

BEFORE THE COMPETITION COMMISSION OF INDIA
(AUTHORITY UNDER SECTION 171 of CENTRAL GOODS & SERVICES TAX ACT, 2017)

I.O. No. 15 /2023
Date of Institution 15.02.2023
Date of Order 29.12.2023

In the matter of:

The 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.

Applicant

Versus

1. M/s Omkar Realtors and Developers Pvt. Ltd., Off Eastern Express Highway, Opp. Sion Chunnabhatti Signal, Sion (East), Mumbai – 400022.
2. M/s Kash Foods Pvt. Ltd. 15-B, Chandermukhi, Nariman Point, Mumbai-400021.
3. Mr. Nakul Ravi Arya, Satlaj Terrace, Walkeshwar Road, Mumbai-100006.
4. Mr. Varun Ravi Arya, Satlaj Terrace, Walkeshwar Road, Mumbai-100006.

Respondents

Coram: -

Mrs. Ravneet Kaur, Chairperson
Sh. Anil Agrawal, Member
Ms. Sweta Kakkad, Member
Sh. Deepak Anurag, Member

ORDER

1. The present Report dated 15.02.2023, has been received from the Director General of Anti-Profiteering (DGAP) after a detailed investigation as per the directions passed under Rule 133(5) of the Central Goods and Service Tax Rules (CGST), Rules 2017 vide Order No. 51/2022 dated 29.07.2022 by the National Anti-Profiteering Authority (NAA) in respect of project "Crescent Bay" situated at Parel, Mumbai, of M/s Omkar Realtors and Developers Pvt. Ltd. (Respondent No. 1) and M/s L&T Parel Project LLP.

2. The DGAP vide his Report dated 15.02.2023 has inter-alia submitted the following: -
 - i) The Respondent No. 1 is in the business of construction of residential and commercial apartments and undertakes development of slum rehabilitation projects. His Projects are Slum Rehabilitation Authority (SRA) Rehab Projects wherein there is redevelopment on slum land. The Respondent No. 1 is required to construct buildings for providing free flats to existing slum dwellers and other buildings for the sale of flats to customers.

 - ii) The DGAP informed that as per the Maharashtra RERA website the Respondent No. 1 had total four construction projects registered with MRERA, having following details:

Sl. No.	Project Name	Promoter Name	RERA Registration No. & Date
1	OMKAR 1973 WORLI	Omkar Realtors and Developers Private Limited	P51900003316 09/09/2021
2	Om Gopal - Floor 3 to 9	Omkar Realtors and Developers Private Limited	P51900012360 18/05/2020
3	The Summit Business Bay Andheri	Omkar Realtors and Developers Private Limited	P51800008187 18/08/2017
4	Sairaj Floor 1, 2 and 22	Omkar Realtors and Developers Private Limited	P51900006458 18/05/2020

3. The Commission had passed Interim order No. 02/2023 dated 31.07.2023 in the projects 'Om Gopal- Floor 3 to 9' and 'Sairaj Floor 1, 2, and 22' directing the DGAP to further investigate the projects and submit his report.
4. The DGAP's Report dated 15.02.2023 in respect of projects "Omkar 1973 Worli" and "The Summit Business Bay Andheri" inter-alia stated as under :-
- i) In the Project "Omkar 1973 Worli", the slum dwellers were permanently housed in Mahalaxmi Co-op. HSG. Ltd. that could not be sold and Slum Rehabilitation Authority (SRA) allowed equivalent FSI in the sold building "Omkar 1973 Worli" which comprises of three towers having total 483 units out of which 455 pertained to the Respondent No. 1 and rest were allotted to the land owner. The Respondent No. 1 submitted copies of Occupancy Certificates issued by the SRA. In the project, the Respondent No. 1 had entered into JDA with 3 land owners: 1) M/s Kash Foods Pvt. Ltd, 2) Mr Varun Ravi Arya 3) Mr. Nakul Ravi Arya (Respondent No. 2, 3, 4 respectively).

