

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

Case No.	52/2019
Date of Institution	23.04.2019
Date of Order	21.10.2019

In the matter of:

1. Sh. Sandeep Kumar, D1/52, Kunwar Singh Nagar, Nangloi, Delhi-110041.
2. Sh. Harish Kumar, House No. D3/203, Tulip Petals, Sector-89, Gurgaon-122505.
3. Ms. Poonam Shiv, 265, Prabhavi Apartments, Floor No. 29B, Sector-10, Dwarka, New Delhi-110075.
4. Sh. Veeran Puri, 132, Prabhavi Apartments, Floor No. 29B, Sector-10, Dwarka, New Delhi-110075.
5. Ms. Ajit Yadav, H No. 490, Near ESIC Hospital, Sector 9A, Gurgaon-122001.
6. Sh. Mukesh Kumar Rajan, Flat No. E-705, Sector 102, Gurugram, Haryana.
7. Sh. Nitin Gambhir, House No. 18, Shree Ram Colony, near Jain Mandir, Sector-4, Gurugram-122001.
8. 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


21.10.19

Versus

M/s Nani Resorts and Floriculture Pvt. Ltd. Building No. 80, 1st Floor,
Sector-44, Gurgaon-122003, Haryana.

Respondent

Quorum:-

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

Present:-

1. Sh. Sandeep Kumar, Applicant No. 1 in person.
2. Sh. Nitin Gambhir, Applicant No. 7 in person.
3. Ms. Gayatri, Deputy Commissioner and Sh. Rana Ashok Rajneesh, Assistant Commissioner for the Applicant No. 8.
4. Sh. Vaibhav Jain and Ms. Garima Jain, Counsels for the Respondent.

ORDER

1. The present Report dated 22.04.2019, has been received on 23.04.2019 from the Applicant No. 8, i.e. the Director General of Anti-Profitteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. Vide the above report, the DGAP has reported that an application dated 04.06.2018 was filed before the Haryana State Screening Committee

on Anti-profiteering, under Rule 128 of the CGST Rules, 2017 by Applicant No. 1 alleging profiteering by the Respondent, in respect of purchase of a flat in the Respondent's project "ROF Aalayas" in Sector-102, Gurgaon, Haryana. The Applicant No. 1 alleged that the Respondent did not pass on the benefit of input tax credit to him by way of commensurate reduction in price at the time of introduction of GST w.e.f. 01.07.2017. Along with the application, the above Applicant submitted copies of the demand letters issued to him by the Respondent.

2. The Haryana State Screening Committee on Anti-profiteering examined the aforesaid application in its meeting held on 20.06.2018 and observed that the burden of tax had reduced in the GST era due to increased availability of input tax credit, which the builder should have passed on to the recipients in terms of Section 171 of the Central Goods and Services Tax Act, 2017. The State Screening Committee referred the said application with its recommendations to the Standing Committee on Anti-profiteering on 27.06.2018 for further action in terms of Rule 128 of the Rules. The aforesaid reference was examined by the Standing Committee on Anti-profiteering in its meetings held on 07.08.2018 & 08.08.2018 and decided to forward the same to DGAP to conduct a detailed investigation in the matter. However, the complete set of documents related to the case was received by the DGAP only on 23.10.2018.
3. Further, six more applications by other applicants, hereinafter referred to as Applicants No. 2, 3, 4, 5, 6, and 7 containing similar allegations

and pertaining to the same case were forwarded to the DGAP by the Standing Committee on Anti-profiteering.

4. Consequently, the DGAP issued a Notice under Rule 129 of the Rules on 26.10.2018 calling upon the Respondent to reply as to whether he admitted that the benefit of input tax credit had not been passed on to the Applicants 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 to furnish all supporting documents pertaining to the matter. The period covered by the DGAP in the current investigation is from 01.07.2017 to 30.09.2018. In response to the Notice dated 26.10.2018, the Respondent submitted his reply in parts vide his letters and e-mails dated 19.11.2018, 22.11.2018, 06.12.2018, 14.12.2018, 20.12.2019, 10.04.2019 and 18.04.2019. The reply of the Respondent to the DGAP contained in the above communications, inter-alia was as follows: -

- i. That he, i.e. the Respondent was engaged in development of residential/ commercial properties and had launched an Affordable Housing Project on 01.12.2015, under the scheme approved by the Government of Haryana, in Sector-111, Gurgaon.
- ii. That he, i.e. the Respondent was directly engaged in construction activity and all the works related to the project were being undertaken on his own and that he procured the required raw materials on his own and claimed the credit of VAT paid on such purchases which was utilized to discharge his output VAT liability.
- iii. That as per the provisions of Haryana Value Added Tax Act, 2003, "under-construction properties" were covered under the definition of

Works Contract and attracted VAT@ 4.5% with full input tax credit of VAT paid on inputs purchased; that affordable housing had been exempt from Service Tax vide Notification No. 9/2016-ST dated 01.03.2016; that in the GST regime, construction of low cost houses up to a carpet area of 60 sq. mtr. per house, in a housing project approved by the State Government, attracted GST @12% (effective GST @ 8% after 1/3rd abatement towards value of land) vide Notification No. 01/2018- Central Tax (Rate) dated 25.01.2018; that therefore, the total indirect tax burden on the project had increased by 3.5% after GST was introduced.

