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

I.O. No.	:	09/2022
Date of Institution	:	27.11.2020
Date of Order	:	04.08.2022

In the matter of:

1. Shri Varun Goel, 4/928 Vikas Nagar, Lucknow, Uttar Pradesh -226022.
2. Shri Dheeraj Jayaswal, Plot No. 313, Flat No. 303, Gyan Khand-1, Indripuram, Ghaziabad, Uttar Pradesh.
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 Town Park Buildcon Private Ltd., Plot No. 3C, Sector 16C, Gaur City-2, Greater Noida (W), Uttar Pradesh.

Respondent

Quorum:-

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

Present:-

1. Sh. Varun Goel and Sh. Dheeraj Jayaswal, Applicant No. 1 & 2 in person.
2. Sh. Sanjay Sharma and Sh. Tarun Arora, Chartered Accountant for the Respondent.

ORDER

1. The present Report dated 27.11.2020 has been received from the Applicant No. 3 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 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 "White Orchid" 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. The Standing Committee on Anti-profiteering, vide the minutes of its meeting held on 19.08.2020, forwarded one more application filed by the Applicant No. 2. The period covered for the current investigation was from 01.07.2017 to 30.09.2019.

2. It has been reported by the DGAP that since the Respondent was discharging his output tax liability on deemed 10% value addition on purchase value since there was no direct relation of turnover reported in VAT Returns with the amount collected from home buyers, therefore, the credit of VAT paid on the purchase of inputs was not considered in the calculation of ITC ratio to Taxable Turnover ratio for the period prior to June, 2017. The DGAP further reported 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 0.90% whereas during the post-GST period (July, 2017 to September, 2019), the said percentage was 8.10% and therefore the Respondent appeared to have benefited from additional ITC to the tune of 7.20% [8.10% (-) 0.90%] of

the turnover. Therefore, the Respondent had benefited by an additional amount of ITC of Rs. 4,40,72,367/- which included GST @12% on the base amount of Rs. 3,93,50,328/-. This amount was inclusive of Rs. 1,73,160/- which was the benefit of ITC required to be passed on to the Applicant No. 1 and Rs. 1,70,354/- which was the benefit of ITC required to be passed on to the Applicant No. 2.

3. The above Report of the DGAP was considered by this Authority in its meeting held on 01.12.2020 and it was decided to direct the Respondent and the Applicant No. 1 & 2 to file their consolidated written submissions in respect of the report of the DGAP by 18.09.2020. The Respondent vide his letter dated 18.01.2021 had filed his written submissions, *inter-alia* stating:-

   a. That he was undertaking a real estate project at Greater Noida West which had the following details:

Particulars	**Total units**	**Units sold upto 30.06.2017**	**Units sold between 01.07.2017 to 30.09.2019**	**Unsold units**
Tower 1	132	104	26	2
Tower 2	132	92	34	6
Tower 3	132	112	13	7
Tower 4	71	30	33	8
Shops	16	15	1	
Total	483	353	107	23

   b. That the Respondent had complied with provisions of Section 171 of the CGST Act, 2017 in the manner that for all flats sold on or before 30th June, 2017 he had passed on the ITC benefit by way of waiving off the Water connection charges, Power Back up charges, Sewerage connection charges by issuing the Credit Notes to the buyers which were produced before the

DGAP and were also mentioned elsewhere in the report of the DGAP.

c. That for all flats sold on or after 1st July, 2017 the Respondent had reduced the basic sale prices of his flats by a percentage varying from 4% to 12% varying with the size of Flat and time of booking and the same was verifiable from the home buyers details submitted before the DGAP.

d. That the DGAP had erred in not calculating the profiteered amount in the spirit of Section 171 of the CGST Act, 2017 and more specifically the definition of the term "profiteered" as provided by way of an explanation to Section 171 and the conclusion paragraph was provided in the GST flyer issued by the department in relation to "National Anti-Profiteering Authority in GST".

e. That the DGAP had misunderstood the concept of profiteering and had merely calculated the amount in the interest of revenue without taking into consideration the facts of the case.

f. That the DGAP had erred in calculating the profiteered amount by comparing the two un-comparable data. The DGAP compared the data including the sale of flats post GST without taking into consideration or without appreciating the fact that the Respondent had himself reduced the prices of the flats sold on or after 15 July, 2017.

g. That the Respondent was selling flats at around Rs. 3500 per sq foot Pre-GST, however, after introduction of GST the flats were sold at around Rs. 3000 per sq foot. The DGAP had failed to take the said reduction into consideration and rather had directed the

