BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	79/2019
Date of Institution	26.06.2019
Date of Order	24.12.2019

In the matter of:

1. Shri Sushil Kumar Jain, GG III/5, Vikas Puri, New Delhi- 110018.
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 Sarvpriya Securities Pvt. Ltd., 201B, 2nd Floor, Tower-A, Signature Tower, South City-1, Gurugram-122001, Haryana.

Respondent

Quorum:-

Sh. B. N. Sharma, Chairman

Sh. J. C. Chauhan, Technical Member

Sh. Amand Shah, Technical Member

Present:-

1. Shri Sushil Kumar Jain, Applicant No. 1 in person.
2. None for the Applicant No. 2.
3. Sh. Rakesh Kataria, Advocate and Sh. Manish Garg, CFO for the Respondent.

ORDER

1. The present Report dated 14.06.2019 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 the Applicant No. 1 had filed an application before the Haryana State Screening Committee on Anti-profiteering, under Rule 128 of the Central Goods and Services Tax Rules, 2017 and submitted that he had purchased a flat in the Respondent's project "Andour Heights", Sector-71, Gurgaon and alleged that the Respondent had not passed on the benefit of input tax credit to him by way of commensurate reduction in price, in terms of Section 171 of the Central Goods and Services Tax Act, 2017. While filing his application, he had sought anonymity. The Haryana State Screening Committee on Anti-profiteering conducted prima facie verification of the application and after having satisfied itself that the Respondent did not appear to have passed on the benefit of ITC, forwarded the said application with its recommendation to the Standing Committee on Anti-profiteering for further action, in terms of Rule 128 of the above Rules.

2. The Standing Committee on Anti-profiteering examined the aforesaid reference, in its meeting held on 13.12.2018 and it forwarded the same to the DGAP for detailed investigation.

3. The DGAP, on receipt of the application and the supporting documents from the Standing Committee on Anti-profiteering, issued a Notice under Rule 129 of the CGST Rules, 2017 on 15.01.2019 calling upon the Respondent to reply as to whether he admitted that the benefit of input tax credit had not been passed on to the Applicant No. 1 by way of commensurate reduction in price 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 supporting documents. Vide the above mentioned notice 15.01.2019, the Respondent was also given an opportunity to inspect the non-confidential evidences/information furnished by the Applicant No. 1 during the period 21.01.2019 to 23.01.2019.

4. Vide e-mail dated 22.05.2019, the DGAP also provided the Applicant No. 1 an opportunity to inspect the non-confidential documents/reply furnished by the Respondent on 24.05.2019, 27.05.2019 & 28.05.2019, which the Applicant No. 1 availed of on 27.05.2019 and requested that he be supplied copies of all the documents submitted by the Respondent, including GSTR-1 and GSTR-3B returns.

5. The period of the investigation conducted by the DGAP in this case is from 01.07.2017 to 31.08.2018.

6. The DGAP sought extension of time for completing the investigation which was duly extended by this Authority vide its order dated 19.03.2019 in terms of Rule 129 (6) of the CGST Rules, 2017.

7. The DGAP, in his report dated 14.06.2019, stated that the Respondent had filed his submissions vide letters/emails dated 06.02.2019, 21.02.2019, 10.04.2019, 12.04.2019, 13.05.2019 and 06.06.2019 vide which the Respondent had stated that his Company was incorporated under the provisions of Companies Act, 1956 and was engaged in development of residential/commercial properties. The Respondent had launched an Affordable Housing Project "Andour Heights" on 18.08.2015, under the Affordable Housing Scheme approved by the State of Haryana in Sector 71, Gurgaon. Thereafter, as per applicable Rules, applications were invited from eligible buyers for the project and the Respondent allotted units/ flats through draw of lots. Accordingly, the builder-buyer agreements were jointly signed, affirming all the terms and conditions applicable.

8. The Respondent added that under the Affordable Housing Scheme approved by the State of Haryana, the selling price of the units/ flats was fixed at Rs. 4,000/- per square feet of carpet area and Rs. 500/- per square feet of balcony area. The Respondent was developing two BHK & one BHK apartments. As per applicable Rules, the Respondent raised demands on the buyers to the extent of 62.50% of total cost of the flat before 30.06.2017, under the erstwhile VAT/Service Tax regime with applicable taxes. After implementation of GST, the Respondent raised demand of the balance amount (37.50% of the total cost of the flat) with applicable GST.

9. The Respondent further submitted that he was not directly engaged in the construction activity and all the work related to the project was assigned to various sub-contractors, who procured all the required materials on their own except Steel, Cement and RMC which were

supplied by the Respondent on free of charge basis. However, the project was executed under the supervision of the staff employed by the Respondent.

10. The Respondent also informed the DGAP that in the pre-GST regime, under the provisions of Haryana Value Added Tax Act, 2003, "Under-Construction Properties" were covered under the definition of 'Works Contract' and subjected to Haryana VAT @ 4.5% (approximately) with full ITC of VAT paid on the goods involved in the execution of works contracts. He also clarified that under the Service Tax regime, "Construction Services" were subjected to Service Tax @4.5% but the Affordable Housing was exempted from Service Tax, vide Notification No. 9/2016-ST dated 01.03.2016 with effect from 01.03.2016. He then submitted that in the GST regime, construction of low cost houses upto a carpet area of 60 square meters per house in a housing project approved by any State Government, was taxable @ 12% (effectively @ 8% after 1/3rd abatement for the value of land), vide Notification No. 01/2018-Central Tax (Rate) dated 25.01.2018 (earlier the rate of tax on affordable housing was 18% and the effective rate was 12% after 1/3rd abatement for land value). Therefore, the total indirect tax burden on the project was increased by 3.5% after the introduction of GST.

11. The Respondent further mentioned that under the erstwhile VAT/Service Tax regime, the Respondent was allowed input tax credit in respect of all VAT/WCT paid to the vendors/sub-contractors and that the affordable housing sale price of Rs. 4,000/- per sq. ft. was fixed after considering the benefit of input tax credit of VAT/WCT. However, the Central taxes, i.e., Central Excise Duty and Service Tax

levied on the goods and services used in the execution of works contract were part of the cost of the project. Now, under the GST regime, the benefit of erstwhile Central Excise Duty/Service Tax was available to the Respondent and the same was required to be passed on to the recipients.

12. The Respondent further submitted that Section 171 of the CGST Act, 2017 provided that it was mandatory to pass on any benefit due to reduction in rate of tax or input tax credit, to the recipients, by way of commensurate reduction in prices. The said statute could be invoked in the following two situations:-

a) If there was reduction in the rate of tax on supply of goods or services.

b) If benefit of additional input tax credit was available.

Upon perusal of the facts of this case, it could be summarised that in the GST regime, there was no reduction in the rate of tax on supply of goods and services as compared to the pre-GST regime. Instead, there was increase in the rate of GST by approximately 3.5%. Hence this was a case where only the benefit of ITC, if any, was relevant for the purposes of determination of profiteering.

13. The Respondent further mentioned before the DGAP that he was only procuring Cement, Steel and RMC on his own while all other raw materials used in construction were being procured directly by his various sub-contractors after due payment of Central Excise Duty or GST. In order to comply with the provisions of Section 171 of the CGST Act, 2017, he (Respondent) had himself calculated the

additional benefit of ITC (provisionally) available under the GST regime and the same had been credited to his homebuyers.

14. The Respondent requested for disposal of the application filed by the Applicant No. 1 by way of a speaking order, before proceeding further under Section 171 of the CGST Act, 2017, citing the decision of the Hon'ble Supreme Court in the case of M/s. GKN Driveshafts (India) Ltd. [2002] 1 SCC 72. He also contended that the issues relevant to be addressed vide a speaking order before proceeding further in the matter were as follows: -

(i) Whether on the facts & circumstances of the case, there was any reduction in the rate of tax on the supply of goods & services involved in the execution of works contract in the current GST regime.

(ii) Whether on the facts & circumstances of the case, the benefit already credited/forwarded to the buyers before initiation of proceedings, should not be treated as compliance with the provisions of Section 171 of the Central Goods and Services Tax Act, 2017.

(iii) Whether on the facts & circumstances of the case, the Applicant No. 1 had misled the investigation by not providing complete facts about the receipt of the benefit of input tax credit under GST.

15. The Respondent also submitted before the DGAP an undertaking to reverse ITC of Rs. 7,00,00,000/- in terms of Rule 42 of the CGST Rules, 2017, on provisional basis, in the return for the month of March 2019 and undertook not to utilize the said amount for

discharging his future output GST liability. The Respondent furnished copy of GSTR-3B Return for the month of March 2019, showing reversal of input tax credit of Rs. 7,00,00,091/-. The Respondent also submitted that he had worked out the provisional benefit, i.e. cost reduction impact on account of GST as Rs. 4,08,20,675/- (including GST), which he claimed had already been passed on to the homebuyers.

16. The Respondent also furnished the following documents to the DGAP: -

(a) Copies of GSTR-1 returns for the period July, 2017 to December, 2018.

(b) Copies of GSTR-3B returns for the period July, 2017 to December, 2018.

(c) Screen shot of Tran-1 duly filed on GSTN.

(d) Copies of VAT & ST-3 returns for the period April, 2016 to June, 2017.

(e) Copies of all demand letters/Agreement issued to one of his recipients.

(f) Details of applicable tax rates, pre-GST and post-GST.

(g) Copy of Balance Sheet for FY 2016-17 & 2017-18.

(h) Copy of Electronic Credit Ledger for the period 01.07.2017 to 31.12.2018.

(i) CENVAT Credit/Input Tax Credit registers for the period April, 2016 to December, 2018.

(j) Details of tax liability discharged under the previous and current tax regimes.

(k) List of home buyers in the project "Andour Heights" along with the details of commercial shop buyers.

(l) Copy of certificate of registration with Haryana RERA.

17. The Respondent further requested that all the data/information furnished by him be treated as confidential in terms of Rule 130 of the CGST Rules, 2017.

18. The Respondent also submitted sample copies of some builder – buyer agreements pertaining to his project, sample copies of intimation-cum-demand letters issued to homebuyers and the payment plans for his homebuyers, which are given in the Table-A below :-

Table-'A' (Amount in Rs.)

