BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

I.O. No.	07/2020
Date of Institution	03.07.2019
Date of Order	03.01.2020

In the matter of:

1. Sh. Sumit Mansingka, 404, Prangan Tower, Ramprastha Greens, Sector-9, Vaishali, Ghaziabad-201010.
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 E-Homes Infrastructure Pvt. Ltd., Head Office: Dasnac Annexe-I, ECE House, 28A, Kasturba Gandhi Marg, New Delhi-110001.

Respondent

Quorum:-

1. Sh. B. N. Sharma, Chairman
2. Sh. J. C. Chauhan, Technical Member
3. Sh. Amand Shah, Technical Member.

Present:-

1. Sumit Mansingka Applicant No. 1 in person.
2. None for the DGAP.
3. Sh. Sandeep Chilana (Advocate), Sh. Devang Bhasin (Advocate), Sh. RK Tayal (Advocate) and Sh. Subodh Kumar Gupta, CA for the Respondent.

ORDER

1. The instant Report dated 01.07.2019 received on 05.07.2019 has been furnished by the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP), under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the present case are that a complaint dated 18.12.2017 was filed before the Uttar Pradesh State level Screening Committee on Anti-Profiteering by the Applicant No.1 alleging profiteering by the Respondent in respect of purchase of a flat in the Respondent's project "The Jewel of Noida" situated at Plot No. 14, Eco City, Sector-75, Noida, Gautam Budh Nagar, U.P. The Applicant No. 1 had alleged that the Respondent has

not passed on the benefit of Input Tax Credit (ITC) to him by way of commensurate reduction in the price of the flat purchased by him on introduction of GST w.e.f. 01.07.2017. The Uttar Pradesh State Screening Committee examined the said application and observed that the Respondent had not passed on the appropriate benefit of Input Tax Credit to the Applicant No. 1 as the additional Input Tax Credit available to the Respondent should have been apportioned against the instalments towards the price of the flat. The Uttar Pradesh State Screening Committee opined that, prima facie, there was contravention of Section 171 of the Central Goods and Services Tax Act, 2017 and forwarded the said application with his recommendation, to the Standing Committee on Anti-profiteering for further action, in terms of Rule 128 of the Rules. The said reference was then examined by the Standing Committee on Anti-profiteering, in its meeting held on 13.12.2018, the minutes of which were received by the DGAP on 07.01.2019, whereby it was decided to forward the same to the DGAP, to conduct a detailed investigation in the matter.

2. Further, the Applicant No. 1 had submitted the following documents along with his application:

(a) Copy of demand letters issued to him, both pre-GST and post-GST.

(b) Copy of Aadhar Card as proof of identity.

(c) APAF form.

(d) Various e-mails/letters written to the Standing Committee on Anti-profiteering.

(e) Allotment /Cancellation letter issued by the Respondent.

(f) Receipts/Invoices for all the payments made by him.

(g) Stamp duty paper purchased after paying₹4,11,000/-

(h) Grievances filed vide Registration No. DORVU/E/2018/00731 dated 17.04.2018.

(i) Grievances filed vide Registration No. PMOPG/D/2018/0247612 dated 05.07.2018.

(j) Snapshots/photographs of the project/flat of the Applicant showing the date wise status/progress in construction of the flats and also as an evidence that materials were being procured in post-GST era and input credit was being availed.

3. Perusal of the above documents revealed that the Applicant No. 1 had booked a flat in the Respondent's project "The Jewel of Noida", vide application dated 27.04.2016, in the pre-GST era. The Respondent raised demand on the above Applicant on 01.12.2017, post-GST implementation, wherein it was alleged that no benefit of Input Tax Credit was passed on. The Applicant No.1 had requested the Respondent to pass on the

benefit of additional Input Tax Credit to him and upon getting no favourable response from the Respondent, filed an application with the Uttar Pradesh State Screening Committee under Rule 128 of the Rules. The Applicant has also informed that consequent to his filing the application, the Respondent unilaterally cancelled the allotment of his flat.

4. The DGAP after receiving the said reference from the Standing Committee on Anti-profiteering issued a Notice under Rule 129 of the CGST Rules, 2017 on 16.01.2019, 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 said Notice, the Respondent was also given an opportunity to inspect the non-confidential evidences/information submitted by the Applicant No. 1 during the period 21.01.2019 to 23.01.2019, which the authorized signatory of the Respondent availed of on 23.01.2019.Vide e-mail dated 06.06.2019, the above Applicant was also afforded an opportunity to inspect the non-confidential documents/reply furnished by the Respondent on 10.06.2019 or11.06.2019, which the Applicant eventually availed of on 18.06.2019.

5. The period covered by the current investigation is from 01.07.2017 to 31.12.2018. The time limit to complete the investigation by the DGAP was extended up to 06.07.2019 by the National Anti-Profiteering Authority, vide letter dated 10.04.2019, in terms of Rule 129(6) of the Rules.

6. The DGAP further stated that as complete and relevant documents were not submitted by the Respondent even after repeated reminders, Summons under Section 70 of the Central Goods and Services Tax Act, 2017 read with Rule 132 of the Rules was issued on 22.05.2019to Sh. Jinender Kumar Jain (Director of the Respondent's company), to appear before the Superintendent of the Directorate General of Anti-Profiteering on 03.06.2019 and produce the relevant documents. In response to the above Summons, Sh. R.K. Tayal, counsel along with representatives of the Respondent, appeared before the Superintendent of the Directorate General of Anti-profiteering on 03.06.2019 and submitted certain documents and informed that the Director was occupied with the marriage of his daughter and sought some more time to submit the remaining documents. Further another Summons was issued on 18.06.2019 to produce the relevant documents and in response of the second summon Sh. Rajendra Pant, authorised representative of the Respondent, appeared before the

Superintendent of the Directorate General of Anti profiteering on 21.06.2019and submitted certain documents.

7. The DGAP further stated that the Respondent submitted his replies vide letters/e-mails dated 30.01.2019, 19.02.2019, 12.04.2019,20.05.2019, 31.05.2019, 03.06.2019, 07.06.2019, 17.06.2019 and21.06.2019 and submitted following documents:-

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) Copy of Electronic Credit Ledger for the period01.07.2017 to 31.12.2018.

d) Copies of Tran-1for the period July, 2017 to December, 2017.

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

f) Copies of all demand letters, sale agreement issued to the Applicant.

g) Tax rates, pre-GST and post-GST.

h) List of home buyers in the project "The Jewel of Noida".

8. Further the Respondent submitted the copies of the allotment letter and the agreement, both dated 27.04.2016, in respect of the Applicant No. 1,showing the details of the payment plan, to the DGAP which are furnished in table-'A' below.

TABLE A

S. No.	Stage	Percentage of Basic Sale Price (BSP)
1	On Application	15% of BSP
2	Within 60 days of the Application	30% of BSP
3	At the time of Excavation	10% of BSP
4	At the time of 1st Floor Slab	5% of BSP + Car Parking
5	At the time of 4th Floor Slab	5% of BSP + Lawn/Green Charges
6	At the time of 8th Floor Slab	5% of BSP + Lease Rent & Services
7	At the time of 12th Floor Slab	5% of BSP + Club Membership
8	At the time of 16th Floor Slab	5% of BSP + Corner Charges
9	At the time of 20th Floor Slab	5% of BSP + Floor PLC
10	At the time of top Floor Slab	5% of BSP + Electrification
11	At the time of External Plaster	5% of BSP + Power Backup Charges
12	At the time of Offer of Possession	5% of BSP + IFMS + Other Charges
	Total	**₹ 85,35,000**

9. The DGAP further stated that para 5 of Schedule-III of the Central Goods and Services Tax 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", along with clause (b) of Paragraph 5 of Schedule II of the Central Goods and Services Tax 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 has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier". Thus, it is apparent that the Input Tax Credit pertaining to the residential units which are under construction but not sold is provisional Input Tax Credit which may be required to be reversed by the Respondent, if such units remain unsold at the time of issue of the completion certificate, in terms of Section 17(2) & Section 17(3) of the Central Goods and Services Tax Act, 2017, which read as under:

Section 17 (2) "Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies".

Section 17 (3) "The value of exempt supply under sub-section (2) shall be such as may be prescribed and shall include supplies on which the recipient is liable to pay tax on reverse

charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building".

Therefore, the DGAP claimed that the Input Tax Credit pertaining to the unsold units was outside the scope of this investigation and the Respondent was required to recalibrate the selling price of such units to be sold to the prospective buyers by considering the proportionate additional Input Tax Credit available to them post-GST.

10. The DGAP further observed that prior to 01.07.2017, i.e., before GST was introduced, the Respondent was eligible to avail CENVAT credit of Service Tax paid on the input services. However, CENVAT credit of Central Excise duty paid on the inputs was not admissible as per the CENVAT Credit Rules, 2004, which was in force at the material time. Moreover, the Respondent was paying VAT under Uttar Pradesh VAT Scheme, wherein he was required to discharge his output VAT liability on deemed 10% value addition to the purchase value of the inputs and the Respondent was not charging such VAT from the home buyers. Therefore, there was no direct relation between the turnover reported in the VAT returns for the period April, 2016 to June, 2017, filed by the Respondent and the actual consideration collected by him from the home buyers. Further, post-GST, the Respondent could avail the Input Tax

Credit of GST paid on all the inputs and the input services. The Respondent, vide his letters dated 06.06.2019 and 17.06.2019, provided home-buyer data which were different from the data furnished by them, vide their letter dated 21.06.2019. For several home-buyers against whose name, unit no. and address, demands were raised in the pre-GST era, different set of home-buyers with different addresses, different value of agreement, etc. were mentioned in the data for the post-GST era. Such differences had been separately mentioned in Annex-16 to the DGAP Report. The Respondent, despite all the opportunities provided to him, couldn't provide the reconciled figures of demand raised as per the home-buyers list with either the ST-3 returns for the pre-GST era or the GSTR-1 and GSTR-3B returns for the post-GST era. The Respondent, vide letter dated 12.04.2019, submitted a copy of completion certificate dated 29.11.2017, issued by the Noida Authority, for the towers B, C, D, E and G but couldn't provide any details regarding the bifurcation of the Input Tax Credit in respect of the units sold and the units that remained unsold at the time of issue of completion certificate. The Respondent also couldn't provide any information regarding reversal of the Input Tax Credit with respect to the unsold units in these towers, at the time of receipt of completion certificate. Hence, in the absence of any documentary evidence, for the purpose of calculation of

the ratio of Input Tax Credit to the turnover, the Input Tax Credit and the turnover in respect of all the flats for which demands had been raised, have been taken into account, irrespective of whether the completion certificate had been issued or not. The details of Input Tax Credit availed have been taken from the ST-3 and the GSTR-3B returns, whereas for the purpose of turnover, data provided by the Respondent, vide their letters dated 07.06.2019 and 18.06.2019, have been taken into account. Moreover, since in the pre-GST period, the VAT was paid on deemed value addition which was also not separately recovered from the homebuyers, the Input Tax Credit or VAT has not been taken into account. From the information submitted by the Respondent for the period April, 2016 to December, 2018, the details of the Input Tax Credit availed by him, his turnover from the project "Jewel of Noida" and the ratio of Input Tax Credit to the turnover, during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to December, 2018) periods, have been furnished in table-'B' below:-

Table-B

(Amount in ₹)

S. No.	Particulars	(Pre-GST) April, 2016 to June, 2017	(Post-GST) July, 2017 to December, 2018
1	Credit of Service Tax Paid on Input Services (A)	24,187,067	-
2	Input Tax Credit of VAT Paid on Inputs (B)	-	-
3	Total CENVAT/VAT/Input Tax Credit Available (C)= (A+B)	24,187,067	-
4	Input Tax Credit of GST Availed (D)	-	69,358,310

5	Total Turnover from Residential and Commercial Area (E)	683,170,814	1,297,633,201
6	Total Saleable Residential Area in sq. ft. (F)	1,001,178	1,001,178
8	Area Sold Relevant to Turnover in sq. ft. (G)	390,775	765,595
9	ITC proportionate to Area Sold (H) = (C) or (D) * G/F	9,440,580	53,037,897
11	**Ratio of CENVAT/Input Tax Credit to Turnover (K=J/E)**	1.38%	4.09%

11. The DGAP further claimed 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 1.38% and during the post-GST period (July, 2017 to December, 2018), it was 4.09%. This apparently showed that post-GST, the Respondent had benefited from additional Input Tax Credit to the tune of 2.71% [4.09% (-)1.38%] of the turnover.

