

BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

I O No. : 25/2022
Date of Institution : 07.10.2021
Date of Order : 30.09.2022

In the matter of:

1. Sh. Ajay Saini, 137, Sakhambari Apartment Madhurda Kolkata-700107, West Bengal
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 Lucknow Development Authority, Pradhikaran Bhawan, Viping Khand, Gomti Nagar, Lucknow-226010

Respondent

Quorum:-

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

Present :-

1. Sh. Ajay Kumar Saini, Applicant No.1 in person.
2. Sh. Ajitesh Johari, Chartered Accountant for the Respondent.

ORDER

1. The present Report dated 06.10.2021 had been received in National Anti-Profiteering Authority (**NAA or Authority**) 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. Briefly stated, the Applicant No. 1 had alleged that the Respondent had not passed on the benefit of ITC to him by way of commensurate reduction in the price on purchase of a **Flat No. F-3/401** in the Respondent's project "**Kritika & Swati Apartment**" situated at Chak, Gajaria, Lucknow on introduction of GST w.e.f. 01.07.2017, in terms of Section 171 pf the CGST Act, 2017.
2. The DGAP in his Report dated 06.10.2021, had *inter-alia*, stated that:-

- a) The said Application was examined by the Standing Committee on Anti-profiteering, in its meeting, the minutes of which were received in the DGAP's office on 15.10.2020, whereby it was decided to forward the same to the DGAP to conduct a detailed investigation in the matter. Accordingly, investigation was initiated to collect evidence necessary to determine whether the benefit of ITC had been passed on by the Respondent to his customers in respect of Construction Service supplied by the Respondent.
- b) On receipt of the reference from the Standing Committee on Anti-profiteering, a Notice under Rule 129 of the Rules was issued by the DGAP on 05.11.2020, calling upon the Respondent to reply as to whether he admit that the benefit of ITC had not been passed on to his customers by way of commensurate reduction in price and if so, to *suo- moto* determine the quantum thereof and indicate the same in his reply to the Notice as well as furnish all supporting documents. Vide the said Notice, the Respondent was also given an opportunity to inspect the non-confidential evidences/ information furnished by the Applicant No.1 during the period 12.11.2020 to 13.11.2020. However, the Respondent did not avail this opportunity.
- c) The period covered by the current investigation was from 01.07.2017 to 30.09.2020.
- d) Despite Notice, several reminders, summons several emails, telephonic conversations and persuasions from jurisdictional CGST Commissionerate, the Respondent submitted only partial information/documents and had not submitted all the desired documents/ information mentioned in the Notice dated 05.11.2020.
- e) When the Respondent did not cooperate and stop submitting further desired information/ documents, the Principal Commissioner of CGST, Lucknow Commissionerate, had been requested to look into the matter who, vide C.No. V (30)/APIL(CO)/Misc/16/19/1266 dated 24.03.2021, and C.No.(30)AP/LKO/Misc./16/19/4300 dated 03.08.2021 forwarded the documents required for investigation (except Home Buyers list in the prescribed format, which was furnished

by the Respondent after lot of persuasions on 27.09.2021 and the same was listed in para 10 of the DGAP's Report).

f) The time limit to complete the investigation was 14.04.2021. However, in terms of Notification No. 91/2020 dated 14.12.2020 where, any time limit for completion/furnishing of any report, had been specified in, or prescribed or notified under the CGST Act, 2017 which falls during the period from the 20th day of March, 2020 to the 30th day of March, 2021, and where completion or compliance of such action had not been made within such time, then, the time limit for completion or compliance of such action was extended upto the 31.03.2021. Further, Hon'ble Supreme Court of India passed an Order dated 08.03.2021 in *Suo Motu* Writ Petition (Civil) No. 3 of 2020, wherein, it was stated that "*in cases where the limitation would had expired during the period between 15.03.2020 till 14.03.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15.03.2021. In the event the actual balance period of limitation remaining, with effect from 15.03.2021, is greater than 90 days, that longer period shall apply*". The above relief had been extended and the period from 14.03.2021 till further orders shall also stand excluded in computing the limitation period as per the Hon'ble Supreme Court's Order dated 27.04.2021 passed in Miscellaneous Application No. 665/2021 in SMW(C) No. 3/2020.

