

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

I.O. No. 35/2020
Date of Institution 10.06.2020
Date of Order 11.12.2020

In the matter of:

1. Shri Mukesh Kumar, RZ-58 South Extension Part-3, Uttam Nagar,
New Delhi-110059.
2. Director-General of Anti-Profiteering, Indirect Taxes & Customs,
2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg,
Gole Market, New Delhi-110001.

Applicant

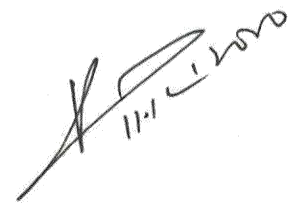
Versus

M/s Supertech Limited, Supertech House, B-28-29, Sector-58,
Noida-201307.

Respondent

Quorum:-

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



Present:-

1. None for the Applicants.
2. Sh. Nitish Garg and Sh. Kamal Gupta, Chartered Accountants for the Respondent.

ORDER

1. The present Report dated 09.06.2020 has been furnished by the Director-General of Anti-Profiteering (DGAP), under Rule 129(6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the case are that a reference was received by the DGAP from the Standing Committee on Anti-profiteering under Rule 129(1) of the CGST Rules, 2017 to conduct a detailed investigation in respect of an application filed by Applicant No.1 under Rule 128(1) of the CGST Rules, 2017, alleging profiteering in respect of construction service supplied by the Respondent. Applicant No. 1 had submitted that he had booked a 2-BHK flat in the Respondent's project "Eco Village-2", Greater Noida (West) and had alleged that the Respondent had not passed on the benefit of ITC to him by way of commensurate reduction in price. The Standing Committee on Anti-profiteering on prima facie having satisfied itself that the Respondent had not passed on the benefit of ITC had forwarded the application of Applicant No. 1 with its recommendation to the DGAP for detailed investigation under Rule 129 (1). Further, the DGAP has also stated that, Applicant No. 1 has submitted the application duly filled in Form APAF-1.

2.The DGAP on receipt of the application and supporting documents from the Standing Committee on Anti-profiteering had issued a notice under Rule 129 (3) of the CGST Rules, 2017 on 14.08.2019 calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the Applicant No. 1 by way of commensurate reduction in prices charged from him and if so, to suo moto determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all supporting documents. Vide the above-mentioned notice dated 14.08.2019, the Respondent was also allowed to inspect the non-confidential evidence/information furnished by the Applicant No. 1, during the period from 20.08.2019 to 21.08.2019, which he had availed on 14.01.2020. Vide e-mail dated 21.05.2020, Applicant No. 1 was also allowed to inspect the non-confidential documents/replies furnished by the Respondent on 26.05.2020 to 27.05.2020, which was not availed of by Applicant No. 1.

3.The DGAP has reported that the time limit to complete the investigation was extended up to 04.05.2020 by this Authority, vide its order dated 30.01.2020 in terms of Rule 129 (6) of the CGST Rules, 2017, and the period of the current investigation was from 01.07.2017 to 31.07.2019. However, due to the prevalent pandemic of COVID-19 in the country, the investigation could not be completed by the above date i.e. 04.05.2020. Therefore, in terms of Notification No. 35/2020 dated 03.04.2020 issued by the Central Government under Section 168 (A) of the CGST Act, where, any time limit for completion or compliance of

any action, which fell during the period from the 20th day of March 2020 to the 29th day of June 2020, and where completion or compliance of such action had not been made within such time, then the time limit for completion or compliance of such action, stood extended up to the 30th day of June 2020, including for the purpose for furnishing of any report under the provision of the CGST Act, 2017 and the same was informed to this Authority vide letter dated 27.04.2020.

4.The DGAP has further submitted that the Respondent replied to the said notice vide various letters/ e-mails but did not furnish the complete and the relevant documents required for the investigation. Hence, Summons under Section 70 of the CGST Act, 2017 read with Rule 132 of the above Rules, were issued on 16.01.2020 to the Respondent asking him to appear before the DGAP on 22.01.2020 and produce the relevant documents. In response to the Summons, the Respondent had submitted certain details vide letter dated 22.01.2020. Since the complete documents were not submitted by the Respondent, another Summons under Section 70 of the CGST Act, 2017 read with Rule 132 of the Rules, were issued on 27.01.2020 to the Respondent asking him to appear before the DGAP on 31.01.2020 and produce the pending relevant documents. In response to the Summons, the Respondent has submitted certain details vide letter dated 31.01.2020, 20.02.2020, and 26.02.2020 to the DGAP. However, on scrutinizing the documents submitted by the Respondent, it was observed that certain details/clarifications were

required from the Respondent, and for this purpose, a letter dated 13.05.2020 was issued by the DGAP to the Respondent. The Respondent replied vide e-mail dated 20.05.2020 and submitted certain clarifications to the DGAP.