12. The DGAP further observed that the Central Government, on the recommendation of the GST Council, had levied 18% GST on construction service (after one third abatement towards value of land, effective GST rate was 12% on the gross value), vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Accordingly, the DGAP has examined the profiteering by comparing the applicable tax and Input Tax Credit available to the Respondent during the pre-GST period (April, 2016 to June, 2017) when Service Tax @ 4.5% was payable with the post-GST period (July, 2017 to December, 2018) when the effective GST rate was 12%. On the basis of

the figures contained in table-'B' above, the comparative figures of Input Tax Credit availed/available as a percentage of the turnover in the pre-GST and post-GST periods as well as the recalibrated basic price and the apparent excess collection (profiteering) during the post-GST period, were tabulated in table-'C' produced below:-

Table 'C'

(Amount in ₹.)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April,2016to June,2017	July,2017 to Dec, 2018
2	Output tax rate (%)	B	4.50%	12.00%
3	Ratio of CENVAT/VAT/GST Input Tax Credit to Total Turnover as per Table - B above (%)	C	1.38%	4.09%
4	Increase in input tax credit availed post-GST (%)	D	-	2.71%
5	**Analysis of Increase in input tax credit:**			
6	Total Basic Demand during July, 2017 to December, 2018	E		1,29,76,33,201
7	GST @12%	F= E*12%		15,57,15,984
8	Total Demand	G= E+F		1,45,33,49,185
9	Recalibrated Basic Price	H=E*(1-D) or 97.29% of E		1,26,24,67,341
10	GST @12%	I=H*12%		15,14,96,081
11	Commensurate Demand Price	J=H + I		1,41,39,63,422
12	**Excess Demand or Profiteered Amount**	**K=G - J**		**3,93,85,763**

13. The DGAP further claimed that the additional Input Tax Credit of 2.71% of the turnover should have resulted in commensurate reduction in the basic price as well as cum-tax price. In terms of Section 171 of the Central Goods and Services Tax Act, 2017, the benefit of such additional Input Tax Credit was required to be passed on by the Respondent to the recipients. The DGAP concluded that by not reducing the pre-GST basic price by 2.71% on account of additional benefit of Input Tax Credit and charging GST @12% on the pre-GST basic price, the

Respondent appear to have contravened Section 171 of the Central Goods and Services Tax Act, 2017. On the basis of the aforesaid CENVAT/Input Tax Credit availability in the pre-GST and post-GST periods and the demands raised by the Respondent on the Applicant and other home buyers on which GST liability @ 12% was discharged by the Respondent during the period 01.07.2017 to 31.12.2018, the amount of benefit of Input Tax Credit not passed on to the recipients or in other words, the profiteered amount comes to ₹3,93,85,763/- which includes 12% GST on the base profiteered amount of ₹3,51,65,860/-. The buyer and unit no. wise break-up of this amount was given in as per the Annex-18 of the Report. Although the Applicant had provided copies of demand letter issued to him and receipt of payments made in the post-GST period, the Respondent didn't mention any demand raised on the Applicant No. 1 in the post-GST era and hence, the Applicant's name doesn't appear in the list of beneficiaries. The same unit no. is mentioned against a new home-buyer by the name of Mrs.Richa Gandhi.

14. The DGAP also observed that the above computation of profiteering was with respect to 426 home buyers from whom the Respondent had received payments in the post-GST period and the services were being supplied in the state of Uttar Pradesh only.

15. The DGAP conclusively submitted that Section 171 of the Central Goods and Services Tax Act, 2017 appears to have been contravened by the Respondent, inasmuch as the benefit of additional Input Tax Credit @2.71% of the demandraisedby the Respondentduring the post-GST period from 01.07.2017 to 31.12.2018, has not been passed on to 426 recipients other than the Applicant. The investigation reveals that the Respondent had realized an excess amount of ₹3,93,85,763/- which includes both the profiteered amount @2.71% of the basic price and GST @ 12% on the said profiteered amount, from 426 recipients who are not Applicants in the present proceedings. He also submitted that the present investigation covers the period from 01.07.2017 to 31.12.2018 and Profiteering, if any, for the period post December, 2018, had not been examined as the exact quantum of Input Tax Credit that would be available to the Respondent in future cannot be determined at this stage, when the construction of the project is yet to be completed.

16. The above DGAP report was considered by the Authority in its meeting held on 09.07.2019 and it was decided to hear the Applicants and the Respondent on 05.08.2019. On 05.08.2019 Sh. Sumit Mansingka, Applicant No. 1 was present in person, none appeared for the DGAP and Sh. Sandeep Chilana, Advocate, Devang Bhasin, Advocate, RK Tayal, Advocate and

Subodh Kumar Gupta, CA appeared for the Respondent. Further hearings were held on 20.08.2019, 03.09.2019, 16.10.2019 and 07.11.2019

17. The Applicant No.1 vide his submissions dated 05.08.2019, 31.08.2019 and 09.12.2019 submitted that he booked a flat in project "The Jewel of Noida" of the Respondent on 27.04.2016 and he also signed a Builder Buyer Agreement on the said date. He remitted entire amount as per agreed payment plan, to the builder along with indirect taxes as and when demanded. He further submitted that although the DGAP in his Report dated 01.07.2019 mentioned that his name did not appeared in the list of beneficiaries of anti-profiteering benefit as the Respondent in the data submitted to the DGAP, had not mentioned any demand raised from him in the post GST period however, he had received a demand letter for clearance of final dues to claim possession on 04.10.2017 i.e post GST period in which there was an exaggerated demand of approximately Rs. 3,67,221 then what was agreed at the time of booking the flat which included an additional amount towards GST and pro-rata recovery of VAT. Aggrieved by this he filed a complaint to the UP State Screening Committee on Anti-Profiteering and Standing Committee on Profiteering. The Complaint was kept pending by the said committees even beyond the time frame in Rule 128 of CGST Rules, 2017and therefore, he wrote a letter

to Finance Ministry and only then the complaint was forwarded by Standing Committee on Anti-Profiteering to the DGAP for investigation.

18. The Applicant No.1 further submitted that the above mentioned facts have not been included in the DGAP Report dated 01.07.2019 and this was vital for his case as the builder has cancelled the allotment of his flat on 28.02.2018. He further alleged that his information/Complaint was divulged by members of "Uttar Pradesh State Screening Committee on Anti-Profiteering" and "Standing Committee on Anti-Profiteering" to the builder under his influence and no action was taken by any of these committees which was supposed to be taken within the pre-defined timelines of 2 months each from the date of receipt of complaint. He also submitted that the builder in order to curb his wrong doings filed a baseless FIR u/s 384 / 504 / 506 of IPC Code 1860 dated 18th July 2018 to harass him further.

19. The Respondent made his submissions vide letters dated 02.08.2019, 20.08.2019, 02.09.2019, 12.09.2019, 06.11.2019, 11.11.2019 and 22.11.2019 which are summarised as follow :-

I. The Respondent submitted that no case of profiteering could be made out for the project under consideration as

no amount of additional ITC benefit has accrued to him and therefore the question of profiteering did not arise and accordingly the Investigation Report issued in this regard was without any basis, in facts and in law.

II. The Respondent submitted that Project 1 and Project 2 were two distinct products and could not be clubbed together for the purposes of the Investigation report. He had launched a residential project named as "Jewel of Noida Phase-I on a plot bearing GH No. 14, Eco City, Sector 75 Noida, Uttar Pradesh consisted of Tower Nos. B, C, D, and E & G" ("Project 1") in 2013. The formal approval of layouts as well as commencement certificate was issued by the Noida Authority on 27.06.2013 and the development of Project 1 began on 01.12.2013. He further submitted that the project was completed in April 2017 itself i.e. much before the introduction of GST which was duly evidenced by completion certificate issued by Noida Authority, which specifically recognized the date of inspection as May 2017, prior to introduction of GST. Much after the completion of Project-1 in April 2017, the Respondent launched another new project named Jewel of Noida Phase-II on GH No. 14, Eco City, Sector 75 Noida, Uttar Pradesh. The new project comprised of only Tower F which and was initiated on the basis of revised

lay out drawing (**"Project 2"**) approved by Noida Authority on 05.11.2018 i.e after introduction of GST, as is evident from RERA registration itself.

Particulars	Project 1	Project 2
Project ID	UPRERAPRJ4327	UPRERAPRJ4350
Start Date	01.12.2013	01.12.2017
Completion Date	April 2017 (Actual completion date as certified by completion certificate)	01.12.2022 (Projected date as declared under RERA)
Saleable Area (approx.)	8.6 lakh	1.4 lakh
Status	Completed	Ongoing

III. He had planned development of the aforesaid land by launching multiple residential projects on such land, in phases at different points of time, with different layouts, cost and pricing structures, target customers etc. He submitted that there was no bar under the law which restricted him from constructing multiple projects on the same piece of land. In other words, it was a prerogative or commercial decision of the Respondent to construct one project or multiple projects on the same piece of land under a common brand of 'Jewel of Noida'. In this regard, reliance was placed on explanation to Section 3 of the

Real Estate (Regulation and Development) Act, 2016 ("RERA Act") which specifically provides that where the land was to be developed in phases, every such phase shall be considered a standalone real estate project and shall obtain separate registration under the RERA Act for each phase. As is evident from record, he had obtained separate registration for Project 1 and Project 2. He also submitted that Project 1 and Project 2 were two independent projects for all legal and factual purposes and the turnovers and ITCs etc. of the two projects cannot be clubbed together for the purposes of determining profiteering, if any.

