

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

Case No. 02/2020
Date of Institution 04.07.2019
Date of Order 01.01.2020

In the matter of:

1. Sh. Susheel Prasad Todi, Cosmos Park, Iberis-1/302, Building-5, Ghodbandar Road, Kasarvadi, Thane, Mumbai-400615.
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 Acme Housing India Pvt Ltd., Building 10, 5th Floor, Solitaire Corporate Park, Guru Hargovindji Road, Chakala, Andheri (E), Mumbai-400093.

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 Applicant No. 1.
2. None for the Applicant No. 2.
3. Sh. Mehul S. Shah, GM(Accounts), Sh. Prasanna Sudke, C.A. for the Respondent.

ORDER

1. This Report dated 03.07.2019 has been received from the Applicant No. 2 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 case are that vide his application dated 18.01.2018 submitted to the Maharashtra Screening Committee on Anti-profiteering under Rule 128 (2) of the CGST Rules, 2017, the Applicant No. 1 had alleged profiteering by the Respondent while he had purchased Flat in Respondent's project named "Acme Ozone Herbelia", Ghodbunder Road, Manpada, Thane, Maharashtra 400610. The above Applicant had also alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) by way of commensurate reduction in price w.e.f. 01.07.2017 to him. The Maharashtra State Screening Committee had examined the above application and after its prima facie satisfaction that the Respondent had violated the provisions of Section 171 of the CGST Act, 2017, had sent the same with its recommendations for necessary action to the Standing Committee on Anti-profiteering as per the provisions of Rule

the Standing Committee on Anti-profiteering in its meeting held on 13.12.2018 and was referred to the DGAP under Rule 128(2) for conducting detailed investigation on the allegations levelled by the Applicant No. 1.

2. The DGAP has stated in his Report that the Applicant No. 1 had submitted the following documents along with his application:

- (a) Duly filled in Form APAF-1.
- (b) Proof of identification (Aadhar card).
- (c) Copies of the demand letters.

3. The DGAP had issued Notice under Rule 129(3) of the CGST Rules, 2017 on 16.01.2019 (Annexure-3 of the Report) asking the Respondent to intimate as to whether he admitted that the benefit of ITC had not been passed on to the above Applicant through commensurate reduction in the price of the flat and if so, to suo moto determine the quantum of such benefit and communicate the same with necessary evidence. An opportunity to inspect the non-confidential evidence/information submitted by the Applicant No. 1 was also afforded to the Respondent, which the Respondent didn't avail. In response to the Notice dated 14.01.2019, the Respondent submitted to the DGAP:-

(i) That in order to determine the benefit accruing to him in respect of the project, which needed to be passed on to his buyers, he had appointed Advocates & Solicitors firm M/s. Economic Law Practices ('ELP') and the said firm had carried out the exercise of determination of savings/benefit accruing due to change in taxation regime. The benefit/saving arrived at by the said firm was 3.16% of the total value

of area sold as on 30th June, 2017. It was also intimated that the project "Herbilia" was a sub project under "Acme Ozone" project having RERA Registration No. P51700001038. He further claimed that he had already passed on the benefit of Rs 3,11,726/- to the Applicant, vide letter dated 27.04.2018.

(ii) He further submitted to the DGAP that he would be giving discount on account of additional input tax credit to all the home buyers at the time of handing over the possession, so that the correct amount could be worked out and passed on. Also, he was not certain whether flat buyers would take possession of the flats or cancel the bookings or transfer the bookings after availing discount or whether they would make payment of all the instalments in time etc.

(iii) That the benefit of additional input tax credit arising due to implementation of GST could only be ascertained and quantified at the time of completion of construction of the project as his milestones for billing and receipt of inward supply were not linked to each other, also in terms of Rule 42 of the Rules, he would be required to reverse input tax credit on receiving the completion certificate.

(iv) The Respondent also submitted to the DGAP that he, being registered under the Maharashtra Regulatory Authority incorporated under Real Estate (Regulation & Development) Act, 2016 (RERA), could not increase the cost of the flat and if benefit was computed at the intermediate stage by comparing the input tax credit availed till date and passed on to the flat buyers without taking into account the eventualities like reversal of credit on receipt of the completion

certificate and non-deposit of tax by his suppliers, he would not be able to recover the amount from flat buyers at a later stage due to provisions of RERA. Therefore, it was not possible for him to quantify the benefit of additional input tax credit on recurring basis during the period of construction.