- iv. That in the pre-GST regime, he was allowed to avail input tax credit of VAT paid to his vendors/ sub-contractors; that the affordable housing sale price of ₹ 4,000/- per sq.ft. was fixed after considering the benefit of input tax credit of VAT/WCT; that, however, the Central taxes, i.e., Central Excise Duty & Service Tax levied on the goods & services used in the execution of Works Contract, the credit of which was not available in the pre-GST regime, was part of the cost of the project; and that in the GST regime, input tax credit of GST paid on all goods and services was available to him.
- v. That he, i.e. the Respondent was availing credit of Service Tax paid on the input services used towards the construction of the commercial project in the pre-GST period.

5. Vide the aforementioned letters and e-mails, the Respondent submitted the following documents/information:-

- i. Copies of GSTR-1 returns for the period July, 2017 to September, 2018.
- ii. Copies of GSTR-3B returns for the period July, 2017 to September, 2018.
- iii. Screenshot of Tran-1 return duly filed on GSTN.
- iv. Copies of ST-3 returns for the period April, 2016 to June, 2017.
- v. Copies of VAT returns for the period April, 2016 to Mar, 2017.

- vi. Copies of all demand letters issued in the name of the Applicants No. 1 & No. 2.
- vii. Details of applicable tax rates, pre-GST and post-GST.
- viii. Copy of Audited Balance Sheet for the FY 2016-17 and FY 2017-18.
- ix. Copy of Registration with Haryana RERA.
- x. Copy of Electronic Credit Ledger for the period 01.07.2017 to 30.09.2018.
- xi. Reconciliation of turnover reported in GSTR-3B with that in the list of home buyers.

6. The Respondent, vide letter dated 16.11.2018, submitted copies of demand letters and the payment schedule in respect of the Applicants No. 1 & No. 2, in respect of their purchase of flats measuring 535.40 square feet each, at the basic sale price of ₹ 4,000/- per square feet; that the details of amounts and taxes paid by the Applicant No. 1 to him are furnished in table-'A' below.

Table-'A'

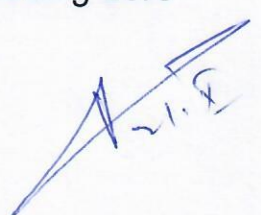
(Amount in ₹.)

S. No.	Payment Stage	Due Date	Basic Price %	BSP	Service Tax	VAT @4.3%	GST@ 8%	Total
1	Application for allotment (Date of Draw)	19.05.2016	5.00%	1,08,614				1,08,614
2	On allotment	19.05.2016	20.00%	4,34,455				4,34,455
3	Date of Draw+ 6 months	19.05.2016	12.50%	2,71,534				2,71,534
4	Date of Draw+ 12 months	22.08.2016	12.50%	2,71,534				2,71,534
5	Date of Draw+ 18 months	22.02.2017	12.50%	2,71,534				2,71,534
6	VAT @4.3%	22.6.2017	4.3%			58,380		58,380
7	Date of Draw+ 24 months	22.08.2017	12.50%	2,71,534			32,588	3,04,122
8	Date of Draw+ 30 months	22.02.2018	12.50%	2,71,534			21,726	2,93,260
9	Date of Draw+ 36 months	22.08.2018	12.50%	2,71,536			21,726	2,93,262
Total			87.50%	21,72,275		58,380	76,040	23,16,693

7. After detailed investigation, the DGAP has, in his report dated 22.04.2019, inter-alia reported that para 5 of Schedule-III of the

Central Goods and Services Tax Act, 2017 (Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services) reads as *"Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building"*. Further, clause (b) of Paragraph 5 of Schedule II of the Central Goods and Services Tax Act, 2017 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 input tax credit pertaining to the residential units which were under construction but not sold, was provisional input tax credit which might be required to be reversed by the Respondent, if such units remained unsold at the time of issue of the Occupancy 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, input tax credit pertaining to the unsold units might 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 net benefit of additional input tax credit available to him post-GST.

8. The DGAP further reported that prior to 01.07.2017, i.e., before the GST was introduced, 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 credit of the Central Excise Duty paid on the inputs or the Service Tax paid on input services, but the Respondent was eligible to avail the credit of VAT paid on the purchase of inputs. Further, in the post-GST period, the Respondent could avail the input tax credit of GST paid on all the inputs and input services including the sub-contracts. From the information submitted by the Respondent for the period April, 2016 to September, 2018, the details of input tax credit availed by him, his turnover from the project "ROF AALAYAS" and the ratio of input tax credit to the turnover, during the Pre-GST

(April, 2016 to June, 2017) and Post-GST(July, 2017 to September, 2018) period, are furnished in table-‘B’ below:-

Table-B

(Amount in ₹.)

