

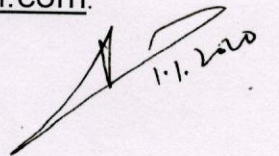
BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY
UNDER

THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No. 01/2020
Date of Institution 05.07.2019
Date of Order 01.01.2020

In the matter of:

1. Sh. Gautam Semwal, email id- gautam.semwal@gmail.com
2. M/s Basera Flat Owners' Association, 400/5, Patel Nagar, Civil Lines, Gurugram Haryana-122022.
3. Sh. Ankur Khetan, Rudra Colony, Tosham Road, Bhiwani-127021.
4. Sh. Ashish Kumar F-528, Sector-9, New Vijay Nagar, Ghaziabad, Uttar Pardesh-201010.
5. Sh. Shyam Lal Sharma, 01, Laurus-B, Natika City, Sector-49, Sohna Road, Gurgaon, Haryana-122002.
6. Ms. Diksha Aggarwal, email-id-dikshaaggarwal1984@gmail.com
7. Ms. Usha Parmar, H. No. 100, Ground Floor, Sector-54, Sun City, Gurgaon, Haryana-122001.
8. Sh. Shiv Narayan Yadav, email id- skyadavs@gmail.com.


1.1.2020

9. Director General of Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Revital Realty Pvt. Ltd., Supertech House, B-28-29, Sector-58, Noida (UP)-201307.

Respondent

Quorum:-

1. Sh. B. N. Sharma, Chairman
2. Sh. J. C. Chauhan, Technical Member
3. Sh. Amand Shah, Technical Member

Present:-

1. None for the Applicants No 1 to 8.
2. None for the Applicant No. 9.
3. Sh. D. K. Gupta, Group CFO & Sh. Sunil Kumar Verma, Assistant Manager for the Respondent.

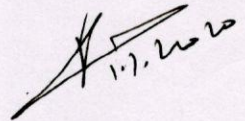
ORDER

1. The present Report dated 02.07.2019 has been received from the Applicant No. 9 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the

Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the present case are that the Applicants No. 1 to 8 had filed applications before the Haryana State Screening Committee stating that the Respondent had resorted to profiteering in respect of supply of construction services related to the purchase of the apartments in his project "Supertech Basera" and had also alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) by way of commensurate reduction in the prices of the apartments purchased by them, on implementation of the GST w.e.f. 01.07.2017. The said applications were examined by the Haryana State Screening Committee in its meeting and upon being prima facie satisfied that the Respondent had contravened the provision of Section 171 (1) of the CGST Act, 2017, had forwarded the same with its recommendation to the Standing Committee on Anti-Profiteering for further action in terms of Rule 128 (2) of the CGST Rules, 2017. The said applications were examined by the Standing Committee on Anti-Profiteering in its meeting held on 27.12.2018 and it had referred the applications to the DGAP for investigation under Rule 129 (1) of the CGST Rules, 2017 to determine whether the benefits of reduction in the rate of tax or ITC had been passed on by the Respondent to his recipients.

2. The Standing Committee on Anti-Profiteering had examined two other similar references against the Respondent in its meetings

- held on 11.03.2019 & 11.04.2019 and it had again referred these applications to the DGAP for conducting detailed investigation.
3. Thereafter, the DGAP on receipt of the reference from the Standing Committee on Anti Profiteering, had issued a notice to the Respondent on 15.01.2019 under Rule 129 (3) of the above Rules, calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the Applicant No 1 to 8 by way of commensurate reduction in prices 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 the supporting documents. The Respondent was also given an opportunity to inspect the non-confidential evidences/information furnished by the above Applicants No. 1 to 8 during the period from 21.01.2019 to 23.01.2019. However, the Respondent did not avail of the said opportunity. The Applicants No. 1 to 8 were also given an opportunity to inspect the non-confidential evidences/reply furnished by the Respondent on 21.06.2019, 24.06.2019 and 25.06.2019. However, they also did not avail of the said opportunity.
4. The DGAP in his above Report has stated that the period covered by the current investigation was from 01.07.2017 to 31.12.2018. Also, the time limit to complete the investigation was extended upto 06.07.2019 by this Authority vide its Order dated 19.03.2019 in terms of Rule 129 (6) of the CGST Rules, 2017.



