

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

Case No. 02 /2022
Date of Institution 05.03.2020
Date of Order 08.04.2022

In the matter of:

1. Sh. Darshan Joshi, 7B, 42, Navjivan Society, Lamington Road, Mumbai-400008.
2. Director General of Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s.Lodha Developers Ltd., Lodha Excelus Building, Opp. Apollo Mills compound, Shastri Nagar, Adarsh Nagar, NM Joshi Marg, Mahalaxmi, Mumbai-400011.

Respondent

Quorum:-

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

Present:-

1. Shri Darshan Joshi for Applicant No. 1
2. None for the Respondent.

ORDER

1. The present Report dated 04.03.2020 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 present case are that the Applicant No. 1 had filed an application stating that the Respondent had resorted to profiteering in respect of the supply of construction services related to the

purchase of Flat No. 1201 in the project "Lodha Primd", Parel, Mumbai. The Applicant No. 1 had also alleged that the Respondent had not passed on the benefit of input tax credit (ITC) by way of commensurate reduction in the price of the apartment purchased by him. The above application was examined by the Maharashtra State Screening Committee on Anti-Profiteering in its meeting and it *prima-facie* observed that it was a case of profiteering by the Respondent in terms of Section 171 of the CGST Act, 2017 and had forwarded the above application with its recommendation to the Standing Committee on Anti-profiteering for further action, as per the provisions of Rule 128 of the CGST Rules, 2017.

2. The DGAP has further reported that the Standing Committee on Anti-profiteering examined the above application in its meeting held on 13.09.2019 and decided to forward the same to the DGAP for detailed investigation under Rule 129 (1) of the CGST Rules, 2017. The DGAP had received the minutes of the meeting of the Standing Committee on Anti-Profiteering on 09.10.2019.
3. Thereafter, the DGAP had issued a notice to the Respondent on 21.10.2019 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 the Applicant No. 1 by way of commensurate reduction in price with respect to the project mentioned in his Application 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. The Respondent was also given an opportunity to inspect the non-confidential evidence/information furnished by the Applicant No. 1 during the period 30.10.2019 to 31.10.2019. However, the Respondent did not avail of the said opportunity. The Applicant No. 1 was also given an opportunity to inspect the non-confidential evidence/reply furnished by the Respondent on 26.02.2020. The Applicant No. 1 did not avail of the said opportunity.

4. The DGAP has informed that the Respondent in his replies vide letters/e-mails dated 04.11.2019, 22.11.2019, 25.11.2019, 10.12.2019 and 18.02.2020 has submitted:-

a) That he had obtained the registration for the project "*Lodha Primd*" under the regulations of Maharashtra Real Estate (Regulation and Development) Act, 2016 in the month of January, 2018. In terms of the provisions of the RERA Act, bookings in the project could not happen till the registration was obtained. Since the registration was obtained for the subject project post the introduction of Goods and Services Tax only, the provisions of Section 171 dealing with Anti-profiteering cannot be made applicable to the above project in view of the fact that there was no additional ITC which had been availed or utilized by him, which was relevant for establishing any allegation of profiteering.

b) That the Applicant No. 1 had booked the flat in the month of February, 2018, which was registered in April, 2018, post the introduction of GST and the price had been agreed mutually considering the taxation regime of GST only.

c) That this principle had also been upheld by this Authority in the matter of M/s Conscient Infrastructure Pvt. Ltd.

5. The Respondent had also submitted the following documents vide the aforementioned letters/e-mails:-

- (a) Details of flat bookings in the project "*Lodha Primd*" from February, 2018 to September, 2019.
- (b) The RERA registration and RERA application.
- (c) Balance Sheet for the F.Y. 2016-17 and 2017-18.
- (d) Commencement Certificate which was necessary for commencing construction activity issued by the Municipal Corporation of Greater

Mumbai. The DGAP has noticed that the same was given based on IOD dated 21.11.2017.

- (e) Payment receipt at the time of application for RERA registration dated 04.01.2018.
- (f) Details of flat bookings in the project Primo from February, 2018 to September, 2019 and the reconciliation of the same with the turnover reported in the GSTR-3B filed by the Respondent. The DGAP has noticed from this sheet that the first booking was done in the month of February 2018.
- (g) Intimation that Lodha Parel project was being marketed as *Lodha Primo*.
- (h) Sample copies of Demand letters cum tax invoices raised in the project were provided.