g) In response to the DGAP's Notice dated 05.11.2020, the Respondent submitted partial documents/ information vide letters and e-mails dated 23.11.2020, 30.01.2021, 24.02.2021, 01.03.2021, 21.09.2021, 22.09.2021, 27.09.2021 and 29.09.2021. The submissions of the Respondent are given below: -

i. The Respondent was incorporated under "*The Uttar Pradesh Urban Planning And Development Act, 1973*" by an Act of the Uttar Pradesh State legislature in order to ensure that there was orderly and planned development within Lucknow. It was imperative to point out that Section 7 of the said Act clearly stipulates

the Objectives of the Authority which has been reproduced hereunder for reference:-

“The objects of the Authority shall be promote and secure the development of the development area according to plan and for that purpose the Authority shall have the Power to acquire, hold, manage and dispose of land and other property, to carry out building, engineering, mining and other operations, to execute works in connection with the supply of water and electricity to dispose of sewage and to provide and maintain other services and amenities and generally to do anything necessary or expedient for purposes of such development and for purposes incidental thereto:

Provided that save as provided in this Act nothing contained in this Act shall be construed as authorising the disregard by the Authority of any law for the time being in force.”

It also renders a large variety of services that fall under the ambit of “Municipal Services” as enshrined under Article 243 W of the Constitution of India which was outside the purview of Service Tax in accordance with the provisions of Section 66 D of the Act. The purported Article 243 W of the Constitution of India was reproduced hereunder for your kind perusal : –

“Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow : –

- a. *the Municipalities with such powers and authority as might be necessary to enable him to function as institutions of self-government and such law might contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as might be specified therein, with respect to -*
- i. *the preparation of plans for economic development and social justice;*
 - ii. *the performance of functions and the implementation of schemes as might be entrusted to him including those in relation*

to the matters listed in the Twelfth Schedule;

- b. the committees with such power and authority as might be necessary to enable him to carry out the responsibilities conferred upon him including those in relation to the matters listed in the Twelfth Schedule.”*
- ii. The Respondent is a not for profit entity and the apartments constructed by him was for the purpose of orderly and necessary development of Lucknow which was in pursuance to the statutory obligation as contained in the parent legislation and no profit was loaded on the cost of the property.
- iii. The excel sheet of homebuyers provided consisted hundreds of pages of material evidence furnished in response to earlier notices issued by the DGAP, the entire paper book of documents clearly established that all ITC duly received/receivable had been passed onto the end consumers in totality which was conveniently not informed by the Applicant No. 1 since his intention was only to arm-twist a Government Authority with ulterior motives. The Applicant No. 1 had squarely failed to state anywhere in his complaint that he was a beneficiary of the benefit of input credit which was moot point of his complaint.
- iv. It was pertinent to point out the law in this respect had been clearly laid down by the Hon'ble Supreme Court in the matter of S. P. Chengalvaraya Naidu in AIR 1994 SC 853 that the one approaching the courts/quasi-judicial authorities should come with clean hands. The relevant portion of the citation was cited hereunder-

“One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court was being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to

retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

- v. The Hon'ble Supreme Court had in the matter of Suresh Kumar Goyal and Others v State of Uttar Pradesh & Another held that "*complaints made with a malafide intention to be dismissed along with payment to the aggrieved party*".
- vi. There was a catena of judgements of the Hon'ble Supreme Court of India and various Hon'ble High Courts which had stated in various cases that bad faith or mala fide complaints must be summarily dismissed and he did not deserve to be heard. Therefore the sum and substance of the law laid down by various courts was that such complaints could not be entertained and therefore it was pleaded that the instant proceedings be instantly dropped in compliance with the law laid down by the Hon'ble Apex Court.
- vii. In accordance with the Anti-Profiteering Rules, the duly constituted Screening Committees had to examine the complaints before beginning any scrutiny or investigation, that having established the malafide intention of the Applicant No. 1 and since he had not come to this Authority with clean hands as per the law laid down by the Hon'ble Supreme Court of India the said complaint could not be entertained. That in the absence of any legitimate complaint the instant proceedings had been rendered infructuous and deserve to be set aside.
- viii. As per section 171 of the CGST Act, 2017, the very essence of the statutory provision is that any reduction in rates or benefit of Service Tax should be passed on to the end consumer. The intent of the legislature was that the any benefit which accrued as a result of implementation of GST and subsuming of existing taxes must mandatorily be passed on to the end customers.



ix. It was pertinent to now mention the following points in respect of the project under investigation:-

A. The first allotment was done after the implementation of GST i.e after 01.07.2017 which was clear from the excel sheet forwarded to this Authority and the copy of documents furnished earlier.