(v) The Respondent further stated to the DGAP that he was not procuring the construction materials directly from the vendors but had given contracts to various Contractors. Majority of construction material had been procured by the Contractors who were providing works contract service to him. These Contractors had charged Service Tax under works contract service which was creditable to him even in the pre-GST period. The effective Service Tax rate on works contract was 6% (15% of 40%) and in the GST period, work contract service attracted GST @18% which was eligible for credit even in the pre-GST period. Similarly, for other input services, increase in credit was due to increase in tax rate. The increase in the input tax credit was not due to availability of credit on items which were not eligible for credit in the pre-GST period but due to increase in the tax rate on items which were eligible for credit even in the pre-GST period. Therefore, there was no additional input tax credit flowing due to introduction of GST.

(vi) The Respondent further submitted to the DGAP that his agreements with the flat buyers were long-term contracts spanning over several years and payments made by the flat buyers were provisional as the contract was not said to have been fulfilled/concluded unless construction was completed and flat buyers

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made full payment of the agreement value. If any of these events did not get fulfilled, the contract would get terminated and supply would be deemed to have not taken place.

(vii) The Respondent submitted the following documents to the DGAP:-

- (a) Copies of GSTR-1 returns for the period July, 2017 to December, 2018.
- (b) Copies of GSTR-3B returns for the period July, 2017 to December, 2018.
- (c) Copies of Tran-1 returns for transitional credit availed by the Respondent.
- (d) Copies of VAT & ST-3 returns for the period April, 2016 to June, 2017.
- (e) Electronic Credit Ledger for the period July, 2017 to December, 2018.
- (f) Tax rates, pre-GST and post-GST.
- (g) Copy of Balance Sheet for FY 2016-17 & 2017-18.
- (h) Payment plan of the Applicant alongwith agreement and demand letters.
- (i) Details of turnover and input tax credit in respect of the project "Acme Ozone Herbelia".
- (j) List of home buyers in the project "Acme Ozone Herbelia".

4. The DGAP stated that the Respondent submitted a copy of the sale agreement dated 08.12.2017, for the sale of flat no. 607, to the Applicant No. 1 in his project "Acme Ozone Herbelia", measuring 984 square feet.

at the basic sale price of Rs. 13,447/- per square feet. The details of amounts and taxes paid by the said Applicant to the Respondent, is furnished in the table below:-

Table (Amount in Rs.)

Sr. No.	Payment Schedule	Date	Cost of Flat	ST@4.5%	SGST@6%	CGST@6%
1	Booking Amount (S)	Jun 09,2017	33,67,608	1,51,542		
2	Balance Earnest Money (S)	Oct 24,2017	41,74,775		2,50,487	2,50,487
3	On Completion of 11th Slab (E)	Oct 24,2017	2,64,645		15,879	15,879
4	On Completion of 13th Slab (E)	Nov 18,2017	2,64,645		15,879	15,879
5	On Completion of 15th Slab (E)	Dec 12,2017	2,64,645		15,879	15,879
6	On Completion of 17th Slab (E)	Jan 06,2018	2,64,645		15,879	15,879
7	On Completion of 19th Slab (E)	Jan 20,2018	2,64,645		15,879	15,879
8	On Completion of 21st Slab (E)	Feb 12,2018	2,64,645		15,879	15,879
9	On Completion of 23rd Slab (E)	Mar 05,2018	2,64,645		15,879	15,879
10	On Completion of 25th Slab (E)	Apr 02,2018	2,64,645		15,879	15,879
11	On Completion of Terrace Slab (E)	May 16,2018	2,64,645		15,879	15,879
12	On Completion of Int Electric Conduit + Int Conceal +Plumbing (E)	Apr 20,2019	6,61,613		39,697	39,697
13	On Completion of Flooring + Daddo + Water Proffing (E)	Apr 20,2019	6,61,613		39,697	39,697
14	On Completion of Ext Plumbing + Electric Main + Ext Painting (E)		6,61,613		39,697	39,697
15	On Completion of Int Painting + CP + Sanitary Ware + Int Wiring (E)		6,61,613		39,697	39,697
16	On Completion of Pumps + Substation + STP (E)		3,96,968		23,818	23,818
17	On Possession (S)		2,64,642		15,875	15,875
	Total		1,32,32,250	1,51,542	5,91,879	5,91,879

5. The DGAP observed that para 5 of Schedule-III of the Central Goods and Services Tax Act, 2017, defining 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"* along with Clause (b) of para 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 input

tax credit pertaining to the residential units which were under construction but not sold was provisional input tax credit which may be required to be reversed by the Respondent, if such units remain 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:

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.

