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

Case No.	56/2019
Date of Institution	16.05.2019
Date of Order	15.11.2019

In the matter of:

1. Shri Diwakar Bansal, A-603, Great Eastern Gardens, Kanjur Marg West, LBS Marg, Mumbai-400078.
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 Horizon Projects Pvt. Ltd., Runwal & Omkar Esquare, 5th Floor, Off Eastern Express Highway, Opp. Sion Chunabhatti Signal, Sion (E) Mumbai-400022.

Respondent

Quorum:-

1. Sh. B. N. Sharma, Chairman
2. Sh. J. C. Chauhan, Technical Member
3. Ms. R. Bhagyadevi, Technical Member

Present:-

1. None for the Applicant No. 1.
2. Sh. Rana Ashok Rajnish., Assistant Commissioner for the Applicant No. 2.
3. Sh. Vidyasagar V., Director (Finance), Sh. A. V. Rajan, Chief Finance Officer, Sh. Rohit Jain, Sh. Gaurav Sogani, Sh. Pratik Shah, Advocates and Sh. Mayur CA for the Respondent.

ORDER

1. This Report dated 10.12.2018, 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 vide his application dated 31.05.2018 filed before the Maharashtra State Screening Committee on Anti-profiteering, under Rule 128 (2) of the CGST Rules, 2017 the Applicant No. 1 had alleged profiteering by the Respondent, in respect of purchase of Flat No. 2204 in Tower B2, in the Respondent's project, "Runwal My City" situated on Diva Manpada Road, Kalyanshil Road, Dombivili, Thane, Maharashtra-

400612. The above Applicant had stated in his application that the benefit of Input Tax Credit (ITC) had not been passed on to him by the Respondent by way of commensurate reduction in the price of the above flat and the Respondent had also charged from him GST @ 12% w.e.f. 01.07.2017.

2. The Maharashtra State Screening Committee on Anti-profiteering had examined the said application and found that the Respondent had not passed on the benefit of input tax credit to the above Applicant as the ITC available to the Respondent should have been apportioned against the instalments towards the price of the flat. The above Committee had forwarded the application with its recommendation to the Standing Committee on Anti-profiteering on 15.06.2018 for further action, in terms of Rule 128 (2) of the above Rules. The above recommendation was examined by the Standing Committee on Anti-profiteering in its meeting held on 02.07.2018 and it was decided to forward the complaint to the DGAP, for conducting a detailed investigation.

3. The above Applicant had submitted copy of the e-mail dated 15.05.2018 to the DGAP wherein he had sought clarification from the Respondent regarding 12% GST being charged from him after passing on the benefit of ITC @ 3.2% only. The above Applicant had furnished the following documents along with his application:-

   - Duly filled in Form APAF-1.
   - Copy of demand letter dated 08.05.2018 in which the Respondent had passed on the ITC benefit @ 3.2%.

- Copies of the e-mails addressed to the Respondent requesting to pass on the benefit of appropriate ITC.

4. The DGAP had issued Notice under Rule 129 (3) of the CGST Rules, 2017 on 26.07.2018 calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the above Applicant by way of commensurate reduction in the price of the flat 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. Through the above Notice the Respondent was also given an opportunity to inspect between 01.08.2018 to 03.08.2018 the non-confidential evidences/information submitted by the Applicant No. 1, however, the Respondent had not availed this opportunity. The Applicant No. 1 was also given an opportunity between 01.10.2018 to 03.10.2018, vide e-mail dated 27.09.2018, to examine the non-confidential evidences/reply submitted by the Respondent, which was not availed by the Applicant No. 1.
5. The DGAP has stated that the time limit to complete the investigation was extended upto 09.12.2018 by this Authority in terms of Rule 129 (6) of the above Rules, vide its order dated 09.10.2018. Further, the period covered by the DGAP for the investigation of this case was from 01.07.2017 to 30.06.2018.
6. The DGAP has stated that the Respondent, in response to the Notice dated 26.07.2018, had filed replies vide his letters/e-mails dated 10.08.2018 21.08.2018, 30.08.2018, 03.09.2018, 05.09.2018,

10.09.2018, 11.09.2018, 12.09.2018, 26.09.2018, 08.10.2018, 11.10.2018, 17.10.2018, 23.10.2018, 24.10.2018, 26.10.2018, 01.11.2018, 02.11.2018 and 19.11.2018. The submissions of the Respondent have been summed up by the DGAP in his Report as follows:-

i. That the project "Runwal My City" was being constructed in a phased manner in which the Applicant No. 1 had purchased a 2 BHK flat in Tower B2 which formed part of Phase I of the above Project. In Phase I, there were 10 towers namely, Tower A1, A2, A3, A4, B1, B2, C1, C2, C3 and C4. These 10 towers were divided into sub-phases with Towers A2, A4, B2, C3, C4 as My City Phase I- Part 1 (Betawade-1) and Towers A1, A3, B1, C1, C2 as My City Phase I- Part 2 (Betawade-2). Both the phases i.e. My City Phase I- Part 1 (Betawade-1) & My City Phase I- Part 2 (Betawade-2) were registered with the Maharashtra Real Estate Regulatory Authority vide Registration No. P51700000528 & P51700009168 respectively. As the investigation proceedings had been initiated on the application received from the above Applicant, the current investigation proceedings should be strictly restricted to Tower B2 of the Project, as the Applicant had purchased a flat in the above Tower.

ii. That with respect to the tax on the construction activity under the GST, construction of a complex or building intended to be

sold to a buyer, except where the entire consideration has been received after issuance of the completion certificate from the competent authority or its first occupation, whichever is earlier, is regarded as supply of service and GST at the rate of 18% (12% in case of affordable housing project) was applicable on the same.

iii. That in the case of provision of construction service involving transfer of property in land or undivided share of land, the value of supply of services and goods shall be equivalent to the total amount charged for such supply less the value of land or undivided share of land. The value of land or undivided share of land in such supply shall be deemed to be one third of the total amount charged for such supply. Therefore, GST at the effective rate of 12% (8% in case of affordable housing project) was applicable where the total amount charged for supply of construction service also included the amount towards transfer of property in land or undivided share of land.

iv. That attention was also drawn to Section 171 of the Central Goods and Services Tax Act, 2017, which is reproduced below:-

"171(1) 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."

Thus, it was submitted that the supplier of taxable service was required to pass on the benefit accruing to him on the following two accounts:

(i) Reduction in rate of tax

(ii) Availability of input tax credit

However, in the instant case, the effective rate of tax on supply of construction service to the customers had increased from 5.50% [4.50% (Service Tax) + 1% (VAT)] to 12% (GST). Therefore, no benefit was required to be passed on to the buyers of flats on account of reduction in the rate of tax.

v. That the Respondent was not allowed to avail ITC of Maharashtra Value Added Tax (MVAT) paid on inward supplies consumed for construction of flats as well as CENVAT credit of duties paid on inputs used in providing construction service to the customers. Therefore, pursuant to introduction of GST and based on the prescribed transitional provisions, the Respondent had availed and carried forward ITC on certain items. The Respondent was required to pass on the said benefit to his customers to the extent admissible to them.

vi. That based on the transitional provisions prescribed in the CGST Act, 2017, the Respondent had availed and carried forwarded ITC at the Company level out of which, the details of input tax credit attributable to the above Applicant were furnished in Table- 'A' below:-

Table-'A' (Amount in Rs.)

Nature of input tax credit availed in Tran 01	Amount as per Tran 01	Whether pertaining to the Applicant	Amount pertaining to Applicant
Carry forward of closing balance of Service Tax lying in CENVAT credit account as on 30 June 2017 in terms of Section 140 (1) of CGST Act	35,95,056	No [since it was CENVAT Credit already availed by the Company in the pre-GST regime]	-
Availment of input tax credit in terms of Section 140 (3) of CGST Act in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to prescribed conditions	47,17,204	Yes, proportionately to the extent of area of unit purchased by him in Phase I [Tower B2]	1,334
Availment of input tax credit in terms of Section 140 (6) of CGST Act in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to prescribed conditions	1,14,37,104	Yes, Proportionately to the extent of area of unit purchased by him in Phase I [Tower B2]	4,308
Availment of input tax credit under Section 142 (11) (c) of CGST Act in respect of tax paid on any supply both under the Value Added Tax Act and under Chapter V of the Finance Act, 1994, which was subjected to GST under the GST regime read with Notification No. VAT-1517/C.R.-57/Taxation-1 dated 26 May 2017 issued by the Government of Maharashtra, Finance Department	79,29,722	Yes, to the extent of MVAT paid on the applicant's unit	29,436
Total input tax credit in Tran-01	**2,76,79,086**		**35,078 [A]**

vii. That in the pre-GST regime, the Respondent was not allowed to avail CENVAT Credit of Central Excise Duties paid on the inputs used for providing construction service to his customers and ITC MVAT paid on the inward supplies. Therefore, such non-creditable duties and taxes paid on inward supplies were

embedded in the budgeted cost to be incurred for the construction of the entire project. However, pursuant to introduction of GST law, GST paid on all the inward supplies was available as ITC to the Respondent. Therefore, the benefit accruing to the Respondent on account of such non-creditable taxes, now being eligible for credit, would be required to be passed on to the customers.

viii. That based on the budgeted project cost to be incurred, as on 30th June, 2017, for Tower B2, the total non-creditable taxes embedded in the project cost amounted to Rs. 90,43,321/-, out of which the non-creditable taxes attributable to the above Applicant were Rs. 84,270/- [B]. Therefore, the total benefit to be passed on by the Respondent to the Applicant was Rs. 1,19,347/- [A+B] in terms of Section 171 of the CGST Act, 2017.

ix. That the Respondent had always been pro-active in adopting measures which were beneficial for his customers. The above Applicant had incorrectly claimed that the Respondent had not passed on the benefit accruing to him. The Respondent had communicated to his customers from time to time that the benefit accruing to them, if any, on account of introduction of GST regime, would be duly passed on in due course, but not later than the time of handing over the possession of the constructed units.

x. That the total value of demand had been reduced proportionately to the extent of benefit passed on to the above Applicant. The details of benefits along with the break-up of the amount of benefit passed on to the above Applicant till date along with sample demand letter evidencing the same, was enclosed with Respondent's letter dated 21.08.2018. The Respondent had also assured that the balance amount of benefit would be passed on to the customers along with the demand to be raised subsequently by the Respondent.

xi. That the above Applicant had erroneously filed the present complaint against the Respondent for profiteering on account of implementation of the GST and the proceedings initiated on the basis of the said complaint were liable to be dropped.

xii. That since the nature of business of the Respondent was providing construction service which was typically provided over a project lifecycle of 3-4 years, there was always a mismatch between the cost incurred on construction and the instalments realized. It was difficult to compute the actual GST benefit due to the reason that the actual purchases of goods or services which eventually would form part of the cost of construction, could vary from the budgeted cost of construction. Further, all the units were not sold at the time of launch of each project/tower and even the payment milestones agreed with each customer varied depending upon factors such as negotiation between the parties and the stage of completion

etc. Therefore, adopting a uniform approach in the present case would not ensure that the benefits accruing due to implementation of GST were appropriately passed on to all the existing and new customers. Therefore, the Respondent had communicated to his existing customers that the potential benefit would be passed on to them at the time of raising tax invoices towards final instalment as per the scheduled milestone and payment plan, i.e., at the time of handing over the possession of such flats. It had always been communicated to the customers that the Respondent had been mandated under the GST law to pass on such GST benefits and he would certainly compute and determine the benefits and pass them on by way of commensurate reduction in value of construction service / instalment value.

xiii. That as far as the methodology and manner of computation of the benefits was concerned, neither the GST Act nor the Rules or any Notifications or Circulars provided any such methodology or manner. Therefore, in the absence of any methodology or manner for determining such benefits, the nature of business or the industry in which the registered person was a part of, who was obligated and mandated to pass on the benefit, was required to be considered for computing the relevant benefits, in terms of Section 171 of the CGST Act, 2017. No single method or uniform approach had been specified in the GST law which could be followed for computing

these benefits. In the instant case, the Respondent was engaged in the business of construction and sale of residential complexes which was considered as part of Real Estate Sector. Unlike any supply of goods which was a one-time transaction, the construction services provided by the Respondent were continuous in nature and the cost of construction was also spread over the period of the project lifecycle, which could be incurred partly in the pre-GST regime and partly in the post-GST regime. Therefore, given the nature of his business the Respondent had adopted methodology for the purpose of computing such GST benefits by considering that any input tax which was factored in the cost of construction services for the procurements to be made in the GST regime for which ITC was now available, should be passed on to the customers by way of commensurate reduction in the price of the construction of residential complex services. For that purpose, the Respondent had considered the total cost to be incurred, i.e., procurements to be made on or after 01.07.2017 towards the said project and identified such costs towards non-creditable taxes in the pre-GST era which had been factored in the cost of construction and had arrived at the aggregate value of such non-creditable taxes which needed to be passed on to the customers, to the extent of construction services to be provided on or after 01.07.2017. However, for the purpose of passing on the benefits of such non-creditable taxes, the Respondent had

considered the total saleable area of the impugned Tower for the following two categories of customers:-

(a) Existing customers – to the extent of saleable area of units purchased by them in the pre-GST regime

(b) Potential customers – to the extent of saleable area of the units that will be sold under the GST regime

xiv. That the benefit, if any, on account of availment of ITC pursuant to the introduction of GST, required to be passed on by way of commensurate reduction in prices, should not be computed in the manner laid down in the recent decision by this Authority in the case of **Sukhbir Rohilla and others vs M/s Pyramid Infratech Private Limited (Case No. 07/2018 decided on 18.09.2018)** as the facts of the present case were different.

