

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

I.O. No. 6/2020  
Date of Institution 04.07.2019  
Date of Order 03.01.2020

**In the matter of:**

1. Rahul Gautam, House No. 1245, Sector-7, Avas Vikas Colony, Sikandra, Agra, UP-282007.
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**

Himalaya Real Estate Pvt. Ltd., GH-10B, Techzone-IV, Greater Noida (West), UP-201306.

Respondent

**Quorum:-**

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



Present:-

1. Sh. Rahul Gautam, the Applicant No. 1.
2. None for the Applicant No. 2.
3. Sh. Balram Sinha, Authorised Representative, for the Respondent.

**ORDER**

1. The present Report dated 01.07.2019 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 the Applicant No. 1 had filed an application dated 16.10.2018 before the Haryana State Screening Committee on Anti-profiteering, under Rule 128 (2) of the Central Goods and Services Tax Rules, 2017 and submitted that he had purchased a flat in the Respondent's project "Himalaya Pride" situated at Plot No. 10-B, Techzone-IV, Greater Noida (West), UP-201306 and alleged that the Respondent had not passed on the benefit of input tax credit to him by way of commensurate reduction in price, in terms of Section 171 (1) of the Central Goods and Services Tax Act, 2017. The Haryana State Screening Committee on Anti-profiteering on prima facie having satisfied itself that the Respondent had not passed on the benefit of ITC, had forwarded the said application with its recommendation to the Standing Committee on Anti-profiteering for further action, in terms of Rule 128 of the above Rules.



2. The above reference was examined by the Standing Committee on Anti-profiteering and vide its minutes of the meeting dated 13.12.2018 it had forwarded the same to the DGAP for detailed investigation.
3. The DGAP on receipt of the application issued two letters to the Standing Committee on Anti-profiteering on 12.09.2018 and 17.10.2018 and sought the supporting documents along with details of the Applicant No. 1. The Standing Committee of Anti-profiteering, vide letter dated 04.10.2018 and e-mail dated 26.10.2018 provided the supporting documents and the details of the Applicant No. 1 to the DGAP. Therefore, the date of receipt of the application from the Standing Committee on Anti-profiteering, had been taken as 26.10.2018 by the DGAP.
4. Further, the Applicant No. 1 had submitted Cost Sheet, Booking Form, Receipt of amounts paid, Copy of allotment letter along with his application.
5. The DGAP on receipt of the application issued notice dated 18.01.2019 to the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the Applicant No. 1 by way of commensurate reduction in price and if so, to suo-moto determine the quantum there of and indicate the same in his reply to the notice as well as furnish all the supporting documents. The Respondent was also given an opportunity to inspect the non-confidential evidences/information submitted by the above Applicant. However, the Respondent did not avail this opportunity. The DGAP, vide email dated 04.06.2019, had also given the Applicant No. 1 an opportunity to inspect the non-confidential evidences/information

submitted by the above Respondent. However, the Applicant No. 1 did not avail of the said opportunity.

6. The DGAP had sought extension of time for completing the investigation which was extended by this Authority vide its order dated 19.03.2019 in terms of Rule 129 (6) of the CGST Rules, 2017. The period of the investigation is from 01.07.2017 to 31.12.2018.
7. In response to the DGAP's Notice dated 18.01.2019, reminders dated 28.01.2019, 01.02.2019 and 13.02.2019, followed by Summons dated 12.03.2019, issued to Shri Vishal Sharma, Director of the Respondent to appear on 19.03.2019, the Respondent submitted his replies vide letters/e-mails dated 14.02.2019, 19.03.2019, 20.05.2019, 28.05.2019, 10.06.2019, 20.06.2019 and 25.06.2019.
8. The Respondent had also furnished 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) Copy of TRAN-1.
  - (d) Copies of VAT & ST-3 Returns for the period April, 2016 to June, 2017.
  - (e) Copies of all demand letters, sale agreement/contract issued to the Applicant No. 1.
  - (f) Copy of Balance Sheet for FY 2016-17 & 2017-18.
  - (g) Copy of Electronic Credit Ledger for the period 01.07.2017 to 31.12.2018.



(h) CENVAT/Input Tax Credit register for the period April, 2016 to December, 2018.

(i) Copy of Project report submitted to the RERA.

(j) List of home buyers in the project "Himalaya Pride".

9. The Respondent, vide his letter dated 14.02.2019 submitted that he had been passing on the benefit of ITC to his customers including the Applicant No 1. He also submitted a copy of the allotment letter dated 26.09.2018, issued in favour of the Applicant No. 1, executed on a non-judicial stamp paper, wherein it was explicitly mentioned that the Applicant No. 1 had to pay only the basic consideration for the flat which was Rs. 40,96,800/- and the applicable GST would be borne by the Respondent. The Respondent did not claim confidentiality of any details/ information furnished by him, in terms of Rule 130 of the CGST Rules, 2017.

10. The DGAP stated that the main issues to be examined were as under:-

(a) Whether there was reduction in rate of tax or benefit of ITC on the supply of construction service by the Respondent after implementation of GST w.e.f. 01.07.2017.

(b) If so, whether the Respondent had passed on such benefit to the recipients, in terms of Section 171 of the CGST Act, 2017.

