Executive summary

This Tax Alert summarizes a recent order [1] passed by the National Anti-Profiteering Authority (NAA) under GST.

The NAA held that the developer had not passed on the benefit on account of Input Tax Credit to buyers of flats under the Affordable Housing Scheme post GST roll out and concluded that there was a case of profiteering u/s 171 of Central Goods and Services Tax (CGST) Act, 2017.

NAA in its order observed that the developer cannot appropriate the benefit as it is the concession given by the government from its own tax revenue to reduce the prices being charged by the builder from the vulnerable section of society which cannot afford high value apartments.

NAA passed the order requiring developer to pass on the benefit not only to the applicants alleging profiteering but to all the buyers of the flats as they are identifiable. It also imposed the penalty on the developer for issuing incorrect invoice and collecting more GST.

Background

- As per the provisions of Section 171 of the Central Goods and Services Tax (CGST) Act, any reduction in rate of tax on any supply of goods or services or the benefit of Input Tax Credit (ITC) shall be passed on to the recipient by way of commensurate reduction in prices.

- Anti-profiteering Authority has been constituted under the GST law to examine whether benefit arising due to ITC or tax rate reduction has resulted in commensurate reduction in price of goods or services supplied by the registered person.

- The process has been laid down to enable recipient and other specified persons to file an application for bringing the cases of profiteering before the notified authority.

Facts of the case

- Two projects are being executed by the respondent under the Affordable Housing Policy, 2013 viz. (1) Urban Homes, Sector 70A, Gurugram and (2) Urban homes Sector-86, Gurugram.

- Around 2476 buyers had booked flats from respondent under the Haryana Affordable Housing Policy 2013 (Policy) of which 109 buyers (applicants) had filed application under Rule 128 of the Central Goods and Services Tax (CGST) Rules, 2017 before the Haryana State Screening Committee.

- Applicants alleged that the benefit of ITC had not been passed on to the applicants after implementation of GST in respect of the construction services supplied by the respondent.

- In Pre-GST period, there was an exemption in service tax on construction service for affordable housing. Value Added Tax (VAT) at 5.25% was collected from applicants.

- After implementation of GST, 12% GST was levied on the construction service for affordable housing in place of Excise Duty and VAT. It was further reduced to 8% w.e.f 25.1.2018.

- Post-GST, respondent availed the benefit of ITC which was much more than its output tax liability. The benefit of ITC was not passed on to its applicants and they were burdened with tax of 12% or 8%. Respondent were thus contravening the provisions of Section 171 of CGST Act, 2017.

- The applications were examined by the Screening Committee in its meeting and were forwarded to the Standing Committee on Anti-profiteering for further action.

- The Standing Committee confirmed that prima facie there was evidence of non-compliance of provision of Section 171, and thus forwarded these applications to the Director General of Anti-profiteering (DGAP) for further investigation.

Findings of Director General Anti-profiteering:

- Post investigation, DGAP submitted its report under Rule 129(6) of the CGST Rules, 2017.

- It had issued notice to the respondent to submit his reply regarding allegation made by the applicants and suo moto declare the amount of profiteering

- After issue of number of summons the respondent submitted requisite documents to DGAP.

- On perusal of the application filed by the respondent before Haryana Real Estate Regulatory Authority (RERA) and as per para 50 of the policy, it’s clear that the maximum sale price per sq. feet area has been fixed at Rs. 4000/- and no minimum rate had been prescribed and hence, respondent could not claim that there was restriction on reducing price.

- The respondent’s claim that benefit of ITC was not attracted, as there was no reduction in GST rate, was not acceptable because the conditions of passing on the benefit of reduced tax and benefit of ITC were two independent conditions and Section 171 of the CGST Act was attracted if both or either of these two conditions existed.

- The profiteering was required to be established in a time bound manner by considering the ITC available to the respondent and price realized by him from the applicants.

- The central government had imposed 18% GST with effective rate of 12% in view of 1/3rd abatement on value of construction service and from 25.01.2018 the GST rate on the construction service of the Affordable Housing is reduced to 8%.

