

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

Case No. 80/2019

Date of Institution 27.06.2019

Date of Order 26.12.2019

In the matter of:

1. Shri Dharmendra Gaud, 212/3, Tekchand Nagar, Sector-104, Gurugram-122006.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s JMK Holdings Pvt. Ltd., Signature Tower, Tower-A, Ground Floor, South City-I, Gurugram-122001.

Respondent

Quorum:-

Sh. B. N. Sharma, Chairman

Sh. J. C. Chauhan, Technical Member

Sh. Amand Shah, Technical Member

Present:-

1. None for the Applicant No. 1.
2. None for the Applicant No. 2.
3. None for the Respondent.

ORDER

1. The present Report dated 25.04.2019 and supplementary Report dated 26.06.2019 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 10.04.2018 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 purchase a flat in the Respondent's project "Grand IV A" situated in Sector-103, Dwarka Expressway, Gurugram, Haryana 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 of the Central Goods and Services Tax Act, 2017 and had

charged GST on the pre-GST base price of Rs. 4000 per sq. ft. The Haryana State Screening Committee on Anti-profiteering on prima facie having satisfied itself that there was less burden of tax in the GST regime due to availability of input tax credit which the Respondent should have passed to the buyers, had forwarded the above application with its recommendation to the Standing Committee on Anti-profiteering on 20.06.2018 for further action, in terms of Rule 128 (2) of the above Rules.

2. The above reference was examined by the Standing Committee on Anti-profiteering and vide minutes of its meetings dated 07.08.2018 and 08.08.2018, it had forwarded the same to the DGAP for detailed investigation under Rule 129 (1) of the above Rules.
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 supporting documents along with details of the Applicant No. 1. The Standing Committee on 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. The DGAP upon receiving the above mentioned details pertaining to the Applicant No. 1 issued Notice dated 29.10.2018 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 thereof and indicate the same in his reply to the Notice as well as furnish all the

supporting documents. Further, the DGAP vide his letter dated 29.10.2018, had given an opportunity to the Respondent to inspect the non-confidential evidences/information submitted by the above Applicant. The Respondent availed the said opportunity and inspected the documents. The DGAP, vide e-mail dated 12.04.2019, 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.

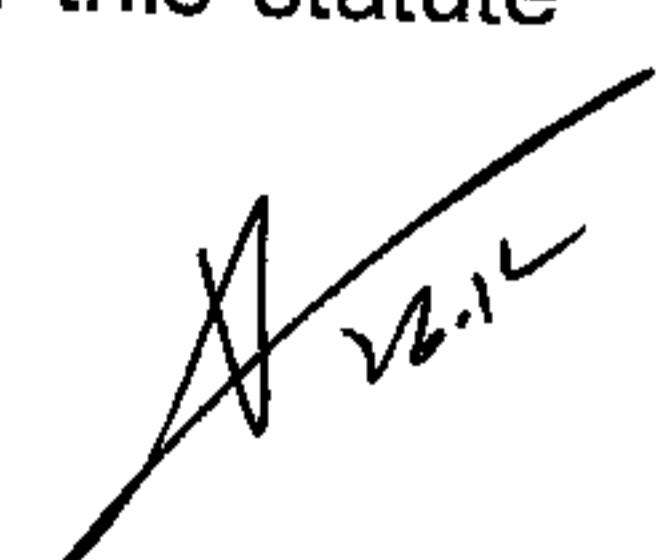
5. Vide letter dated 07.01.2019, the above Applicant informed the DGAP that all his doubts regarding pricing matters in the present project, stood clarified by the Respondent and that he was fully convinced that no undue advantage had been taken by the Respondent with regard to the flat booked by him under the Affordable Housing Scheme.
6. The DGAP had sought extension of time for completing the investigation which was extended by this Authority vide its order dated 15.01.2019 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. The Respondent replied to the DGAP's notice vide various letters but did not furnish the complete and the relevant documents. Hence, Summons under Section 70 of the CGST Act, 2017 read with Rule 132 of the CGST Rules, 2017 were issued by the DGAP on 06.12.2018 to the Respondent asking him to appear before his Superintendent on 14.12.2018 and produce the relevant documents. The Authorised Representative of the Respondent appeared before the Superintendent of the office of DGAP on 14.12.2018 and submitted the requisite documents.

8. In response to the Notice dated 29.10.2018 issued by the DGAP, the Respondent vide his replies dated 19.11.2018, 03.12.2018, 04.12.2018, 05.12.2018, 14.12.2018, 17.12.2018, 01.01.2019, 21.02.2019, 10.04.2019 and 12.04.2019 submitted that the Respondent was a single housing project construction company and was developing the present project in Sector-103, Gurugram under the Affordable Housing Scheme under the Pradhan Mantri Awas Yojna. He also submitted that he had already informed his customers that the benefit of reduction in the cost on account of tax benefit with the implementation of GST, would be duly passed on to them. He further submitted that his project was nearing completion and he was in the process of computing the final tax benefit which would be passed on to the customers in the next demand invoices to be raised in the month of May, 2019. The Applicant No. 1 had also been apprised of the above facts with the request for withdrawal of his complaint which had been made in haste.

9. He further stated that he was not directly engaged in any construction activity and all the work related to the project was assigned to various sub-contractors, who procured all the required raw materials on their own except Steel, Cement and RMC which were supplied by the Respondent on free of charge basis. However, the project was executed under the supervision of the staff employed by the Respondent. He also informed that in the pre-GST regime, "under-construction properties" were covered by the definition of works contract and attracted Haryana VAT @ 4.5% (approximately) with full input tax credit of VAT paid on goods involved in the execution of works contracts. Affordable housing was, however, exempt from

Service Tax, vide Notification No. 9/2016-ST dated 01.03.2016. He further contended that in the GST regime, construction of low cost houses upto a carpet area of 60 square meters per house in a housing project approved by any State Government, was taxable @ 12% (effectively @ 8% after 1/3rd abatement for the value of land), vide Notification No. 01/2018-Central Tax (Rate) dated 25.01.2018 (earlier the GST rate on affordable housing was 18% and the effective rate was 12% after 1/3rd abatement for the value of land). Thus, the total indirect tax burden on the project had increased by 3.5% after the introduction of GST. The Respondent also submitted that under the erstwhile VAT/Service Tax regime, the Respondent was allowed input tax credit of all VAT/WCT paid to the vendors/Sub-contractors. The affordable housing sale price of Rs. 4,000/- per sq. ft. was fixed after considering the benefit of input tax credit of VAT/WCT. However, the Central taxes, i.e., Central Excise Duty and Service Tax levied on the goods & services used in the execution of works contract were part of the cost of the project. Now, under the GST regime, the benefit of the erstwhile Central Excise Duty/Service Tax was available to the Respondent and the same was required to be passed on to the recipients.

10. The Respondent further submitted that Section 171 of the CGST Act, 2017 provided that it was mandatory to pass on benefit due to reduction in rate of tax or input tax credit, to the consumer, by way of commensurate reduction in prices and the applicability of this statute would have arisen in the following two situations:-



- a) If there was reduction in rate of tax on the supply of goods or services
- b) If additional benefit of input tax credit was available.

He also stated that on perusal of the facts of the present case, it could be summarised that in the GST regime, there was no reduction in the rate of tax on supply of goods and services as compared to the pre-GST regime, instead, there was an increase in the rate of GST by approximately 3.5%.

