	GST @12%	I=H*1 2%	17,68,81,980
11	Commensurate demand price	J=H+I	1,65,08,98,479
12	Excess Collection of Demand or Profiteering Amount	K=G- J	18,42,48,785

16. As per Table-'E' above, DGAP has inferred that the additional ITC of 10.04% of Turnover should have resulted in the commensurate reduction in the base price as well as cum-tax price. Therefore, in terms of Section 171 of the CGST Act, 2017, the benefit of such additional ITC was apparently required to be passed on by the Respondent to the respective recipients. On the basis of the above, the DGAP has reported that his computation suggests that the Respondent had benefited from ITC by an amount of Rs. 18,42,48,785/- (which included GST @12% on the base amount of Rs. 16,45,07,844/-). The DGAP has annexed the unit-buyer wise and unit no. wise break-up of this amount in Annexure-29 of his Report. The DGAP had added that the above amount was inclusive of Rs. 2,50,250/- (including GST on the base amount of Rs. 2,23,438/-) which was the benefit of ITC that was required to

be passed on by the Respondent to the Applicant No. 1 in the view of the DGAP.

17. The DGAP has further reported that the above computation of profiteering was done in respect of 931 buyers (931 flats and Nil commercial shops) to whom units had been sold by the Respondent before the receipt of partial Occupancy Certificates. The DGAP has added that while the Respondent had, till 31.05.2020, booked a total of 1092 units (1063 flats and 29 commercial shops), 154 of those units had been booked (125 flats and 29 commercial shops) in the period after the receipt of the partial OC, on which GST was not charged. Further, 03 units had been cancelled and 04 customers who had booked the units and also paid the booking amounts in the pre-GST period, had not paid any consideration during the post-GST period from 01.07.2017 to 31.05.2020 (i.e. The period under investigation). Therefore, if the ITC in respect of these units was considered to calculate profiteering in respect of 931 flats where payments had been received after GST, the ITC as a percentage of turnover might be erroneous. Therefore, the benefit of ITC in respect of these units might be calculated when the consideration was received from such units by taking into account the proportionate ITC in respect of such units.
18. The DGAP has reported that during the process of investigation, the Respondent has claimed that he had passed on ITC benefit amounting to Rs. 10,63,05,403/- to 935 home buyers (including

the Applicant No. 1) on whom the demands had been raised/amounts collected by the Respondent during the period from 01.07.2017 to 31.05.2020. Further, the DGAP has reported that the Respondent had submitted sample copies of price sheets and receipts to evidence that he had passed on the benefit of ITC along with e-mail Ids of 895 home buyers (including the Applicant No 1). To substantiate his claim of having passed on the ITC benefit, e-mails were sent by the DGAP to these 895 home buyers (including the Applicant No. 1) during the period 15.02.2021 to 01.03.2021, to confirm the amount of benefit received from the Respondent. In response, the Applicant No. 1 and other 195 home buyers had replied to the DGAP, out of which 80 home buyers had confirmed the receipt of benefit of ITC from the Respondent. However, in another 105 of the 895 cases, the home buyers have denied having received any such benefit from the Respondent. Further, 06 other home buyers have replied and requested for additional time to cross-check the amount of benefit received by them with the documents available with them. In remaining 05 cases, the home buyers had replied that they were not aware about any such receipt of the ITC benefit from the Respondent and that they had requested the Respondent for further clarification on the issue but had not received any response from the Respondent. In view of the above ambiguous outcome, the DGAP vide letter dated 18.02.2021, 04.03.2021 and Summons dated 15.01.2021 & 23.02.2021, requested the

Respondent to submit copies of all the documentary evidences which could help establish that he had indeed passed on the benefit of ITC to the home buyers and commercial shop buyers, however, the Respondent did not submit the requisite evidence to the DGAP. Hence the DGAP has reported that it could be concluded that the Respondent had actually passed on ITC benefit amounting to Rs. 1,40,07,906/- to 80 home buyers and that it also appeared that in some cases, the Respondent had passed on the benefit of ITC more than the required commensurate benefit whereas in some other cases the benefit of ITC passed on was less than the required commensurate benefit. A summary of category-wise ITC benefit required to be passed on and the benefit passed on, had been furnished by the DGAP in Table-'F' of his Report below:-

Table-'F' (Amount in Rs.)