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 DGAP concluded that the input tax credit pertaining to the unsold units was outside the scope 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 proportional benefit of additional input tax credit available to them post-GST.

6. The DGAP further observed from the details submitted by the Respondent that he had not submitted the details/reconciliation of all the

home buyers of the project "Acme Ozone". Accordingly, he limited the computation of profiteering to the sub-project "Herbelia". It also appeared to the DGAP that prior to 01.07.2017, i.e., in the pre-GST era, the Respondent was eligible to avail CENVAT credit of Service Tax paid on the input services only (no CENVAT credit was available in respect of Central Excise Duty and VAT paid on the inputs). However, post-GST, he could avail input tax credit of GST paid on all the inputs and the input services. From the data submitted by the Respondent, the details of the input tax credit availed by the Respondent, his turnover from the project "Acme Ozone Herbelia" 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 December, 2018) periods, is furnished in table below as given by the DGAP:-

Table

(Amount in Rs.)

Sr. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	July, 2017 to December, 2018 Total (Post-GST)
1	CENVAT credit of Service Tax Paid on Input Services (A)	42,05,349	21,81,958	63,87,307	
2	Credit of VAT paid on Inputs (B)				
3	Total CENVAT/VAT Credit Available (C)= (A+B)	42,05,349	21,81,958	63,87,307	
4	Input Tax Credit of GST (D)				3,20,57,112
5	Total Turnover as per Home buyers list (E)	28,64,33,564	15,22,77,929	43,87,11,493	72,03,56,512
6	Total Saleable Area of Flats in the project (in Square Feet) (F)			1,35,905	1,35,905
7	Area Sold relevant to Turnover as per Home buyers list (G)			98,208	1,11,846
8	Relevant CENVAT/Input Tax Credit (H)= [(C) or D*(G)/(F)]			46,15,604	2,63,82,061
9	Ratio of CENVAT/ Input Tax Credit to Turnover [(I)=(H)/(E)]*100			1.05%	3.66%

7. From the above table, the DGAP concluded that, the input tax credit as a percentage of the turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 1.05% and during

the post-GST period (July, 2017 to December, 2018), it was 3.66%, which showed that post-GST, the Respondent had benefited from additional input tax credit to the tune of 2.61% (3.66%-1.05%) of his turnover. Accordingly, the DGAP computed profiteering by comparing the ratio of input tax credit available to the turnover and the turnover during the pre-GST period (April, 2016 to June, 2017) when Service Tax @4.5% and VAT@1% were payable (total tax rate of 5.5%) with those of the post-GST period (July, 2017 to December, 2018) when the effective GST rate on construction service was 12% (GST @18% alongwith 1/3rd abatement on account of land value), levied vide Notification No.11/2017-Central Tax (Rate) dated 28.06.2017 (**Annex-15 of the DGAP Report**). On the basis of the figures contained in the table above, the comparative figures of the applicable tax rate and ratio of input tax credit to the turnover during the pre-GST and post-GST periods as well as the recalibrated basic price and the excess realization (profiteering) during the post-GST period, has been tabulated below as provided by the DGAP:-

Table

(Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST
	Period	A	April, 2016 to June, 2017	July, 2017 to December, 2018
1	Tax Rate	B	5.5%	12%
2	Ratio of CENVAT credit/ Input Tax Credit to Turnover as per Table B above (%)	C	1.05%	3.66%
3	Increase in input tax credit availed post-GST (%)	D= 3.66% less 1.05%	-	2.61%
	Analysis of Increase in input tax credit:			
4	Basic Price collected during July, 2017 to December, 2018	E		72,03,56,512
5	GST @ 12% on Basic Price	F= E*12%		8,64,42,781
6	Total Demand collected/raised	G=E+F		80,67,99,293
7	Recalibrated Basic Price	H= E*(1-D) or 97.39% of H		70,15,55,207
8	GST @12% on recalibrated Basic Price	I= H*12%		8,41,86,625

