



BEFORE THE COMPETITION COMMISSION OF INDIA

(AUTHORITY UNDER SECTION 171 OF THE CENTRAL GOODS & SERVICES TAX ACT, 2017)

I. O. No. : 16/2023  
Date of Institution : 20.04.2023  
Date of Order : 29.12.2023

**In the matter of:**

1. Smt. Sudha, H No. E-88, 3rd Floor, West Patel Nagar, New Delhi-110008.
2. 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 Diya Greencity Pvt. Ltd. for the Project "Diya Greencity", Raj Nagar Extension Near Vardan Hospital/ Reliable Institute, Humtum Road, Meerut Road, Ghaziabad-201003.

**Respondent**

**Coram: -**

1. Smt. Ravneet Kaur, Chairperson
2. Sh. Anil Agrawal, Member
3. Ms. Sweta Kakkad, Member
4. Sh. Deepak Anurag, Member

## ORDER

1. The present Report dated 20.04.2023 had 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. A reference was received by DGAP from the erstwhile National Authority Anti-profiteering (NAA) to conduct a detailed investigation in respect of an Application filed under Rule 128 of the CGST Rules, 2017, by Applicant No. 1 alleging profiteering in respect of Construction Service supplied by the Respondent. The above Applicant No. 1 alleged that the Respondent had not passed on the benefit of ITC to her by way of commensurate reduction in the price of the flat purchased from the Respondent in the project "**Diya Greencity**" situated at Raj Nagar Extension, Meerut Road, Ghaziabad on the introduction of GST w.e.f. 01.07.2017, in terms of Section 171 of the CGST Act, 2017.
2. The DGAP vide his Report dated 20.04.2023 had inter-alia submitted the following: -
  - i. On receipt of the reference from the NAA on 02.11.2022, a Notice under Rule 129 of the Rules was issued to Respondent calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the recipients by way of commensurate reduction in price and if so, to *suo motu* determine the quantum thereof and indicate the same in his reply to the Notice as well as to furnish all documents in support of his reply.

- ii. The period covered by the current investigation was from 01.07.2017 to 31.10.2022.
- iii. The DGAP issued the Notice dated 10.11.2022 and subsequent reminders to the Respondent. The replies of Respondent to DGAP are summed up as follows: -
  - a) The Respondent, having GSTIN: 09AADCD9607N1Z4, carries on the business of construction of flats and commercial shops as approved by Awas Bandhu, Dept. of Housing & Urban Planning Govt. of U.P Lucknow. The project was named "Diya Greencity" which was situated at Khasra No. 1097M & 1098, Village Morta, Hum tum Road, Raj Nagar Extension, Ghaziabad, Uttar Pradesh.
  - b) The Respondent submitted that there were 15 towers in the project "Diya Greencity", named towers A to O, and no Occupancy Certificate was received for the project "Diya Greencity" from the Ghaziabad Development Authority. The Respondent informed that he had applied for Completion Certificate but the same was rejected for want of fulfilment of certain formalities.
  - c) The Respondent also submitted that w.e.f. 01.04.2019, he had opted to pay tax at the existing rates with the full benefit of ITC in terms of Notification No. 03/2019-Central Tax (Rate).
  - d) The Respondent also submitted that no CENVAT Credit Register was maintained by him as no benefit of



CENVAT Credit was availed by the Respondent in Pre-GST regime.

- e) The Respondent submitted that he was registered under the UP-VAT Act, 2008 w.e.f. dated 23.08.2016.
  - f) The Respondent also informed that as per the agreement executed between the him and homebuyers/ allottees, it was agreed that every allottee was required to make the payment of instalment alongwith the amount of GST but none of the allottees had paid the GST at the time of payment of instalments and therefore the GST amount had been paid by the Respondent out of his own packet. The GST amount had been paid only by 650 allottees later on at the time of getting the possession of the flats. The Respondent informed that he had passed on the benefit of ITC to all these 650 customers at the time of getting the possession of the flats when he had paid the amount of GST and other pending dues also. The Respondent also submitted that total amount of benefit of ITC passed on to such customers was Rs. 3,81,70,416/- and except the above said 650 customers no other customer including the complainant/ Applicant No. 1 i.e. Mrs. Sudha had paid the amount of GST and other pending dues.
- iv. The Respondent vide e-mail dated 06.03.2023, submitted copies of demand letters, for the sale of Flat no. I-604 of Type-

3B to the Applicant No. 1, measuring 807.36 square feet, at total base price of Rs. 24,36,500/- (including one car parking).