S. No.	Category of Customers	No. of Units	Area (in Sqft)	Benefit to be passed on as per Annex-29	Benefit Passed on by the Respondent & Confirmed by the Buyer	(Excess)/ Shortage of Benefit (profiteering)	Remark
A	B	C	D	E	F	G=F-E	H
1	Applicant	1	1,080	2,50,250	6,335	2,43,915	Benefit to be passed on. List Attached as Annex-34
2	Buyers other than Applicant No. 1 (Residential Flats)	13	21,010	35,45,267	48,66,495	(13,21,228)	Excess Benefit passed on. List Attached as Annex-35
3		66	78,790	1,80,18,615	91,35,076	88,83,539	Buyers confirmed the receipt of Benefit. However, further Benefit to be passed on. List Attached as Annex-34
4		105	1,24,100	2,27,75,523	-	2,27,75,523	Noticee claimed to pass on benefit of Rs. 1,07,44,246/-. However, the Buyers replied that no benefit was received. List attached as Annex-34.
5		746	9,03,710	13,96,59,130	-	13,96,59,130	Further Benefit to be passed on. List Attached as Annex-34
6		4	5,745	-	-	-	No Consideration received during post-GST period from 01.07.2017 to 31.05.2020.
7		3	4,585	-	-	-	Units Cancelled

8		125	1,50,920	-	-	-	Units sold post receipt of OC. Nobenefit to be passed on.
9		89	1,34,215	-	-	-	Unsold Residential Flats
10	Buyers other than	29	11,541	-	-	-	Shops sold post receipt of OC. Nobenefit to be passed on.
11	Applicant No. 1 (Commercial Shops)	7	8,366				Unsold Commercial Shops
Total		1,188	14,44,062	18,42,48,785	1,40,07,906		

19. The DGAP has finally reported that as detailed in Table 'F' of his Report, it was clear that the benefit of ITC passed on by the Respondent to the recipients was not commensurate in terms of section 171 of CGST Act, 2017 and was less than what he ought to had passed on to his unit buyers including the Applicant No. 1 (Sr. 1, 3, 4 & 5 of above table) by an amount of Rs. 17,15,62,107/- . The details of these amounts were given by the DGAP in Annex-34 of his Report. The DGAP has further added that the benefit of ITC claimed to have been passed on by the Respondent was higher than what he should had passed on (i.e. commensurate benefit) in respect of 13 home buyers (Sr. 2 of above table) by an amount of Rs. 13,21,228/-. The details of this excess benefit passed by the Respondent, were given in Annex-35 to the Report of the DGAP. However, this excess benefit passed on to these 13 recipients could not be set off against the additional ITC benefit required to be passed on to the other recipients as per Annex-34 of the Report and could only be adjusted against any future ITC benefit that might accrue to such recipients in future.

20. The DGAP has finally reported that the benefit of additional ITC to the tune of 10.04% of the Turnover, which was arrived at Rs. 18,42,48,785/- (including GST @12% on the base amount), accrued to the Respondent post-GST and the same was required to be passed on by him to the eligible unit-buyers/recipients. Further, the Respondent had realized an additional amount to the tune of Rs. 2,43,915/- (Rs. 2,50,250/- (-) Rs. 6,335/-) from the Applicant No. 1. As such, the Respondent was required to pass on an additional benefit of ITC amounting to Rs. 17,13,18,192/- as mentioned at Sr. No. 3, 4 & 5 of Table- 'F', to 917 other unit-buyers/recipients apart from the Applicant No. 1. The DGAP has also stated that these recipients were identifiable as per their unit-numbers, names and contact details furnished by the Respondent and hence this additional amount of Rs. 17,13,18,192/- was required to be returned to the eligible recipients by the Respondent. Thus, Section 171(1) of the CGST Act, 2017, requiring that *"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"*, had been contravened by the Respondent in the present case.
21. The DGAP has finally reported that in the instant investigation, he had computed the profiteering covering the period from 01.07.2017 to 31.05.2020 and profiteering, if any, for the period post May, 2020, had not been examined as the exact quantum of ITC that would be available to the Respondent in future could not


be determined at that stage, when the Respondent had not received the Occupancy Certificates for all towers in the project bearing RERA registration no. UPRERAPRJ2634 and was continuing to avail ITC in respect of the project.