7. Vide the above letters/e-mails, the Respondent had submitted the following documents/information to the DGAP:-

a) Copies of GSTR-1 Returns for July, 2017 to June, 2018.

b) Copies of GSTR-3B Returns for July, 2017 to June, 2018.

c) Copies of Tran-1 Return.

d) Copies of VAT & ST-3 Returns for April, 2016 to June, 2017.

e) Copies of all demand letters and sale agreement/contract issued in the name of Applicant Shri Diwakar Bansal.

f) Tax rates- pre-GST and post-GST

g) Copy of Balance Sheet for FY 2016-17.

h) Copy of Electronic Credit Ledger for 01.07.2017 to 31.08.2018.

i) CENVAT/Input Tax Credit register for April, 2016 to June, 2018.

j) Copies of documents submitted to Maharashtra RERA.

k) Details of taxable turnover and input tax credit for the project "Runwal My City".

l) Details of benefits passed on to the Applicant No. 1.

m) List of home buyers in the project "Runwal My City".

8. The Respondent had submitted before the DGAP that except the following, all data/information was to be treated as confidential, in terms of Rule 130 of the CGST Rules, 2017:-

a) Details of benefits passed on to the above Applicant.

b) Copies of all demand letters and sale agreement/contract and payment schedule issued in the name of Applicant Shri Diwakar Bansal.

9. The DGAP, after careful examination of the above application, the various replies of the Respondent and the documents/evidences on record has stated that the main issues for determination were whether there were benefits of reduction in the rate of tax or ITC on the supply of construction service availed by the Respondent after the introduction of GST w.e.f. 01.07.2017 and if so, whether such benefits were passed on to the recipients in terms of Section 171 of the above Act.

10. The Respondent vide his letters dated 21.08.2018 and 26.09.2018, had submitted copies of demand letters and the payment schedule to the DGAP for the purchase of an apartment measuring 541.45 Sq. ft.

at the basic sale price of Rs. 8,959/- per sq. ft. by the above Applicant. The details of amounts and taxes paid by the Applicant to the Respondent are furnished in the Table-'B' below:-

Table-'B' (Amount in Rs.)

Sr.No.	Payment Stages	Due Date	Basic %	BSP	Benefit Passed on	Service Tax, SBC & KKC	VAT	GST	Total
1	EMR	03-01-2015	1.11%	54,000		1,668	-	-	55,668
2	Booking	02-02-2015	17.89%	8,67,690		26,812	-	-	8,94,502
3	On Commencement of Plinth	01-06-2015	10.00%	4,85,100		16,979	-	-	5,02,079
4	On Commencement of 1st & 2nd slab	15-03-2016	3.44%	1,66,874		6,049	-	-	1,72,923
5	On Commencement of 3rd & 4th slab	10-10-2016	3.44%	1,66,874		7,509	-	-	1,74,383
6	On Commencement of 5th & 6th slab	09-05-2017	3.44%	1,66,874		7,509	-	-	1,74,383
7	On Commencement of 7th & 8th slab	10-07-2017	3.44%	1,66,874		-	-	20,025	1,86,899
8	On Commencement of 9th & 10th slab	30-08-2017	3.44%	1,66,874	(6,064)	-	-	19,297	1,80,107
9	On Commencement of 11th & 12th slab	14-09-2017	3.44%	1,66,874	(6,064)	-	-	19,297	1,80,107
10	On Commencement of 13th & 14th slab	08-10-2017	3.44%	1,66,874	(6,064)	-	-	19,297	1,80,107
11	On Commencement of 15th & 16th slab	08-10-2017	3.44%	1,66,874	(6,064)	-	-	19,297	1,80,107
12	On Commencement of 17th & 18th slab	09-11-2017	3.44%	1,66,874	(6,064)	-	-	19,297	1,80,107
13	On Commencement of 19th & 20th slab	09-11-2017	3.44%	1,66,874	(6,064)	-	-	19,297	1,80,107
14	On Commencement of 21st & 22nd slab	05-12-2017	3.44%	1,66,874	(6,064)	-	-	19,297	1,80,107
15	On Commencement of 23rd & 24th slab	08-01-2018	3.44%	1,66,874	(6,064)	-	-	19,297	1,80,107
16	On Commencement of 25th & 26th slab	08-01-2018	3.44%	1,66,874	(6,064)	-	-	19,297	1,80,107
17	On Commencement of 27th, 28th & 29th slab	12-02-2018	5.28%	2,56,133	(6,064)	-	-	20,006	2,70,075
18	BRICK WORK	08-03-2018	4.00%	1,94,040	(6,064)	-	-	15,038	2,03,014
19	INTERNAL PLASTER	09-04-2018	4.00%	1,94,040	(6,064)	-	-	15,038	2,03,014
20	EXTERNAL PLASTER	08-05-2018	4.00%	1,94,040	(6,064)	-	-	15,038	2,03,014
21	FLOORING	14-06-2018	3.00%	1,45,530	(6,064)	-	-	11,157	1,50,623
22	DOORS & WINDOWS	To be Demanded	3.00%	1,45,530	-	-	-	11,643	1,57,173
23	ON POSSESSION	To be Demanded	3.00%	1,45,535	-	-	-	11,643	1,57,178
24	Maharashtra VAT	2015-16	0.00%	-	-	-	48,510	-	48,510
	Total			**48,51,000**	**(84,896)**	**66,526**	**48,510**	**2,93,262**	**51,74,401**

11. The DGAP has noted that the contention of the Respondent that the accurate quantum of ITC would be finally determined and the benefit would be passed on to the recipients at the time of giving possession,

might be correct but the profiteering, if any, had to be established at a point of time in terms of Rule 129 (6) of the above Rules. Therefore, the ITC available to the Respondent and the taxable amount received by him from the above Applicant and the other recipients post implementation of the GST had to be taken into account for determining the benefit of ITC required to be passed on.

12. The Respondent had contended before the DGAP that neither the GST Act nor the Rules had provided any mechanism for computation of the above benefits, in the absence of which, nature of his business was required to be considered for computing the relevant benefits. However, the DGAP has stated that the provisions of Section 171 were very clear which provided that any reduction in the rate of tax or the benefit of ITC had to be passed on to the recipients by way of commensurate reduction in the prices, which implied that every person who was a recipient of supply of goods or services must get such benefit and the same had to be calculated for every supply of goods or services. It was also for the suppliers of the goods and services to determine the benefit to be passed on by reducing their prices.

13. The DGAP has also stated that the present project did not entirely pertain to the 'Affordable Housing Scheme' which was the issue in respect of the case of **Sukhbir Rohilla and others v. M/s Pyramid Infratech Private Limited** supra. It was also submitted by the DGAP that in the above case, all the units were sold at the time of launch of the project before the issuance of completion certificate, whereas in

the present case the Respondent had not sold all the units till the period of the investigation. It was further submitted by him that other facts like cap on per sq. ft. rate to be charged from the customers, manner of raising demands/invoices and eligibility of credit of the VAT amount paid on the purchases of inputs consequent to opting of State VAT scheme were different in the present case as compared to the Pyramid's case and hence both the cases were clearly distinguishable on facts.

14. The DGAP has also noted 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 above Act reads as "(b) construction of a complex, building, civil structure or a part thereof, including a 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, the ITC pertaining to the residential units which were under construction but not sold was provisional ITC which might be required to be reversed by the Respondent in terms of Section 17 (2) & Section 17 (3) of the CGST Act, 2017 which read as under:-

Section 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".

Section 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".

The DGAP has concluded from the above that the ITTC pertaining to the unsold units was outside the scope of this investigation and the Respondent was required to recalibrate the selling price of such units to be sold to the prospective buyers by considering the net benefit of additional ITC available to him post-GST.

15. The DGAP has also observed that the Respondent had claimed in his letter dated 20.08.2018 that the above Applicant had been informed from time to time that the benefit of ITC accruing to him, if any, on account of introduction of GST would be passed on to him. It was further seen from the payment schedule and demand letters raised post-GST, furnished as a part of the letter dated 20.08.2018 of the Respondent, that the Respondent had passed on benefit amounting

to Rs. 84,896/- to the above Applicant during the period from July, 2017 to June, 2018 which worked out to 3.20% of the basic amount collected post-GST. The Respondent had also submitted that the balance benefit of Rs. 34,452/- [Rs. 1,19,347/- (as per para-9(h) supra) (-) Rs. 84,896/-] would be passed on to the above Applicant along with the demand letter to be raised subsequently. However, the correctness of the amount of benefit so passed on by the Respondent had to be determined in terms of Rule 129 (6) of the above Rules. Therefore, the ITC available to the Respondent and the taxable amount received by him from the Applicant No. 1 and other recipients post implementation of GST had to be taken into account for determining the benefit of ITC required to be passed on, the DGAP has claimed.

16. Further, the DGAP has also found that prior to 01.07.2017, i.e., before the GST was introduced, the Respondent was eligible to avail CENVAT credit of Service Tax paid on input services only. However, the credit of the MVAT paid on the purchase of inputs and CENVAT credit of the Central Excise Duty paid on inputs was not admissible as per the CENVAT Rules, however, post-GST, the Respondent could avail the ITC of GST paid on all the inputs and input services including the sub-contracts. From the information submitted by the Respondent for the period from April, 2016 to June, 2017 and from July, 2017 to June, 2018, the details of the CENVAT/ITC availed by him and his taxable turnovers for the project "Runwal My City Phase-I

Part-1" during the above periods the DGAP has computed the ratio of ITC to turnover as has been given in Table-'C' below:-

Table-'C' (Amount in Rs.)

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	July, 2017 to March, 2018	April, 2018 to June, 2018	Total (Post-GST)
(1)	(2)	(3)	(4)	(5)=(3)+(4)	(6)	(7)	(8)=(6)+(7)
1	CENVAT of Service Tax Paid on Input Services **(A)**	32,73,146	22,75,091	53,48,237	-	-	-
2	Input Tax Credit of GST Availed **(B)**	-	-	-	4,91,25,959	76,04,756	5,67,30,715
3	Total Taxable Turnover as per ST-3 **(C)**	10,41,83,200	9,17,49,459	19,59,32,659	60,78,37,372	21,99,66,270	82,78,03,642
4	Total Saleable Area of flats in the project (Square Ft.) **(D)**			3,26,638			3,26,638
5	Area Sold relevant to Taxable turnover as per Home buyers List **(E)**			2,11,100			2,51,342
6	Relevant CENVAT/Input Tax Credit **(F)= [(A)*(E)/(D)] or [(B)*(E)/(D)]**			34,56,462			4,36,53,263
7	**Ratio of CENVAT/ Input Tax Credit to Taxable Turnover [(I)=(H)/(E)]**			**1.76%**			**5.27%**

17. The DGAP has further found from the above Table that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 1.76% and during the post-GST period (July, 2017 to June, 2018), it was 5.27% which clearly confirmed that post-GST, the Respondent had benefited from additional input tax credit to the tune of 3.51% [5.27% (-) 1.76%] of the taxable turnover.