- v. DGAP submitted 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 but no CENVAT Credit was available/ availed in pre-GST era, as per the VAT returns. The DGAP found that the Respondent had availed ITC of Rs. 1,15,34,080/- on VAT in the F.Y. 2016-17 and 2017-18 i.e. upto June-2017. Post-GST, the Respondent was entitled to avail ITC of GST paid on all the inputs and the input services including the sub-contracts. The Central Government, on the recommendation of the GST Council, had levied 18% GST (effective rate was 12% in view of 1/3rd abatement on value) on construction service, vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. From the information submitted by the Respondent for the period April, 2016 to July, 2022, DGAP had calculated the ratio of ITC to turnover, during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to October, 2022) periods, as is shown in Table - 'A' below:

**Table-'A'**

(Amount in ₹)

| S. No. | Particulars   | April, 2016 to June, 2017 (Pre-GST) | Total Post GST July, 2017 to October, 2022 |
|--------|---|-------------------------------------|--|
| (1)    | (2)   | (3)                                 | (4)  |
| 1      | CENVAT of Service Tax Paid on Input Services as per ST-3 return (A) | -                                   | -  |
| 2      | ITC of VAT Paid on Purchase of Inputs (B)                           | 1,15,34,080                         | -  |
| 3      | Input Tax Credit of GST Availed (C)                                 | -                                   | 20,23,87,878                               |

|   |  |              |                |
|---|--|--------------|----------------|
| 4 | Total CENVAT/ITC Availed (D)= (A+B) or (C)                         | 1,15,34,080  | 20,23,87,878   |
| 5 | Turnover for Residential Flats as per Home Buyers List (E)         | 79,79,19,196 | 2,08,08,46,816 |
| 6 | Total Saleable Area (in SQF) (F)                                   | 16,20,828    | 16,20,828      |
| 7 | Total Sold Area relevant to Turnover (G)                           | 6,13,256     | 9,96,677       |
| 8 | Relevant CENVAT/ITC [(H)= (D)*(G)/(F)]                             | 43,64,029    | 12,44,51,962   |
|   | <b>Ratio of CENVAT/Input Tax Credit to Turnover [(I)= (H)/(E)]</b> | <b>0.55%</b> | <b>5.98%</b>   |

vi. From the above Table - 'A', DGAP has stated 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 0.55% whereas during the post- GST period (July, 2017 to October, 2022), this percentage was 5.98%. DGAP inferred from above Table that post-GST, the Respondent has benefited from additional ITC to the tune of 5.43% [5.98% (-) 0.55%] of the turnover. Accordingly, on the basis the figures contained in Table-'A' above, the comparative figures of the ratio of ITC availed/available to the turnovers in the pre-GST and post-GST periods. The DGAP recalibrated base price and the excess realization (profiteering) during the post-GST period, which are mentioned in Table- 'B' below:

| Sr. No. | Particulars  |                        |                          |
|---------|--|------------------------|--------------------------|
| 1       | Period   | A                      | July, 2017 to 31.10.2022 |
| 2       | Output GST rate (%)  | B                      | 12%                      |
| 3       | Ratio of CENVAT credit/ ITC to Total Turnover as per table - 'B' above (%) | C                      | 0.55%/5.98%              |
| 4       | Increase in ITC availed post-GST (%)                                       | D= 5.98%<br>less 0.55% | 5.43%                    |