11. The Respondent also submitted that the Central taxes, i.e., Central Excise Duty/Service Tax levied under the pre-GST regime, on the transfer of property in goods in the execution of works contracts, were now available as input tax credit in the GST regime. The Respondent was only procuring Cement, Steel and RMC on his own and all other raw materials used in construction were sub-contracted to the various contractors, who procured raw materials directly, after due payment of Central Excise Duty/GST. However, the Respondent was negotiating with the sub-contractors for seeking the benefits under the GST regime and would pass on the same to his buyers, on or before the completion of the project.

12. The DGAP in his Report has also stated that the Respondent had furnished the following documents:-

- (a) Copies of GSTR-1 Returns for the period from July, 2017 to December, 2018.
- (b) Copies of GSTR-3B Returns for the period from July, 2017 to December, 2018.

- (c) Copy of Tran-1 return for transitional credit.
- (d) Copies of VAT & ST-3 Returns for the period from April, 2016 to June, 2017.
- (e) Copies of all demand letters and sale agreement/contract issued in the name of the Applicant.
- (f) Details of applicable tax rates, pre-GST and post-GST.
- (g) Copies of Balance Sheets (including all annexures and profit & loss account) for FY 2016-17& 2017-18.
- (h) Copy of Electronic Credit Ledger for the period from 01.07.2017 to 31.12.2018.
- (i) CENVAT Credit/Input Tax Credit register for the period from April, 2016 to December, 2018.
- (j) Details of turnover, output tax liability, GST payable and input tax credit availed.
- (k) List of home buyers and commercial shop buyers in the project "Grand IV A", along with the details of commercial shop buyers.
- (l) Reconciliation of turnover reported in the GSTR-3B Returns with that in the list of home buyers.
- (m) Sample copies of letters issued to the customers regarding assurance to pass on the GST input tax credit benefit.

The Respondent had also requested to treat all the data/information furnished by him as confidential, in terms of Rule 130 of the CGST Rules, 2017.

13. Based on the above mentioned documents filed by the Respondent, the DGAP submitted that the main issues for

determination were whether there was any benefit of reduction in rate of tax or input tax credit on the supply of construction service by the Respondent after implementation of the GST w.e.f. 01.07.2017 and if so, whether such benefit was passed on to the Applicant No. 1, in terms of Section 171 of the CGST Act, 2017.

14. The DGAP further submitted that the Respondent, vide his letter dated 04.12.2018, has submitted a copy of application dated 13.12.2017, demand letters and payment receipts for the sale of Flat No. 12-101 to the above Applicant, measuring 419.25 sq. ft., at the basic sale price of Rs. 4,000/- per sq. ft. and 69.84 sq. ft. of Balcony area at the basic sale price of Rs. 500/- per sq. ft. The DGAP has furnished the details of amounts and the GST paid by the Applicant No. 1 to the Respondent in Table-A below:-

Table-A

(Amount in Rs.)

S. No.	Payment Stage	Due Date	Basic %	BSP	GST	Total
1	On submission of Application					
2	Within 15 days of Allotment					
3	Within 6 months of Allotment	17.04.2018	62.50%	10,69,950	85,596	11,55,546
4	Within 12 months of Allotment					
5	Within 18 months of Allotment					
6	Within 24 months of Allotment	31.05.2018	12.50%	213,990	17,119	2,31,109
7	Within 30 months of Allotment	25.11.2018	12.50%	213,990	17,119	2,31,109
8	Within 36 months of Allotment	Not yet due	12.50%	213,990	17,119	2,31,109
Total			100.00%	17,11,920	1,36,953	18,48,873

15. The DGAP has also observed that the Respondent stated that he would compute the benefit of reduction in the cost on account of tax benefit in respect of the project, at the end of the project and pass

on the benefit to his customers, might have merit but the profiteering, if any, had to be determined at a given point of time, in terms of Rule 129 (6) of the CGST Rules, 2017. Therefore, the additional ITC available to the Respondent and the amounts received by him from the Applicant No. 1 and other recipients post implementation of GST, have to be taken into account to determine the benefit of input tax credit that was required to be passed on.

16. The DGAP has further stated that the Respondent also contended that the Applicant No. 1 had been requested to withdraw the complaint which had been made in haste without any merit and consequentially, the Applicant No. 1 has withdrawn his complaint. The DGAP further observed that while the present proceedings must necessarily flow from an application, there was no statutory provision for its closure on account of withdrawal of such application. Also, in terms of Rule 129 of the CGST Rules, 2017 the DGAP was under a statutory obligation to complete the investigation in case of receipt of any reference from the Standing Committee on Anti-profiteering. For these reasons, the DGAP has contended that the withdrawal of an application was not a legally valid ground to discontinue the proceedings initiated under Rule 129 of the above Rules.

17. The DGAP has also submitted that 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* *... b.1*
.....

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, he has claimed that 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:-

17 (2) "Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies".

17 (3) "The value of exempt supply under sub-section (2) shall be such as may be prescribed and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building".

18. Thus the DGAP has 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 prices 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.

19. The Respondent has also submitted that out of total 1,472 flats and 113 commercial shops, only 55 flats and 38 commercial shops were unsold as on 31.12.2018.

20. The DGAP has also claimed that prior to 01.07.2017 i.e. before the GST was introduced, the service of construction of affordable housing provided by the Respondent, was exempted from Service Tax, vide Notification No.25/2012-ST dated 20.06.2012, as amended by Notification No. 9/2016-ST dated 01.03.2016. The Respondent was also not eligible to avail CENVAT credit of Central Excise Duty paid on inputs or Service Tax paid on the input services, as per the CENVAT Credit Rules, 2004, which were in force at the material time. However, the Respondent was eligible to avail credit of Service Tax paid on the input services but CENVAT credit of Central Excise Duty was not available for the commercial shops sold by him. The DGAP has further submitted that the Respondent was also eligible to avail ITC of VAT paid on the inputs and claim deduction from the taxable turnover under the VAT (WCT), of the payments made to the registered contractors or sub-contractors for the execution of the project. Further, post-GST, the Respondent could avail input tax credit of GST paid on inputs and input services including the sub-contracts. From the information submitted by the Respondent for the period from 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) periods in the Table-B given below:-

Table-'B'

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	01.07.2017 to 24.01.2018 (GST @ 12%)	25.01.2018 to 31.12.2018 (GST @ 8%)	(Amount in Rs.) Total (Post-GST)
(1)	(2)	(3)	(4)	(5) = (3)+(4)	(6)	(7)	(8) = (6)+(7)
1	Credit of Service Tax Paid on Input Services used for Commercial Shops (A)	62,51,893	3,91,914	66,43,807	-	-	-
2	Input Tax Credit of VAT Paid on Purchase of Inputs (B)	1,02,28,653	28,95,878	1,31,24,531	-	-	-
3	Rebate of VAT(WCT) Paid to sub-contractors (C)	29,69,281	11,32,925	41,02,206	-	-	-
4	Total CENVAT/Input Tax Credit Available (D)= (A+B+C)	1,94,49,827	44,20,717	2,38,70,544	-	-	-
5	Input Tax Credit of GST Availed (net of reversal) (E)	-	-	-	3,87,08,524	6,26,42,823	10,13,51,347
6	Service Tax Turnover from Commercial Shops (F)	3,54,79,559	55,40,971	4,10,20,530	-	-	-
7	Turnover from residential flats as per VAT Returns (G)	31,23,51,664	5,82,33,550	37,05,85,214	-	-	-
8	Total Turnover (H)	34,78,31,223	6,37,74,521	41,16,05,744	41,53,29,701	89,19,53,612	1,30,72,83,313
9	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (I)	7,15,818 (Residential)	39,055 (Commercial)	7,54,873	7,15,818 (Residential)	39,055 (Commercial)	7,54,873
10	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to turnover (J)	6,00,050 (Residential)	18,988 (Commercial)	6,19,038	6,91,293 (Residential)	16,361 (Commercial)	7,07,654
11	Relevant ITC [(K)= (D)*(J)/(I)] or [(K)= (E)*(J)/(I)]			1,95,75,178			9,50,11,592
Ratio of Input Tax Credit to Turnover Post-GST [(L)=(K)/(H)*100]				4.76%			7.27%

21. Thus, from the above Table, the DGAP has contended that it was clear that the input tax credit as a percentage of the turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 4.76% and during the post-GST period (July, 2017 to December, 2018), it was 7.27% which confirmed that post-GST, the Respondent had benefited from additional input tax credit to the tune of 2.51% [7.27% (-) 4.76%] of the turnover.