22. The above Report of the DGAP was considered by this Authority and it was decided to allow the Respondent to file his consolidated written submissions. A notice dated 16.06.2021 was also issued to the Respondent to explain why the Report dated 30.03.2021 furnished by the DGAP should not be accepted and his liability for profiteering in violation of the provisions of Section 171 should not be fixed and penalty under Section 171(3A) read with Rule 133(5) of the CGST Rules, 2017 should not be imposed.
23. Meanwhile, this Authority also received e-mails dated 12.02.2021 & 29.03.2022 from Sh. Hitesh Kumar Chauhan, whereby he informed that he was also a homebuyer in the Respondent's Project "Samridhi Grand Avenue" and alleged that the Respondent has not passed on the benefit of ITC to him. This Authority vide its Order dated 27.04.2022 also impleaded Sh. Hitesh Kumar Chauhan as Applicant No. 2 in the present proceedings and the Applicants were also given opportunities to file their submissions before this Authority.
24. In reply to the above Notice issued by this Authority, the Respondent filed his submissions through his e-mail dated 26.04.2022 vide which he has inter-alia averred as below:-

- I. That the calculations of Profiteering done by the DGAP was erroneous and conceptually flawed due to the following reasons mentioned below:-
- a. That the period considered pre-GST i.e. April 2016 to June 2017 and period considered post-GST i.e. July 2017 to May 2020 for computation of ratios was not equal. Ratios computed by taking figures for different length of periods could not be said to be true and fair. Ratios were fluctuating.
 - b. In terms of Section 171 of the CGST Act, 2017 benefit of ITC ought to be required to be passed on to the customers only in respect of the CENVAT portion on Goods. However, ITC of services had been inappropriately merged in the calculations. For instance, in the pre-GST regime, the tax rate on Works Contract services was 6% whereas in post-GST regime tax rate on the said service had been increased to 18%. This difference of 12% was not any benefit of ITC arising to him and was actually a cost to him as this was extra amount paid by him to the suppliers of such services.
 - c. Benefit of ITC required to be passed on as per the concept of Anti-profiteering in terms of Section 171 of the CGST Act, 2017 ought to be limited to

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the extent of ITC that was not available to him in pre-GST regime but was made available to him in post-GST regime.

- d. Change in tax rate of inputs could not be said to be benefit of ITC to him. That due to increase in tax rate of inputs, he had to bear extra cost from his pocket while purchasing inputs. Hence, if there had been any increase in ITC due to a matching increase in the tax rate applicable on inputs/ input services, then it should not be said that he had earned any extra ITC due to introduction of GST.
- e. Therefore, he did not agree with the calculations of the profiteered amount worked out by the DGAP and requested for re-computation of profiteering in light of his above submissions. 

II. That the DGAP had not allowed the ITC of VAT in the pre-GST regime calculations in an arbitrary manner, resulting into inflated ITC benefit amount, despite the fact that he had availed ITC on VAT of Rs 2,63,09,785/- during the period from April 2017 to June 2017, which was evidenced by his statutory VAT records and that the same should be factored in the pre-GST regime. Calculation of the ratio of ITC to Turnover; that he had enclosed his VAT Annual Returns and VAT Assessment Order for the relevant period. He further averred that the profiteered amount would reduce to Rs 16.22 Crores if the VAT

of ITC was factored in the calculation of the profiteered amount.