|    |   |                                 |                     |
|----|---|---------------------------------|---------------------|
| 5  | <b>Analysis of Increase in input tax credit:</b>          |                                 |                     |
| 6  | Base Price raised during July, 2017 to 26.09.2019 (Rs.)   | E                               | 208,08,46,816       |
| 7  | GST raised over Base Price (Rs.)                          | F= E*B                          | 24,97,01,618        |
| 8  | Total Demand raised                                       | G=E+F                           | 233,05,48,434       |
| 9  | Recalibrated Base Price                                   | H= E*(1-D)<br>or 94.57%<br>of E | 196,78,56,834       |
| 10 | GST @12%  | I = H* B                        | 23,61,42,820        |
| 11 | Commensurate demand price                                 | J = H+I                         | 220,39,99,654       |
| 12 | <b>Excess Collection of Demand or Profiteering Amount</b> | <b>K= G-J</b>                   | <b>12,65,48,780</b> |

- vii. From Table-'B' above, the DGAP has claimed that the additional ITC of 5.43% of the 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 Central Goods and Services Tax Act, 2017, the benefit of such additional ITC was required to be passed on by the Respondent to the respective recipients.
- viii. The Respondent vide his email dated 10.04.2023 sent to DGAP has submitted that he had charged GST from only 650 home buyers at the time of possession of flats and also GST rate charged from the above 650 home buyers was less than the effective rate of GST. Respondent claimed that eventually he had passed on Rs. 3,81,70,416/- of ITC benefits to the home buyers. To verify the claim of the Respondent DGAP sent emails to all 642 home buyers. Replies from only 102 Homebuyers have been received; out of 102 homebuyers, 23 denied that

benefit of GST/Input Tax Credit was received by them, 64 have confirmed that GST discount had been received; and 15 were not sure whether the GST discount has been received by them or not. Hence, DGAP did not accept the contention of Respondent that benefit to all the homebuyers had been passed on. A summary of benefit of ITC required to be passed on and the ITC benefit claimed to have been passed on to the homebuyers, has been furnished by DGAP which is shown in Table-'C' below:-

**Table-'C'** (Amount in ₹)

| Sr. No. | Category of Homebuyers                     | No. of Units | Area (in Sqf) | Amount Received Post GST | Profiteering Amt. as per Annex- | Confirmation received from homebuyers in respect of benefit passed on by Respondent | Difference   |
|---------|--|--------------|---------------|--------------------------|---------------------------------|---|--------------|
| A       | B  | C            | D             | E                        | F                               | G   | H=F-G        |
| 1       | Buyer who have taken possession & paid GST | 642          | 4,90,323      | 105,49,85,800            | 641,60,016                      | 42,11,007   | 599,49,009   |
| 2       | Buyer who have not taken possession        | 691          | 5,22,044      | 103,76,63,346            | 623,88,764                      | 0   | 623,88,764   |
| Total   |  | 1,333        | 10,12,367     | 209,26,49,146            | 1265,48,780                     | 42,11,007   | 12,23,37,773 |

- ix. DGAP submitted that as per above calculation, it is evident that the Respondent had benefitted by an additional amount of ITC of ₹ 12,65,48,780/- which included GST @12% on the base amount of ₹ 11,29,89,982/-.
- x. DGAP finally concluded that the benefit of additional ITC to the tune of 5.43% of the turnover, accrued to the Respondent post-GST and the same was required to be passed on by him to the



respective recipients. DGAP stated that the provisions of Section 171 of the Central Goods and Service Tax Act, 2017 were contravened by the Respondent, in as much as the additional benefit of ITC @ 5.43% of the base price received by the Respondent during the period 01.07.2017 to 31.10.2022 had not been passed on by him to his buyers. DGAP noticed that the confirmation from 64 home buyers has been received regarding the ITC benefit of Rs 42,11,007/- passed on by the Respondent as mentioned in above Table-C and this amount could be deducted from the total profiteered amount. From the above facts DGAP submitted that the Respondent **was yet to pass on an additional amount of Rs. 12,23,37,773/-** (Rs. 12,65,48,780/- (-) Rs. 42,11,007/-) to the 1333 home buyers which included the profiteered amount and GST on the said profiteered amount.