18. The DGAP has also observed 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 up to 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. He has further observed that in view of the change in the GST rate after 01.07.2017, the issue of profiteering had been examined by him in two parts, i.e., by comparing the applicable tax rate and the ITC available for the pre-GST period (April, 2016 to June, 2017) when Service Tax @ 4.50% and VAT@ 1% were payable (total tax rate of 5.50%) with (1) the post-GST period from July, 2017 to 24.01.2018 when the effective GST rate was 12% and (2) with the GST period from 25.01.2018 to 30.06.2018 when the effective GST rate was 8%. Accordingly, on the basis of the figures contained in Table-'C' above, the comparative figures of ITC availed/available during the pre-GST period and the post-GST period have been furnished by him as per the Table-'D' below:-

Table-'D'

(Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST			
1	Period	A	April,2016 to June,2017	01.07.2017 to 24.01.2018	25.01.2018 to 30.06.2018		Total
			Affordable/ Non-Affordable	Affordable/ Non-Affordable	Non-Affordable	Affordable	
2	Output tax rate (%)	B	5.50%	12.00%	12.00%	8.00%	
3	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover asper Table - C above (%)	C	1.50%	5.27%	5.27%	5.27%	
4	Increase in tax rate post-GST (%)	D		6.50%	6.50%	2.50%	
5	Increase in input tax credit availed post-GST (%)	E= 5.27% *less* 1.76%		3.51%	3.51%	3.51%	
Analysis of Increase in input tax credit:							
6	Base Price collected during July, 2017 to June, 2018	F		44,44,07,780	3,21,78,403	35,12,17,460	82,78,03,642
7	GST Collected over Basic Price	G= F*12% or 8%		5,33,28,934	38,61,408	2,80,97,397	8,52,87,739

8	Total Demand collected	H=F+G		49,77,36,713	3,60,39,811	37,93,14,857	91,30,91,381
9	Recalibrated Basic Price	I= F*(1-E) or 96.49% of F		42,88,09,067	3,10,48,941	33,88,89,727	79,87,47,735
10	GST @12%	J= I*12% or 8%		5,14,57,088	37,25,873	2,71,11,178	8,22,94,139
11	Commensurate demand price	K= I+J		48,02,66,155	3,47,74,814	36,60,00,905	88,10,41,874
12	**Excess Collection of Demand or Profiteered Amount**	**L= H - K**		**1,74,70,559**	**12,64,997**	**1,33,13,951**	**3,20,49,507**

19. The DGAP has also noted from the above Table that the additional ITC of 3.51% of the taxable turnover should have resulted in the commensurate reduction in the base prices as well as cum-tax prices. Therefore, in terms of Section 171 of the above Act, the benefit of the additional ITC was required to be passed on to the recipients. He has further noted that the Respondent had not contested that this benefit would have to be passed on to the recipients and the Respondent had submitted that he had passed on an amount of Rs. 84,896/- (i.e. 3.20% of the basic amount collected post-GST) to the above Applicant which had been duly verified by the DGAP from the demand letters submitted by the Respondent.

20. The DGAP has also claimed on the basis of the aforesaid CENVAT/ITC availability pre and post-GST and the details of the amount collected by the Respondent from the above Applicant and the other home buyers that during the period from 01.07.2017 to 30.06.2018, the amount of benefit of ITC not passed on, or in other words, the profiteered amount was Rs. 3,20,49,507/- which included GST on the base profiteered amount of Rs. 2,90,55,908/-. The home buyer and unit no. wise break-up of this amount have been given in

Annexure-27 of the Report by the DGAP. This amount was inclusive of Rs. 1,00,232/- (including GST on the base amount of Rs. 90,709/-) which was the profiteered amount in respect of the above Applicant, as mentioned at Serial No. 359 of Annexure-27. It was also observed by the DGAP that the Respondent had supplied the construction service in the State of Maharashtra only.

21. The above Report was considered by the Authority in its meeting held on 11.12.2018 and it was decided that the Applicants and the Respondent be asked to appear before the Authority on 04.01.2019 for hearing. Since, the Respondent had asked for adjournment of the hearing scheduled on 04.01.2019, it was decided to grant next hearing on 11.01.2019. The Respondent again requested for the adjournment vide his e-mail dated 05.01.2019 accordingly next hearing was granted on 17.01.2019. The Respondent further requested for the adjournment vide his letter dated 16.01.2019 accordingly next hearing was fixed on 31.01.2019. During the course of the hearing the Applicant No. 1 did not appear, the DGAP was represented by Sh. R. A. Rajneesh, Assistant Commissioner and the Respondent was represented by Sh. Vidyasagar V., Director (Finance), Sh. A. V. Rajan, Chief Finance Officer, Sh. Rohit Jain, Sh. Gaurav Sogani, Sh. Pratik Shah, Advocates and Sh. Mayur Chartered Account.

22. The Respondent vide his submissions dated 31.01.2019 has submitted that he was engaged in the business of construction and

sale of residential units and the present project was a residential project which was being constructed as My City Phase I - Part 1 (Betawade-1) comprising of Towers A3, A4, B2, C3 and C4 which was registered with Maharashtra Real Estate Regulatory Authority (MRERA) vide Registration No. P51700000528. He has also submitted that in the pre-GST period he was not eligible to avail credit of Central Excise Duty and MVAT paid on the goods used for construction service being provided by him and hence these duties and taxes were embedded in the cost of the project. He has further submitted that post introduction of GST, he was eligible to avail the credit of taxes paid on inputs, therefore, the benefit of ITC was being availed by him which he had started to pass on to his customers as per the provisions of Section 171 of the above Act. He has also stated that the present proceedings had been launched on the application filed by the Applicant No. 1 who had purchased a 2 BHK flat in Tower B2 of the project alleging that he had profiteered by not passing on the benefit of ITC.

23. The Respondent has further stated that the GST Council had constituted a Group of 7 Ministers (GOM) *as* per the Press Release dated January 15, 2019 to analyse the tax rates of the Real Estate Sector for suggesting a Composition Scheme, to examine the various aspects of levy of GST on Transfer of Development Rights (TDSR) and Development Rights in a joint Development Agreement, to examine the legality of inclusion/exclusion of land or any other ingredient, to suggest valuation mechanism and to examine and

suggest any other aspect relevant to boost the Estate Sector. The Respondent has also claimed that the entire dynamics of the GST implication on the above Sector might change radically after the recommendations of the GOM were received and therefore, the present proceedings should be kept in abeyance till his project was completed as the GST Law was still evolving and any assumptions made while computing the benefits might significantly change.

24. The Respondent has further claimed that under the GST laws no mechanism or methodology had been provided for determining profiteering in the absence of which the investigation carried out by the DGAP was without sanction of law. He has also argued that it was well settled that in the absence of machinery for assessment of tax, the levy itself was illegal and was liable to be struck down as unconstitutional. He has placed reliance on the judgement of the Hon'ble Supreme Court passed in the case of **Commissioner Central Excise and Customs Kerala v. Larsen and Toubro Limited (2016) 1 SCC 170** wherein it was held that in the absence of machinery provisions for computation of taxable value in case of composite works contract, levy of Service Tax would become non-existent.

25. The Respondent has also argued that prescribing a methodology for anti-profiteering measures was a legislative function which required that the same should be enshrined in the CGST Act or the Rules, however, no such provision had been made in them nor any mechanism or guiding principles had been framed. The Respondent

has also pleaded that Rule 126 of the above Rules had delegated the power to this Authority to frame methodology which was unconstitutional as such delegation was vague and arbitrary as it was settled law that important legislative functions could not be delegated.

26. The Respondent has further pleaded that if the Report of the DGAP was accepted then the provisions of Section 171 of the above Act would itself be unconstitutional as they sought to regulate prices as under the pretext of a tax enactment, the legislature could not act as a price regulator. He has also averred that the prices were governed by market forces and price regulation would violate the fundamental right of trade and commerce. He has also cited the judgement passed in the case of **Indraprastha Gas Ltd. v. Petroleum and Natural Gas Regulatory Board and others 2015 (9) SCC 209** in his support.

27. The Respondent has further averred that the entire concept of passing on the benefit of tax to the customers was not envisaged through a tax law as the levy of tax under the GST was on the supplier and it was for him to choose the method of passing it on to the customers or bear the burden himself. He has also quoted the law settled in the case of **British India Corporation Ltd. v. CCE 1978 (2) ELT J307 (SC)** which states as under:-

> *"The contention that this duty does not amount to a duty of excise because it cannot be passed on by the petitioner to the consumer was not raised before us. It was mentioned in the petition. An Excise Duty is a duty on production and though according to the economists, it is an indirect tax capable of being passed on to the consumer as part of the price yet the*

mere passing on of the duty is not its essential characteristic. Even if borne by producer or manufacturer it does not cease to be a duty of excise. The nature of such a duty was explained in the very first case of the Federal Court and subsequently in others of the Federal Court, the Privy Council and this Court, but this ground continues to be taken and we are surprised that it was raised again."

28. The Respondent has also claimed that the DGAP had made it mandatory for him to pass on the credit availed by him to the consumers and such interpretation of the anti-profiteering provisions made by the DGAP was unconstitutional and against the tenant of taxation laws. He has further claimed that if the exercise was only a mathematical calculation then the legislature was required to state as such and hence there was no necessity for it to prescribe Rule 126 of the above Rules as it was well settled that a legislation was required to be read in entirety and no part of it could be made otiose or redundant. He has also placed reliance on the decision of the Hon'ble Supreme Court in the case of **Voltas Limited v. State of Gujarat 2015 VIL 23 (SC)**. The Respondent has also contended in the case of **Union of India vs. Adani Exports Limited [2001 (134) ELT 596 (SC)]** it was held that the adjudicating authority was required to pass an order deciding the preliminary objections raised by the assessee and hence the objections raised by him were required to be decided at the outset.

29. The Respondent has further contended that unlike any other manufacturing business or one-time service contract, in a real estate

business, the project life-cycle was spread over a period of 3-4 years and at the start of a project, the developer prepared his budget based on his experience and market conditions which was bound to change over the project life cycle due to change in the market conditions, tax laws and prices etc. and therefore the actual cost incurred on the project was known only after the completion of the project and therefore, the actual savings on account of credit would also be available once the project was completed. He has also stated that this fact had been accepted by the DGAP vide Para No. 14 of his Notice. He has further stated that the sale of flats after receiving of the Occupancy Certificate (OC), cost of the project, rate rationalization and changes in the GST law etc. were some key reasons which might lead to variation in the credit availability which was required to be passed on. The Respondent has also claimed that the above reasons clearly established that in a real estate project, the actual benefit was known only after the project was completed and hence, the exact working of the amount of benefit could be arrived at only at the time of its completion.

30. The Respondent has further claimed that Section 171 of the CGST Act, 2017 provided that any reduction in the rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices and Section 171 (2) provided that this Authority was required to examine whether ITC availed by a registered person or reduction in the rate of tax had actually resulted in commensurate reduction in the price, however,

the above Act was silent on the modus operandi to be adopted for the computation of the benefit, the methodology to be adopted and the timing of passing on the said benefit. He has also contended that the intention of the legislature was to provide rules with regard to the computation of benefit accruing on account of transitioning into GST regime however, there was no mechanism in place to compute commensurate reduction in prices as there was no methodology for determining the meaning of the term "commensurate reduction in prices." More importantly, the CGST Act did not provide any time frame within which such commensurate reduction in prices was to be passed on. The Respondent has further contended that Rule 122 to 137 of the above Rules also did not provide any methodology for determining the meaning of the term 'commensurate reduction' in prices and in the absence of any prescribed methodology it was important to adopt a logical method which could satisfy the intention of the legislature and rationally pass on the benefit to the customers on account of transition into GST regime. The Respondent has also submitted that after taking in to account the peculiarities of the real estate industry, he had considered the benefit of non-creditable taxes embedded in the construction cost pending as on July 1, 2017 and computed the benefit and distributed the same to all the customers although in the real estate sector where the project itself took 3-4 years for completion it was difficult to accurately compute in advance the benefit which should be passed on to the customers and has

accordingly passed on the same and hence, he has complied with the requirements of Section 171 of the CGST Act, 2017.

31. The Respondent has also argued that the DGAP in his Report had completely ignored the genesis of Section 171 of the above Act as the intention of the legislature was to determine the benefit of ITC which was available to a registered person post introduction of GST and pass on the same to the customers by way of commensurate reduction in prices however, in the case of the Real Estate Sector, the output tax liability under the GST regime had increased as it attracted tax @ 12%, whereas in the erstwhile regime the outward tax liability was 5.5% only and later on the rate of GST was reduced to 8% in the case of specified Affordable Housing Projects, therefore, there has been no reduction in the rate of tax and on the contrary the tax liability of the Respondent had increased.

32. The Respondent has further argued that in the case of the real estate projects, the developer was providing construction service by way of composite supply of works contract services and transfer of property in goods for which he might either award a composite contract to a works contractor or directly procure the material for the purpose of construction. The Respondent has also stated that while opting for the abatement scheme under the Service Tax and Composition Scheme under the MVAT he was not eligible to avail the credit of both due to which he was suffering increased tax burden which had increased his costs which were to be borne by the customers. However, under the GST regime, the above taxes and duties did not

amount to costs in and hence, the above benefit was required to be passed on the customers. The Respondent has claimed that he had appropriately computed such non-creditable costs and had started passing on the benefit to the customers including the above Applicant. The Respondent has further claimed that in respect of the flat buyers who had purchased them in the pre-GST regime, the benefit of ITC payable to them had been passed on by way of discount at the time of raising of the invoices and in respect of the customers to whom units had been sold under the GST regime, the benefit of ITC had been passed on by way of price negotiations, at the time of execution of the sale agreements. He has also stated that he always had the intention to pass on the above benefit even though the same would actually be known to him only at the end of the completion of the project. The Respondent has also referred to the Press Release No. F. No. 296/07/2017-CX.9 dated 15 June 2017 which reads as below:-

> *"2. Central Excise duty is payable on most construction material @12.5%. It is higher in case of cement. In addition, VAT is also payable on construction material @12.5% to 14.5% in most of the States. In addition, construction material also presently suffer Entry Tax levied by the States. Input Tax Credit of the above taxes is not currently allowed for payment of Service Tax. Credit of these taxes is also not available for payment of VAT on construction of flats etc. under composition scheme. Thus, there is cascading of input taxes on constructed flats, etc.*
>
> *3. As a result, incidence of Central Excise duty, VAT, Entry Tax, etc. on construction material is also currently borne by the builders, which they*

pass on to the customers as part of the price charged from them. This is not visible to the customer as it forms a part of the cost of the flat.