IV. He also submitted that the clubbing of two separate projects has led to serious distortion in methodology and calculation adopted by the DGAP and therefore both the projects should be looked at independently and the profiteering calculation must be reviewed looking at the data and figures of Project 1 independently. As per the approved building plans received by the Respondent in 2013, Tower F (Project 2) drawing was approved for construction ofinter alia 4 bedroom flats. However, as per the revised drawing plans as submitted him in 2017 for sanction and approval, Tower F drawings were revised to consists of primarily 3 bedroom flats and was only

constructed based on revised drawing which finally got approved on 05.11.2018.

V. He further submitted that no procurement or construction work had started for Project 2 before 01.07.2017 and in fact the first procurement for Project 2 was made on 01.07.2017 as evident from first invoice on which he had claimed ITC for Project 2. The Respondent undertakes and certifies that he had not claimed any ITC of VAT or Service Tax for Project 2 and the first ITC was claimed of GST only. .He further submitted that ITC of Project 1 had not been utilized for payment of GST pertaining to Project 2. He also submitted an Original Chartered Accountant Certificate dated 30.08.2019 to certify the same He also submitted that there was no bar in law to use ITC of Project 2 for payment of GST liability of Project 1 and any such cross utilization would not make two different projects as one, requiring clubbing of turnovers of such projects. He also cited the decision of the Hon'ble Tribunal in the case of CCE, Coimbatore v. Lakshmi Technology & Engineering Indus. Ltd. - 2011 (23) S.T.R. 265 (Tri.-Chennai), wherein it was observed as under:-

"The objection by the Department is that the respondent who is both a service provider and a manufacturer should maintain two separate accounts one in respect of credit

attributable to inputs, capital goods and services meant for excisable goods and credit attributable to capital goods, inputs and services attributable to the service provided by them. Common CENVAT Credit Rules have been framed in terms of powers conferred by Section 37 of the Central Excise Act, 1944 and Section 94 of the Finance Act, 1994. Rule 3(1) enables a 'manufacturer' or a provider of taxable service' to take credit of specified duties and utilize them to discharge duty liability under Rule 3(4) of the CENVAT Credit Rules.A credit can be utilized for payment of any duty of excise on any final product or for payment of service tax on any output service. The respondent is undisputedly registered as a service provider for providing the services of renting of immovable property. The credit taken by them as manufacturer and service provider has been used both for paying excise duty and for paying service tax. The rules permit taking of credit under a common pool and permit use of the credit from the common pool for different purposes, and there is no restriction placed to the effect that credit accounts should be maintained for use for manufacture of excisable goods and for use for providing services."

The aforesaid order was subsequently followed by CESTAT, Mumbai in the case of S.S. Engineers v. CCE, Pune - 2015 (317) E.L.T. 597 (Tri. – Mumbai).

VI. In this regard he also submitted following documents: -

a) A copy of the Sanction Letter and Letter filed by the Respondent for obtaining Completion Certificate for Project 1.

b) A copy of the Completion Certificate issued by Noida Authority

c) Copy of RERA Registrations for Project 1 and Project 2.

d) Chart showing the reconciliation of the construction area/no. of flats as approved from time to time.

e) Statement showing project-wise ITC / CENVAT Credit availed and Turnover as per the statutory returns (VAT, Service Tax, GST) for the period from 01.04.2016 to 31.12.2018.

f) Project wise list of all payments received from each of his buyers and details of ITC benefits passed on to the customers

g) Balance Sheet for the years 2016-17, 2017-18 & 2018-19 along with project wise trial balance for the same period

h) Original Chartered Accountant Certificate dated 30.08.2019 certifying that ITC of Project 1 has not been utilized for payment of GST pertaining to Project 2

i) Copy of GST Returns for the period November 2018 to January 2019

j) Copy of revised sanction plans, relevant portion of agreement with Modern Construction Company and Insurance policy for Project 2.

k) Copy of Original drawing and revised drawings

l) Copy of first invoice for Project 2

VII. He also denied the allegation of the DGAP that the splitting of Project 1 and Project 2 is only an afterthought to escape from clutches of law, he since the very inception of investigation highlighted the fact that the concerned site involves 2 projects and the investigation should be limited to Project 1 for which the complaint is received. This position had been maintained in his replies to the DGAP vide letters dated 19.02.2019 and 12.04.2019. He submitted that the GST laws do not mandate separate registration of each real estate project and therefore the ITC and turnover details were reflected collectively in the GST Returns. single GST registration for Project 1 and Project 2 would not in any manner lead

to the conclusion that Project 1 and Project 2 were one and the same project. He also cited the orders passed by the Authority in the case no. 47/2019 of Gaurav Gulati vs. Paramount Propbuilt Pvt. Ltd (supra)wherein, the authority has accepted the details pertaining to project wise break-up of ITC and turnover and has computed the profiteering with respect to the concerned one project only.

VIII. He further submitted that vide his e-mail dated 07.06.2019 to the DGAP he had already submitted a statement showing the project wise break-up of such ITC and turnover to the DGAP as evident from Annexures 13 & 15 of the Investigation Report and also as Annexure C to the Additional Submissions dated 20.08.2019 filed before the DGAP. However, the DGAP had blatantly ignored the aforesaid

IX. The DGAP in his reply had alleged that the Respondent in his demand letters, receipts/ invoices, cancellation letter etc. had referred both Project 1 and Project 2 as 'Jewel of Noida' only and therefore it was the same project however, every document generated by the Respondent for his customers clearly mentioned the Unit No. and Tower No. which makes it abundantly clear as to whether the same belongs to Project 1 or Project 2. It is not

necessary commercially or in law that the Respondent must mention on his communication that both projects were different projects and so long as in substance both project pertained to different buildings, different specifications etc., The Respondent stated that it must be given the legal consequence and the nomenclature in the receipts, demand letters etc., cannot be a criteria for determining the fact whether the project constructed by the Respondent was single or a separate project. Therefore, he said that any contrary interpretation in this regard would be illegal, devoid of merits and is against the spirit of law. The DGAP has failed to appreciate that the Respondent has duly passed on the benefits of ITC of GST pertaining to Tower F (Project 2) to the flat buyers of Tower F (Project 2) by way of additional discounts and commensurate reduction in price. Fundamentally, such benefits belonging to flat buyers of Tower F (Project 2) could not be passed on again to flat buyers of Tower B, C, D, E & G (Project 1). He further submitted that he had duly passed the benefits on account of ITC of GST by way of price reduction by issuing credit notes to the 9 customers who had paid advances prior to 01.07.2017. Further, the customers who were sold the flats after 01.07.2017, the Respondent was extending appropriate

discounts to give effect to GST benefits which is evident from account confirmations evidencing passing of such discounts/GST benefits to the customers of Project 2.

X. He further submitted that the very purpose of the anti-profiteering provisions under the GST laws that any benefit of ITC available to the Respondent with respect to construction of Tower F (Project 2) can only be passed on to the customers of Tower F (Project 2) and any direction to pass on such benefit to customers of Tower B, C, D, E & G (Project 1) by clubbing turnovers of Project 1 and 2 would not only vitiate the aforesaid basic principles of anti-profiteering but would also lead to unjust enrichment of the customers of Project 1 at the cost of customers of Project 2.

XI. He further also cited the Authority order in the Case No. 45/2019 in Shri Arjun Kumar Parwani v. Signature BuildersPvt. Ltd.

XII. He further submitted that the exclusion of ITC of VAT from profiteering calculations is legally incorrect the DGAP has incorrectly excluded the ITC of VAT from the calculations of 'Total ITC available' to Respondent in the pre-GST period on the grounds i.e. a) VAT has been paid on deemed value addition; and b) VAT has not been recovered from the home buyers.

XIII. He further submitted that in the construction of building being a complex composite contract, different VAT Acts of States provide different formula to arrive at the taxable turnover for the purposes of determining the VAT liability and both the VAT as well as service tax laws in the erstwhile regime provided for deemed value addition formulas for the purposes of arriving at the taxable turnover. The VAT being a 'value added tax', the valuation for discharging VAT liability for composite works contract was to be determined and discharged as per the methodology determined and notified by the VAT Authorities and he had claimed the Input Tax Credit of VAT paid on the purchases made.

XIV. He further submitted that the assessment of developers in the State of Uttar Pradesh was used to be completed by the VAT Authorities by arriving at a taxable turnover on the basis of cost of material purchased plus 21% markup which was then reduced to 10% in lieu of Ho'ble Allahbad High Court Orders for arriving at taxable turnover to execute VAT liability. He further submitted that his eligibility to claim VAT credit is confirmed through various assessment orders of the VAT department, which is uncontroverted.

XV. Regarding the recovery of VAT from customers as VAT, he submitted that he was duly recovering the VAT liabilities on account of VAT from the pre-booked flat owners, in terms of the agreement with customers, which was well within the knowledge of the DGAP as the same was evident from demand letter for recovery of liability of VAT raised on the complainant itself which was a part of the complaint itself. He further cited that in the case of Gaurav Gulati vs. Paramount Propbuilt Pvt. Ltd (supra) it had been held that ITC of VAT was not taken into account as the Respondent therein was neither collecting VAT from his customers nor discharging any output liability. In the instant case, he was duly collecting VAT from its customers on account of VAT and further discharging output VAT liability with the State Government Exchequer. Therefore, the allegation and findings of DGAP that the Respondent was not eligible for ITC of VAT needs to be reconsidered. The DGAP in its counter reply has raised an altogether new ground to allege that VAT ITC is not available to Respondent on the ground that there is no relation between VAT paid on notional value and the VAT collected from home buyer. however, the VAT turnover had been calculated as per the methodology prescribed under the UP VAT Act, 2008 can

in no circumstances match the total turnover which included the consideration services such as labor, consumables, etc. as well as land and which were required to be excluded in terms of the judgment of the Hon'ble Supreme Court in the case of M/s Larsen &Tubro Ltd &Anr Vs State of Karnataka & Anr,Civil Appeal No 8672 of 2013. He also submitted that he only started recovering VAT from his customers (in terms of its agreement) after the issue was decided by the Hon'ble Supreme Court in favor of the VAT Authority and the total VAT payable by him was proportionately divided by the number of flats to arrive at the VAT payable by each customer on pro-rata basis.

XVI. He also submitted the following documents as evidence for his claim of ITC of VAT :-

a) Copy of Assessment Orders passed by the assessing authority under UP VAT Act, 2008 for the Financial Years 2014-15 and 2015-16

b) Copy of Orders passed by the First Appellate (Authority Additional/Joint Commissioner (Appeals) against such Assessment Order for the Financial Years 2014-15 and 2015-16

c) Copy of the assessment order passed by the VAT Authorities for Financial Year 2016-17.

d) Copy of certificate issued by the Deputy Commissioner (VAT) certifying that the Respondent has not availed composition scheme in any financial year 2012-13

e) Copy of the Order dated 06.01.2018 passed by UP VAT Tribunal holding cost plus 10% basis is a fair method for determining the taxable turnover

f) A copy of demand letter recovering the arrears of VAT from the complainant itself

g) Sample Copy of the booking form issued to Applicant No.1

XVIII. He also cited the case of M/s Signature Global Developers Pvt Ltd (Report dated 21.05.2019), M/s Aster Infrahome Pvt Ltd (Report 28.02.2019), M/s Bhartiya City Developers Pvt. Ltd.(Report dated 25.02.2019), M/s Lodha Developers (Report dated 30.05.2018),Puri Constructions Private Limited (Report dated 27.08.2018), S3 Infra Reality Private Limited (Report dated 28.11.2018), Pyramid Infratech Private Limited (Report dated 24.05.2018) and Sattva Developer Private Limited (Report dated 28.02.2019), wherein DGAP had allowed VAT ITC of assessee. He submitted that the finding in the Investigation Report that the Respondent is not eligible for

ITC of VAT is not only arbitrary but is also discriminatory and is violative of Article 14 of the Constitution of India.