9	Commensurate Demand	J= H+I	78,57,41,832
10	Excess Realization or Profiteering Amount	K= G - J	2,10,57,462

8. The DGAP concluded that the additional input tax credit of 2.61% of the turnover should have resulted in commensurate reduction in the basic price as well as cum-tax price, and for the present, the Respondent has retained the benefits that had accrued on account of additional input tax credit. After taking into account the aforesaid CENVAT/input tax credit availability pre-GST and post-GST and the details of the amount collected from the home buyers during the period 01.07.2017 to 31.12.2018, the amount of benefit of input tax credit not passed on to the recipients as computed by the DGAP was Rs. 2,10,57,462/- which included 12% GST on the base profiteered amount of Rs. 1,88,01,305/-, and the benefit to be passed on to the Applicant was Rs 1,91,662/- which included both the profiteered amount @2.61% of the basic price and 12% GST on the said profiteered amount. The DGAP informed that the Respondent had already passed on Rs. 3,11,726/- to the Applicant, vide letter dated 27.04.2018, so the extra benefit passed on by the Respondent to the Applicant can be adjusted against the demand to be raised on the Applicant or the benefit of input tax credit to be passed on to him for the post December, 2018 period. Also, the DGAP informed that the Respondent did not provide any evidence to show that the benefit of input tax credit in GST- era has been passed on to the other home buyers. The computation of profiteering by the DGAP has been done in respect of 152 home buyers from whom payments have been received by the Respondent during the post-GST period covered by the present investigation, i.e., w.e.f. 01.07.2017 to 31.12.2018, whereas the

Respondent has booked a total number of 176 flats till 31.12.2018. In respect 24 flats, the customers have not paid any consideration during the post-GST period from 01.07.2017 to 31.12.2018.

9. The above Report was considered by the Authority in its sitting held on 09.07.2019 and it was decided that the Applicants and the Respondent be asked to appear on 31.07.2019. The Respondent was represented by Sh. Mehul S. Shah, GM (Accounts) and the Applicants were not present. After the first hearing, on the request of the Respondent, he was granted four more opportunities of hearings on 21.09.2019, 03.09.2019, 18.09.2019 and 10.10.2019, but he didn't appear in any of them. He was accorded last opportunity of hearing on 24.10.2019, in which he appeared.

10. The Respondent vide his reply dated 29.07.2019 stated that the observations made by the DGAP about non-passing of benefit were not correct as supply to the customers/receivers was not yet completed and therefore time for passing on the benefit had not lapsed yet. He also argued that in the CGST Rules, 2017 which deal with anti-profiteering provisions (Rule 122 to Rule 137), due date/time before which the supplier was required to pass on the benefit to the receiver has no where been prescribed.

11. The Respondent further stated that the DGAP had determined the benefit even before the completion of supply and the benefit of additional input tax credit, if any due to implementation of GST which could only be ascertained and quantified at the end of the completion of construction of the project as neither sales nor purchases were even

spread. He also argued that agreement with the flat buyer was a long term contract spreading into multiple years and flat buyer made payments which were progressive in nature as contract was not concluded unless construction was completed and flat buyer made full payment towards the agreement value.

12. He contended that the ITC availed by him was not final and it was required to be reversed in future which would be in proportion to the unsold area of flats on the date of obtaining of Occupation Certificate, therefore he requested that the discount/reduction in sale price would only be possible only at the completion of the project by which the finality in terms of consumption of materials, services, cost, sales etc would be ascertained.

13. The Respondent claimed that the methodology followed by the DGAP was not correct as the DGAP has simply compared the ITC availed in the pre-GST and post-GST period from the returns filed, but only those goods/services on which credit was not available in the pre-GST period needed to be taken into consideration, the goods/services on which credit was available in the pre-GST period should have been excluded, which has not been considered by the DGAP.