6. The DGAP has further mentioned that the Respondent had submitted that anti-profiteering provisions could not be applied to the project "*Lodha Primo*" as the project was not in existence before the implementation of GST and was launched in the GST regime. The Respondent had also stated that he had obtained the registration for the project "*Lodha Primo*" under the regulations of Maharashtra Real Estate (Regulation and Development) Act, 2016 in the month of January, 2018. In terms of the provisions of the RERA Act, bookings in the project could not happen till the registration was obtained and the Respondent had also stated that the commencement certificate was issued on 07.05.2018 and the same was given based on IOD dated 21.11.2017.

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7. The DGAP has also intimated that on scrutiny of the documents (Home buyers' list and allotment letter to the Applicant No. 1) submitted by the Respondent, it was found that the project "*Lodha Primo*" was launched in the post-GST era and there was no price history of the units 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 present case, the booking and receipt of payments had taken place post introduction of GST. Therefore, there was no pre-GST tax rate or ITC structure which could be compared with the post-GST tax rate and ITC. Hence, the DGAP has concluded that the provisions of Section 171 of the Central Goods and Services Tax Act, 2017 were not attracted in the present case.

8. The above Report was received by this Authority from the DGAP on 05.03.2020 and was considered in its sitting held on 06.03.2020 and it was decided to accord an opportunity of hearing on 25.03.2020. But, in the wake of the Corona pandemic and subsequent lockdowns in Delhi, the hearing scheduled on 25.03.2020 and 24.04.2020 could not be held. The hearing was held on 18.03.2021 wherein Sh. Darshan Joshi, the Applicant No. 1 was present in person. The Applicant No. 1 vide his e-mails dated 25.11.2020 and 16.10.2019 has filed his written submissions wherein he has submitted that:-

a) *Lodha Primo* was a redevelopment project and consisted of three buildings, out of which two buildings were for old tenants who must not be paying GST and the third building was being sold in the open market. He has contended that there was possibility that the benefit of ITC towards raw material purchased for these 2 buildings constructed for the old tenants was also taken and enjoyed by the Respondent against the third building on which GST was paid by new buyers like him. In this manner, the Respondent had received huge benefit which he did not pass on to them.

b) In March 2019, GST council had introduced GST@5% without input tax benefit. Suddenly, the Respondent had announced the scheme of 7% Input Tax Benefit for the payment made towards demand raised in the month of March 2019. The Respondent also introduced the ITC benefit @4% for all the future payments provided one pays in advance in March 2019 itself. So the Applicant No.1 had money lying with Respondent as advance and the

Respondent has assured that he would give 7% benefit towards March 2019 demand and he further made advance payments for 4% benefit. However, when GST council had announced that under construction property could continue to charge 12%, the Respondent went back on his scheme and said he could not give 7% benefit on the amount which was already lying with him and for future payments the Respondent has paid him 7%. In all, the above Applicant had lost approx. Rs.1.8 Lacs. The Respondent has also sold flats at rate of 5%.

- c) He had booked a under construction house with the Respondent in the project called *Lodha Primo* located in Parel, Sewri. At the time of booking, he was verbally told that Input Tax Credit benefit for the project would be calculated and approx. @4-5% of ITC benefit would be passed on to him at the time of giving the possession. So he went ahead with the registration process of the property.
- d) In the 1st week of February 2019, when the above Applicant had enquired about the ITC benefit, he was again told over the phone that 4-5% benefit would be adjusted at the time of possession. He also sent the Respondent an email on 07.02.2019 seeking clarity on the same. On 18.02.2019, he was told that Consideration Value given to him was already net of ITC benefit and the information passed on 07.02.2019 was incorrect. However, in the cost sheet shared by the Respondent, it was nowhere mentioned about the calculation of ITC.