III. That the figure of ITC for post GST period considered while computing ratio of ITC to Turnover in Table - D of the DGAP Report by the DGAP, was incorrect since the DGAP had not reduced the ITC reversed by him (the Respondent) on account of cancellations of units from the amount of the ITC. The ITC considered by the DGAP while computing the ITC to Turnover ratio was Rs. 26,52,86,770/- whereas the ITC amount reversed on cancelled units amounted to Rs. 4,36,68,444/-. He further submitted that these reversals were on account of incorrect/excess ITC claimed by him earlier and thereafter, had been corrected by reversing the same in the subsequent period and that he was submitting a summary of such excess/ineligible ITC reversed by him and averred that ITC reversed by him, amounting to Rs. 4,36,68,444/- was liable to be reduced from the ITC figures considered by the DGAP for the post GST period while computing the ratio of ITC to turnover. After taking into account such a reversal, the net ITC would work out to Rs. 22,16,18,326/- and consequently the profiteered amount would reduce to Rs 12.40 Crores. The Respondent also submitted his own Re-calculation sheet citing the same, he argued that the computation of ratios done by the DGAP was erroneous and should be rectified.

IV. That while calculating the profiteered amount in his case, the DGAP had taken wrong saleable area under the head "Total Saleable Area relevant to Turnover" as 6,07,235 sq. ft. since the actual figure was 8,30,080 sq. ft., as per the sheet annexed by the DGAP.

V. That he had already passed on the ITC benefit to all his customers; that while computing the profiteered amount, benefit of only Rs. 1,26,86,678/- had been considered as passed on by DGAP which was incorrect and erroneous; that as per the report of the DGAP, 105 unit-buyers had denied the receipt of any benefit of ITC whereas he reiterated his claim that he had already passed on ITC benefit of Rs. 2,27,75,523/- to these buyers; that he had submitted proper documentary evidence to prove that the benefit of ITC had indeed been passed on to by him to the unit-buyers but the DGAP had failed to consider the same by relying on the denials of receipt of benefit by the unit-buyers/customers. He has also argued that the denial of receipt of any benefit e-mail by the unit-buyers could not be considered as evidence that he had not passed on any benefit of ITC and that the DGAP had erred on this account. He further averred that the DGAP had not considered the legal documents submitted by him and that the verification of documents submitted by him had been done casually by the DGAP.

- VI. Further, he claimed that he had passed on the ITC benefit to all the customers who booked units post-GST, though the Builder Buyer Agreement (BBA) itself and he enclosed sample copies of such BBA. Further, he claimed that he had also passed on the ITC Benefit to all the pre-GST unit buyers/customers on the invoices and through Credit Notes and he enclosed sample copies of such credit notes in support of his above contention.
- VII. That he has given a total discount of Rs. 4,41,940/- to the Applicant No. 1 at the time of booking out of which Rs. 3,56,940/- was on the account of the ITC benefit. The said discount, though had not been mentioned as 'GST ITC benefit' on the face of documents, it was granted on her request towards ITC benefit itself; that her booking was made at the time when GST was just about to get introduced and so she (Applicant No. 1) influenced the Respondent's marketing team and took that discount; that such a special discount had not been offered by him to any other customer in the pre-GST regime and it is for this very reason that ITC benefit was not passed on to her separately; that giving her further discount on the same ground was unreasonable and not justified; that therefore the special discount already extended to the Applicant No. 1 should be considered as passage of benefit of ITC to her.

VIII. That the provisions of Section 171 of CGST Act, 2017 & Rule 126 of the CGST Rules, 2017 were violative of Article 14 & Article 19(1)(g) of the Constitution.

IX. That the DGAP had exceeded his jurisdiction in calculating profiteering in respect of the customers other than the Applicant No. 1 in the matter. That in terms of the provisions of Anti profiteering as contained under CGST Act 2017, DGAP could not have gone beyond the complaint of the Applicant No. 1.

X. That the Respondent could not be asked to reduce his profit in the business citing anti-profiteering provisions, as the said freedom was guaranteed under the Constitution; that he could anytime increase prices of his services to increase his profit and that the GST Act could not restrict such profit; that therefore, fresh contracts/bookings post GST could have profits as per his discretion; that. Section 171 of the CGST Act 2017 did not cover fresh contracts post GST and if at all, it could at best be invoked for the transition phase.