S. No.	Payment Stage	% of total cost
1	At the time of Application	5% of total cost
2	At the time of Allotment	20% of total cost
3	Within 6 months of Allotment	12.5% of total cost
4	Within 12 months of Allotment	12.5% of total cost
5	Within 18 months of Allotment	12.5% of total cost
6	Within 24 months of Allotment	12.5% of total cost
7	Within 30 months of Allotment	12.5% of total cost
8	Within 36 months of Allotment	12.5% of total cost

19. The Respondent submitted before the DGAP that the benefit already credited/passed onto the buyers by him should be treated as compliance with provisions of Section 171 of the CGST Act, 2017. Also, in support of this claim, the Respondent, on 12.04.2019, submitted:-

1. Sample copies of some individual homebuyer ledgers maintained by him;
2. Sample copies of covering letters dated 18.07.2018 issued to the homebuyers informing them regarding his intent to pass on the ITC benefit @ Rs.75.75/- per sq. ft.

3. Copies of credit notes issued to his buyers.

20. The DGAP further reported that while the Respondent has claimed that he has already passed on the benefit of ITC and complied with the provisions of Section 171 of the Act, the correctness of the amount so passed on by the Respondent, has to be computed in terms of Rule 129(6) of the CGST Rules, 2017. Therefore, the ITC available to the Respondent in the pre and post GST periods as also the amounts received by him from the Applicant No. 1 and other recipients post implementation of GST were to be taken into account to compute the benefit of ITC that was required to be passed on by the Respondent to his recipients.

21. The DGAP has further reported that since the period covered by the investigation was from 01.07.2017 to 31.12.2018 and since the completion certificate in respect of the Respondent's project was not received in the investigation period and was yet to be issued as on 31.12.2018 and since the project had also not reached the stage of first occupancy yet, the claim made by the Respondent, that the reversal of input tax credit amounting to Rs. 7 Crore affected by him voluntarily in March 2019 be factored in the computation of the amount profiteered, was untenable. Further, since the said reversal was affected by the Respondent only in March 2019, which was much after the end of the investigation period, the said reversal was in any case outside the scope of investigation and thus not considered by the DGAP in the computation of the amount profiteered.

22. Further, the DGAP has reported that as per 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) which reads as "Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building" and clause (b) of Paragraph 5 of Schedule II of the CGST Act, 2017 which 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 had been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever was earlier", the ITC pertaining to the residential units which were under construction but not sold was provisional input tax credit which might be required to be reversed by the Respondent, if such units remained unsold at the time of issue of the completion certificate, 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 was 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 was 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 was 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".

23. Hence, the ITC pertaining to the unsold units did not fall within the ambit of this investigation and as such 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 input tax credit available to them in the post-GST period.

24. The DGAP further reported that prior to 01.07.2017, i.e., before the GST was introduced, Service of construction of affordable housing provided by the Respondent was exempt from Service Tax, vide Notification No. 25/2012-ST dated 20.06.2012 (as amended by Notification No. 9/2016-ST dated 01.03.2016) and thus the Respondent was not eligible to avail CENVAT credit of Central Excise Duty paid on the inputs or Service Tax paid on the input services as per the CENVAT Credit Rules, 2004, which were in force at the material time. However, the Respondent was eligible to avail credit of Service Tax paid on the input services in respect of commercial shops sold by him. The Respondent was also eligible to avail input tax credit of VAT paid on the inputs and also claim deduction from his taxable turnover under VAT (WCT) in respect of the payments made to his registered contractors or sub-contractors. However, in the post-GST period, the Respondent was eligible to avail input tax credit of GST paid on all inputs and input services, including sub-contracts. The DGAP computed the amount of profiteering on the basis of the

information and records furnished by the Respondent for the period from April 2016 to December 2018. These included details of the input tax credit availed by him, turnover from the present project and the ratio of ITC to turnover in respect of the project, during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to December, 2018) periods, which have been tabulated below: -

Table-'B' (Amount in Rs.)

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	01.07.2017 to 24.01.2018 (GST @ 12%)	25.01.2018 to 31.12.2018 (GST @ 8%)	Total (Post-GST)
(1)	(2)	(3)	(4)	(5) = (3)+(4)	(6)	(7)	(8) = (6)+(7)
1	Credit of Service Tax Paid on Input Services used for commercial shops (A)	32,15,703	3,91,056	36,06,759	-	-	-
2	Input Tax Credit of VAT Paid on Purchase of Inputs (B)	2,21;17,260	31,90,875	2,53,08,135	-	-	-
3	Rebate of VAT(WCT) Paid to sub-contractors (C)	1,10,82,389	29,67,221	1,40,49,610	-	-	-
4	Total CENVAT/Input Tax Credit Available (D)= (A+B+C)	3,64,15,351	65,49,152	4,29,64,503	-	-	-
5	Input Tax Credit of GST Availed (E)	-	-	-	2,74,72,088	10,59,05,601	13,33,77,689
6	Turnover from commercial shops as per ST-3 return(F)	9,48,86,747	25,52,251	9,74,38,998	-	-	-
7	Turnover from residential flats as per VAT Returns (G)	64,90,47,326	9,75,96,550	74,66,43,875	-	-	-
8	Total Turnover (H)	74,39,34,073	10,01,48,801	84,40,82,873	24,22,72,227	61,29,66,741	85,52,38,968
9	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (I)	477068.59 (Residential)	23769.54 (Commercial)	5,00,838	477068.59 (Residential)	23769.54 (Commercial)	5,00,838
10	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to turnover (J)	452796.67 (Residential)	15023.42 (Commercial)	4,67,820	477068.59 (Residential)	17535.67 (Commercial)	4,94,604
11	Relevant ITC [(K)= (D)*(J)/(I)] or [(K)= (E)*(J)/(I)]			4,01,32,046			13,17,17,518
Ratio of Input Tax Credit to Turnover [(L)=(K)/(H)*100]				4.75%			15.40%

25. From the above Table, it was clear that the input tax credit as a percentage of the turnover that was available to the Respondent

during the pre-GST period (April, 2016 to June, 2017) was 4.75% and during the post-GST period (July, 2017 to December, 2018), it was 15.40% which evidenced that in the post-GST period, the Respondent had benefited from input tax credit to the tune of 10.65% [15.40% (-) 4.75%] of the turnover.

26. The DGAP also stated in his Report 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 for land value) on construction service, vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 (Annex-12). The effective GST rate on construction service in respect of affordable and low-cost houses upto a carpet area of 60 square metres per house had further been reduced from 12% to 8%, vide Notification No. 1/2018-Central Tax (Rate) dated 25.01.2018 (Annex-13). In view of the change in the GST rate after 01.07.2017, the DGAP had examined the issue of profiteering in two parts, i.e., by comparing the applicable tax rate and input tax credit available in the pre-GST period (April, 2016 to June, 2017) when only VAT@ 4.50% was payable with (1) the post-GST period from 01.07.2017 to 24.01.2018, when the effective GST rate was 12% and (2) with the GST period from 25.01.2018 to 31.12.2018, when the effective GST rate was 8%. Accordingly, on the basis the figures contained in Table-'B' above, the comparative figures of the ratio of input tax credit availed/available to the turnover in the pre-GST and post-GST periods as well as the turnover, the recalibrated base price and the excess realization (profiteering) during the post-GST period, was tabulated by the DGAP in the Table given below:-

Table-'C' (Amount in Rs.)

S. No.	Particulars		Post- GST Period			
1	Period	A	01.07.2017 to 24.01.2018 (Flats & Shops)	25.01.2018 to 31.12.2018 (Shops)	25.01.2018 to 31.12.2018 (Flats)	Total
2	Output GST rate (%)	B	12	12	8	
3	Ratio of Input Tax Credit to Total Turnover post-GST as per table (%)	C	15.40	15.40	15.40	15.40
4	Increase in input tax credit availed post-GST (%)	D= 15.40% *less* 4.75%	10.65	10.65	10.65	10.65
5	**Analysis of Increase in input tax credit:**					
6	Base Price raised during July, 2017 to December, 2018 (Rs.)	E	24,22,72,227	5,09,32,238	56,20,34,503	85,52,38,968
7	GST raised over Base Price @ 12% or 8% (Rs.)	F= E*B	2,90,72,667	61,11,869	4,49,62,760	8,01,47,296
8	Total Demand raised	G=E+F	27,13,44,895	5,70,44,107	60,69,97,263	93,53,86,264
9	Recalibrated Base Price	H= E*(1-D) or 89.35% of E	21,64,70,235	4,55,07,955	50,21,77,828	76,41,56,018
10	GST @12% or 8%	I = H* B	2,59,76,428	54,60,955	4,01,74,226	7,16,11,609
11	Commensurate demand price	J = H+I	24,24,46,663	5,09,68,909	54,23,52,054	83,57,67,627
12	**Excess Collection of Demand or Profiteered Amount**	**K= G–J**	**2,88,98,231**	**60,75,197**	**6,46,45,208**	**9,96;18,637**

27. From the Table given above, it was clear that the additional input tax credit of 10.65% of the turnover, which was the benefit to the Respondent, should have resulted in the commensurate reduction in the base prices as well as cum-tax prices of the units.

28. On the basis of the aforesaid CENVAT/input tax credit availability pre and post-GST and the details of the amount collected by the Respondent from the Applicant No. 1 and other buyers during the period 01.07.2017 to 24.01.2018, the DGAP computed the profiteered amount as Rs. 2,88,98,231/- for residential flats and commercial shops, which included 12% GST on the base profiteered amount of Rs. 2,58,01,992/-. Further, the amount of benefit of input tax credit that was needed to be passed on by the Respondent to the recipients or in other words, the profiteered amount during the period

25.01.2018 to 31.12.2018, came out to be Rs. 7,07,20,406/- which included 12% GST on commercial shops and 8% GST on residential flats, on the base profiteered amount of Rs. 6,52,80,958/-. Therefore, the DGAP computed the total profiteered amount during the period 01.07.2017 to 31.12.2018 as Rs. 9,96,18,637/- which included GST (@ 12% or 8%) on the base profiteered amount of Rs. 9,10,82,950/-. The said total amount profiteered by the respondent was inclusive of profiteered amount in respect of the Applicant No. 1.

29. The DGAP added that the said service had been supplied by the Respondent only in the State of Haryana.

30. The DGAP also reported that the Respondent had submitted that he had passed on benefit of Rs. 4,08,20,676/- (including GST) to the buyers. A summary of category-wise benefit of input tax credit required to be passed on as against the input tax credit benefit claimed by the Respondent to have been passed on to his buyers, is given in the Table given below: -

Table-'D' (Amount in Rs.)