5. The DGAP has further reported that in response to the notice dated 14.08.2019 and subsequent reminders dated 24.09.2019, 15.10.2019 and 06.11.2019 and Summons dated 16.01.2020 and 27.01.2020, the Respondent submitted his replies vide letters/e-mails dated 03.10.2019, 20.11.2019, 06.01.2020, 15.01.2020, 22.01.2020, 31.01.2020, 20.02.2020, 26.02.2020, 20.05.2020 and 28.05.2020 vide which he had stated:

- i. That the phase-I of the project "Eco Village-2" comprised 3 towers, namely B3, B4, and C6, altogether comprising of 501 units, out of which 1 unit had remained unsold as of 31.07.2019.
- ii. That each phase of the project "Eco Village 2" was separately registered under RERA. Applicant No. 1 in the proceedings belonged to the tower B3 of the Phase-I of the project "Eco Village" which was separately registered under RERA No. UPRERAPRJ4112.
- iii. The Respondent also submitted the details of the project: Eco Village-2 in terms of phases and towers as under:-

Project Name/ Project Address	Project Phase	Name of Towers	No. of Towers	RERA Registration No.
Eco Village-			8	Pre-RERA Completed
	Phase - I	B3, B4, C6	3	UPRERAPRJ4112
	Phase - I C	B1, B9, B10,	10	UPRERAPRJ8337

11.12

2 / Plot no.GH-1, Sec.16B Greater Noida		B12A, B14, C4, B2, C5, C12, B5		
	Phase – II	B11, B12, B6, B7, B8, A2, C8, C9, G1, C7, F3, E1, G2, D4, D5	15	UPRERAPRJ4917
	Phase – III	I1, I2, J1, J2	4	UPRERAPRJ4939
	Phase – IV	H4 & K1	2	UPRERAPRJ4968
		TOTAL	42	

6.The DGAP has further stated that vide the aforementioned letters/e-mails, the Respondent submitted the following documents/information:-

- i. Copies of GSTR-1 Returns for the period July 2017 to July 2019.
- ii. Copies of GSTR-3B Returns for the period July 2017 to July 2019.
- iii. Copies of Tran-1 (Tran-2 not filed).
- iv. Electronic Credit Ledger for the period from July 2017 to July 2019.
- v. Copies of VAT & ST-3 Returns for the period from April 2016 to June 2017.
- vi. Copies of Allotment letter issued in the name of Applicant No. 1.
- vii. Copies of sale agreement/contract issued in the name of Applicant No. 1.
- viii. Details of applicable taxes in the pre-GST and post-GST periods.
- ix. Copy of Respondent's Balance Sheet for FY 2016-17, 2017-18 & 2018-19.

- x. Details of VAT, Service Tax, ITC of VAT, Cenvat Credit for the period April 2016 to June 2017, Output GST and ITC for the period July 2017 to July 2019 for the impugned Project.
- xi. Cenvat/ITC register for the FY 2016-17, 2017-18, 2018-19 & April 2019 to July 2019 reconciled with VAT, ST-3 and GSTR-3B Returns.
- xii. List of home-buyers for the project Eco Village-2(B-3, B-4 & C-6 Tower).
- xiii. Copy of RERA Registration Certificate of Eco-Village-2 (Phase-1).

Further, the DGAP has also reported that the Respondent did not claim confidentiality of any of the details/information furnished by him, in terms of Rule 130 of the Rules.

7.The DGAP has further stated that the reference received from the Standing Committee on Anti-profiteering, various replies of the Respondent, and the documents/evidence on record had been carefully scrutinized and the main issues for determination were:-

- i. Whether the Respondent had been benefited on account of reduction in the rate of tax or ITC on the supply of construction service upon 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.