XI. That the provisions of Section 171 of the CGST Act, 2017 was applicable to the long term/continuous contracts; that it could not be applied to the fresh contracts entered after 01/07/2017; that the price offered by him after 01/07/2017 was after considering the cost of inputs in the post-GST era, the applicable taxes, the prices prevailing in the open market for the similar products etc; that similarly, a customer would also

enter into fresh contract only after assessing the final cost and would agree for the applicable taxes and other terms and conditions as per the Agreement; that it just could not be said that the Respondent had made any benefit of ITC on the new bookings post GST since the prices had themselves got recalibrated as per the new taxes under the GST regime; that hence the allegation of anti- profiteering on the saleable area for which Agreements to sell had been entered after 01-07-2017 was totally baseless, illogical and not enforceable under the law.

XII. That a bunch of matters was pending before High Courts wherein various provisions of Anti-profiteering had been challenged on the following grounds:-

- a) Blanket power had been inappropriately and improperly delegated by Central Government for exercising powers to Authority by the CGST Rules. Section should list the functions and duties of the Authority instead of Rules.
- b) The word "Commensurate Reduction" had not been explained/ defined in the Act/ Rules. Therefore, Section 171 of the Act was incomplete and vague as it did not define/describe the word "Commensurate reduction".
- c) Concept of anti-profiteering as given under Section 171 of the Act had ignored the inflation and other

factors adding to the cost of other inputs used by taxpayer.

- d) No standard formula for profiteering had been prescribed under the law. Excessive delegation of power to the authorities. Methodology should have been determined by the Parliament.
- e) The Authority did not have a judicial member.
- f) Section 171 of the Act was in incomplete and vague provision as the clause of time period was missing in the provision.
- g) ITC benefit could not be sole factor for determination of anti-profiteering. Increase in the cost of price of a raw material would always have an effect of an increase in availed ITC, but this could not be treated as a determining factor for profiteering.
- h) Peculiarities of Real Estate Industry had been completely ignored by the Authority while computing profited amount. In any development project, the developer seeks to sell the flats/commercial units at the inception of the project to ensure that adequate finance was available for the construction activity. The authority should have appreciated the actual proportion and approached the proceedings accordingly.

25. Supplementary Report was sought from the DGAP on the above submissions of the Respondent dated 26.04.2022 under Rule


133(2A) of the CGST Rules, 2017. The DGAP filed his clarification dated 27.06.2022 on the above submissions of the Respondent and has inter-alia stated that:-

- a) The Respondent the ITC/CENVAT availed by the Respondent in the GST/Service Tax regime was not a cost to him as the amount of tax paid on services was available as credit to him. In the pre-GST period, the Respondent was eligible to avail CENVAT credit of Service Tax paid on input services but was not eligible to avail credit of duty paid on inputs. During the course of investigation, the Respondent had not submitted the copies of Assessment Orders for the period from April 2016 to June 2017 issued by the VAT Authorities. Therefore, the credit of VAT was not considered in the computation of ratio of ITC to taxable turnover in the pre-GST regime.
- b) The mechanism of computation adopted by the DGAP is in consonance with the provisions of Section 171 of the Act.
- c) In the calculation of ratio of ITC to turnover, the ITC and area relevant to the demand raised / advances received during the period of investigation only was taken for consideration. Hence, ITC of unsold units was never part of the calculation and was required to be reversed.
- d) The Respondent had not submitted copies of all the documentary evidences towards his claim of passing on the ITC benefit. Hence, his claim of the passing on the benefit of

ITC to the remaining 851 home buyers was not accepted by the DGAP.

e) With respect to the claim of the Respondent regarding passing on the benefit of ITC of Rs. 3,56,940/- to the Applicant No. 1, it was observed that the Respondent has mentioned "Discount by Company" against the amount of Rs. 3,56,940/-. The above discount has been given by the Respondent in the pre-GST period. Hence, it was not clear whether the benefit was towards GST-ITC benefit as claimed by the Respondent.