XIX. He further submitted that ITC to Turnover ratio for pre-GST period should be calculated from the inception of the Project. Without prejudice to his submissions on Project 1 and Project 2 being independent projects, even when both the projects were treated as one project as alleged in the investigation report, the DGAP in his reply had admitted that the correct manner and methodology for computation of profiteering in a real estate project was to undertake the analysis on complete project basis i.e. for the entire construction of the project from the inception of the project. He also submitted that computation of profiteering in real estate sector cannot be done in a piecemeal manner on financial year basis and would necessarily need to be done on the basis of all procurements of input and input services across several financial years in pre and post GST regime. He further submitted that the reliance of the DGAP on Rule 129(6) of the Central Goods and Services tax Rules, 2017 (**"CGST Rules"**) for undertaking the investigation for split period was without any merits, that the Rule 129(6) of the CGST Rules only provided for the time period within which the DGAP should complete the investigation and did not in

any manner guided that the period of investigation has to be truncated to one or few financial years prior to introduction of GST. Taking only a part of procurements made in one financial year would lead to distorted ITC ratios and the said ratio cannot be considered as average ITC ratio over turnover.

XX. He further submitted that even if the profiteering is determined on the basis of comparison of ITC to turnover ratios of pre-GST and post GST period, such comparison should be made for ITC availed during the total period of construction in pre-GST regime and any comparison of partial or truncated period is bound to vitiate the calculations. He also relied on Order dated 26.09.2019 passed by Hon'ble NAA in case No. 47 of 2019 in the case of Gaurav Gulati vs M/s., Paramount Propbuilt Pvt. Ltd, wherein the Hon'ble NAA while dealing with contention raised with respect to calculation of ITC on complete project basis observed that since the Respondent had not submitted any details of units sold prior to 01.04.2016 and hence the ITC availed by him on the project cannot be rightly assessed. He vide his e-mail dated 21.06.2019 had already submitted the homebuyers data which contains details of flats sold prior to 01.04.2016 and the DGAP must consider the ITC and

turnover of whole project (Phase-I) life in the pre-GST period in order to arrive at average percentage of ITC available on a real estate project, the findings of the DGAP in the Impugned Investigation Report, wherein he had calculated the ITC to turnover ratio for the pre-GST period by taking data of partial / truncated period of 15 months i.e. from 01.04.2016 till 30.06.2017 should be rejected on this ground alone. He also submitted that the DGAP which had never sought ITC details of Service Tax and VAT from the Respondent for the period prior to 2016. The Respondent further tabulated hereunder the details of ITC for the period beginning 2013 for reference:

Sl. No.	Financial Year	ITC VAT (Amount in Rs.)	CENVAT ST (Amount in Rs.)
1.	2013-14	1, 82,22,243	1, 68, 51, 393
2.	2014-15	1, 82, 48, 584	2, 23, 11, 479
3.	2015-16	1, 81, 52, 124	2, 54, 82, 970
4.	2016-17	2, 45, 78, 903	1, 92, 47, 792
5.	2017-18	65, 70, 034	49, 39, 275
	Total	**8, 57, 71, 888**	**8, 88, 32, 909**

XXI. He also submitted copy of the Chartered Accountant Certificate certifying the details of ITC availed by him. The above mentioned claim of VAT ITC was supported by the assessment orders itself. Further, he claimed that the

above mentioned claim of service tax credit is evident from the service tax returns filed by the Company which were already on record with DGAP. He also submitted service tax returns for the period 2013-14 to 2015-16 and VAT assessment order for the financial year 2013-14.

XXII. He also submitted that if the ITC to turnover ratio was considered for the complete project since the inception of project i.e. from 2013-14 to 2017-18 (upto 30.06.2017), the same would be 4.36 % as against ITC to turnover ratio 4.09% in GST regime, which clearly established that he had not made any profiteering on account of GST. He also submitted his own caluclations for the same which is tabulated as below:-

S. No.	Particulars	Pre-GST	Post-GST
1	Credit of Service Tax paid on Input Services(A)	88,832,909	-
2	Input Tax Credit of VAT Paid on Inputs(B)	85,771,888	-
3	Total CENVAT/VAT/Input Tax Credit available '(C)=(A+B)	174,604,797	-
4	Input Tax Credit of GST Availed (D)	-	69,358,310
5	Total Turnover from Residential and Commercial Area ('E)	2,205,408,286	1,297,633,201
6	Total Saleable Residential Area in Sq Ft(F)	1,001,178	1,001,178
7	Area Sold Relevant to Turnover in Sq Ft (G)	550,673	765,595
8	ITC proportionate to Area Sold (H)=('C) or (D)*G/F	96,037,016	53,037,897
9	Ratio of CENVAT/Input Tax Credit to Turnover (I=H/E)-%	4.36	4.09
	Incremental/Decremental		(0.27)

XXIII. He has further submitted that the DGAP had travelled beyond the scope of investigation proceedings by including Project 2 of the Respondent and therefore the investigation proceedings are bad in law as the complaint was made against the flat booked under Project 1 and Project 2 was a different product. He also cited the stay order passed by the Hon'ble Delhi High Court in the case of Reckitt Benckiser India Pvt. Ltd vs. Union of India and OrsWP (C) 7743/2019, wherein DGAP had suo motu assumed jurisdiction with regard to all products of the Company instead of the complained product.

XXIV. He also submitted that in the absence of prescribed method of calculation of profiteering in the Act or the Rules or the procedure, the proceedings were arbitrary and liable to be dropped. In this regard, he relied upon the decision of the Hon'ble Supreme Court in the case of CIT, Bangalore v. BC Srinivas Shetty reported at 1981 2 SCC 460, the Hon'ble Supreme Court held that charging section is not attracted where corresponding computation provision is inapplicable. He also submitted that leaving the mechanism and procedure for determining whether increased benefit of ITC had been passed on by the assessee and whether the same was commensurate to the reduction of prices, to the executive without framing

any guidelines was violative of Articles 14 and 19 of the Constitution of India and therefore the provision of Section 171 of the CGST Act read with Rule 126 of CGST Rules is ultra vires the Constitution of India. Accordingly, the steps taken in pursuance of the same by the standing committee and DGAP were without jurisdiction and arbitrary.

XXV. He also submitted that the Methodology adopted by the DGAP in the present case is for determining the profiteering on the basis of ratio of ITC to turnover is erroneous and contrary to the interpretation of Section 171 for the reasons set out hereunder:

a) DGAP had failed to consider that in case where all civil structure construction work of a project is complete prior to introduction of GST regime, thereby meaning that the builder had already procured all necessary goods and services in the pre-GST regime for completion of the project, no question of additional ITC of GST arises. In such scenario, as in the present case, even when some portion of the consideration was received post GST, negligible additional ITC was available to the builder/developer and therefore no question of applicability of Section 171 of the CGST Act and consequent 'commensurate' reduction of price arises.

b) DGAP had failed to consider that a mere difference in ITC availed pre and post GST era could not be said to be the profit which had accrued to a builder/ developer and there were a number of other factors which needed to be considered such as change in rate of tax on various inputs and input services, etc. For instance, on account of increase in the rate of GST on various inputs /input services from 12.5%/15% to 18%/28% ITC to turnover ratio would be higher but the same did not in any manner reflect availability of additional ITC as the builder/developer incurs additional costs for procuring such services. The comparison of tax rates of certain illustrative items under the erstwhile and post GST regime are reproduced below in tabular form for the illustrative purposes:-

S.No	Description of Inputs/Input Services	Tax Rate under erstwhile Regime	Post GST Tax Rate
1	Architect	15%	18%
2	Brokerage	15%	18%
3	Steel	5.25%	18%
4	Cement	13.5%	28%

It is evident from the above table that there might be various factors which may lead to increase of ITC is post GST numbers in absolute numbers such as paying GST on higher rates but the same does not reflect any

additional ITC credit available and therefore mere comparison of ITC to turnover of pre and post GST period will lead to distorted results.

c) DGAP had failed to appreciate that while the Respondent may have been able to take ITC of the said additional GST paid on account of increase in tax rate, such additional ITC did not in any manner represent additional benefit available to the Respondent and therefore such increased ITC (incurred on account of increase in rate of tax) ought to have been reduced while comparing ITC to turnover ratio in pre and post GST periods.

d) Based on sample analysis of data of few vendors it was evident that he has incurred an additional cost of Rs. 49,08,986 on account of increased rate of GST/customs duty. He mentioned here that such additional ITC amount incurred by the Respondent due to increase in rate of GST is illustrative and not exhaustive. While such additional GST paid by Respondent may have been available as Input Tax Credit to the Respondent, the same must be excluded while determining the benefit available to Respondent on account of additional GST ITC benefit. He submitted that even if such illustrative additional ITC of Rs 49,08,986 was reduced from the ITC of GST claimed post 01.07.2017 as per the Impugned

Investigation Report, the revised ITC amount would stand reduced to Rs. 64,449,324. Accordingly, the ITC to turnover ratio for post GST period would stand lowered to 3.80%. Therefore, the findings of the DGAP in the Impugned Investigation Report is without appreciation of material, factual and legal aspects and deserves to be set aside.The Respondent had already submitted a summary of sample analysis of few procurement obtained from various vendors along with invoices leading to such additional cost on account of increased rates of GST which is Annexure 1 to our Additional Submissions dated 12.09.2019.

e) DGAP had failed to understand that certain inputs in construction including bricks, stones and dust stone aggregate etc. were exempted from VAT in the pre-GST period. However, in the post GST period, such input suffers GST @ 5%. He submitted, while computing the input GST, the amount of GST on such tax free items had been considered by the DGAP which would be detriment to the Respondent. Therefore, he submitted, DGAP while computing profiteering, if any, should have eliminated the GST on such items which earlier were tax free.

f) Also in the Case No. 9/2018 in the matter of Jijrushu N. Bhattacharya V. N. P. (Franchisee of Subway)wherein the Hon'ble NAA held that when the base price of the Hara Bhara Kabab had been increased from Rs.130/- to Rs. 135/- and the Respondent had increased the price to make good the loss which had occurred due to the loss of ITC postGST rate reduced and the increase was commensurate with the increase in the cost of production on the account of denial of ITC, there was no profiteering and there was no violation of Section 171.Accordingly, the Respondent submitted that the ratio of the aforesaid ruling is applicable in the present case since base price of the construction material in the GST regime had gone up and the Respondent had not increased the prices to be charged from the customers.