B. Allotments were done through lotteries and all letters of allotment were issued only after the lottery had been fructified. The Applicant No. 1 had himself been issued the allotment letter after 01.07.2017 and therefore the instant project did not draw the ire of the Anti-Profiteering law and rules framed hereunder.

The entire project had commenced after 01.07.17. Since the project was commenced after 01.07.17, the procurements would take place after 01.07.17 which would be subject to tax under GST laws and the availment of transition benefit under section 140(3) & (6) would not arise. That even the question of profiteering in these cases would not arise which was also confirmed by the NAA vide his ruling Arjun Kumar Parwani & Others vs. Signature Builders Private Limited.

x. While it was clear that the rigors of Section 171 were not attracted in this case since the very first allotment based on a lottery was made after 01.07.2017. However to further buttress his contentions, the Respondent stated that this issue had been clearly addressed in the NAA case law of matter of **Ramesh Kumar Yadav Vs M/s Vatika Ltd.**

xi. Even though the rigour of the Anti-profiteering law was not attracted, however since the Respondent was a Government Authority, it had passed on the entire credit to the consumers as had been demonstrated in the excel sheet of homebuyers. With regards to the issue of ITC benefit passed on it was pointed out that Rs 467.80 lacs in respect of "Swati Apartments" and Rs 242.01 lacs in

respect of "Kritika Apartments" totalling Rs 709.81 lacs had been passed on to the homebuyers on a proportionate basis.

- h) Vide the aforementioned letters & emails, the Respondent and the CGST, Commissionerate, Lucknow submitted the following documents/ information:-
- i. Brief Profile of the Respondent.
 - ii. Copies of GSTR-1 Returns for the period July, 2017 to September, 2020.
 - iii. Copies of GSTR-3B Returns for the period July, 2017 to September, 2020.
 - iv. Copies of GSTR-9 Returns s for the period FY 2017-18 & 2018-19.
 - v. Electronic Credit Ledger for the period July, 2017 to August, 2020.
 - vi. Copies of Service Tax for the period of April, 2016 to March, 2017 & VAT returns for the period April, 2016 to June, 2016, September, 2016 to June, 2017.
 - vii. Chart of applicable tax rate before and after GST Regime.
 - viii. Balance Sheet for the FY 2016-17 to FY 2019-20.
 - ix. Copy of the Communication/Demand letter to the Applicant No. 1.
 - x. Copy of Annual Status submitted to RERA.
 - xi. Chart of Government order regarding transfer of land of C.G. City Yojna.
 - xii. Details of Flats Allotted in "Swati & Kritika Apartment".
 - xiii. Status of sale of Flats of "Swati & Kritika Apartment".
 - xiv. List of home buyers in the project "Kritika & Swati Apartment".
- i) Vide e-mail dated 23.09.2021, the Applicant No.1 was afforded an opportunity to inspect the non-confidential documents/reply furnished by the Respondent on 27.09.2021 to 28.09.2021. However, the Applicant No.1 vide e-mail dated 23.09.2021 informed that he authorised his brother Shri Lokendra Kumar to attend and inspect the documents. Shri Lokendra Kumar had inspected the documents submitted by the Respondent on 27.09.2021, on behalf of the Applicant No. 1.

j) Vide the Notice dated 05.11.2020, the Respondent was informed that if any information/documents was provided on confidential basis, in terms of Rule 130 of the Rules, a non-confidential summary of such information/documents was required to be furnished. However, the Respondent did not submit any such information or summary.

k) The main issues for determination are:-

- i. Whether there was benefit of reduction in rate of tax or ITC on the supply of Construction Service by the Respondent after implementation of GST w.e.f. 01.07.2017 and if so,
- ii. Whether the Respondent passed on such benefit to the recipients by way of commensurate reduction in price, in terms of Section 171 of the CGST Act, 2017.