5. The DGAP has also stated that in response to the notice dated 15.01.2019, the Respondent has submitted replies vide letters dated 04.02.2019, 15.02.2019, 28.02.2019, 05.03.2019, 14.06.2019 and 18.06.2019 and has stated that:-

- a. He has never denied the benefit of excess ITC to his customers and the customers were duly informed vide e-mail dated 24.11.2018 that they were required to withhold payment upto Rs. 50,000/- to account for any benefit that might accrue to him.
- b. He had claimed balance of credit of Service Tax of Rs. 3,41,41,867/- in TRAN-1 statement, duly submitted on the GST Portal. However, Service Tax Credit was not excess credit, rather it was to be adjusted towards his output GST liability on payment receivable from his customers as the project had not been granted Occupancy Certificate. He had no balance of credit of VAT as on 01.07.2017
- c. The benefit of ITC claimed in TRAN-1 statement had not been accepted by the GST authorities due to some technical glitch for which he had been running from pillar to post and had filed a Writ Petition before the Hon'ble Punjab & Haryana High Court.

6. The DGAP in his Report has further stated that vide the aforesaid letters, the Respondent had submitted the following documents/information:-

- a. As the GSTR-1 & GSTR-3B Returns were not filed due to technical glitch, he had submitted a summary of the sales details for the period of July, 2017 to January, 2019.
 - b. Service Tax and VAT Returns for the period from April, 2016 to June, 2017.
 - c. Allotment letters issued to the Applicants.
 - d. CENVAT Credit Register for the F.Y. 2016-17, 2017-18 and from April, 2018 to January, 2019
 - e. Applicable tax rates, pre-GST and post-GST.
 - f. Balance Sheets for the F.Y. 2016-17 and 2017-18.
 - g. Copy of RERA Report.
 - h. List of all the home buyers of the project "Supertech Basera".
7. The DGAP in his report has further stated that various replies of the Respondent and the documents/evidences on record have been carefully examined by him and the main issues to be examined were (a) whether there was benefit of reduction in rate of tax or ITC on the supply of construction service by the Respondent after implementation of the GST w.e.f. 01.07.2017 and if so, (b) Whether the Respondent has passed on such benefit to the recipients by way of commensurate reduction in prices, in terms of Section 171 (1) of the CGST Act, 2017.
8. The DGAP in his report has mentioned that the Respondent, vide letter dated 05.03.2018, submitted the project report of the project

“Supertech Basera” wherein payment schedule for the purchase of flats at the basic sale price of Rs. 4,000/- per sq. ft. for carpet area and Rs. 500/- per sq. ft. for Balcony area was enclosed. The details of payment schedule have been furnished by the DGAP in Table-‘A’ below:-

Table-‘A’

Time of Payment	% of the total price payable
At the time of submission of the Application for allotment	5% of the total price
At the time of Allotment letter	20% of the total price
Within 06 months of the date of Allotment letter	12.5% of the total price
Within 12 months of the date of Allotment letter	12.5% of the total price
Within 18 months of the date of Allotment letter	12.5% of the total price
Within 24 months of the date of Allotment letter	12.5% of the total price
Within 30 months of the date of Allotment letter	12.5% of the total price
Within 36 months of the date of Allotment letter	12.5% of the total price

9. The DGAP in his report has also submitted that another relevant point in this regard was para 5 of the Schedule-III of the CGST Act, 2017 (Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services) which reads as “Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building” read with clause (b) of Paragraph 5 of Schedule II of the Central Goods and Services Tax Act, 2017 which reads as “(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of

completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier". Thus, the DGAP has claimed that the ITC pertaining to the residential units which were under construction but not sold was provisional ITC which might be required to be reversed by the Respondent, if such units remained unsold at the time of issue of the completion certificate, in terms of Section 17 (2) & Section 17 (3) of the Central Goods and Services Tax Act, 2017, which read as under:-

Section 17 (2):- "Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

Section 17 (3):- "The value of exempt supply under sub-section (2) shall be such as may be prescribed and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building."

Therefore, the ITC pertaining to the unsold units may not fall within the ambit of this investigation and the Respondent was

required to recalibrate the selling price of such units to be sold to the prospective buyers by considering the proportionate benefit of additional ITC available to him post-GST.