<table>
<thead>
<tr>
<th>Period</th>
<th>01/07/2017-24/01/2018</th>
<th>25/01/2018-28/2/2018</th>
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</thead>
<tbody>
<tr>
<td>Tax Rate</td>
<td>12%</td>
<td>8%</td>
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</table>

- On examination of the GSTR-3B returns filed by the respondent it was revealed that the ratio between the taxable turnover and the ITC availed by him post-GST was 7.2%. Thus, it concluded that there was additional benefit under GST to the tune of 6.1% (7.2% - 1.1%)
<table>
<thead>
<tr>
<th>Period</th>
<th>ITC available (as % to taxable turnover)</th>
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<tbody>
<tr>
<td>GST regime</td>
<td>7.2%</td>
</tr>
<tr>
<td>Pre-GST regime</td>
<td>1.1%</td>
</tr>
<tr>
<td>Difference</td>
<td>6.1%</td>
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</tbody>
</table>

The tax rate had increased by 6.75% for period from July 2017 to 24.01.2018 and by 2.75% for the period from 25.01.2018 to 28.02.2018.

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<tr>
<td>GST Rate</td>
<td>12%</td>
<td>8%</td>
</tr>
<tr>
<td>Difference GST - VAT rate</td>
<td>6.75%</td>
<td>8% - 5.25% = 2.75%</td>
</tr>
</tbody>
</table>

The additional ITC of 6.10% was more than the increase in the tax rate by 2.75% requiring the respondent to pass on the benefit of additional ITC of 3.35% (6.10% - 2.75%) by commensurate reduction in the price of flats.

There was no violation of Section 171 of CGST Act, during the period between 01.7.2017 to 24.1.2018 when GST was leviable @12% but there was violation when the GST was reduced to 8% w.e.f 25.1.2018 to February 2018 as the respondent had not passed on the net benefit of ITC to the applicants which accrued to him.

DGAP’s report was perused by the NAA. It issued notices to applicants and respondents for hearing in the matter.

Respondent has justified its case on benefit of ITC, it contentions are as below:

- The basic cost of raw material like steel had increased abnormally in post GST period which resulted in setting off the benefit of ITC.
- The sub-contractors were exempt from service tax earlier, but after the implementation of GST, they had to register and discharge tax liabilities, which are being passed on to the respondent.
- Out of total GST incidence, 50% was towards SGST, whereas in pre-GST period ITC availed on the State VAT and difference after utilizing the ITC was paid in cash. Therefore, the ITC being allowed was not an additional benefit and the GST liability was not entirely covered by the ITC available.
- The payment plan under the policy was time bound and not construction linked. The payment were to be made in instalments i.e 5% of the cost at the time of application, 20% on allotment and balance to be paid in 6 equal half yearly installments each being 12.50% of the total value of the apartment.
- During pre-GST period, 62.50% of the payment was received, from the buyer however the amount spent on construction during this period was only 25% of the total cost. It means as against 37.50% of the total payment due during the post-GST period, respondent had to spend 75% of the total cost on construction.
- The initial consideration paid by the applicants was towards the cost incurred or to be incurred by him against the cost of land, licenses and approvals, administrative and financial expenses which amounted to 40-45% of the revenue from the applicants.
- Thus, while calculating the ITC against the taxable value during the pre-GST period, the taxable value should be adjusted by giving effect to the above issues during pre and post GST period and percentage of ITC should be recalculated.

Respondents Contentions

Applicants disagree with the DGAP’s report which stated that profiteering was only to the extent of 3.35%. They claimed that the amount of profiteering was 6.10%. Respondent had recovered VAT @6.25% from the applicants but had paid to government 5.09%.

The increase or decrease in cost on account of the factors other than tax rate and ITC was not to be considered for the purpose of profiteering.

The maximum rate of Rs 4000/- per sq. ft. carpet area was fixed and any escalation in the cost had already been taken into account at the time of fixing the above rate.

Any increase or decrease in the raw material prices was a market phenomenon which was not related to GST and therefore, the cost escalation factor was not required to be considered by the authority.

The extra liability claimed by the respondent on account of GST charged by the sub-contractors couldn’t be taken into account since they were also availing ITC on the purchases made by them resulting in reduction of cost of the material purchased by the sub-contractors.

In pre-GST era, composition scheme was available in State of Haryana under which 1% VAT was payable which could not be passed on to the applicants. However, respondent did not opt for it and charged 5.25% VAT to applicants which benefited him. This shows that respondent had burdened them with extra tax when they were eligible for levy of reduced tax.

- Huge amount of ITC was availed by the respondent from September, 2017 to February, 2018. ITC availed by the respondent should have been passed to the applicants after re-calibrating the price, which is not done. Thus, penal provisions under anti-profiteering should be attracted on the respondent.
- Thus, appropriate amount may be allowed to be refunded along with the interest @18% p.a. for the period during which extra amount was in respondent’s custody.
Ruling of the National Anti-profiteering Authority

- Basis the DGAP’s Report and the written and oral submissions of both the applicants and the respondent, the authority had to decide,
  - Whether there was any violation of the provisions of Section 171 of the CGST Act, 2017?
  - If yes, then what was the quantum of profiteering?