l) From the verification of documents submitted by the Respondent and his submission, it appeared that there was no sale of the flats in the said project in the pre-GST regime. Further, the first allotment made by the Respondent in this project was 04.07.2017 i.e. in post-GST period. On scrutiny of the documents submitted by the Respondent it was observed that the Respondent had invited applications for the allotment of flat in his new housing scheme 2016 named as "LDA Swati Apartment". Besides, this scheme, the Respondent had also offering flats in "Kritika apartment" and both housing schemes was located at Sultanpur road, Lucknow. In the scheme, flats was available in Stilt+Ground+3 floor building and total five types of flats were available for registration including LIG-Type-I, LIG-Type-II, LIG-Type-III, LIG-Type-IV and LIG-Type-V, for registration in the scheme from 15.07.2016 to 16.08.2016 which was offered by the Respondent. The Respondent had finally announced the lottery draw on 15.06.2017 for the project "Kritika & Swati Apartment". From the above discussion, it was clear that the base price of the flats was already fixed before the introduction of GST at the time of advertisement only and hence the benefit of additional ITC accrued to the Respondent post-GST could not have been factored in base prices determined prior to introduction of GST. Further, the finalization of names of

allottee's were also done prior to introduction of GST. As the result of the lottery drawn for the project "Kritika & Swati Apartment" i.e. 15.06.2017 prior to the introduction of GST.

- m) On scrutiny of Service Tax Returns submitted by the Respondent, it was observed that turnover/Gross taxable amount and Cenvat credit of Construction Service was NIL prior to introduction of GST. However, the Respondent had submitted vide e-mail dated 27.09.2021 that he had received Rs. 898.28 lacs ITC for the project "Kritika & Swati Apartment" after introduction of GST. As the Respondent was not taking Credit of Cenvat in earlier regime and the ITC benefit availed by him in GST regime which was considered by the Respondent as accrual of addition of ITC benefit. The Respondent had taken cognizance of Anti-Profiteering provision of Section 171 of the CGST Act, 2017 and *suo-moto* calculated the amount to be passed on as a benefit of addition of ITC to all homebuyers.
- n) From the submissions of Respondent, it had observed that he had calculated and passed on benefit of ITC amounting to Rs. 7,09,81,848.82/- (Rs. 4,67,80,041.64 for Swati Apartment and Rs. 2,42,01,807.18 for Kritika Apartment) upto 30.09.2020. The Respondent had adjusted the final demand of the all homebuyers after giving the rebate of ITC and charged the GST @12% on the balance amount. However, it was calculated that Respondent had passed on the lesser amount as compared to amount of ITC accrued to him as mentioned in his submissions. The details of additional benefit to be passed on as given in table-'A' below: -

Table-'A'

Sr. No	Particulars	No. of buyers	Area	Benefit passed on by the Respondent
1.	No. of buyers for Swati Apartment	A	421	25242.90
2.	No. of buyers for Kritika Apartment	B	298	13055.74
3.	Total benefit passed by the Respondent	C		7,09,81,848.82/-
4.	Total Area of the Project	D		46062.77
5.	Total ITC received by the Respondent after introduction of GST	E		8,98,82,000/-
6.	Benefit of ITC to be passed by the Respondent	$F = \{(A+B) * (E) / D\}$		7,47,31,900.84/-
7.	Further Benefit to be passed by the Respondent	G=		37,50,052.03/-