8.The DGAP has further reported that the Respondent, vide letter dated 20.11.2019, submitted a copy of Sale Agreement dated 27.07.2018,

Allotment Letter dated 03.08.2018 of Flat no. R0190B31508 Tower B3, Unit No. 1508, 15th Floor in respect of the Applicant No. 1, measuring 890 square feet, at a total basic sale price of Rs. 27,94,600/- (Rs. 3,140/- basic sale price per square feet and Rs. 2,50,000/- for covered car parking, Rs. 22,250/- for IFMS, Rs. 44,500 as PLC amount, Rs. 40,000 as Electrification Charges and Rs. 20,000 as Power Backup). The details of amounts and taxes paid by Applicant No. 1 to the Respondent has been furnished by the DGAP in the below mentioned Table-'A':-

S. No.	Payment Stage	Due Date	Basic %	BSP
1	On Booking	26.10.2016	10.00%	3,17,135
2	Within 30 days	16.11.2016	20.00%	6,34,270
3	Within 60 days	23.12.2016	20.00%	6,34,270
4	On Offer of Possession	07.11.2017	50.00%	15,85,675
Total			100.00%	31,71,350

9. It has also been reported by the DGAP that the Respondent submitted that each phase of the project Eco Village-2 was separately registered under RERA and the unit purchased by the Applicant No. 1 belonged to the tower B3 of the Phase-I of Eco Village-2. Therefore, the DGAP has restricted the investigation to the Phase-I of the project Eco Village-2 only, which was separately registered under RERA no. UPRERAPRJ4112.

10. Further, the DGAP has also reported that para 5 of Schedule-III of the CGST Act, 2017 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 CGST 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 the completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier”.

Thus, the ITC in respect of those residential units and commercial shops which were under construction but not sold was provisional ITC which might 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 CGST Act, 2017. Therefore, the ITC pertaining to the unsold units might not fall within the ambit of the investigation, and the Respondent was required to recalibrate the selling price of such units to be sold to the prospective buyers by considering the net benefit of additional ITC available to them post-GST.

11. The DGAP has further claimed that before 01.07.2017, i.e., before the GST was introduced, the Respondent was eligible to avail credit of Service Tax paid on input services only (no credit was available in respect of Central Excise Duty paid on the inputs) and also ITC of VAT paid on inputs was not available to the Respondent. Further, post-GST, the Respondent could avail ITC of GST paid on all the inputs and the input services including the sub-contracts. From the information submitted by the Respondent to the DGAP for the period April 2016 to July 2019, the details of the ITC availed by him, his turnovers from the subject project “Eco Village-2 (Phase-I)”, the ratios

of ITC to turnovers, during the pre-GST (April 2016 to June 2017) and post-GST (July 2017 to July 2019) periods have been furnished by the DGAP in the below mentioned Table- 'B':-

Table-'B'

(Amount in Rs.)

S. No.	Particulars	April 2016 to March 2017	April 2017 to June 2017	Total (Pre-GST)	July 2017 to March 2018	April 2018 to July 2019	Total (Post-GST)
(1)	(2)	(3)	(4)	(5)= (3)+(4)	(6)	(7)	(8)= (6)+(7)
1	CENVAT of Service Tax Paid on Input Services (A)	10,67,003	26,216	10,93,219	-	-	-
2	Input Tax Credit of VAT Paid on Purchase of Inputs (B)	-	-	-	-	-	-
3	Input Tax Credit of GST Availed (C)	-	-	-	16,19,356	25,83,838	42,03,194
4	Total CENVAT/Input Tax Credit Available (D)= (A+B) or (C)	10,67,003	26,216	10,93,219	16,19,356	25,83,838	42,03,194
5	Turnover for Residential Flats as per Home Buyers List (E)			1,81,73,810			7,65,26,418
6	Total Saleable Area (in SQF) (F)			4,78,086			4,78,086
7	Total Sold Area relevant to turnover as per Home Buyers List (in SQF) (G)			78,050			2,58,496
8	Relevant ITC [(H)= (D)*(G)/(F)]			1,78,474			22,72,622
	Ratio of Input Tax Credit Post-GST [(I)=(H)/(E)]			0.98%			2.97%

12. It has also been reported by the DGAP that as per the Table-'B', the ITC as a percentage of the turnover that was available to the Respondent during the pre- GST period (April 2016 to June 2017) was 0.98% and during the post- GST period (July 2017 to July 2019), it was 2.97%. Hence, it was confirmed that post-GST, the Respondent had been benefited from additional ITC to the tune of 1.99% [2.97% (-) 0.98%] of the turnover. Accordingly, the profiteering had been examined by comparing the applicable tax rate and ITC available in the pre-GST period (April 2016 to June 2017) when Service Tax @4.50% was payable with the post-GST period (July 2017 to July

2019) when the effective GST rate was 12% (GST @18% along with 1/3rd abatement for land value) on construction service, vide Notification No.11/2017-Central Tax (Rate), dated 28.06.2017. Accordingly, based on the figures contained in Table- 'B' above, the comparative figures of the ratios of ITC availed/available to the turnovers in the pre-GST and post-GST periods as well as the turnovers, the recalibrated base price, and the excess realization (profiteering) during the post-GST period has been tabulated by the DGAP in the below mentioned Table-'C':-

Table-'C'

(Amount in Rs.)