.....

5. This will change under GST. Under GST, full input credit would be available for offsetting the headline rate of 12%. As a result, the input taxes embedded in the flat will not (& should not) form a part of the cost of the flat....

6. The builders are expected to pass on the benefits of lower tax burden under the GST regime to the buyers of property by way of reduced prices/ installments..."

On the basis of the above press release, the Respondent has contended that every developer was required to pass on the benefit of Excise Duty and VAT as he was able to avail ITC of the GST. The Respondent has also submitted that the approach prescribed by the Central Board of Indirect Taxes & Customs (CBIC) had further substantiated the basic fundamentals laid down in Section 171 of the CGST Act, 2017 and he had followed similar methodology to identify such costs and had already passed on the above benefit to his customers.

33. The Respondent has also pleaded that it was an established principle of law that the intention of the legislature was deemed to be a corner stone in the interpretation of the statues. He has also cited the law settled in the case of **United Bank of India Calcutta v. Abhijit Tea Co. Pvt. Ltd. and others decided on 05.09.2000** in which it was held that:-

"In regard to purposive interpretation, Justice Frankfurter observed as follows:

Legislation has an aim, it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evidenced in the language of the statute, as read in the light of other external manifestations of purpose ("Some Reflections on the Reading of Statutes) (1947) 47 CLR 527."

On the basis of the above observation, the Respondent has stated that the tax authorities and the adjudicating authorities while interpreting the issues pertaining to the anti-profiteering measures may primarily infer the true intention of the legislature while interpreting these measures. He has also stated that in the present case, the DGAP had computed the amount of benefit by merely arriving at the difference of ratio of CENVAT Credit availed to taxable turnover in the pre-GST regime vis-à-vis the ratio of ITC to taxable turnover during the period from July 2017 to June 2018, which was clearly not in line with the intention of Section 171 of the CGST Act, 2017. The Respondent has also argued that the term 'Anti-Profiteering' used in Section 171 connoted that no registered person should make additional profits on transition to the GST in respect of the taxes which were not available as credit under the pre-GST regime however, the taxes paid on services were available as credit

even under the erstwhile regime and the price was accordingly determined hence, such taxes should not be considered for the purpose of computing benefit under the Anti-Profiteering measures. The Respondent has further argued that any increase in the rate of tax could not be considered for computation of profiteering. He has also claimed that the supplies in respect of which the credit was available even under the erstwhile regime, any incremental increase in the credit due to increase in the rate of tax could not be considered as part of the benefit. He has also claimed that the ratio of CENVAT/ITC to turnover considered by the DGAP had completely ignored the above fact and hence it should not be accepted. He has further claimed that without admitting, the methodology adopted by the DGAP to determine the profiteered amount for the period upto 30.06.2018 without taking in to account the increase in the rate of tax was incorrect and if the above increase in the rate of tax was considered the ratio of benefit would be reduced to 2.64% as opposed to 3.51%.

34. The Respondent has also urged that the DGAP had compared the percentage of credit availed to taxable turnover for the period from April, 2016 to June, 2017 (pre-GST) with July, 2017 till June, 2018 (post GST) as was mentioned in the returns filed by the Respondent to arrive at the additional ITC, however, unlike other supplies which were one-time transactions, the construction service was continuous, the cost of which was spread over a long period and therefore, the amount of expenditure and the selling time and value of each unit

needed to be considered and hence, the ratio adopted by the DGAP would invariably differ from project to project and within the project from period to period.

35. The Respondent has further urged that the benefit computed by the DGAP in Table D in Para 21 of the of his Report was not correct as the DGAP had considered the taxable value reflected in the returns as the base value on which he had made the calculation of the GST paid and further recalibrated the basic value to arrive at the additional benefit. He has also contended that the basic value on which the DGAP had worked out the saving computations was actually the net adjustment figure after deducting the discount which had already been passed on to the customers meaning there by that the values reflected in the returns already had the amount of reduction in prices included in terms of Section 171 of the CGST Act and therefore, the computation made by the DGAP was incorrect since it completely disregarded the discounts already adjusted in the taxable value (basic figure in Table D) leading to a situation wherein the Respondent would be passing the same discount twice to the customers and hence the methodology adopted by the DGAP needed to be revised on account of the double counting of the benefits.

36. The Respondent has also submitted that in terms of Table-D of the impugned Report the total profiteered amount came to Rs. 3,20,49,507/- which included GST amount of Rs. 29,93,599/-. He has further submitted that the GST amount collected from the customers had been duly paid to the Government and therefore the allegation of

profiteering was completely absurd and should be ruled out. The Respondent has also claimed that the intention of the Respondent had always been to be law abiding person and he had duly computed the benefit and had also started passing on the same to his customers by way of reduction in the prices including the Applicant No. 1 which was in line with the percentage calculated by the DGAP and was in fact, more than what had been computed by the DGAP. The Respondent has further claimed that the above Act or the Rules did not provide any time frame within which such commensurate reduction in prices was to be passed on and hence, a reasonable time period was required to be given to any registered person to bring about the necessary reduction in the prices keeping in view the nature of the business and the several amendments which had been made since introduction of the GST and therefore, the insistence of the DGAP to pass on the benefit immediately was not tenable.

37. The Respondent has also argued that the DGAP, despite accepting that the facts of the present case were different than those of the Pyramid Infratech case, had proceeded to determine profiteering in the manner laid down in the above case and had only provided the benefit of unsold inventory while computing the benefit in terms of the provisions of Section 171 of the CGST Act, 2017.

38. The Respondent has also filed additional submissions dated 11.02.2019 vide which he has submitted Service Tax Returns (Annexure-A), GSTR-3B Returns (Annexure-B), Revised Table C (Annexure-C), Revised Estimated Cost of the project (Annexure-D),

Copy of RERA Certificate (Annexure-E), Affidavit of unsold area (Annexure-F) and list of customers to whom benefit of ITC had been passed on (Annexure-G).

39. The Respondent has also filed submissions on 22.02.2019 in which the following additional objections have been raised by him:-

a) That in a Real Estate Project, the credit availed in a particular period was not co-related to the turnover achieved during the same period. Unlike any other manufacturing business or typically one-time service contract, the project life-cycle of a Real Estate Project spreads over a period of 3-4 years during which the developer continues to construct the building and consequently, avails the credit of the taxes paid in respect of the cost incurred towards the construction. Whereas, generally the developer is not able to sell all the units at the start of the project and therefore the sales happen anytime during the construction of the project or even after the completion of the project and accordingly, the turnover is reflected in the periodic returns. The Respondent, with an intention to boost sales, had also sold units under subvention scheme where the major payments would be received and reflected in the returns nearer to the completion of the Project. In such a scenario, the methodology adopted by the DGAP to arrive at the profiteering ratio would be more distorted since credit availed would be higher during the construction period and much lower in the completion phase of the project. Accordingly, it could be

observed that in a real estate business, a ratio based on part of the project lifecycle would never reflect the actual savings to be passed on to the customers and more likely than not provide an incorrect amount of the additional credit as envisaged under Section 171 of the CGST Act.

b) That the intention of the legislature was to determine the benefit of ITC on goods or services or both which was available to the registered person post introduction of GST which hitherto was not available as credit (i.e. "non-creditable taxes"), and that such benefit of ITC should be passed on to the customers by way of commensurate reduction in prices. The question of passing on the benefit on account of reduction in the rate of tax did not arise as the tax rate on under-construction units had increased under GST. Under the erstwhile regime, the Respondent had opted for abatement scheme under the Service Tax and the Composition Scheme under MVAT and therefore, was not eligible to avail the credit of the VAT and Excise Duty paid on the goods used in the construction of the building which transpired into cost. On implementation of GST, the Respondent was allowed to avail the credit of the taxes paid on goods. Therefore, under the GST regime, the said taxes and duties did not remain as costs in the transactions and hence, in terms of Section 171 of the CGST Act, this benefit to the Respondent was required to be passed on to the customers accordingly, he had appropriately computed such non-

creditable taxes and had started passing on these benefits to the customers including the above Applicant.

c) That the methodology adopted by the DGAP in Table C of the impugned Report to compute the additional benefit needed to be revised on account of the turnover considered for the said purpose. The turnover considered by the DGAP in Table C was the gross value of demand letters issued by the Respondent to his customers whereas the ratio should be based on the taxable turnover (i.e. Gross Turnover less abatement) on which the Respondent was liable to pay tax. The taxable turnover would be determined as follows –

- **Pre-GST Regime** - The taxable turnover to be considered for pre-GST regime should be the abated value i.e. gross demand less 70% abatement
- **Post-GST Regime** - Under the GST regime, the turnover on which the Respondent is liable to pay tax in respect of an under-construction unit would be the 2/3rd of the total value of such supply i.e. gross demand less 1/3rd deduction towards transfer of property in land or undivided share of land.

d) That any change in applicable rate of tax on the supply of goods and services could not be perceived as reason for profiteering. As a basic principle of CENVAT Credit, the Respondent was first required to pay tax and then avail the credit. This rule remained applicable under both the regimes i.e.

pre-GST and post-GST e.g. under the GST regime, the rate of tax on supply of services had increased from 15% to 18%. This incremental tax was available as credit to Respondent after payment of tax to the supplier of services who in turn paid this tax to the Government and therefore, to that extent there could not be any profiteering by the Respondent.

e) That the term 'Anti-Profiteering' in Section 171 of the CGST Act connotes that no registered person should make additional profits in respect of the taxes not available as credit under the erstwhile regime and hence included in the cost which however, on implementation of GST, did not remain as cost and accordingly such benefit of non-creditable taxes should be passed on to the end customer. The taxes paid on services were available as credit to the Respondent even under the erstwhile regime and the prices were accordingly determined. Since taxes pertaining to services were available as credit under both the regimes, considering such credit while computing the additional benefit on account of Section 171 of the CGST Act would reflect an incorrect profiteered amount. Consequently, credit of taxes paid on services should be excluded for the purpose of computing benefit under the Anti-Profiteering measures.

40. The submissions dated 31.01.2019, 11.02.2019, and 22.02.2019 filed by the Respondent were forwarded to the DGAP for his Report. The DGAP, after taking into consideration all the submissions of the

Respondent, has submitted revised investigation Report dated 11.03.2019, the brief facts of which are as follows:-

a. **On the issue of entire investigation/proceeding being without the authority of law and delegation of methodology**:- The DGAP has replied that the contention of the Respondent was not correct as he had conducted the investigation and submitted his Report under Rule 126 of the CGST Rules, 2017.

b. **On the issue of regulation of prices**:- The DGAP has submitted that he had already dealt with the statutory provisions covering the issue in his earlier Report. As regards, constitutionality or otherwise of the provisions, the DGAP has offered no comments as this was a legal issue to be decided in the adjudication.

c. **On the issue of period of Investigation:** The DGAP has submitted that the investigation Report covered the period from 01.07.2017 to 30.06.2018. Therefore, the estimated project cost and the ITC that would be available in future, had not been taken into account.

d. **On the issue of computation to be applied for calculation of profiteering**:- The DGAP has stated that in terms of the provisions of Section 171 (1) of the above Act, the benefit of ITC availed by the Respondent needed to be quantified and passed on to the recipients, which had been quantified in his

Report dated 10.12.2018 and the methodology adopted by him was in consonance with the provisions of the above Section.

e. **On the issue of base of profiteering and period of profiteering**: The DGAP has submitted that, in his Report dated 10.12.2018, the increase in the ITC availed by the Respondent as a percentage of the Respondent's total turnover in the post GST period had been quantified. The input or input service wise availability or non-availability of ITC, prior to and post implementation of GST, had not been examined. Further, there should be no extra liability on the Respondent on account of GST charged by the suppliers as the said suppliers were also enjoying ITC on the purchases made by them resulting in reduction in prices of the materials purchased by them which they should have passed on to the Respondent. The DGAP had computed the benefit of ITC for the period from July, 2017 to June, 2018 for which comparison was made with the ITC available in the pre-GST period from 01.04.2016 to 30.06.2017. Therefore, the period considered by him in his Report was reasonable and comparable.

f. **On the issue of post GST turnover**: The DGAP has submitted that this was a new fact which was not submitted to him during the course of investigation. Revised figures of turnover have been submitted by the DGAP in the subsequent paras.

g. **On the issue of GST on the profiteered amount**: The DGAP has submitted that the price included both the basic price and

the tax charged on it. Therefore, any excess amount collected from the recipients amounts to profiteering which must be returned to the them. In case the recipients are not identifiable, such amount was required to be deposited in the Consumer Welfare Fund. Moreover, the tax already paid by the Respondent could be adjusted by issuing credit notes, in terms of Section 34 of the CGST Act, 2017.

h. **On the issue of ITC benefit already passed on to the buyers**: The DGAP has submitted that this was a new fact which was not submitted to him during the course off investigation. Revised computations were submitted by the DGAP in the subsequent paras.