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9. A Supplementary Report was sought from the DGAP on the Applicant No. 1's submissions. The DGAP in his Report dated 11.12.2020 has contended that:-

- a) Email dated 16.10.2019:- The Applicant No. 1 had forwarded copy of complaint enclosing Cost Sheet dated 08.03.2018 and correspondence made

with the Respondent vide email dated 21.02.2019, 22.02.2019 and 22.03.2019. In the cost sheet, GST@ 12% on the consideration value has been mentioned and the Applicant No. 1 had booked the flat accordingly. Further, the Respondent vide email dated 21.02.2019 informed the above Applicant that for the bookings done after the GST was introduced; prices had been set taking into account the credits available to him for GST.

b) Email dated 22.11.2019:- regarding possibility of cross utilization of ITC, the DGAP has submitted that according to the RERA details available at Maharashtra RERA website, registration for Tower C was obtained by the Respondent. The Letter of Intent of Development (IOD) in the present case was given on 21.11.2017 and thereafter, Commencement Certificate was issued by the Municipal Corporation of Greater Mumbai. Thus, the project was launched after implementation of the GST and there was no pre-GST tax rate or input tax credit structure that could be compared with the post-GST tax rate and input tax credit. The DGAP has further stated that the issue regarding cross utilization of ITC did not fall under the ambit of Section 171 of the CGST Act, 2017.

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c) Regarding opting for Composition Scheme w.e.f. 01.04.2019:- In this regard, the DGAP has submitted that the Central Government, on the recommendation of the GST Council, vide Notification No. 3/2019-Central Tax (Rate) dated 29.03.2019 had given two options to the suppliers of Construction Services either to continue to pay on Construction Services at the effective rate of 12% (after one-third abatement towards land value) with Input Tax Credit (ITC) or option to pay the tax at the new rate of 5% with a condition of non-availability of ITC, with effect from 01.04.2019. In the present case, the Respondent chose the former option for his impugned project, "Lodha Primo" and continued to pay the GST at the old rate of 12% (with ITC). Therefore, the above Notification has no impact and is not

applicable on the present proceedings. The DGAP has further asserted that in the absence of pre-GST tax rate or input tax credit structure that could be compared with the post-GST tax rate and input tax credit, the profiteering could not be computed.

d) On the basis of the home buyers' list submitted by the Respondent, the DGAP has observed that the bookings for the impugned project started from February, 2018. i.e. post GST launch and the Applicant No. 1 himself had booked apartment on 20.02.2018. The above Applicant's submissions were not incorporated in the DGAP's Report dated 04.03.2020 inadvertently. However, there would be no change in conclusion of the DGAP's Report dated 04.03.2020.

10. Meanwhile, this Authority has also supplied a copy of the DGAP's Report to the Standing Committee on Anti-Profiteering and the Maharashtra State Screening Committee on Anti-Profiteering for filing their submissions on the DGAP's Report with respect to their observations while referring the case for investigation to the DGAP. The Maharashtra State Screening Committee vide letter dated 19.10.2020 has submitted that the complaint was sent to the Standing Committee on the apparent observation from application that quantum of ITC was not passed on to the Applicant No. 1 by the Respondent. The Applicant in his application had asked for benefit of reduction in GST Rate from 12% to 5%. The builders were given an option to pay under Composition Scheme w.e.f. 01.04.2019 vide Notification No. 3/2019-Central tax (Rate) dated 29.03.2019 at the reduced rate of tax from 12% to 5 % withnil ITC. This option was to be exercised by 10.05.2019 to the jurisdictional authority. It was observed that the Respondent had not opted for composition, therefore, no further deliberation was required in the Report of the DGAP. It has stated that the Applicant No. 1 had an impression that the Respondent had opted for composition at a lesser rate and therefore,

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the rate reduction or ITC benefits was not passed on by the Respondent to him, which was not true.

11. The Standing Committee vide its submissions dated 02.12.2020 has contended that it took up the issue in its meeting held on 02.12.2020 and decided that it has already referred the matter to the DGAP for investigation and hence, has offered no further comments on this issue.