- ii) The DGAP stated that out of 455 units the Respondent No. 1 had benefited from additional ITC of 7.36% of the turnover which amounts to Rs. 9,52,76,540/- (inclusive of GST @12% on the base amount of Rs. 8,50,68,339/-) with respect to 40 flats, since consideration was received for them during the period of investigation i.e. 01.07.2017 to 31.07.2022. The DGAP had calculated no profiteering in respect of 201 units, since no consideration was received during the period of investigation. Further, 130 units were sold post-OC, 78 units remained unsold and 06 units booking was cancelled.
- iii) In case of flats pertaining to landowners in the project 'Omkar 1973 Worli' the DGAP stated that the Respondent No. 2, 3 & 4 had not submitted the copies of sale agreements and documentary evidence of payments received in 02 flats sold by Mr. Nakul Arya . Hence, the DGAP was not in position to verify whether the said flats had been sold before Occupancy Certificate or not. Accordingly, the DGAP had sent letter to the jurisdictional Commissionerate to verify Respondent No. 2, 3 & 4's assertions and to inquire into the tax liability involved in sale of those flats.
- iv) The DGAP stated that the Respondent No. 1 had not provided project-wise figures for ITC of VAT availed by the Respondent No. 1 in respect of projects "Omkar 1973 Worli" and "The Summit Business Bay Andheri". The Respondent No. 1 vide email dated 14.12.2022 submitted figures of

CENVAT/ITC pertaining to the projects certified by Chartered Accountant as reconciled with statutory returns. However, the Respondent No. 1 had not bifurcated CENVAT/ITC figures pertaining to the Rehab building and Sale building in the respective projects. Accordingly, the figures provided has been considered for the respective Sale building in projects.

- v) The DGAP stated that the Respondent No. 1 had submitted list of homebuyers in the Projects "Omkar 1973 Worli" and "The Summit Business Bay Andheri" project. However, the Respondent No. 1 had not provided complete documents to verify the authenticity of the details of bookings and consideration received from the buyers. Accordingly, the DGAP had sent a letter to the jurisdictional Commissionerate to check the authenticity of the Respondent No. 1's homebuyers' list and to verify the CENVAT/ITC figures provided by the Respondent No. 1 to his office.
- vi) As regards the Project "The Summit Business Bay Andheri", the slum dwellers were permanently housed in Prakshwadi CHS Ltd. that could not be sold and SRA allowed equivalent FSI in the sale building "The Summit Business Bay Andheri", which comprised of 342 units. The Respondent No. 1 had received Occupancy Certificate for the project.
- vii) Out of 342 units of the above project the DGAP stated that the Respondent No. 1 has benefited from additional ITC of 2.40% of the turnover which amounts to Rs. 3,04,60,309/- (inclusive of GST @12%

on the base amount of Rs. 2,71,96,704/-) with respect to 86 flats, since the consideration for these flats was received during the period of investigation i.e 01.07.2017 to 31.07.2022. The DGAP stated that since no consideration was received for 202 units during the period of investigation, no profiteering was calculated. Further, 51 units were sold post OC and 03 units were unsold.

- viii) The DGAP stated that the Respondent No. 1 had claimed of passing benefit of Rs. 29.58 lakhs to 27 customers of "The Summit Business Bay Andheri" by way of credit notes and that the Respondent No. 1 had passed on ITC benefit to 19 other customers who booked units in post GST regime before OC. However, the Respondent No. 1 did not provide the supporting documentary evidences. Hence, the DGAP could not verify the said claim of the Respondent No. 1.
- ix) The DGAP concluded that the Respondent No. 1 was required to pass on the additional benefit of ITC of Rs. 9,52,76,540/- to 40 eligible recipients in the "Omkar 1973 Worli" project and Rs. 3,04,60,309/- to 86 eligible recipients in the "The Summit Business Bay Andheri" project. Therefore, Section 171 of the Central Goods and Services Tax Act, 2017 has been contravened by the Respondent No. 1.
- x) The Respondent No. 1 has supplied construction services in the State of Maharashtra only. The present investigation covered the period from 01.07.2017 to 31.07.2022.