11. The DGAP also submitted that the para 5 of Schedule-III of the CGST Act, 2017 (Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services) 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 ITC pertaining to the residential units which were under construction but not sold was provisional ITC which may be required to be reversed by the Respondent, if such units remained unsold at the time of issue of the completion certificate, in terms of Section 17(2) & Section 17(3) of the CGST 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".*



12. Thus the DGAP claimed that the ITC pertaining to the unsold units may not fall within the ambit of the current investigation and the Respondent would be 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 them post-GST.

13. The DGAP further stated that though the Respondent had mentioned that he had passed on the benefit of ITC to the home-buyers, he failed to provide any documentary evidence of such discounts offered to the individual home-buyers except the allotment letter dated 26.09.2018 issued to the Applicant No. 1, wherein it was mentioned that all GST liability would be borne by the Respondent as discount and the Applicant No. 1 would have to pay only the basic consideration of Rs. 40,96,800/-.

14. The DGAP further observed that prior to 01.07.2017, i.e., before GST was introduced, the Respondent was eligible to avail CENVAT credit of Service Tax paid on the input services. However, CENVAT credit of Central Excise duty paid on the inputs was not admissible as per the CENVAT Credit Rules, 2004, which were in force at the material time. The Respondent had submitted that he was neither availing any ITC of VAT, nor was he charging VAT from his customers, as would be evident from the demand letters. However, he was discharging his output VAT liability on deemed 20% value addition to the purchase value of the inputs. Hence, there was no direct relation between the turnover reported in the Respondent's VAT returns for the period April, 2016 to June, 2017 and the actual consideration received from the home buyers. Therefore, the ITC of

VAT and the VAT turnover had not been considered for computation of the ratio of ITC to the turnover for the pre-GST period. Further, post-GST, the Respondent could avail ITC of GST paid on all the inputs and the input services. From the information submitted by the Respondent for the period April, 2016 to December, 2018, the DGAP has furnished the details of the input tax credit availed by him, his turnover from the present project and the ratio of ITC to turnover, during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to December, 2018) in the table given below:-

Table 'A'

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total	
				(Pre-GST)	(Post-GST)
1	2	3	4	(5)=(3)+(4)	(6)
1	CENVAT Credit of Service Tax Paid on Input Services (A)	22,102,675	7,487,735	29,590,410	-
2	Credit of VAT Paid on Inputs (B)	-	-	-	-
4	Total CENVAT/VAT/ Credit Availed (C)= (A)+(B)	22,102,675	7,487,735	29,590,410	
5	Input Tax Credit of GST Availed (D)	-	-	-	142,732,568
6	Total Turnover as per Home Buyers List (Flats sold upto 31.12.2018) (E)			802,322,679	893,185,597
7	Total Saleable Area (in sq. ft.) (F)			1,473,354	1,473,354
8	Area Sold relevant to Turnover (G)			401,307	877,525
9	ITC relevant to area sold (H)= (C) or (D)*G/F			8,059,732	85,011,068
10	Ratio of CENVAT/ Input Tax Credit to Turnover (I)= (H/E*100)			1.00%	9.52%

15. The DGAP has thus stated that from the above table, it was clear that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 1.00% and during the post-GST period (July, 2017 to December, 2018), it was 9.52% which indicated that post-GST, the Respondent had apparently benefited from additional ITC to the tune of 8.52% [9.52% (-) 1.00%] of the turnover.



16. The DGAP also observed that the Central Government, on the recommendation of the GST Council, had levied 18% GST on construction service (after one third abatement towards value of land, effective GST rate was 12% on the gross value), vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Accordingly, the DGAP had examined the profiteering by comparing the applicable tax rate and ITC available to the Respondent for the pre-GST period (April, 2016 to June, 2017) when Service Tax @ 4.5% and VAT on deemed 20% value addition was payable with the post-GST period (July, 2017 to December, 2018) when the effective GST rate was 12% on the gross value and accordingly, on the basis of the figures contained in table-'A' above, the comparative figures of the ratio of input tax credit availed/available to the turnover in the pre-GST and post-GST periods as well as the turnover and the recalibrated base price as well as the excess collection (Profiteering) during the post-GST period, was tabulated in table-'B' below:-

Table 'B'

(Amount in ₹)

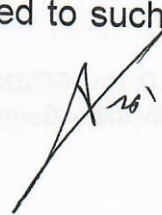
S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April,2016 to June,2017	July,2017 to Dec. 2018
2	Output tax rate (%)	B	4.50%	12.00%
3	Ratio of CENVAT/ Input Tax Credit to Turnover as per Table - A above (%)	C	1.00%	9.52%
4	Increase in input tax credit availed post-GST (%)	D	-	8.52%
5	<b>Analysis of Increase in input tax credit:</b>			
6	Total Base Demand raised during July, 2017 to December, 2018	E		893,185,597
7	GST @12%	F= E*12%		107,182,272
8	Total demand	G=E+F		1,000,367,869
9	Recalibrated Base Price	H=E*(1-D) or 91.48% of E		817,086,184
10	GST @12%	I=H*12%		98,050,342
11	Commensurate demand price	J=H + I		915,136,526
12	<b>Excess Collection of Demand or Profiteered Amount</b>	<b>K=G - J</b>		<b>85,231,342</b>

17. Thus, from the table-'B' above, it was clear that the additional ITC of 8.52% of the turnover should have resulted in commensurate reduction in the base price as well as cum-tax price. Therefore, in terms of Section 171 of the CGST Act, 2017, the benefit of the additional ITC should have been passed on by the Respondent to the recipients and thus, by not reducing the pre-GST base price by 8.52% on account of additional benefit of ITC and charging GST @12% on the pre-GST base price, the Respondent had contravened the provisions of Section 171 of the of the CGST Act, 2017.