41. The DGAP has claimed that on examination of the documents submitted by the Respondent on 31.01.2019, he had sent an e-mail to the Respondent on 07.02.2019, seeking home buyer-wise details of the benefit passed on to the recipients along with the documentary evidence thereof. The Respondent had submitted further documents to the DGAP on 08.02.2019, 18.02.2019 and 27.02.2019.

42. The DGAP, after considering the revised details of the turnover (inclusive of the benefit of the ITC passed on) submitted by the Respondent in the post-GST period, has re-calculated the Respondent's CENVAT/ITC ratio for the period from April, 2016 to June, 2017 (pre-GST) and for the period from July, 2017 to June, 2018 (post-GST), as has been furnished in the table below:-

(Amount in Rs.)

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	July, 2017 to June, 2018 (Post-GST)
(1)	(2)	(3)	(4)	(5)=(3)+(4)	(8)=(6)+(7)
1	CENVAT of Service Tax Paid on Input Services **(A)**	32,73,146	22,75,091	53,48,237	-
2	Input Tax Credit of GST Availed **(B)**	-	-	-	5,67,30,715
3	Total Turnover (before adjusting benefit of Input tax credit passed on by the Respondent **(C)**	10,41,83,200	9,17,49,459	19,59,32,659	85,50,64,279
4	Total Saleable Area of flats in the project (Sq. ft.) **(D)**			3,26,638	3,26,638
5	Area Sold relevant to Turnover as per Home buyers List (Sq. ft.) **(E)**			2,11,100	2,51,342
6	Relevant CENVAT/Input Tax Credit **(F)= [(A)*(E)/(D)] or [(B)*(E)/(D)]**			34,56,462	4,36,53,253
7	**Ratio of CENVAT/ Input Tax Credit to Turnover [(I)=(H)/(E)]**			**1.76%**	**5.11%**

43. The DGAP has stated from the above Table that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 1.76% and during the post-GST period (July, 2017 to June, 2018), was 5.11%. This showed that post-GST, the Respondent had benefited from additional ITC to the tune of 3.35% [5.11% (-) 1.76%] of the turnover.

44. The DGAP on the basis of revised details given in the above Table, the comparative figures of ITC availed/available and the rate of tax during the pre-GST period and the post-GST period has recalibrated the basic price and the excess collection (profiteering) as is given in the Table below:-

(Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST			
1	Period	A	April,2016 to June,2017	01.07.2017 to 24.01.2018	25.01.2018 to 30.06.2018		Total
			Affordable/ Non-	Affordable/ Non-	Non-Affordable	Affordable	

			Affordable	Affordable			
2	Output tax rate (%)	B	5.50	12.00	12.00	8.00	
3	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover asper Table - B above (%)	C	1.76	5.11	5.11	5.11	
4	Increase in input tax credit availed post-GST (%)	D= 5.11 *less* 1.76		3.35	3.35	3.35	
Analysis of Increase in input tax credit:							
5	Net Base Price collected during July, 2017 to June, 2018	E		44,44,07,780	3,21,78,403	35,12,17,460	82,78,03,643
6	Add: Input tax credit benefit passed on by reducing the above instalments	F		1,58,53,634	0	1,14,07,003	2,72,60,637
7	Total Base price collected (before adjusting ITC benefit passed on)	G= E+F		46,02,61,414	3,21,78,403	36,26,24,463	85,50,64,280
8	GST over Basic Price	H= G*12% or 8%		5,52,31,370	38,61,408	2,90,09,957	8,81,02,735
9	Total Demand raised (before adjusting ITC benefit passed on)	I=G+H		51,54,92,784	3,60,39,811	39,16,34,420	94,31,67,015
10	Recalibrated Basic Price	J= G*(1-D) or 96.65% of G		44,48,42,657	3,11,00,426	35,04,76,543	82,64,19,627
11	GST @12% or 8%	K= J*12% or 8%		5,33,81,119	37,32,051	2,80,38,123	8,51,51,293
12	Commensurate demand price	L= J+K		49,82,23,776	3,48,32,478	37,85,14,667	91,15,70,920
13	**Excess Collection of Demand or Profiteered Amount**	**M= I – L**		**1,72,69,008**	**12,07,334**	**1,31,19,753**	**3,15,96,095**

45. The DGAP has stated from the above Table that the additional ITC of 3.35% of the turnover, should have resulted in commensurate reduction in the basic prices. Therefore, in terms of Section 171 of the above Act the benefit of the additional ITC that had accrued to the Respondent, was required to be passed on to the recipients.

46. The DGAP on the basis of the aforesaid CENVAT/ITC availability in the pre-GST and the post-GST periods and the details of the amount collected by the Respondent from the above Applicant and the other home buyers during the period from 01.07.2017 to 30.06.2018 has computed the amount of benefit of ITC that had not been passed on by the Respondent to the recipients or in other words, the profiteered amount as Rs. 3,15,96,095/- which included GST (@ 12% or 8%) on the base profiteered amount of Rs. 2,86,44,653/-. The home buyer

and unit no. wise break-up of this amount has been given in Revised Annexure-27 by him. This amount was inclusive of Rs. 98,808/- (including GST on the base amount of Rs. 89,418/-) which was the profiteered amount in respect of the Applicant No. 1.

47. The DGAP has further stated that the above computation of the profiteered amount was with respect to the 495 home buyers, whereas the Respondent had booked 537 flats till 30.06.2018. Out of these 537 flats, 42 customers had not paid any consideration during the period from 01.07.2017 to 30.06.2018 (post-GST period under investigation), therefore, if the ITC in respect of these 42 units was taken into account to calculate the profiteered amount in respect of the 495 units where payments had been received post GST, the ITC as a percentage of taxable turnover would be distorted and erroneous. Therefore, the profiteering in respect of these 42 units should be calculated when the consideration thereof would be received in the post-GST period, by taking into account the proportionate ITC in respect of such units. The DGAP has also informed that the construction service had been supplied in the State of Maharashtra only.

48. The Respondent has also claimed that he had passed on the benefit of Rs. 3,00,75,576/- to the home buyers who had booked their flats upto 30.06.2018. A summary of category-wise profiteering and the ITC benefit passed on, was furnished by the DGAP as has been given below:-

(Amount in Rs.)

S. No.	Category of Customers	No. of Units	Area (in Sq. ft.)	Amount Received Post GST	Profiteered Amt. as per Annex-27	Benefit claimed to have been Passed on by the Respondent	Difference	Remarks
A	B	C	D	E	F	G	H=F-G	I
1	Applicant	1	541.45	26,69,195	98,808	93,875	4,933	Further Benefit to be passed on as per Annex-28
2	Other Than Applicant	332	1,71,978	51,95,42,421	1,92,18,164	1,31,36,446	60,81,718	Further Benefit to be passed on as per Annex-28
3	Other Than Applicant	162	78,823	33,28,52,663	1,22,79,124	1,68,45,255	(45,66,131)	Excess Benefit passed on. List Attached as Annex-29
4	Other Than Applicant	42	20,127	-	-	-	-	No Consideration Paid Post-GST, No benefit to be passed on
5	Other Than Applicant	117	55,168	-	-	-	-	Unsold Units as on 30.06.2018
	Total	654	3,26,638	85,50,64,279	3,15,96,096	3,00,75,576		-

49. The DGAP has observed from the above Table that the benefit claimed to had been passed on by the Respondent was less than what he should have passed on in respect of 333 cases including the Applicant No. 1 (Sr. 1 and 2 of the above table), amounting to Rs. 60,86,651/-. The DGAP has also stated that the additional ITC benefit of 3.35% of the taxable turnover had accrued to the Respondent and the same was required to be passed on to the above Applicant and the other recipients as per the provisions of Section 171 of the CGST Act, 2017. He has further stated that the Respondent had realized an additional amount of Rs. 98,808/- from the above Applicant which included both the profiteered amount @ 3.35% of the basic price and GST on the said profiteered amount, however, the Respondent had claimed to have suo-moto passed on Rs. 93,875/- to the Applicant No. 1 which has been duly verified by the DGAP from the demand letters issued by the Respondent to the above Applicant, therefore, the Respondent as per Annexure-28 had profiteered an amount of

Rs. 4,933/- [Rs. 98,808/- (-) Rs. 93,875/-] from him. The DGAP has also claimed that the investigation appeared to indicate that the Respondent had also realized an additional amount of Rs. 60,81,718/- (Annexure-28) which included both the profiteered amount @ 3.35% of the basic price and GST on the said profiteered amount from 332 other recipients who were not Applicants in the present proceedings. He has further claimed that these recipients were identifiable as the Respondent had provided their names and addresses along with the unit no. allotted to them, therefore, this additional amount of Rs. 60,81,718/- was required to be returned to such eligible recipients. The DGAP has also intimated that the Respondent had profiteered an amount of Rs. 1,22,79,124/- from the rest 162 flat buyers and claimed to have passed on benefit of Rs. 1,68,45,255/- to them (Annexure-29) which was in excess of the benefit which he was required to pass on, however, the DGAP has claimed that the same could not be set off against the additional benefit to be passed on to the above recipients.

50. The DGAP has also stated that the present investigation covered the period from 01.07.2017 to 30.06.2018 only and profiteering, if any, for the period post June, 2018, had not been examined as the exact quantum of ITC that would be available to the Respondent in future could not be determined at this stage, when the construction of the project was yet to be completed.

51. The revised Report filed by the DGAP was considered by the Authority in its meeting held on 03.04.2019 and it was decided that

the Applicants and the Respondent be asked to appear before the Authority on 23.04.2019. Since, the Respondent had asked for adjournment of the hearing scheduled on 23.04.2019, the Authority decided to accord next hearing on 02.05.2019. The Respondent did not attend the hearing but filed written submissions dated 02.05.2019 on the DGAP's revised Investigation Report dated 11.03.2019.

52. It was observed that most of the objections raised by the Respondent vide his submissions dated 02.05.2019 have been taken on record vide his previous submissions. However, new submissions made by the Respondent are mentioned in the subsequent paras.

53. The Respondent has submitted that vide Notification No. 3/2019-Central Tax (Rate) dated 29.03.2019 the rate of tax on the construction service had been changed without benefit of ITC and any such benefit availed by a registered person would have to be reversed in case he opted for the new rate of tax and therefore, all the credit availed w.e.f. 01.07.2019 could not be passed on to the customers and it might also result in excess release of the benefit.

54. The Respondent has also submitted that the DGAP has not addressed the issue of sale of the flats once the OC was received by the Respondent. Since, the ITC availed on such flats would have to be reversed therefore, the benefit of ITC could be determined only after the project was completed. The Respondent has further submitted that the intention of the legislature was that a registered person should not profiteer from the incremental benefit available to him on implementation of the GST. He has further submitted that the

DGAP had admitted that the Respondent had passed on benefit of Rs. 3,00,75,576 to his customers which established that the Respondent had not retained the benefit and had passed on the same. The Respondent has also stated that nowhere it was provided that an equal amount of benefit was required to be passed on to the customers as it was difficult to do so in the real estate sector and hence it needed to be decided on case to case basis. He has further stated that once it was proved that the registered person had correctly computed the benefit and had not retained but passed on the same to the customers, he had complied with the provision of the Section 171 of the CGST Act although some customers might have benefitted more than the others. He has accordingly, contended that the additional amount required to be passed on to the customers was only Rs. 15,20,519 (3,15,96,095 – 3,00,75,576) and not Rs. 60,81,718.

55. The Respondent has also argued that Rs. 34,44,408/- had already been passed on by way of credit notes in the month of March, 2019 as per the details given vide Annexure-2 of his submissions and the balance amount of Rs. 26,42,243/- had been passed on to the customers who had purchased flats after coming in to force of the GST. The Respondent has further submitted that the computations given in Table C read with Annexure-28 referred in the revised DGAP Report had completely ignored the fact that the benefit of ITC attributable to such units had already been passed while deciding the prices of the units at the time of execution of the sale agreements.

Consequently, Rs. 26,42,243/- had already been passed on to the customers at the time of execution of the Agreements for sale as per Annexure-3 and the allegation of profiteering by the DGAP was not tenable. The Respondent has also submitted his calculations as has been given in the Table below:-

Particulars	Amount in Rs.
Benefit passed on to the customers by way of credit note	34,44,408
Units sold after July 1, 2017 – Benefits passed on while deciding the agreement value of the unit at the time of execution of sale agreement	26,42,243
TOTAL	**60,86,650**

56. The above submissions of the Respondent were forwarded to the DGAP vide order dated 02.05.2019 and the DGAP vide his final Report dated 15.05.2019 has submitted that the ITC availed by the Respondent needed to be quantified and passed on to the recipients, which had been quantified in his revised Report dated 11.03.2019. He has also submitted that the amount of benefit of ITC required to be passed on to the recipients as per his Report was Rs. 3,15,96,096/- which pertained to only 495 home buyers who had paid the consideration during the post-GST from period from 01.07.2017 to 30.06.2018. He has also contended that the profiteered amount, i.e. the benefit of ITC which had not been passed on had been quantified as Rs. 60,86,651/- in respect of 333 home buyers. He has further contended that the Respondent had provided incomplete

information regarding estimated taxes on the balance cost of construction as he had not considered all the non-creditable taxes embedded in the projected cost of the project, such as, Central Excise Duty embedded in the direct material purchases which was now available as ITC to him. The DGAP has also maintained that the approach adopted by the Respondent was based on estimated/assumed figures and the approach adopted by him was in consonance with the provisions of Section 171 of the CGST Act, 2017. The DGAP has also added that all the other objections raised by the Respondent had been addressed in his previous Reports.