10. The DGAP in his report has further submitted that the Respondent had got permission to start construction activity for the project on 03.10.2017, i.e., post-GST implementation and no ITC was available to the Respondent in the pre-GST era. Further, as the service of construction of affordable housing, provided by the Respondent, was exempt from Service Tax vide Notification No. 25/2012-ST dated 20.06.2012, as amended by Notification No. 9/2016-ST dated 01.03.2016, the Respondent was not eligible to avail CENVAT credit of Central Excise Duty paid on the inputs and Service Tax paid on the input services in the pre-GST era. Besides, the Respondent neither had any output VAT liability nor could he avail ITC of VAT in the pre-GST period. Post-GST, the Respondent was eligible to avail ITC of GST paid on the inputs and the input services. The details of the ITC availed by the Respondent, his turnover from the project "Supertech Basera" and the ratio of ITC to turnover during the pre-GST period (April, 2016 to June, 2017) and post-GST period (July, 2017 to December, 2018), has been furnished by the DGAP in Table-B below:-

Table-'B'

(Amount in Rs.)

S. No.	Particulars	(Pre-GST) 01.04.2016 to 30.06.2017 (Flats) & (Shops)	(Post-GST) 01.07.2017 to 24.01.2018 (Flats)&(Shops)	(Post-GST) 25.01.2018 to 31.12.2018 (Flats)& (Shops)	Total (Post-GST) 01.07.2017 to 31.12.2018

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1	CENVAT of Service Tax Paid on Input Services (A)	-	-	-	
2	Input Tax Credit of VAT Paid on Purchase of Inputs (B)	-	-	-	-
3	Total CENVAT/Input Tax Credit Available (C)= (A+B)	-	-	-	-
4	Input Tax Credit of GST Availed (D)	-	1,36,75,573	2,12,71,482	3,49,47,055
5	Total Turnover from residential flats (E)	1,13,17,76,434	39,06,83,030	73,45,28,567	1,12,52,11,597
6	Total Turnover from commercial shops (F)	3,86,02,004	2,58,385	88,99,148	91,57,533
7	Total Turnover from residential flats and commercial shops (G)= (E + F)	1,17,03,78,438	39,09,41,415	74,34,27,715	1,13,43,69,130
8	Total Saleable Area (H)	11,10,400	--	--	11,10,400
9	Area sold relevant to turnover (I)	10,01,912 (Residential) + 9,008 (Commercial)	9,61,566 (Residential) + 4,311 (Commercial)		9,65,877
10	ITC relevant to Area Sold (J) = C or D*I/H	-	-	-	3,03,98,556
11	Ratio of CENVAT/ Input Tax Credit of GST to Turnover (K) = J/G*100	0.00%			2.68%

11. The DGAP has also claimed that as per the Table-B, the ITC as a percentage of the total turnover (as per the home buyer's list) that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 'NIL' and during the post-GST period (July-2017 to December, 2018), it was 2.68%. This clearly confirmed that post-GST, the Respondent had been benefited from additional ITC to the tune of 2.68% (2.68% (-) 0%) of the turnover.

The DGAP has further claimed that the Central Government, on the recommendation of the GST Council, has levied 18% GST (effective rate was 12% in view of 1/3rd abatement for land value) on construction service, vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. The effective GST rate on construction service in respect of affordable and low-cost housing was further

reduced from 12% to 8%, vide Notification No. 1/2018-Central Tax (Rate) dated 25.01.2018. In view of the change in the GST rate after 01.07.2017, the issue of profiteering had been examined by the DGAP in two parts, i.e., by comparing the ITC and turnover in the pre-GST period when the tax liability of the Respondent was 'NIL' with those in (1) the post-GST period from July, 2017 to 24.01.2018 when the effective GST rate was 12% on both residential flats and commercial shops and (2) in the GST period from 25.01.2018 to 31.12.2018 when the effective GST rate was 8% on the residential flats and 12% on the commercial shops. Therefore, on the basis of Table-B, the comparative ratio of ITC availed/available to the turnover of the Respondent during the pre-GST period and post-GST period and the recalibrated base price and the apparent excess realization (profiteering) in the post-GST period has been tabulated by the DGAP in Table-'C' below:-

Table-C

(Amount in Rs.)