26. Personal hearings through video conferencing were offered twice to the Respondent and the Applicants on 29.03.2022 and 29.04.2022. However, none appeared before the Authority for the hearings. In response to the notice for hearing of 29.04.2022, the Respondent vide his e-mail dated 29.04.2022, enclosed his submissions alongwith certain documents that included copies of Assessment Orders/Appellate Order for financial years 2016-17 and 2017-18 issued by the VAT Department and a recalculation sheet of profiteering amounting from his submissions relating to the issue of ITC on VAT in the Pre-GST period and other submissions. He also submitted sample copies of his Builder Buyer Agreement (B.B.A) and credit notes for passage of ITC benefit and requested the Authority to decide the matter on merits without any hearing.

27. The Applicant No. 2, vide his submissions made through e-mail dated 02.05.2022, has averred that while the Respondent had charged an amount of Rs. 3,24,147/- towards GST and Service Tax from him over and above the basic sale price of his unit, he had received only an amount of Rs. 46,112/- as ITC benefit from the Respondent till date.
28. This Authority has carefully considered the Report filed by the DGAP, all the submissions and the documents placed on record and the arguments advanced by the Respondent and the submissions of the Applicants on record. On examining the various submissions, the observations of this Authority are as follows:-
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- i. The Respondent vide his submissions dated 26.04.2022 has argued that the DGAP had not allowed the ITC of VAT in the pre-GST regime calculations, which has resulted into inflated ITC benefit amount, despite the fact that he had availed ITC on VAT of Rs 2,63,09,785/- during the period from April 2017 to June 2017, which was evidenced by his statutory VAT records and that the same should be factored in the pre-GST regime.
 - ii. With respect to the above contention of the Respondent, the DGAP has clarified that during the course of investigation, copies of Assessment Orders for the period from April 2016 to June 2017 issued by the VAT

Authorities had not been placed before him and thus the said issue was not addressed in the DGAP's Report.

- iii. Now that the said records have been produced by the Respondent before this Authority, it is imperative that the facts in these records/documents be duly incorporated in the Report of the DGAP. Thus we take the view that this case merits to be revisited by the DGAP so that all the facts and records are considered. Accordingly, the Respondent is directed to submit all the facts and records before the DGAP within 15 days from the receipt of this Order.

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29. Therefore, without going into the merits and the other submissions made by the Respondent and the Applicants at this stage, we find this case that merits to be reinvestigated by the DGAP based on the above observations of this Authority. Thus, we direct the DGAP to reinvestigate the matter as per the provisions of Rule 133(4) of the CGST Rules 2017 and submit his report before this Authority.
30. 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, has extended the period of limitation prescribed under general law of limitation or any other special laws (both Central and State) including those

prescribed under Rule 133(1) of the CGST Rules, 2017, as is 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 has extended the period(s) of limitation till 28.02.2022 and the relevant portion of the said Order is as follows:-

"The Order dated 23.03.2020 is restored and in continuation of the subsequent Orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is 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.

31. A copy each of this order be sent, free of cost to the DGAP, the Respondent and the Applicants.

Sd/-
(Sh. Amand Shah)
Technical Member &
Chairman



Sd/-
(Pramod Kumar Singh)
Technical Member

Sd/-
(Hitesh Shah)
Technical Member

Certified Copy

(Dinesh Meena)
Secretary, NAA

File No. 22011/NAA/12/Samridhi/2021-22

Date:-26.07.2022

Copy To:-

1. M/s Samridhi Realty Homes Pvt. Ltd., 438, Jagriti Enclave, Delhi-110092.
2. Ms. Abha Tiwari, C-302, Samridhi Grand Avenue, Plot No.GH09D, Techzone 4, Greater Noida West, Uttar Pradesh-201 306.
3. Sh. Hitesh Kumar Chauhan, 601, Tower – B, Samridhi Grand Avenue, Techzone 4, Greater Noida West, GB Nagar Uttar Pradesh-201318.
4. Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
5. Guard File.