

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

I. O. No. : 07 /2022
Date of Institution : 27.11.2020
Date of Order : 27.07.2022

In the matter of:

Director General of Anti-Profiteering, CBIC, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicant

Versus



M/s Elan Ltd., 3rd Floor, Golf Course View Corporate Tower,
Golf Course Road, Sector-42, Gurgaon, Haryana-122002.

Respondent

Quorum:-

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

Present:-

1. None for the Applicant.
2. None for the Respondent.

ORDER

1. This Authority vide its Final Order No. 85/2020 dated 11.12.2020 for the Respondent's project "Mercado" directed to pass on an amount of Rs. 2,44,80,835/- to the Applicant (Sh. Mool Chand Mittal) and other 228 commercial shop buyers along with the interest @ 18% per annum.
2. As the Respondent himself admitted that he had been constructing one more project namely "Epic", therefore, the Authority vide the said Order No. 85/2020 dated 11.12.2020, taking *suo moto* cognizance, directed the DGAP to also investigate the project "Epic" being executed by the Respondent and submit his Report under Rule 129 (6) stating whether the Respondent is liable to pass on the benefit of ITC to the buyers of the above project and their entitlement thereof. The excerpt of the said Order is reproduced below:-

"The Respondent in his submissions made before the DGAP, which have been mentioned in Para 9 of the Report of the DGAP dated 23.03.2020, has himself admitted that he has been constructing one more project namely "Epic". The Respondent vide his e-mail dated 13.11.2020 sent to this Authority has also admitted that difference in the turnovers pertaining to the post-GST period as depicted in the Home-Buyer's List and the GST Returns furnished by him in respect of his "Mercado" project, which is subject matter of the present proceedings, has arisen due to the turnovers of another project of the Respondent namely "Epic" being included in them. Keeping in view the above self-admissions of the Respondent, the liability of the Respondent to pass on the benefit of additional ITC as per the provisions of Section 171 of the above Act, is required to be investigated in respect of his "Epic" project, as there are sufficient reasons to believe that the

Respondent is required to pass on the benefit of additional ITC to the eligible buyers which he may not have passed on, as has been established in the present case. Accordingly, this Authority is bound to examine and take suo moto cognizance of the benefit of ITC which the Respondent is apparently liable to pass on to the buyers of the "Epic" project, as per the provisions of Section 171 (2) of the CGST Act, 2017, once it has been brought to its notice. Accordingly, the DGAP is directed to investigate the "Epic" project being executed by the Respondent and submit his Report under Rule 129 (6) stating whether the Respondent is liable to pass on the benefit of ITC to the buyers of the above project and their entitlement thereof. The Respondent is directed to extend full co-operation to the DGAP during the course of the investigation."



3. Therefore, the DGAP vide its Report dated 24.03.2021 submitted under Rule 133(5) conducted investigation against the Respondent for the project "Epic", and *inter alia* submitted that:-

a. On receipt of the aforesaid Order from the Authority, it was decided to initiate investigation in respect of project "EPIC". In order to collect evidence necessary to determine whether the benefit of ITC has been passed on by the Respondent to the recipients/ buyers in respect of the Construction Service supplied by the Respondent in the project "EPIC", a Notice under Rule 129 of the Rules was issued by the DGAP on 01.01.2021, calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the buyers by way of commensurate reduction in price and if so, to *suo moto* determine the quantum thereof and indicate the same in his reply to the Notice as well as to

furnish all the supporting documents.

- b. The period covered by the current investigation was from 01.07.2017 to 30.11.2020.
- c. The statutory time limit to complete the current investigation was on or before 22.06.2021 in terms of Rule 129(6) of the Rules.
- d. In response to the Notice dated 01.01.2021 and subsequent reminders, the Respondent replied vide letters dated 02.03.2021 and 08.03.2021. The Respondent placed the following facts to establish that he was not covered under the provisions of Section 171 of CGST Act, 2017 and the replies of the Respondent have been summed up as follows:-


- (i) The provisions related to Anti-Profiteering measure are contained in section 171 of the CGST Act, 2017. Relevant extract is reproduced below:-

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

(2) The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

(3) The Authority referred to in sub-section (2) shall exercise such powers and discharge such

functions as may be prescribed”.

Under the explanation provided to Section 171, the expression “profiteered” shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of ITC to the recipient by way of commensurate reduction in the price of the goods or services or both. Thus, in short, the benefit arising out of rate reduction and ITC due to the introduction of GST law should be passed on to the customers. 

