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

Case No.	26/2020
Date of Institution	25.09.2019
Date of Order	15.05.2020

In the matter of:

1. Sh. Rahul Kumar, B-5/22, 1st Floor, Safdarjung Enclave, New Delhi-110029.
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 Emaar MGF Land Ltd., Emaar Business Park, Mehrauli Gurugram Road, Sikanderpur Chowk, Sector-28, Gurugram-Haryana-122002.

Respondent

Quorum:-

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

Present:-

1. None for the Applicant No. 1.
2. None for the Applicant No. 2.
3. Sh. Manish Gaur, Advocate, Sh. Sanjeev Sharma, DGM-Tax, Sh. Tarun Trehan, CA, Sh. R. Chitkara, Advocate and Ms. Disha, Advocate for the Respondent.

ORDER

1. The present Report dated 24.09.2019 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that vide his application dated 07.01.2019 filed before the Standing Committee on Anti-profiteering under Rule 128 (1) of the CGST Rules, 2017, the Applicant No. 1 had alleged profiteering by the Respondent in respect of purchase of Flat No. EFP 24-0501 in "Emerald Floors Premier" project of the Respondent. The above Applicant had also alleged that the Respondent had not passed on the benefit of Input

Tax Credit (ITC) by way of commensurate reduction in the price of the above flat. The aforesaid reference was considered by the Standing Committee on Anti-profiteering, in its meeting held on 11.03.2019, wherein it was decided to forward the same to the DGAP to conduct detailed investigation in to the complaint according to Rule 129 (1) of the CGST Rules, 2017.

2. The above Applicant had furnished the following documents along with his application:-

   (a) Statement of Account as on 03.10.2018 for his unit.

   (b) Facts as known to him regarding the Project.

3. On receipt of the recommendation from the Standing Committee on Anti-profiteering, the DGAP had found from the application filed by the Applicant No. 1 that he had booked a flat in the Respondent's Project "Emerald Floor Premier", on 24.01.2010 i.e. in the pre-GST era. In terms of the instalment plan agreed upon, the above Applicant was to pay the consideration in 12 instalments and prior to coming in to force of the GST he had already paid 10 instalments. As per the above Applicant, vide demand letter issued on 22.09.2017, the Respondent had raised demands equal to Instalments Number 11 and 12, totalling ₹ 9,24,853/- plus GST of ₹ 93,378/-.

4. The DGAP had issued Notice dated 08.04.2019 under Rule 129 (3) of the above Rules, asking the Respondent to intimate as to whether he admitted that the benefit of ITC had not been passed on to the above Applicant by way of commensurate reduction in the price of the flat

and in case it was so, to suo moto compute the quantum of the same and mention it in his reply to the Notice along with the supporting documents. The Respondent was given opportunity to inspect the non-confidential evidence/information furnished by the above Applicant during the period between 15.04.2019 to 17.04.2019 in accordance with Rule 129 (5) of the above Rules and he availed of the said opportunity and inspected the documents on 24.04.2019. Vide e-mail dated 21.08.2019, the above Applicant was also given opportunity to inspect the non-confidential documents/reply submitted by the Respondent on 30.08.2019. However, the Applicant No. 1 did not avail of the said opportunity.

5. The DGAP has covered the period from 01.07.2017 to 31.03.2019 during the current investigation. The time limit to complete the investigation was extended by this Authority, vide its orders dated 19.06.2019 in terms of Rule 129 (6) of the above Rules.

6. The DGAP has stated in his Report that the Respondent had submitted replies vide his letters/e-mails dated 18.04.2019, 25.04.2019, 15.05.2019, 31.05.2019, 18.07.2019, 26.07.2019, 02.08.2019, 16.08.2019, 22.08.2019 and 17.09.2019. The submissions of the Respondent have been summed up by the DGAP as under:-

a) That the unit as referred to in the complaint was one of the categories of the Project "Emerald Estates" which had other category of unit therein too namely "Emerald Estate Apartments". The project "Emerald Estate" was registered with

RERA and the total saleable area of the project was 21,51,306 sq. ft. and it had a total of 1587 units.

b) That the Respondent had been a duly compliant corporate citizen and had complied with the provisions of anti-profiteering as envisaged in Section 171 of the CGST Act, 2017. He had also claimed that he had duly passed on the benefit arising on account of ITC in each demand note raised/yet to be raised to the customers in the GST regime and had been passing on the benefit of 1.64% to the customers of the above Project.