14. The DGAP, in response to the Respondent's submissions replied vide Report dated 16.09.2019 stated that the investigation report covered the period from 01.07.2019 to 31.12.2018 and the contention of the Respondent was that the benefit of ITC would be passed on only on the completion of the project, but the amount received by the Respondent till 31.12.2018 had been taken for the calculation of the profiteering and

the credit that would be available to him in the future has not been taken into account and also the ITC which was relevant to turnover was only taken into account to calculate the profiteering by the DGAP, and unsold units had not been taken into account.

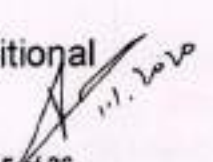
15. On the issue of methodology followed by the DGAP, the DGAP has reported that the increase in the input tax credit availed by the Respondent as a percentage of the Respondent's total turnover in the post GST period has been worked out to quantify the extent of profiteering, without going into the aspect of input/input service wise availability of input tax credit in the pre-GST and post-GST periods as that was not relevant to the computation of profiteering.
16. The Respondent vide submissions dated 24.10.2019 stated that ITC benefit of 3.16% has been passed to all customers who have booked flats before 01.07.2017 on entire demand which will be issued in Post GST period. He stated that the customers who have booked flats after introduction of the GST, were not eligible for discount towards anti-profiteering since the price agreed by the customers was after taking into consideration all the benefits which were accruing to him. And also, since the anti profiteering provisions itself are not applicable for flats booked after 01.07.2017, the DGAP needs to revise the report to the extent it has computed discount for flats which were booked after 01.07.2017.
17. The Respondent also stated that as the supply to the customers is not yet completed and therefore time for passing of the benefit has not lapsed yet and in absence of any specific provision with reference to the

timing for passing of ITC benefit, he stated that the supplier may be required to pass on the benefit either, at the time of completion of supply or immediately after completion of supply.

18. The Respondent stated that the methodology worked by the DGAP is not proper as he has simply compared the ITC availed in the pre-GST and post-GST period from the returns filed. As per the Respondent, only those items which were not-creditable needs to be taken into consideration and items which were creditable in pre-GST period need to be excluded.

19. The submissions of the Respondent dated 24.10.2019 were forwarded to the DGAP for comments if any, the DGAP replied vide letter dated 07.11.2019 that the Respondent has not submitted any sales/booking agreement wherein it has been mentioned that the input credit benefit accruing to the Respondent in the post-GST period has been considered to arrive at the sale price for flat booked after introduction of GST.

20. We have carefully considered all the Reports filed by the DGAP, the submissions made by the Respondent and find that the Applicant No. 1 had booked Flat with the Respondent in his "Acme Ozone herbililia" project located in Thane, Maharashtra measuring 984 sq. feet, at basic sale price of Rs. 13447/- per sq. feet. It is also revealed from the record that the above Applicant vide his complaint dated 18.01.2018 had alleged that the Respondent was not passing on the benefit of ITC to him in spite of the fact that he was availing ITC on the purchase of inputs at higher rates of GST which had resulted in benefit of additional

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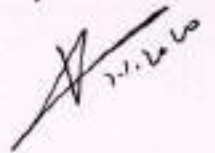
ITC to him and was also charging GST from him @12%. The above complaint was examined by the Standing Committee in its meeting held on 13.12.2018 and was forwarded to the DGAP for investigation who vide his Report dated 02.07.2019 has found that the ITC as a percentage of the total turnover which was available to the Respondent during the Pre-GST period was 1.05% and during the Post-GST period this ratio was 3.66% as per the Table-B of the DGAP Report and therefore, the Respondent had benefited from the additional ITC to the tune of 2.61% (3.66%-1.05%) of the total turnover which he was required to pass on to the flat buyers of this project. He has also claimed that the Respondent had not reduced the basic prices of his flats by 2.61% due to additional benefit of ITC and by charging GST at the increased rate of 12% on the Pre-GST basic prices, he had contravened the provisions of Section 171 of the of the CGST Act, 2017. The DGAP vide his Report dated 02.07.2018 has further submitted that the amount of benefit of ITC which had not been passed on by the Respondents or the profiteered amount came to Rs. 2,10,57,462/- which included 12% GST on the basic profiteered amount of Rs. 1,88,01,305/-. The DGAP has also intimated that the above amount was inclusive of Rs. 1,91,662/- (including GST) which the Respondent had profiteered from the Applicant No. 1. But the Respondent had already passed on Rs. 3,11,726/- to the above Applicant which can be adjusted against the demand to be raised on the Applicant or the benefit of ITC to be passed on to him post December. He has also supplied the details of all the buyers who had purchased flats from the Respondent along with their unit numbers vide

Annexure-16 attached with the DGAP Report in which the profiteered amount of Rs. 2,10,57,462/- has been computed.