S. No.	Category of Customers	No. of Units	Area (in Sq. ft.)	Amount Received Post GST	Benefit required to be passed on as per Annex-14	Benefit claimed to have been Passed on.	Difference (Profiteering)	Remark
A	B	C	D	E	F	G	H=F-G	I
1	Residential Flat Buyers	980	4,77,069	79,32,51,649	9,22,24,790	3,90,29,068	5,31,95,722	Further Benefit to be passed on as per Annex-15
	Total Residential (A)	**980**	**4,77,069**	**79,32,51,649**	**9,22,24,790**	**3,90,29,068**		
2	Commercial Shop Buyers	59	17,536	6,19,87,319	73,93,847	14,87,736	59,06,111	Further Benefit to be passed on as per Annex-16
3	Commercial Shop Buyers	11	3,582	-	-	3,03,872	(3,03,872)	No Consideration paid Post-GST, However, Respondent passed on benefit. List Attached as Annex-17

4	Commercial Shop Buyers	5	2,652	-	-	-	-	Unsold Units as on 31.12.2018
	Total Commercial (B)	**75**	**23,770**	**6,19,87,319**	**73,93,847**	**17,91,608**		
	Grand Total (C)=(A)+(B)	**1,055**	**5,00,839**	**85,52,38,968**	**9,96,18,637**	**4,08,20,676**		

31. On the basis of the above tabulation, the DGAP observed that the total amount profiteered by the Respondent worked out to be Rs. 9,96,18,637/-. Out of the above amount, the benefit claimed to have been passed on by the Respondent was Rs. 4,08,20,676/- which was lesser than what he should have passed on in all 980 cases of residential flats (Sr. 1 of above table) by an aggregate amount of Rs. 5,31,95,722/- and by an aggregate amount of Rs. 59,06,111/- in case of 59 commercial shops (Sr. 2 of above table). Further, benefit claimed to have been passed on by the Respondent was more than what he was required to pass on, in respect of 11 commercial shops, (Sr. 3 of above table) by an amount of Rs. 3,03,872/-. However, in terms of the relevant provisions this excess benefit claimed to have been passed on to some recipients, could not be permitted to be set off against the additional benefit required to be passed on to the other homebuyers/ shop buyers/ recipients and any such amount could only be adjusted against any future benefit that might accrue to such recipients.

32. The DGAP concluded his report by reporting that the benefit of additional input tax credit, which worked out to 10.65% of the turnover, has accrued to the Respondent in the post-GST period and the same was required to be passed on by the Respondent to the Applicant No. 1 and 1038 other recipients. In monetary terms, the Respondent had benefitted by an aggregate amount of Rs. 5,91,01,833/- (as detailed in Table-'D' of the report), which included both, the profiteered amount

@10.65% of the base price and the GST on the said profiteered amount and the same needed to be passed on to the eligible recipients (Applicant No. 1 and other 1038 recipients - 979 home buyers and 59 shop buyers), all of whom were identifiable as per records furnished by the Respondent.

33. The DGAP also clarified that since the present investigation covered the period from 01.07.2017 to 31.12.2018, profiteering, if any, for the period post December, 2018, had not been examined since the quantum of ITC that would be available to the Respondent in future could not be determined at this stage in as much as the construction of the project was yet to be completed.

34. The above Report was considered by this Authority in its meeting held on 02.07.2019 and it was decided to hear the Applicants and the Respondent on 17.07.2019.

35. Eight personal hearings were accorded to the parties on 17.07.2019, 02.08.2019, 20.08.2019, 05.09.2019, 12.09.2019, 24.09.2019, 14.10.2019, 06.11.2019 out of which 4 hearings were attended by the Respondent. During the course of the hearings, Shri Sushil Kumar Jain, the Applicant No. 1 appeared in person, none appeared for Applicant No. 2 and the Respondent was represented by Sh. Rakesh Kataria, Advocate and Sh. Manish Garg, CFO.

36. The Applicant No. 1 who had sought anonymity until the investigation stage, requested this Authority vide his letter dated 17.07.2019 that he be permitted to take part in the proceedings. The Authority allowed his above mentioned request.

37. The Applicant No. 1, vide his written submissions dated 17.07.2019 and 02.08.2019, requested that he be provided the GSTR-

3B returns, VAT returns, Service Tax returns, List of home buyers, Electronic Credit Ledger, all the bills raised and issued by the sub-contractors in favour of the Respondent towards contracts awarded to the former relating to procurement of raw materials/labour etc. giving details of T.D.S. and all other relevant documents submitted by the Respondent during the DGAP's investigation.

38. Since the above-listed records and documents furnished by the Respondent before the DGAP during the course of investigation had been marked as confidential by the Respondent in terms of Rule 130 of the CGST Rules, 2017, the Authority sought Respondent's objections, if any, regarding supply of the documents as per the request of the Applicant No. 1.

39. Meanwhile, the Respondent, vide his letters dated 01.08.2019 and dated 09.08.2019, requested that he be supplied a copy of the application filed by the Applicant No. 1, as the same had not been enclosed with the DGAP's Report dated 14.06.2019 as the Applicant No. 1's identity was kept anonymous at that stage. The Authority supplied the same to the Respondent after procuring a copy of the application filed by the Applicant No. 1 from the DGAP.

40. Further, the Respondent, vide his submissions made on 19.08.2019 and on 26.08.2019, averred that the information sought by the Applicant No. 1 vide submissions dated 17.07.2019, was not public information and the same was sought to be kept confidential by the Respondent under Rule 130 of the CGST Rules, 2017. The Respondent also submitted that the provisions of Section 11 of the Right to Information Act, 2005 (22 of 2005) apply mutatis mutandis to the disclosure of any information, which was provided on confidential

basis. The desired information contained business sensitive information such as vendor details, sources of material, detail of sub-contractors and buyer details of the project and this information might be used in a manner prejudicial to the business interests of the Respondent. The Respondent also submitted that the CGST Act, 2017 and the CGST Rules, 2017 nowhere provided power of disclosure of confidential documents to this Authority. He further cited Rule 129 and 130 of the CGST Rules, 2017 and requested not to supply copies of original confidential documents to the Applicant No. 1 in order to prevent the usage of confidential documents in a manner prejudicial to the business interests of the Respondent.

41. The above mentioned submissions of the Respondent were carefully considered by the Authority and it was found that the records/ returns and other documents sought by the Applicant No. 1 contained sensitive business related information pertaining to various facets of the business of the Respondent and sharing of such information could be detrimental to the business interests of the Respondent. It was also felt that certain records/ documents requested by the Applicant No. 1 pertained to third parties such as Respondent's vendors, contractors, suppliers and homebuyers, which should remain confidential from others. Therefore, after seriously considering the facts of the case and the provisions of Rule 130 of the CGST Rules, this Authority decided to not share the confidential documents/ records/ returns of the Respondent with the Applicant No. 1.

42. Thereafter, Applicant No. 1 filed his written submissions dated 20.08.2019 vide which he submitted that he had paid a total tax of Rs.

2,00,601/- to the Respondent on various dates as per the details given in the Table below: -

Table **(Amount in Rs.)**

S.No.	Date of payment	Service Tax	VAT	CGST	SGST
1	23.03.2015	4,595	5,907	-	-
2	19.08.2015	18,379	23,630	-	-
3	01.12.2016	-	14,768		
4	20.02.2017	-	14,768		
5	21.08.2017	-	-	19,691	19,691
6	15.03.2018	-	-	13,128	13,128
7	15.09.2018	-	-	13,128	13,128
8	15.03.2019	-	-	13,127	13,127
9	15.03.2019 (Additional Area)	-	-	203	203
Total		22,974	59,073	59,277	59,277

Citing the above Table, he stated that he had paid tax component of Rs. 2,00,601/- (Rs. 22,974 + Rs. 59,073 + Rs. 59,277 + Rs. 59,277) to the Respondent. He also submitted that the Respondent should have passed on to him more than Rs. 2,00,601/- by way of reduction in the price per sq. ft. on account of the benefit of ITC. The Applicant No. 1 further furnished the payment details as is given below:-

S. No.	Description	Percentage (%)	Total amount paid (Rs.)	VAT	Service Tax	GST	Due date of payment	Actual date of payment
1	Application money	5	1,31,275	-	-	-	13.03.2015	28.02.2015
2	Allotment money	20	5,48,073	-	22,973	-	04.09.2015	31.08.2015
3	Within 6 months of Allotment	12.5	3,28,188	-	-	-	16.09.2016	13.09.2016
4	VAT Payable	-	59,077	59,077	-	-	20.02.2017	20.02.2017
5	Within 12 months of allotment	12.5	3,28,188	-	-	-	13.03.2017	20.02.2017
6	Within 18 months of allotment	12.5	3,67,570	-	-	39,383	15.09.2017	21.08.2017
7	Within 24 months of allotment	12.5	3,28,188	-	-	26,253	15.03.2018	12.03.2018
8	Within 36 months of allotment	12.5	3,54,444	-	-	26,256	15.09.2018	28.08.2018
9	Within 42 months of allotment	12.5	3,33,389	-	-	26,660	22.03.2019	22.03.2019
Gross Total Payment			27,78,392	59,077		1,18,552	-	-

The Applicant No. 1 further submitted that the gross total taxes paid by him were Rs. 2,00,601/-; the total Cost of the flat was Rs. 26,25,500/-; and no benefit on account of ITC was passed on to him by the Respondent. He also enclosed a copy of the Agreement executed between him and the Respondent; copies of the demand letters issued by the Respondent; copies of the acknowledgement receipts issued by the Respondent as proof of having paid the amounts to the Respondent and a copy of the VAT Receipt.

43. In response, the Respondent filed his written submissions dated 12.09.2019 vide which he submitted that the allegations levelled by the Applicant No. 1 (vide his submissions dated 20.08.2019) were

false. The Respondent also pointed out that Applicant No. 1 has, in his application dated 13.11.2018 stated as follows "ITC is not being passed fully" and "Only a meagre figure is offered" while in page 2 of the same application, the Applicant No. 1 had contradicted himself by selecting "No" as a response to the question "whether benefit of reduction in tax rate has been passed on." The Respondent also highlighted that in the declaration column of the application form, the Applicant No. 1 had very clearly stated as under: -

> *"I hereby declare that the information furnished above is true to the best of my knowledge and that I have exercised due diligence in submitting such information. I understand that providing incomplete or incorrect information will make the application invalid".*

Citing the above, the Respondent contended that the Applicant No. 1 had made a false declaration while filing the application, which should render the application as void.

44. The Respondent also submitted that the initial complaint of the Applicant No. 1 dated 13.11.2018, was followed by another complaint filed before this Authority on 20.08.2019, which was titled "Input Tax Credit not yet passed". The Respondent submitted that the contents of the application/ submission filed by the Applicant No. 1 dated 20.08.2019 were false since it had been claimed therein that a total tax component of Rs. 2,00,601/- had been paid by him to the Respondent on various dates, whereas the Applicant No. 1 had not paid tax amounting to Rs. 52,916/- as claimed and the details of the said amount claimed to have been paid but not paid were as under: -

- 15.03.2018 Rs. 26,256/-
- 15.03.2019 Rs. 26,256/-
- 15.03.2019 Rs. 406/- (GST on additional area)

In support of his above contention, the Respondent enclosed the ledger account maintained in respect of Applicant No. 1.