g) DGAP had failed to appreciate that in a real estate project, the credit availed in a particular period was not at all co-related to the turnover achieved during the same period. Unlike any other manufacturing business, the project life-cycle of a real estate Project spreads over a period of 3-4 years during which the developer continues to construct the building and consequently, avails the credit of the taxes paid in respect of the cost incurred towards the construction. He submitted that generally the

developer is not able to sell all the units at the start of the project and therefore the sales happen anytime during the construction of the project or even after the completion of the project and accordingly, the turnover is reflected in the periodic returns. In such a scenario, he submitted that the methodology adopted by the DGAP to arrive at the profiteering ratio would be distorted since the credit availed would be higher during the construction period and much lower in the completion phase of the project. Accordingly, he deduced that in a real estate business, a ratio based on part of the project lifecycle would never reflect the actual savings to be passed on to the customers and more likely than not provide an incorrect amount of the additional credit as envisaged under Section 171 of the CGST Act.

h) DGAP had failed to consider that ITC had no nexus or correlation to the turnover since ITC of a builder/developer is dependent on the goods and services procured during a financial year and not on the revenues generated. Simply put, the ITC is available on amount of inputs and input services procured by a builder during a particular period and not on the amount of consideration received from a customer. The same becomes more evident from the following illustrations:

i. A builder launches a project and takes loan from bank to start construction, various goods and services are procured by the builder for construction works. However no or negligible amount is received from the customers. In such circumstances, while the ITC amount would be huge, the turnover would be meagre leading to distorted ITC to turnover ratio;

ii. Similarly, in the next years when such builder would receive substantial amount from customer, but the comparative construction would be lower, the ITC to turnover ratio would again get skewed.

iii. Also, for instance, where a builder sells all flats in a year on down payment basis, but the construction takes place in 3 years, ITC to turnover ratio would be highly skewed in 2nd and 3rd year where no payments are received from customers. Similar complexities would arise in scenarios where the flats are sold on different payment plans such as 50:50 payment plans, subventions schemeetc.

Accordingly, he submitted that ITC to turnover ratio is a highly unreliable methodology and comparison of ITC to turnover ratio in different year does not in any manner reflect availability of additional ITC available in the hands of builder.

i) DGAP had failed to consider that unlike other products which have a short production to market cycle, construction of flats take multiple years involving multiple changes in construction costs due to ensuing inflation,etc., and therefore computation of profiteering in such sector could not be done in a piecemeal manner on financial year basis and would necessarily need to be done on a complete project basis that too after duly considering other peripheral issues such as escalations, labour costs,etc.

j) DGAP also failed to ensure that the flats sold by the Respondent post the introduction of GST and the commensurate credits were not included in the calculations as such inclusion would lead to distortionssince the price of such flats were negotiated between the builder and the customers keeping in mind current market conditions including benefits available to builder. The DGAP failed to appreciate that the price so negotiated between the Respondent and the customers for flats sold after introduction of GST are market driven and factors in various discounts/rebates negotiated between the builder and customers taking into consideration all benefits available to the builder.

Therefore, any additional benefit accruing to the Respondent stands duly passed on to the customers.

k) DGAP had failed to appreciate that any change in applicable rate of tax on the supply of goods and services could not be perceived as reason for profiteering. He submitted that as a basic principle of CENVAT Credit, the Respondent was first required to pay tax and then avail the credit. This rule remained applicable under both the regimes i.e. pre-GST and post GST e.g. under the GST regime, the rate of tax on supply of services had increased from 15% to 18%. He submitted that this incremental tax was available as credit to Respondent after payment of tax to the supplier of services who in turn paid this tax to the Government and therefore, to the extent there could not be any profiteering by the Respondent.

l) The DGAP had failed to consider that the term 'Anti-Profiteering' in Section 171 of the CGST Act connotes that no registered person should make additional profits in respect of the taxes not available as credit under the erstwhile regime and hence included in the cost which however, on implementation of GST, did not remain as cost and accordingly such benefit of non-creditable taxes should be passed on the end of the customer. In this

regard, he submitted that the taxes paid on services were available as credit to the Respondent even under the erstwhile regime and the prices were accordingly determined. Since taxes pertaining to services were available as credit under both the regimes, considering such credit while computing the additional benefit on account of Section 171 of the CGST Act would reflect an incorrect profiteered amount. Accordingly, he submitted that credit of taxes paid on services should be excluded for the purpose of computing benefit under the Anti-Profiteering measures.

m) DGAP had failed to seek information/ take into consideration VAT (WCT) paid to subcontractors by the Respondent on turnover and his eligibility to claim ITC of the same as was considered by Hon'ble NAA in case No. 60/2019 in Shri Abhishek v. Signature Global Developers Pvt. Ltdat Para 16, Table B of the order.

n) DGAP had failed to appreciate that the profiteering amount cannot be more than the actual ITC of GST claimed by the company. For instance, in the present case, the Respondent had only availed ITC of Rs. 2,71,85,969 for goods and services procured for its Project 1 whereas the Investigation report concludes that the Respondent has profiteered an amount of Rs.

3,93,85,763, which on the face of it is arbitrary and inconceivable.

XXVI. He has also submitted that he had received a small amount of advance of Rs.13,826,199 towards booking of 9 Flats proposed to be launched in Project 2 for which appropriate price reduction by way of credit note has duly been passed on to the respective customers. He also submitted that all other flats in Project 2 post introduction of GST were sold after appropriate discounts/price correction to give effect to GST benefits. He further submitted that while in the pre-GST regime the customers were negotiating base price of flat with VAT and Service Tax payable extra. However, after introduction of GST, on account of sufficient advertisement by Government as well as competition in market, the customers negotiated all-inclusive prices including GST. The DGAP failed to appreciate that the price so negotiated between the Respondent and the customers for flats sold after introduction of GST were market driven and factors in various discounts/rebates negotiated between the builder and customers taking into consideration all benefits available to the builder. Therefore, he strongly claimed that any additional benefit accruing to him stands duly passed on to the customers.

XXVII. He further submitted that without prejudice to the challenge to methodology, the inclusion of the saleable area, amounts received towards sale of flats as well as ITC of GST on inputs relating to a different project i.e. Project 2 would not be correct and inclusion would lead to distortions. He also submitted that after including ITC of VAT which would legally available to the Respondent and excluding turnovers and ITC of Project 2, which have no correlation with Project 1, the revised ratio calculations as undertaken by the DGAP in Para 19 of his report, Table B, would be as follows:

Sl. No.	Particulars	Project 1 Pre GST April 2016-June 2017	Project 1 Post GST July 2017 – December 2018
1	Credit of Service Tax paid on Input Services (A)	2,41,87,067	-
2	Input Tax Credit of VAT Paid on Inputs(B)	3,12,04,124	-
3	Total CENVAT/VAT/Input Tax Credit Available C=(A+B)	5,53,91,191	-
4	Input Tax Credit of GST Availed (D)	-	2,71,85,969
5	Total turnover from Residential and Commercial Area E	669,344,615	1,180,099,848
6	Total Saleable Residential Area in Sq. Ft. (F)	8,60,178	8,60,178
7	Area Sold Relevant to Turnover in Sq. Ft. (G)	3,75,835	6,99,195
8	ITC Proportionate to Area Sold (H) = C or (D) *G/F	2,42,01,907	2,20,98,093
9	Ratio of CENVAT/Input Tax Credit to Turnover (I=H/E)---%	3.62	1.87
	Incremental		**(1.74)**

He claimed that he had not made any profiteering post introduction of GST and in fact the difference between the

Post GST ITC to Turnover Ratio and pre-GST ITC to Turnover Ratio would be in negative.

XXVIII. He has also submitted that the DGAP had incorrectly included GST already paid by him to Government in value of profiteering and even if he assumed for the sake of argument that there was an excess ITC benefit of 2.71% he should have reduced the base price by 2.71% i.e. by Rs 3,51,65,860, the DGAP has erred in calculating the profiteered amount as Rs. 3,93,85,763/- (as mentioned in Table C of the Investigation Report) by incorrectly including 12% GST on such base profiteered amount which had already been deposited with the Central and state governments and in no manner such amount can be said to have been 'profiteered'.

XXIX. He has challenged the proceedings on following other miscellaneous grounds:-

a. The provisions of CGST Act and Rules made therein pertaining to anti-profiteering which are violative of Article 19(1)(g) of the Constitution of India.

b. Rule 126, 127 and 133 of CGST Rules suffers from the vice of excessive delegation.

c. In absence of judicial member, constitution of NAA is improper.

d. Any order by NAA shall be passed in compliance of the principles of natural justice including the observation of Hon'ble Bombay High Court in the case of Hardcastle Restaurants Pvt. Ltd. & Anr. Vs Union of India & Ors. W.P. No. 3492 of 2018

XXX. In the view of above mentioned grounds he has requested to drop the present proceedings holding that he has not made any profiteering, to direct the DGAP to compute the profiteering only after considering the VAT & Service Tax ITC and turnover for the Project 1 since the beginning of construction in 2013 until 30th June, 2017, exclude the figures and data pertaining to Project 2 which was not within the scope of the investigation; allow the inclusion of VAT Credits for the purposes of calculating the ITC ratio for the period prior to 01.07.2017 and/or without prejudice, direct the Central and State Government to refund any GST amount already deposited by the Respondent on the alleged base profiteered amount directly to the customers.

20. The above submissions of the Respondent were forwarded to the DGAP for filing clarification under Rule 133(2A), the DGAP has filed his supplementary Report dated 17.09.2019 which may be summed up as follow :-

I. The DGAP submitted that during the investigation the Respondent did not inform the DGAP that land for the project was sub-leased. The Respondent did not submit any sale Deed with the Homebuyers. Further regarding the contention of the Respondent, that there were actually two projects viz. Jewel of Noida Project and Jewel of Noida Project 1, it didn't appear to be correct and on going through the complaint of Applicant dated 17.09.2018 it was revealed that he had referred to the project as "The Jewel of Noida" only and not to phase I or phase II also, in the enclosure to the complaint there is Demand Letter dated 04.10.2017 issued by the Respondent in which he had referred to the Applicant's booking in "The Jewel of Noida" and does not refer to phase-I or phase II. In allotment letter dated 27.04.16 by E-homes to the applicant, it was mentioned that the apartment is allotted at "The jewel of Noida". Further in the letter dated 28.02.2018 by the Respondent to the Applicant, it referred to cancellation of unit E-304 at "The Jewel of Noida". It does not refer to phase-I or II or project 1 or 2. Further in receipt/invoices dated 25.04.16, 09.05.16, 24.06.16, 01.07.16, 30.06.16, 25.12.17, 25.12.17, 03.01.18, 03.01.18 issued by the Respondent, it was seen that the name of project mentioned was "The

Jewel of Noida" only and not project 1 or project 2. Further, in the stamp duty paper of 4,11,000/- dated 13.02.18, the property is described as "The Jewel of Noida" and not project 1 or Project 2. The strategy of splitting into Project 1 or 2 was only an afterthought by the Respondent to escape from clutches of law. Further, the Respondent did not submit, separate CENVAT Credit Ledger, bifurcation of ITC across projects and reconciliation of home-buyers data with ST-3 or GSTR returns during the investigation so as to establish the contention that the two projects, as claimed, were separate projects for the purpose of investigation.