- xi. Regarding Applicant No. 1, the DGAP submitted that the Respondent has realised an additional amount of ₹ 66,680/- from the Applicant No. 1. Further, the investigation revealed that the Respondent was required to pass on the additional benefit of ITC amounting to ₹ 12,22,71,093/- to other recipients in the present proceedings. These recipients are identifiable as per the documents provided by the Respondent, giving the names and addresses along with Unit No. allotted to such recipients.
- xii. In view of the aforementioned findings, DGAP concluded that Section 171(1) of the Central Goods and Services Tax 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”, was contravened by the Respondent.

3. The above report was considered by the Commission and a copy of the investigation report dated 19.04.2023 was provided to the Respondent vide Notice dated 10.08.2023 to file his consolidated written submissions in respect of the above report of the DGAP. The Respondent vide letter dated 11.10.2023 filed his written submissions which are summarized as follows: -

i. **That the methodology adopted to compute and determine the anti-profiteering by the respected Authority was illegal and was arbitrary as the same was unconstitutional.**

The Respondent alleged that as per the provisions of Section 171 (3) read with Rule 126 of CGST Rules 2017 the methodology for computation of profiteering for transfer of commensurate benefit to the consumers was required to be prescribed but no such methodology had yet been prescribed under the law and the un-prescribed methodology as adopted by the Authority was being used uniformly to all the tax payers ignoring the different and distinct facts in each case. Also the present methodology adopted by the Authority was against the natural justice as it did not consider the external factors which adversely affect the tax payers which were beyond his control like high price escalations, COVID etc.

Thus, from the above facts, it was submitted by the Respondent that in the absence of any absolute mechanism to determine the amount of profiteering, the impugned DGAP report was erroneous and bad in law. Further the provisions contained under Section 171 of the CGST Act read with Rule 133(3)(a) of the CGST Rules, were bad in law and were violative of the settled principles of law as defined under Article 14 and 19(1)(g) of the Constitution of India.

Further, in case of M/S Samsung India Electronics Pvt. Ltd. vs. Union of India & Ors. it was contested that section 171 of the CGST Act and Rules 126, 127 and 133 of the CGST Rules be declared unconstitutional and ultra vires Articles 14, 19(1)(g), 246A, 265 and 300A of the Constitution. In addition to above the constitutional validity of anti-profiteering provisions had also been challenged in many other cases which were pending for disposal in the Hon'ble Delhi High Court.

ii. **Application of Anti-profiteering provisions to the customers who had booked the flat during the post-GST period was not legally valid and justified**

The Respondent submitted that 534 no. of flats in the project were booked and sold post-GST wherein the buyer and builder had mutually agreed upon at the then prevailing prices and agreement to sell was also signed post-GST only. Therefore, it was safe to assume that buyers were well aware of the implementation of GST, the then prevailing market prices and thereafter the agreement to sell were signed by them. As the agreements were signed post-



GST, there was no question of application of provision of anti-profiteering on these flats since the buyers were well aware about the amount of GST they were required to pay.

The Respondent also relied upon the case of M/s DRA Aadithya Projects Pvt. Ltd wherein the Hon'ble Delhi High Court had granted an interim stay on an anti-profiteering investigation by DGAP on a complaint filed by home buyers who had booked units on or after 1 July 2017. The key argument advanced by the writ petitioner was that there was no element of passing of benefit under Section 171(1) of the CGST Act/ SGST Act for unit buyers whose agreement had been entered into during the introduction of GST, for the reason that there was neither change in the rate of tax nor there were any benefits of any additional ITC.