- Section 171 of CGST Act, deals with two situations one relating to passing on the benefit of reduction in the rate of tax and the second pertaining to the passing on the benefit of ITC.

- Rationalization of tax has not resulted in the reduction in the tax rate, but the benefit of ITC had been extended to all the goods and services which were utilized by the respondent which were not available in the pre-GST era.

- Section 171 not only deals with passing the benefit of reduction in rate of tax but also deals with passing on the benefit of ITC. Thus, the contention of the respondent of increase in rate from 5.25% to 12% and then 8% is not legally correct.

- Respondent was building flats and selling them as per the policy. Based on the policy, it had submitted its report to RERA and had chosen to collect the maximum rate fixed by the policy i.e. Rs 4000/-sq.ft carpet area. Thus, his plea that the rate reduction was not possible was not correct.

- The rate offered did not include taxes. The applicants paid 5.25% VAT in pre-GST era and 12% and 8% GST after 01.07.2017. Respondent was obliged to pass on the benefit of ITC in terms of reduction in tax.

- The argument of respondent that the ratio should be calculated taking into account the cost of construction rather than the taxable turnover does not hold good because the policy makes it mandatory on him that he could not charge more than Rs 4000/- per sq.ft.

- Respondent admitted that he had collected 62.50% of the amount due during the pre-GST period but utilized it only to the extent of 25%, which means that the balance amount had been utilized by the respondent in his business and no interest had been paid by him on this amount to applicants.

- On comparison of returns of the respondent of pre-GST and post-GST period, it’s apparent that while 86% of tax liability was paid in cash after availing ITC, in the post-GST period the entire amount of tax liability had been paid through ITC.

- The contention of the respondent of increase in cost of steel (raw material) is not tenable. The cost of all the inputs and their costs should be taken into consideration, since for most of the building material there had been rate rationalization and all the raw material was available without CST across the country.

- In post-GST era, as claimed by the respondent 75% of construction had been completed that means there was all the more scope for reduction in the cost of construction.

- Tax levied on the sub-contractors which was borne by the respondent was now eligible for ITC and also on account of rationalization of tax rates many of the inputs were available at the reduced rates.

- The concession is given by the government from its own tax revenue to reduce the prices being charged by the builders to the vulnerable section of the society which cannot afford high value apartments. The respondent is not extending this benefit out of his own account. He is only liable to pass on benefit of ITC to which he has become entitled by virtue of grant of ITC on the construction service by the government.

- Respondent has profiteered from the amount charged to flat owners as per DGAP’s calculation of 6.1% profiteering on the base price of Rs 4000/-per sq ft.

- In view of the above facts, the authority orders the respondent to reduce the price to be realized from the buyers of the flats in commensurate with the benefit of ITC received till 28.02.2018 and even thereafter.

- The benefit should be passed to all the 2476 buyers as they are identifiable and not only to 109 applicants.

- Respondent is directed to refund or reduce the amount, to the extent calculated for each and every buyer, at the time of collecting the last installment, along with the interest @18% per annum to be calculated from the date of receipt of the excess amount from each buyer, within a period of 3 months from the date of receipt of this order.

- Penalty is imposed on respondent for realizing more price from buyers by issuing incorrect invoices and for not passing the benefit of ITC. A show cause notice is issued directing to explain why penalty under Section 122 of CGST Act read with rule 133(3) (c) of the CGST Rules, 2017 should not be imposed on him.

- The authority, in terms of Rule 136 of CGST Rules directs the Commissioner of State Tax Haryana to monitor this order under the supervision of DGAP by ensuring that the amount profiteered by respondent as ordered by the authority is passed on to all the buyers.

- NAA further requires the Commissioner to submit report within a period of 4 months from the date of receipt of the order.
Comments:

The first order passed by the National Anti-Profiteering Authority in case of real estate development will have significant implication on the construction industry.

It will need to be seen whether the mechanism adopted in the order to compute the quantum of profiteering is extended to other businesses as well. In absence of any method prescribed under the GST law, the principles applied to determine the amount of profiteering based on the increase in ITC ratio may not depict a true picture and as such would not hold good in many cases.

It is pertinent to note that while the Authority computed the profiteering at project level, it also directed to pass on the benefit not just to the applicants but to all other flat buyers in the project.

As law reads, at present there is no provision to challenge the order passed by NAA before any appellate forum.
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