- o) From the above table it was observed that the Respondent required to pass on the additional benefit of ITC of Rs. 37,50,052.03/- plus 12% GST in respect of the proportionate units sold by the Respondent up to 30.09.2020. Further, in respect of unsold units the Respondent was required to pass on the additional benefit of ITC accordingly.
- p) On the basis of the details of outward supply of Construction Services submitted by the Respondent, it was also observed that the service was supplied in the State of Uttar Pradesh only.
- q) From the above discussion, it appeared that the benefit of additional ITC accrued to the Respondent post-GST and the same was required to be passed on by the Respondent to his recipients. Section 171 of the CGST Act, 2017 had been contravened by the Respondent, in as much as the additional benefit of ITC of Rs. 37,50,052.03/- plus 12% GST by the Respondent during the period 01.07.2017 to 30.09.2020. It was concluded that the Respondent was required to pass on the additional benefit of ITC of Rs. 37,50,052.03/- plus 12% GST in respect of the proportionate units sold by the Respondent upto 30.09.2020. As observed earlier, the Respondent had supplied Construction Services in the State of Uttar Pradesh only.
3. The above Report of the DGAP was carefully considered by this Authority and a Notice dated 25.02.2022 was issued to the Respondent to explain why the Report dated 06.10.2021 furnished by the DGAP should not be accepted and his liability for profiteering in violation of the provisions of Section 171 should not be fixed. The Respondent was directed to file written submissions, which had been filed on 15.03.2022, 07.04.2022 & 30.05.2022 wherein the Respondent had, *inter-alia* submitted that:-
- a) Para 15 of the said Report categorically stated that the "*the Respondent has taken cognizance of Anti profiteering provision of Section 171 of the CGST Act, 2017 and suo moto calculated the amount to be passed on as a benefit of addition of ITC to all homebuyers*". It is evident that the Applicant No. 1's intention was to arm twist and cast aspersions upon the functioning of a Government Authority by wilfully suppressing facts. The Applicant No. 1 was a beneficiary of the ITC benefit which was passed on to him in respect of his flat in the said scheme and

after obtaining the benefit the Applicant No. 1 had chosen to be maliciously silent about the benefits he had enjoyed. Further, the Respondent re-iterated his written submissions made to the DGAP during investigation of the matter as stated in para 2 g (i to xi) *supra*.

- b) The Respondent vide his submissions dated 07.04.2022 stated that the DGAP had in his report admitted to the fact that the Respondent had passed on the benefit on the benefit of ITC amounting to Rs. 7,09,81,848.42/- and therefore the only issue pending before this Authority is the issue of quantification of this benefit. That as per the report of DGAP the Respondent should have passed on credit of Rs. 7,47,31,900.84/- and therefore there is a shortfall of Rs. 37,50,052.03/-. That even on this point it was pointed out that the report of the DGAP was based on the benefit of hindsight, it was submitted that it was a large construction contract and a 5% variation was permissible in these contracts and hence due to the uncertainty this 5% cushion was taken while passing on ITC benefit since this might or might not have been incurred and there was no method by which the 5% could be anticipated at the time of costing to pass on the benefit of ITC. It was submitted that since the final costing of the project and this 5% variation had been incurred, the Respondent was in the process of passing on this benefit to the end users. The Respondent submitted that this is not in the nature of profiteering but only in the nature of practicality that a benefit could only be passed on once the certainty of these expenses could be reliably assessed.
4. The Applicant No. 1 vide his email dated 08.04.2022 has submitted that the Respondent allotted the flat to him with value of Rs. 16 lacs as per the allotment letter and thereafter, the cost of the flat escalated to Rs. 23 lacs without taking any concurrence from him.
5. Copy of the above submissions dated 15.03.2022 & 07.04.2022 filed by the Respondent were supplied to the DGAP for supplementary Report under Rule 133(2A) of the CGST Rules, 2017. The DGAP has filed his clarification dated 20.04.2022 & 28.06.2022 wherein he has *inter-alia* submitted the following clarification:-