45. The Respondent reiterated that Applicant No. 1, vide his submissions dated 20.08.2019, had declared that "I have not been given a single penny benefit towards the ITC by the Respondent" which was also false as per applicant's own admission made in his complaint dated 13.11.2018, wherein he had admitted that he had not been passed on the benefit of ITC fully and only a meagre amount had been paid to him. The Respondent also submitted a copy of letter dated 07.08.2018 issued by Applicant No. 1 to the Respondent, vide which the Applicant No. 1 had complained to the Respondent that the amount of ITC passed on by the Respondent @ 75.75 per sq. ft. was miscalculated and needed rectification. Citing the said latter, the Respondent alleged that the Applicant No. 1 had himself accepted on 07.08.2018 itself that the Respondent had passed on benefit of ITC to the Applicant @ 75.75. per sq. ft. The Respondent further alleged that Applicant No. 1 was in know of the fact that benefit has been passed on by the Respondent to the buyers much before filing his first application / complaint on 13.11.2018.

46. The Respondent also enclosed a comparison sheet of tax liability on Builders/Developers in pre-GST and post-GST prepared by the Haryana State Screening Committee.

47. Next, the Applicant No. 1 filed his written submissions on 05.10.2019, vide which he again requested for supply of the documents of the Respondent which he had requested vide his earlier submissions dated 17.07.2019, 02.08.2019 and 20.08.2019. He further submitted that since the documents submitted by him (the Applicant No. 1) were being shared with the Respondent, he should also get the confidential documents of the Respondent to file his submissions.

48. The Applicant No. 1 further submitted that if he was not allowed to defend his complaint, it would be a one sided judgement and would thus be against the principles of natural justice and that the contention of the Respondent that he (Applicant No. 1) was not a government body or an auditor or an assessing authority was not relevant. He added that he was a homebuyer and not a third party and that the actions of the Respondent had affected his (Applicant No. 1's) interests adversely and hence he claimed full right to have all the relevant records/ documents/ returns in order to get to know the leakages which might remain hidden from the authorities such as the DGAP. He further contended that no provisions of law stated that the complainant could not defend his suit. The Applicant No. 1 also claimed that in a similar case of ***Shruti Garg & Ors v/s Signature Builders Pvt. Ltd. (Solera-1)***, this Authority vide order dated 08.08.2019 had made available the necessary documents to the applicant and thus, he should also get the documents/information of the Respondent.

49. This apart, The Applicant No. 1 contended that the ledger account pertaining to him, maintained by the Respondent, clearly

showed that full and final payment of Rs. 28,31,181/- (including all taxes) had been received from him (the Applicant No. 1) but the Respondent's submissions before the Authority were different from this truth and were hence untrue.

50. The Applicant No. 1 further averred that the Respondent had misreported before this Authority that the benefit of ITC to the Applicant No. 1 was @ Rs. 75.75. per sq. ft. Contradicting the Respondent's submissions on this issue, the Applicant No. 1 stated that the Respondent had never passed on the benefit but had only offered to do so and that Rs. 75.75 per sq. ft. was only an "offered Rate" which was never passed on by the Respondent.

51. The Respondent filed his next written submissions on 14.10.2019 vide which he submitted that :-

- He had sold his flats within the investigation period.
- He had since applied for completion certificate in the residential project consisting of 980 dwelling units.
- Of the total dwelling units, 44 units were sold after 01.07 2017 i.e. during the GST period and should not have formed part of the profiteering investigation.
- He had also sold 70 units out of the total of 75 units (shops) of the commercial area by December 2018. Out of these, 70 units so sold, 21 units were sold after 01.07.2017 i.e. during the GST period and should not have formed part of the profiteering investigation.
- 5 commercial units, aggregating to total demand of Rs. 2,69,81,920/-, remained unsold as on 31/12/2018.

- He had applied for Occupation Certificate before the Competent Authority on 02.12.2018.
- The project stood completed for occupation by 31.12.2018.

52. The Respondent reiterated his earlier submission that the complaint made by the Applicant No. 1 was false, mischievous and against the facts. The Respondent also claimed that the Applicant No. 1 had filed his complaint before this Authority on 13.11.2018 and the same was thereafter forwarded to the Haryana State Screening Committee. The Committee, within the very short period of time available to it for examining the accuracy and adequacy of the evidence provided in the application, decided to forward the same to the Standing Committee. The Respondent contended that the Screening Committee's letter provided neither any explanation nor any remark with regard to the need for further examination of the complaint. Also, no evidence whatsoever was recorded by the Screening Committee that the Respondent had contravened the provisions of Section 171 of the CGST Act and that neither was he given nor any opportunity of being heard was afforded to him. He further submitted that he (Respondent) had already compensated all his buyers, including Applicant No. 1 in respect of the benefit in the post GST period to the extent of 4.90%. The Respondent further claimed that he had issued credit notes dated 01.08.2018 to his buyers/customers for passing on the benefit on his own accord and as per his own calculations@ Rs. 75.75 per sq. ft. He further added that the receipt of credit notes issued by him had been acknowledged by the complainant as also other customers and that the Applicant No. 1 had also admitted to have received the credit note.

53. The Respondent further submitted that the benefit on account of additional input tax credit to the tune of 10.65% of the turnover has been miscomputed by the DGAP by arbitrarily applying the average method without any proper mechanism.

54. The Respondent also submitted that vide his submissions dated 10.04.2019 made before the DGAP, he had furnished an undertaking to reverse an amount of Rs. 7,00,00,091/- (Rupee seven crore and ninety one only) representing input tax credit unavailed by him as per the provisions of Section 18 (4) read with Rule 42 of the CGST Act/Rules. The Respondent further mentioned that the said reversal of ITC was effected in his GST returns (Form GSTR-3B) filed for the month of March 2019. The filing of the said Return was delayed due to his Electronic Credit Ledger account being blocked, thereby holding back ITC of Rs. 1,76,15,353/- due to certain mismatch between his GSTR 3B & GSTR 2A Returns. He added that the GST Return for March 2019 was subsequently filed by him in June 2019 when his Electronic Credit Ledger account was finally unblocked and once the GST credit in the electronic credit ledger was released, the reversal of ITC of Rs. 7,00,00,091/- was reflected in the above Return and the same was also intimated to the DGAP. However, the DGAP in his Report dated 14.06.2019, rejected his claim of reversal of Input Tax Credit of Rs. 7,00,00,091/- made by him in terms of section 18 (4) read with rule 42 of the CGST Act/Rules, on the grounds that the period covered by the DGAP was only from 01.07.2017 to 31.12.2018 and the Respondent still had unsold inventory, in respect of which his output GST liability might arise. The Respondent contended that refusal of the DGAP to consider the said reversal of ITC of Rs.

7,00,00,091/- was unfair as the reversal pertained to the period upto 31.12.2018. The Respondent also averred that the reversal ought to have been factored in the computation of the amount profiteered as the DGAP had himself accepted in his Report that all 980 residential units were sold during the period of his Report, while 70 out of 75 commercial units had been sold before 31.12. 2019.

55. The Respondent further submitted that his ITC was blocked by the jurisdictional Officer of State GST on 12.02.2019 and the same was unblocked on 28.05.2019 and thereafter the Respondent had voluntarily reversed an amount of Rs. 7,00,00,091/- in terms of Rule 42 of the CGST Rules 2017. The Respondent further contended that in the case of M/s Signature Global Developers Private Limited, the DGAP had admitted and factored in the reversal of an amount of Rs. 1,25,00,000/- for computation of the amount of profiteering in terms of sub-section 4 of section 18 read with rule 42 of the CGST Rules.

56. The Respondent further submitted that in para 14 of the DGAP's Report dated 14.06.2019, the DGAP has stated that Applicant No. 1 had not misled this Authority by giving a false complaint. On this issue, the Respondent claimed that the Applicant No. 1 had never filed any complaint on 24.07.2018 as reported by the DGAP and that the covering note of the complaint attaching all the annexures was only filed on 13.11.2018. Hence, the conclusion drawn in the DGAP's Report relating to the date of filing of the complaint by Applicant No. 1 was incorrect. The Respondent also reiterated that the Applicant was in full knowledge of the Respondent having issued credit notes for passing on the benefit of ITC in the post GST period and that

Applicant No. 1's letter dated 07.08.2018 was an admission of receipt of ITC credit at the rate of 75.75 per sq. ft.

57. The Respondent further mentioned that the DGAP, in his Report had alleged profiteering by him of 10.65%. Hence, while accepting that benefit of ITC to the extent of 4.96%, amounting to Rs. 4,08,20,676/- had been passed on, the DGAP had found that the total amount of benefit that needed to be passed on to the flat owners aggregated to Rs. 9,96,18,637/-. On this issue, he drew reference to the study conducted by the State Level Screening Committee of Haryana on tax liability of builders/developers in the pre & post GST periods which mentioned that on an average, the variance in the input tax credit in the post GST period as compared to the pre GST period worked out to approx. 4 to 5%. Further, he contended that a comparative study of certain previous orders passed by this Authority also supported the above claim. The Respondent further averred that on the basis of the ITC stated to have been utilized by him, the comparative utilisation of ITC was in excess of 2.15% in the post GST period as against 10.65% in the DGAP's Report. The Respondent further claimed that the DGAP had incorrectly ignored his reversal of Rs. 7,00,00,091/- of the unavailed input tax credit which pertained to the period upto 31.12.2018. He also stated that even after the reversal of Rs. 7,00,00,091/-, the electronic credit ledger reflected closing balance of approximately Rs. 59 lakh of unadjusted ITC as on 06.06.2019. He also added that the DGAP had also overlooked the fact that the present project stood completed on 31.12.2018 and except for unsold commercial area comprising of 5 units aggregating to 2,652 sq. ft. valued at Rs. 2,69,81,920/-, the entire project was sold within the

period under investigation of the DGAP. Further, out of the sold inventory the following residential flats / commercial units were sold during the post GST period and were therefore out of purview of the provisions of Section 171 of the CGST Act read with Rule 122 to 137 of the CGST Rules:-

i. Shops numbering 21 aggregating Rs. 6,26,05,341/- @ 18% effective @ 12%;

ii. Residential flats numbering 44 aggregating Rs. 9,90,47,070/- @ 12% effective 8%.