c) That as per the stay order granted by the Hon'ble High Court of Delhi in the case of **M/s Abbott Healthcare Pvt. Ltd. v. Union of India** in (W. P. (C) 4213/2019) the investigation should be restricted only to the unit in respect of which the complaint had been filed or same class of buyers and not to the whole Project.

d) That the Respondent has made an estimated computation of the additional benefit which has accrued to him keeping in view two factors namely (a) benefit of Transitional Stock carried forward in TRAN-1 Form and (b) Saving of taxes on goods/services to be purchased in the GST regime for completion of the Project. This computed benefit has been or would be distributed among the units booked in the pre-GST regime but delivered under the post-GST regime. Details of benefit passed on to the customers were mentioned in his home-buyer's data.

e) That the methodology of comparing the ratio of ITC to the turnover for the pre-GST and the Post GST period, adopted to calculate profiteering by the DGAP would not yield the correct quantum of profiteering. Comparison of the above ratios was not appropriate for the reason that under the real estate sector, there was no correlation of turnover with the cost of construction or development of a project. The turnover reflected the amount collected as per the payment or booking plan issued by the developer which was dependent upon marketing driven strategy. On the contrary, the ITC credit would accrue to a developer on the basis of the actual cost incurred by him while undertaking the development of the project. Thus, accrual of ITC was not dependent on the amount collected from the buyers. Accordingly, calculation of profiteering on the basis of the turnover would not reflect the correct outcome.

f) That the additional ITC in the hands of the Respondent in terms of Section 171 of the CGST Act, 2017 would reflect that ITC on goods or services which was not available earlier. However, the above approach for calculating the additional benefit, which has accrued to the Respondent, had considered the change in the rate of tax on input goods and services, the credit of which was available earlier also but had not considered the tax cost which was earlier blocked in the hands of the Respondent. Hence, the above approach of comparison of ITC to turnover ratio for the

pre-GST and the post-GST period was not a correct approach and thus, was liable to be discarded.

g) That according to the computation made by the Respondent as per his understanding of the methodology adopted by the DGAP and this Authority in its recent orders, there was a net negative additional ITC ratio based on which there was no profiteering at all in his Project.

h) That the CGST Act, 2017 read with the Rules, did not specify the procedure and mechanism of calculation of profiteering, hence the proceedings were arbitrary and liable to be dropped. The above Act and the Rules also did not provide any method or formula of computation to ensure compliance with the anti-profiteering provisions and whether such computation should be made invoice-wise, product-wise, business vertical wise or entity wise. In the absence of the same, it was impossible to defend and explain how the observations and findings on the complaint were incorrect and thus, violative of the principles of natural justice.

i) That the investigation must not go beyond the application submitted by the above Applicant as per the Orders of this Authority passed in case No. 01/2018 and 05/2018. As there was only one applicant who had filed the complaint, the DGAP should not suo-moto assume jurisdiction with regard to other recipients (home-buyers) of the Respondent.

j) That he has decided to pass on the benefit of 4.93% to his customers, despite his earlier decision to pass benefit of 1.64% as communicated in his submissions dated 15.05.2019 and 18.07.2019, wherein he has worked out a net negative benefit post-GST. The benefit has been passed on or would be passed on by way of commensurate reduction in prices.

7. The Respondent has also submitted the following documents/information to the DGAP vide his above mentioned letters/e-mails during the course of the investigation:-

(a) Copies of GSTR-1 Returns for the period from July, 2017 to March, 2019.

(b) Copies of GSTR-3B Returns for the period from July, 2017 to March, 2019.

(c) Electronic Credit Ledger for the period from July, 2017 to March, 2019.

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

(e) Copies of all demand letters, sale agreement/contract issued in the name of the Applicant No. 1.

(f) Details of applicable taxes pre-GST and post-GST.

(g) Copies of Balance Sheets and Cost Audit Reports for FY 2016-17 and 2017-18.

(h) Details of VAT, Service Tax, ITC of VAT, CENVAT Credit for the period from April, 2016 to June, 2017, Output GST and ITC for the period from July, 2017 to March, 2019 for the impugned Project.

(i) CENVAT/ITC register for the FY 2016-17, 2017-18 and 2018-19 reconciled with VAT, ST-3 and GSTR-3B Returns.

(j) List of home-buyers of the impugned Project.