- a) For the contention raised by the Respondent regarding the amount of profiteering, the DGAP clarified that the Respondent had admitted the amount of profiteering in in the DGAP Report dated 06.10.2021. It was mentioned in the Report that the Respondent had already passed additional benefit of ITC Rs. 7,09,81,848/- and remaining Rs. 37,50,052 would be passed in due course.
- b) As per Report of the DGAP dated 06.10.2021, total profiteering was Rs. 7,47,31,900.84/- as mentioned column no. 6 of Table- 'A' of para 16 of the DGAP's report. Considering benefit already passed on Rs. 7,09,81,848.82/- further remaining benefit calculated which was Rs. 37,50,052.03/-.
- c) For the contentions raised by the Respondent regarding the applicability of Section 171 of the CGST Act, 2017, the DGAP clarified that the Respondent's contention was not correct and Para 14 of the Report of DGAP dated 06.10.2021 might be referred in this regard. Allotments were done through lottery/ draw in pre GST period somewhere in 2016, however only letters were issued after 01.07.2017. Rates were fixed in pre GST period and not considering additional benefit of ITC.
- d) For the contentions raised by the Respondent regarding passing of the ITC benefit, the DGAP clarified that the Respondent himself admitted and passed on additional benefit of ITC of *suo moto* calculations and also admitted remaining benefit of Rs. 37,50,052/-. Therefore, above objections of the Respondent was not sustainable.
- e) From the verification of documents submitted by the Respondent and his submission, it appeared that the first allotment made by the Respondent in this project was 04.07.2017 i.e. in post-GST period. On scrutiny of the documents submitted by the Respondent it was observed that the Respondent had invited applications for the allotment of flat in its new housing scheme 2016 named as 'LDA Swati Apartment'. Besides, this scheme, the Respondent had also offered flats in 'Kritika apartment' and both of these housing schemes was located at Sultanpur road, Lucknow. In the scheme, flats were available in Stilt+Ground+3 floor building and total five types of flats were available for registration including LIG-Type-I, LIG-Type-II, LIG-Type-III, LIG-Type-IV and LIG-Type-V, for

registration in the scheme from 15.07.2016 to 16.08.2016 which was offered by the Respondent. The Respondent had finally announced that the lottery draw was completed on 15.06.2017 for the project "Kritika & Swati Apartment". From the above discussion it was clear that the base price of the flats was already fixed before the introduction of GST at the time of advertisement only and hence the benefit of additional ITC accrued to the Respondent in post-GST period could not have been factored in base prices determined prior to introduction of GST. Further, the finalization of names of allottee's were also done prior to introduction of GST. As the result of the lottery drawn for the project "Kritika & Swati Apartment" in on 15.06.2017, prior to the introduction of GST and on the prices set before the introduction of GST. It was therefore, evident that the benefit of ITC was not factored in deciding the prices. Accordingly, the profiteering in the said project had been calculated.

6. The Respondent had filed his rejoinders/submissions dated 30.05.2022 & 27.07.2022 vide which he had reiterated his earlier submissions and had *inter-alia* stated:-

a. The allotment letter appended by the complainant in his mail states that this price was "Estimated Cost" and the said cost was also cited as Rs. 16,60,000/- and not Rs. 16,00,000/-. It was pointed out that Rs. 16,60,000/- was not supposed to be the actual cost and was only in the nature of estimated cost. The Respondent was not for profit organization and worked with the intent of passing on flats to the allottees at cost price. The estimated cost was fixed based on preliminary costing and the final cost could only be determined at the time of final costing. Thus it was the own case of the Applicant No. 1 that Rs. 16,60,000/- was not in the nature of final cost.

The original estimated cost was Rs. 16,60,000/- as was evident from the allotment letter, however Rs. 23,00,000/- had several other components, including interest since the Applicant No. 1 paid for the unit in instalments, parking charges, maintenance charges, corpus fund contribution, GST and amongst others and therefore the two figures was incomparable. The actual increment in cost was only Rs. 1,03,000/- and the Applicant No.

1 had been passed on ITC credit of Rs. 1,07,220/- and the balance would be passed on at the time of final costing.

b. With respect to the clarifications submitted by the DGAP, it was submitted that the DGAP had responded with no comments on most issues and hence the only substantive issues on which the DGAP had raised an objection to was the applicability of Anti-Profitteering provisions and rules and the issue of computation of ITC which should have been passed on to the allottees and his defence on both these issues was enumerated hereunder-

i. Applicability of Anti Profitteering Rules- It was the own case of the Applicant No. 1 that the allotment letter was issued to him 02.11.2017 which he had submitted as evidence and it was clear from record that as on that date GST laws were already in force and even a perusal of the allotment letter clearly show that GST was charged on all instalments and therefore the question of Anti-Profitteering to the specific complaint of the Applicant No. 1 was bogus and patently not maintainable. It was his own case that allotment was not done in the pre-GST era and therefore he could not claim to seek umbrage under the Anti-Profitteering Rules.