S. No.	Particulars	A	Post- GST Period			Total
			01.07.2017 to 24.01.2018 (Flats & Shops)	25.01.2018 to 31.12.2018 (Shops)	25.01.2018 to 31.12.2018 (Flats)	
1	Period	A				
2	Output GST rate	B	12%	12%	8%	
3	Ratio of Input Tax Credit of GST to Turnover	C	2.68%	2.68%	2.68%	2.68%
4	Increase in Input Tax Credit of GST availed post-GST	D	2.68%	2.68%	2.68%	2.68%
5	Analysis of Increase in input tax credit:					
6	Base Price raised during July, 2017 to December, 2018	E	39,09,41,415	88,99,148	73,45,28,567	1,13,43,69,130
7	GST @12% or 8%	F= E*B	4,69,12,970	10,67,898	5,87,62,285	10,67,43,153
8	Total Demand	G=E+F	43,78,54,385	99,67,046	79,32,90,852	1,24,11,12,283

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9	Recalibrated Base Price	$H = E \times (1-D)$ or 97.32% of E	38,04,64,185	86,60,651	71,48,43,201	1,10,39,68,037
10	GST @12% or 8%	$I = H \times B$	4,56,55,702	10,39,278	5,71,87,456	10,38,82,436
11	Commensurate Demand	$J = H+I$	42,61,19,887	96,99,929	77,20,30,657	1,20,78,50,473
12	Excess Demand or Profiteered Amount	$K = G-J$	1,17,34,498	2,67,117	2,12,60,195	3,32,61,809

12. The DGAP in his report has claimed that as per Table-'C', the benefit of ITC of 2.68% of the turnover should have resulted in commensurate reduction in the base prices. Hence, provisions of Section 171 (1) of the CGST Act, 2017 had been contravened, as the Respondent had not passed on the benefit of the additional ITC to the recipients by way of commensurate reduction in prices.

13. The DGAP in his report has also contended that the next issue to be examined was the amount of profiteering made in this case. On the basis of aforesaid CENVAT/ITC availability in pre-GST and post-GST periods and the amount collected by the Respondent from the Applicant No. 1 to 8 and other buyers of the flats and commercial shops during the period from 01.07.2017 to 24.01.2018, the amount of benefit of ITC that needed to be passed on by the Respondent to the recipients or in other words, the profiteered amount came to Rs. 1,17,34,498/- for residential flats and commercial shops, which included 12% GST on the base profiteered amount of Rs. 1,04,77,230/-. Further, the amount of benefit of ITC that needed to be passed on by the Respondent to the recipients or in other words, the profiteered amount during the period from 25.01.2018 to 31.12.2018, came to Rs. 2,12,60,195/- for residential flats which included 8% GST on the base

profiteered amount of Rs. 1,96,85,366/-. The profiteered amount during the period from 25.01.2018 to 31.12.2018, came to Rs. 2,67,117/- for commercial shops which included 12% GST on the base profiteered amount of Rs. 2,38,497/-. Therefore, the total profiteered amount during the period from 01.07.2017 to 31.12.2018 came to Rs. 3,32,61,809/- which included GST (@ 12% or 8%) on the base profiteered amount of Rs. 3,04,01,093/-.

14. The DGAP in his report has also argued that the above computation of profiteering was with respect to 1782 home buyers and 11 commercial shop buyers, whereas the Respondent had booked 1924 residential units and 34 commercial shops till 31.12.2018. Out of the 1924 residential units and 34 commercial shops booked till 31.12.2018, in respect of 142 flats and 23 shops, though the booking amount was received in the pre-GST period, no consideration had been received during the post-GST period of 01.07.2017 to 31.12.2018. Therefore, if the ITC in respect of these 142 residential units and 23 commercial shops was considered to calculate the profiteering in respect of 1793 units (1782 residential flats + 11 commercial shops) where payments had been received after GST, the ITC as a percentage of turnover may not be correct. Therefore, the benefit of ITC in respect of these 142 flats and 23 commercial shops should be calculated when the consideration thereof would be received in the post-GST period by taking into account the proportionate ITC in respect of such units.