5. The Commission carefully considered the Report dated 15.02.2023 of the DGAP and the other material placed on record and in the projects "Omkar 1973 Worli" and "The Summit Business Bay Andheri" issued Notices dated 12.07.2023 to the Respondent No. 1, 2, 3 & 4 to explain why the Report dated 15.02.2023 furnished by the DGAP should not be accepted and their liability for profiteering in violation of the provisions of Section 171 of the CGST Act, 2017 should not be fixed.
6. The Respondent No. 1 vide his written submissions dated 30.09.2023 has inter-alia submitted the following:-
- i) The Respondent No. 1 claimed the saleable area mentioned in DGAP's report for both projects was incorrect. As DGAP has arrived at profiteering on the basis of wrong saleable area hence, alleged profiteering determined by DGAP was also incorrect. The Respondent claimed that in Table A and B of the DGAP's Report dated 15.02.2023, the area of the project was actually the carpet area and not saleable area of the project.
 - ii) The DGAP has failed to reduce incremental ITC arising on account of increase in tax rate by the Government. The DGAP's method of comparison of absolute ITC under Pre-GST and Post -GST regime is thus without logic. The rate of ITC-CENVAT was increased from 6% to 18%. The Respondent No. 1 was paying Service Tax @6% and post GST paying tax @18%. Incremental

credit of higher tax paid becomes nullified since to that extent as the Respondent has paid incremental tax from his pocket.

- iii) While determining the alleged profiteering amount, DGAP has erred by recalibrating the amount of demand collected as inclusive of GST. The DGAP has recalibrated the base price collected from customers and added the amount of GST to it. Thereafter, alleged profiteering amount was calculated on the recalibrated figure (which was inclusive of GST).
- iv) The methodology adopted by DGAP was subject to various glaring issues:-
- a) There was no relation of turnover and ITC. Hence the ratio of ITC and turnover was absolutely baseless.
 - b) The construction work was executed in phased wise manner over period of time. The formula completely ignores the procurement pattern. The credit is lower at initial stage of the project and higher as the project progresses.
 - c) Comparing the credit of input services during pre-GST regime and post-GST regime was faulty.
 - d) Under the provisions of Maharashtra Value Added Tax (MVAT) Act and Rules, as per Rule 58 of MVAT Rules 2005, full input credit in respect of MVAT paid on purchase of goods was available. Also, an option was given to developer to pay tax under composition/lump sum without taking any

input credit. Therefore, for determining the exact benefit arising due to change of taxation scheme, this input credit availability needed to be considered. The DGAP's report has completely missed out this aspect.

- e) The formula did not factor increase in prices due to inflation. The proportion of ITC automatically increases due to rise on inflation. Around 7-8% increase in ITC is directly connected to increase in prices. Hence, benefit of ITC should be reduced by such extent.
- v) There was no mechanism specified under law for computing the profiteered amount. In absence of such mechanism, the anti-profiteering amount derived by DGAP lacked validity, logic and hence was erroneous.
- vi) For passing on the profiteering, there has to be a profit at first place. Post introduction of GST the prices of various goods and services have been increased which has resulted into additional cost burden. The ITC benefit alleged is miniscule as compared to the increase in costs of construction materials. Hence, without receiving any benefit, the Respondent No. 1 was unable to pass on any benefit to the end customers.
- vii) There was no contravention of any of the provisions of Section 171 of the CGST Act as alleged in the DGAP's report and the

alleged benefit has already been passed. Thus the entire report was liable to be quashed.