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	Turnover for the period 01.07.2017 to 24.01.2018 (when GST @ 12%)	Turnover for the period 25.01.2018 to 30.09.2018 (when GST @ 08%)	Total (Post-GST) (01.07.2017 to 30.09.2018)
1	CENVAT Credit of Service Tax Paid on Input Services (A)	0	0	0	-	-	-
2	Credit of VAT Paid on Inputs (B)	1,38,80,832	0	1,38,80,832			
3	input Tax Credit of GST Availed (C)				1,62,13,534	3,87,50,131	5,49,63,665
4	Total VAT Credit / Input Tax Credit Availed (D)= (A)+(B) or (C)	1,38,80,832	0	1,38,80,832	1,62,13,534	3,87,50,131	5,49,63,665
5	Turnover as per VAT returns / Home-buyer List (E)	28,74,19,637	-	28,74,19,637	7,73,08,375	51,65,81,557	59,38,89,932
6	Total Residential Area (in SQF) (F)			3,82,699			3,82,699
7	Total Sold Residential Area relevant to turnover (in SQF) (G)			3,41,889			3,36,980
8	ITC relevant to the sold Residential Area [(H)= (D)*(G)/(F)]			1,24,00,617			4,83,97,450
9	Ratio of Input Tax Credit to Turnover [(I)=(H)/(E*100)]			4.31%			8.15%

9. The DGAP has also reported that from the above **table-‘B’**, it was apparent that the input tax credit as a percentage of the turnover that was available to the Respondent during the pre-GST period was 4.31% and during the post-GST period it was 8.15%, which implies that the Respondent has benefited from additional input tax credit to the tune of 3.84% [8.15%-4.31%] of the turnover. Further, the DGAP has reported that 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. Further, vide Notification No. 1/2018-Central Tax (Rate) dated 25.01.2018 the GST rate for affordable housing was reduced from 12% to 8%. Thus, the issue of profiteering has been examined in two parts, i.e., by comparing the applicable tax rate and the

availability of input tax credit during the pre-GST period (April, 2016 to June, 2017) when only VAT was payable @4.5% with (1) the post-GST period from July, 2017 to 24.01.2018, when the effective GST rate was 12% and (2) the GST period from 25.01.2018 to 30.09.2018, when the effective GST rate was 8%. Accordingly, on the basis of table-B above, the comparative figures of tax rate, ratio of input tax credit to the Respondent's turnover in the pre-GST and post-GST periods, the recalibrated basic price on account of benefit of additional input tax credit and the excess realization (profiteering) by the Respondent, during the post-GST period, are tabulated in the table-'C' below:

Table 'C'					
(Amount in ₹)					
S. No.	Particulars		Pre-GST	Post- GST	
1	Period	A	April, 2016 to June, 2017	01.07.2017 to 24.01.2018	25.01.2018 to 30.09.2018
2	Output tax rate (%)	B	4.50%	12.00%	8.00%
3	Ratio of CENVAT/ Input Tax Credit to Total Turnover as per Table - E above (%)	C	4.31%	8.15%	8.15%
4	Increase in input tax credit availed post-GST (%)	D	-	3.84%	3.84%
5	Analysis of Increase in input tax credit:				
6	Total Basic Demand raised during July, 2017 to September, 2018 as per home-buyers data (For Residential area)	E		7,73,08,375	51,65,81,557
7	GST applicable	F= 12% or 8% of E		92,77,005	4,13,26,525
8	Total Cum-tax Demand	G=E+F		8,65,85,380	55,79,08,082
9	Recalibrated Base Price	I=E*(1-D) or 96.16% of E		7,43,39,733	49,67,44,825
10	GST applicable	J = I*12% or 8%		89,20,768	3,97,39,586
11	Commensurate Demand Price	K=I+J		8,32,60,501	53,64,84,411
12	Excess Demand/Profiteering	L=H-K		33,24,879	2,14,23,670

10. The DGAP further stated that from table- 'C' above, it appeared that the additional input tax credit of 3.84% of the turnover should have resulted in commensurate reduction in the basic 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 the aforesaid additional input

tax credit that has accrued to the Respondent, was required to be passed on to the recipients.

11. The DGAP has stated that on the basis of the CENVAT/VAT/input tax credit availability during the pre-GST and the post-GST periods and the amounts collected by the Respondent from the above Applicants and other home buyers during the period 01.07.2017 to 24.01.2018, the amount of benefit of input tax credit that should have been passed on by the Respondent to the recipients, or in other words, the profiteered amount worked out to ₹ 33,24,879/- which included 12% GST on the base profiteered amount of ₹ 29,68,642/-. Further, the amount of benefit of input tax credit that should have been passed on by the Respondent to the recipients, during the period 25.01.2018 to 30.09.2018, worked out to ₹ 2,14,23,670/- which included 8% GST on the base profiteered amount of ₹ 1,98,36,732/-. Therefore, the total profiteered amount during the period 01.07.2017 to 30.09.2018 worked out to ₹ 2,47,48,549/-, which included GST @12% or 8% on the base profiteered amount of ₹ 2,28,05,373/-. The DGAP has also forwarded the home buyer and unit no. wise break-up of this amount as Annex-13 of the Report. The report also states that the said service has been supplied by the Respondent only in the State of Haryana.

12. The DGAP has also reported that whereas the Respondent was constructing 834 flats, bookings were made only for 751 flats in the pre-GST period. Further, it has been reported by the DGAP that while no new booking was made in the post-GST period, bookings of 20

flats have been cancelled. The demands raised on all these 731 home buyers (751-20=731) during the pre-GST period as well as in the post-GST period under investigation (01.07.2017 to 30.09.2018) had been reconciled with that mentioned in the home buyers list. The DGAP has clarified that the above computation of profiteering has been made only in respect of only those flats where demands had been raised or payments received in the post-GST period. The DGAP has further clarified that if the input tax credit in respect of the unsold flats or the flats, in respect which no consideration has been received in the post-GST period is also taken into account to calculate profiteering, the input tax credit as a percentage of turnover would be distorted and erroneous. Therefore, the profiteering in respect of the remaining 103 flats needed to be calculated subsequently as and when the consideration was received in the post-GST period by taking into account the proportionate input tax credit in respect of such units.