18. The DGAP further stated that on the basis of the aforesaid CENVAT/input tax credit availability in the pre-GST and post-GST periods and the demands raised by the Respondent on the Applicant No. 1 and other home buyers on which GST liability @ 12% was discharged by the Respondent during the period 01.07.2017 to 31.12.2018, the amount of benefit of ITC not passed on to the recipients i.e. the profiteered amount came out to Rs. 8,52,31,342/- which included GST @ 12% on the base profiteered amount of Rs. 7,60,99,413/-. This amount was inclusive of Rs. 2,73,653/- (including GST on the base profiteered amount of Rs. 2,44,333/-) which was the profiteered amount in respect of the Applicant No. 1. He further clarified that the Respondent had supplied construction services in the State of Uttar Pradesh only. The DGAP further stated that the profiteered amount was with respect to 739 home buyers, whereas the Respondent had booked 778 units till 31.12.2018, 39 buyers had not paid any consideration during the post-GST period from 01.07.2017 to 31.12.2018 (period covered by the investigation). Therefore, if the ITC

in respect of these 39 units was considered for calculation of profiteering in respect of 739 units where payments had been received in the post-GST period, the ITC as a percentage of turnover would be distorted and erroneous. Therefore, the benefit of ITC in respect of these 39 units should be calculated when the consideration was received from such units by taking into account the proportionate ITC in respect of such units.

19. Thus, the benefit of additional ITC was @8.52% of the turnover, accrued to the Respondent and the same was required to be passed on to the Applicant No. 1 and other recipients. The Respondent had thus contravened the provisions of Section 171 of the CGST Act, 2017, in as much as the benefit of such ITC has not been passed on to the Applicant No. 1 and other recipients. The DGAP further stated that the Respondent had realized an excess amount of Rs. 2,73,653/- from the Applicant No. 1 which included both the profiteered amount @8.52% of the base price and GST @12% on the said profiteered amount. Further, the DGAP stated that the Respondent had realized an amount of Rs. 8,49,55,689/- which included both the profiteered amount @8.52% of the turnover and GST @12% on the said profiteered amount, from 738 other recipients who were not Applicants in the present proceedings. As these recipients were identifiable as per the documents provided by the Respondent, giving the names and addresses along with unit no. allotted to such recipients. Therefore, the amount of Rs. 8,49,55,689/- was required to be returned to such eligible recipients.



20. The DGAP also clarified that since the present investigation covered the period from 01.07.2017 to 31.12.2018, thus, profiteering, if any, for the period post December, 2018, had not been examined as the exact quantum of input tax credit that would be available to the Respondent in future could not be determined at the present stage, when the construction of the project was yet to be completed.
21. The above Report was considered by this Authority in its meeting held on 09.07.2019 and it was decided to hear the Applicants and the Respondent on 01.08.2019.
22. Seven personal hearings were accorded to the parties on 01.08.2019, 20.08.2019, 11.09.2019, 17.09.2019, 30.09.2019, 10.10.2019 and 04.11.2019. During the course of the hearing, Sh. Rahul Gautam, the Applicant No. 1 appeared in person; None appeared for the Applicant No. 2 and the Respondent was represented by Sh. Balram Sinha, CA.
23. The Applicant No. 1 filed his written submissions on 20.08.2019 vide which he submitted the letter dated 05.02.2019 of the Superintendent (Anti Evasion), Office of Commissioner of Central Tax, Gautam Buddh Nagar, Greater Noida, UP in which it was written that the Applicant No. 1's complaint against the Respondent had been received. But as the legible copies of the documents along with the complaint were not submitted by the Applicant No. 1, thus he was requested to provide the same. He also submitted his reply to the above mentioned letter, copies of payment receipts of the demands raised by the Respondent to the Applicant No. 1, Allotment letter,



Payment plan and the Agreement between the Respondent and the Applicant No. 1.

24. The Respondent filed his written submissions on 20.08.2019 vide which he submitted that the Respondent was a private limited company duly incorporated with the Registrar of Companies, NCR of Delhi and the Respondent's main object was to deal in Real Estate business, providing Construction Services and do activities incidental thereto. He further stated that he was carrying out his business activities majorly in the areas of Greater Noida (W) U.P. He further stated that the Real estate sector was not doing good and few developers had even closed their projects. The market sentiment for developers was also not in good shape and developers were unable to construct projects. He further mentioned that when GST rate was fixed @12% for under construction flats, the ultimate cost of flats to the buyers went up as the tax rate under GST was higher as compared to the Service Tax regime. Also, the market conditions since then had deteriorated due to various factors and the GST rate was one of them. He further stated that the Respondent was facing financial challenges to complete the project and the sale was very slow.