57. We have carefully considered all the Reports filed by the DGAP, submissions of the Respondent and the other material placed on record and find that the Applicant No. 1 had purchased Flat No. 2204 in Tower-B2 in "My City Phase I-Part 1 (Betawade-1) project" floated by the Respondent comprising of Towers A3, A4, B2, C3 and C4 which was registered with MRERA vide Registration No. P51700000528. The above project formed part of his "Runwal My City" project located in Dombivili, Thane, Maharashtra and the Applicant No. 1 had purchased the above flat for total consideration of Rs. 48,51,000/- (Excluding Taxes) as per the details furnished by the DGAP vide Table B of his Report dated 10.12.2018. It is also revealed from the record that the above Applicant vide his complaint dated 31.05.2018 had alleged that the Respondent was not passing on the commensurate benefit of ITC to him in spite of the fact that he was availing ITC on the purchase of the inputs at higher rates of GST

which had resulted in benefit of additional ITC to him and was also charging GST from him @ 12%. The above complaint was examined by the Maharashtra State Screening Committee in its meeting held on 15.06.2018 and was forwarded to the Standing Committee on Anti-Profiteering for further action. The Standing Committee in its meeting held on 02.07.2018 had forwarded this complaint to the DGAP for investigation who vide his Report dated 10.12.2018 has found that the ITC as a percentage of the total turnover which was available to the Respondent during the pre-GST period was 1.76% and during the post-GST period this ratio was 5.27% as per the Table C mentioned above and therefore, the Respondent had benefited from the additional ITC to the tune of 3.51% (5.27% - 1.76%) of the total turnover which he was required to pass on to the flat buyers of this project. However, the Respondent has not reduced the basic prices of the flats by 3.51% due to additional benefit of ITC and by charging GST at the increased rate of 12%/8% on the pre-GST basic price, he has contravened the provisions of Section 171 of the of the CGST Act, 2017. The DGAP has further submitted that the amount of benefit of ITC which has not been passed on by the Respondent or the profiteered amount came to Rs. 3,20,49,507/- which included 12%/8% GST on the basic profiteered amount of Rs. 2,90,55,908/-. The DGAP has also intimated that the above amount was inclusive of Rs. 1,00,232/- (including GST) which the Respondent has profiteered from the Applicant No. 1. He has also supplied the details of all the buyers who have purchased flats from the Respondent along with

their unit numbers and the profiteered amount vide Annexure-27 attached with his Report.

58. The Respondent was issued notice dated 12.12.2018 to explain why the above Report of the DGAP should not be accepted and his liability for violating the provisions of Section 171 of the CGST Act, 2017 should not be fixed along with the imposition of penalty as per the provisions of Section 29 and 122-127 of the above Act read with Rule 133 (d) of the CGST Rules, 2017 and his registration under the above Act should also not be cancelled.

59. The Respondent vide his submissions dated 31.01.2019 has stated that the GST Council had constituted a Group of 7 Ministers (GOM) for examining the issues pertaining to the Real Estate Sector and the recommendations made by it might radically change the implication of the GST on this Sector and therefore, the present proceedings should be kept in abeyance. However, this contention of the Respondent is not tenable since any recommendation made by the GOM would be effective prospectively only and would have no impact on the eligibility of the Respondent to avail benefit of ITC and pass on the same to his customers pertaining to the period of the current investigation w.e.f. 01.07.2017 to 30.06.2018 and therefore, there is no ground to keep the present proceedings in abeyance.

60. The Respondent has also claimed that under the GST laws no mechanism or methodology has been provided for implementing anti-profiteering measures in the absence of which the investigation

carried out by the DGAP was without sanction of law. In this connection it would be pertinent to mention that Section 171 (1) of the CGST Act, 2017 clearly states that "Any reduction in the 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, the intention of the legislature is amply clear from the above provision which requires that the benefit of tax reduction or ITC is required to be passed on to the customers by commensurate reduction in prices and the same cannot be retained by the suppliers. This Authority has been duly constituted under Section 171 (2) of the above Act and in exercise of the powers conferred on it under Rule 126 of the CGST Rules, 2017 has notified the 'Procedure & Methodology' for determination of the profiteered amount vide its Notification dated 28.03.2018. However, the mathematical methodology for determination of the profiteered amount has to be applied on case to case basis depending on the facts of each case and no fixed formula can be set for calculating the same as the facts of each case are different. The mathematical methodology applied in the case where the rate of tax has been reduced and ITC disallowed cannot be applied in the case where the rate of tax has been reduced and ITC allowed. Similarly, the mathematical methodology applied in the case of Fast Moving Consumer Goods (FMCGs) cannot be applied in the case of construction services. Even the methodology applied in two cases of construction service may vary on account of the period taken for

execution of the project, the area sold and the turnover realised. The Respondent has himself admitted that the same methodology could not be applied in each case and hence he should have no objection on the methodology which had been adopted by the DGAP in his case, based on the ITC availed, area sold and the instalments received after 01.07.2017. It would also be appropriate to mention here that this Authority has power to 'determine' the methodology and not to 'prescribe' it as per the provisions of the above Rule and therefore, no set prescription can be laid while computing profiteering. It would be further relevant to mention that the power under Rule 126 has been granted to this Authority by the Central Govt., as per the provisions of Section 164 of the above Act which has approval of the Parliament. Rule 126 has further been framed on the recommendation of the GST Council which is a constitutional body created under the Constitution (One Hundred and First Amendment) Act, 2016. Therefore, the above power has both legislative sanction as well as incorporation in the CGST Act, 2017 and the CGST Rules, 2017. The delegation provided to this Authority under the above Rule is clear, precise, unambiguous and necessary and is well within the provisions of the Constitution and therefore, it has been rightly conferred on this Authority. Hence, the objections raised by the Respondent in this regard are frivolous and without legal force.

61. The Respondent has also argued that it was well settled that in the absence of machinery for assessment of tax, the levy itself was illegal. However, perusal of Section 171 (2) of the above Act and the

Rules framed under it shows that the Central Govt. has been empowered to constitute an Authority "to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of goods or services or both supplied by him." In exercise of the above power the Central Govt. has constituted this Authority vide Office Order No. 343/2017 dated 28th November, 2017 to ensure that both the above benefits are passed on to the customers. Vide Rule 123 of the above Rules it has also been provided to constitute the Standing Committee and the State level Screening Committees to prima facie establish the veracity of the complaints made against non-passing of the above benefits. Under Rule 129 a full-fledged investigating machinery has been provided by creating the office of DGAP to enquire in to the complaints made under the anti-profiteering measures. Under Rule 136 of the above Rules this Authority has been empowered to get its orders implemented through any field office of the State tax, the Central tax or the Union Territory Tax. Since appropriate and adequate machinery has been provided to implement the anti-profiteering measures provided under the above Act and the Rules, therefore, the above contention of the Respondent is untenable.

62. The Respondent has also placed reliance on the judgement of the Hon'ble Supreme Court passed in the case of **Commissioner Central Excise and Customs Kerala v. Larsen and Toubro Limited (2016) 1 SCC 170.** However, it is respectfully submitted that

in the above case the issue involved was pertaining to the lack of machinery for enforcing the levy of Service Tax however, in the present case no tax has been levied and hence the law settled in the above case does not apply.

63. The Respondent has also contended that if the Report of the DGAP was accepted then the provisions of Section 171 of the above Act would amount to price regulation. However, perusal of the Report dated 10.12.2018 filed by the DGAP and his subsequent Reports shows that the DGAP has nowhere recorded any finding which can be construed as price regulation. He has only computed the ratio of the ITC to the turnover and calculated the benefit which the Respondent should have passed on by commensurate reduction in the prices of the flats which is well within the provisions of Section 171 of the above Act. At no stage the Respondent has been directed to fix his prices as per the findings given in the Reports. The Respondent is absolutely free to determine his prices as per the market forces however, he cannot be allowed to appropriate the benefit of ITC which has been granted to him by the Central and the State Govt. out of their own revenue for providing houses to the general public at affordable prices. Passing on of the benefit of ITC which is not being paid by the Respondent from his own pocket also does not amount to violation of his fundamental right to carry out his business. Therefore, the above claims of the Respondent are wrong and hence they cannot be accepted.

64. The Respondent has also cited the judgement passed in the case of **Indraprastha Gas Ltd. v. Petroleum and Natural Gas Regulatory Board and others 2015 (9) SCC 209** in his support. However, in this case the issue involved was fixing of the maximum retail price of the gas on which it could be sold, however in the present case no such direction has been sought to be passed by the DGAP through his present Reports and hence the argument advanced by the Respondent on the basis of the above judgement cannot be accepted.

65. The Respondent has also relied on the case of **British India Corporation Ltd. v. CCE 1978 (2) ELT J307 (SC)** and stated that the entire concept of passing on the benefit of tax to the customers was not envisaged through a tax law as the levy of tax under the GST was on the supplier and it was for him to choose the method of passing it on to the customers or to bear the burden himself. In this connection it would be appropriate to mention that no tax has been levied on the Respondent to pass on the benefit of ITC rather he is required to pass on the amount which he has received as ITC on the tax which he has paid on his inward supplies of goods and services, from the public exchequer. As per the provisions of Section 171 he has no choice but to pass on the same by commensurate reduction in his prices. Neither he is required nor he can pay it from his own account as it does not amount to tax as was the case in the judgement supra and hence the above case is of no help to him.

66. The Respondent has also claimed that the DGAP has made it mandatory for him to pass on the ITC availed by him to the consumers. However, the above plea of the Respondent is incorrect as it are the provisions made under Section 171 of the above Act and not the DGAP which require him to pass on the benefit of ITC and rightly so as this is a concession granted to him by the State and the Central Govt. out of their own scarce revenue resources which the Respondent cannot appropriate at the expense of the vulnerable section of house buyers. The Respondent has himself claimed to have computed the benefit of ITC and passed on the same which shows that the same has been calculated by him by applying a mathematical methodology and hence he is estopped from claiming that no mathematical methodology was required to be applied while computing the benefit of ITC. Rule 126 of the above Rules has been enacted only to determine the methodology and procedure to be adopted by the Authority while determining the above two benefits however, no mathematical methodology can be determined as it has to be applied on the basis of facts of each case. The power to determine methodology and procedure given under Rule 126 to this Authority has been conferred on all the judicial and quasi-judicial authorities and hence they are legal and constitutional and therefore, the objections raised by the Respondent in this regard are irrelevant.

67. The Respondent has also quoted the decision of the Hon'ble Supreme Court given in the case of **Voltas Limited v. State of Gujarat 2015 VIL 23 (SC)** in his support. Perusal of the facts of this

case shows that it involved interpretation of the provisions of the Gujrat Sales Tax Act, 1969. However, as the provisions of Section 171 (1) of the above Act are amply precise and unambiguous which clearly state that "Any reduction in the 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." and therefore, the above case does not support the contention of the Respondent which claims that the provisions of the above Section were not clear and the same were to be read in entirety and could not be made redundant.

68. The Respondent has also submitted that in the case of **Union of India v. Adani Exports Limited 2001 (134) ELT 596 (SC)** it was held that the adjudicating authority was required to pass an order deciding the preliminary objections raised by the assessee and hence the objections raised by him were required to be decided at the outset. Perusal of the facts of the above case shows that the issue raised in this case pertained to the territorial jurisdiction of the Hon'ble High Court of Gujrat to entertain the appeals filed by the above Respondent. However, in the present case the Respondent has raised no preliminary objection against the territorial jurisdiction of this Authority and therefore, it is respectfully submitted that the above judgement is not being followed.