13. In conclusion, the DGAP has reported that the benefit of additional input tax credit to the tune of 3.84% of the turnover had accrued to the Respondent post-GST and the same was required to be passed on to the above Applicants and the other eligible buyers, who were identifiable based on the documents placed on record. The DGAP report states that an aggregate amount of ₹ 2,47,48,549/- was required to be returned to all the eligible recipients as per the present investigation which covered the period from 01.07.2017 to 30.09.2018. It has been categorically clarified by the DGAP that

profiteering, if any, for the period post September, 2018 has not been examined as the exact quantum of input tax credit that would be available to the Respondent in future, could be determined at this stage when the construction of the project was yet to be completed and no occupancy certificate has been issued.

14. The above report was considered by the Authority in its meeting held on 25.04.2019 and it was decided to hear the above Applicants and the Respondent on 15.05.2019. On 15.05.2019 Sh. Sandeep Kumar, Applicant No. 1 and Sh. Nitin Gambhir, Applicant No. 7 appeared in person and the DGAP was represented by Smt. Neelam Kapoor, Superintendent while Sh. Vaibhav Jain, Advocate and Ms. Garima Jain, Advocate appeared on behalf of the Respondent. Further hearings were held on 23.08.2019 and 12.09.2019. The Applicant No. 1 and 7 requested to provide copies of GST and VAT returns filed by the Respondent for the investigation period. The Applicants No. 2 to 6 were not present during the hearings. The Respondent further made his submissions on 14.05.2019, 24.05.2019, 05.06.2019, 23.08.2019, 12.09.2019 & 13.09.2019 Which may be summed up as follows:-

- a) That he was engaged in the business of construction of project "ROF Aalayas", an affordable housing project, located at Sector-102, Village Dhankot, District Gurugram, Haryana
- b) That the report from DGAP dated 22-04-2019 which states that profiteering amounting to Rs. 2,45,75,633/- had been established against him under section 171 of CGST Act, 2017, was not acceptable as it was erroneous and it was not in accordance with the law.

- c) That he had received the Notice of Initiation (NOI) dated 26.10.2018 from DGAP and in response thereto he had submitted the requisite documents / information to the DGAP on 20.12.2019, following which he had received no communication for a significant period of time, which made him think that the time for investigation had got completed by 15.01.2019; that it was only through the report dated 22.04.2019 of the DGAP that he came to know that the time for completing the investigation had been extended by this Authority; that no communication for extension of the investigation was given to him; that all documents and inputs received by the DGAP after 15.01.2019 or any conclusions drawn on the matter by the DGAP after that date are time barred.
- d) That he was not given proper opportunity of being heard by the DGAP and the investigation was finalized without following the principles of natural justice.
- e) That his request dated 18.04.2019 for grant of another 7 to 10 days for making further submissions and incorporating certain corrections to his earlier submissions was ignored by the DGAP; that therefore he requested that the matter be sent back to investigating agency for re-investigation so that all his submissions are taken into account properly.
- f) That since this authority has not prescribed any procedure or methodology for determination of reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit has been passed on or not by the registered person to the recipients as

required under rule 126 of CGST Rules, 2017, the investigating agency has followed approach of comparing average ratio of input tax credit with turnover, which is not feasible or appropriate in case of real estate business and which is also clearly against basic principles of accounting i.e. matching concept, whereby the accrual of input tax credit may not necessarily match with sales / output of current accounting period.

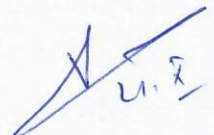
- g) That the said basis adopted by the Investigating agency is bad in law and the amount calculated is not depictive of actual affairs. The approach adopted by the agency in calculation of the amount of Profiteering is theoretical and not justifiable in courts of law.
- h) That his cost of construction has increased due to increase in prices of inputs and other purchases after the introduction of GST and due to natural inflation, such as firming up of the prices of steel and cement and unprecedented increase in Minimum Wages; that consequentially, the estimated total cost of construction of his project which was estimated at the close of FY 16-17 as Rs. 1,53,91,33,634.08/-, had to be revised at the close of FY 17-18 as Rs. 1,65,91,33,634.08/- as per his audited books of account and Income Tax returns, which imply that the the actual cost of inputs has gone up by Rs. 12,00,00,000/- i.e. 7.79% from previous year, which needs to be incorporated in the calculation of the amount of profiteering; that the provisions of Section 171 of the CGST Act do not apply in his case as the sales prices of the flats are already regulated and the

Respondent is prohibited from charging a price higher than the price fixed under the scheme of PMGKY.

- i) That the calculation of ratio of input tax credit to turnover for Pre-GST period as per Table B of the DGAP's Report was worked out as 4.31% without even considering the VAT input for the period from April 2017 to June 2017. This figure was not taken into account by the DGAP despite the fact that VAT returns and the figures were submitted on 22.04.2019 and the same may be considered by the Authority while deciding the matter.
- j) That he was engaged in constructing a project having 832 flats in Towers A to H which are under construction and 595 flats in Towers I to N, which have not yet been launched. Only 760 flats were sold in pre-GST regime of which 19 flats have been cancelled subsequently. Hence the profiteering liability, as alleged and determined, should be taken at (741 / 832). Further, in the Post-GST Period, 72 flats were sold, out of which 3 were cancelled. Hence Total flats sold till March 31, 2019 are 810. The number of unsold flats as on March 31, 2019 is 22. Further, as per para 24 of the report of DGAP, the total number of flats on which construction cost has been incurred is 834, but as per his project approved by Haryana Real Estate (Regulation and Development) Rules, 2017, this figure is 832 flats. This is an error and which needs to be rectified.