22. The DGAP has also stated that the Central Government, on the recommendation of the GST Council, had levied 18% GST (effective rate was 12% in view of 1/3rd abatement on value) on construction service, vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. The effective GST rate on construction service in respect of affordable and low-cost houses upto a carpet area of 60 square metres per house was further reduced from 12% to 8%, vide Notification No. 1/2018-Central Tax (Rate) dated 25.01.2018. In view of the change in the GST rate after 01.07.2017, the DGAP has examined the issue of profiteering in two parts i.e. by comparing the applicable tax rate and input tax credit available in the pre-GST period (April, 2016 to June, 2017) when only VAT@ 4.50% was payable with (1) the post-GST period from 01.07.2017 to 24.01.2018, when the effective GST rate was 12% and (2) with the GST period from 25.01.2018 to 31.12.2018, when the effective GST rate was 8% and accordingly, on the basis of the figures contained in Table-'B' 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, the recalibrated base price and the excess realization (Profiteering) during the post-GST period, has been tabulated by the DGAP in the Table-'C' below:-

Table-'C'

S. No.	Particulars		Post- GST Period				(Amount in Rs.)
			01.07.2017 to 24.01.2018 (Flats & Shops)	25.01.2018 to 31.12.2018 (Shops)	25.01.2018 to 31.12.2018 (Flats)	Total	
1	Period	A					
2	Output GST rate (%)	B	12	12	8		

3	Ratio of CENVAT credit/ Input Tax Credit to Total Turnover as per table - 'B' above (%)	C	7.27	7.27	7.27	7.27
4	Increase in input tax credit availed post-GST (%)	D= 7.27% less 4.76%	2.51	2.51	2.51	2.51
5	<u>Analysis of Increase in input tax credit:</u>					
6	Base Price raised during July, 2017 to December, 2018 (Rs.)	E	41,53,29,701	3,58,99,965	85,60,53,647	1,30,72,83,313
7	GST raised over Base Price (Rs.)	F= E*B	4,98,39,564	43,07,996	6,84,84,292	12,26,31,852
8	Total Demand raised	G=E+F	46,51,69,265	4,02,07,961	92,45,37,939	1,42,99,15,165
9	Recalibrated Base Price	H= E*(1-D) or 97.49% of E	40,49,04,926	3,49,98,876	83,45,66,700	1,27,44,70,502
10	GST @12% or 8%	I = H* B	4,85,88,591	41,99,865	6,67,65,336	11,95,53,792
11	Commensurate demand price	J = H+I	45,34,93,517	3,91,98,741	90,13,32,036	1,39,40,24,294
12	Excess Collection of Demand or Profiteering Amount	K= G-J	1,16,75,749	10,09,220	2,32,05,902	3,58,90,871

23. The DGAP has also argued that the additional input tax credit of 2.51% 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 Central Goods and Services Tax Act, 2017, the benefit of such additional input tax credit was required to be passed on to the recipients. Whereas the Respondent had not contested that any such benefit would eventually have to be passed on to the recipients at the time of giving possession of the flats, it was a fact that this had not been done so far. Thus, by not reducing the pre-GST base price by 2.51% on account of additional benefit of input tax credit and charging GST at the increased rate of 12% or 8% on the

pre-GST base price, the Respondent had contravened the provisions of Section 171 of the CSGT Act, 2017, the DGAP has alleged.

24. The DGAP has also submitted that on the basis of the aforesaid CENVAT/input tax credit availability in the pre and the post-GST periods and the details of the amount collected by the Respondent from the Applicant No. 1 and other home buyers during the period from 01.07.2017 to 24.01.2018, the amount of benefit of input tax credit that needed to be passed on by the Respondent to the recipients, came to Rs. 1,16,75,749/- for residential flats and commercial shops, which included 12% GST on the base profiteered amount of Rs. 1,04,24,775/-. The DGAP has also mentioned that the amount of benefit of ITC that needed to be passed on by the Respondent to the recipients during the period from 25.01.2018 to 31.12.2018, came to Rs. 2,42,15,122/- which included 12% GST on commercial shops and 8% GST on residential flats, on the base profiteered amount of Rs. 2,23,88,036/-. Therefore, the total profiteered amount during the period w.e.f. 01.07.2017 to 31.12.2018, came to Rs. 3,58,90,871/- which included GST (@ 12% or 8%) on the base profiteered amount of Rs. 3,28,12,811/-. The DGAP has also furnished the home buyer and Unit No. wise break-up of the above mentioned amount. The DGAP has also clarified that this amount was inclusive of Rs. 40,606/- (including GST on the base amount of Rs. 37,598/-) which was the benefit of ITC required to be passed on to the Applicant No. 1.

25. The DGAP has further intimated that the Respondent had supplied the service in the State of Haryana only.

26. The DGAP has thus submitted that the benefit of additional input tax credit to the tune of 2.51% of the turnover has accrued to the Respondent post-GST and the same was required to be passed on by the Respondent to the Applicant No. 1 and the other recipients. Thus, the Respondent had contravened the provisions of Section 171 of the CGST Act, 2017, in as much as the additional benefit of input tax credit @ 2.51% of the base price received by the Respondent during the period from 01.07.2017 to 31.12.2018, had not been passed on by the Respondent to the Applicant No. 1 and the other recipients. On this account, the Respondent had realized an additional amount to the tune of Rs. 40,606/- from the Applicant No. 1 which included both the profiteered amount @ 2.51% of the base price and GST on the profiteered amount. The DGAP has also stated that the investigation has revealed that the Respondent has also realized an additional amount of Rs. 3,58,50,265/- which included both the profiteered amount @ 2.51% of the base price and GST on the profiteered amount, from other recipients (1416 home buyers and 54 shop buyers) as well who were not Applicants in the present proceedings. These recipients were identifiable as per the documents provided by the Respondent which gave their names and addresses along with Unit Nos. allotted to such recipients therefore, this additional amount of Rs. 3,58,50,265/- was required to be returned to such eligible recipients.

27. The DGAP has further stated 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 by him 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.

28. The above Report was considered by this Authority in its meeting held on 29.04.2019 and it was decided to hear the Applicants and the Respondent on 17.05.2019. A Notice was also issued to the Respondent on 01.05.2019 asking him to reply why the Report dated 25.04.2019 furnished by the DGAP should not be accepted and his liability for profiteering under Section 171 of the CGST Act, 2017 should not be fixed. He was also asked to explain why penal provisions should not be invoked against him under Section 29 and 122-127 of the CGST Act, 2017 read with Rule 21 and 133 of the CGST Rules, 2017.