69. The Respondent has vehemently argued that unlike any other manufacturing business the project life-cycle in the Real Estate

Sector was spread over a period of 3-4 years and therefore, the actual ITC benefit could be computed only at the finalization of the project. This contention of the Respondent is completely frivolous as the Respondent has all the figures of ITC which he has availed and the turnover realized by him every month available to him. In case there is any change in the market conditions, tax laws, prices of inputs and rates of tax the same would also get reflected in the ITC available to him every month and it has no connection with his final cost of construction for computation of the ITC benefit. Further, there should be no extra liability on the Respondent on account of the GST charged by the suppliers as the said suppliers were also enjoying benefit of ITC on the purchases made by them resulting in reduction in the prices of the materials purchased by them which they should have passed on to the Respondent. Accordingly, all the invoices submitted by the Respondent which have been issued by his suppliers and break ups of the construction cost which have been attached by the Respondent with his submissions along with the revised Tables C and D cannot be taken in to consideration for computation of the ITC benefit as all the non-creditable taxes have not been taken in to account by him and such computations are based on the assumed/estimated figures. It is also abundantly clear from the perusal of the GST-3B Returns filed by the Respondent that he has been availing the benefit of ITC w.e.f. 01.07.2017 every month since coming in to force of the GST to discharge his output tax liability and as per the provisions of Section 171 (1) he is legally bound to

pass on the above benefit to his customers. Therefore, the Respondent is required to pass on the above benefit every month as he is himself availing the benefit every month. The Respondent cannot apply different yardsticks while availing the benefit himself and while passing it on to the home buyers. In case he wants to compute the benefit of ITC after the completion of the project after a period of 3-4 years he should also claim the above benefit after the completion of the project. The Respondent cannot be allowed to use the amount of ITC in his business during the period of execution of the project and enrich himself at the expense of the flat buyers as the amount of ITC belongs to his customers and not to him. Even the reversal of ITC after the issue of OC would make no difference to the passing on of the benefit as no benefit has been computed by the DGAP on the unsold units and no benefit is required to be passed on such units. Therefore, all the claims made by the Respondent on the above grounds are not tenable.

70. The Respondent has also contended that under the GST regime the rate of tax had been increased to 12% and then reduced to 8% for affordable housing whereas in the erstwhile regime the outward tax liability was 5.5% and therefore, there has been no reduction in the rate of tax and on the contrary the tax liability of the Respondent had increased. In this connection it is mentioned that as per the provisions of Section 171 (1) of the above Act both the benefits of tax reduction and additional ITC are required to be passed on. It is apparent from Table D supra that the increase in the rate of tax post-GST was

6.50% for general housing and 2.50% in respect of affordable housing and therefore, no benefit on account of tax reduction is required to be passed on in the present case. However, there has been increase in the benefit on account of additional ITC of 3.51% of the turnover which is required to be passed on by the Respondent. This benefit would not be reduced to 2.64% as has been claimed by the Respondent vide Annexure-7 of his submissions. Accordingly, he is required to pass on the above benefit to the flat buyers as per the provisions of Section 171 (1) of the above Act as the above objection of the Respondent is untenable.

71. The Respondent has also stated that he had opted for the abatement under the Service Tax and the Composition Scheme under the MVAT and therefore, he was not eligible to avail the ITC in the pre-GST period whereas under the GST regime he was availing benefit of ITC which was required to be passed on to the customers. The Respondent has also claimed that he had appropriately computed and passed on the above benefit by way of discount at the time of raising of the invoices and in respect of the customers to whom units had been sold under the GST regime, the benefit of ITC had been passed on by way of price negotiations-, at the time of execution of the sale agreements in terms of the press release issued by the CBIC vide F. No. 296/07/2017-CX.9 dated 15 June 2017. However, the above claim of the Respondent is not borne out from the perusal of the Reports filed by the DGAP which shows that the Respondent has not passed on the benefit of ITC and has profiteered an amount of

Rs. 3,20,49,507/- from the flat buyers as per the details given in Table D supra as well as from the reasons mentioned in the subsequent paras.

72. The Respondent has also cited the case of **United Bank of India Calcutta v. Abhijit Tea Co. Pvt. Ltd. and others decided on 05.09.2000** and claimed that the tax and the adjudicating authorities were primarily required to infer the true intention of the legislature while interpreting the anti-profiteering measures. Perusal of the facts of the above case shows that it pertained to the interpretation of the provisions of the "Recovery of Debts due to the Banks & Financial Institutions Act, 1993" which are entirely different than those of the CGST Act, 2017 and hence the same cannot further the cause of the Respondent.

73. The Respondent has also stated that the DGAP has wrongly computed the amount of benefit by arriving at the difference of ratio of the CENVAT credit availed during the pre-GST regime with the ratio of ITC availed during the post-GST period. In this connection it would be pertinent to mention that the provisions of Section 171 (1) of the above Act require that the benefit of additional ITC availed by the Respondent should be passed on to the recipients which cannot be done unless comparison of the pre-GST CENVAT/ITC availed on the taxes paid is made with the benefit of ITC availed post-GST. Further, the above computation does not take into account the benefit of CENVAT available on the services which was being availed by the

Respondent during the pre-GST period as is apparent from the perusal of Table C supra but it takes into account the difference between the above two ITCs. It is also clear that the above benefit has been calculated on the basis of the net difference in the ITC pre-GST and post-GST which does not get affected due to increase in the rate of the Service Tax. Hence, the computation of benefit made by the DGAP is correct and the argument advanced in this behalf by the Respondent is not correct.

74. The Respondent has also claimed that the DGAP has wrongly compared the percentage of ITC availed to taxable turnover to arrive at the additional ITC. He has further claimed that due to the long period taken for completion of the project the ratio calculated by the DGAP would invariably differ from project to project and within the project. The above claim made by the Respondent is incorrect as the ratio of the ITC to the turnover is required to be computed on the basis of the area purchased by a customer and the amount paid by him after coming in to force of the GST to arrive at the benefit of ITC. There is no question of difference in the above ratio as it is to be computed on the basis of the actual figures of the ITC and the turnover which are available every month as per the GST-3B Returns filed by the Respondent himself. Therefore, the above claim of the Respondent is unjustified.

75. The Respondent has also submitted that as per Table D of the Report dated 10.12.2018 the total profiteered amount was Rs. 3,20,49,507/-

which included GST amount of Rs. 29,93,599/- which had been duly paid to the Government and therefore the allegation of profiteering was completely absurd. However, on the contrary the above contention of the Respondent is absurd as by compelling his customers to pay more prices than what they should have paid and by collecting tax @ 12/8% on this additional realisation he has not only denied the benefit of additional ITC to his customers by not reducing the prices of the flats commensurately but has also collected additional GST on this amount. Had he not collected this additional amount of GST his buyers would have paid less price and by doing so he has denied them the benefit of additional ITC which amounts to violation of the provisions of Section 171 of the above Act. Both the Central as well as the State Government had no intention of collecting this additional GST as they had forfeited their share of tax revenue in favour of the flat buyers to provide them accommodation at the affordable prices and by forcing the buyers to pay the additional GST the Respondent has not only defeated the intention of the above Governments but has also acted against the interests of the house buyers. Hence, the above claim of the Respondent is not justifiable and therefore, the GST collected by him on the additional realization has rightly been included in the profiteered amount by the DGAP.

76. The Respondent has also submitted that in a Real Estate Project, the credit availed in a particular period was not co-related to the turnover achieved during the said period and therefore, the methodology

adopted by the DGAP to arrive at the profiteering ratio would be distorted. However, the above claim of the Respondent is not correct as the profiteered amount has been calculated by computing the ratio of the CENVAT/ITC to the turnover keeping in view the area sold relevant to the turnover as per the list of home buyers supplied by the Respondent as well as the relevant CENVAT/ITC availed during the pre and post-GST period as is clear from Table C of the Report of the DGAP dated 10.12.2018. The DGAP has computed the ratio of ITC to the turnover for the period from 01.07.2017 2017 to 30.06.2018 and compared it with the ratio of ITC to the CENVAT/ITC availed in the pre-GST period from 01.04.2016 to 30.06.2017 therefore, the period considered by him in his Report is reasonable and comparable. Hence, there is no question of computation of distorted amount of profiteering. It is also clear from the above Table that the above ratio has been calculated w.e.f. 01.07.2017 to 30.06.2019 only and final computation of the profiteered amount shall be done by the Respondent after issue of the OC and hence in case any under or over payment of the ITC benefit has been made the same can be adjusted by the Respondent.

77. The Respondent has also stated that the methodology used by the DGAP in Table C supra to compute the additional benefit needed to be revised by taking into account the gross turnover less abatement on which the Respondent was liable to pay tax during the pre and the post-GST period. However, the above argument of the Respondent is not plausible as the benefit is required to be calculated on the basis

of the additional ITC which the Respondent has availed post-GST which has no connection with the abatement on the Service Tax and the value of land. Hence, the methodology adopted by the DGAP is correct.

78. The Respondent has also argued that the rate of tax on the services has been increased from 15% to 18% post-GST and therefore, there could not be any profiteering by the Respondent on the incremental ITC. In this context it would be appropriate to mention that the benefit has to computed on the basis of the entire additional ITC which has become available to the Respondent on the purchase of the goods also not only on the ITC available on account of purchase of services. Moreover, the Respondent is also availing full benefit of ITC on the 18% tax which he is paying on the services and is not bearing any burden of tax. Therefore, the above argument advanced by the Respondent is untenable.

79. The Respondent has also argued that he has passed the benefit of ITC as per Annexure-2 and Annexure-11 of his submissions dated 31.01.2019. Perusal of Annexure-2 shows that it comprises of 5 'Tax Invoices' issued to S/Sh./Smt. Dalvi Sanjay Ganpat, Diwakar Bansal, Reena Kusum Arvind Singh, Nikhil Manudhane and Ravi Kumar Tiwari, from whom an amount of Rs. 6484/-, 6064/-, 6616/-, 9579/- and 8031/- respectively has been reduced on account of 'less ITC Value'. However, there is no mention in these tax invoices that this amount has been passed on account of benefit of ITC and hence the above entry cannot be construed to have been made on account of such benefit. The above

claim has also not been verified by the DGAP in his Reports. Perusal of Annexure-11 mentioned above shows that the Respondent has claimed that he has passed on benefit of Rs. 3,00,75,576/- to his existing customers and Rs. 28,00,000/- to his new customers (Total Rs. 3,28,75,576/-) against the benefit computed by the DGAP as Rs. 3,20,49,507/- (Rs. 2,92,54,065+Rs. 27,95,442) in his Report dated 10.12.2018. Therefore, the Respondent has claimed that he has passed on an excess benefit of Rs. 8,26,069/- (Rs. 8,21,511+4558) However, the Respondent has repeatedly claimed in his submissions that this amount has been passed as a discount and any amount passed as a discount cannot be considered to be the passing on of the benefit of ITC as the discount is passed from the profit margins. Similarly he has also claimed that the above amount has been passed on by way of price negotiations and hence the same cannot be treated to have been passed as a benefit of ITC. The above amount except the amount which has been passed on to the Applicant No. 1 has also not been verified by the DGAP. Due to the above reasons the above amount cannot be taken to have been passed on account of the ITC benefit.

80. Perusal of Annexure-G of the submissions dated 11.02.2019 filed by the Respondent shows that it contains the details of the ITC benefit of Rs. 3,23,60,080/- and Rs. 3,00,75,576/- which the Respondent has claimed to have passed on 31.01.2019 and 30.06.2018 respectively, however, both the above amounts have not been verified by the DGAP in his original or the revised Report and also have been claimed to have been passed as discount of due to price negotiations and hence

the above amounts cannot be taken to have been passed on account of the ITC benefit. Annexure-G also contains copies of the Tax Invoices in which the entry of 'less ITC value @0.000000% has been made showing different amounts against each entry. The above entry cannot be construed to have been made on account of benefit as it does not show the computation of the above benefit and the percentage of benefit has also been shown @ 0.000000%.

81. Perusal of Annexure-2 attached by the Respondent with his submissions dated 02.05.2019 shows that it contains details of the credit notes through which the Respondent has claimed to have passed on the benefit of ITC however, no date has been mentioned on them which creates serious doubts about their genuineness. Moreover, neither the relevant entries made in the GSTR-3B Returns filed by the Respondent on account of these credit notes have been shown nor the certified copies of the entries made in the books of account of the Respondent have been produced. There is also no evidence to the effect that the above credit notes have been debited to the flat buyers as there is no acknowledgment/recipient on record issued by them. These credit notes have also not been produced by the Respondent before the DGAP nor have been verified by him. On the basis of the above reasons these credit notes cannot be construed to have been issued on account of passing on of the benefit of ITC. Perusal of Annexure. -3 of his submissions dated 02.05.2019 shows that it gives details of 'GST credit passed through price negotiation' which can certainly not be taken as benefit of ITC. Therefore the claim of the

Respondent that he had passed on an amount of Rs. 3,28,75,576/- to his pre and post-GST customers in not correct and hence the same cannot be accepted.