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15. The DGAP has further argued that on the basis of outward supplies of the construction service submitted by the Respondent, it was observed that the services had been supplied in the state of Haryana only.
16. The DGAP in his Report has also stated that the benefit of additional ITC of 2.68% of the turnover which has accrued to the Respondent was required to be passed on by the Respondent to the Applicant No. 1 to 8 and other recipients. It appeared that Section 171 (1) of the CGST Act, 2017 has been contravened by the Respondent in as much as the additional benefit of ITC @ 2.68% of the base price received by the Respondent during the period from 01.07.2017 to 31.12.2018, has not been passed on to the Applicant No. 1 to 8 and other recipients. On this account, the Respondent has realized an additional amount to the tune of Rs. 34,31,510/- (including GST) from the Applicant No. 1 to 8, which included both the profiteered amount @ 2.68% of the base price and GST on the said profiteered amount. He has further stated that the investigation revealed that the Respondent had also realized an additional amount of Rs. 2,98,30,299/- which included both the profiteered amount @ 2.68% of the base price and GST on the said profiteered amount, from 1768 other recipients who were not the Applicants in the present proceedings. These recipients were identifiable as the Respondent had provided their names and addresses along with Unit Nos. allotted to them.

Therefore, this additional amount of Rs. 2,98,30,299/- was required to be returned to such eligible recipients.

17. It has also been intimated by the DGAP that the present investigation covered the period from 01.07.2017 to 31.12.2018. Profiteering, if any, for the period post December, 2018, has not been examined by him as the exact quantum of ITC that would be available to the Respondent in future could not be determined at this stage, when the construction of the project was yet to be completed. The DGAP has further intimated that as the Respondent had failed to submit the copies of the GST returns, this Report had been prepared on the information/details provided by the Respondent. He has also contended that on verification from the GST portal, it was ascertained that the Respondent had filed GSTR-1 Returns for January, 2019 to March, 2019 and GSTR-3B Returns for September, 2018 to March, 2019, in the month of June, 2019 but had not submitted the copies of these returns to the DGAP. Therefore, no data verification or reconciliation could be done during the course of the investigation.
18. The DGAP has concluded that Section 171(1) of the CGST Act, 2017, requiring 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”*, had been contravened in the present case.



19. The investigation Report was received by this Authority from the DGAP on 05.07.2019 and was considered in the sitting held on 09.07.2019 and it was decided to accord an opportunity of hearing to the Applicants and the Respondent on 05.08.2019. Notice was also issued to the Respondent directing him to explain why the Report dated 02.07.2019 furnished by the DGAP should not be accepted and his liability for violation of the provisions of Section 171 of the CGST Act, 2017 should not be fixed. He was also asked to show cause why penalty under Section 29 and 122-127 of the above Act read with Rule 21 and 133 of the CGST Rules, 2017 should also not be imposed on him. Only the Respondent attended the hearing, wherein vide his submissions dated 05.08.2019, he submitted :-

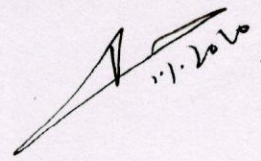
- a. That he had adopted the scheme of 1% GST on this project with effect from 01.04.2019 and hence, he requested to calculate the profiteering for the period from 01.07.2017 to 31.03.2019 instead of from 01.07.2017 to 31.12.2018.
- b. That as per the Government's New Policy he had balance of CENVAT Credit as on 31.03.2019 of Rs. 1,62,78,213/-, which was not allowable to be carried forward and he was ready to reverse the same with the consent/permission of this Authority. He requested to consider these facts and give him the final ratio of Profiteering on the amount received during the period from 01.07.2017 to 31.03.2019 so that he could pass on the same to his customers.

20. The Respondent vide his submissions dated 22.08.2019 has also submitted the following documents:-

- i. Statement of ITC/CENVAT Credit availed and Turnover for the period from 01.04.2016 to 31.12.2018.
- ii. List of all payments received by the customers and ITC benefit passed on to the customers on 06.08.2019.
- iii. Balance Sheets for the period from 2016-17 to 2017-18.
- iv. Ledger copies of customers.
- v. Details of the total number of Residential/Commercial units with area.
- vi. Copy of voucher of CENVAT Credit reversal.
- vii. Copy of land purchase agreement.