S. No.	Particulars		Post- GST
1	Period	A	After 01.07.2017
2	Output GST Rate (%)	B	12.00
3	Ratio of CENVAT credit/ InputTax Credit to Total Turnover as per table - 'B' above (%)	C	2.97
4	Increase in input tax credit availed post-GST (%)	D= 2.97% less 0.98%	1.99%
5	<u>Analysis of Increase in input tax credit:</u>		
6	Base Price raised/collected from July 2017 to July 2019 (Rs.)	E	7,65,26,418
7	GST @ 12% over Base Price	F=E*12%	91,83,170
8	Total amount to be collected/raised	G=E+F	8,57,09,588
9	Recalibrated Base Price	H= (E)*(1-D) or 98.01% of (E)	7,50,05,314
10	GST @12%	I=H*12%	90,00,638
11	Commensurate demand price	J=H+I	8,40,05,952
12	Excess Collection of Demand or Profiteering Amount	K=G-J	17,03,637

13. From table-'C' above, the DGAP has deduced that the additional ITC of 1.99% of the turnover should have resulted in the commensurate reduction in the base prices as well as cum-tax prices. Therefore, in terms of Section 171 of the CGST Act, 2017, the benefit of such

additional ITC was required to be passed on by the Respondent to the respective recipients.

14. Further, the DGAP has reported that based on the aforesaid CENVAT/ITC availability in the pre and post-GST periods and the details of the amount raised/collected by the Respondent from Applicant No. 1 and other home buyers during the period 01.07.2017 to 31.07.2019, the Respondent had been benefited by additional ITC amounting to Rs. 17,03,637/- which included GST @12% on the base profiteered amount of Rs. 15,21,104/-. The said amount was inclusive of Rs. 35,857/- (including GST on the base profiteered amount of Rs. 32,015/-) which was the benefit of ITC required to be passed on to Applicant No. 1.

15. It is also evident from the report of the DGAP that the above computation of profiteering was concerning 499 buyers of the project under investigation (excluding Applicant No. 1). However, out of these 499 buyers only 274 buyers had paid consideration to the Respondent in the GST regime. Accordingly, the benefit of additional ITC concerning these 274 buyers in the GST regime was proportionately calculated. The benefit in terms of the remaining 225 buyers in the present proceedings was not considered for the computation of profiteering as it would be possible only when the consideration/payment was received by the Respondent from them and then it will be incumbent on the Respondent to pass on the benefit to these 225 recipients. Based on the details of outward supplies of the construction service submitted by the Respondent, it was

observed that the said service had been supplied by the Respondent in the State of Uttar Pradesh only.

16. The DGAP has concluded that the benefit of additional ITC to the tune of 1.99% of the turnover has accrued to the Respondent post-GST and the same was required to be passed on by the Respondent to the 275 buyers, including Applicant No. 1 and other recipients from which the consideration/payment was received in the post-GST period. Thus the provisions of Section 171 of the CGST Act, 2017 appeared to have been contravened by the Respondent in as much as the additional benefit of ITC @ 1.99% of the base price received by the Respondent during the period 01.07.2017 to 31.07.2019, had not been passed on by the Respondent to the Applicant No. 1 and other eligible homebuyers/ recipients. The computation has revealed that the Respondent has realized an additional amount to the tune of Rs. 35,857/- from Applicant No. 1. which includes both, the profiteered amount @ 1.99% of the base price and GST on the said profiteered amount. Further, the investigation has revealed that the Respondent had also realized an additional amount of Rs. 16,67,780/- which included both the profiteered amount @1.99% of the base price and GST on the said profiteered amount, from 274 other recipients who were not Applicants in the present proceedings. These 274 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 said additional amount of Rs. 16,67,780/- was required to be returned to such eligible recipients. Therefore, the

total profiteered amount of **Rs. 17,03,637/- (Rupees Seventeen Lacs, Three Thousand, Six Hundred and Thirty-Seven only)** was required to be passed on by the Respondent to Applicant No. 1 and the other 274 eligible homebuyers/ recipients.

17. The DGAP has further reported that the investigation covered the period from 01.07.2017 to 31.07.2019. Profiteering, if any, for the period post-July 2019, had not been examined as the exact quantum of ITC that would be available to the Respondent in the future could not be determined at this stage since the Respondent was continuously availing ITC in respect to the said project.