That furthermore no allotment was made in the pre-GST era and the same had been accepted by the DGAP, however the most crucial point in the instant proceedings was that the allotment letter was issued to the allottee only on 02.11.2017 clearly indicating that the project was not an on-going project as on 30.06.2017 and therefore the provisions of Anti-Profitteering did not apply. The Respondent had already submitted citations in this regard which had not been distinguished by either the Applicant No. 1 or the DGAP.

The DGAP had averred that "*rates were fixed in pre-GST period*", this averment was untrue since only an estimated cost was fixed at the time of allotment and the actual cost was not determined at the time of such

advertisement and therefore estimated cost by his very nomenclature means that this cost was not cast in stone.

- ii. The DGAP had clearly stated in his reply that Rs. 7,09,81,848.82/- had been passed on by the Respondent “*suo moto*” to the allottee. That this ITC which had been passed was because the Respondent felt that any benefit in the form of ITC should have been passed on to the end customers but not because he was mandated by law to do so. That it was a practice that the Respondent follows till date in case of projects which were launched years after GST laws came into force as a measure of furthering the spirit behind the legislation and ensuring that the property was passed on to the allottees at actual cost. It was further pointed that with respect to the balance amount of Rs. 37,50,052/- which was the own *suo moto* figure submitted by the Respondent and it was averred that this amount should also be passed on to the allottees when the final costing was being done for the flats. It was reiterated that we was viewing this amount with the benefit of hindsight and this amount could not had been precisely determined at the beginning of the project. That due to cost escalations a greater amount of ITC had accrued to the Respondent and the process of passing of the balance amount would be done at the time of final costing. That this could not be used against the Respondent since he was already in the process of passing on this benefit to allottees at the time of final costing which obviously the Applicant No. 1 was unaware of since he had not volunteered to get his registry done till date.
- c. The reply of the complainant was omnibus and in fact every iota of his statement was false and malicious. The fact that that Rs. 16,60,000/- was the basic cost was mentioned in the offer document itself and the final cost of the flat was Rs. 17,83,000/- and against which a rebate corresponding to the ITC of Rs. 1,07,220/- had already been passed and balance amount of 5% would also be passed on at the time of final costing.

- d. The Respondent maintained that only estimated cost of the projected was calculated in the pre- GST era and the allotment was made only after the advent of GST therefore the Anti-Profitteering law did not apply to the Respondent. Moreover the estimated ITC was passed even before the ITC was actually claimed by the Respondent and since now the project had been finalized we had the benefit of actual ITC known and therefore even the remaining 5% was being passed on to the allottee at the time of final costing. Therefore even though the law did not apply to this project the credit had still being passed on since the Respondent was a government entity and any benefit being accrued was being passed on to honor the spirit of the GST legislation.
7. The hearing in the matter was held on 03.08.2022 through Video Conferencing. It was attended by Sh. Ajay Kumar Saini, Applicant No. 1 in person and Sh. Ajitesh Johari, Chartered Accountant for the Respondent. The Applicant No. 1 and the Respondent were heard. During the personal hearing, the Respondent has re-iterated his arguments based on his written submissions dated 15.03.2022, 07.04.2022, 30.05.2022 and 17.07.2022. The Applicant No. 1 has also re-iterated his complaint and his submissions made vide his email dated 08.04.2022.
8. The Authority has carefully considered the Reports filed by the DGAP, all the submissions and the documents placed on record, and the contentions raised by the Respondent vide his written submissions. It is clear from the plain reading of Section 171(1) 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 period; hence the only issue to be examined is whether there was any net benefit of ITC with the introduction of GST. It is observed from the DGAP's report that there was no sale of flats in pre-GST regime. However, the Authority finds that Respondent had invited applications for the allotment of flats in his new housing scheme 2016 named as "*LDA Swati Apartment*". Besides, this scheme, the Respondent was also offering flats in "*Kritika Apartment*". In the scheme, flats were available for registration from 15.07.2016 to 16.08.2016 which was offered by the Respondent. The