II. The DGAP submitted also that the details such as formal approval of layouts as well as commencement certificate for the all the towers as issued by NOIDA Authority were not made available to the DGAP during course of investigation. Through the Respondent stated that the formal approval of layout as well as commencement certificate of the Project 1, as claimed, was Issued by NOIDA Authority on 27.06.2013 but the Respondent is silent on when the same was issued for Project 2, as claimed. Further, these claims and supporting documents for the same were not made available to the DGAP during course of investigation. Completion Certificate dated

29.11.2017 was issued by the NOIDA Authority for some towers of the project. The date of Inspection of a project neither establishes the date of completion of the said project, nor does it establishes that no CENVAT Credit/Input Tax Credit (ITC) can be availed for remaining works related to finishing, etc. Further, the Respondent did not submit any documents to corroborate that Input Tax Credit being availed in post-GST was not linked to these towers. The DGAP report dated 01.07.2019 was based on the facts as submitted by the Respondent during the investigation.

III. The DGAP submitted that as registration under RERA were compulsory under RERA Act, the Respondent, in compliance to UP RERA Rules, obtained two different registrations on 29.07.2017 (copy enclosed) for the project under investigation. The date of issue of Registration Certificate was not linked in any way with availment of CENVAT or Input Tax Credit, or for the purpose of investigation. Details of all the towers as issued by NOIDA Authority were not made available to the DGAP during course of investigation. No evidence had been produced to justify that CENVAT of one tower was not used in other towers or projects. Further the Respondent had claimed to submit details of Output GST

& ITC of GST for project-1 which show that they have availed ITC in post-GST period which is in contradiction of his claim of completion of project in April 2017 ie.pre-GST period.

IV. The DGAP further submitted that the minutes of the Screening Committee contains Information related to other third parties and the views and findings of the members as well as directions expressed therein as official correspondence to the Standing Committee. As a practice minutes of the meeting of Screening Committee or Standing Committee are not shared with the Respondent. All the communication and submissions made therein by the Respondent had been accounted for in Annexure 7-15 of the Report dated 01.01.2019. Reference was received from the Standing Committee on Anti-profiteering on 07.01.2019, the Notice was issued on 16012019 and the last date of submission of report was 06.07.19. The Respondent deliberately delayed the submission of data on one pretext or another. The Respondent even submitted incorrect details of ITC which is corroborated by the fact as the revised data were submitted only on 06.06.2019 and project wise GST calculation were submitted only on 07.06.2019. Also, as claimed by the Respondent that he had submitted project

wise details of calculations vide his submission dated 07.06.2019, the DGAP submitted that in the said reconciliation of turnover and Tax details provided, for the period 01.04.2016 to 30.06.2017 the Respondent showed taxable Turnover for purpose of Service Tax to be Rs. 25,83,67,090/-, whereas in their ST-3 returns the corresponding figure was Rs. 23,69,74,972/- and Gross taxable turnover was of Rs. 66,87,49,135/- Similarly, for the period 01.07.2017 to 31.12.2018 the Respondent showed taxable Turnover for the purpose of GST to be Rs. 28,61,74,373 /-, whereas in its GSTR-3B Returns the corresponding figure is Rs. 28,52,17,352/-. This discrepancy was there even after the revised calculations were submitted. Moreover, the Respondent deliberately did not show any demand details of the Applicant No. 1 in his reconciliation of home-buyers data. Though the said Applicant had submitted copy of demand letter dated 04.10.2017, and copies of payment Invoice issued by the Respondent dated 25.12.2017 and 03.01.2018 all in the post-GST era, the Respondent deliberately did not show the same in the home buyers data in the concerned period, rather showed a different home-buyer details against the same unit. Other discrepancies of the similar nature, i.e: different set of details in home-buyers data

against any particular unit in different time periods were also found and the observation had been reported duly in Annexure 16 of the DGAP report. The Respondent did not supply the home buyers details in the format given by the DGAP. As home-buyers data was not being submitted, Summons were issued after issuing several reminders. There was discrepancy in the data submitted by the Respondent and he admitted to have revised it subsequently. Neither home-buyers data nor its reconciliation with the ST-3/GST returns nor bifurcation of CENVAT/ITC was submitted. The Respondent had not submitted any specific point which has any bearing on calculation of profiteering. Though Summons dated 22.05.2019 and 18.06. 2019 were issued to the Director of the Respondent's firm (M/s E-homes Pty. Ltd.), but the designated person choose not to appear. Further, the persons who appeared on his behalf were neither subjected to any Interrogation nor any voluntary statements were recorded. The Respondent's representative only submitted the documents as prepared by him and brought along by him.

V. The DGAP had followed the standard method as adopted in other cases of similar nature for construction services. The Respondent was always informed that findings of the

investigation will be based upon statutory documents and other details submitted by him, in accordance with the provisions of Section 171 of the CGST Act, 2017 and the Rules made therein. As far as the stay order passed by the Hon'ble High Court of Delhi in case of Reckitt Benckiser India Pvt. Ltd vs. Union of India and ors WP (C) 7743/2019 was concerned Since this was not a final judgment by the Hon'ble High Court, but only a stay order for limited interim relief, the Respondent can't claim benefit based on this. Further, the above case pertained to FMCG, where one product was different from other, and this case was related to supply of service in one project, where benefit of ITC was to be passed on to all the beneficiaries.

VI. He also submitted that the Respondent has wrongly stated that the reference from Standing Committee was with regard to project 1 only. As per Annex 18 of the minutes of meeting of Standing Committee, S. No. 5 pertains to E-homes Infra Pvt. Ltd. in which it was written "Non passing of benefit of ITC to consumer by builder" (copy enclosed). There was no mention of one Project Only. Also, no evidence was made available to the DGAP to conclusively establish the Respondent's claim that these are really two distinct projects, and Project 2 as

claimed, has been launched post-GST and is a completely new one different from the other tower as being claimed. in fact on going through the complaint dated 17.09.2018, he has referred to the project as "The Jewel of Noida" only and not to phase I or phase II. In the enclosure to the complaint there is Demand Letter dated 04.10.2017 issued by the Respondent in which he has referred to the Applicant's booking in "The Jewel of Noida" and does not refer to phase I or phase II. In allotment letter dated 27.04.16 by E norms to the applicant, it is mentioned that the apartment is allotted of "The Jewel of Noida". Further in the letter dated 28.02.2018 by the Respondent to the Applicant, it refers to cancellation of unit E-304 at "The Jewel of Noida". It does not refer to phase-I or II. Further in receipt/invoices dated 25.04.16, 09.05.16, 24.06.16, 01.07.16, 30.06.16, 25.12.17, 25.12.17, 03.01.18, 03.01.18 Issued by the Respondent, it is seen that the name of project mentioned is "The Jewel of Noida" only and not project 1 or project 2 Further, In the stamp duty paper of 4,11,000/- dated 13.02.18, the property is described as "The Jewel of Noida" and not project 1 or Project 2. The strategy of splitting into Project 1 or 2 is only an afterthought by the Respondent to escape from clutches of law.

VII. The DGAP submitted that his report was based on the facts and documents submitted by the Respondent and it was a fact that the Respondent have availed Rs. 6,93,58,310 /- as Input Tax Credit in post-GST period. In the Report dated 01.07.2019, the increase in Input Tax Credit as a percentage of total taxable turnover availed by the Respondent post GST had been quantified. The input or input service wise availability or non-availability of Input Tax Credit prior to and post implementation of GST had not been examined. Further, there should be no extra liability on the Respondent on account of increase in rate of GST compared to Services Tax as the supplier of input services was now also enjoying Input Tax Credit on all the purchases made by him, thus resulting in reduction in effective cost of the materials purchased by them, which should be passed on to the Respondent. Further, as there was no cost escalation clause in the agreements with the buyers, the Respondent would have factored in the increase in the cost of inputs at the time of determining the base price. Further, as per Section 171 of the Central Goods and Services Tax Act, 2017, any reduction in rate of tax on any supply of goods or services or the benefit of Input Tax Credit should be passed on to the recipient by way of commensurate reduction in prices. Thus, the

increase in cost, on account of factors, other than the tax rate or Input Tax Credit could not be offset against the benefit to be passed on due to increased availability of Input Tax Credit.

VIII. He also submitted that the Respondent had submitted a hypothetical situation that in one year Developer launch the project and takes loan from bank to start construction with negligible amount received from customers and in another year receive substantial amount but comparative construction would be lower and also different payment plans. In this regard, the DGAP observed that Respondent utilized credit of Input Tax Credit for making payments of his output GST. The DGAP has considered that there is a direct relation of Input Tax Credit claimed with that of output tax to be paid, as the use of Input Tax Credit is only towards making payment of its output liability. Therefore, Respondent was required to compute the benefit to be passed on to the recipients on the demands raised after considering the Input Tax Credit available.

IX. The DGAP stated that contention of the Respondent that the profiteering needed to be done on a complete project basis may have merit but the profiteering, if any, has to be determined at a given point of time, in terms of Rule

129(6) of the Rules. Therefore, the additional Input Tax Credit available to the Respondent and the amounts received by him from the Applicant and other recipients post implementation of GST, has to be taken into account to determine the benefit of Input Tax Credit that is required to be passed on. Further, as stated above also the increase in cost, on account of factors, other than the tax rate or Input Tax Credit cannot be offset against the benefit to be passed on due to increased availability of Input Tax Credit.

X. The DGAP further claimed that the Respondent has not submitted any documentary evidence like copy of agreement or price breakup sheet to substantiate the claim that the amount negotiated with the home buyers for flats sold post GST period is after adjusting benefit of Input Tax Credit of GST.

XI. He also submitted that the submission regarding co-operation by the Respondent during investigation is Incorrect, as in response to the DGAP Notice dated 16.01.2019 & further letter dated 06.02.2019, 15.02.2019, email dated 18.04.2019, 17.05.2019 Summons dated 22.05.2019 & 18.06.2019, further letter dated 27.05.2019 and 17.06.2019 the Respondent had never submitted complete requisite information/documents, rather tried to

divert the proceeding by submitting the incomplete documents in a piecemeal manner and regularly asking for extension of time to submit the remaining documents. Further, as the investigation was required to be completed in a time bound manner in terms of Rule 129(6) of the Central Goods and Services Tax Rules, 2017. Therefore, the DGAP had to conclude the investigation with the available documents submitted by the Respondent.

XII. He further submitted that his Report dated 01.07.2019 covers all the submissions made by the Respondent during the investigation on or before furnishing the Report (last reply submitted by the Respondent on 21.06.2019 was also duly incorporated in the Report). The DGAP had not left any selective evidence/information/data and addressed all such documents in its report dated 01.07.2019. As regard the e-mail dated 18.06.2019, the DGAP informed that the Respondent had not submitted any document/information of the same and only claimed that all the data and details have been submitted by them.