18. The above Report was carefully considered by this Authority in its sitting held on 11.06.2020 and it was decided to hear the above Applicants and the Respondent on 26.06.2020. A Notice dated 15.06.2020 was also issued to the Respondent to explain why the Report dated 09.06.2020 furnished by the DGAP should not be accepted and his liability for profiteering in violation of the provisions of Section 171 should not be fixed. However, due to the Covid-19 outbreak and subsequent lockdown in Delhi, the hearing could not be held. Sh. Nitish Garg Chartered Accountant and Sh. Kamal Gupta Chartered Accountant appeared for the hearing held through video conferencing on 16.10.2020 on behalf of the Respondent.

19. The Respondent was directed to file his written submissions which have been filed on 06.07.2020 in which the Respondent has contended:-



- i. That in Para No. 20, the DGAP has stated that "In Pre-GST Period, he was eligible for CENVAT Credit of Service Tax paid on input services only and Input Tax Credit of VAT paid was not available to him; that the ITC of VAT paid on goods purchased was allowed by Assessing Authority of Uttar Pradesh VAT Department as per UPVAT Act 2008; that he had availed ITC of VAT in his monthly filed Returns; that he had furnished the details of Input Tax Credit of VAT of Rs. 17,82,460/- in the prescribed format to the DGAP; that he wished to enclose a copy of the relevant VAT Assessment Order for the financial year 2015-2016.
- ii. That as per Table-B of the DGAP's Report, the Total Sold Area relevant to turnover has been wrongly calculated as 78,050 sq. ft. in the pre-GST period and 2,58,496 sq. ft. in the post-GST period; that all the flats were sold in pre-GST period but the DGAP's report has shown the Sold Area in Proportion to the Turnovers in both periods; that since all the flats in the project had been booked in the pre-GST period, the total sold area should be the same in the pre and the post GST periods.

20. Clarifications were sought from the DGAP on the Respondent's above submissions dated 22.06.2020 under Rule 133(2A) of the CGST

Rules, 2017. The DGAP vide his Report dated 20.07.2020 has reported as follows:-

- i. That the Respondent has submitted a copy of Assessment Order of the VAT for the FY- 2015-16 of the State of Uttar Pradesh; however while determining profiteering, the period of investigation considered by the DGAP for the pre-GST regime was only from April 2016 to June 2017 and hence the investigation only looked at the VAT credit availed by the Respondent during the period from April 2016 to June 2017. Further, the DGAP has added that the Respondent submitted the details of the ITC of VAT amounting to Rs. 1782460/- in the prescribed format to the DGAP and that it has been seen from the above-said documents submitted by the Respondent that while the Respondent has shown the ITC of VAT in the VAT returns, the VAT turnovers for the relevant period was nowhere mentioned in the said returns. Therefore, no correlation between the VAT turnovers and ITC of VAT for the relevant period could be established. Given the same, ITC of VAT for the period from April 2016 to June 2017 was not considered in the report of DGAP.
- ii. That the turnover of the Respondent was taken from the Homebuyers list, which indicated the demands/bills raised to the buyers in both pre & post GST periods. Even if, as alleged, all the flats were sold in the pre GST period, the

Respondent would not have raised demands/bills for the entire amount in the pre GST period. Accordingly, the sold area taken into consideration for arriving at profiteering was relevant to the turnover which denoted the demand or bills raised in the pre or post GST period. Hence, the contention of the Respondent was not correct and might not be accepted.

21. The above-referred clarifications dated 20.07.2020 filed under Rule 133(2A) of the CGST Rules, 2017 by the DGAP were supplied to the Respondent for his rejoinder if any. In response to the same, the Respondent has filed his submissions dated 25.09.2020 against the Report of the DGAP dated 20.07.2020 in which he has made the following arguments:-

- i. That the provisions of Section 171 of the CSGT Act did not provide the machinery provision to calculate the benefit of ITC which was fatal to its validity. The Respondent has also relied upon the judgement of the Hon'ble Supreme Court in the case of **Govind Saran Ganga Saran v. CST: (1985) 155 ITR 144 (SC)**.
- ii. That the provisions of Section 171(3) have granted unfettered power to the Rule-making authority to determine powers and functions of this Authority, which has sub-delegated the said powers to this Authority, enabling this Authority to determine the methodology and procedure for the determination of the benefit of ITC which

should be passed on by the registered person to the recipient by way of commensurate reduction in prices in terms of Section 171 of the CGST Act, 2017 though the delegated power could not have been sub-delegated as per the settled legal position; that in this context, he has relied upon the judgement passed by the Hon'ble Supreme Court in the matter of **Municipal Corporation of Delhi v. Birla Cotton Spinning and Weaving Mills AIR 1968 SC 1232**), wherein it was held such a function could not have been delegated; that any delegation of powers should have laid the principles, policy, standards or guidance necessary for the implementation of the provisions of Section 171 of CGST Act, 2017; that the said sub-delegation of unfettered powers to this authority to determine the methodology and the procedure for the determination of profiteering in terms of Rule 126 of CSGT Rules was beyond the competence of the Rule-making authority.