Respondent had finally announced the lottery draw on 15.06.2017 for the project “*Kritika & Swati Apartment*”. From the above discussion, it was clear that the base price of the flats was already fixed before the introduction of GST at the time of advertisement only and hence the benefit of additional ITC accrued to the Respondent post-GST could not have been factored in base prices determined prior to introduction of GST. The Respondent has not produced any evidence or document to prove that the prospective buyers were aware of the fact that the benefit of the ITC arising out of implementation of GST is already factored in the price or cost of the flat, bookings of which were made during the pre-GST period. The first allotment made by the Respondent in the said project was on 04.07.2017. Though the flats were available for registration from 15.07.2016 to 16.08.2016. It has been claimed by the Respondent that they did not have the actual cost of the flat before the GST implementation and that the actual cost of the flats were available only after the GST implementation and that the allotment letters to the buyers were issued subsequent to the GST implementation, as such, they are not covered within the ambit of provisions of section 171 of the CGST, Act 2017. Further, it is observed from the report of the DGAP that the Respondent had received Rs. 898.28 lacs of ITC for the project “*Kritika & Swati Apartment*” after introduction of GST. The Respondent, on his own, has taken cognizance of Anti-Profitteering provision of Section 171 of the CGST Act, 2017 and *suo moto* calculated the amount to be passed on as benefit of addition of ITC to all homebuyers.

The Respondent have claimed to calculate and pass on benefit of ITC amounting to Rs. 7,09,81,848.82/- (Rs. 4,67,80,041.64/- for Swati Apartment and Rs. 2,42,01,807.18/- for Kritika Apartment) upto 30.09.2020 by adjusting the final demand of the home buyers after giving the rebate of ITC and charged the GST @12% on the balance amount. Therefore, the Respondent was required to pass on additional benefit of ITC of Rs. 37,50,052.03/- (Rs. 7,47,31,900.84 - Rs. 7,09,81,848.82) plus 12 % GST for the period 01.07.2017 to 30.09.2020.

9. However, the Authority finds that the Annexures attached to the DGAP's report does not contain any details/homebuyers wise list to whom the remaining profiteering amount of Rs. 37,50,052.03/- plus 12% GST is to be passed on.
10. Since the Respondent has profited in the instant project, there is every likelihood that he has profited in other projects also under GST No. 09AAALL0016F1ZK. The Authority has reason to believe that the Respondent may have resorted to profiteering in the other projects also and hence, directs the DGAP under Rule 133(5) to investigate all the other projects of the Respondent under the same GST registration which have not yet been investigated from the perspective of Section 171 of the CGST Act, 2017 and submit the complete investigation report for all the Projects under this single GST Registration.
11. Therefore, without going into the merits and the other submissions made by the Respondent and the Applicant No. 1 at this stage, the Authority finds that this case needs to be investigated by the DGAP based on the above findings in the para 9 and 10 supra of this Authority. Thus the Authority directs the DGAP to investigate the matter as per the provisions of Rule 133(4) and Rule 133(5) of the CGST Rules 2017 for the period 01.07.2017 to 30.09.2020 or till the date of Completion Certificate of the Project.
12. Further, the Hon'ble High Court of Delhi, vide its Order dated 10.02.2020 in the case of Nestle India Ltd. & Anr. Vs. Union of India has held that:-

"We also observe that prima facie, it appears to us that the limitation of period of six months provided in Rule 133 of the CGST Rules, 2017 within which the authority should make its order from the date of receipt of the report of the Directorate General of Anti Profiteering, appears to be directory in as much as no consequence of non-adherence of the said period of six months is prescribed either in the CGST Act or the rules framed thereunder."


13. A copy of this order be sent to both the Applicant No. 1, the Respondent, Commissioners CGST/SGST Lucknow, the Principal Secretary (Town and Country Planning) free of cost for necessary action.

S/d
(Amand Shah)
Technical Member &
Chairman



S/d
(Pramod Kumar Singh)
Technical Member

S/d
(Hitesh Shah)
Technical Member


(Rajarshi Kumar)
NAA, Secretary

File No. 22011/NAA/ Lucknow Development/63/2021

Date:-30.09.2022

Copy To:-

1. M/s Lucknow Development Authority, Pradhikaran Bhawan, Viping Khand, Gomti Nagar, Lucknow- 226010.
2. Sh. Ajay Saini, 137, Sakhambari Apartment Madhurda Kolkata, West Bangal- 700107.
3. Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
4. Guard File.