25. Thus, after the implementation of GST, the Respondent had decided to reduce the GST rate to the extent of rate applicable to buyers under Service Tax regime i.e. @4.5% after reduction @7.5% on GST rate i.e. 12%. Further he had decided 100% reduction in GST rate for new bookings of the flats to attract new customers i.e. additional discount of 4.5% in GST rate for new customer was also given and which was also shown in the price list. He also mentioned

that the above mentioned claim could be verified from the price list available on the portal/ website of the Respondent.

26. He further stated that he had passed on Rs. 9,45,78,855/- as benefit of GST ITC to the customers by way of reduction in the GST rate which was more than the profiteered amount calculated by the DGAP. He also furnished the details of flat wise demand & benefit of GST Input Tax passed on. He further contended that it could also be verified from demand and allotment letters issued to customer. He had also submitted the copies of the above letters to the DGAP, but the same were not considered by the DGAP while calculating GST liability. He has further furnished the sample copies of demand letters issued to the customers.

27. The Respondent also stated that the Applicant No. 1 had booked the flat in the present project through application dated 21.09.2018 which was allotted by Allotment Letter dated 26.09.2018. It was evident from the allotment letter which was a valid contract signed by the Applicant No. 1 and the Respondent, format approved by the RERA and the other Authorities which showed that the Applicant No. 1 had to pay only the basic sale consideration of the said flat and the applicable GST would be borne by the Respondent. The Applicant No. 1 had benefited from the amount of ITC passed on by the Respondent by way of commensurate 100% reduction in the GST rate. The Respondent had issued demand letters and received payment accordingly for the flat sold to the Applicant No. 1. He also furnished a copy of the Price List, copy of allotment letter of Applicant No. 1, copy of demand letter issued to the Applicant No. 1 which showed 100%

reduction in the GST. He further stated that the DGAP's Report dated 01.07.2019 had been prepared without considering the above mentioned documents/evidences. He also clarified that he had not contravened the provisions of section 171 of the CGST Act, 2017 and if the applicant No. 1 was of the opinion that the Respondent had not passed on the ITC benefit of GST, the Applicant No. 1 had full authority to not sign the agreement. Thus, the main objective of the Applicant No. 1 was to harass the Respondent by asking for more facilities free of cost.

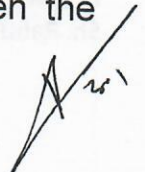
28. The Respondent also stated that the DGAP's Report dated 01.07.2019 suffered from the following mathematical/technical errors:

A. The ITC availed under GST had been taken Rs. 14,27,32,568/- which included input credit carried forward by way of TRAN-1 and Input credit available for providing other services which amounted to Rs. 80,90,909/-

The other services had been properly disclosed in the GST Returns which amounted to Rs. 80,90,909/- which was the GST input credit availed for providing other services. Thus, this amount and the TRAN-1 amount could not be taken while preparing input ratio for construction of residential project.

B. The area sold relevant to turnover had been taken as 4,01,307 Sq. ft. during pre- GST regime but it should have been 5,95,537 sq. ft. for sold flats during pre-GST period.

If the above mentioned two contentions were considered, then the revised ratio of ITC to Turnover would be as follows:-



S. No.	Particulars	April 2016 to March, 2017	April 2017 to June, 2017	Total	
				Pre GST	Post GST
1	CENVAT Credit of Service Tax paid on Input services (A)	2,21,02,675	74,87,735	2,95,90,410	
2	Credit of VAT paid on Inputs (B)	-	-	-	
4	Total CENVAT credit Availed ( C)= (A+B)	2,21,02,675	74,87,735	2,95,90,410	
5	Input Credit of GST Availed (D)				12,81,16,165
6	Total Turnover as per Homes Buyers List ( Flat Sold upto 31.12.2018) ( E )			80,23,22,679	89,31,85,597
7	Total Saleable Area ( In Sq. Ft) ( F)			14,73,354	14,73,354
8	Area sold relevant to Turnover ( G)			5,95,537	8,77,525
9	ITC relevant to sold Area (H) = (C) or (D) *G/F			1,19,60,591	7,63,05,584
10	Ratio of CENVAT/ Input Tax Credit to Turnover ( I) = (H/E*100)			1.49%	8.54%
Difference:					7.05%

The Total Input Credit availed for Construction of Residential & commercial Complex would be Rs. 12,81,16,165/- [Rs. 14,27,32,568/- (Total Input Credit of GST Availed as per GST Returns) – Rs. 61,83,321/- (Less: Input Credit for Construction Contract Services) – Rs. 19,07,588/- (Less: Input Credit for Other than Real estate Developers Services) – Rs. 65,25,494/- (Less: Input of Pre-GST Period TRAN-1)].

- C. The GST liability was computed as Rs. 10,71,82,272/- by simply calculating @12% of the total Basic consideration due without considering Invoices/Demand letters issued to the customers, a valid document to determine the GST tax liability. He further furnished the details of demands raised and GST charged to the customer on the basis of demand letters & Contracts entered



with them, to show that only Rs. 1,26,03,416/- GST was charged on the demands raised and Rs. 9,45,78,855/- ITC had been passed on to the customers by way of reduction in the GST rate.

He also enclosed the details of the same.