- iii. That the calculation of the additional benefit of ITC of Rs. 17,03,637/- in the post-GST period by the DGAP was based on assumptions and presumptions derived from mathematical calculations without leading any evidence to show that additional benefit of ITC has accrued to the Respondent in the post-GST regime.



- iv. That the DGAP has incorrectly jumped to the conclusion that the additional ITC had accrued to him (the Respondent) due to implementation of GST whereas the additional amount of ITC could accrue due to the following reasons (a) higher amount of ITC due to the higher rate of GST or; (b) an amount of ITC which was not available as credit during pre-GST regime but now available as ITC in the post-GST regime.
- v. That the entire investigation conducted by the DGAP did not have any evidence to show that the additional amount of ITC had accrued in the post-GST regime due to the reason that he had become eligible to claim ITC on the goods or services, which was not available as credit under erstwhile State VAT law and Finance Act, 1994; that the quantification of additional ITC of Rs. 17,03,637/- was based on assumptions and presumptions; that it was a settled principle of law that the burden of proof lied on the shoulder of the person who has alleged it and in the present case, the burden of proof lied on the DGAP to prove that an amount of Rs. 17,03,637/- has been profiteered, which has not been done; that he has relied upon the judgement of Hon'ble Supreme Court in the matter of **Uniworth Textiles Ltd. v CCE, Raipur, 2013 (288) ELT 161 (SC)** para 24, wherein the Hon'ble

Supreme Court held that the burden of proving any form of mala fide lied on the shoulder of the one alleging it.

- vi. That although he has shown proof of having availed the ITC of VAT in the statutory VAT documents submitted to the DGAP during the investigation, the said amount of ITC was not considered by the DGAP while computing the profiteering; that on this issue, the DGAP has, in his reply dated 20.07.2020, merely stated that the Respondent had not mentioned the VAT turnovers and hence no co-relation between the VAT turnovers and ITC of VAT for the relevant period could be established; that the DGAP, in Table-B of his Report, has taken the turnover for residential flats for the pre-GST period as Rs. 1,81,73,810/-, which was the actual amount of demand raised by the Respondent to the homebuyers; that since the said amount represented both, services and goods, it was incorrect to say that the Respondent did not mention the VAT turnovers; that his own computation of his benefit after considering the ITC of VAT of Rs. 17,82,460/- is detailed in Table-B (Revised) and Table-C (Revised) below:-

Table-B(Revised)

(Amount in Rs.)

S.No.	Particulars			Pre-GST	Post GST
				01.04.2016 - 30.06.2017	01.07.2017 - 1.03.2019
1	Cenvat of Service Tax Paid on Input Services	(A)		10,93,219	-

2	Input Tax Credit of VAT Paid on Purchase of Input	(B)		17,82,461	-
3	Total Cenvat / Input Tax Credit Available	(C)	(A+B)	28,75,680	-
4	Input Tax Credit of GST Availed	(D)			42,03,193
5	Total Turnover from Residential Flats	(E)		1,81,73,810/-	7,65,26,418
6	Total Turnover from Commercial Shops	(F)		-	-
7	Total Turnover from Residential Flats and Commercial Shops	(G)	(E+F)	1,81,73,810/-	7,65,26,418
8	Total Salable Area	(H)		4,78,086	4,78,086
9	Area Sold relevant to turnover	(I)		78,050	2,58,496
10	ITC relevant to Area Sold	(J)	C or D*I/H	4,69,470	22,72,622
11	The ratio of CENVAT / Input Tax Credit of GST to Turnover	(K)	J/G*100	2.58	2.97
	Diff in Ratio (%)				0.39

Table-C (Revised) (Amount in Rs.)