(k) Collaboration Agreement between the Respondent and M/s Sewak Developers Private Limited, Active Promoters Private Limited and Brij Basi Projects Private Limited.

(l) Development Agreements for plots between Sh. Rajiv Kumar and M/s Sewak Developers Private Limited and Smt. Shakuntala and M/s Sewak Developers Private Limited.

8. The DGAP has also stated that all the documents placed on record were carefully examined by him and he had found that the main issues for determination were whether there was reduction in the rate of tax or benefit of ITC on the supply of construction service by the Respondent after implementation of the GST w.e.f. 01.07.2017 and in case it was so, whether the Respondent has passed on the above benefits to the home buyers as per the provisions of Section 171 of the CGST Act, 2017 or not.

9. The DGAP has further stated that Para 5 of Schedule-III of the CGST Act, 2017, defining activities or transactions which would be treated neither as a supply of goods nor a supply of services, reads as "Sale of land and subject to clause (b) of paragraph 5 of Schedule-II, sale of

building". Further, Clause (b) of para 5 of Schedule-II of the Central Goods and Services Tax Act, 2017 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". In the light of these provisions, the DGAP has contended that the ITC pertaining to the units which were under construction but were not sold was provisional ITC that would be required to be reversed by the Respondent, if such units would remain unsold at the time of issue of Completion Certificate (CC), in terms of Section 17 (2) & Section 17 (3) of the Central Goods and Services Tax Act, 2017 which read as under:-

"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.

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 has claimed that the ITC pertaining to the unsold units was outside the scope of this investigation and the Respondent was required to recalibrate the selling prices of such units to be sold to the prospective buyers by considering the net benefit of additional ITC available to him post-GST.

10. The DGAP has also claimed that the Respondent's contention regarding lack of methodology and procedures was not maintainable. Definition of Profiteering has been provided in Explanation to Section 171 (3A) of the Central Goods and Services Tax Act, 2017 which reads as "profiteered shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of ITC to the recipient by way of commensurate reduction in the price of the goods or services or both." He has further claimed that the methodology and procedure for determination of profiteering may vary from case to case, depending on the facts and circumstances of the case as well as the nature of Goods and Services supplied.

11. The DGAP has also submitted that the stay order, granted by the Hon'ble High Court of Delhi in the case of **M/s Abott Healthcare Pvt. Ltd. v. Union of India**, was only an interim stay order and not final judgement of the Hon'ble High Court. Hence its *ratio* would not apply

to the present case. Further, the above case was regarding a product which was being sold in the market and the stay was to limit the adjudication to that product only. The present case was of construction service and the investigation was being limited to one project only out of 23 projects under construction.

12. The DGAP has further submitted that the orders of this Authority cited by the Respondent in his submissions dated 18.07.2019, to restrict the scope of this investigation only to the unit for which the complaint had been filed or same class of buyers and not to the whole project, had been wrongly interpreted and were not relevant to this case. Order No. 01/2018 was related to supply of goods where there was no profiteering in respect of the said product, whereas the other Order No. 05/2018 pertained to the Fast Moving Consumer Goods (FMCG) Sector, where one product was different from another, and there was also no profiteering on the said product. The investigation reports and the final Orders of this Authority in both these cases as quoted by the Respondent, were related to supply of goods on which profiteering was not found. This was not the case in the present investigation. The present case was related to supply of service and the investigation had been kept limited to one project only, where benefit of ITC was to be passed on to all the beneficiaries.

13. The DGAP has also observed from the home-buyer's data submitted by the Respondent that the Respondent's Project "Emerald Estate" has different categories of units viz. Emerald Floors Premier, Emerald Estate, Emerald Estate-School and Emerald Estate EWS. The EWS

units were not categorised as affordable houses and same rate of GST had been charged across all categories.

14. The DGAP has also contended on the claim of the Respondent that he had decided to pass on benefit to the tune of 1.64% and 4.63%, to the customers, and would provide details of such benefit passed on but the Respondent had not explained the basis of his calculations and reasons for difference in his own calculations. In the absence of basis of calculations, there was no reason to admit his claim that he has been passing on the benefit already, however the benefit as claimed has been mentioned in the home-buyers list.

15. The DGAP has further contended that the Respondent has claimed that there was a net negative benefit of credit post-GST, but the calculations made by the Respondent, claimed to be in line with the methodology followed by the DGAP, were not correct, as the Respondent has wrongly claimed credit of WCT (VAT) and even the turnover accounted for has difference from the data provided in the home-buyers details.