He has thus furnished the computations after considering the above points, which are as follows:-

S. No.	Particular		Pre-GST	Post- GST
1	Period	A	April, 2016 to June 2017	July, 2017 to Dec 2018
2	Output tax rate ( %)	B	4.50%	12%
3	Ratio of Cenvat/Input Tax Credit to Turnover as per Table A above (%)	C	1.49%	8.54%
4	Increase in input tax credit availed post GST ( %)	D		7.05%
5	Analysis of Increase in input Tax Credit			
6	Total Base Demand raised during July 2017 to December 2018	E		89,31,85,597
7	GST@4.5% or Nil ( As per invoice raised)	F= E*12%		1,26,03,416
8	Total Demand	G=E+F		90,57,89,013
9	Recalibrated Base price	H=E*(1-D) or 91.48% OF E		81,70,86,184
10	GST@12%	I=H*12%		9,80,50,342
11	Commensurate demand price	J=H+I		91,51,36,526
12	Excess Collection of Demand or Profiteered Amount	K=G-J		-93,47,513

D. He thus contended that he had passed on benefit of ITC of Rs. 9,45,78,855/- which was more than the profiteered amount computed by the DGAP.

29. The Respondent filed his next written submissions on 11.09.2019 vide which he submitted that this Authority was set up to monitor and to oversee whether the reduction or benefit of ITC was reaching the recipients by way of appropriate reduction in prices. The CBIC (Central Board of Indirect Taxes and Customs) had also issued

FAQ on Anti-profiteering provisions which provided detailed applicability of the above provisions under construction projects. The answer to the question "How can buyers of under-construction flats benefit from the anti-profiteering provisions" was also given in the FAQ by CBIC as "Section 171 of the CGST Act, 2017 can be invoked when the builder increases the instalment amount to be paid in case of an under-construction flat, complex etc, on the pretext of leviability of 12% GST as against the apparently lower tax rates in the earlier indirect tax regime. In pre-GST era, Central Excise duty was payable on most construction material at 12.5%. In addition, VAT was payable on construction material at 12.5% to 14.5% in most of the States & the construction material also suffered entry tax. The ITC of the above taxes was inadmissible for meeting Service Tax liability of the builder, thus leading to cascading of input taxes on constructed flats and a higher effective tax incidence. But GST regime allows full ITC for offsetting the headline rate of 12%, thereby reducing the effective tax incidence". Thus, the builder was expected to pass on the benefits of lower tax burden under the GST regime to the buyers of property by way of reduced prices/ instalments. It was, therefore, advised to all builders / construction companies that in respect of the flats which were under construction that they should not ask customers to pay higher tax rate on instalments received after imposition of GST.

30. From the above it was clear that the intension of law maker was that they wanted to protect the existing buyers who had entered into agreements to buy flats prior to the GST regime and they had to pay instalments in the GST regime also after the implication of GST since

the buyers who were entering into buying agreement after GST regime were free to buy from anyone who was offering very competitive rates. The Respondent further stated that since, the buyer who had booked flat before GST regime i.e. 01.07.2017 had no option to re-negotiate with the service provider for reducing the rate GST or reduction in price since he was abide by an agreement, therefore the law makers had brought provisions of Anti Profiting to protect such type of buyer. The Respondent further mentioned that in the present case, the Applicant No. 1 had booked the flat and had entered into buying agreement after more than one year of implementation of GST and he had bought the flat at a very competitive rate, he was also not defaulter in paying instalment and was paying sale consideration on time as he knew that he would not find such cheap price anywhere else. He had also got the benefit of input tax credit of GST which he had also accepted during hearing dated 20.08.2019. Thus, it was clear from above facts that the initiation of the proceedings was not as per the provision of section 171 of CGST Act.

31. The Respondent further stated that during the hearing held on 20.08.2019 , the Applicant No. 1 had accepted and stated as follows:-

a) He had no objection against the DGAP's Report dated 01.07.2019.

As per the Report, the Applicant No. 1 was entitled to get benefit of Rs. 2,73,653/- on account of reduction in price or reduction in GST rate.

b) He had also given the breakup of detailed cost of the flat and the GST charged and he had not objected on the price that had been

charged i.e. 39,20,400/- + GST @4.5% i.e. an amount of Rs.1,76,418/- instead of applicable rate @12% (however the agreement was not as per the statement). The Breakup details were as follows:-

**Cost of Flat as per Applicant No. 1's statement:**

Basic	: 39,20,400/-
GST Charged as per applicant	: 1,76,418/-
Total	: 40,96,818/-

If GST liability was calculated as per the applicable rate i.e. @12% on under construction flat on the price it would be as follows:

Basic	: 39,20,400/-
GST @12%	: 4,70,496/-
Total	: 43,91,246/-

Thus, from the above data provided and accepted by the Applicant No. 1, it was evident that the Applicant No. 1 had been charged GST of Rs. 1,76,418/-, however, the GST liability as per the provisions of CGST Act on the value of Rs. 39,20,400/- was Rs. 4,70,496/-.

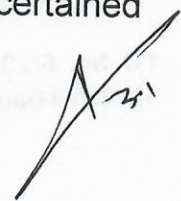
Thus, the Respondent had passed on the benefit of input credit of GST of Rs. 2,94,078/- (Rs. 4,70,496 – Rs. 1,76,418) which was higher than the amount of Rs. 2,73,653/- computed by the DGAP and accepted by the Applicant No. 1.

