

Tax alert: NAA upholds profiteering charge against a builder for not passing ITC benefit arising on introduction of GST

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Summary

The National Anti-Profiteering Authority (NAA) has recently upheld the case of profiteering in respect of sale of ready-to-move villa on the grounds that the benefit of additional input tax credit (ITC) was not passed on to home buyers. The NAA upheld the anti-profiteering charge to the extent of 2.84% of taxable turnover representing additional ITC that had accrued to the builder on the introduction of GST.

Facts of the case

- An individual home buyer bought a ready-to-move-in villa from the Respondent¹ on 15 July 2017 (ie after implementation of GST with effective from 1 July 2017).
- It filed an application before the Delhi State Screening Committee on Anti-Profiteering alleging that the Respondent had indulged in profiteering² due to failure in passing the benefit of input tax credit (ITC) on the sale of the villa.
- 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 period³ was 0.61% and during the post-GST period⁴ was 3.45%. Accordingly, the DGAP observed that the Respondent had benefitted from additional ITC to the tune of 2.84% of the taxable turnover.

- Thus, the DGAP concluded that since the benefit of additional ITC is not passed to the ultimate consumer, the Respondent has contravened anti-profiteering provisions under the GST law to that extent.
- Accordingly, the DGAP calculated the profiteered amount by the respondent at approximately INR 42 lakh consisting of the following:
 - INR 2.8 lakh from the applicant, and
 - INR 39 lakh from other 12⁴ home buyers

Respondent's contentions

- **No computation methodology prescribed:** The Respondent argued that there was no methodology prescribed under the GST law to measure the benefit to be passed on to the buyers.
- **No penalty should be levied:** The Respondent requested that no penalty should be levied on him as he had voluntarily agreed to pass on the benefit

¹M/s. Eldeco Infrastructure & Properties Limited

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

³April 2016 to June 2017

⁴July 2017 to August 2018

of ITC as computed by the DGAP to the customers.

- **Payment of interest to customers:** With respect to the payment of interest to the customers, the Respondent submitted that the same shall be adjusted with the final demand due from the customers at the time of completion of services.

NAA's observations and order

- The NAA, on perusal of the DGAP report, observed that the additional ITC benefit to the extent of 2.84% 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 ready-to-move-in villa
- 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 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 said action of the Respondent is liable for imposition of penalty.⁵

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 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.

⁵ U/s 122(1) of the CGST Act, 2017

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