16. The DGAP has also intimated that prior to 01.07.2017 i.e. before the GST was introduced, the Respondent was eligible to avail CENVAT credit of Service Tax paid on 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 were in force at the material time.

17. The DGAP has further intimated that the Respondent was paying VAT under the Haryana VAT Act, 2003 under the normal scheme and was eligible to avail ITC on VAT paid on the inputs purchased by him.

However, the Respondent, in his submissions dated 18.07.2019 has claimed VAT credit of ₹1259/- and turnover of ₹9,591/- for the impugned Project for the period from April, 2017 to June, 2017, whereas NIL VAT turnover and NIL VAT credit has been shown for the period from April, 2016 to March, 2017. The issue was examined in detail and it was observed by the DGAP that in total, VAT paid on the purchases made in the State amounted to a total of ₹ 2,67,07,322/- which was for the whole of the State, spread across all projects and not just for the impugned Project. This amount was different from the amount as was claimed in the Respondent's submissions and the Respondent did not submit breakup of the purchases made across projects to justify either the credit of VAT for the impugned Project or the VAT turnover. As, there was no direct relation between the turnover reported in the VAT Returns for the period from April, 2016 to June, 2017, filed by the Respondent and their reconciliation with the actual consideration collected from the home buyers, therefore, the credit of VAT and the VAT turnover was not considered for computation of the ratio of ITC to the turnover for the pre-GST period.

18. The DGAP has also informed that the Respondent has claimed credit for Rebate of VAT (WCT) paid to the registered contractors or sub-contractors claiming credit for the same in the pre-GST period. The DGAP has examined this issue in detail and has reported that there was no deduction claimed on account of payment to the works contractors to claim WCT credit for the Project in his VAT Returns submitted to his office. Moreover, in terms of Section 42 of the Haryana VAT Act, 2003 and the relevant Rules, the liability to pay tax

was jointly upon the developer (Respondent) and his sub-contractors. The Respondent was eligible to claim the ITC of WCT (VAT) credit, even if not paid directly by him, only if, the following conditions were fulfilled:-

a. Tax has been paid by his sub-contractor on the sale of goods involved in execution of the works contract.

b. The assessment of such tax has become final and

c. ITC of such VAT has not been availed by his sub-contractor.

The DGAP has alleged that the Respondent did not submit any evidence in this regard to substantiate his claim of ITC of WCT (VAT) credit. Therefore, the Respondent was not eligible to claim this amount as ITC.

19. The DGAP has further informed that post-GST the Respondent could avail the ITC on GST paid on all the inputs and input services including the sub-contracts. The Respondent vide his submission dated 22.08.2019 has submitted reconciliation of turnover and CENVAT/ITC for all his projects, as in the pre-GST era, the Respondent had a centralized registration for Service Tax, and in post GST era, the GSTR Returns reflected turnover and ITC for the whole State of Haryana and not just the impugned project. Further vide his submissions dated 17.09.2019, the Respondent has submitted the detailed calculations regarding appropriation of common ITC on the

basis of proportionate area of the impugned Project with the total area of active projects across the State in the corresponding period.

20. The DGAP has also stated that the Respondent vide his e-mail dated 02.08.2019 has submitted his home-buyers data wherein he has mentioned several entries which were either negative or were having very petty figures. Clarifications were sought from the Respondent regarding the same and he was asked to submit details of such demands raised vide invoices of such low value and reasons thereof. The Respondent vide his reply dated 17.09.2019 has submitted that such petty demand notes as reflected in the home-buyers list were due to rounding off of the adjustments and the amount did not pertain to demand notes raised from the customers. Further, other petty demands were on account of services such as delayed payment charges or transfer charges and not on account of the basic cost of the unit. Hence for the purpose of investigation, all such negative values and petty demands upto ₹1,000/- have been excluded from the demands raised in the relevant period to get a more accurate figure of turnover. From the information submitted by the Respondent for the period from April, 2016 to March, 2019, the details of the ITC availed by him with respect to the impugned Project, his turnover from the Project "Emaar Floor Premier", the ratio of ITC to the turnover, during the pre-GST period from April, 2016 to June, 2017 and the post-GST period from July, 2017 to March, 2019), has been furnished by the DGAP in the Table-'B' given below:-

Table – B (Amount in Rs.)