- k) That while credit was available to him for WCT and VAT portion in the pre GST regime, the input tax credit of Service Tax and Excise Duty was not available.
- l) That as per his understanding 'profiteering' is the availability of input tax credit on central taxes and as such it is only the savings in basic expenditure of construction due to reduction in prices that would lead to profiteering, computation of which is not only time consuming but can be done only after completion of the project since the construction work is still in process.
- m) That the copies of VAT and GST returns as requested by the Applicant No. 1 and 7 should not be provided as the details contain confidential information.
- n) That he was also submitting calculation of profiteering as per his understanding with assumptions and formula to enable the authority to take a view on the same.
- o) That his Project falls under the exemption entry in the pre GST era therefore, the output services were not taxable under the Service Tax; that both the Input as well as output tax were exempted under the service tax, while input of WCT was available, hence the entire input on sub-contractor's payment was fully allowable and therefore there is no profiteering in respect of input on bills of labor or other contractor payments.



- p) That as he was exempted under Service Tax, any sub-contractor providing services in relation to the exempted project were also exempt and now his output and input both are taxable under GST, which showed that there is no profiteering in respect of these expenses.
- q) That the services which do not have direct nexus to the construction and are more related to non-operating and indirect business expenses should not be considered for calculation of profiteered amount. Such services are Advertisement expenditure, AMC Charges, Audit Fees, bank Charges, Consultancy and insurance etc.
- r) That expenses only on account of goods that are used in construction of project should be considered while calculating profiteering and expenses on goods such as bike, laptop, and mobile should not be accounted for as these were either company assets or not related to construction of project.
- s) That earlier, input tax credit of VAT was available @ 13.125%/ 5%/ 5.25% and now GST credit is available @ of 28%/18%/12%/5% and the difference between these rates i.e. (18% - 13.125%) 4.875% is profiteering.
- t) That the Respondent is ready to pass on benefit amounting to Rs. 1,68,75,112/- to his homebuyers/ customers and since the total area of project is 4,09,299 sq. ft, the profiteering works out to Rs. 41.22 per Sq. Ft. (Rs. 1,68,75,112 Crore/ 4,09,299 sq. ft.) as per his

calculations. During the hearing, he added that the amount so calculated shall be multiplied with actual area of flat and shall be credited to all flat buyers with whom contract was entered prior to transition to GST.

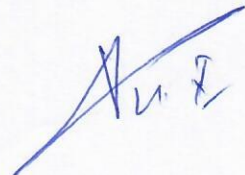
u) That he is having ongoing three project at

- i. ROF AALAYAS of 5 Acres -Sector- 102, Gurugram.
- ii. ROF AALAYAS PHASE II - Sector- 102, Gurugram.
- iii. ROF AMALTAS- SECTOR 92, Gurugram.

v) That as he was in the business of construction, financials were prepared according to Guidance Note issued by ICAI. As per the Guidance Note, there were some conditions to recognise the revenue which are mentioned below: -

- Development Cost Ratio (at least 25% should be incurred).
- Sold unit area ratio (at least 25% should be sold).
- Realised Consideration Ratio is equal to the Realised Consideration/Consideration of Sold Units and If one of the additional conditions is not satisfied, no revenue will to be recognised.

Therefore, there was always some difference in the turnover he had reported in the financials with the turnover reported in monthly or quarterly returns.



Turnover Reconciliation between Return and Financials					
Turnover	FY 16-17	FY 17-18	FY 18-19	April-Jun 2019	Total
As per Financials (a)	66,79,92,045.50	36,89,48,417.69		1,02,37,35,151.41	2,06,06,75,614.60
As per return					
VAT Return*	66,92,31,924.00	13,38,05,290.00	-	-	80,30,37,214.00
GST Return*	-	25,18,10,348.00	51,21,10,760.57	49,37,17,292.04	1,25,76,38,400.61
Total (b)	66,92,31,924.00	38,56,15,638.00	51,21,10,760.57	49,37,17,292.04	2,06,06,75,614.61
Difference (a) - (b)					0.00

He also attached a copy of the turnover reconciliation.

- w) That he is required to reverse the input tax credit on unsold units approximately amounting to Rs. 29, 20,000/-. A copy of calculation sheet was also attached.

In view of above submissions he requested to drop the proceedings, since the benefit of ITC had been passed on and also the time period given under Rules of CGST, Rules 2017 had elapsed.

15. We have carefully considered the Report of the DGAP, submissions made by the Respondent and based on the record it is revealed that the Respondents in the Real Estate business and the DGAP's Report is with regard to one of his projects namely "ROF Aalayas" an affordable housing project in Sector-102, Village Dhankot, District Gurugram. On examining the various submissions we find that the following issues need to be addressed:-

- Whether there was any net additional benefit of ITC to the Respondent?
- Whether there was any violation of the provisions of Section 171 of the CGST Act, 2017, by not passing on the benefit ITC by the Respondent?