7. Copy of the above submissions dated 30.09.2023 filed by the Respondent No. 1 was supplied to the DGAP for clarification under Rule 133(2A) of the CGST Rules, 2017. The DGAP filed his clarifications dated 21.11.2023 on the Respondent No. 1's submissions and inter-alia clarified as under:-

- i) As regards the Respondent No. 1's claim that in Table A and B of the DGAP Report dated 15.02.2023, the area of the project is actually the carpet area and not saleable area of the project, the DGAP stated that during the course of investigation, the Respondent No. 1 vide email dated 14.02.2023 had informed that the total saleable area of the projects 'Omkar 1973 Worli' and 'The Summit Business Bay' were 9,26,567 Sq. Ft. and 2,14,224 Sq. Ft. respectively and on the basis of Respondent No. 1's submission, the said figures were considered at S. No. 6 of Tables A and B in the DGAP's report.
- ii) The Respondent No. 1's contention that the additional ITC is attributed due to increase in tax rate (Service Tax rate @ 6% vs GST @ 18%) and not due to profiteering is incorrect. In the erstwhile pre-GST regime, various taxes and cesses were levied by the Central Government and the State Governments, which got subsumed in the GST. Out of these,

taxes, ITC of some taxes was not allowed in the erstwhile tax regime. Such input taxes, the credit of which was not allowed in the erstwhile tax regime, used to get embedded in the cost of the goods or services supplied, resulting in increased price. With the introduction of GST all these taxes got subsumed in the GST and the ITC of GST is available in respect of all goods and services, unless specifically denied. The additional benefit of ITC in GST is limited to those input taxes, the credit of which was not allowed in the pre-GST regime but allowed in GST regime. This additional benefit of ITC in the GST regime is required to be passed on by the suppliers to the recipients by way of commensurate reduction in price, in terms of Section 171 of GST Act, 2017. However, the Respondent No. 1 has deliberately and conveniently ignored that the ITC availed in post GST regime is inclusive of input goods as well. Thus, the contention of the Respondent No. 1 is incorrect.

- iii) As regards Respondent No. 1's claim that the DGAP has erred by recalibrating the base price collected and by adding the GST amount to it, the DGAP has submitted that Section 171 of the CGST Act, 2017 and Chapter XV of the CGST Rules, 2017, require the supplier of goods or services to pass on the benefit of the ITC to the recipients by way of commensurate reduction in price. Price includes both, the

base price and the tax paid on it. If the supplier has charged more tax from the recipients, the aforesaid statutory provisions would require that such amount be refunded to the eligible recipients, regardless of whether such extra tax collected from the recipient has been deposited in the Government account or not. Besides, any extra tax returned to the recipients by the supplier by issuing credit note can be declared in the return filed by such supplier and his tax liability shall stand adjusted to that extent in terms of Section 34 of the CGST Act, 2017. Therefore, option is always open to the Respondent No. 1 to return tax amount to the recipients by issuing credit notes and adjusting his tax liability for the subsequent period to that extent. Therefore, any excess amount collected from recipients, even in the form of tax, must be returned to the recipients. By not reducing the price commensurately the Respondent No. 1 has forced his customers to pay extra tax which they were not liable to pay. Further, no imposition of any levy or taxes have been made by the DGAP. Only the amount of profiteering made by the Respondent No. 1 has been calculated. Hence, the contention of the Respondent No. 1 is erroneous.

- iv) The Respondent No. 1 claimed that the methodology adopted by the DGAP is subject to various glaring issues.

- a. As regards the Respondent No. 1's contention that there is no relation of turnover and ITC, the DGAP submitted that there is direct correlation between the turnover and the ITC as the Respondent No. 1 was discharging his output tax liability out of the ITC available to him on the basis of turnover i.e. the amount realised by him from the buyers. Moreover, the benefit to be passed on is the additional ITC proportionate to the payment made by a buyer and hence the above ratios are relevant. Therefore, the claim of the Respondent No. 1 was misconceived.
- b. The DGAP stated that the contention of the Respondent No. 1 that the construction work is executed in phase wise manner over a period of time and the DGAP's formula, which completely ignores the procurement pattern, is not correct. The DGAP submitted that Section 171(1) of Central Goods and Services Tax Act, 2017 mandates passing on the benefit of additional ITC which has accrued to the Respondent No. 1 during the entire life of the project before occupancy certificate is issued. Further, the Respondent No. 1 has availed Input Tax Credit every month by filing GSTR-3B Returns inspite of a long gestation period in a housing project. The Respondent No. 1 cannot enrich himself at the expense of the flat buyers by denying them the benefit of ITC till

completion of the project while he uses the same in his business for discharging his output tax liability every month. Therefore, the Respondent No. 1 has to make periodical assessment of the ITC benefit and pass it on to the eligible flat buyers on each and every demand raised by him. The Respondent No. 1 can always make adjustments in case more or less benefit is passed on at the final computation and payment of the benefit.