S.No.	Particulars		Post GST
1	Period	A	After 01.07.17
2	Output GST Rate (%)	B	12
3	Rate of CENVAT Credit/Input Tax Credit of Total Turnover as per Table -B	C	2.97
4	Increase in Input Tax Credit availed Post GST (%)	D=2.97% Less 2.58%	0.39%
5	Analysis of Increase in Input Tax Credit		
6	Basic Price raised/collected July.17 - July-19 (Rs.)	E	7,65,26,418
7	GST @ 12% over Base Price	F=E*12% %	91,83,170

8	Total Amount to be collected/raised	$G=E+F$	8,57,09,58 8
9	Recalibrated Base Price	$H=(E)*(1-D)$ or 99.61% of E	7,62,27,96 5
10	GST @12%	$I=H*12\%$	91,47,356/ -
11	Commensurate demand price	$J=H+I$	8,53,75,32 1/-
12	Excess Collection of Demand or Profiteering Amount	$K=G-J$	3,34,267/-

vii. That as could be seen from the Table-B and Table-C, the amount of benefit of ITC gets reduced from Rs. 17,03,637/- to Rs. 3,34,267/- if the said ITC is considered; that therefore, the amount of profiteering ought to be reduced by Rs. 13,69,369/-.

viii. That the DGAP has wrongly calculated the alleged profiteering amount on the assumption that avilment of ITC of VAT was a function of the value of taxable services rendered/supplied whereas there was no co-relation in the ITC availed and taxable services in the construction industry because ITC of VAT was being availed based on expenditure incurred and taxable services were supplied based on the milestone/taxable event occurred in accordance with the agreement. Hence, the methodology adopted by DGAP was grossly wrong.

- ix. That profiteering needed to be computed only upon the completion of the entire project and the benefit would be passed on to the buyers on the completion of the project; that calculation of the same before the completion would not give true account of actual benefit/loss accruing to the Respondent; that therefore, the basis of the calculation of profiteering by the DGAP was wrong and devoid of merit and hence the impugned report was liable to be set aside on this ground itself.
- x. That the DGAP has wrongly calculated the profiteered amount and did not consider the reversal of ITC to be made by the Respondent to the extent of the area which remained unsold after the receipt of Completion Certificate in terms of Section 17 of CGST Act, 2017. Therefore, it would be incorrect to infer that Rs. 17,03,637/- was the benefit accruing to the Respondent as the DGAP has not taken into account the reversal of ITC which might happen later on. Hence, the impugned report was bad under the law and liable to be quashed. If the benefit computed by the DGAP was passed onto the buyers without taking into account the ITC reversal on unsold flats then the Respondent would not be able to recover the amount from buyers due to Real Estate (Regulation and Development) Act, 2016. Therefore, the benefit/loss should be calculated on the completion of the entire project.

- xi. That there was no nexus between the installments received and the ITC as the ITC was dependent on the goods and services purchased by the Respondent and the taxable turnover was based on the installments received from the buyers.
- xii. That he might not have received the installment from the buyers during the specific period. However, the construction would have continued and therefore ITC would be available. Hence, computation made by the DGAP was incorrect as it had not considered the various factors which would have impacted the alleged profiteering amount.
- xiii. That mere difference in the ITC availed in pre and post GST era could not be said as a benefit to the Respondent as there were several factors which were required to be taken into account for calculating the benefit/loss. Therefore, the impugned report was bad and liable to be set aside.
- xiv. That he was eligible to take ITC in the pre-GST regime as well however, the rate of tax on services had increased from 15% in the pre-GST period to 18% post-GST and the rate of tax on goods had also increased from 5.25% VAT to 18% / 12% / 28% post-GST. He has submitted the comparison of tax rates under the erstwhile and post GST regime in the below-mentioned table:-

Table

S.No	Description of goods/services	The tax rate under the erstwhile tax regime	Post GST Tax rate
1	Architect Services	15%	18%
2	Brokerage	15%	18%
3	Steel	5.25%	18%

xv. That as per the above table, it was clear that he would be paying tax at the rate of 18%/ 28% on the inputs instead of 5.25%/15%, due to which ITC had got increased but it could not be considered as an additional benefit arising to the Respondent. Hence, the impugned report was bad and suffered from legal infirmities

xvi. That no penalty could be imposed in the present case as the period involved was from July 2017 to July 2019 and no penalty provisions were in existence between the aforesaid period, therefore, the penalty prescribed under section 171(3A) could not be imposed on the Respondent retrospectively.