Respondent to pass on benefits at wrongly calculated amount to flat owners who had purchased the said flats on or after 1st July, 2017.

h. That the DGAP should have calculated the profiteered amount for the two sets of contracts i.e. sold before implementation of GST and after implementation of GST individually with their respective facts. Same calculation method for both was not fair and reasonable in any manner.

i. That the DGAP had erred in calculating the profiteered amount without appreciating the fact and taking into consideration that the instant case was a real estate project and the ITC originating in one period could not be compared with ITC originating in the second period.

j. That the DGAP should have taken into consideration the percentage of completion method for comparing the ITC of the two periods. The said approach was also used by the Department when the GST rates in relation to real estate projects were modified vide notification number 03/2019 dated 29th March, 2019. Had the percentage of completion been so irrelevant then the Department would not have discussed the same at length in the above said notification.

k. That the DGAP had also erred in calculating the profiteered amount on the basis of amount received from the flat buyers over the two periods without appreciating the fact that the amount received from flat buyer had no nexus with expenditure incurred or ITC eligibility or revenue recognition of the Respondent.

l. That additional ITC accruing to the Respondent had no co-relation with the amount received from the flat buyer. The objective was to ascertain the benefit that

would flow to the Respondent and which should have been distributed to the flat buyers, irrespective of when the payment was received. However, the DGAP in Table 'C' of his report has concentrated himself in linking ITC for the specific period with the amount received which was grossly wrong. The ITC was not availed for the amount received by the Respondent rather it related to the entire project.

m. That the amount received from flat buyers varied differently on the basis of the percentage of completion of project and accordingly the same could not be the basis for any calculations of profiteered amount.

n. That the DGAP had erred in not including the value of ITC on account of Value Added Tax under the Pre GST regime and restricting only to CENVAT amount under Service Tax, merely on the basis that the output VAT was paid on the value of total Purchases plus 10%.

o. That the objective of the DGAP was to ascertain ITC availed by the Respondent before implementation of GST and after implementation of GST. However, restricting one set of credits on flimsy grounds that output tax paid was paid on a notional value was grossly incorrect.

p. That the DGAP had itself accepted that the company was availing ITC under VAT, however since the output tax was paid on a notional value the ITC should not be considered which was a very vague presumption.

q. That the DGAP had erred in not considering the amount already reduced by the Respondent under Section 171 amounting to Rs. 2 crores (approx.) while calculating the amounts in Table 'C' and Table 'D' of the report.

r. That the DGAP had considered the amount received by the Respondent while calculating the ratio of ITC, however, the amount of Rs. 2 crore approx which was not received on account of reduction of prices under Section 171 of the GST Act by the Respondent himself had not been considered. Had the Respondent received the said amount in cash/bank and returned the same through cash and bank the ratios would have been different, accordingly the Respondent was of the view that the relevant adjustment should be done for amount not received by him on account of self-reduction in prices.

s. That he would like to raise concerns on the legal and constitutional validity of the constitution of this Authority and the DGAP, which was already pending before the Hon'ble High Court of Delhi.

t. That the working of the DGAP was not appropriate and the issue could be remanded back to him and he could submit all his concerns before the DGAP.

4. Copy of the above submissions dated 18.01.2021 of the Respondent was supplied to the Applicant No. 1 to file his rejoinder if any. However, the Applicant No. 1 had 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 12.02.2021 and stated:-

a. That vide letter 05.02.2021 the Respondent was directed to submit the details of all the customers to whom he had passed on the benefit of ITC along with copies of

invoices and/or credit notes etc. on or before 11.02.2020.

b. That the contention of the Respondent that the DGAP had mis-understood the concept of profiteering and had merely calculated the amount in the interest of revenue was incorrect and hence denied. In this regard, it would be appropriate to mention that the provisions of Section 171 are abundantly clear, complete and concise and hence there was no ambiguity in their interpretation. Section 171 (1) of the CGST Act, 2017 states that "Any reduction in rate of tax on any supply of goods or services or the benefit of ITC should be passed on to the recipient by way of commensurate reduction in prices". The word "commensurate" mentioned in the above Section gives the extent of benefit to be passed on by way of reduction in the prices which has to be computed in respect of each flat based on the tax reduction as well as the existing base price (price without GST) of the flat. The computation of commensurate reduction in prices was purely a mathematical exercise.