58. The Respondent also stated that certain inputs in construction including bricks, stones and dust stone aggregate etc. were exempted from VAT in pre GST period. In post GST period, such inputs suffered GST @ 5%. Therefore, while computing Input GST, the amount of GST on such tax free items had also been considered by the DGAP which was to the detriment of the Respondent and in fact, the GST on such items which earlier were tax free had to be eliminated while computing possible profiteering. He also added that he himself had determined the profiteering of 2.56% as compared to the profiteering determined by the DGAP of 10.65% and the profiteered amount should be Rs. 2,39,45,888.36 as compared to the profiteering calculated by the DGAP of Rs. 9,96,18,637/-. He also submitted that against the recalibrated profiteering at Rs. 2,39,45,888.36, he had already passed on benefit of ITC to his customers of Rs. 4,08,20,676/- i.e. excess benefit of Rs. 1,68,74,787.64 had already been passed on.

59. He further stated that it was trite law for taxing statutes to provide a mechanism for computation of value on which tax was to be

paid and it had been held by several Courts including the Apex Court that in the absence of any computational machinery the charging provisions would be construed to have never included the transactions within its fold and no tax can be levied on such transactions. He further cited the judgements passed in the cases of ***B. C. Srinivasa Setty (1981) 128 ITR 294 (SC), Palai Central Bank Ltd. (1984) 150 ITR 539 (SC) and National Mineral Development Corporation (2004) 65 SCC 281.*** He also contended that the Hon'ble Patna High Court has held in the case ***Larsen & Toubro v State of Bihar 2004 (134) STC 354 (Pat.)*** which was affirmed by Supreme Court in the case of ***Voltas Ltd., (2007) 7 VST 317 (SC)***, that in absence of all exclusions which were to be prescribed for computation of tax, no tax was payable. He further submitted that the recent judgement passed in the case of ***Larsen & Toubro, 2015 SCC Online SC 738***, supra, had also quoted with approval the decisions of the Patna, Madras and Orissa High Courts relating to machinery provisions in following terms:-

"We find that the Patna, Madras and Orissa High Courts have, in fact, either struck down machinery provisions or held machinery provisions to bring indivisible works contracts into the service tax net, as inadequate."

The said judgment had also quoted the judgment of *Hon'ble Supreme Court passed in the case of* ***State of Jharkhand v. Voltas Ltd., East Singhbhum (2007) 9 SCC 266.***

60. The Respondent also claimed that Anti-Profiteering provision under the CGST Act and the Procedure & Methodology drafted as provided in Rule 126 was silent on the timing of the accrual of benefit

in respect of an agreement of supply entered in pre-GST regime where the transfer of property in goods/services took place in the post-GST regime and the timing of the passing on of the same to the buyer. He also mentioned that in a conventional sale of goods/services, the property in goods/services got transferred as intended by the parties and after transferring risk and reward of the goods/services, the recipient became the owner after paying due consideration along with taxes thereon. In a conventional case, the anti-profiteering provisions would become applicable from the time the recipient received the goods/services. He further submitted that in the present case, he was engaged in the development of Affordable Group Housing residential flats. The project was launched on 18.08.2015 with expected completion on 31.12.2018. The transaction entered with the buyer was covered under the definition of works contract involving undivided share of land, transfer of property in goods and services and thus it ought to be treated as a composite works contract.

61. The Respondent also submitted that Section 171 of the CGST Act, 2017 nowhere provided for comparison between the pre GST rate of tax in comparison with the post GST rate of tax and it only stated that any reduction in the rate of tax whether on supply of goods or services or the benefit of input tax credit was to be passed on to the recipients by way of commensurate reduction in prices. He also furnished the Electronic Credit Ledger for the period 01.10.2018 to 14.08.2019 and copy of the letter dated 07.08.2018 issued by Applicant No. 1 to him as part of his submissions.

62. The Respondent again filed written submissions on 21.10.2019 vide which he reiterated his earlier submissions and also submitted

copies of his GSTR 3B Returns for the period of January 2019 to March 2019.

63. Clarification was sought from the DGAP on the Respondent's submissions. The DGAP vide his Report dated 01.11.2019, reported that most of the issues raised by the Respondent in his submissions had been duly considered and incorporated in the DGAP's Report dated 14.06.2019. The DGAP has also reported that his mandate was to conduct investigation based on the recommendation of the Standing Committee on Anti-profiteering. The DGAP further stated that the investigation under Rule 129 of the CGST Rules, 2017 was a time bound matter. In the instant case, since the last date for submission of the Report was approaching, the Draft Report was prepared and put up for approval on 13.06.2019 which was approved and signed by the Director General of Anti-profiteering on 14.06.2019. Moreover, the Respondent had intimated to the DGAP only on 13.06.2019 about the reversal of the ITC of Rs. 7,00,00,091/- vide an e-mail and hence the same could not be incorporated in the DGAP's Report dated 14.06.2019. The DGAP also stated that if the details of reversal of ITC of Rs. 7,00,00,091/- would have been submitted earlier, the same could have been considered appropriately.

64. The DGAP further clarified that under the provisions of the Section 171 of the CGST, 2017 read with Chapter XV of the CGST Rules, 2017, the profiteering, if any, would vary from case to case depending upon the facts and circumstances of each case and the nature of goods or services supplied. Therefore, the average profiteering arrived on the basis of a comprehensive study of different

cases pertaining to different projects and different developers/ builders could not be compared with the computation of any individual case.

65. Regarding the Respondent's submission that on the basis of the ITC stated to have been utilized by him, the comparative utilisation of ITC was in excess of 2.15% in the post GST period as against 10.65% in the DGAP's Report, the DGAP has stated that the claim of the Respondent was incorrect as the Respondent had taken the amount of ITC utilized by him whereas the DGAP in his Report dated 14.06.2019 had considered the amount of ITC availed by the Respondent for making the computation of profiteering in this case.

66. Regarding the Respondent's submission that out of the sold inventory the following residential flats / commercial units were sold during the post GST period and were therefore out of purview of the provisions of Section 171 of the CGST Act read with Rules 122 to 137 of the CGST Rules: -

i. Shops numbering 21 aggregating Rs. 6,26,05,341/- @ 18% effective @ 12%;

ii. Residential flats numbering 44 aggregating Rs. 9,90,47,070/- @ 12% effective 8%.

The DGAP stated the above contention of the Respondent was unacceptable. As the project of the Respondent was launched/started in the pre-GST regime, the benefit of the ITC was required to be passed on by him to all homebuyers even if some of them might have purchased the units (flats/shops) in the post-GST regime.

67. Regarding another claim of the Respondent that certain inputs in construction including bricks, stones and dust stone aggregate etc.

were exempted from VAT in the pre GST period and in post GST period, such inputs suffered GST @ 5%. While computing Input GST, the amount of GST on such tax free items had also been considered by the DGAP which was to the detriment of the Respondent and the GST on such items which earlier were tax free had to be eliminated while computing possible profiteering. The DGAP mentioned that since certain inputs were exempted from VAT in pre-GST period, there was no credit/ ITC of the same in pre-GST period. However, these inputs suffered GST @ 5% in post-GST period and the ITC of the same was available in post-GST period. Therefore, the additional benefit of the said ITC was required to be passed on by him to his homebuyers in terms of Section 171 of the CGST Act, 2017.

68. The DGAP further clarified that the extent of profiteering would vary from case to case depending upon the facts and circumstances of each case and the nature of goods or services supplied. Therefore, the average profiteering arrived at by the Respondent from this Authority's orders and the average profiteering arrived at by the Haryana State Screening Committee on the basis of a comprehensive study could not be compared with an individual case. Further, the calculations made by the Respondent himself were made after taking into account the voluntary reversal of the ITC of Rs. 7,00,00,091/- and hence the amount of profiteering calculated by the Respondent was vastly different from the computation in the report of the DGAP.

69. The Respondent filed further written submissions on 06.11.2019 vide which he requested that the Authority may consider and pass an appropriate order keeping in mind the facts of the case and the precedent as pointed out by him vide his submissions dated

14.10.2019 with regard to his reversal of input tax credit of Rs. 7,00,00,091/-. The Respondent also pointed out that the DGAP has accepted that this submission made by the Respondent has not been incorporated in the Report of the DGAP and hence needed to be considered appropriately. The Respondent also submitted that his submissions were based on the past orders passed by this Authority as also on a study of comparative statement of tax liability on builders/developers in the pre and the post GST periods under taken by the State Level Screening Committee of Haryana. He also stated that the above comments were notwithstanding his submissions dated 14.10.2019 with regard to the provisions of section 171 and the inference drawn by the Respondent with regard to the wording of section and also the fact of its being positioned in Chapter XXI of the CGST Act pertaining to "Miscellaneous Provisions" and not Transitional Provisions" detailed in Chapter XX of the CGST Act. He further requested that his above submissions may be taken on record and the case be concluded without granting any further hearing to him. In case any documents/clarifications were required, the same may be conveyed to him for being submitted to this Authority.

70. This Authority vide Order dated 15.11.2019 had asked the Respondent to submit the details of the amount which he had released to the buyers through credit notes and also the details of the input tax credit reversed by him in the present project. The Respondent vide his letter dated 25.11.2019 furnished the details of the amount released/credited to the buyers of residential & commercial units of the project in terms of section 171 of the CGST Act through credit notes. He also stated that the said credit notes have been adjusted in the

subsequent demand notes issued to the buyers. He also enclosed sample copies of the demand notes for evidencing that the credit notes have been adjusted in the subsequent demands. He also submitted details of the voluntary reversal of the unutilized Input Tax Credit affected by him in terms of first proviso of sub-section 4 of Section 18 of the CGST Act, 2017 amounting to Rs. 7,00,00,091/- (SGST - Rs. 3,04,61,609/-, CGST - Rs. 3,04,61,609/- & IGST- Rs. 90,76,873/-) for the period 01.04.2018 to 31.12.2018 within the time limit prescribed under sub-section 9 of Section 39 of the CGST Act, 2017 in the GST return for the month of March 2019. He also drew reference to CBIC Circular No. 26/26/2017 dated 29/12/2017. The Respondent also submitted a copy of Electronic Credit Ledger showing unutilized Input Tax Credit of Rs. 7,19,46,200 /- after discharge of liability upto the period till 31.12.2018 and a copy of his GST return for the month of March 2019, in which unutilized Input Tax Credit of Rs. 7,00,00,091/- for the period 01.04.2018 to 31.12.2018 (SGST – Rs. 3,04,61,609/-, CGST Rs. 3,04,61,609/-, & IGST of Rs. 90,76,873) has been shown as reversed. He also referred the case of Abhishek v. M/s Signature Global Developers Pvt. Ltd (Order No. 60/2019 dated 21.11.2019) passed by this Authority in which the Authority had allowed the reversal of unutilized input tax credit of Rs. 1,25,00,000/- on similar basis.