21. The Respondent was issued notice dated 09.07.2019 to explain why the above Report of the DGAP should not be accepted and their liability for violating the provisions of Section 171 of the CGST Act, 2017 should not be fixed along with imposition of penalty as per Sections 122-127 of the above Act read with Rule 133 of the CGST Rules, 2017 and his registration under the above Act should also not be cancelled.
22. The DGAP has also mentioned that the above computation of the profiteered amount was in respect of the 152 flat buyers whereas, the Respondent had booked 176 flats till 31.12.2018, out of which 24 buyers had not paid any consideration during the post GST from the period between 01.07.2017 to 31.12.2018 Post-GST.
23. He has further mentioned that if the ITC in respect of these 24 units was calculated with reference to the 152 units where payments had been received after GST had come in to force, the ITC as a percentage of taxable turnover would be distorted and erroneous and hence, the benefit of ITC in respect of these 24 units should be calculated when the consideration would be received Post-GST by taking into account the proportionate taxable turnover in respect of these 24 Units. It is observed from the documents placed on record as well as the above submissions of the DGAP that out of the above 176 flat buyers the Respondent has received consideration Post-GST, only from 152 flat buyers. Therefore, the ITC benefit is required to be passed on to the 152 buyers only at this stage and benefit should be passed on to the other buyers at a later stage when payments are received from them.

24. The DGAP has further mentioned that the Respondent had passed on the benefit of Rs. 3,11,726/- to the Applicant No. 1 and has stated that the benefit claimed to have been passed on by the Respondent was higher as compared to what they should have passed on in respect of the Applicant No. 1.

25. The DGAP has also reported that the additional ITC benefit of 2.61% of the taxable turnover which has accrued to the Respondent was required to be passed on to the Applicant No. 1 and the other recipients and therefore, the provisions of Section 171 of the CGST Act, 2017 has been violated by the Respondent as the additional benefit of ITC @2.61% of the base prices received by the Respondent during the period from 01.07.2017 to 31.12.2018 had not been passed on to the Applicant No. 1 and the other buyers and the Respondent has realized an additional amount of Rs 1,91,662/- from the Applicant No. 1 which includes both the profiteered amount @2.61% of the taxable amount (base price) and the GST on the said profiteered amount. Further, the DGAP has reported that the Respondent has apparently passed an amount of Rs. 3,11,726/- as benefit of ITC to him and hence an excess benefit of Rs. 1,20,064/- had been passed on to the Applicant No.1 vide letter dated 27.04.2018 as mentioned in the DGAP Report. However, perusal of the said letter of the Respondent addressed to the DGAP (Annexure 9 of the DGAP Report) shows that this amount has been paid as a discount/rebate which cannot be taken to be the benefit of ITC and hence no excess benefit of ITC. The said letter of the Respondent inter alia reads as below:-



"we have already passed on the benefit of 3.61% of uncalled demand to Mr. Susheel Prasad Todi. (copy of letter dated 27.04.2018 intimating rebate/discount to Mr. Susheel Prasad Todi is enclosed as Annexure-2)"

Also, in his submissions dated 24.10.2019, the Respondent reiterated that he had passed on the ITC benefit of 3.16% to all customers who booked flats before 01.07.2017 on the entire demand which would be issued in post-GST period and enclosed customer ledgers showing that the said benefit had been credited. But perusal of the ledgers proves that the Respondent has given them rebate/discount and not passed on the full benefit of ITC as there is no such entry in their account statements. Granting of rebates/discounts is the most prevalent practice followed in the construction industry to increase sales and hence the above rebate cannot be equated with the passing on of the benefit of ITC. The Respondent has also not produced any reliable or cogent evidence either before the DGAP or this Authority in support of his contention that he has passed on the benefit of ITC by submitting the details of the entries made in his books of account or cheques issued to the buyers or the copies of the tax invoices/demand letters or the acknowledgements made by his customers of having received the benefit of ITC due to implementation of the GST. As discussed above the Respondent has only claimed to have passed on the discount/rebate on account of GST which cannot amount to passing on the benefit of ITC as per the provisions of Section 171 (1) of the CGST Act, 2017.