c. That the contention of the Respondent regarding computation of profiteering amount with respect to flats sold on or after 01.07.2017 was wrong and hence denied. In this regard, it was submitted that the Respondent did not submit any documentary evidence to substantiate that the prices offered to the customers booking flats post July, 2017 were after adjusting/giving benefit of ITC during the course of investigation by the DGAP. The DGAP had computed the benefit of ITC amounting to Rs. 2,03,53,464/- (for the period July, 2017 to September, 2019) pertaining to 89 customers who booked units post 01.07.2017 (i.e. after implementation of GST). However, the Respondent had

himself admitted that he had passed on the benefit of ITC amounting to Rs. 93,65,813/- to 35 customers out of these 89 customers who booked units post 01.07.2017 (i.e. after implementation of GST) which had been considered by the DGAP in his investigation Report dated 27.11.2020. Thus the contention of the Respondent that the bookings made after introduction of GST needed to be excluded from computation of profiteering was wrong and contradictory to his own claim of passing on benefit to these customers and hence denied.

d. That the Respondent's contention that ITC originating in one period could not be compared with ITC originating in the second period was incorrect and hence denied. In this regard, it was submitted that in order to quantify the benefit of ITC, it was necessary to quantify the credits available to the Respondent in the pre-GST regime and also the credits available in the GST regime. Further, the amount of the additional benefit of ITC required to be passed on, was the amount paid by the customers or flat buyers to the Respondent in the form of GST charged from them which was to be deposited by the Respondent in the Government exchequer. But, the Respondent instead of paying this GST amount in cash to the Government exchequer utilised the ITC available to him in addition to the credit which was not available to him in pre-GST period. Therefore, the Respondent was not required to pay anything from his own pocket to pass on the benefit of additional ITC which had accrued to him in GST period. Hence, the methodology adopted by the DGAP was correct and justifiable.

In the erstwhile pre-GST regime, various taxes and Cesses were being levied by the Central Government and the State Governments, which got subsumed in the GST. Out of these taxes, the ITC of some taxes was not being allowed in the erstwhile tax regime. For example, the ITC of Central Sales Tax, which was being collected and appropriated by the States, was not admissible. Similarly, in case of construction service, while the ITC of Service Tax was available, the ITC of Central Excise Duty paid on inputs was not available to the service provider. Such input taxes, the credit of which was not allowed in the erstwhile tax regime got embedded in the cost of the goods or services supplied, resulting in increased price. With the introduction of GST with effect from 01.07.2017, all these taxes got subsumed in the GST and the ITC of GST was available in respect of all goods and services, unless specifically denied. Broadly, the additional benefit of ITC in the GST regime would be limited to those input taxes, the credit of which was not allowed in the pre-GST regime but was allowed in the GST regime. This additional benefit of ITC in the GST regime was required to be passed on by the suppliers to the recipients by way of commensurate reduction in prices, in terms of Section 171 of GST Act, 2017. Therefore, the approach & methodology adopted by the DGAP was in consonance with the provisions of Section 171 of the CGST Act, 2017.

e. The Respondent's contention that the input credit and the amounts realized from the customers had no correlation was not acceptable as there was direct correlation between the turnover and the ITC as the Respondent was discharging his GST output liability out of the ITC available to him on the basis of the

turnover i.e. the cost realized by him from the buyers. Moreover, the benefit was to be passed on the additional ITC proportionate to the payment made by a buyer and hence the above ratios were relevant.

f. The contention made by the Respondent regarding non consideration of the value of ITC on account of Value Added Tax under the Pre-GST regime was wrong and hence denied. The Respondent had discharged his output VAT liability on a notional/deemed taxable value which was 110% of the purchase price of the inputs and the VAT so paid by the Respondent had not been recovered from the home-buyers. Therefore, while on the one hand, the pre-GST base price had not been reduced by the VAT amount, the ITC of VAT had not been taken into account.

g. The contention raised by the Respondent regarding non consideration of the amount already passed on by him while computing the amount of profiteering in Table-'C' and Table-'D' of the Report was not correct as the DGAP had considered the turnover as per list of home buyers reconciled with the GSTR-3B Returns. Further, the Respondent submitted that he had passed on the benefit to his buyers in the form of Credit Notes. Since the value of credit notes was not reduced from the turnover reported in GSTR-3B, no addition of such credit notes' value was required while computing the amount of profiteering in Table-'C' and Table-'D' of the Report.

5. The above supplementary report of the DGAP was supplied to the Respondent to file his rejoinder/reply, if any. The Respondent vide his submissions dated 02.03.2021 has stated that he had already submitted a detailed reply vide his

earlier submissions dated 18.01.2021 and he had nothing more to add.