22. We have carefully considered the Report filed by the DGAP, all the submissions and the documents placed on record and the arguments advanced by the Respondent and find that the Respondent is

executing his "Eco Village-2" project in Greater Noida, Uttar Pradesh
The above project has three phases out of which the Eco Village 2
Phase-I project is a subject matter of the present proceedings. It has
also been revealed that Applicant No. 1 had complained that the
above Respondent was not passing on the benefit of ITC to him on
the flat which he had purchased from him in the project, as per the
provisions of Section 171 of the above Act. The above complaint was
examined by the Standing Committee on Anti-profiteering in its
meeting held on 05.07.2019 and was forwarded to the DGAP for
detailed investigation as per the provisions of Rule 129 (1) of the
CGST Rules, 2017. Accordingly, the DGAP had investigated the
complaint and submitted his Report dated 09.06.2020 under Rule 129
(6) of the CGST Rules, 2017. The present investigation pertains to the
period from 01.07.2017 to 31.07.2019. Further, we find that the
Respondent is executing his Eco Village-2 project in Greater Noida,
Uttar Pradesh The above project has three phases out of which the
Eco Village 2 Phase-I project is the subject matter of the present
proceedings.

23. On perusal of Para 13 and 18 of the report of the DGAP dated
09.06.2020, it is clear that the project 'Eco Village-2' comprises of five
Phases i.e. Phase I, IC, II, III, and IV, and each Phase of the project
was separately registered under RERA. The complaint filed by
Applicant No. 1 belongs to tower B3 of the Phase-I of the project
'Eco Village-2'. Therefore, the DGAP has restricted the investigation to
the Phase-I of the project Eco Village-2 only, which was separately

registered under RERA no. UPRERAPRJ4112. The details of the project 'Eco Village-2' in terms of Phases and Towers are mentioned below:-

Project Name/ Project Address	Project Phase	Name of Towers	No. of Towers	RERA Registration No.
Eco Village-2 / Plot no.GH-1, Sec.16B Greater Noida			8	Pre-RERA Completed
	Phase – I	B3, B4, C6	3	UPRERAPRJ4112
	Phase – I C	B1, B9, B10, B12A, B14, C4, B2, C5, C12, B5	10	UPRERAPRJ8337
	Phase – II	B11, B12, B6, B7, B8, A2, C8, C9, G1, C7, F3, E1, G2, D4, D5	15	UPRERAPRJ4917
	Phase – III	I1, I2, J1, J2	4	UPRERAPRJ4939
	Phase – IV	H4 & K1	2	UPRERAPRJ4968
		TOTAL	42	

24. In the context of this case, we refer to provisions of Section 4 (2) (l) (D) of the Real Estate (Regulation and Development) Act, 2016 (RERA Act 2016, inter alia, which provides as below:-

“that seventy percent. of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose:-



*Provided that the promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project:
Provided further that the amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project.”*

25. It is observed that the above provision of the RERA Act, 2016 makes it mandatory for a real estate developer/promoter to maintain separate bank accounts for each of his projects registered separately under the RERA Act, 2016. In the case of the Respondent, the above provision implies that he was required to maintain five separate escrow/bank accounts in respect of the Five Phases of the project “Eco Village-2”, however, the DGAP’s Report has no mention of this aspect. It has a bearing on the instant proceedings since the DGAP’s Report dated 09.06.2020 only covers one of the five Phases i.e. ‘Phase-I’. As the Respondent had obtained five separate RERA registrations for his five Phases, he should have maintained separate escrow/bank accounts. In case the Respondent has not complied with the above-mentioned provision of the RERA Act, 2016, then the entire project “Eco Village-2” comprising all its Phases, should be considered as a single project for the computation of profiteering, given that the Respondent has been maintaining a common ITC register/ITC ledger for all the Phases

of his said project and has been filing common GST Returns for all the Phases of the said project "Eco Village-2". Hence, the compliance of the Respondent with the above-referred provisions of the RERA Act, 2016, becomes paramount and needs to be examined. Given this, there arises the need to revisit the investigation to ascertain if the Respondent has passed on the benefit of ITC to the homebuyers of the other 4 Phases of the impugned project by a commensurate reduction in the prices of the residential units supplied by him in terms of Section 171 of the CGST Act, 2017.

26. Hence, in terms of the provisions of Section 171(2) of the CGST Act and for the reasons detailed in Para 21 above, the DGAP is directed to further investigate the present case under Rule 133 (4) of the CGST Rules, 2017 to ensure that the Respondent has passed on the benefit of ITC by way of a commensurate reduction in the prices in respect of all the residential units supplied by him. Hence, without dwelling upon any other aspect of the case and without going into any other contentions of the Respondent and the Applicants, this Authority, under the powers conferred on it vide Rule 133(4) of the CGST Rules read with Section 171(2) of the CGST Act 2017, directs the DGAP to reinvestigate this case and to recompute the quantum of profiteering based on above findings.

27. The DGAP is directed to submit a fresh Report after a detailed investigation as per Rule 129 (6) of the above Rules, 2017. The Respondent is directed to extend all necessary assistance to the



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