21. The Respondent vide the above submissions has also stated that:-

- a. He has reversed balance ITC amounting to Rs. 1,62,78,213/- as on 31.03.2019.
- b. He has also disbursed an amount of Rs, 3,32,61,809/- to the 1976 customers.
- c. The DGAP in his report had not considered the reversal of Rs. 1,62,78,213/-. Therefore, he requested to adjust the amount of CENVAT credit reversal and claimed that the actual profiteering amount should be Rs. 1,69,83,596/-.
- d. He also requested to consider all the details upto 31.03.2019.



22. The Respondent vide his submissions dated 17.09.2019 has also furnished the following documents/information:-

- a. Details of Turnover and ITC for the period from 01.07.2017 to 31.03.2019 alongwith the copies of the GSTR-3B and GSTR-1 Returns.
- b. He has also stated that he has reversed the CENVAT Credit of Rs. 1,62,78,213/- on 06.08.2019 and Rs. 15,15,360/- on 31.08.2019, total amounting to Rs. 1,77,93,573/- which had not been considered while calculating profiteering as per the DGAP's Report. He requested to consider the above amount and calculate the profiteering ratio.
- c. Details of flat booked/sold during the period from 01.01.2019 to 31.03.2019.
- d. Details of the benefit passed on to all the customers along with the Credit notes.
- e. Sample copies of the Credit vouchers of benefit passed on to the customers.

23. Supplementary Report was sought from the DGAP on the issues raised by the Respondent through his submissions dated 22.08.2019, under Rule 133 (2A) of the CGST Rules, 2017. The DGAP vide his submissions dated 09.10.2019 has stated that the present Report dated 02.07.2019 covered the period of investigation from 01.07.2017 to 31.12.2018, whereas the Respondent was claiming that he had reversed the CENVAT

Credit of Rs. 1,62,78,213/- on 06.08.2019 and Rs. 15,15,360/- on 31.08.2019 (Total Rs. 1,77,93,573/-). Therefore, the same could not be considered in the Report dated 02.07.2019.

24. This Authority has carefully examined the DGAP's Reports, the written submissions of the above Applicants as well as that of the Respondent. The issues to be decided by this Authority in the present case are as under:-

- 1) Whether the Respondent has availed benefit of additional ITC during the period between 01.07.2017 to 31.12.2018 which he was liable to pass on to his buyers?
- 2) Whether there was any violation of the provisions of Section 171 of the CGST Act, 2017 committed by the Respondent ?
- 3) If yes then what was the quantum of profiteering?

25. Perusal of Section 171 (1) of the CGST Act shows that it provides as under:-

(1). "Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."

It is clear from the plain reading of Section 171 (1) mentioned above that it deals with two situations one relating to the passing on the benefit of reduction in the rate of tax and the second pertaining to the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from the DGAP's Report

that there has been no reduction in the rate of tax in the post GST period; hence the only issue to be examined is as to whether there was any net benefit of ITC with the introduction of GST. On this issue it has been revealed from the DGAP's Report 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% and during the post-GST period (July-2017 to December-2018), it was 2.68%. This confirms that, post-GST, the Respondent has been benefited from additional ITC to the tune of 2.68% (2.68%-0%) of his turnover and the same was required to be passed on to the Applicant No. 1 to 8 and the other flat buyers. The DGAP has calculated the amount of ITC benefit to be passed on to all the flat buyers as Rs. 3,32,61,809/- which was availed by the Respondent vide Table- C Supra on the basis of the information supplied by the Respondent, which the Respondent has not challenged and hence the amount of profiteering computed by the DGAP is hereby accepted as correct.