XIII. The DGAP submitted that the Construction of Building being a complex composite contract, different VAT Acts of States provide different formula to arrive at the taxable turnover for the purposes of determining the VAT liability

and also the eligibility to avail the Input Tax Credit of VAT is also state specific provision and provision of one state cannot be applied to the case of other state and even case of one developer cannot be compared with case of another developer in the same state. Notwithstanding the provisions contained in the Uttar Pradesh Value Added Tax Act and Uttar Pradesh Trade Tax Act, the fact is that the Respondent have discharged their output VAT liability on a notional/deemed taxable value which is 110% of the purchase price of the inputs and the VAT so paid by the Respondent has not been recovered from the home buyers. Since the taxable value for the purpose of output VAT liability of the Respondent is distinct/different from the actual base price raised/collected from the home buyers, the taxable value reflected in the VAT returns of the Respondent had not been considered for computation of profiteering and instead, the demand shown to have been raised in the home buyers list, has been taken into account as any variation in the credit/VAT liability of the Respondent has no impact on the consideration demanded or received by the Respondent from the home buyers. The credit of any input tax is availed to discharge the output tax liability of the tax payer. In this case, the Respondent has discharged his output VAT liability on a

notional/deemed taxable value, which has no relation with the consideration received from the home-buyers. Further the Respondent has charged aprox. 3% VAT (Rs 2,25,893/- on the demand of 7528375 /- from the Applicant), whereas the Respondent has not discharged any VAT on output turnover neither from ITC or via Cash). The Respondent has charged 3% VAT from home-buyers which denotes there is no relation between VAT paid on notional value (as claimed by the Respondent) and the VAT collected from the home buyers. Further, assuming the Respondent discharges 12% (average rate of various inputs) VAT on 10% notional value addition, resulting in 1.2% of the VAT turnover as VAT liability. This would be far lower than the 1.2% of the turnover collected from the home buyers as turnover collected from the home buyers included component of services and profit margins also, whereas the Respondent has charged 3% VAT on amount demanded from them and had not adjusted ITC of VAT availed on inputs against such VAT collected from home-buyers. Therefore exclusion of credit of VAT paid on inputs and collected from buyers, by the DGAP in investigation report dated 01.07.2019 is Just and fair.

XIV. He also submitted that the Respondent had stated that the substantial portion of procurement made by him post-

GST in period July-December 2018 pertains to what he term as Project 2 which was launched in December 2018, however in pre-GST era he had already started receiving advance towards the same, and have lesser procurement for what he have termed as Project-1, which otherwise he claim to be have been already completed pre-GST. The above stand in itself contradicts that these are two different projects. Further, the Respondent did not submit any evidence of reversal of CENVAT/ITC credit against unsold flats as required under Rule 42 of the CGST Rules, 2017, or Rule6(3) of the erstwhile Cenvat Credit Rules 2004, also a reason to establish that all the towers collectively comprise the Project. No documentary evidence has been submitted to conclude that the credit of one tower was not used in other towers.

21. The DGAP has further filed his supplementary Report dated 06.12.2019 which may be summed up as follow:-

I. Regarding treating Project 1 and Project 2 as Independent Project and the analysis of profiteering on complete Project.

- It was submitted that for the determination of profiteering, ratio of Input Tax Credit to Turnover for the period just before introduction of GST was compared with the GST period to ascertain the additional benefit of Input Tax Credit

available with the Respondent Covering entire period prior to introduction of GST has no logic, as calculation of profiteering had nothing to do with the absolute quantum of credit in the pre-GST period and it is related with the ratio of credit that was available to the Supplier prior to GST and additional benefit of Input Tax Credit which was available to the Respondent on account of introduction of GST. He also submitted that, in case of construction service, it was a continuous supply of service and the supply to the recipients though not yet complete, the benefit of additional Input Tax Credit profiteering, if any had to be determined at a given point of time, in terms of Rule 129(6) of the Central Goods and Services Tax Rules, 2017. Therefore, the additional Input Tax Credit available to the Respondent and the amounts received by him from the Applicant and other recipients post implementation of GST has to be taken into account to determine the benefit of Input Tax Credit that is required to be passed on during the period of investigation i.e 01.07.2017 to 31.12.2018. The Respondent's concern that ITC to turnover comparison for the pre GST period must be based on the analysis of entire construction is complete had been dealt in Para 26 of the investigation report dated 01.07.2019, Determination of profiteering in the investigation report had to be carried out in term of

Section 171 of Central Goods and Services Tax Act, 2017 and the Rules made therein for the period covered under the investigation only. This issue related to analysis of profiteering by taking into account the entire period of construction during pre GST era i.e 2013 to 2017 had already been settled and comparison of CENVAT Credit for the period from 01.04.2016 to 30.06.2017 has been accepted by the National Anti-profiteering Authority.

II. Regarding the Respondent's submissions that even though he questions the methodology adopted by the DGAP still the comparison should be made for ITC availed during the total period of construction in pre-GST regimes and any comparison with partial or truncated period as in the DGAP working is bound to vitiate the calculations.

- The DGAP submitted that the additional benefits that accrued to the Respondent on account of rollout of GST had to be passed on to the recipients in terms of Section 171 of the Central Goods and Services Tax Act, 2017, as and when invoices were raised or payments are received. There is no logic behind considering the ITC availed for whole period prior to Introduction of GST Similarly, for post-GST period, as mentioned in Para 8 and 26 of his

investigation Report dated 01.07.2019, investigation period is only from 01.07.2017 to 31.12:2018.

III. Submission regarding admissibility of VAT credit in his case.

- The DGAP submitted that this point has been dealt with in his report dated 01.07.2019. He also stated that the non-admissibility of VAT credit in state of Uttar Pradesh has been settled by NAA in Case of Order No 62/2019. Given that VAT law varies across states, all cases as cited by the Respondent are irrelevant in the matter as they pertain to states other than Uttar Pradesh. He also cited that in case of NAA order 47/2019 of NAA, which is for the state of Uttar Pradesh NAA has already settled DGAP stand on the issue of non-applicability of VAT credit.

IV. The Respondent claims that there are two separate projects in the impugned investigation.

- The DGAP submitted that in absence of conclusive evidence of such claim led to denial of the claim of having to separate projects. The Respondent claims to have duly passed on benefits on account of ITC of GST by way of price reduction by issuing credit notes to the 9 customers who have paid advance in the Tower F of the Project prior to 01.07.2017 However, no documents pointing towards any such claims were made available to DGAP during the

period of investigation. The Respondent submission that was evident from the very purpose of the anti-profiteering provisions under the GST law, that any benefit of ITC available to the Respondent with respect to construction of Tower F could only be passed on to the customers of the tower Only, and any direction to the contrary would be erroneous could have been true only when the inputs purchased for each unit would have been separately purchased or bifurcation of Input Tax Credit would have been provided for each unit separately by the Respondent. However, in the event of Respondent's failure to submit details regarding bifurcation of credit availed by him for the period under investigation for each tower or as being claimed now for different phases and his inability to prove that credit of one tower was not used in another lower suggest that the Respondent's claim is incorrect and misleading. Further on perusal of UP RERA website he observed that for the said project all the Development work including but not limited to Energy Management System Including Use of Renewable Energy, Community Buildings and Other Miscellaneous Work on the plot is common for all towers. The Respondent also didn't made him available the details of CENVAT for different towers for the period covered in the

investigation, reversal of credit for completed towers under Rule 42 for unsold units, if any, or data related to bifurcation of credit for common services across projects and reversal thereof if any, to DGAP. As, regarding the reiteration that the Respondent since the inception of investigation has highlighted that concerned site involves 2 projects and investigation has to be limited to Project 1 only, the DGAP stated that the Respondent repeatedly asserted that Tower B, C, D, E and G were completed and ready for occupation as on the date of inspection of site by the NOIDA Le 16.05.2017 point no, 03 of Reply dated 19.02.2019, Annexure 8 of Report, however, evidence available in form of photographs with time-date stamp enclosed with the application date 17.09.2018 forwarded to the DGAP from the office of Finance Minister, also corroborates the fact that work in the tower E of project was still underway and the Respondent was availing Input Tax Credit of input and input services for the impugned project as a whole. As regards the points raised in para 23, the DGAP requested to refer Annexure 13 of his Report, wherein bifurcation of tower-wise ITC and turnover were not provided and no evidence to corroborate the submission was provided. Further, the facts such as revised approval date and subsequent

dates have no bearing on the anti-profiteering investigation.

V. He also submitted that the investigation report had not in any manner suggested that since there was only one GST registration, therefore two projects as claimed by Respondent are one and same. This had no bearing on the anti-profiteering investigation. Allotment letter, Invoice/demand letters, cancelation letter were only corroborative evidence with respect to the conclusion that towers B, C, D, E, F and G are part of the same project.

VI. He further submitted that that the Section 171 of the CGST Act, 2017 and Chapter XV of the CGST Rules, 2017, require the supplier of gods or services to pass on the benefit of the tax rate reduction to the recipients by way of commensurate reduction in price included both the base price and the tax paid on it if any supplier has charged more tax from the recipients the aforesaid statutory provisions would require that such amount be refunded to the eligible recipients or alternatively deposited in the Consumer Welfare Fund regardless of whether such extra tax collected from the recipient has been deposited in the Government account or not Besides any extra tax returned to the recipients by the supplier by issuing credit note can be declared in the

return filed by such supplier and his tax liability shall stand adjusted to that extent in terms of Section 34 of the CGST Act 2017. Therefore, the option was always open to the Respondent to return the tax amount to the recipients by issuing credit notes and adjusting his tax liability for the subsequent period to that extent.

22. We have carefully considered the Report filed by the DGAP, submissions of the Applicant No. 1, submissions filed by the Respondent from time to time, supplementary Clarification Reports filed by the DGAP and the other material placed on record and find that the DGAP, vide his Report dated 01.07.2019, has claimed that the credit/ ITC as a percentage of the total turnover, which was available to the Respondent during the Pre-GST period was 1.38% whereas during the Post-GST period, this ratio works out to 4.09% and hence the benefit of Input Tax Credit amounting to 2.71% of the turnover, which works out to Rs. 3,93,85,763/- had accrued to the Respondent in the post-GST period and the same was required to be passed on by the Respondent to the recipients.

23. The DGAP has clarified that at the investigation stage, no evidence was made available to him to conclusively establish that the Respondent was executing two distinct projects during the period of investigation. The DGAP had added that in a number of documents produced before him (i.e. the application

filed by the applicant dated 17.09.2018, Demand Letter issued by the Respondent dated 04.10.2017, allotment letter dated 27.04.16 and receipts/invoices dated 25.04.16, 09.05.16, 24.06.16, 01.07.16, 30.06.16, 25.12.17, 25.12.17, 03.01.18 and 03.01.18 issued by the Respondent to the Applicant No. 1; and the stamp duty paper dated 13.02.18), the property was seen described as "The Jewel of Noida" and not as project I or Project II. However, the above said contention of the DGAP is immaterial as every document had mentioned Tower and flat no. to which the unit belong and it is not a conclusive evidence to prove that Project I and II is a common project. Moreover, the Respondent has different RERA registration for the two projects, he has also submitted Copy of revised sanction plans and contract for Project 2. It has been observed that the revised drawing for project II got approval only on 05.11.2018 which endorses the claim of the Respondent that Project 1 and 2 are different project. Also as per Section 3 of the Real Estate (Regulation and Development) Act, 2016 ("RERA Act") it is specifically provided that that where the land is to be developed in phases, every such phase shall be considered a standalone real estate project and shall obtain separate registration under the RERA Act for each phase which has been obtained separately by the Respondent.