c. As regards the Respondent No.1's contention that the credit of input services was available even before GST and it is not a benefit that has arisen due to introduction of GST, the DGAP submitted that prior to 01.07.2017, i.e., in the pre-GST era, the Respondent No. 1 was eligible to avail CENVAT Credit of Service Tax paid on input services only (no credit was available in respect of Central Excise Duty paid on inputs and of VAT paid on inputs). However, post-GST, the Respondent No. 1 could avail input tax credit of GST paid on input services and input goods as well. Therefore, there was an additional input tax credit which was available to the Respondent No. 1 in the post- GST period and the same is required to be passed on by him to the recipients/buyers by way of commensurate reduction in price, in terms of Section 171 of GST Act, 2017.

d. As regards the Respondent No. 1's contention that the DGAP report has missed out on the input credit available to the Respondent No. 1 on input goods in the VAT regime, the DGAP submitted that during the investigation, the Respondent No. 1 was requested to provide the project-wise figures of input tax credit availed by him in both pre-GST (both Service Tax and VAT) and post-GST regime. In his replies, the Respondent No. 1 never mentioned that he had availed ITC of VAT under the MVAT Act and rules.

e. The DGAP stated that the Respondent No.1's contention that the DGAP formula does not factor increase in prices due to inflation was wrong and hence denied. In this regard, the DGAP submitted that the increase in the cost of inputs and input services may be a factor for determination of price but this factor is independent of the output GST rate. The increase in cost, if any, is a kind of business risk which must have been factored in by the Respondent No. 1 at the time of entering into agreements with the prospective flat buyers. The Respondent No. 1 cannot claim to set off such increase in his cost with the benefit of input tax credit which is the sacrifice of precious tax revenue made from the kitty of the Central and the

State Governments and required to be passed on to the end customers who bear the burden of tax.

f. In view of above, the DGAP submitted that the DGAP's methodology is rational, logical & appropriate in terms of Section 171 of the Central Goods and Services Tax, 2017, and the same has been consistently upheld by the Authority in similarly placed cases.

v) The Respondent No. 1 has contended that there is no mechanism specified under law for computing the profiteered amount and in absence of such mechanism, the profiteered amount calculated by DGAP is erroneous and unjustified. In this regard, the DGAP submitted that the main contours of the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and the benefit of ITC are enshrined in Section 171 (1) of the CGST Act, 2017 itself which states that "Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices." The Section 171 of the CGST Act 2017 and the anti-profiteering rules under the CGST Rules 2017 were duly passed by the Parliament. The DGAP has not adopted any self- derived method for computing the profiteering amount, but has compared the ITC to turnover ratio in pre & post GST

periods in the present case which is rational, logical & appropriate in terms of Section 171 and the same has been approved by the Authority in similarly placed cases. Further, the court cases cited by the Respondent No. 1 are not relevant to the present case.

vi) In view of above, the Respondent No. 1 has not passed on the additional benefit of ITC in terms of Section 171 of the CGST Act 2017 as concluded in the DGAP Report dated 15.02.2023.

8. We have carefully considered the Report dated 15.02.2023 furnished by the DGAP, the submissions made by the Respondent No. 1 and the clarifications filed by the DGAP and find that the DGAP has reported profiteering of Rs. 9,52,76,540/- in respect of 'Omkar 1973 Worli' project and Rs. 3,04,60,309/- in respect of "The Summit Business Bay Andheri" project in its report dated 15.02.2023. It has been observed in the DGAP's report that :-

i) As per Annexure No. 21 attached with the DGAP report dated 15.02.2023, the total saleable area of project 'Omkar 1973 Worli' is 21,02,641 Sq. Ft. and for project 'The Summit Business Bay' it is 5,37,474 Sq. Ft. as contended by the Respondent No. 1. However, according to Para No. 24 and Para No. 26 of DGAP Report, as per Table A and Table B at S.No. 6 total saleable Area of project 'Omkar 1973 Worli' has been taken as 9,26,567 Sq. Ft. and for project 'The Summit Business Bay' it has been taken as 2,14,224 Sq. Ft. The

difference in the area is required to be reconciled for which further investigation needs to be made by the DGAP.