29. Five personal hearings were accorded to the parties on 17.05.2019, 30.05.2019, 10.06.2019, 18.06.2019 and 11.07.2019 out of which none was attended by the Respondent as well as by the Applicant No. 1 and the Applicant No. 2.

30. The Respondent has filed his written submissions on 17.06.2019 vide which he has reproduced the alleged complaint of the Applicant No. 1 as below:-

-- Forwarded message -----

From: dharm goud <mrahdgoud@gmail.com>

Date: Tue, Apr 10, 2018 at 4:30 PM

Subject: GST charged by Builder on affordable housing scheme

To:cbecmitra.helpdesk@icegate.gov.in,helpdesk@gst.gov.in,jsraoofficial@gmail.com, sandeep.moca@nic.in

I have allotted an affordable flat and getting a demand letter from builder (Signature Global) related to that, in which they have charged GST @8% addition to pre GST rate of the flat.

when I write them regarding this with GST council's recommendation in 25th meeting (in which council states not to charge GST to affordable home

buyers) they told there is only recommendation no notification comes and you have to pay GST separately.

I want to know whether any notification related to this published and if not than is there any value of GST council's recommendation, they did not revised basic rate after GST and it is also violence of rule 171 (Anti-profiteering Rules, 2017)

they are claiming ITC on input and charging output GST from buyer, they are getting complete input benefit and not paying off output gst as they burdon this to customer.

than how it remains affordable, and what is the benefit of CLSS scheme of PMAY.

Please help on this matter,

Thanks

*Dharmendra Goud
(Professional Accountant)
Mob:-9015745676”*

He has contended that a plain reading of the above application led to an inference that a query was raised by the Applicant No. 1 to the Helpdesk CBIC to respond on the matters relating to the recommendation of the GST Council made in its 25th meeting dated 18.01.2018. This inference got strengthened on a review of the response received by the Applicant No. 1 from the Helpdesk dated 28.04.2018 and the same was reproduced below:-

“On Sat, Apr 14, 2018 at 8:56 PM, cbecmitra.helpdesk@icegate.gov.in <cbecmitra.helpdesk@icegate.gov.in> wrote:

*Dear Sir/Madam,
Your Request ID is 201804101166998*

Thank you for writing to us at CBEC Mitra Helpdesk.

We received your support request, and we understand that you want to know the benefits of homes purchased under the Pradhan Mantri Awas Yojana (PMAY) scheme.

This is to inform you that the GST Council Meeting held on 18th January, 2018 has decided to reduce the GST rate on under-construction houses under

Pradhan Mantri Awas Yojana (PMAY) scheme to 8% (after deducting the value of land). During the GST Council Meeting, it was declared that all under construction houses that are being built as a part of Credit Linked Subsidy Scheme (CLSS) would be charged at 8% GST, contrary to its current rate of 12%. Note: Anyone who is not entitled to CLSS will continue to pay 12% GST on real estate.

NOTE: Sale of building is an activity or consideration that is neither a supply of goods nor a supply of services (Refer to Para 5 of schedule III of the CGST Act, 2017). Therefore, it follows that the sale of ready to move or completed property does not attract GST. GST is payable only on under-construction property.

For detailed information on recommendations made by the GST Council in its 25th Meeting held on 18th January, 2018 at Delhi for the housing sector, please click the link: _____

If you require any further information, please call us on our toll-free number 1800-1200-232, and we would be glad to assist you.

Thanks and Regards,

CBEC Mitra Helpdesk”

He has further contended that the Applicant No. 1, in response to the reply from the Helpdesk dated 14.04.2018 had asked for further clarifications from the Helpdesk on 28.04.2018 which was as follows.

He has also mentioned that the query of the Applicant No. 1 was specific to para 8 of the GST Council meeting dated 18.01.2018 and there was no complaint till now alleged to have been made by the above Applicant:-

“---Forwarded message---

From: dharm goud <mrahdgoud@gmail.com>

Date: Sat, Apr 28, 2018 at 6:40 PM

Subject: Re: GST charged by Builder on affordable housing scheme | 201804101166998

To:

<cbecmitra.helpdesk@icegate.gov.in>

cbecmitra.helpdesk@icegate.gov.in

Cc: helpdesk@gst.gov.in <helpdesk@gst.gov.in>, jsraoofficial@gmail.com <jsraoofficial@gmail.com>, sandeep.moca@nic.in <sandeep.moca@nic.in>

Thanks for your valuable reply, but my main concern for point no. 8 in the recommendation made by the GST Council in its 25th Meeting held on 18th January, 2018 at Delhi for the housing sector, please click the link:

Builder's did not reduced pre gst price of the flats and charging 8% GST addition to pre GST rate, and when we asked them for this recommendation they said there is no notification related to this so you have to pay GST @ 8%.

Kindly help on this on earliest.

Thanks

*Dharmendra Goud
(Professional Accountant)"*

The Respondent has further contended that the recommendation made in para 8 of the GST Council Meeting had not been notified as yet.

31. The Respondent has also claimed that in all the correspondence reproduced above no complaint has been made by the above Applicant addressed to the Standing Committee as prescribed under Rule 128 of the CGST Rules read with Rule 129. There had also been no receipt of information from the interested party by this Authority as prescribed in Para 9 read with Para 12 of the Procedure & Methodology to initiate investigation in accordance with the procedure prescribed in Rule 128 of the CGST Rule read with Rule 129. He has further claimed that the DGAP's Report dated 25.04.2019 has not mentioned the information on the basis of which the correspondence made by the above Applicant with the Helpdesk was assumed to be a

complaint. He has also submitted that the DGAP in his Report dated 25.04.2019, has stated that the Applicant No. 1 had informed him that his doubts with regard to the pricing matters in respect of the said project stood clarified by the Respondent and that he was fully convinced that no undue advantage had been taken by the Respondent. He has also stated that the above Applicant had become a successful allottee in the project only in the post-GST period on 27.01.2018, therefore by necessary implication he was not an allottee in the pre-GST period to be impacted by any change in the rate. The Respondent has further stated that since the flat was allotted on 27.01.2018, the reduction in GST rate from 12% to 8% (after abatement of 1/3rd towards cost of land) notified on the recommendation of the GST Council Meeting held on 18.01.2018 had already been done by him.

32. The Respondent has also submitted that the DGAP's Report dated 25.04.2019 had made incorrect finding that he had benefited from additional input tax credit of 2.51% of the turnover which was based on the average method on his own accord. He has further submitted that he had not been given opportunity to either controvert or respond to the DGAP adopting the average basis for determining the alleged profiteering.

33. The Respondent has further submitted that Rule 126 of the CGST Rules, 2017 provided that this Authority should prescribe the "Methodology and Procedure" for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit has been passed on by a registered person to the recipient by way of commensurate reduction in prices. This

Authority had drafted the Procedure & Methodology comprising of 41 paras, but it did not provide the basis, method and reasoning for computing alleged contravention of the provisions of section 171 of the CGST Act.