Therefore, the above claim of the Respondent is frivolous and hence, the same cannot be accepted.

26. Hence, we take the view that no benefit of ITC has yet been passed on to him by the Respondent. Accordingly, we hold that the Applicant No. 1 is entitled to an amount of Rs 1,91,662/- including the GST as benefit of ITC along with interest @18% from the date from which the above amount was realised by the Respondents from him and that any amount passed on by the Respondent as a discount can't be treated as passing of the benefit of ITC.

27. The DGAP has also claimed that the investigation had revealed that the Respondent had profiteered an amount of Rs. 2,08,65,800/- which included both the profiteered amount @2.61% of the taxable amount (base price) and the GST on the said profiteered amount from 151 other recipients who were not Applicants in the present proceedings and since they were identifiable as per the documents furnished by them therefore, an amount of Rs. 2,08,65,800/- was required to be returned to such eligible buyers and hence this amount is ordered to be returned to the above buyers with interest.

28. The Respondent has also raised objection on the methodology of computation followed by the DGAP while calculating the profiteered amount as the DGAP had not taken goods/services on which credit was available to him in the pre-GST period. This argument of the Respondent does not hold good as the DGAP has taken both, the Credit available in the pre-GST and post-GST periods and has arrived at the ratio of Credit to turnover, totally in accordance with the statutory documents submitted by the Respondent himself. Also, in each case

profiteering has to be determined on the basis of the facts of each case and no mathematical straight jacket formula can be fixed for calculating the same as the facts of each case differ. Further the Authority under Rule 126 of the CGST Rules, 2017 has already notified the 'Procedure & Methodology' for determination of the profiteered amount vide its Notification dated 28.03.2018 however, as has been stated above the same has to be applied on case to case basis. It would also be appropriate to mention here that this Authority has power to 'determine' the methodology and not to 'prescribe' it as per the provisions of the above Rule and therefore, no set prescription can be laid while computing profiteering. Accordingly, the claim made by the Respondent that the methodology adopted is wrong cannot be considered.

29. We also find it pertinent to mention that Section 171 (1) of the CGST Act, 2017 clearly states that "Any reduction in the 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". Therefore, the intention of the legislature is amply clear from the above provision which requires that the benefit of tax reduction or ITC is required to be passed on to the customers by commensurate reduction in prices and the same cannot be retained by a supplier. In furtherance of the same, this Authority has in exercise of the powers conferred on it under Rule 126 of the CGST Rules, 2017, notified the 'Procedure & Methodology' for determination of the profiteered amount vide its Notification dated 28.03.2018. However, the mathematical methodology for determination of the profiteered amount is case specific since it depends on the facts of each case and thus, no fixed formula can be

set for calculating the amount profiteered in different cases. It is also pertinent to elaborate that the mathematical methodology applied in cases where the rate of tax has been reduced and ITC disallowed cannot be applied to cases where the rate of tax has been reduced and ITC allowed.

30. The Respondent has also submitted that he would have to reverse the ITC after issuance of the Completion Certificate as per Schedule-III subject to clause (b) of para 5 of Schedule-II as well as Section 17(3) of the above Act. As the Completion Certificate has not been obtained by the Respondent therefore, the above provisions are not applicable in his case. The Respondent has also claimed that he has passed on the benefit of additional ITC in the sales made post GST, but nowhere he has proved this in his sales/booking agreement.

31. 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 Respondent as he has profiteered an amount of Rs. 2,10,57,462/- which includes 12% GST on the base profiteered amount of Rs. 1,88,01,305/-. The Respondent has also realized an additional amount to the tune of Rs. 1,91,662/- from the Applicant No. 1 which includes both the profiteered amount @2.61% of the taxable amount (base price) and the GST on the said profiteered amount. Accordingly, the above amounts shall be paid to the above Applicant and the other eligible house buyers by the Respondent 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

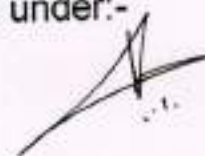
Rules, 2017, within a period of 3 months from the date of passing of this order.