26. The Respondent has also contended that he has reversed the CENVAT Credit of Rs. 1,62,78,213/- on 06.08.2019 and Rs. 15,15,360/- on 31.08.2019 (Total Rs. 1,77,93,573/-) and the same has not been considered while calculating the amount of profiteering in DGAP's Report and he has requested to adjust the above amount. In this context, it will be pertinent to mention that the expression "profiteered" as explained under Section 171 (1) of the CGST Act, 2017 means the amount determined on account of

not passing on the benefit of reduction in the rate of tax on supply of goods or services or both or the benefit of additional input tax credit to the recipients by way of commensurate reduction in the prices. The implication of the above provision in respect of the present case is that the benefit of ITC which has become available to the Respondent has to be passed on to the buyers irrespective of the fact whether the Respondent utilizes the additional ITC or not. What is relevant for the purpose of computation of profiteered amount is the additional availability of ITC in the pre-GST and the post GST periods and not what is done subsequently which could either be discharging of output GST liability by the Respondent or reversal of ITC. In the present case, it cannot be denied that the additional benefit of ITC has become available to the Respondent which he has chosen to reverse, has no bearing on the computation of the profiteered amount. Hence, we hold that the above reversal of ITC affected by the Respondent on his own accord does not alter the computation of profiteering by the DGAP in any manner. It is apparent that the Respondent by his act of reversal of ITC has attempted to deny his customers/homebuyers the benefit of ITC. Accordingly, the above amount cannot be adjusted as has been claimed by the Respondent.

27. In this context, after having carefully going through the contentions of the Respondent we also observe that the reversal of the ITC has been effected by the Respondent even before

occupancy certification/ completion certificate was issued by the competent authority. The above voluntary reversal of the credit has been effected by the Respondent only in August 2019, i.e. much after the expiry of the period of investigation of the DGAP i.e. from 01.07.2017 to 31.12.2018. Further, Rule 42 of the CGST Rules, 2017 lays down the mode of computation of mandatory reversal of the unutilized input tax credits in respect of unsold flats/shops of a real estate project at the time of receipt of completion/ occupancy certificate or on the date of first occupancy, whichever is earlier. This is the only method prescribed for reversal of ITC under the CGST Rules and the same requires that such reversal is effected only after the date on which completion/ occupancy certificate has been issued or from the date of first occupancy, whichever is earlier. In this case, however, the Respondent has effected reversal much before the above dates and hence the said reversal by the respondent has to be viewed as an act that was carried out with the mala-fide intent of denying the passage of benefit of ITC to his customers/ homebuyers. It is also a fact that at the time of reversal a number of units were yet to be sold and occupancy certificate has not yet been received which implies that this act of reversal was not only premature on the part of the Respondent but apparently also an afterthought aimed at avoiding the passing on of the benefit of ITC to his customers/ homebuyers. It would also be relevant to add here that the profiteered amount has been calculated by the

DGAP only in respect of the sold units on which the GST is being charged by the Respondent from his customers in proportion to the ITC available on such units and therefore, in case the ITC would be required to be reversed in the case of the unsold flats/shops in future the same can be easily done by the Respondent from the balance available ITC. Therefore also the above argument of the Respondent cannot be accepted.

28. The Respondent vide his submissions dated 17.09.2019 has also submitted the details of the profiteered amount claimed to have been passed on by him to all his customers along with sample copies of Journal Vouchers issued to the customers. Perusal of the CD enclosed by the Respondent with his above submissions shows that he has claimed to have passed on ITC benefit of Rs. 3,30,91,398/- to his buyers. He has also furnished copies of 26 Journal Vouches issued on 06.08.2019 to claim that he has passed on the benefit of ITC. However, perusal of these vouchers shows that they have been issued on the same date which makes their genuineness doubtful. The Respondent has neither produced the acknowledgement receipts from the recipients nor he has furnished the tax invoices to prove that he has passed on the above amount as benefit of ITC. The Respondent has also not furnished the above details to the DGAP during the course of the investigation. Hence, there is hardly any doubt that the above record has been prepared by the Respondent subsequently to mislead the present proceedings. Therefore, the above claim of

the Respondent of his having passed on the benefit of ITC to the eligible buyers cannot be accepted as no reliable and irrefutable evidence has been furnished by the Respondent to prove his above claim.