34. He has also stated that it was trite law for the taxing statutes, to provide a mechanism for computation of value on which tax was to be paid and it had been held by several Courts including the Apex Court that in the absence of any computational machinery the charging provisions would be construed to have never included the transaction within its fold and no tax could be levied on such transactions. He has further cited the judgements passed in the cases of *B. C. Srinivasa Setty (1981) 128 ITR 294 (SC)*, *Palai Central Bank Ltd. (1984) 150 ITR 539 (SC)* and *National Mineral Development Corporation (2004) 65 SCC 281*. He has also contended that the Patna High Court has held in the case of *Larsen & Toubro v. State of Bihar 2004 (134) STC 354 (Pat.)* which has been affirmed by the Hon'ble Supreme Court in the case of *Voltas Ltd., (2007) 7 VST 317 (SC)* that in the absence of all exclusions which were be prescribed for computation of tax, no tax was payable. He has further submitted that the recent judgement passed in the case of *Larsen & Toubro 2015 SCC Online SC 738* had also quoted with approval the decisions of the Patna, Madras and Orissa High Courts relating to machinery provisions in the following terms:-

"We find that the Patna, Madras and Orissa High Courts have, in fact, either struck down machinery provisions or held machinery provisions

to bring indivisible works contracts into the service tax net, as inadequate."

The said judgment was also quoted in the judgment of Hon'ble Supreme Court passed in the case of **State of Jharkhand v. Voltas Ltd. East Singhbhum**, (2007) 9 SCC 266, the Respondent has contended.

35. The Respondent has also claimed that the anti-profiteering provisions under the CGST Act and the Procedure & Methodology drafted under Rule 126 was silent on the timing of the accrual of the benefit on the agreement entered in the pre-GST regime and the transfer of property in goods/services executed in the GST regime and the passing on of the same to the buyer. He has also mentioned that in a conventional sale of goods/services, the property in goods/services got transferred as intended by the parties, and after transferring risk and reward of the goods/services, the recipient became the owner after paying due consideration along-with taxes thereon. In a conventional case, the provision of anti-profiteering would come into effect from the time, the recipient received the goods/services. He has further submitted that in the present case, he was engaged in the development of Affordable Group Housing residential flats. The project was launched on 14.10.2015 with expected completion on 31.12.2019. The transaction entered with the buyer was covered under the definition of works contract involving undivided share of land, transfer of property in goods and services and thus, it was a composite works contract. The Respondent has further

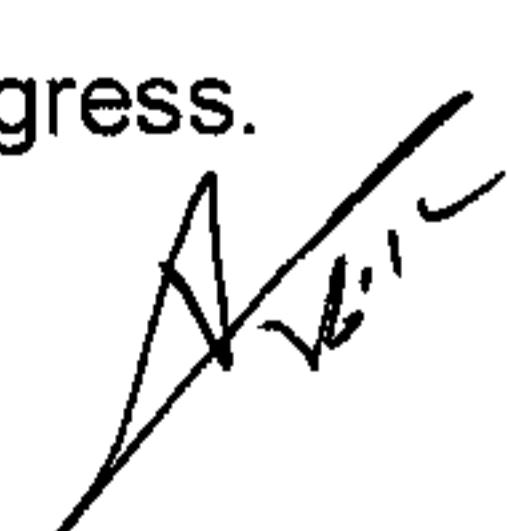
mentioned that the project was nearing completion and the final calculation of the tax benefit was in the process of being computed and would be passed on to the flat buyers in due course.

36. The Respondent has also contended that the average method adopted by the DGAP suffered from the following errors:-

- i. Certain inputs in construction including bricks, stones and dust stone aggregate etc. were exempted from VAT in the pre GST period. In the post GST period, such inputs suffered GST @ 5%. Therefore, while computing input GST, the amount of GST on such tax free items had also been considered by the DGAP which was to the detriment of the Respondent and in fact, the GST on such items which earlier were tax free had to be eliminated while computing possible profiteering.
- ii. Even while adopting average basis for alleging profiteering, the DGAP has erred in not doing a like comparison adopting similar set of circumstances in pre and the post GST period. Profiteering could be freely determined in the case of a tangible product while comparing the pricing and tax input benefit in the pre and post GST regime and thus, adopting an ad hoc average basis for determining profiteering on a product which was yet to be completed was both arbitrary and premature and was biased against him.

37. The Respondent has also stated that the present proceedings could not have been launched against him in view of the following objections:-

- (a) Taking cognizance of an alleged complaint of profiteering by the Applicant No. 1 without establishing whether the correspondence between him and the Helpdesk would tantamount to being a complaint.
- (b) Forcibly converting a query with regard to minutes of the GST Council Meeting dated 18.01.2018 into a complaint ignoring the provisions of Rule 128 and 129 of the GST Rules.
- (c) and concluding the profiteering proceedings arbitrarily despite the complaint against the Respondent by the said Applicant having been withdrawn.
- (d) Making an arbitrary finding of profiteering of 2.51% on the claims raised during the GST period and ignoring the Respondent's submissions that the construction was yet to be completed by 31.12.2019. The Respondent has also claimed that it was premature to compute profiteering till the project was nearing completion which had found acceptance by the DGAP in para 16 of his Report dated 25.04.2019. However, the DGAP had made an observation in the same para of being bound to make a report in terms of Rule 129 (6) of CGST Rules. This observation of the DGAP was misinterpretation of the Rule 129 (6) which only provided a time frame of 3 months for concluding an enquiry and submitting his Report along with records. It did not provide for profiteering to be determined at any point during the process of any product / service which was under completion and if so, profiteering will have to be determined in respect of all works in progress.



(e) Absence of mechanism for computing profiteering in case of real estate project not being provided in the Act, Rules or in the Procedure & Methodology formulated by this Authority in terms of Rule 126 of the CGST Rules, 2017.

(f) The Respondent was not given any opportunity to object to the adoption of the average basis for computing alleged profiteering.

(g) There were errors in computing profiteering under the Anti Profiteering provisions on average basis as per the Table B and consequently Table C especially with regard to the average method not being representative of like comparison.

38. The Respondent has also requested that his above submissions should be taken on record for concluding the case without granting any further hearing to him and in case any documents / clarifications were required, the same be conveyed for being submitted to this Authority.

39. The DGAP was also asked to submit his Report on the issues raised by the Respondent vide his above mentioned submissions. The DGAP vide his Report dated 26.06.2019 received on 27.06.2019 has submitted that he has already examined the facts brought on record and the relevant law points raised by the Respondent in his Report dated 25.04.2019.

40. We have carefully considered all the Reports filed by the DGAP, submissions of the Respondent and other material placed on record and it is revealed that the Respondent is executing his "Grand IV A" project under the Affordable Housing Scheme approved by the Government of Haryana under the Prime Minister Awas Yojana and is

constructing both residential and commercial accommodation. It is also revealed that the Applicant No. 1 had complained to the Haryana State Screening Committee on Anti-profiteering on 10.04.2018 that the above Respondent was not passing on the benefit of ITC to him on the flat which he has purchased from him and was also charging GST from him on the pre-GST base price of Rs. 4,000/- per sq. ft. The above Committee had examined the complaint in its meeting held on 20.06.2018 and having satisfied itself that there was *prima facie* evidence to believe that the Respondent had not passed on the benefit of ITC to the above Applicant had forwarded his application to the Standing Committee on Anti-Profiteering for further action as per the provisions of Section 128 (2) of the above Rules. The above complaint was examined by the Standing Committee in its meetings held on 07.08.2018 & 08.08.2018 and was forwarded to the DGAP for detailed investigation as per the provisions of Rule 129 (1) of the CGST Rules, 2017. The DGAP has conducted investigation in the above allegations levelled by the Applicant No. 1 and vide his Report dated 25.04.2019 has stated that the Respondent had violated the provisions of Section 171 of the above Act by resorting to profiteering of an amount of Rs. 3,58,90,871/-.