71. The Respondent, vide his email dated 03.12.2019, has also enclosed some of the covering letters attached to pre-intimation cum demand letters dated 18.07.2018 issued to the buyers against the residential units vide which he had stated that he was giving the benefit of ITC of Rs. 75.75/- per sq. ft. under Section 171 of the CGST

Act. He also furnished the details of benefit of ITC given by way of commensurate reduction in prices transferred to the buyers through Cheques/Bank Transfers and the details of benefit of ITC credited by way of commensurate reduction in prices transferred to the buyers through Credit Notes and adjusted in demand notes in the MS-Excel sheet.

72. Clarification had also been sought from the DGAP on the Respondent's submissions dated 25.11.2019. The DGAP vide his Report dated 13.12.2019 submitted that the Respondent's submission of passing on the benefit of ITC through credit notes which have been adjusted in the next demand notes of the home buyers have been verified from the documents submitted by the Respondent and the same were duly been considered in Para 22 of the DGAP's Report dated 14.06.2019. The DGAP also mentioned that in respect of ITC reversal, clarification has already been submitted by him vide his Report dated 01.11.2019. However, the reversal of ITC of Rs. 7,00,00,091/- has been verified from the GST returns and Electronic Credit Ledgers of the Respondent. He further stated that this Authority may consider the same and give directions for revising the DGAP's Report dated 14.06.2019 accordingly.

73. The DGAP's Report dated 13.12.2019 was supplied to the Respondent and to the Applicant No. 1 vide order dated 13.12.2019 and both the Respondent and the Applicants were offered an opportunity to make submissions if any by 17.12.2019 positively. The Respondent vide email dated 16.12.2019 requested to conclude his arguments on the basis of the written submissions filed before this Authority from time to time. No reply from the Applicant No. 1 was

received till 17.12.2019. Accordingly, the hearing was closed vide Order of this Authority dated 18.12.2019.

74. We have carefully considered the Reports filed by the DGAP, submissions of the Respondent, the Applicant No. 1 and other material placed on record and it is revealed that the Respondent is executing his "Andour Heights" project under the Affordable Housing Scheme approved by the State of Haryana and is constructing both the residential and commercial units therein. Records also reveal that the Applicant No. 1 had filed an application before the Haryana State Screening Committee on Anti-profiteering and alleged that the Respondent had not passed on the benefit of input tax credit to him by way of commensurate reduction in price, in terms of Section 171 of the Central Goods and Services Tax Act, 2017. The Haryana State Screening Committee on Anti-profiteering conducted a prima facie verification of the application and after having satisfied itself that it was a case of profiteering in as much as the Respondent did not appear to have passed on the benefit of ITC, forwarded the said application with its recommendation to the Standing Committee on Anti-profiteering for further action, in terms of Rule 128 (2) of the above Rules. At the time of filing his application, the Applicant No. 1 had sought anonymity. In the application filed by him, he had complained that the Respondent was not passing on the benefit of ITC to him in respect of the flat purchased from the Respondent. The above application was examined by the Standing Committee in its meeting held on 13.12.2018 and the same was forwarded to the DGAP for detailed investigation as per the provisions of Rule 129 (1) of the CGST Rules, 2017. The DGAP conducted detailed investigation on the above

allegation levelled by the Applicant No. 1 and vide his Report dated 14.06.2019 reported that the Respondent had violated the provisions of Section 171 of the above Act by profiteering an amount of Rs. 5,91,01,833/-, after excluding an amount of Rs. 4,08,20,676/-, which was the benefit claimed to have passed on by the Respondent to his customers/ home buyers. The total profiteered amount for the period 01.07.2017 to 31.12.2018 computed by the DGAP worked out to Rs. 9,96,18,637/- (inclusive of GST) on the base profiteered amount of Rs. 9,10,82,950/-.

75. Records also reveal that the identity of Applicant No. 1 was kept anonymous at his insistence right from the time of filing of the application till the completion of the DGAP's investigation. However, during the first hearing held by this Authority on 17.07.2019, the Applicant No. 1 requested to make him a part of the hearings which this Authority had allowed.

76. We observe that the Applicant No. 1 has claimed that the ledger account maintained by the Respondent clearly shows that full and final payment of Rs. 28,31,181/- (including all taxes) in respect of the unit purchased by him had been received from him (the Applicant No. 1) and thus, the respondent ought to have passed on the benefit of ITC to him. The investigation conducted by the DGAP, who has followed the established methodology of mathematical computation of the amount profiteered, has confirmed that the instant case is one of profiteering. Having gone through the computation undertaken by the DGAP, it is clear that the mathematical methodology adopted by the DGAP is correct and follows the same basis as the methodology invariably followed by the DGAP in all such cases and upheld by this

Authority in its previous orders. We also find that this Authority has notified the Methodology and Procedure vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017 which was also made available on its website for ready reference of the trade. As the facts of each case are different, no fixed mathematical methodology can be prescribed for each case separately but the principles for computation determined by this Authority have been followed in this case too. It is also pertinent that this methodology of computation is strictly in line with the provisions of Section 171 of the CGST Act, 2017. It is also worthwhile to note that this Authority has already determined the Methodology and Procedure under Rule 126 vide its Notification dated 28.03.2018 which is available on its website. However, the basis and the reasons for computing profiteering have been mentioned in Section 171 (1) of the above Act itself which require that "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." Therefore, it is quite clear that both the above benefits are required to be passed on by commensurate reduction in the price on every product to each buyer and in case they are not passed on profiteered amount has to be computed as per the provisions of Section 171 (3A) of the above Act. In view of the above facts no methodology is required to be prescribed by this Authority as the same has been clearly and unambiguously prescribed in the above Section. Therefore, this contention of the Respondent is not correct.

77. Further, another contention of the Respondent is that the State level Screening Committee of Haryana has not given its detailed

findings on why it thought the application filed by the Applicant No. 1 deserved to be looked into in depth by the Standing Committee and thereafter the DGAP. In this context, we observe that the CGST Rules mandate a State level Screening Committee to examine the accuracy and adequacy of the evidence provided in the application to determine whether there was prima-facie evidence to support the claim of the applicant that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has not been passed on to the recipient by way of commensurate reduction in prices and this is exactly what the Screening Committee has correctly done in the instant case. It is pertinent that any investigation under provisions of Section 171 of the Act, ibid, can only be undertaken by the DGAP after the State level Screening Committees carries out a prima-facie examination of an application and the connected evidence supplied by an applicant to sieve out cases of profiteering before these are forwarded to the Standing Committee and then to the DGAP.

78. We observe that the Respondent has contended that in Page No. 1 of the Form APAF-1 dated 13.11.2018 filed by the Applicant No. 1, it has been mentioned by the Applicant No. 1 that the ITC has not been passed fully and that only a meagre figure has been offered to him by the Respondent whereas on page 2 of the same application, the Applicant No. 1 has contradicted himself by selecting "No" as the answer for the question whether benefit of reduction in tax rate has been passed on. Regarding the contention of the Respondent that the Applicant No. 1 had misled the investigation by not disclosing the fact that he (Applicant No. 1) had already received benefit of ITC in terms of Section 171 of the CGST Act, 2017 the DGAP has found that the

Applicant No. 1 had filed his application on 24.07.2018 whereas the respondent has claimed to have issued letters to his buyers on 18.07.2018 wherein he had informed them that he had already started passing on the benefit of ITC to them as per his own computation and that such benefit will be passed to the buyers till March 2019. From the above report of the DGAP, it is clear that at the time of filing of application, the Applicant No. 1 had not actually received the benefit, even if it was assumed that letters had been issued by the Respondent conveying his intent of passing on the benefit of ITC to his customers including the Applicant No. 1. In any case, the above claim of the Respondent does not have any bearing on the proceedings under Section 171 of the Act, ibid, since commensurate benefit of profiteering had, in any case, not been passed on to the buyers at the time of filing of the application or even during the period under investigation. Accordingly, the other contentions of the Respondent questioning the date of the application or inadequacies therein, also become irrelevant. We find it pertinent to mention that as a buyer/consumer, it is not expected of the Applicant No. 1 to have an immaculate knowledge of the documentation related to the application and to have knowledge regarding the exact benefit of ITC that ought to be passed on, which is a matter of investigation by the DGAP. Hence, notwithstanding any clerical anomaly in the Application, the fact that the application has led to the finding of the DGAP after a detailed investigation that the instant case was indeed a case of profiteering is relevant here and hence this contention of the Respondent does not come to his rescue. To sum up, we find that while the applicant has alleged profiteering on the part of the Respondent, the Respondent

has questioned the accuracy of the contents of the application and has also alleged that the application filed by the Applicant No. 1 was baseless and motivated. On this contention, we find that once the investigation by DGAP has revealed that the Respondent has not passed on the commensurate benefit of ITC to his customers/buyers, any inconsistencies in the application or subsequent submissions of the Applicant No. 1 (including those relating to the quantum of tax component paid by the Applicant to the Respondent) become bereft of significance to the outcome of the case. In any case, the amount profiteered by the Respondent has no direct correlation with the total amount of tax paid by the Applicant No. 1 to the Respondent. Thus, the contention of the Applicant No. 1 does not hold good.

79. We also observe that the Applicant No. 1 has continuously questioned the need for retaining the confidentiality of the documents/ records/ returns marked as confidential by the Respondent. We observe that the applicant has cited the case of ***Shruti Garg & Ors v/s Signature Builders Pvt. Ltd. (Solera-1)***, wherein this Authority, vide order dated 08.08.2019, had made available certain documents to the applicant, although these had been marked confidential by the Respondent in that case. Citing the said order of this Authority, the applicant has stated that he should also get copies of the documents/ records/ information pertaining to the Respondent, even if these were marked as confidential. Since this issue was raised continuously by the applicant, after due deliberations, it was decided to not accede to the request of the applicant for reasons which have already been detailed in Para Supra. To repete, it was felt that the information

sought by the Applicant No. 1 contained sensitive business/commercial information relating to various third parties such as details of vendors, suppliers of materials, sub-contractors and home buyers and sharing the same could be prejudicial to the commercial interest of the Respondent. While deciding on this matter, it was also noted by the Authority that facts of this case were different from the facts of the case cited by the Applicant No. 1 and that the documents marked as confidential in the two cases were also different from each other. Hence it was decided to not share the records marked "confidential" with the Applicant No. 1. Thus, in terms of Rule 130 of the CGST Rules, 2017, the records that the Respondent had marked "confidential" were not provided to the Applicant No. 1.