24. The DGAP has further contended that the Respondent has not been maintaining separate CENVAT Credit Register, Credit Ledger neither he has filed statutory Returns for the project separately to substantiate his claim of the projects being separate and the Respondent did not submit any documents to corroborate that Input Tax Credit being availed in post-GST was not linked to these towers. However, Separate E-Credit Ledger cannot be maintained when the Respondent has single GST Registration and further the Respondent had claimed to that Input Register, Turnover for the two projects was different. The Respondent is directed to submit the reconciled statement of the same to the DGAP to further substantiate his claim of the two projects being independent.

25. We further observe that the Respondent has submitted following documents to substantiate his claim of the project 1 and 2 being separate projects :-

i. Copy of the Completion Certificate issued by Noida Authority.

ii. Copy of different RERA Registrations for Project 1 and Project 2.

iii. Chart showing the reconciliation of the construction area/no. of flats as approved from time to time.

iv. Reconciliation Statement showing Project wise ITC/CENVAT Credit availed and turnover as per statutory Returns(VAT, Service Tax and GST)

v. Balance Sheet for the years 2016-17, 2017-18 & 2018-19 along with project wise trial balance for the same period.

vi. Chartered Accountant Certificate dated 30.08.2019 certifying that ITC of Project 1 has not been utilized for payment of GST pertaining to Project 2.

vii. Copy of revised sanction plans, relevant portion of agreement with Modern Construction Company and Insurance policy for Project 2.

viii. Copy of Original drawing and revised drawings.

ix. Copy of first invoice for Project 2

x. Copy of Statutory Returns for the period of investigation.

xi. He has also cited the orders of the Authority in case of Gaurav Gulati vs. Paramount Propbuilt Pvt. Ltd and Arjun Kumar Parwani vs. Signature Builders Pvt. Ltd in this regard.

26. We find it evident from the documents placed before us that Project 1 and Project 2 are two separate projects in as much as these relate to two distinct RERA registrations, separate approvals issued by the NOIDA Development Authority, distinct sanction plans/ maps and completely distinct construction schedules, project 1 having been launched and initiated in the pre GST period whereas construction of project 2 started only after the receipt of mandatory approval of the relevant authority on 5.11.2018 and the statutory RERA

registration in December 2017. In this context, we also find it pertinent that it was only after he had received the revised approval of the project 2, he entered into a contract with one M/s Modern Construction Company on 15.02.2019 for construction of the said project 2. The contention of the DGAP that the two projects are covered under the same GST registration and have a common electronic credit ledger cannot be the ground to club the two projects. It is also pertinent to mention here that the records indicate that the Respondent has apportioned the ITC of the two projects and has thus not utilized the ITC of one project for payment of GST pertaining to other project. In similar cases pertaining to other real estate developers and builders, some of whom have also been cited by the Respondent, i.e. M/s Signature Global Pvt. Ltd. and M/s Paramount propbuilt Pvt. Ltd, projects having separate RERA registrations have been investigated independently and disjointedly by the DGAP under provisions of Section 171 of the CGST Act, on the basis of data reconciled from the statutory Returns of the Respondent. Hence, we opine that it will not be in the interest of equity to club project 1 and project 2 in the present case and hence investigation needs to cover these two projects individually in terms of Section 171 of the CGST, 2017 on merits. Hence, we direct the DGAP is investigate afresh by treating the projects separately as has been done in the

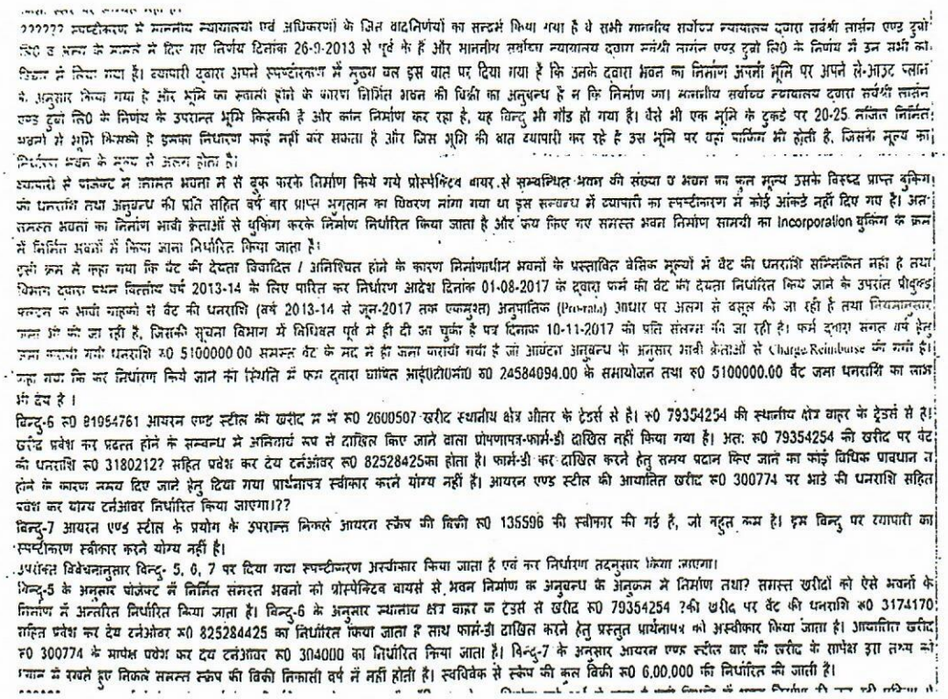
previous cases which has been quoted by the Respondent by taking merits of the two projects into account so that profiteered amount can be tenably computed. The Respondent is also directed to make available all the documents/proofs/evidences desired by the DGAP.

27. Further, the findings of the DGAP in investigation Report dated 01.07.2019 need revisiting and further investigation on following counts:-

I. The DGAP has submitted in his Report dated 01.07.2019 and Supplementary Report dated 17.09.2019 and 06.12.2019 that the Respondent has not cooperated during the investigation in as much as he failed to submit bifurcation of CENVAT Credit Ledger/ITC, reconciliation of homebuyer data with ST-3 or GSTR Returns, formal approval of layouts as well as commencement certificate for projects as issued by NOIDA Authority and certain other documents with were relevant for the investigation under Section -171 of the CGST, 2017. The DGAP also stated that the Respondent deliberately did not show any demand details of the Applicant No. 1 in its reconciliation of home-buyers data, though the said Applicant had submitted copy of demand letter dated 04.10.2017. He also submitted that the Respondent has furnished different set of home buyers details in different submissions. After going through the submissions of the investigating wing i.e

the DGAP, we direct the Respondent to provide to the DGAP all the available data/information/documents and evidences related to the said projects as and when desired by the DGAP. The DGAP is directed to undertake the investigation afresh by treating the two projects separately.

II. The Respondent has also argued that the ITC of VAT has not been incorporated in the computation of profiteering to him even though he fulfills the two conditions as mentioned in the DGAP Report dated 01.07.2019 i.e. a) VAT has been paid on deemed value addition; and b) VAT has not been recovered from the home buyers however, he claimed to fulfils both of these conditions and has also submitted documentary evidence for the same. He has submitted copy of assessment orders passed by the UPVAT Authorities for F.Y 2014-15, 2015-16 and the certificate issued by the Deputy Commissioner (VAT) certifying that he has not availed composition scheme in any financial year after 2012-13. In this context we also take cognizance of VAT assessment order dated 04.11.2019 in respect of the Respondent for the financial year 2016-17, the relevant para of the said assessment order is reproduced below:



The assessment order clearly states that the Respondent has been collecting VAT from his customers for year 2013-14 to Jun-2017 on pro-rata basis and is also depositing the same in accordance with rules. This documentary evidence being in the form of the VAT assessment order passed by the competent authority is indisputable in its own right. Hence it needs careful consideration without following the rhetorical assertion that similar cases have been decided in the identical manner for the state of Uttar Pradesh as each such case has its own distinct facts and has to be decided upon based on whether the conditions for incorporating credit of VAT paid in the pre GST period in the computation of profiteering are fulfilled or not. In view of the above the DGAP is directed to examine the fresh claims made by the Respondent.

III. The Respondent has argued that the DGAP has calculated the ITC to turnover ratio for the pre-GST period by taking data of partial / truncated period of 15 months i.e. from 01.04.2016 till 30.06.2017 while ITC to turnover of pre-GST period should have been calculated on the basis of all credit legally available to him in the total period of construction in pre-GST regimes. He has also quoted the case of M/s Paramount Propbuilt Pvt. Ltd. In this regard, we observe that this claim of the Respondent is required to be addressed adequately..

IV. The Applicant No. 1 has vehemently argued that allotment of his flat was cancelled because he had complained to the State Screening Committee on Anti-Profiteering and Standing Committee on Anti-Profiteering. However, the mandate of the Authority is limited to implementation of the provisions of Section 171 of the CGST 2017 and hence the Applicant No. 1 is at liberty to approach the appropriate forum for redressal of his grievance.

V. The details of reversal of credit as per CGST rules 2017, if any, in respect of those towers/units of the two projects, wherein Completion/ Occupancy Certificate has been received, may also be looked into.

28. To conclude, it is clear to us that this case, including the computation of profiteering in the two projects, need to be

revisited by the DGAP through a thorough investigation, keeping in view the above directions of the Authority that project 1 and project 2 are two separate projects and hence the ITC/turnover of the two cannot be clubbed for the purpose of calculation of profiteering. Needless to say that the entire computation of profiteering will need to be reworked out afresh accordingly, after due consideration of the details/ records/ information that has been submitted by the Respondent before this Authority. We find that further investigation is required in the present case in line with this order, covering therein all the issues in their entirety. Accordingly, the DGAP is directed to reinvestigate the matter and furnish his report in terms of Rule 133(4) of the CGST Rules, 2017 within 02 months from the receipt of this order.

29. A copy each of this order be supplied to both the Applicants and the Respondent for necessary action.

Sd/-	Sd/-	Sd/-
(J. C. Chauhan)	(Amand Shah)	(B. N. Sharma)
Technical Member	Technical Member	Chairman

Certified Copy

3.1.2020

(A.K Goel)

(Secretary, NAA)

File No. 22011/NAA/61/E-Homes/2019/122 Dated: 03.01.2020

Copy to:-

1. M/s E-Homes Infrastructure Pvt. Ltd., Head Office: Dasnac Annexe-I, ECE House, 28A, Kasturba Gandhi Marg, New Delhi-110001.
2. Sh. Sumit Mansingka, 404, Prangan Tower, Ramprastha Greens, Sector-9, Vaishali, Ghaziabad-201010.
3. Director General Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. Guard File/NAA Website.

31.2021