32. The Respondent also stated that the Applicant No. 1 had submitted a signed copy of price list where it was clearly and boldly mentioned as "FIXED PRICE" apart from other price components and terms and conditions and GST @4.5% Extra was also mentioned

The Respondent also calculated the total Sale consideration of the unit booked by the Applicant No. 1 as per the price list as submitted by the Applicant No. 1 which is shown in the table below:

Particular	Area	Rate	Amount
Basic price	1,188	3,365	39,97,620
Add: Car Parking		2,50,000	2,50,000
<b>Total</b>			<b>42,47,620</b>
Add GST @4.5%			1,91,143
<b>Grand Total</b>			<b>44,38,763</b>
Cost to the Applicant			40,96,800
<b>Discount to the applicant in addition to reduction in GST rate of 7.5%</b>			<b>3,41,963</b>

33. The Respondent also submitted the documents which were sought by this Authority vide its order dated 20.08.2019 i.e. Reconciliation Statement showing project wise ITC/CENVAT Credit and turnover as per statutory records. He further submitted that he had been entering into a written contracts with buyer for providing construction service and in this contract every detail including value of the service and term and conditions were mentioned. Further, as he knew that under construction service falls under continuous service and in case of continuous service, the taxability was ascertained according to contract only.



34. He also mentioned that as per section 31(5) of CGST Act, it was provided that:-

*“Subject to the provisions of clause (d) of sub-section (3), in case of continuous supply of services,—*

*(a) where the due date of payment was ascertainable from the contract, the invoice shall be issued on or before the due date of payment;*

*(b) where the due date of payment was not ascertainable from the contract, the invoice shall be issued before or at the time when the supplier of service receives the payment;*

*(c) where the payment was linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event.”*

From the above section it was clear that time of supply was ascertained from the contract only. A contract entered into between the buyer and service provider which was a legal document, was evidence that the service provider would bear all GST liability by way of reduction in GST rate. Further, it was also evident from the demand letter issued to the buyer, that GST was charged as was applicable but would be reduced by way of Input tax credit of GST which meant that the GST had to be borne by the service provider only was to be paid from his own source. He further furnished the sample copy of the contract executed and demand letter issued showing that the ITC credit will be borne by the Builder, list of payment received from the flat buyer (unit wise) and ITC passed on to him, Electronic Credit

Ledger of GST as per GST portal, Detail of total No. of Unit of the project and area of the unit and Copy of the Tran -1 return.

35. The Respondent filed his next written submissions on 10.10.2019 vide which he submitted that he had reversed GST amount of Rs. 39,24,012/- on unsold inventory in the GSTR filed for the month of June and July 2019 after Government amended Rule 42 and 43 w.e.f. 01.04.19 for real estate sector. He further furnished the copies of GST Returns, ST-3 Returns from April 2016 to June 2017, VAT Assessment Order for the period ended March 2017 and VAT Returns from April 17 to June 2017, input credit availed from April 2017 to June 2017, table showing units sold till date, tower-wise no. of unit unsold as on date when OC had been received for the tower, copy of allotment letters and demand letters for the customers who had booked flats prior to GST regime where it was evident that the Respondent had been charging Service Tax in addition to the basic rate of flat and it was also ensured by the Respondent that the instalment due from the applicant during the GST regime should not increase, by passing on benefit of ITC @7.5%. He also furnished the copy of an allotment letter and demand letters of the customers who had booked the flat after 01.07.2017 i.e. after implementation of the GST where it was clearly mentioned that the total cost of flat will be the basic cost plus GST as applicable and the GST will be borne by the Respondent and will be passed on to customers as benefit of ITC discount to comply with the provision of Section 171(1) of the CGST Act, 2017. As per agreement, the Respondent had been issuing demand letter showing the basic value plus GST and the reduced

GST amount on account of discount for input credit of GST to the customer. Accordingly, the Respondent had been depositing monthly GST amount as applicable on demand issued. He further furnished a copy of agreement.

36. The Respondent filed his next written submissions on 04.11.2019 vide which he submitted the copies of confirmation from the customers to whom the benefit of input credit of GST had been passed on as an additional evidence and completion certificate of Tower -A, B, C and E. Further, he stated that the Tower – D had not been completed till date.

37. Clarification was also sought from the DGAP on the Respondent's above mentioned submissions. The DGAP had furnished his clarification on 07.11.2019 vide which he stated that from the documents submitted by the Respondent, it was observed that the Respondent has claimed that for the customers who had made the bookings prior to implementation of GST, i.e. 01.07.2017, he has charged only 4.5% GST (i.e., equal to the rate of erstwhile Service Tax) from them and borne the remaining 7.5% GST himself, and for the customers who have made the bookings after implementation of GST w.e.f. 01.07.2017, the entire GST of 12% has been borne by the Respondent. In support of his above claim, the Respondent has submitted sample Demand letters issued to the customers, where

(a) For bookings made after implementation of GST w.e.f 01.07.2017, the applicable GST@12% on the Basic Instalment has been charged in the Demand letter and an amount equal to the applicable GST has been passed on as benefit of ITC.