- ii) Further, the DGAP has also stated that in case of project "Omkar 1973 Worli", the land was contributed by (i) M/s Kash Foods Pvt. Ltd. (ii) Mr. Nakul Ravi Arya and (iii) Mr. Varun Ravi Arya (Respondent No. 2, 3 & 4 respectively) who were also entitled to sell flats. On these flats the benefit of ITC has to be passed on by the Respondent No. 1 to the landowners who would further pass on the ITC benefit to the homebuyers. However, no profiteered amount has been computed in respect of these flats of land owners by the DGAP. The DGAP has stated that he had sent a letter to the jurisdictional Commissioner to verify the assertions of the landowners and to inquire into their tax liability involved in sale of these flats. However, he has not mentioned whether any reply was received or not. Accordingly, the DGAP is directed to reinvestigate whether any ITC benefit is required to be passed on by the Respondent No. 1 to the land owners for further passing on to their buyers or not.
- iii) Vide Para No. 22 of the Report the DGAP has stated that the Respondent No. 1 vide email dated 14.12.2022 submitted figures of CENVAT/ITC pertaining to the projects 'Omkar 1973 Worli' and 'The Summit Business Bay' certified by Chartered Accountant as reconciled with statutory returns. However, the Respondent No. 1 had not bifurcated CENVAT/ITC figures pertaining to the Rehab building and

Sale building in the respective projects. Accordingly, the figures provided have been considered for the respective Sale building in projects. The DGAP is also directed to obtain the bifurcated figures of CENVAT / ITC from the Respondent No. 1 in respect of the Rehab and Sale buildings and record his findings on the same.

iv) Further, vide Para no. 23 of the Report the DGAP has stated that the Respondent No. 1 had not provided complete documents to verify the authenticity of the details of booking and consideration received from the homebuyers. In this regard, the DGAP had sent letter to the Jurisdictional Commissionerate to check the authenticity of the Respondent No. 1's homebuyer's list and to verify the CENVAT/ITC figures provided by the Respondent No. 1. In this regard, the DGAP is directed to obtain the details from the Respondent No. 1 as well as the Jurisdictional Commissioner and submit his report.

9. In view of above, it is observed that the DGAP report dated 15.02.2023 in respect of both the above projects is incomplete. Accordingly, the DGAP is directed to re investigate both the above projects viz 'Omkar 1973 Worli' and 'The Summit Business Bay' under Rule 133(4) of the above Rules and submit complete report accordingly. The Respondent No. 1 is also directed to supply the required information to the DGAP promptly.

10. A copy of this order be supplied to all the parties free of cost and file be consigned after completion.

-sd-
(Deepak Anurag)
Member

-sd-
(Sweta Kakkad)
Member

-sd-
(Anil Agrawal)
Member

-sd-
(Ravneet Kaur)
Chairperson

Certified Copy


(Anupama Anand)
Secretary, CCI

F. No. M/AP/14/Omkar-OP/2023-Sectt.

Dated: 29/12/2023

Copy To:-

1. M/s Omkar Realtors and Developers Pvt. Ltd., Off Eastern Express Highway, Opp. Sion Chunnabhatti Signal, Sion (East), Mumbai – 400022.
2. M/s Kash Foods Pvt. Ltd. 15-B, Chandermukhi, Nariman Point, Mumbai-400021.
3. Mr. Nakul Ravi Arya, Satlaj Terrace, Walkeshwar Road, Mumbai-100006.
4. Mr. Varun Ravi Arya, Satlaj Terrace, Walkeshwar Road, Mumbai-100006.
5. The Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
6. Guard File.