- (ii) The Respondent also relied upon the Order passed by this Authority in the matter of Shri Arjun Kumar Parwani & others Vs. Signature Builders Private Limited, wherein it was held that:

“The agreement between the above Applicant and the Respondent was executed on 13.12.2017. Therefore, it is apparent that the Applicant No.1 had applied for allotment and was allotted the above flat after coming in to force of the GST w.e.f. 01.07.2017. Since the above project was not under execution in the pre-GST period i.e. before 01.07.2017 therefore, no comparison can be made between the ITC which was available to the Respondent before 01.07.2017 and after 01.07.2017 to determine whether the Respondent had benefitted from additional availability of ITC or not. The Respondent through his sworn affidavit has also claimed that he had not availed benefit of ITC during the pre-GST period and he had availed the same on 28.07.2017 after coming in to force of the GST. From the above facts it is established that there has been no additional

benefit of ITC to the Respondent and hence he was not required to pass on its benefit to the above Applicant by reducing the price of the flat. The Applicant No.1 could have availed the above benefit only if the above project was under execution before coming in to force of GST as the Respondent would have been eligible to avail ITC on the purchase of goods and services after 01.07.2017 on which he was not entitled to do so before the above date. Since there was no basis for comparison of ITC available before and after 01.07.2017, the Respondent was not required to recalibrate the price of the flat due to the additional benefit of ITC. Hence, the allegations of the Applicant made in this behalf are incorrect and therefore, the same cannot be accepted".



- (iii) The project 'EPIC' was launched in post-GST period. Haryana Real Estate Regulatory Authority (RERA), Gurugram has granted Registration Certificate on 06.12.2018. Also, first supply for the construction of the project was received on December 18, 2018.
- (iv) Notification No. 03/2019-Central Tax (rate) dated 29.03.2019 is applicable on Residential Real Estate Project (RREP) whereas the project "EPIC" is a commercial project.

Hence the same was not applicable to him and there was no change in rate of tax w.e.f. 01.04.2019 and that he was charging GST @12% on Construction Services provided to prospective buyers.

- (v) The Respondent had not availed CENVAT/ITC, related to 'EPIC' project, in

pre-GST regime. Also, he neither raised any demand nor received any advance for this project in Pre-GST period.

- (vi) The project was outside the ambit of section 171 i.e. anti-profiteering measures and accordingly requested to drop the investigation.
- e. Vide the aforementioned letters/e-mails, the Respondent submitted the following documents/information:
- (i) Copy of first builder buyer agreement dated 28.12.2018 for the project "EPIC".
 - (ii) Copy of first work order dated 16.11.2018 executed with contractor along with first invoice raised by supplier.
 - (iii) Copy of Registration Certificate dated 06.12.2018 granted by Haryana RERA for the project "Epic".
 - (iv) Copy of advertisement in Newspaper for launching of the Project "Epic".
- f. In the Notice dated 01.01.2021, the Respondent was informed that if any information/documents were provided on confidential basis, in terms of Rule 130 of the Rules, a non-confidential summary of such information/documents was required to be furnished. However, the Respondent had not classified his information/documents as confidential in terms of Rule 130 of the Rules.
- g. The DGAP had carefully scrutinized the Order received from the Authority, various replies of the Respondent and the documents/evidences on record.

The main issues for determination, as per the DGAP were:-

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

The Respondent contended that the Anti-profiteering provisions did not apply to the project "EPIC" as the said project was not in existence before GST implementation and had been launched for the first time in GST Regime in December, 2018.

- h. On scrutinizing the documents submitted by the Respondent, the dates of various significant events in the impugned project "Epic" are as in table-'A' below:

Table-'A'

S. No.	Date	Event
1.	23.10.2018	Grant of permission for transfer of License to the Respondent by the Director, Town and Country Planning, Haryana
2.	23.10.2018	Approval for Building Plans Issued by District Town Planner.
3.	16.11.2018	First Work order for Road Work to contractor M/s. Sana BUILTECH Pvt. Ltd.
4.	26.11.2018	First invoice raised by the Contractor to the Respondent
5.	06.12.2018	Issuance of registration certificate by the Haryana Real Estate Regulatory Authority

6.	09.12.2018	First application for allotment of unit.
7.	28.12.2018	First Builder-Buyer Agreement entered b/w Respondent and the Shop buyer (Mr. Upendra Arora & Ms. Jyoti Arora) for the UnitNo. KIOSK 50

From the above table 'A', it could be construed that all the events took place in GST regime. On scrutinizing the documents submitted by the Respondent it was observed that, the project got RERA registration No. 30 dated 06-12-2018, for a period commencing from 06.12.2018 to 31.12.2023. Also RERA registration mentioned that, 4 acres of license No. 148 of 2008 issued to M/s Koshi Builders Pvt. Ltd. stood transferred to the Respondent on 23.10.2018.

Further, from the news clippings (API NEWS), it was gathered by the DGAP that the project 'EPIC' was launched on 27.12.2018 i.e. in the GST Regime.