6. Further, the DGAP vide his supplementary Report dated 09.06.2021 to his clarifications dated 12.02.2021 has stated that the Respondent Vide letter dated 19.02.2021 submitted list of 256 customers to whom he has passed on benefit of ITC amounting to Rs. 4,56,00,941/- along with copies of invoices, credit notes, affidavits and customer acknowledgements which were verified and found to be correct by the DGAP. To substantiate claim of the Respondent e-mails were sent to 131 homebuyers randomly selected. Out of these 131 homebuyers, 53 have confirmed receipt of benefit of ITC and replies from other homebuyers were awaited.

7. The proceedings in the matter could not be completed 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 23.02.2022 and hearing in the matter through Video Conferencing was scheduled to be held on 21.03.2022. However, the Respondent vide his email dated 23.03.2022 requested for adjournment.

8. Further, the next hearing in the case was granted to the Respondent and the Applicant No. 1 & 2 on 04.04.2022. Therefore, hearing in the matter was held on 04.04.2022, which was attended by Shri Varun Goel and Shri Dheeraj Jaiswal, Applicant No. 1 & 2 in person and Shri Sanjay Sharma and Shri Tarun Arora, Chartered Accountants for the Respondent. During the personal hearing the Respondent has re-iterated his arguments based on his written submissions dated 18.01.2021. The Respondent and the Applicant No. 1 & 2 further requested a day's time to file

their consolidated written submissions against the Report of the DGAP.

9. Further, the Respondent vide his email dated 05.04.2022, 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 Uttar Pradesh 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.

10. Further, the Applicant No. 1 vide his email dated 04.04.2022 submitted copies of Allotment letters and list of other buyers in the project "White Orchid" who had not been passed any GST benefit by the Respondent.

11. The Authority has carefully considered the Report furnished by the DGAP, the submissions made by the Respondent and the other material placed on record. This Authority is in agreement with the said Report of the DGAP subject to only the following exceptions:-

    a. The Respondent vide his submissions dated 05.04.2022 has contended that the DGAP has not incorporated the ITC of VAT in the pre-GST period for the computation of profiteering which ought to have been done. He has further submitted before this Authority that the said ITC on VAT credit was Rs. 83,52,074/- for the period from April 2016 to June 2017 has been allowed to him by the concerned statutory Authority, in support of which he has submitted VAT Assessment Orders for the period from April, 2016 to June, 2017.

    b. The Authority finds that the Assessment Orders for the period from April 2016 to June 2017 issued by the

VAT Authorities in respect of the Respondent have never been placed before the DGAP during the course of the investigation and hence the same have not been incorporated in the computation of profiteered amount. The Authority further finds that the ITC of VAT, as much as is allowed vide the said VAT Assessment Orders for the period from April 2016 to June 2017 (copies enclosed as Annexure I and II) shall be incorporated into the computation of profiteered amount by the DGAP subject to verification of the authenticity of the same.

c. The Authority therefore directs the DGAP to ascertain the authenticity of the VAT Assessment Orders submitted by the Respondent for the period from April 2016 to June 2017 and if verified from the State GST Commissioner/Uttar Pradesh VAT Department, the DGAP shall incorporate the amounts, as allowed by the concerned statutory Authority on assessment, in the computation of profiteered amount by including the same as ITC in the pre GST period and recalculate the profiteered amount and submit his Report to this Authority.

12. Further, the Hon'ble Supreme Court, vide its Order dated 23.03.2020, 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 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 of 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 of the CGST Rules, 2017.

13. A copy of this order be supplied to the Applicant No. 1 & 2 and the Respondent. File of the case be consigned after completion.

S/d
(Amand Shah)
Chairman

S/d
(Pramod Kumar Singh)
Technical Member

S/d
(Hitesh Shah)
Technical Member

(Dinesh Meena)
NAA, Secretary

Encl: Annexure I & II

File No. 22011/NAA/227/Townpark/2020 Date:- 04.08.2022

Copy To:-

1. M/s Town Park Buildcon Private Ltd., Plot No. 3C, Sector 16 C, Gaur City-2, Greater Noida (W), Uttar Pradesh.
2. Shri Varun Goel, 4/928, Vikas Nagar, Lucknow, Uttar Pradesh-226022.
3. Shri Dheeraj Jayaswal, Plot No. 313, Flat No. 303, Gyan Khand-1, Indripuram, Ghaziabad, Uttar Pradesh-201014.
4. Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
5. Guard File.