41. The Respondent in his written submissions filed on 17.06.2019 has claimed that no complaint had been filed by the Applicant No. 1 against him for not passing on the benefit of ITC. He has further claimed that the above Applicant vide his e-mails dated 10.04.2018 and 28.04.2018 addressed to the Helpdesk established by the Central Board of Excise & Customs (CBEC) had only raised queries regarding the proceedings of the 25th meeting of the GST Council held on

18.01.2018 which could not be construed as complaint against him and hence the present proceedings were not maintainable. However, perusal of Annexure-1 attached with the Report of the DGAP dated 25.04.2019 shows that the above Applicant had made a specific complaint to the Anti-Profiteering authorities against the Respondent for not passing on the benefit of ITC. The e-mail dated 10.04.2018 sent by the above Applicant to the anti-profiteering@gov.in reads as under:-

"Subject :Fwd: GST charged by Builder on affordable housing scheme

To: anti-profiteering@gov.in Date: 04/12/18 12.25PM

From: dharm goud mrahdgoud@gmail.com

Dear Sir or Mam,

Kindly look into the matter and guide me what to do in the case as per trail mail.

Builder charging using the basic rate of 4000/- Psf, this rate is pre-GST and never revised by builder, and this was exempted in earlier service tax law but after GST **they did not transfer any benefit of ITC taken on Input to customers by lowering the rate** but putted an additional burden on weaker section of Indian people, Prime minister trying to lowering the cost by provided subsidy on home loan under PMAY scheme and these builders making that effort useless.

Please look into the matter and try to resolve the matter of earliest

Regards

Dharmendra Goud

(Professional Accountant)

Mob:- 9015745676"

(Emphasis supplied)

42. Therefore, it is clear that the above claim of the Respondent is absolutely wrong and hence the same cannot be accepted. Accordingly, the investigation against the Respondent has rightly been initiated on the recommendations of the Haryana State Screening Committee and the Standing Committee and correctly carried out by the DGAP as per the provisions of the CGST Rules, 2019.

43. The Respondent has also contended that the Applicant No. 1 had withdrawn his complaint vide his letter dated 07.01.2019 and hence no investigation could have been done against him. In this regard it would be relevant to refer to the application submitted by the above Applicant to the DGAP which states as under:-

"Dated: 07th January, 2019

The Directorate General of Anti-Profiteering,
Gole Market, New Delhi.

Sub.: Complaint against JMK Holdings Private Limited

Ref: Flat No 12-101, Tower 12, Grand Iva, Sector 103, Gurugram.

Respected Sir,

This refers to my complaint to your good self and your subsequent letter to the builder M/s JMK Holdings Pvt. Ltd., vide F. No. 22011/API/109/2018/5627 dated 29th October, 2018, a copy of which

has been endorsed to me, wherein you had directed the builder to redress the issue being faced by me.

In this context I hereby inform you that the authorised representative of the company has approached me and has clarified all the doubts regarding pricing matters. I am fully convinced that no undue advantage has been taken from me for the flat booked under affordable housing. I also confirm that the above statement is being made by me without any pressure and with full consent and understanding of the matter.

Thanking you for your help,

Your's

Sd/-

Name: Dharmendra Goud

Mobile No: 9015745676

Address: 212/3, Tex Chand Nagar, Sec-104, Gurugram"

(Emphasis supplied)

44. It is clear from the perusal of the above letter that the Respondent had approached the above Applicant and won him over not to pursue the complaint as it would have made him liable for profiteering under Section 171 (1) of the above Act. It is also clear that the above Applicant had not mentioned in his above letter that he has received the benefit of ITC which was his main allegation against the Respondent. Therefore, the above withdrawal cannot be taken to be bonafide and genuine There is also no provisions in the CGST Act or the Rules for withdrawal of the complaint as there is possibility of coercion or undue influence on the complainants by the unscrupulous

builders. The DGAP is also bound to launch investigation on a complaint once he has received recommendation from the Standing Committee on Anti-Profiteering under Rule 129 (1) and he cannot stop such investigation on the withdrawal of the complaint once it discloses commission of an offence under Section 171 of the above Act. Since, the benefit of ITC has been given by the Central and the State Government out of the public exchequer in favour of the buyers it is also incumbent on the DGAP to find out whether the above benefit has been passed on by the Respondent or it has been misappropriated by him. Therefore, the above contention of the Respondent is frivolous and hence, the same cannot be accepted.

45. The Respondent has further claimed that the DGAP's Report dated 25.04.2019 had recorded incorrect finding by stating that he had benefited from additional ITC of 2.51% of the turnover, as this finding was based on the average method applied by the DGAP on his own accord. However, perusal of Table B of the above Report shows that the ratio of CENVAT and VAT for the period from April, 2016 to June, 2017 has been calculated on the basis of the figures reflected by the Respondent in his VAT and Service Tax Returns filed during the above period. Similarly, the computation of ratio of ITC to turnover for the period from July, 2017 to December, 2019 is based on the information submitted by the Respondent in his Returns. The figures of turnover for both the above periods have also been taken from the information submitted by the Respondent in his Returns. The Respondent has himself supplied the details of the total saleable carpet area and the total sold area relevant to the turnover for both the above periods. Hence, both the above ratios are based on actual

mathematical computations and not on averages as has been claimed by the Respondent and hence, the above claim of the Respondent is incorrect.

46. He has further stated that he had not been given opportunity by the DGAP to either controvert or respond to the DGAP's adoption of the average basis for determining the alleged profiteering. In this connection it would be appropriate to mention that as per the provisions of Rule 129 (1) of the CGST Rules, 2017 the DGAP has been entrusted with the responsibility of carrying out detailed investigation in the allegations of profiteering and collect necessary evidence and therefore, he is not required to afford opportunity of hearing to the Respondent being an investigating agency. As per the provisions of Rule 129 (3) the DGAP is required to give notice to the Respondent which he has given on 29.10.2018 and hence he has complied with the above provision. Proper opportunity of being heard has been provided to the Respondent by this Authority in which the Respondent has controverted the computations of the DGAP through his written submissions and hence he should have no objection on this ground. However, he has not cared to attend any of the personal hearings which were afforded to him by this Authority on 17.05.2019, 30.05.2019, 10.06.2019, 18.06.2019 and 11.07.2019.

47. The Respondent has also contended that this Authority has not provided any basis, method and reasoning for computing profiteering in respect of violation of the provisions of Section 171 of the CGST Act, 2016 under Rule 126 of the above Rules. In this connection it is mentioned that this Authority has already determined the Methodology and Procedure under Rule 126 vide its Notification dated 28.03.2018

which is available on its website. However, the basis and the reasons for computing profiteering have been mentioned in Section 171 (1) of the above Act itself which require 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." Therefore, it is quite clear that both the above benefits are required to be passed on by commensurate reduction in the price on every product to each buyer and in case they are not passed on profiteered amount has to be computed as per the provisions of Section 171 (3A) of the above Act. In view of the above facts no methodology is required to be prescribed by this Authority as the same has been clearly and unambiguously prescribed in the above Section.

Therefore, this contention of the Respondent is not correct.