- i. From the verification of documents submitted by the Respondent and his submission, it was observed that the Respondent had not availed any CENVAT/ITC, related to 'EPIC' project, in pre-GST regime. Also, the Respondent neither raised any demand nor received any advance for this project in Pre-GST period. Therefore, there was no pre-GST tax rate or ITC structure which could be compared with the post-GST tax rate and ITC. There was no availability of CENVAT to compare ITC which was available to the Respondent in the post-GST era. Hence, the base price in pre-GST era could not be computed to compare price change in post-GST period. It was also observed that the price

charged for the said commercial units was for a new project developed and constructed by the Respondent after implementation of GST. Hence, it appeared that the anti- profiteering provisions were not applicable to the impugned project under investigation.

- j. It was also observed that the impugned project "EPIC" was a commercial project which was outside the definition of Residential Real Estate Project (RREP) and there was no reduction/change in rate of GST. Accordingly the Notification No. 03/2019-Central Tax (Rate) dated 29.03.2019 was not applicable to the impugned project.
- k. Section 171 of the CGST Act, 2017 came into play in the event when there was a reduction in the rate of tax or there was an increase in the benefit of ITC. In the present case, since the project itself was launched after implementation of GST w.e.f. 01.07.2017, there was no pre-GST tax rate or ITC availability that could be compared with the post-GST tax rate and ITC, to determine whether there was any benefit that was required to be passed on by way of reduced price.
- l. From the above discussion, it appeared that the allegation of profiteering by way of not passing on the benefit of reduction in the rate of tax or the benefit of ITC did not stand confirmed against the Respondent and therefore, Section 171(1) of the CGST Act, 2017 requiring that *"any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by*

way of commensurate reduction in prices", was not applicable against "Elan Limited" in the present case as all the events like launch of project, bookings and allotment of the units happened in the post GST era.

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- m. In these proceedings, any reference to CGST Act, 2017 and CGST Rules, 2017 should also include a reference to the corresponding provisions under the relevant SGST/ UTGST/ IGST Acts and Rules.
4. The Authority had a meeting on 28.06.2022 to discuss the Report dated 24.03.2021 of the DGAP and found that since no profiteering amount has been worked out/calculated by the DGAP for the reasons mentioned at (g) to (l) of para 3 above, the Authority has decided not to offer any personal hearing in the matter since there was no Applicant in these proceedings (as the investigation was done on the directions of the Authority).
5. The Authority has carefully examined the Report of the DGAP and it has been observed that as per the Table 'A' of the Report all the relevant events for the project "Epic" took place in GST regime and the Respondent had not availed any CENVAT/ITC, related to 'EPIC' project, in pre-GST regime and that the Respondent neither raised any demand nor received any advance for this project in Pre-GST regime. Therefore, there was no pre-GST tax rate or ITC structure which could be compared with the post-GST tax rate and ITC structure and therefore, the provisions of Section 171(1) of the CGST Act, 2017 were not applicable against the Respondent's project "Epic". In view of the

facts and records/documents cited and considered by the DGAP in its report dated 24.03.2021, the Authority concurs with the findings of the DGAP that the provisions of section 171(1) of the CGST Act, 2017 does not get attracted in the present case for the said project "Epic" and for said period 01.07.2017 to 30.11.2020.

6. Further, the Hon'ble Supreme Court, vide its Order dated 23.03.2020, while taking *suo-moto* cognizance of the situation arising on account of Covid-19 pandemic, has extended the period of limitation prescribed under general law of Limitation or any other special laws (both Central and State) including those prescribed under Rule 133(1) of the CGST Rules, 2017, as is clear from the said Order which states as follows:-

"A period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings."

Further, the Hon'ble Supreme Court, vide its subsequent Order dated 10.01.2022 has extended the period(s) of limitation till 28.02.2022 and the relevant portion of the said Order is as follows:-

"The Order dated 23.03.2020 is restored and in continuation of the subsequent Orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings."

Accordingly this Order having been passed today falls within the limitation prescribed under Rule 133(1) of the CGST Rules, 2017.


7. A copy of this order be supplied to the Respondent. File of the case be consigned after completion.

S/d
(Amand Shah)
Technical Member &
Chairman



S/d
(Pramod Kumar Singh)
Technical Member

S/d
(Hitesh Shah)
Technical Member


(Dinesh Meena)
NAA, Secretary

File No. 22011/NAA/Elan/02/2021-22

Date:-27.07.2022

Copy To:-

1. M/s Elan Ltd., 3rd Floor, Golf Course View Corporate Tower, Golf Course Road, Sector-42, Gurgaon, Haryana-122002.
2. Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
3. Guard File.