12. The Personal Hearing in the matter was held on 18.03.2021. However, before the order could be passed, one of the Technical Members of the Authority who had heard the matter was transferred out and thereafter the Chairman of the Authority has also left the Authority. Since, the quorum of the Authority of minimum three Members, as provided under Rule 134 was not available till 23.2.2022, the matter was not decided. With the joining of two new Technical Members in February 2022, the quorum of the Authority was restored from 23.2.2022 and a personal hearing was granted on 14.3.2022; which was rescheduled on the request of the Applicant No. 1. The personal hearing took place on 1.4.2022; in which Applicant No. 1 appeared and reiterated his written submission filed earlier. He has confirmed that the booking in the project was made by him in Feb 2018.



13. This Authority has carefully examined the DGAP's Report and various submissions placed on record. The issues to be decided by the Authority are as under:-

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

14. A perusal of Section 171 of the CGST Act shows that it 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."*

15. It is clear from a plain reading of Section 171(1) mentioned above 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(introduced from 1.7.2017) period since the Respondent has continued to pay on the "Construction Services" at the effective rate of 12% with ITC. Hence, the only issue to be examined is whether there was any net benefit of ITC with the introduction of GST. On this issue, the DGAP in his Report has stated that the project "Lodha Primd" situated at Parel Mumbai had been issued the Letter of Intent of Development on 21.11.2017 and Commencement Certificate was obtained thereafter under the regulations of Maharashtra Real Estate (Regulation and Development) Act, 2016. In terms of the provisions of the RERA Act, bookings in the project could not happen till the Commencement Certificate was obtained. Since the Commencement Certificate was obtained for the subject project post introduction of GST only and also there has not been any reduction of GST rates in the instant case, the provisions of Section 171 dealing with Anti-profiteering cannot be made applicable to the said project in the view of the fact that there was no additional ITC which had been utilized by the Respondent, which was relevant for establishing allegation of profiteering. Further, no demand has been raised by the Respondent upon Applicant No.1 in the pre-GST regime. The Letter of Intent of Development, Commencement Certificate of the project, launching of the project and receipt of the payments had taken place in the post-GST regime and hence, there was no pre-GST tax rate or ITC structure which could be compared with the post-GST tax rate and ITC. On this basis, it would

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emerge that the Respondent had neither benefited from additional ITC nor had there been a reduction in the tax rate in the post-GST period and therefore it does not qualify to be a case of profiteering.

16. In the given facts, where the project was launched after introduction of GST, booking/price of the flat has been made/finalised by the Applicant No. 1 in February 2018 and during the whole period the Respondent continued to pay the GST at same rate, and also in absence of any other legally enforceable document; the emails exchange between Applicant No. 1 and Respondent mentioned above in paragraph 8 are not relevant material in these proceedings of anti-profiteering under CGST/SGST Act, 2017.
17. We find no reason to differ from the Report of the DGAP and we therefore agree with his findings that the provisions of Section 171 of the CGST Act 2017 have not been contravened in this case.
18. 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 05.03.2020 the order was to be passed on or before 04.09.2020. However, due to prevalent pandemic of COVID-19 in the Country this order could not be passed on or before the above date. In this regard it would be relevant to mention that the Hon'ble Supreme Court in Miscellaneous Application No 21 of 2022 in MA 665 of 2021 vide its Order dated 10.1.2022 has directed that:-

" I. 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.

II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, the longer period shall apply.

IV. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Section 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings."

19. In view of above findings, we conclude that the instant case does not fall under the ambit of Anti-Profitteering provisions of Section 171 of the CGST Act, 2017.

Therefore, the allegation that the Respondent has not passed on the benefit of ITC in this case is not found sustainable. Accordingly, the application filed by Applicant No. 1, requesting action against the Respondent for alleged violation of the provisions of Section 171 of the CGST Act is dismissed being not maintainable.

20. A copy of this order be sent to the Applicants and the Respondent free of cost.

Sd/-
(Amand Shah)
Technical Member &
Chairman

Sd/-
(Pramod Kumar Singh)
Technical Member

Sd/-
(Hitesh Shah)
Technical Member



Certified Copy


(Dinesh Meena)
Secretary, NAA

o/c

F. No. 22011/NAA/144/Lodha(Primo)/2020 | 3803-3805 Date: 08.04.2022

Copy To:-

1. Sh. Darshan Joshi, 7B, 42, Navjivan Society, Lamington Road, Mumbai-400008.
2. Directorate General of Anti-Profitteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
3. Guard File.