48. He has further contended that it was settled that in the taxing statutes mechanism and machinery for computation of value should be provided. However, this contention of the Respondent is fallacious as no tax has been levied under Section 171 (1) of the above Act and hence no machinery is required to be provided. However, to enforce the Anti-profiteering measures, as provided under Section 171 (2) of the above Act, this Authority has been established to determine whether both the above benefits have been passed on or not to the consumers. Under Rule 123 Standing and Screening Committees on Anti-Profiteering have been constituted to examine the accuracy and adequacy of the evidence to prima facie establish whether the above benefits have not been passed. As per Rule 129 of the CGST Rules, 2017 office of DGAP has been created and empowered to investigate the complaints alleging non passing of the above benefits on the 1st

recommendation of the Standing Committee on Anti-Profiteering. Vide Rule 127 this Authority has been assigned the duty of determining whether these benefits have been passed on or not, to identify the registered person who has not passed on the above benefits, to provide relief to the affected consumers, get the profiteered amount returned or deposited and impose penalties. Under Rule 133 this Authority has been empowered to determine the above benefits, grant them to the eligible recipients, get the profiteered amount deposited and impose penalties. Under Section 171 (3A) of the CGST Act, 2017 read with Rule 133 (3) (d) & (e)) of the above Rules, this Authority has been given power to impose penalty on the registered persons and cancel their registration who do not pass on the above benefits. Under Rule 136 this Authority can get its orders monitored through the tax authorities of the Central or the State Governments. Hence, there is more than the adequate machinery required to implement the Anti-Profiteering measures and hence all the claims made by the Respondent on this ground are incorrect and hence they cannot be accepted.

49. He has also cited the judgement passed in the case of ***Commissioner of Income Tax v. B. C. Srinivasa Setty (1981) 128 ITR 294 (SC)*** in his support. Keeping in view the facts mentioned in para supra it is respectfully submitted that the law settled in the above case is not being followed as adequate machinery has been provided to implement the Anti-Profiteering measures in the CGST Act and the Rules made thereunder. The Respondent has also relied on the case of ***Commissioner of Income Tax v. The Official Liquidator Palai Central Bank Ltd. (1984) 150 ITR 539 (SC)*** in which the issue of

charging of super profit tax was involved. However, as mentioned above there exists appropriate mechanism and machinery to enforce the Anti-Profiteering measures and hence the law settled in the above case is not being relied. The Respondent has also cited the judgement passed in the case of *National Mineral Development Corporation v. State of M. P. and another* (2004) 65 SCC 281 in his support in which the issue of levy of royalty on 'slimes' was involved however, the above case is of no help to the Respondent as has been discussed above. He has also placed reliance on the law settled in the case of *Larsen & Toubro v. State of Bihar and others* 2004 (134) STC 354 (Pat.) which was affirmed by the Hon'ble Supreme Court in the case of *State of Jharkhand and others v. Voltas Ltd.* (2007) 7 VST 317 (SC), in which it was held that in the absence of all exclusions which were to be prescribed for computation of tax, no tax was payable. Since no tax has been imposed under Section 171 (1) of the above Act, hence the facts of this case are not similar to the facts of the above cases and hence they do not further the cause of the Respondent. The Respondent has also cited the case of *Commissioner Central Excise & Customs Kerala & others v. Larsen & Toubro* 2015 SCC Online SC 738 in which the issue pertained to the levy of Service Tax on the indivisible works contracts which is not the issue in the present case and hence the above case is not relevant in the facts of the present case as there is adequate machinery to implement the provisions of Section 171 (1) of the above Act.

50. The Respondent has also stated that the Anti-Profiteering provisions under the CGST Act and the Procedure & Methodology

drafted under Rule 126 was silent on the timing of passing on of the benefit. However, there can be no doubt that the above benefit has to be passed on as soon as the Respondent avails the ITC for discharging his output tax liability. Since, the Respondent is utilising the ITC every month through his GSTR-3B Returns he should also pass on the benefit by commensurate reduction in the prices every month to his buyers. The Respondent cannot use two parameters while using the ITC himself every month and by claiming that his buyers would be entitled to get the benefit of ITC when the project would be near completion or completed. The Respondent cannot be allowed to enrich himself at the expense of vulnerable affordable house buyers by denying them the benefit for more than 4 years and use the additional ITC in his business at the same time. In case he wants to pass on the benefit after completion of the project he should also claim the ITC after the project is completed. There is also no provision in the Anti-Profiteering measures which requires that the benefit of ITC would be passed on when the flats would be delivered to the buyers. The execution of the project by awarding works contracts also does not entitle him to pass on the above benefit when the project would be nearing completion or will be completed. Hence, all the above claims of the Respondent are wrong and therefore, they cannot be accepted.

51. The Respondent has also submitted that while computing the above benefit the DGAP has not taken in to account the rate of tax on those material which were tax free in the pre-GST period. This argument of the Respondent is untenable since the DGAP has computed the benefit of additional ITC by comparing the ITC which

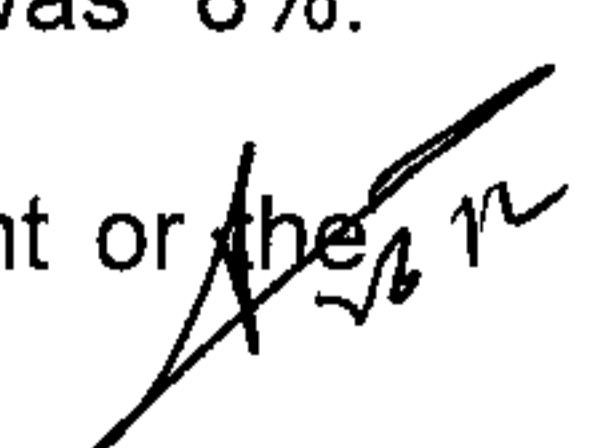
was available to him in the pre and the post-GST period and it is clear from his computation that the Respondent has got additional benefit of 2.51% of ITC to the turnover. In case the Respondent had bought those goods on which no tax was leviable then no ITC was available to him during the pre-GST period and hence the same was not be considered while computing the ratio of ITC to turnover. As discussed in para supra the DGAP has also not calculated the profiteered amount by using averages. Hence, the above arguments of the Respondent are incorrect.

52. The Respondent has also contended that Rule 129 (6) of the CGST Rules, 2017 only provided a time frame of 3 months for concluding an enquiry and it did not provide for profiteering to be determined at any point. In this connection it would be pertinent to mention that profiteering has to be determined as soon as the Respondent avails the benefit of ITC and has no connection with the work in progress as it is to be calculated on the additional benefit of ITC availed by the Respondent.

53. We also observe that the benefits of tax rate reduction and ITC have been given by the State and the Central Govt. from their own tax revenue to provide accommodation to the vulnerable sections of society under the Affordable Housing Schemes. The method of interpretation of this provision has been given in the text of Section 171 of the CGST Act, 2017 itself. We also observe that the above provision clearly links profiteering with each supply of goods or services or both and hence, profiteering has to be computed at the level of both. Therefore, the Respondent is under legal obligation to

pass on the benefit of ITC to his buyers and he cannot be allowed to appropriate the same.

54. Based on the above facts it is clear that the ITC as a percentage of the turnover that was available to the Respondent during the pre-GST period from April, 2016 to June, 2017 was 4.76% and during the post-GST period from July, 2017 to December, 2018, it was 7.27% as per Table B supra and hence it is established that the Respondent has benefited from the benefit of additional ITC to the extent of 2.51% [7.27% (-) 4.76%] of the turnover. Since, the above computations shown in Table B have been made on the basis of the VAT, Service Tax and GST Returns filed by the Respondent as well as the information supplied by him therefore, the same can be taken to be correct and relied upon.

