

# **Tax alert: NAA upholds profiteering charge against a builder for not passing additional ITC benefit**

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## Summary

The National Anti-profiteering Authority (NAA) has recently upheld the case of profiteering in respect of a builder on the grounds that the benefit of additional input tax credit (ITC) was not passed on to the flat buyers. The NAA upheld the anti-profiteering charge to the extent of 1.45% of taxable turnover representing additional ITC that had accrued to the builder on the introduction of GST.

## Facts of the case

- An individual had booked a flat in the Respondent's<sup>1</sup> project on 31 July 2016 (ie in pre-GST period).
- It filed an application before the Standing Committee on Anti-Profiteering alleging that the Respondent had indulged in profiteering<sup>2</sup> due to failure in passing the benefit of additional ITC on the sale of the flat after the implementation of GST.
- The application was referred to the Directorate General of Anti-Profiteering (DGAP) for a detailed investigation.

## DGAP's observations

- The DGAP observed that ITC as a percentage of total turnover available to the Respondent during the pre-GST

period was 3.06% and during the post-GST period was 4.51%.

- Accordingly, the DGAP observed that the Respondent had benefitted from additional ITC to the tune of 1.45% of the taxable turnover.
- Thus, the DGAP concluded that since the benefit of additional ITC is not passed to the ultimate consumer, the Respondent had contravened the anti-profiteering provisions under the GST law to that extent.
- Accordingly, the DGAP calculated the profited amount by the respondent at approximately INR 19.7 lakh consisting of the following:
  - INR 0.68 lakh from the applicant
  - INR 19.02 lakh from other 51 flat buyers

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<sup>1</sup> M/s Salarpuria Real Estate Pvt. Ltd.

<sup>2</sup> In contravention of provisions of Section 171 of the CGST Act

## Respondent's contentions

- The respondent contended that there was no attempt to make profit by not passing on the benefit of ITC. It was further submitted that it had suo moto communicated to all eligible customers of passing benefit to the tune of INR 25 per sq. ft. on the super built-up areas computed on a provisional basis. Further, it was also intimated that final benefit would be passed at a later stage.
- The Respondent argued that interpretation of the anti-profiteering section should also consider the increase in the raw material costs.
- The Respondent submitted that penalty should not be imposed due to the following reasons:
  - It had voluntarily informed the customers about passing on the ITC benefit on completion of the project.
  - The project was still in progress and final figures were not available.
  - It had also cooperated with the anti-profiteering investigations.

## NAA's observations and order

- The NAA, on perusal of the DGAP report, observed that the additional ITC benefit

to the extent of 1.45% 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 flats.

- It further noted that the Respondent had not raised any objection against the computation of the profiteered amount by the DGAP. It accordingly upheld the computation of profiteered amount by the DGAP.
- The NAA also directed the applicant to accordingly reduce the prices to be received from the buyers commensurate with the ITC benefit received. Further, as regards imposition of penalty, the NAA observed that the Respondent has deliberately and consciously violated the anti-profiteering provisions by not only collecting extra amount from the buyers but also compelling the buyers to pay more GST on the additional amount realised.
- Thus, the NAA held that the action of the Respondent was a deliberate and conscious violation of provisions of the law and hence is liable for imposition of penalty<sup>3</sup>.

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<sup>3</sup> U/s 122(1) of the CGST Act, 2017

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## **Our comments**

The NAA was formulated under the GST regime to ensure that the taxpayers pass on the benefit from reduction in tax rate/ITC to the ultimate consumers. However, the anti-profiteering provisions do not prescribe any mechanism/methodology to determine the quantum of benefits to be passed on to the consumers. This has caused many taxpayers to come under the ambit of the anti-profiteering provisions. Recently, various High Courts have granted a stay on the NAA's order against various high-profile taxpayers. At this juncture, it has become imperative that the Government prescribe a detailed mechanism for computing the benefit to be passed on to the consumers so that litigation on these issues can be mitigated.

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