(b) For existing customers who have made bookings before Implementation of GST, the applicable GST@ 12% on the Basic Instalment has been charged in the Demand letter, but an amount equivalent to 7.5% of the applicable GST has been passed on as benefit of ITC and only 4.5% GST has been collected from the customer.

The DGAP further stated that the Respondent has also submitted CA certificate and an Undertaking by the Management, stating that he has passed on Rs. 9,45,78.855/- in such manner and the Respondent has also provided the home-buyer wise breakup of the said amount. However, while the Respondent has passed on a benefit of 12% (by not charging applicable GST) to the home-buyers who have made the bookings after 01.07.2017, he has charged 4.5% GST from the home-buyers who had made the booking during the pre-GST period and only passed on benefit of 7.5%, which is less than the input tax credit benefit of 8.52%. The DGAP thus stated that wherever the profiteered amount is more than the benefit already passed on, the remaining amount also needs to be passed on by the Respondent to the home-buyers.

38. We have carefully considered all the Reports filed by the DGAP, submissions of the Respondent, Applicant No. 1 and other material placed on record and it is revealed that the Respondent is executing his "Himalaya Pride" project and is constructing the residential accommodation. It is also revealed that the Applicant No. 1 had complained to the Haryana State Screening Committee on Anti-

profiteering on 16.10.2018 that the above Respondent had increased the price of the flat after introduction of GST w.e.f. 01.07.2017 and he was also not passing on benefit of ITC by way of commensurate reduction in price. The above complaint was examined by the Standing Committee on Anti-profiteering in its meeting held on 13.12.2018 and was forwarded to the DGAP for detailed investigation as per the provisions of Rule 129 (1) of the CGST Rules, 2017.

39. It is also revealed that the DGAP has conducted investigation in the above allegations levelled by the Applicant No. 1. Further, from Table A supra it is also observed that the ITC as a percentage of the total turnover computed by the DGAP, which was available to the Respondent during the pre-GST period from April, 2016 to June, 2017 was 1.00% and during the post-GST period from July, 2017 to December, 2018 it was 9.52% which had resulted in benefit of additional ITC to the tune of 8.52% [9.52% (-) 1.00%] of the total turnover to the Respondent. Accordingly, the profiteering has been computed by the DGAP by comparing the applicable tax rate and the ITC available during the pre-GST period from April, 2016 to June, 2017 when output tax rate was 1.00% with the post-GST period from July, 2017 to December, 2018 when the effective GST rate was 12%. The DGAP has thus computed the profited amount during the period 01.07.2017 to 31.12.2018 as Rs. 8,52,31,342/- which included 12% GST on the base profited amount of Rs. 7,60,99,413/-. The home buyer and unit no. wise break-up of this amount has been given in Annexure- 17 of the DGAP's Report. The DGAP as per Table-B has claimed that the additional ITC of 8.52% of the turnover should have

resulted in commensurate reduction in the base prices as well as the cum-tax prices of the flats which was required to be passed on in terms of Section 171 of the CGST Act, 2017.

40. Upon perusal of the DGAP's Report dated 04.07.2019, DGAP's supplementary Report dated 07.11.2019 and the Respondent's submissions, it is observed that the Respondent has claimed that the customers who had made bookings prior to implementation of the GST, i.e. 01.07.2017, he has charged only 4.5% GST (i.e., equal to the rate of erstwhile Service Tax) from them and borne the remaining 7.5% GST himself. He had further decided for 100% reduction in GST rate for new booking of the flats to attract new customers i.e. additional discount of 4.5% in the GST rate for new customers was provided by the Respondent. He has also submitted copies of confirmation from the customers to whom the benefit of input credit of GST has been passed on as an additional evidence. In this regard, upon perusal of the several copies of the confirmation from the customers to whom the benefit of input credit of GST had been passed on by the Respondent, it is observed that some of the buyers have confirmed that:-

*"I/we acknowledge that in terms of the provisions of the GST Act, it has been mutually decided that the company shall pass on the benefit of Input Tax Credit @ 12% to me/us in respect of the said unit and we are paying sale consideration as per sign agreement value i.e. Basic Sale consideration only. I/we hereby confirm that I/we have fully satisfied myself/ourselves with respect to the benefits of input credit agreed to be passed on to me/us".*

However, some of the buyers have confirmed that

*"I/we acknowledge that in terms of the provisions of the GST Act, it has been mutually decided that the company shall pass on the benefit of Input Tax Credit @ 12% to me/us in respect of the said unit and we are paying sale consideration as per sign agreement value i.e. Basic Sale consideration only. I/we hereby confirm that I/we have fully satisfied myself/ourselves with respect to the benefits of input credit agreed to be passed on to me/us".*

Further, the DGAP vide his supplementary Report dated 07.11.2019 has also stated that while the Respondent has passed on benefit of 12% (by not charging applicable GST) to the home-buyers who have made the bookings after 01.07.2017, he has charged 4.5% GST from the home-buyers who had made the booking during the pre-GST period and only passed on benefit of 7.5%, which is less than the input tax credit benefit of 8.52% and wherever the profiteered amount is more than the benefit already passed on, the remaining amount also needs to be passed on by the Respondent to the home-buyers.

