

Tax alert: ITC benefit on actual basis and not on presumption is required to be passed on to the flat-buyer - NAA

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Summary

The National Anti-profiteering Authority (NAA) has recently upheld the case of profiteering on a builder on grounds that the benefit of additional input tax credit (ITC) on actual basis (not on presumed basis) is required to be passed on to the flat buyer. NAA held the profiteering charge to the extent of 3.09% of the taxable turnover representing additional ITC accrued to the builder on the introduction of GST.

Facts of the case

- An individual had booked a flat in the Respondent's¹ project during the pre-GST period.
- It filed an application before the Standing Committee on Anti-Profiteering alleging that the Respondent had failed to pass the benefit of ITC on the sale of flat after the implementation of GST, and thus it had indulged in profiteering².
- The application was referred to the Directorate General of Anti-Profiteering (DGAP) for a detailed investigation.

NAA's observations and order

- **Benefit on actual basis needs to be passed:** The NAA observed that the anti-profiteering provisions require passing on the additional benefit of ITC on the basis of actual benefit available to a supplier and not on the basis of presumed figures.
- **Discounts/rebates not to be equated with ITC:** Further, the NAA opined that granting of rebates/discounts is the most prevalent practice followed in the construction industry to increase sales and hence it cannot be equated with the passing on of the benefit of ITC.
- **No evidence of passing on the benefit:** The Respondent has not furnished any evidence in the form of book entries, cheque issued to

buyers, copies of tax invoices/demand letters or acknowledgment from customers to demonstrate that ITC benefit has been passed on to customers due to GST implementation.

- **Rate reduction:** The NAA also rejected the Respondent's plea that ITC benefit would have to be reworked since the rates of tax on affordable and other houses have been reduced to 1% and 5% prospectively with effect from 01 April 2019.
- **Upheld profiteering:** In light of the above, the NAA on perusal of the DGAP report observed that the additional ITC benefit to the extent of 3.09% of the turnover has accrued to the Respondent. The NAA, thus, confirmed the case of profiteering against the Respondent in respect of the sale of flat.

¹M/s Friends Land Developers

²In contravention of provisions of Section 171 of the CGST Act

Our comments

According to the anti-profiteering provisions under the GST law, which have been in force for more than two years, a supplier is required to pass on the actual benefit accrued on account of reduction of output tax rate or on account of additional ITC. Recently, pursuant to the 35th GST Council meeting, the tenure of NAA has been further extended by two more years. The extension of the tenure was mainly due to the large pendency of complaints filed by the consumers.

The GST laws do not prescribe mechanism/methodology to determine the quantum of benefit to be passed on. Non-availability of the mechanism is one of the major reasons of non-compliance to anti profiteering provisions. Therefore, to reduce the litigation and to effectively implement these provisions, the government should prescribe a detailed mechanism.

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|--|---|---|---|---|
| NEW DELHI National Office Outer Circle L 41 Connaught Circus, New Delhi 110001 T +91 11 4278 7070 | NEW DELHI 6th floor, Worldmark 2, Aerocity, New Delhi - 110037 T +91 11 4952 7400 | AHMEDABAD 7th Floor, Heritage Chambers, Nr. Azad Society, Nehru Nagar, Ahmedabad - 380015 | BENGALURU 5th Floor, 65/2, Block A, Bagmane Tridib, Bagmane Tech Park, C V Raman Nagar, Bengaluru - 560093 T+91 80 4243 0700 | CHANDIGARH B-406A, 4th Floor, L&T Elante office Industrial area, Phase-I, Chandigarh 160002 T +91 172 4338 000 |
| CHENNAI 7th Floor, Prestige Polygon 471, Anna Salai, Teynampet Chennai - 600 018 T +91 44 4294 0000 | DEHRADUN Suite 2211, Michigan Avenue, Doon Express Business Park, Saharanpur Road, Dehradun - 248002T +91 135 264 6500 | GURGAON 21st Floor DLF Square Jacaranda Marg, DLF Phase II, Gurgaon 122002 T +91 124 462 8000 | HYDERABAD 7th Floor, Block III White House Kundan Bagh, Begumpet Hyderabad 500016 T +91 40 6630 8200 | KOCHI 7th Floor, Modayil Centre Point, Warriam road junction, M.G. Road, Kochi 682016 T +91 484 406 4541 |
| KOLKATA 10C Hungerford Street 5th Floor, Kolkata 700017 T +91 33 4050 8000 | MUMBAI 16th Floor, Tower II Indiabulls Finance Centre SB Marg, Elphinstone (W) Mumbai 400013 T +91 22 6626 2600 | MUMBAI 9th Floor, Classic Pentagon, Nr Bisleri, Western Express Highway, Andheri (E)Mumbai 400099 T +91 22 6176 7800 | NOIDA Plot No. 19A, 7th Floor Sector - 16A, Noida 201301 T +91 120 4855 901 | PUNE 3rd Floor, Unit No 309 to 312, West Wing, Nyati Unitree Nagar Road, Yerwada Pune- 411006 T +91 20 6744 8800 |

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