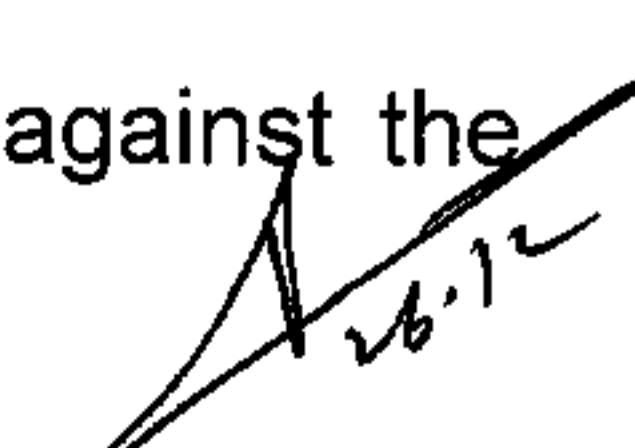
55. It is also clear from the record that the Central Government, on the recommendation of the GST Council, had levied 18% GST with effective rate of 12% in view of 1/3rd abatement on value on the construction service, vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 which was reduced in the case of affordable housing from 12% to 8%, vide Notification No. 1/2018-Central Tax (Rate) dated 25.01.2018. Accordingly, the DGAP has computed the profiteered amount by comparing the applicable tax rate and ITC available in the pre-GST period when only VAT@ 4.50% was payable with (1) the post-GST period from 01.07.2017 to 24.01.2018, when the effective GST rate was 12% and (2) with the GST period from 25.01.2018 to 31.12.2018, when the effective GST rate was 8%. Accordingly, the DGAP has calculated the profiteered amount or the 

benefit to be passed on for the period from 01.07.2017 to 24.01.2018, as Rs. 1,16,75,749/- for the residential flats and commercial shops, which includes 12% GST on the base profiteered amount of Rs. 1,04,24,775/-. He has also computed the amount of benefit of ITC or the profiteered amount that needs to be passed on by the Respondent to his recipients during the period from 25.01.2018 to 31.12.2018 as Rs. 2,42,15,122/- which includes 12% GST on commercial shops and 8% GST on residential flats, on the base profiteered amount of Rs. 2,23,88,036/-. Therefore, the total benefit of ITC which is required to be passed on during the period from 01.07.2017 to 31.12.2018, comes to Rs. 3,58,90,871/- which includes GST @ 12% or 8% on the base profiteered amount of Rs. 3,28,12,811/- as per Table C of the above Report. The home buyer and Unit No. wise break-up of this amount has been given by the DGAP vide Annexure-22 of his Report. This amount is inclusive of Rs. 40,606/- including GST on the base amount of Rs. 37,598/- which is the benefit of ITC which is required to be passed on to the Applicant No. 1, mentioned at Serial No. 187 of Annexure-22. Since, Table C has been prepared on the basis of the information reflected in the Returns filed by the above Respondent and the details submitted by him hence, the computations made in the above Table are taken to be correct and accordingly the profiteered amount is determined as Rs. 3,58,90,871/- as per the details mentioned in Annexure-22 above in terms of Rule 133 (1) of the CGST Rules, 2017.

56. In view of the above facts this Authority under Rule 133 (3) (a) of the CGST Rules, 2017 orders that the Respondent shall reduce the

prices to be realized from the buyers of the flats commensurate with the benefit of ITC received by him as has been mentioned in detail in the preceding paras of this Order. As per the provisions of Rule 133 (3) (b) of the CGST Rules, 2017 it is further ordered that the Respondent shall refund the above profiteered amount to the buyers as per the details given by the DGAP in Annexure-22. The benefit of Rs. 40,606/- including GST on the base amount of Rs. 37,598/- will be required to be passed on to the Applicant No. 1. The above amount shall be passed on by the Respondent along with interest @18% PA payable from the date from which the excess amount was collected by the Respondent from the buyers till the date of its payment within a period of 3 months from the date of this order failing which the same shall be recovered by the concerned Commissioner CGST/SGST and paid to the eligible buyers as per their entitlement as per the provisions of CGST/SGST Acts.

57. Since, the DGAP has carried out the present investigation till 31.12.2018 only any further benefit of additional ITC which might accrue to the Respondent shall also be passed on by him to the eligible buyers. The concerned Commissioner CGST/SGST shall ensure that the above benefit is passed on by the Respondent to his recipients as per the provisions of Section 171 of the CGST Act, 2017. In case if the above benefit is not passed on in future the Applicant No. 1 or any other buyer shall be at liberty to approach the Haryana State Screening Committee to launch fresh proceedings against the



Respondent as per the provisions of Section 171 of the CGST Act, 2017.

58. It is also evident from the above narration of facts that the Respondent has denied benefit of ITC to the buyers of the flats and the shops being constructed by him in his Project 'Grand IV A' in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has committed an offence under Section 171 (3A) of the above Act and therefore, he is apparently liable for imposition of penalty under the provisions of the above Section. Accordingly, a Show Cause Notice be issued to him directing him to explain as to why the penalty prescribed under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him. Accordingly, the Notice dated 01.05.2019 vide which it was proposed to impose penalty under Section 29 and 122-127 of the above Act read with Rule 21 and 133 of the CGST Rules, 2017 is withdrawn to that extent.

59. The Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Haryana to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by the Authority is passed on to all the eligible buyers. A Report in compliance of this order shall be submitted to this Authority by the Commissioners CGST/SGST Haryana through the DGAP within a period of 4 months from the date of receipt of this order.

60. A copy each of this order be supplied to both the Applicants, the Respondent, Commissioners CGST/SGST Haryana as well as the

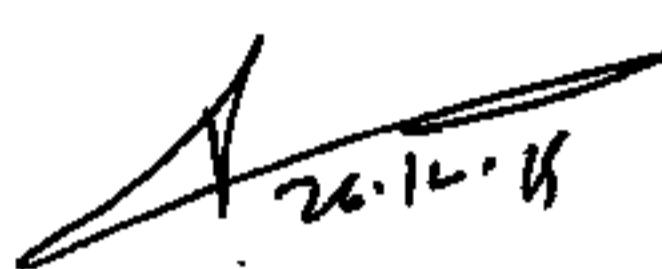
Principal Secretary (Town & Country Planning), Government of Haryana for necessary action. File be consigned after completion.

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/40/JMK/2019 / 1417 - 7503

Dated: 26.12.2019

Copy To:-

1. M/s JMK Holdings Pvt. Ltd., Signature Tower, Tower-A, Ground Floor, South City-I, Gurugram-122001.
2. Shri Dharmendra Gaud, 212/3, Tekchand Nagar, Sector-104, Gurugram-122006.
3. The Commissioner of State Tax, Vanijya Bhavan, Plot No. 1-3, Sector-5, Panchkula, Haryana- 134151,
4. The Commissioner, CGST Gurugram, Plot no. 36 & 37, Sector-32, Gurugram, Haryana-122001,
5. Principal Secretary to Govt. of Haryana, Town & Country Planning Department, Plot No. 3, Sec-18A, Madhya Marg, Chandigarh-160018,
6. Director General Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
7. NAA Website/Guard File.



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