**iii. Submission with respect to complaint filed by the customer  
Smt. Sudha**

The Respondent had informed that the Applicant No. 1 Smt. Sudha was reluctant to purchase the flat and wished to get her money back with compensation. The Respondent had informed that he had settled the dispute with complainant and consequently both the parties had mutually agreed to execute a settlement deed dated 24.06.2023 whereby she had agreed to withdraw all the complaints which she had filed with all the Govt. agencies at consideration price of ₹ 27,50,000/- (Rupees twenty-seven lakh fifty thousand only). A copy of settlement deed was also provided alongwith his submissions. Accordingly the Respondent argued that the question

of passing of the benefit of ITC to complainant did not arise and therefore the observation of the DGAP for passing of commensurate benefit of ITC of Rs. 66,680/- to complainant Smt. Sudha might be treated as null and void.

**iv. The amount of additional benefit of ITC as determined by the DGAP needed revision in view of under noted facts and evidences not considered by the DGAP in framing his report.**

- a) The Respondent had argued that the DGAP had determined the amount of anti-profiteering by considering GST rate of tax @ 12% which was not correct as the applicable rate of GST was 12% w.e.f 01.07.2017 to 31.01.2018 and the net effective GST rate after considering 1/3<sup>rd</sup> abatement on value of affordable housing units having carpet area upto 60 Sq. Mtr. was 8% and was @ 12% on other housing units. The relevant Notification No. 11/2017-Central Tax (rate) dt. 28.06.2017 and 01/2018-Central Tax (Rate) dt. 25.01.2018 might be referred in this respect.
- b) The Respondent had argued that after the issue of report of DGAP **nine** no. of affordable housing flats had been cancelled, so, the profiteered amount as computed by the DGAP in respect of these flats might be reduced.
- c) The Respondent had argued that subject to the cancellation of flats the total profiteered amount determined by the DGAP might be reduced to the extent of amount of profiteering calculated in respect of 534 flats booked post-GST.

- d) The Respondent had argued that the DGAP had calculated and added GST on the base price which was not legally justified as the GST charged and recovered by the respondent on the base price had already been paid to the GST Department which was not recoverable back to the Respondent in any manner. Therefore, it would cause double incidence of GST on the Respondent causing huge loss to him/it which was not legally justified and against the natural justice also.
- v. The Respondent had alleged that as per the DGAP's report the emails were sent to all the 650 home buyers to whom the benefit of ITC had been passed on by the Respondent for verification. 23 customers had denied and said that they had not received any benefit of ITC and 15 customers had said that they were not sure about it. The Respondent argued that in respect of above 38 customers, he had already given benefit of ITC to and therefore, the fact of denial as well as of uncertainty of receiving of benefit of ITC by all these 38 customers was not correct.
- vi. The Respondent argued that no penalty under section 171(3) read with Rule 133(3)(d) might be imposed as the respondent was complying with the provisions of Section 171 of the GST.
4. Copy of the above submissions dated 11.10.2023 filed by the Respondent was supplied to the DGAP for providing clarifications under Rule 133(2A) of the CGST Rules, 2017. DGAP vide his letter dated 16.11.2023 had filed the clarifications as under :-



- i. **(Reply of Para 1)** DGAP submitted that the methodology adopted by them in the Report was in line with the legal principles and this methodology of DGAP had been consistent throughout in all reports involving allegation of profiteering. DGAP further submitted that the case of Samsung India Electronics Pvt. Ltd. vs. Union of India & Ors., cited by the Respondent was not relevant in the present matter.
- ii. **(Reply of Para 2)** DGAP submitted that the averment made by the Respondent regarding non-applicability of anti-profiteering provisions on the customers who have book flats post-GST period was incorrect. DGAP submitted that the Respondent had benefitted from additional ITC only after the introduction of the GST. This additional benefit of ITC pertains to the entire project or in other words relates to each flat/unit of the project of the Respondent. Hence all unit/flat buyers were eligible to get his due benefit of ITC from the Respondent irrespective of his bookings made in pre-GST or post-GST period. Whatever was the negotiated price, the benefit of additional ITC had to be specifically passed on to all the recipients by the Respondent.
- iii. **(Reply of Para 3)** On the issue of the withdrawal of the complaint by the Applicant No. 1 Smt. Sudha, the DGAP clarified that the Respondent vide written submission dated 11.10.2023 submitted that the Applicant No. 1 had settled with the Respondent and both the parties mutually agreed to execute his settlement deed dated 24.06.2023. But DGAP further added that the Respondent had not

made any submission or settlement deed during the time of investigation. Since the DGAP relied only on the verification from the customers themselves through emails regarding passing on the benefit of ITC, , the contention of the Respondent in this regard was not considered.