16. The Respondent has himself agreed to the profiteering and shown his willingness to pass on the benefit of additional ITC of Rs. 1,68,75,112/- received by him on the project to his customers vide his submissions dated 05.06.2019. While considering the various contentions made by the Respondent on the report of the DGAP, our findings are as under:-

- A. All the relevant documents were demanded by the DGAP vide his Notice of Initiation (NOI) dated 26.10.2018. As the Respondent failed to submit the required documents in the given time, further reminders requesting the Respondent to submit the remaining documents were issued by the DGAP. Since the last date for submission of investigation report was 22.04.2019, the respondent's request to give further time to 7 to 10 days after 18.04.2019 to submit further documents could not be considered by the DGAP and the investigation report was prepared by the DGAP based on the documents/ data available as on 18.04.2019.
- B. The Respondent's contention that no communication for extension of investigation time was given to him also has no merit as the DGAP is not required to inform its official proceedings/communications made with this Authority to the respondent. As the time for investigation was extended by the Authority in terms of Rule 129(6) the CGST Rules, vide order dated 15.01.2019 (Annex-3 of the Report dated 22.04.2019), the plea of the Respondent that all information

submitted after 15.01.2019 and conclusion drawn upon the same be considered as time barred is not admissible. We take note that in the NOI dated 26.10.2018 (Annex-1 of the Report dated 22.04.2019), issued by the DGAP, the Respondent had been informed that he may suo -moto determine the quantum of benefit not passed on, if any and indicate the same in his reply to the Notice. However, it is seen, that the Respondent neither admitted to any profiteering at that stage nor submitted any calculations, though he had been given ample opportunity to present his case and submit records. We find it amusing that on one hand the Respondent claims that he assumed that the investigations were closed by the DGAP in a hurry and on the other hand, in points raised subsequently he has himself admitted to having profiteered. We find that this conduct of the Respondent only shows that he had been attempting to derail the investigation and delay the proceedings by not submitting required documents in time.

- C. Further, the investigation report was finalized by the DGAP based on the data and information which was as provided by the Respondent only. There is no provision under CGST Rules, 2017 under which the DGAP, is supposed to give formal hearing of personal hearing to the respondent, in case he is found to have contravened the provisions of Section 171. Further, the Authority affords ample opportunity to any Respondent during the courses of its

proceedings and hearing, to put-forth any contentious grievances. Hence, the respondent's claim that the basic principles of natural justice were not followed by the DGAP does not hold.

- D. In the absence of any new facts and submissions regarding the case, or factual error in the report dated 22.04.2019, we find that there is no valid reason to refer the matter back to the DGAP.
- E. We find that the Respondent has contended that the Authority has not prescribed methodology for calculation of profiteering and consequently the DGAP has followed a methodology that is questionable and erroneous. In this regard, we/Authority observed that the profiteering and extent thereof is determined on cases to case basis, by adopting the most appropriate and accurate method based on the facts and circumstances of each case as well as the nature of the goods and services supplied. We reiterate that there cannot be any fixed mathematical formulations/methodology for determination of the quantum of benefit to be passed on which could cover different sectors of the economy and that each case has to be decided based on its specific facts. In this case, for calculation of profiteering, the increase in the Input Tax Credit as a percentage of total taxable turnover has been taken by the DGAP and we do not find anything incorrect therein.

- F. The Respondent has mentioned that the estimated cost of construction has gone up. Also, the he has submitted that the actual cost after GST has gone up by the Rs.12,00,00,000/- (Twelve Crores only) i.e. by 7.79% increase from the previous year. Therefore, no reduction would be required in price of units after transition to GST as that will be offset by enhancement due to commercial or business considerations. We observe that profiteering does not have any co-relation with costing and as per the Section 171 of the CGST Act, 2017, any additional input tax credit available on account of supply of goods or services used in the construction of the project whether directly or indirectly on account of GST shall have to be passed on to the recipients. Benefits arising out of GST implementation in form of additional input tax credit cannot be set of against any cost increase, once the agreement for sale with home-buyers has been finalized.
- G. The Respondent has submitted that the calculation of ratio of ITC to turnover for pre-GST period has been taken without considering the VAT from April, 2017 to June, 2017. In this regard, we take note that the last date of submission of the Investigation Report by the DGAP was 22.04.2019 taking into account the extension of time for completion of the investigation report that had been granted by the Authority in accordance with law. In the instant case, all documents submitted on or before 18.04.2019 were duly

taken into consideration by the DGAP for the purpose of finalisation of profiteering and Report. In the instant case, for calculation of profiteering, the increase in the Input Tax Credit as a percentage of total taxable turnover has been taken. During investigation, only the VAT returns for the period 01.04.2016 to 31.03.2017 were made available to the DGAP and despite repeated reminders the Respondent did not furnish the returns pertaining to the period from April to June 2017. The Respondent did so only on 22.04.2017, which was the last day for submission of the investigation report by the DGAP by the Authority. Therefore increase in ITC as percentage of total taxable turnover for the impugned period 01.04.2016 to 31.03.2017 with the Post-GST period was only considered in the investigation Report dated 22.04.2019. It is also pertinent that in the methodology followed by the DGAP, if VAT input is accounted for, consequently VAT turnover shall also increase for the impugned period. However, as the details were submitted on the very last day, the changes could not be incorporated and rightly so because the Respondent had himself not submitted the requisite documents/returns knowing fully that the DGAP proceedings were time bound. We find that this act of the Respondent of non-submission of documents is just to derail the whole proceedings and enrich himself at the expense of the flat buyers. The delay in justice will hamper the interest of vulnerable home buyers investing in

an affordable housing scheme. The arguments regarding number of flats and not considering the VAT ITC/turnover can be considered at the time of calculation of the final figures of the profiteering when occupancy certificate is received. In the interest of justice, we find no aberration in accepting the DGAP report.