29. Based on the above facts the profiteered amount is determined as Rs. 3,32,61,809/- in terms of Rule 133 (1) of the CGST Rules, 2017, during the period from 01.07.2017 to 31.12.2018. This Authority under Rule 133 (3) (a) of the CGST Rules, 2017 also orders that the Respondent shall reduce the prices to be realized from the buyers of the flats/shops commensurate with the benefit of ITC received by him as has been detailed above. The above amount of Rs. 3,32,61,809/- which includes 12% GST on the base profiteered amount of Rs. 3,04,01,093/- has been profiteered by the Respondent from the Applicant No. 1 to 8 and other flat buyers which is required to be refunded to the above Applicant No. 1 to 8 and the other flat buyers as per the Annexure-20 of the DGAP Report dated 02.07.2019 alongwith interest @18% from the date from when the above amount was profiteered by him till the date of payment as per the provisions of Rule 133 (3) (b) of the above Rules. The present investigation is only up to 31.12.2018 and any additional benefit of ITC which shall accrue subsequently shall also be passed on to the buyers by the Respondent. In case this additional benefit is not passed on to the Applicant No. 1 to 8 or any other buyer they shall be at liberty to approach the State Screening Committee Haryana for initiating fresh proceedings

under Section 171 of the above Act against the Respondent. The concerned CGST or SGST Commissioner shall take necessary action to ensure that the benefit of additional ITC is passed on to the eligible house buyers in future. The profiteered amount along with applicable interest shall be paid by the Respondent within a period of 3 months from the date of this order, failing which the same shall be recovered by the concerned Commissioner CGST/SGST as per the provisions of the CGST/SGST Act, 2017, under the supervision of the DGAP. This Authority as per Rule 136 of the CGST Rules 2017 directs the jurisdictional Commissioners of CGST/SGST Haryana to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by this Authority is passed on to all the eligible buyers. A report in compliance of this order shall be submitted to this Authority by the Commissioners CGST /SGST within a period of 4 months from the date of receipt of this.

30. It is also evident from the above narration of facts that the Respondent has denied benefit of ITC to the buyers of the flats being constructed by him in his Project 'Supertech Basera' in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and he has thus apparently committed an offence under Section 171 (3A) of the above Act and therefore, he is liable for imposition of penalty under the provisions of the above Section.

Accordingly, a notice be issued to him directing him to explain as

to why the penalty prescribed under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him.

31. A copy of this order be sent to the Applicants, the Respondent, Commissioner CGST/SGST Haryana as well as the Principal Secretary (Town and Country Planning), Government of Haryana free of cost for necessary action. File of the case be consigned after completion.




Sd/-
(B. N. Sharma)
Chairman

Sd/-
(J. C. Chauhan)
Technical Member

Sd/-
(Amand Shah)
Technical Member

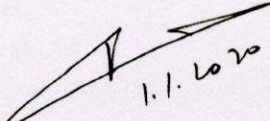
Certified Copy


1.1.2020
(A.K Goel)
(Secretary, NAA)

File No. 22011/NAA/53/Revital/2019/09-22 Dated: 01.01.2020
Copy to:-

1. M/s Revital Realty Pvt. Ltd., Supertech House, B-28-29, Sector-58, Noida (UP)-201307.
2. Sh. Gautam Semwal, email id- gautam.semwal@gmail.com
3. M/s Basera Flat Owners' Association, 400/5, Patel Nagar, Civil Lines, Gurugram Haryana-122022.
4. Sh. Ankur Khetan, Rudra Colony, Tosham Road, Bhiwani-127021.

5. Sh. Ashish Kumar F-528, Sector-9, New Vijay Nagar, Ghaziabad, Uttar Pardesh-201010.
6. Sh. Shyam Lal Sharma, 01, Laurus-B, Natika City, Sector-49, Sohna Road, Gurgaon, Haryana-122002.
7. Ms. Diksha Aggarwal, email-id-dikshaaggarwal1984@gmail.com
8. Ms. Usha Parmar, H. No. 100, Ground Floor, Sector-54, Sun City, Gurgaon, Haryana-122001.
9. Sh. Shiv Narayan Yadav, email id- skyadavs@gmail.com.
10. Director General Anti-Profitteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
11. The Commissioner of State Tax, Vanijya Bhavan, Plot No. 1-3, Sector-5, Panchkula, Haryana-134151.
12. The Commissioner, CGST Gurugram, Plot No. 36 & 37, Sector-32, Gurugram, Haryana-122001.
13. Principal Secretary to Govt. of Haryana, Town and Planning Department, Plot No. 3, Sec-18A, Madhya Marg, Chandigarh-160018.
14. NAA Website/Guard File.


1.1.2020