**iv. (Reply of Para 4)**

- a. Regarding the claim that the net effective GST rate of 8% after considering 1/3rd abatement under the affordable housing units having carpet area upto 60 sq.mt was not considered by the DGAP, it was submitted that the Respondent had not claimed in any of his submissions that certain flats of the project "Diya Greencity" fell under the affordable scheme. Hence the contention of the Respondent had not been considered in the report.
- b. Respondent raised an issue that after submission of report nine numbers of affordable flats had been cancelled so profiteering in respect of those flats might be reduced. In this regard the DGAP has clarified that since the investigation report had already been submitted to the Commission, the Commission might decide on this issue.
- c. Respondent's contention regarding non-applicability of anti-profiteering provisions on the bookings of flats in post-GST period was held incorrect by the DGAP.
- d. Respondent's contention regarding inflated profiteering amount due to addition of GST on the profiteered amount was also held unsustainable by the DGAP.

- v. **(Reply of Para 5)** The Respondent has alleged that verification process carried out by the DGAP for ascertaining the amount of passing on the benefit of ITC, the denial and the uncertainty of receiving the benefit of ITC by the 38 customers was not correct. The DGAP here clarified that it had adopted a uniform practice of verifying the passing on of benefit of ITC from customers/homebuyers through emails only, therefore, the contention of the Respondent in this regard was not considered.
- vi. **(Reply of Para 6)** With regard to the imposition of penalty under Rule 133(3)(d) of the CGST Rules 2017 on the Respondent, the DGAP has clarified that no clarification from DGAP was warranted as the applicability of the penalty would arise only after the final order was passed by the Commission.
5. The Commission has carefully considered the investigation report submitted by the DGAP; the submissions received from the Respondent and the clarifications received under Rule 133(2A) of the CGST Rules, 2017 from the DGAP. The Commission finds that the matter needs to be sent back to DGAP under Rule 133(4) of the CGST Rules, 2017 for re-investigation on the following issues:
- i. Whether Smt. Sudha has received the benefit of ITC due to the settlement made by her with the Respondent as a consequence of which she has withdrawn her complaint?
  - ii. Whether some of the flats constructed by the Respondent fell under the 'Affordable Housing Scheme' and whether GST was to be charged on those flats @ 8%?



- iii. To consider the claim of the Respondent regarding cancellation of flats/units in the project and calculate the profiteering accordingly.
  - iv. Verification of the 'passing on of ITC benefit' to homebuyers/customers be carried out afresh.
6. In view of the above, the DGAP is directed to submit a fresh investigation report under Rule 133(4) of the CGST Rules, 2017 on all above mentioned issues.
  7. 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 Agarwal  
(Member)

Sd/-  
Ravneet Kaur  
(Chairperson)

o/c

Certified Copy



Secretary, CCI

F. No. M/AP/31/Diya Greencity/2023-Sectt./1306-1310 Dated: 03.01.2024

Copy to:

1. M/s Diya Greencity Pvt. Ltd., Raj Nagar Extension Near Vardan Hospital/ Reliable Institute, Humtum Road, Meerut Road, Ghaziabad- 201003.
2. Regd. Office: M/s Diya Greencity Pvt. Ltd., Eureka House, A-30/2, Gali No-3, West Jyoti Nagar (Near Durga Puri Chowk), Delhi-110094.
3. Smt. Sudha, H No. E-88, 3rd Floor, West Patel Nagar, New Delhi-110008.
4. Directorate General of Anti-Profitteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
5. Guard File.