- H. The variation in the number of flats mentioned in the submissions of the Respondent was provided to the DGAP by the Respondent only after the finalization of the investigation report. The data regarding number of flats has been considered for final calculations on the basis of the earlier submissions given by the Respondent himself on 18.04.2019 (Annex-10 of the Report dated 22.04.2019) during the course of investigation before DGAP. Since the Respondent had himself submitted the data, we do not find any reason to interfere with the report of the DGAP on this count.
- I. The Respondent has submitted that profiteering is availability of inputs on Central taxes. No proper meaning can be derived from this one-line submission. Further, as GST has subsumed most of the indirect taxes that included central, State and local body taxes, this submission has no meaning.
- J. The Respondent has contended that profiteering covers only two cases i.e. (a) Savings in cost (b) Reduction in price of inputs. This contention of the Respondent is not in



conformity with Section-171 of CGST Act, 2017 which stipulates that any reduction in rate of tax on supply of goods or services or the benefit of input tax credit shall be passed on to the recipients by way of commensurate reduction in prices. We further find that based on his own understanding of Section 171 of CGST Act, 2017 and CGST Rules, 2017 regarding profiteering, the Respondent has furnished his calculation of profiteering but we observe that in this calculation, the impact of Central Excise Duty, Central Sales Tax, State Octroi e.t.c on the price of the impugned product for which there was no credit available to the Respondent in the erstwhile regime has been completely ignored.

- K. We also find that Respondent has contended that only saving in basic expenditure of construction due to reduction in prices on change of regime would lead to profiteering. This contention is also not in conformity with Section- 171 of CGST Act, 2017 which Stipulates that any reduction in rate of tax on supply of goods or services or the benefit of input tax credit shall be passed on to the recipients by way of commensurate reduction in prices. The statutory position regarding definition of profiteering is contained in Section 171 of the CGST Act, 2017 and the rules made there under, which has an inbuilt mechanism and procedure for determination of profiteering. Hence, to say that the Savings accrued on account of reduction in prices due to regime

change, only is profiteering, is an incorrect interpretation of the statute and rules made therein.

- L. The Respondent's submission that computation of profiteering can be done only on completion of the project has been duly considered, we find that this issue has already been dealt with at para-10 and para-26 of the DGAP Report dated 22.04.2019. We also find that the present investigation by the DGAP covers the period from 01.07.2017 to 30.09.2018. Profiteering, if any, for the period post September, 2018 has not been examined by the DGAP as yet, since the exact quantum of input tax credit that would be available to the Respondent in future, cannot be determined at this stage when the construction of the project is yet to be completed. Hence the present report of the DGAP only covers the quantum of profiteering for the interim period as covered during the investigation and the matter merits to be revisited and finalized after completion of the project.
- M. We also observe that the Respondent has referred to a guidance note issued by ICAI. In this context, we find that the Investigation Report of the DGAP has not looked into the costing of the project and other requirements of ICAI being not relevant to the investigation. Also, for the purpose of calculation of profiteering, only demands raised as per the payment plan agreed upon during allotment of the units between the home-buyers and the Respondent in

accordance with the guidelines of the Affordable Housing Policy of Town and Country Planning Department of Haryana, upon which tax liability is discharged has been considered as the turnover for the relevant period and we find no fault in the report of the DGAP on this ground.

N. We also find that Respondent's submission regarding reversal of ITC of an amount of Rs. 29, 20,000/- on unsold units after receiving occupancy certificate hold no merit as the calculation of DGAP only considers the sold area and proportionate input tax credit for the purposes of calculation of profiteering. Further, the period covered under the present investigation is w.e.f. 01.07.2017 up to 30.09.2018 whereas the reversal as mentioned by the Respondent which is yet to be reported and the same is beyond the period of this investigation.

17. The DGAP after taking into account the benefit of credit available during pre GST (April 2016 to June 2017) period to the taxable turnover received during the said period and comparing the same with the post GST period (01.07.2017 to 30.09.2018) has arrived at the percentage of ITC. Based on the above analysis the DGAP has as has been shown in the Table-C above correctly estimated the net benefit of ITC as 3.84%. This Authority is in agreement with the DGAP's calculations as mentioned in Annexure 13 of his Report. Thus, based on the above facts this Authority determines the profiteered amount as Rs. 2,47,48,549/- which includes GST @12% or 8% as applicable on the base profiteered amount of Rs. 2,28,05,373/- realized from all the 731

residential units for the period w.e.f. 01.07.2017 to 31.09.2018 as per the Annexure- 13 of the Report., including the above Applicants.