80. We also observe that the Respondent, in his written submissions filed on 14.10.2019, has claimed that the DGAP's Report dated 14.06.2019, has recorded an incorrect finding whilst stating that the Respondent had benefited from additional ITC of 10.65% of the turnover, as this finding was based on the average method applied by the DGAP's on his own accord. In this regard, however, a perusal of the Table B of the DGAP Report makes it clear to us that while computing the ratio of CENVAT/VAT to Turnover, the DGAP has, for the period between April, 2016 to June, 2017 calculated the above ratio on the basis of the figures furnished by the Respondent himself in his Service Tax and the VAT Returns filed during the above period. Similarly, the computation of ratio of ITC to turnover for the period from July 2017 to December 2019 is also based on the Returns and the information, which the Respondent has himself submitted. The Respondent has also supplied the details of the total saleable carpet

area and the total sold area relevant to the turnover for both the above periods. The above ratios have also been worked out by the DGAP for the pre and post GST periods by actual mathematical computation and not on any average basis as has been claimed by the Respondent. Thus, we find no force in this contention of the Respondent.

81. The Respondent has further claimed that he had not been given opportunity by the DGAP to either controvert or respond to the methodology adopted for determining the alleged profiteering. In this context, we find it pertinent to mention that as per the provisions of Rule 129 (1) of the CGST Rules, 2017 the DGAP has been entrusted with the responsibility of carrying out detailed investigation in allegations of profiteering and collection of necessary evidence. However, the DGAP, being an investigating agency, is not required to afford opportunities of hearing to the Respondent. As per the provisions of Rule 129 (3) the DGAP is required to give notice to the Respondent which he has given on 15.01.2019 and hence he has complied with the above provision. Proper and ample opportunities of being heard have been provided to the Respondent by this Authority in which the Respondent has controverted the computations of the DGAP through his written and oral submissions and hence he should have no tenable objection on this ground.

82. The Respondent has further contended that it was settled law that in the taxing statutes mechanism for computation of value should be provided. However, this contention of the Respondent is fallacious, as no tax has been imposed under Section 171 of the above Act. However, adequate machinery has been provided to implement the

Anti-profiteering measures as under Section 171 (2) of the above Act this Authority has been constituted to determine whether the above benefits have been passed on or not. Under Rule 123 Standing and Screening Committees on Anti-Profiteering have been constituted to prima facie look in to the complaints received from the complainants who have been denied the above benefits. Under Rule 129 office of DGAP has been created and empowered to investigate the complaints and under Rule 127 this Authority has been assigned the duty of determining whether these benefits have been passed on not. Under Rule 133 this Authority has been empowered to determine the above benefits, grant them to the eligible recipients and get the profiteered amount deposited. Under Section 171 (3A) of the CGST Act, 2017 read with Rule 133 (3) (d) of the above Rules, this Authority has been given power to impose penalty on the registered persons who do not pass on the above benefits. Under Rule 136 this Authority has been assigned power to get its orders monitored through the tax authorities of the Central or the State Governments. Hence, there is more than the adequate machinery required to implement the Anti-Profiteering measures and hence all the claims made by the Respondent on this ground are incorrect and hence they cannot be accepted.

83. We also observe that the Respondent has also placed reliance on the case of ***Commissioner of Income Tax v. B. C. Srinivasa Setty (1981) 128 ITR 294 (SC)*** while making the above contention. In this connection it is mentioned that no tax has been levied under Section 171 (1) of the above Act and hence no machinery is required to compute it.

84. In view of the reasons given in para supra the law settled in the cases of ***Commissioner of Income Tax Bangalore v. B. C. Srinivasa Setty (1981) 128 ITR 294 (SC)***, ***Palai Central Bank Ltd. (1984) 150 ITR 539 (SC)***, ***National Mineral Development Corporation v. State of M. P. and another (2004) 65 SCC 281 and Larsen & Toubro v. State of Bihar and others 2004 (134) STC 354 (Pat.)*** which was affirmed by the Hon'ble Supreme Court in the case of ***State of Jharkhand and others v. Voltas Ltd. (2007) 7 VST 317 (SC)***, ***Commissioner Central Excise & Customs Kerala & others v. Larsen & Toubro 2015 SCC Online SC 738***, are not being followed.

85. The Respondent has also stated that the Anti-Profiteering provision under the CGST Act and the Procedure & Methodology drafted under Rule 126 was silent on the timing of passing on of the benefit. 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. 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. 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. However, there can be no doubt that the above benefit has to be passed on as soon as the Respondent avails the benefit for discharging his output tax liability by utilising the ITC. Since, the Respondent is utilising the benefit of ITC every month through his GSTR-3B Returns he should also pass on the benefit by commensurate reduction in the price every month. The Respondent cannot use two yardsticks while passing the above benefit by using the ITC every month himself and by claiming that his buyers would be entitled to get the same when the project would be near completion/completed. The Respondent cannot enrich himself at the expense of vulnerable house buyers by denying them the benefit for more than 4 years and use the additional ITC in his business. In case he wants to do so he should also claim the ITC at the time of completion of the project. There is also no provision in the anti-profiteering measures which mentions that the benefit of ITC would be passed on when the flats would be delivered to the buyers. The

execution of the project under the works contract also does not entitle him to pass on the above benefit when the project would be nearing completion/completed. Hence, all the above claims of the Respondent are wrong and hence they cannot be accepted.

86. The Respondent has also submitted that while computing the above benefit the DGAP has not taken in account the rate of tax on those materials, which were tax free in the pre-GST period. This argument of the Respondent is untenable since the DGAP has computed the benefit of additional ITC by comparing the ratios of ITC which was available to him in the pre and the post-GST period and it is clear from his computation that the Respondent has got additional benefit of 10.65% of the turnover. As discussed in para supra the DGAP has also not calculated the profiteered amount by using averages. Hence, the above arguments of the Respondent are incorrect.

87. The Respondent has also contended that he had voluntarily reversed the unutilized Input Tax Credit, amounting to Rs. 7,00,00,091/- (SGST – Rs. 3,04,61,609/-, CGST – Rs. 3,04,61,609/-, & IGST of Rs. 90,76,873/-) for the period 01.04.2018 to 31.12.2018, in terms of first proviso of sub-section 4 of Section 18 of the CGST Act, 2017 within the time limit prescribed under sub-section 9 of section 39 of the CGST Act, 2017 vide his GSTR-3B return filed for the month of March 2019. He has also furnished a copy of Electronic Credit Ledger showing unutilized Input Tax Credit of Rs. 7,19,46,200 /- after discharge of liability upto the period 31.12.2018 along with a copy of the GSTR-3B return for the month of March 2019 which was filed by him in June 2019, vide which unutilized Input Tax Credit of Rs.

7,00,00,091/- for the period 01.04.2018 to 31.12.2018 (SGST – Rs. 3,04,61,609/-, CGST Rs. 3,04,61,609/-, & IGST of Rs. 90,76,873/-) was reversed by him voluntarily.

88. In this context, It is pertinent to mention that the expression "profiteering" as explained under Section 171 of the CGST Act, means the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both. The implication thereof, in respect of the instant case, is that the benefit of ITC which becomes available to the supplier, has to be passed on to the recipients, irrespective of whether the supplier utilizes the benefit or not. In other words, what is relevant to the computation of profiteering is the amount of ITC that became available to the supplier (i.e. the Respondent) and the actual utilization/ reversal thereof is irrelevant for this purpose of the said computation. In other words, what is relevant for the purpose of computation of profiteering is the comparative availability of ITC in the pre-GST and post GST periods (and not what is done therefrom, which could either be payment of tax or reversal as has been done in this case). With this background, we find that in the instant case, it cannot be denied that benefit of ITC became available to the Respondent. It also cannot be denied that the said benefit accrued to him on account of rollout of GST. The fact that the Respondent did benefit on account of ITC is sufficient for the purpose of inclusion of the entire ITC for the computation of the amount of profiteering in terms of Section 171 of the Act, ibid, irrespective of whether and how such ITC was utilized by the Respondent. Hence, in

the instant case, the fact that the Respondent had unutilized credit in his electronic ledger account, which he chose to reverse voluntarily, has no bearing on the computation of profiteering under Section 171 of the CGST Act. Hence we hold that the said reversal of ITC affected by the Respondent on his own accord does not alter the computation of profiteering by the DGAP in any manner. It is apparent that the Respondent has, by his act of reversal of ITC, attempted to deny his customers/homebuyers the benefit of ITC. It is pertinent that this issue has to be seen from the perspective of the legislative intent behind Section 171(1) of the CGST Act, 2017, i.e. protection of the right of the consumers to the benefit of ITC and not as an issue related to leviability of tax.

89. Further, in this context, after having carefully gone through the contentions of the Respondent and the evidence submitted by him, we observe that the reversal of the unutilized credit has been effected by the Respondent even before occupancy certification/ completion certificate was issued by the competent authority. We also observe that the said voluntary reversal of the credit has been effected by the Respondent only in March 2019, i.e. much after the expiry of the period of investigation of the DGAP i.e. from 01.07.2017 to 31.12.2018. Further, Rule 42 of the CGST Rules 20017 lays down the mode of computation of mandatory reversal of the unutilized input tax credits in respect of unsold portions of a real estate project at the time of receipt of completion/ occupancy Certificate or on the date of first Occupancy, whichever is earlier. This is the only method prescribed for reversal of credit under the CGST Rules and the same necessitates that such reversal is effected only after the date on which

completion/ occupancy certificate has been issued or from the date of first occupancy, whichever is earlier. In this case, however, the Respondent has effected the reversal much before the prescribed date and hence the said reversal by the respondent has to be viewed as an act that was carried out with the mala-fide intent of denying the passage of benefit of ITC to his customers/ homebuyers. Further, it is also a fact that the period of investigation by the DGAP in the instant case had ended on 31.12.2018 whereas the reversal was effected in March 2019 and reported in the GST return of March 2019, which was filed only in June 2019 by the Respondent. It is also a fact that at the time of reversal, a number of units were yet to be sold and occupancy certificate had not yet been received, which implies that the act of reversal was not only premature on the part of the Respondent but apparently also an afterthought aimed at hoodwinking the investigation with the sole mens-rea of avoiding the passing on of benefit of ITC to his customers/ homebuyers. The said reversal, having been done without the authority of law, effected much after the period of investigation had ended and it having been effected with mala-fide intent of denying the passing on of the benefit of ITC to the customers/ homebuyers (as envisaged under provisions of Section 171 of the CGST Act, 2017) also leads us to opine that the said reversal does not merit to be considered as material to the instant proceedings and has no bearing on the amount of profiteering computed by the DGAP. The contents of the Circular No. 26/26/2017-GST thus have no bearing on our above finding.