32. In view of the above facts this Authority under Rule 133 (3) (a) of the CGST Rules, 2017 orders that the Respondents shall reduce the prices to be realized from the buyers of the flats commensurate with the benefit of ITC received by them as has been detailed above. Since the present investigation is only up to 31.12.2018 any benefit of ITC which accrues subsequently shall also be passed on to the buyers by the Respondent. In case this benefit is not passed on the Applicant No. 1 or any other buyer shall be at liberty to approach the State Screening Committee Maharashtra for initiating fresh proceedings under Section 171 of the above Act against the Respondent. The concerned CGST or SGST Commissioner of Maharashtra shall take necessary action to ensure that the benefit of additional ITC is passed on to the eligible house buyers in future.

33. It is also evident from the above narration of facts that the Respondent has denied benefit of ITC to the buyers of the flats and the shops being constructed by him in his Project 'Fusion Homes' in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has 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 Show Cause 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. Accordingly, the notice dated 09.07.2019 vide which it was proposed to impose penalty under Section

29, 122-127 of the above Act read with Rule 21 and 133 of the CGST Rules, 2017 is hereby withdrawn to that extent.

34. On perusal of the DGAP Report dated 03.07.2019 and the annexures attached with it, it has been observed that the Respondent has other subprojects under project "Acme Ozone" other than project "Acme Ozone Herbilia" as it was also intimated by the DGAP that the project "Herbilia" was a sub project under "Acme Ozone" project having RERA Registration No. P51700001038. The present investigation covers only one sub project i.e. "herbilia", out of the whole project under one RERA Registration. The Respondent has himself admitted that he had appointed Advocates & Solicitors firm M/s. Economic Law Practices ('ELP') and the firm had carried out the exercise of determination of savings/benefit accruing due to change in taxation regime. The benefit/saving arrived at by the said firm was 3.16% of the total value of area sold as on 30th June, 2017, therefore, there are sufficient reasons to believe that there might be some sub projects left under the whole project, which have not been investigated. Further, if any other projects are being constructed by the registrant, same needs to be investigated separately. Accordingly, the DGAP is directed to investigate the issue of passing on the benefit of additional ITC by the registrant Respondent in respect of the whole project "Acme Ozone" and also other projects being undertaken under the said registration by the Respondent and submit his Report in terms of section 171(2) of the CGST Act read with Rule 133 (5) of the CGST Rules, 2017 which reads as under:-



"(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."

35. The Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Maharashtra to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondents as ordered by the 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 through the DGAP from the date of receipt of this order.



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

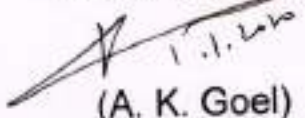


Sd/-
(J. C. Chauhan)
Member(Technical)

Sd/-
(B. N. Sharma)
Chairman

Sd/-
(Amand Shah)
Member(Technical)

Certified Copy


(A. K. Goel)
Secretary, NAA

F. No. 22011/NAA/62/Acme/2019/30-36

Date: 01.01.2020

Copy To:-

1. M/s Acme Housing India Pvt. Ltd., Building 10, 5th Floor, Solitaire Corporate Park, Guru Hargovind Ji Road, Chakala, Andheri(E), Mumbai-400093.

2. Sh. Sushil Prasad Todi, Cosmos Park, Iberis-I/302, Building-5, Ghodbandar Road, Kasarwadi, Thane, Mumbai- 400615.

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

4. Chief Commissioner, CGST, Mumbai Zone, GST Building, 115 M.K. Road, OPP, Churchgate Station, Mumbai- 400020.

5. Commissioner, Commercial Taxes, Office of the Commissioner of State Taxes, 8th floor, Goods and Services Tax (GST) Bhavan, Mazgaon, Mumbai - 400010.

6. Principal Secretary, Urban Development Department, 4th Floor, Main Building, Mantralay, Hutatma Rajguru Chowk, Mumbai.

7. Guard File/NAA Website.