82. The DGAP in his revised Report dated 11.03.2019 has claimed that on examination of the documents submitted by the Respondent through his submissions dated 31.01.2019 he had asked the Respondent vide his e-mail dated 07.02.2019 to submit home buyer wise details of the benefit passed on to the recipients along with the documentary evidence which has been submitted by the Respondent vide his replies dated 08.02.2019. 18.02.2019 and 27.02.2019. The DGAP has also claimed that after considering the revised details of the turnover inclusive of the benefit of ITC passed on in the post-GST period he has computed the ratio of CENVAT/ITC to the turnover as per Table A supra of his revised Report. Perusal of Table A shows that it contains the same figures which have been taken by the DGAP while calculating the above ratio in Table C of his first Report dated 10.12.2018 except for the figure of the total turnover for the post-GST period. In Table A this turnover has been taken as Rs. 85,50,64,279/- whereas in Table C it was taken as Rs. 82,78,03,642/- thereby showing an increase of Rs. 2,72,60,637/- due to inclusion of the amount of benefit of ITC which the Respondent has claimed to have passed on post implementation of GST, as has been mentioned against Serial No. 6 of the Table B of the revised Report. However, Table C of the revised Report dated 11.03.2019 shows the amount of benefit of ITC passed on as Rs. 3,00,75,576/-. The amount of turnover mentioned against Serial No. 3

of Table C of the Report dated 10.12.2019 has been taken by the DGAP from the GSTR-3B Returns as Rs. 82,78,03,642/- whereas the same amount has been taken as Rs. 85,50,64,279/- as has been mentioned against Serial No. 3 of Table A of his revised Report, as per the information supplied by the Respondent subsequently. On the basis of the above it is clear that there is difference in the amount of ITC claimed to have been passed on by the Respondent and the amount added by the DGAP in the turnover. It has been repeatedly mentioned by the DGAP in para 11 of his revised Report that the Respondent has claimed to have passed on the benefit of ITC of Rs. 3,00,75,576/- to his customers however, the DGAP has neither verified the above amount nor any evidence has been quoted by him to support his above contention. As per the reasons given in the paras mentioned above also there is no evidence that the Respondent has passed on the benefit of ITC to his customers as has been claimed by him. Therefore, the amount of Rs. 85,50,64,279/- taken as turnover before adjusting the benefit of ITC passed on by the Respondent as has been mentioned in Table A of the revised Report cannot be relied upon. Accordingly, the ratio of 5.11% computed by the DGAP for the period w.e.f. 01.07.2017 to 30.06.2018 can also not be taken cognizance of. Consequently, the amount of turnover of Rs. 82,78,03,642/- mentioned in Table C of the Report dated 10.12.2018 is taken to be correct as it is based on the Returns filed by the Respondent and the ratio of CENVAT/ITC to turnover mentioned as 5.27% in Table C supra is also taken to be correct and the percentage of additional benefit of ITC availed by the

Respondent post-GST is held to be 3.51% as per the Report dated 10.12.2018 instead of 3.35% as has been mentioned in the revised Report dated 11.03.2019.

83. The DGAP has also computed the profiteered amount as Rs. 3,15,96,095/- which includes GST (@ 12% or 8%) on the base profiteered amount of Rs. 2,86,44,653/- as has been mentioned in Table B of his revised Report dated 11.03.2019 by taking in to account the ratio of CENVAT/ITC to turnover as 5.11%. The home buyer and unit no. wise break-up of this amount has been given in Revised Annexure-27 by him. This amount is inclusive of Rs. 98,808/- (including GST on the base amount of Rs. 89,418/-) which is the profiteered amount in respect of the Applicant No. 1. As has been discussed in para supra, since the amount of the benefit of ITC which the Respondent has claimed to have passed on cannot be construed to have been passed on account of the benefit of ITC due to the reasons mentioned above, therefore, the above profiteered amount of Rs. 3,15,96,095/- can not be held to be correct and accordingly, the details of the above amount mentioned in revised Annexure-27 can also not be taken in to account to pass on the benefit of ITC.

84. The DGAP has also submitted that the computation of the profiteered amount was with respect to the 495 home buyers, whereas the Respondent had booked 537 flats till 30.06.2018. Out of these 537 flats, 42 customers had not paid any consideration during the period from 01.07.2017 to 30.06.2018 therefore, if the ITC in respect of these 42 units was taken into account to calculate the profiteered amount in

respect of the 495 units where payments had been received post GST, the ITC as a percentage of taxable turnover would be erroneous. Therefore, the profiteering in respect of these 42 units should be calculated when the consideration would be received in the post-GST period, by taking into account the proportionate ITC in respect of such units. The above contention of the DGAP is justified and hence the same can be taken to be correct.

85. The DGAP has also stated that the Respondent has claimed that he has passed on the benefit of Rs. 3,00,75,576/- to the home buyers who had booked their flats upto 30.06.2018. A summary of category-wise profiteering and the input tax credit benefit passed on, has been furnished by the DGAP as under:-

(Amount in Rs.)

S. No.	Category of Customers	No. of Units	Area (in Sq. ft.)	Amount Received Post GST	Profiteered Amt. as per Annex-27	Benefit claimed to have been Passed on by the Respondent	Difference	Remarks
A	B	C	D	E	F	G	H=F-G	I
1	Applicant	1	541.45	26,69,195	98,808	93,875	4,933	Further Benefit to be passed on as per Annex-28
2	Other Than Applicant	332	1,71,978	51,95,42,421	1,92,18,164	1,31,36,446	60,81,718	Further Benefit to be passed on as per Annex-28
3	Other Than Applicant	162	78,823	33,28,52,663	1,22,79,124	1,68,45,255	(45,66,131)	Excess Benefit passed on. List Attached as Annex-29
4	Other Than Applicant	42	20,127	-	-	-	-	No Consideration Paid Post-GST, No benefit to be passed on
5	Other Than Applicant	117	55,168	-	-	-	-	Unsold Units as on 30.06.2018
	Total	654	3,26,638	85,50,64,279	3,15,96,096	3,00,75,576		-

86. The DGAP has also submitted on the basis of the above Table that the benefit claimed to had been passed on by the Respondent was less

than what he should have passed on in respect of 333 cases including the Applicant No. 1 (Sr. 1 and 2 of the above table), amounting to Rs. 60,86,651/- (Annexure-28 of the revised Report). He has further submitted that the Respondent had realized an additional amount of Rs. 98,808/- from the above Applicant which included both the profiteered amount @ 3.35% of the basic price and GST on the said profiteered amount, however, the Respondent had claimed to have suo-moto passed on Rs. 93,875/- to the Applicant No. 1 which has been claimed to have been duly verified by the DGAP from the demand letters issued by the Respondent to the above Applicant, therefore, the Respondent as per Annexure-28 had profiteered an amount of Rs. 4,933/- [Rs. 98,808/- (-) Rs. 93,875/-] from him. The DGAP has further claimed that the investigation appeared to indicate that the Respondent had also realized an additional amount of Rs. 60,81,718/- (Annexure-28) which included both the profiteered amount @ 3.35% of the basic price and GST on the said profiteered amount from 332 other recipients who were not Applicants in the present proceedings. He has also contended that these recipients were identifiable as the Respondent had provided their names and addresses along with the unit no. allotted to them, therefore, this additional amount of Rs. 60,81,718/- was required to be returned to such eligible recipients. The DGAP has also intimated that the Respondent had profiteered an amount of Rs. 1,22,79,124/- from the rest 162 flat buyers and claimed to have passed on benefit of Rs. 1,68,45,255/- to them (Annexure-29) which was in excess of the benefit which he was required to pass on which the DGAP has claimed that the

same could not be set off against the additional benefit to be passed on to the above recipients. However, as per the detailed reasons given above the benefit of ITC claimed to have been passed on by the Respondent as has been mentioned by the DGAP in Annexures-28 and 29 of his Report is not correct and hence the same can not be taken in to account while computing the benefit of ITC which is required to be passed on to the flat buyers.

87. The DGAP has also stated that the present investigation covered the period from 01.07.2017 to 30.06.2018 only and profiteering, if any, for the period post June, 2018, had not been examined as the exact quantum of ITC that would be available to the Respondent in future could not be determined at this stage, when the construction of the project was yet to be completed. The above claim of the DGAP is correct and accordingly, the Respondent shall be liable to pass on the benefit of ITC to the flat buyers regularly in future in terms of the provisions of Section 171 (1) of the above Act.

88. The Respondent has also submitted that vide Notification No. 3/2019-Central Tax (Rate) dated 29.03.2019 the rate of tax on the construction service had been changed without benefit of ITC and any such benefit availed by a registered person would have to be reversed in case he opted for the new rate of tax and therefore, all the credit availed w.e.f. 01.07.2019 could not be passed on to the customers and it might also result in excess release of the benefit. However, the above plea of the Respondent is incorrect as the provisions of the above Notification will come in to force w.e.f. 01.04.2019 only and any benefit of ITC which

has been availed by the Respondent before the above date will have to be passed on to the home buyers. There is also no question of reversal of the ITC except when it pertains to the unsold flats on which he has not been asked to pay ITC benefit. There is also no issue of excess payment of ITC benefit as he can always adjust the same in the future instalments.

89. Based on the above facts the excess collection or the profiteered amount is determined as Rs. 3,20,49,507/- which includes GST @ 12/8% on the base profiteered amount of Rs. 2,90,55,908/-, as per the provisions of Rule 133 (1) of the above Rules as has been computed vide Table D of the Report dated 10.12.2018 @ 3.51% of the taxable turnover which is required to be passed on by the Respondent to the flat buyers. The profiteered amount in respect of the Applicant No. 1 is held to be Rs. 1,00,232/- including the GST on the base profiteered amount of Rs. 90,709/-. The DGAP has contended in para 18 and 24 of his Report dated 10.12.2018 that he has verified that the Respondent has suo-moto passed an amount of Rs. 84,896/-, accordingly, the profiteered amount in respect of the above Applicant is held to be Rs. 15,336/-. It would be pertinent to mention here that the DGAP vide his revised Report dated 11.03.2019 as per Serial No. 1 of Table C has claimed that the Respondent has profiteered an amount of Rs. 98,808/- from the Applicant No. 1 and has suo-moto passed on the benefit of ITC of Rs. 93,875/- to him and hence the balance amount of Rs. 4,933/- only was required to be passed to him. However, since the details of the computations of the benefit of ITC given in the revised Report have not

been held to be correct and hence the above Applicant is held entitled to an amount of Rs. 15,336/- as benefit of ITC. Accordingly, the balance amount of Rs. 3,19,49,275/- is directed to be passed on to the flat buyers, who are identifiable as per the details given in Annexure-27 of the Report dated 10.12.2018, without taking in to account the benefit of ITC which has been claimed to have been passed on by the Respondent to his recipients except in the case of the above Applicant in respect of whom the benefit of ITC passed has been duly verified by the DGAP. Needless to mention that the above amount of benefit of ITC shall be passed on along with interest @ 18% per annum payable from the date from which the additional amount was collected by the Respondent from the flat buyers till the payment is received by them. The above amount shall further be passed 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 as per the provisions of the CGST/SGST Act.

90. 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 detailed above. Since the present investigation is only up to 30.06.2018 any benefit of ITC which accrues subsequently shall also be passed on to the buyers by the Respondent. The Commissioners CGST/SGST shall ensure that the above benefit is passed on to the eligible buyers. The Applicant No. 1 as well as the other flat buyers will also be at liberty to maintain

proceedings against the Respondent for violation of the provisions of Section 171 of the CGST Act, 2017, in case the benefit of additional ITC is not passed on to them.

91. It is also evident from the above narration of the facts that the Respondent has denied benefit of ITC to the buyers of the flats being constructed by him in his 'Runwal My City' Project in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has thus profiteered an amount of Rs. 3,20,49,507/- from his customers, hence he has committed an offence under section 171 (3A) of the CGST Act, 2017 and therefore, he is 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 why the penalty prescribed under the above Section read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him. Accordingly, the notice dated 12.12.2018 issued to the Respondent vide which it was proposed to impose penalty under Section 29 and 122-127 of the above Act is hereby withdawn to that extent.

92. The Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Maharashtra 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 within a period of 4 months from the date of receipt of this order.

93. A copy each of this order be supplied to both the Applicants, the Respondent, Commissioners CGST/SGST Maharashtra as well as the Principal Secretary (Town & Country Planning), Government of Maharashtra for necessary action. File be consigned after completion.

Sd/-
(B. N. Sharma)
Chairman

Sd/-
(J. C. Chauhan)
Technical Member

Sd/-
(R. Bhagyadevi)
Technical Member

Certified Copy
15.11.19
(A. K. Goel)
Secretary, NAA

F. No. 22011/NAA/122/Horizon/2018/6329-35 Date: 15.11.2019

Copy To:-

1. M/s Horizon Projects Pvt Ltd., Runwal & Omkar Esquare, 5th Floor, Off Eastern Exp. Highway, Opp. Sion Chunabhatti Signal, Sion (E) Mumbai-400022.
2. Sh. Diwakar Bansal, A-603, Great Eastern Gardens, Kanjur Marg West, LBS Marg, Mumbai-400078.
3. Director General, Directorate 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.
4. Chief Commissioner, CGST, Mumbai Zone, GST Building, 115 M.K. Road, OPP, Churchgate Station, Mumbai- 400020.
5. Commissioner, Commercial Taxes, Office of the Commissioner of State Taxes, 8th floor, Goods and Services Tax (GST) Bhavan, Mazgaon, Mumbai - 400010.
6. Principal Secretary, Urban Development Department, 4th Floor, Main Building, Mantralay, Hutatma Rajguru Chowk, Mumbai.
7. Guard File/NAA Website.

15.11.19