41. The Respondent has also contended that he had passed on Rs. 9,45,78,855/- benefit of GST ITC to his homebuyers/customers by way of reduction in GST rate, which was more than amount of profiteering calculated by the DGAP. The Respondent has also submitted some of the sample invoices showing ITC benefit passed on by him to the buyers. The perusal of the sample invoices reveals that the total amount of additional benefit computed by the DGAP in respect of the above customers is different from the amount that the Respondent has claimed to have been passed on to them. A typical entry of Rs.

3,42,656/- made as "Input Tax Credit" given in three stages i.e. on booking, within 45 days of booking, within 6 months of booking on 26.04.2019 of one Mr. Nanak Chand & Mrs. Ajay Kumari, who has been allotted unit No. C-18/6 in the above project by the Respondent, shows that the claim of the Respondent regarding passing on the ITC benefit appears to be correct. However, the profiteered amount to be passed on to Mr. Nanak Chand as Rs. 1,70,299/- as computed by the DGAP is lower than what the Respondent has claimed to have already passed on to the said customer/homebuyer. Perusal of other sample invoices also suggests the same. This apart, the Respondent, vide his submissions dated 04.11.2019, has also furnished sample copies of confirmation from some of his homebuyers/customers, to whom the benefit of input tax credit of GST has been claimed to have been passed on by him (the Respondent), which further supports the Respondent's claim of having passing on the benefit to his homebuyers/customers. However, this claim of the Respondent needs to be verified before a final decision can be taken thereon. Further, whether the amount claimed to have been passed on by the Respondent to his customers is commensurate with the benefit of ITC received by him has also to be verified to workout the actual amount of profiteering that needs to be passed on by the Respondent. The exact amount which is required to be passed on by the Respondent to his homebuyers/customers is also to be verified.

42. The Respondent further claimed that he had passed on the benefit of Input credit of GST of Rs. 2,94,078/- (Rs. 4,70,496 (GST @12% – Rs. 1,76,418 (GST charged as per Applicant No. 1) which

was higher than the amount of Rs. 2,73,653/- computed by the DGAP and accepted by the Applicant No. 1. He also contended that an amount of Rs. 3,41,963/- was given as the discount in addition to reduction in GST rate of 7.5% to the Applicant No. 1. However, upon perusal of the annexure 1 of the Respondent's submissions dated 20.08.2019, it is revealed that he himself had computed an amount of Rs. 3,44,131/- as the ITC/Discount as per demand letter/contract for the Applicant No. 1. Further, from the perusal of the Applicant No. 1's submissions dated 20.08.2019, it is observed from the receipts that an amount of Rs. 2,36,130/- has been passed on as ITC rebate (SGST and CGST) by the Respondent which contradicts his claim of Rs. 3,41,963/- as the discount in addition to reduction in GST rate of 7.5% was given to the Applicant No. 1. However, the possibility of passing on some ITC benefit to the Applicant No. 1 can not be completely ruled out and the same needs to be verified. Thus, we find it imperative that the mathematical calculations of profiteering are reinvestigated by the DGAP.

43. Based upon the above facts, the present Report filed by the DGAP cannot be accepted and hence the case is remanded to him for further investigation as per the provisions of Rule 133 (4) of the above Rules on the following issues:-

- (i) Whether the Respondent's claim of passing on of Rs. 9,45,78,855/- as benefit of GST ITC to his homebuyers/customers by way of reduction in GST rate is correct?



- (ii) Whether the Respondent's claim that for the customers who had made the bookings prior to implementation of GST, i.e. 01.07.2017, he has charged only 4.5% GST (i.e., equal to the rate of erstwhile Service Tax) from them and borne the remaining 7.5% GST himself and he had given 100% reduction in GST rate for new bookings of the flats is correct?
- (iii) Whether the Respondent has passed on the benefit of ITC of GST of Rs. 2,94,078/- to the Applicant No. 1?
- (iv) Whether the Respondent has given an amount of Rs. 3,41,963/- as discount in addition to reduction in GST rate of 7.5% to the Applicant No. 1?
- (v) Whether the above amounts claimed to have been passed on by the Respondent is in line with the provisions of Section 171 of the CGST Act?
- (vi) After carefully considering above issues, exact amount of profiteering which is to be passed on by the Respondent to every homebuyers/customers?

44. Accordingly, the DGAP is directed to submit his Report keeping in view the aforementioned issues.



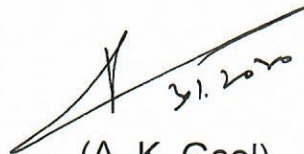
45. A copy of this order be sent to both the Applicants and the Respondent free of cost. File of the case be consigned after completion.

Sd/-  
(B. N. Sharma)  
Chairman

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

Sd/-  
(Amand Shah)  
Technical Member

Certified copy

  
(A. K. Goel)  
Secretary, NAA

File No. 22011/ NAA/57/Himalaya/2019 /108

Dated: 03.01.2020

Copy To:-

1. Himalaya Real Estate Pvt. Ltd., GH-10B, Techzone-IV, Greater Noida (West), UP-201306
2. Shri Rahul Gautam, Flat No. 103, Tower-C4, Supertech Eco-Village-II, Greater Noida (West), Gautam Buddha Nagar, U.P.
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. Guard File.