90. We also observe from the submissions of the Respondent dated 14.10.2019, wherein he has cited the case of M/s Signature Global

Developers Pvt. Ltd. and stated that in that case, the DGAP had admitted and given effect to the reversal of an amount of Rs 1,25,00,000/- in view of sub-section 4 of section 18 read with rule 42 of the CGST Act/Rules 2017 and the ITC reversal in view of Rule 42 had been considered by the DGAP for computing the profiteered amount. However, this contention of the Respondent is not established from the Report dated 21.05.2019 submitted by the DGAP in the above case as no such reversal has either been mentioned or allowed by the DGAP. Further, since reversal of ITC is to be done in respect of unsold units or exempted supplies of units as per Rule 42 (E) of CGST Rules, 2017, the same has already been considered in the DGAP's Report. Moreover, profiteering is calculated only in respect of sold units on which GST is being charged by the Respondent from the customers and the effect of reversal of ITC must be treated as "NIL" before receiving of the Occupancy Certificate. Thus, it will not affect the profiteered amount computed by the DGAP. So, the argument that he has reversed the amount of ITC is not relevant to the amount of profiteering calculated by the DGAP in his Report.

91. The Respondent has further claimed that he had himself determined the profiteering in respect of the said project to be 2.56% of the turnover, as compared to the profiteering of 10.65% computed by the DGAP. He has also contended that as per his own calculation, the profiteered amount should work out to Rs. 2,39,45,888.36 as compared to the amount of profiteering calculated by the DGAP, i.e. Rs. 9,96,18,637/-. In this regard, we observe that the profiteering and extent thereof is determined on the basis of facts of each case, which

include the stage of construction in the pre and post GST periods; the comparative accrual of ITC and the turnover (aggregate payments received from homebuyers/ customers) in the two periods; the instalments plans of the customers/ homebuyers; total area sold and the numbers of units sold and units that remain unsold and presence or otherwise of joint venture partners, etc. and hence the mathematical computation and result thereof differs from case to case within the real estate sector. Further, mathematical computation of profiteering in respect of supplies of other sectors, such as FMCG, services or cinema, are even more divergent as the facts in those cases are different from those of the real estate sector. Thus there cannot be any fixed mathematical formulation/methodology for determination of the quantum of benefit to be passed on and that each case has to be decided based on its specific facts. In this case profiteering has been computed by the DGAP on the basis of comparison of the ratios of Input Tax Credit to the total taxable turnover for the pre and post GST periods and we find no infirmity in the computation made by the DGAP.

92. We further observe that the DGAP has reported that the Respondent has claimed to pass on benefit of ITC amounting to Rs. 4,08,20,676/- to his customers/ homebuyers. However, we observe that this claim of the Respondent has not been duly verified at any stage. In this context, we find that a careful perusal of 40 of the ledger accounts of the buyers which have been submitted by the Respondent shows that there is no evidence to suggest that he had passed on the benefit of Rs. 4,08,20,676/- to his 980 home buyers and 75 commercial unit / shop buyers on account of ITC, as there is no entry

that evidences passing on of the benefit of ITC in the ledger accounts of these buyers. For instance, a typical entry of Rs. 42,085/- made in the ledger account on 01.08.2018 of one such homebuyer, Ms. Savitri Devi, who has been allotted unit No. A005 in the above project reads as "Receipt Ref. CRAN/00188/18-19 (38,967.00+ Tax 3118.00)." We find that nowhere has it been mentioned against the said entry that this amount has been credited to the homebuyer on account of benefit of ITC. In the absence of any specific entry which could relate the said credit to the passing on of benefit on account of ITC, we find no grounds to treat the said credit entry as one that evidences passing on of the benefit of ITC, as such credit entries could be on a number of other grounds. Scrutiny of the ledger accounts of the other homebuyers/customers to whom the Respondent has claimed to have passed on the benefit of ITC also shows that similar entries have been made in all such cases on 01.08.2018 itself but the said entries do not mention that these are on account of passing on of the benefit of ITC. Therefore, the claim of the Respondent that he had already passed on the benefit of ITC amounting to Rs. 4,08,20,676/- to his homebuyers/ customers cannot be accepted.

93. We also observe that the provisions of Section 171 (1) of the CGST Act, 2017 are aimed at ensuring that the recipients get the commensurate benefit, in the form of reduction in prices, in case of any tax rate reduction and/or incremental benefit of ITC which has become available to them due to sacrifice made by the State and the Central Govt. from their own tax kitty to provide accommodation to the vulnerable section of society under the Affordable Housing Scheme. The method of interpretation of this provision has been given in the

text of Section 171 of the CGST Act, 2017 itself. We also observe that the said provision clearly links profiteering to be a function of each supply of goods or services or both and hence, profiteering needs to be computed at the level of each tax invoice. From a plain reading of Section 171 (1) of the Act ibid, it is amply clear that the total quantum of profiteering by a registered person is the sum total of all the benefits that stood denied to each of the recipients/consumers individually. Therefore, we hold that the Respondent is under legal obligation to pass on the benefit of ITC to his buyers and he cannot be allowed to appropriate the same.

94. Based on the above facts it is clear that the ITC as a percentage of the turnover that was available to the Respondent during the pre-GST period from April, 2016 to June, 2017 was 4.75% and during the post-GST period from July, 2017 to December, 2018, it was 15.40% as per Table B supra and hence it is established that the Respondent has benefited from the additional ITC to the extent of 10.65% [15.40% (-) 4.75%] of the turnover. Since, the above computations made in Table B have been done on the basis of the records, information and returns furnished by the Respondent himself, the same can be relied upon.

95. It is also clear from the records that the Central Government, on the recommendation of the GST Council, had levied 18% GST with effective rate of 12% in view of 1/3rd abatement on value on the construction service, vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 which was reduced in the case of affordable housing from 12% to 8%, vide Notification No. 1/2018-Central Tax (Rate) dated 25.01.2018. Accordingly, the DGAP has computed the

profiteering by comparing the applicable tax rate and ITC available in the pre-GST period when only VAT@ 4.50% was payable with (1) the post-GST period from 01.07.2017 to 24.01.2018, when the effective GST rate was 12% and (2) with the GST period from 25.01.2018 to 31.12.2018, when the effective GST rate was 8%. Accordingly, the DGAP has calculated the profiteered amount or the benefit to be passed on for the period from 01.07.2017 to 24.01.2018, as Rs. 2,88,98,231/- for the residential flats and commercial shops, which includes 12% GST on the base profiteered amount of Rs. 2,58,01,992/-. He has also computed the amount of benefit of ITC or the profiteered amount that needs to be passed on by the Respondent to his recipients during the period from 25.01.2018 to 31.12.2018 as Rs. 7,07,20,406/- which includes 12% GST on commercial shops and 8% GST on residential flats, on the base profiteered amount of Rs. 6,52,80,958/-. Therefore, the total benefit of ITC which is required to be passed on during the period from 01.07.2017 to 31.12.2018, comes to Rs. 9,96,18,637/- which includes GST @ 12% or 8% on the base profiteered amount of Rs. 9,10,82,950/- as per Table C of the above Report. The home buyer and unit no. wise break-up of this amount has been given by the DGAP vide Annexure-14 of his Report. This amount is inclusive of profiteered amount in respect of the Applicant No. 1. Since, Table C has been prepared on the basis of the information reflected in the Returns filed by the above Respondent and the details submitted by him hence, the computations made in the above Table are taken to be correct and accordingly the profiteered amount is determined as Rs. 9,96,18,637/- as per the details

mentioned above in terms of the provisions of Rule 133 (1) of the CGST Rules, 2017.

96. 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 mentioned in detail of the preceding paras of this Order. As per the provisions of Rule 133 (1) (b) of the CGST Rules, 2017 it is further ordered that the Respondent shall refund the above profiteered amount to the flat buyers as per the details given by the DGAP in Annexure-14 without taking in to account the benefit which he has claimed to have passed on. The above amount shall be passed on by the Respondent along with interest @18% payable from the date from which the excess amount was collected by the Respondent from the buyers till the date of its payment 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 and paid to the eligible house buyers as per their entitlement as per the provisions of CGST/SGST Acts.

97. Since, the DGAP has carried out the present investigation till 31.12.2018 only any further benefit of additional ITC which might accrue to the Respondent shall also be passed on by him to the eligible buyers. The Commissioner CGST/SGST shall ensure that the above benefit is passed on by the Respondent to his recipients as per the provisions of Section 171 of the CGST Act, 2017. In case if the above benefit is not passed in future the Applicant No. 1 or any other buyer shall be at liberty to approach the Haryana State Screening

Committee to launch fresh proceedings against the Respondent as per Section 171 of the CGST Act, 2017.

98. It is also evident from the above narration of facts that the Respondent has denied benefit of ITC to the buyers of the flats and the shops being constructed by him in his Project 'Andour Heights' in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has committed an offence under Section 171 (3A) of the above Act 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 as to why the penalty prescribed under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him. Accordingly, the notice dated 02.07.2019 vide which it was proposed to impose penalty under Section 29, 122-127 of the above Act read with Rule 21 and 133 of the CGST Rules, 2017 is withdrawn to that extent.

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

100. A copy each of this order be supplied to both the Applicants, the Respondent, Commissioners CGST/SGST Haryana as well as the

Principal Secretary (Town & Country Planning), Government of Haryana for necessary action. File be consigned after completion.

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Technical Member

Certified copy

24.12.19

(A.K. Goel)
Secretary, NAA

File No. 22011/NAA/53/Sarvpriya/2019/7490-96

Dated: 24.12.2019

Copy To:-

1. M/s Sarvpriya Securities Pvt. Ltd., 201B, Ground Floor, Tower-A, Signature Tower, South City-1, Gurugram-122001, Haryana.
2. Shri Sushil Kumar Jain, GG III/5, Vikas Puri, New Delhi- 110018.
3. The Commissioner of State Tax, Vanijya Bhavan, Plot No. 1-3, Sector-5, Panchkula, Haryana- 134151,
4. The Commissioner, CGST Gurugram, Plot no. 36 & 37, Sector-32, Gurugram, Haryana-122001,
5. Principal Secretary to Govt. of Haryana, Town & Country Planning Department, Plot No. 3, Sec-18A, Madhya Marg, Chandigarh-160018,
6. Director General Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
7. NAA Website/Guard File.

24.12.19