18. It is established from the perusal of the above facts of the case that the provisions of Section 171 of the CGST Act, 2017 have been contravened by the Respondents as he has profiteered an amount of Rs. 2,47,48,549/- which includes GST @12% or 8% as applicable on the base profiteered amount of Rs. 2,28,05,373/- from all the 731 residential units for the period w.e.f. 01.07.2017 to 31.09.2018 as per Annexure- 13 of the Report. Accordingly, the above amounts shall be paid to the above Applicants and the other eligible house buyers by the Respondents along with interest @18% from the date from which these amounts were realised from them till they are paid as per the provisions of Rule 133 (3) (b) of the CGST Rules, 2017, failing which shall be recovered by the concerned Commissioner CGST / SGST and paid to the eligible house buyers.
19. From the above discussions it is clear that the Respondent has profiteered an amount of Rs. 2,47,48,549/- for the period of investigation. Therefore, in view of the above facts the Authority under Rule 133 (3) (a) of the CGST Rules, 2017 orders that the Respondent shall reduce/refund the price to be realized from the buyers of the flats commensurate with the benefit of ITC received by him as has been detailed above. As far as the total additional input tax credit that will be available to the Respondent is concerned it cannot be determined at this stage when the construction of the project is yet to be completed and the DGAP is directed to carry out a comprehensive

investigation at the time of issue of occupancy certificate. The present investigation is only up to 30.09.2018 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 7 or any other buyer shall be at liberty to approach the State Screening Committee Haryana for initiating fresh proceedings under Section 171 of the above Act against the Respondents. 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.

20. The Respondent vide his written submission dated 11.09.2019 had stated that there were three on-going projects under execution the details of which are given as follows: -

1. ROF AALAYAS of 5 Acres -Sector- 102, Gurugram.
2. ROF AALAYAS PHASE II - Sector- 102, Gurugram.
3. ROF AMALTAS- SECTOR 92, Gurugram.

21. The Authority, as per the Rule 133 (5) (a) of the CGST Rules, 2017, which is reproduced below, directs the DGAP to investigate all the other projects of the Respondent including those mentioned in Para 20 above, for violation of the provisions of Section 171 of the CGST Act, 2017 and submit his Report as per the provisions of Rule 133 (5) (b) of the CGST Rules, 2017, as there may be a possibility of profiteering w.r.t. their other projects also. Rule 133 (5) (a) & Rule 133 (5) (b) of the CGST Rules, 2017 is reproduced as below:-



[(5) (a) Notwithstanding anything contained in sub-rule (4), where upon receipt of the report of the Director General of Anti-profiteering referred to in sub-rule (6) of rule 129, the Authority has reasons to believe that there has been contravention of the provisions of section 171 in respect of goods or services or both other than those covered in the said report, it may, for reasons to be recorded in writing, within the time limit specified in sub-rule (1), direct the Director General of Anti-profiteering to cause investigation or inquiry with regard to such other goods or services or both, in accordance with the provisions of the Act and these rules.

(b) The investigation or enquiry under clause (a) shall be deemed to be a new investigation or enquiry and all the provisions of rule 129 shall mutatis mutandis apply to such investigation or enquiry]

22. It is evident from the above that the Respondent has denied the benefit of ITC to the buyers of the flats being constructed by him in contravention of the provisions of Section 171(1) of the CGST Act, 2017 and has thus realized more price from them than he was entitled to collect. Therefore, he is liable for imposition of penalty under Section 171(3A) of the CGST Act. Accordingly, a Show Cause Notice be issued to him directing him to explain why the penalty prescribed should not be imposed on him.

23. Further the Authority as per Rule 136 of the CGST Rules 2017 directs the 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 the Authority is passed on to all the buyers . A



report in compliance of this order shall be submitted to this Authority by the DGAP within a period of 3 months from the date of receipt of this order.

24. A copy each of this order be supplied to the Applicants, the Respondent, Commissioners CGST /SGST as well as Principal Secretary (Town & Planning) Government of Haryana for necessary action. File be consigned after completion.



Certified copy


(A.K. Goel)
Secretary, NAA

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(R. Bhagyadevi)
Technical Member

Sd/-
(Amand Shah)
Technical Member

File No. 22011/NAA/34/NANI/2019/5890-91

Dated: 21.10.2019

Copy to:

5892-1, 5892-2, 5893, 5894/1-5894/7

1. Directorate General of Anti-Profitteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001,
2. M/s Nani Resorts and Floriculture Pvt. Ltd., Building No. 80, 1st Floor, Sector-44, Gurgaon-122003, Haryana,
3. The Commissioner of State Tax, Vanijya Bhavan, Plot No. 1-3, Sector-5, Panchkula, Haryana- 134151,
4. The Commissioner, CGST Gurugram, Plot no. 36 & 37, Sector-32, Gurugram, Haryana-122001,
5. Principal Secretary to Govt. of Haryana, Town & Country Planning Department, Plot No. 3, Sec-18A, Madhya Marg, Chandigarh-160018,
6. Sh. Sandeep Kumar, D1/52, Kunwar Singh Nagar, Nangloi, Delhi-110041,
7. Sh. Harish Kumar Yadav, House No. D3/203, Tulip Petals, Sector-89, Gurgaon 122505,
8. Ms. Poonam Shiv, 265, Prabhavi Apartments, Floor No. 29B, Sector-10, Dwarka, New Delhi-110075,
9. Sh. Veeran Puri, 132, Prabhavi Apartments, Floor No. 29B, Sector-10, Dwarka, New Delhi-110075,
10. Ms. Ajit Yadav, H.No 490, Near ESIC Hospital, Sector 9A, Gurgaon-122001,

11. Sh. Mukesh Kumar Rajan, Ho.No- 755, Sector- 7 extn. Gurgaon, Haryana-122001,
12. Sh. Nitin Gambhir, House No 18, Shree Ram Colony, near Jain Mandir, Sector-4, Gurugram 122001,
13. NAA website
14. Guard File



(A.K. Goel)
Secretary, NAA

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