S. No.	Particulars	(Pre-GST) April, 2016 to June, 2017	(Post-GST) July, 2017 to March, 2019
1	Credit of Service Tax Paid on Input Services (A)	5,70,76,754	-
2	ITC of VAT Paid on Inputs (B)	-	-
3	Total CENVAT/VAT/ITC Available (C)= (A+B)	5,70,76,754	-
4	ITC of GST Availed (D)	-	21,71,38,646
5	Total Turnover from Residential Area (E)	28,12,08,005	1,00,22,48,168
6	Total Saleable Residential Area in sq. ft. (F)	21,51,306	21,51,306
7	Sold Area Relevant to Turnover in sq. ft. (G)	9,62,588	20,83,211
8	ITC proportionate to Sold Area (H)= (C) or (D) * G/F	2,55,38,626	21,02,65,586
9	**Ratio of CENVAT/ VAT/ITC to Turnover (I=H/E*100)**	**9.08%**	**20.98%**

21. The DGAP has argued from the Table-'B' that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 9.08% and during the post-GST period (July, 2017 to March, 2019), it was 20.98% which clearly confirmed that post-GST, the Respondent has been benefited from additional ITC to the tune of 11.90% [20.98% (-) 9.08%] of the turnover.

22. The DGAP has further argued that the Central Government, on the recommendation of the GST Council, has 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. The Respondent vide his submissions dated 18.07.2019 has stated that the impugned Project had different categories of units including EWS units and there were total of 1587 units in the said Project and all the units were categorised in the category of other than affordable housing.

Accordingly, the profiteering has been examined by the DGAP by comparing the applicable tax rate and ITC available to the Respondent during the pre-GST period from April, 2016 to June, 2017 when the Service Tax @ 4.5% and Haryana VAT at the variable rates was leviable, with the post-GST period from July, 2017 to March, 2019 when the effective GST rate was 12% on the gross value. On the basis of the figures contained in Table-'B' above, the comparative figures of ITC availed/available as a percentage of the turnover in the pre-GST and the post-GST periods, the recalibrated basic price as well as the excess collection (profiteering) during the post-GST period, has been computed by the DGAP as per the Table-'C' given below:-

Table-'C' (Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April, 2016to June, 2017	July, 2017 to March, 2019
2	Output tax rate (%)	B	4.50%	12.00%
3	Ratio of CENVAT/VAT/GST ITC to Total Turnover as per Table - B above (%)	C	9.08%	20.98%
4	Increase in ITC availed post-GST (%)	D	-	11.90%
5	**Analysis of Increase in ITC:**			
6	Total Basic Demand during July, 2017 to March, 2019	E		1,00,22,48,168
7	GST @12%	F= E*12%		12,02,69,780
8	Total demand	G= E+F		1,12,25,17,948
9	Recalibrated Basic Price	H=E*(1-D) or 98.49% of E		88,29,80,636
10	GST @12%	I=H*12%		10,59,57,676
11	Commensurate demand price	J=H + I		98,89,38,312
12	**Excess Collection of Demand or Profiteered Amount**	**K=G - J**		**13,35,79,636**

23. The DGAP has claimed from the Table-'C' that the additional ITC of 11.90% of the turnover should have resulted in commensurate reduction in the base prices as well as cum-tax prices of the flats. Therefore, in terms of Section 171 of the CGST Act, 2017, the benefit of additional ITC was required to be passed on to the respective recipients.

24. On the basis of the aforesaid CENVAT/ITC availability pre and post-GST and the details of the amount collected by the Respondent from the Applicant No. 1 and other home buyers during the period from 01.07.2017 to 31.03.2019, the amount of benefit of ITC not passed on or in other words, the profiteered amount has been quantified by the DGAP as Rs. 13,35,79,636/- which includes GST @ 12%, on the base profited amount of Rs. 11,92,67,532/-. The buyer and Unit No. wise break-up of this amount has been given in Annexure-18 of the DGAP's Report. This amount is inclusive of Rs. 1,04,734/- (including GST @ 12% on the base amount of Rs. 93,512/-) which is the profiteered amount in respect of the Applicant No. 1, mentioned at Serial No. 318 of Annesure-18 of the Report. It was also intimated by the DGAP that the Respondent has supplied the construction service in the State of Haryana only.

25. The DGAP has also submitted that the above computation of profiteering was with respect to 1239 buyers, whereas the Respondent has booked 1500 units in the pre-GST period, however, demands were raised only on 687 buyers who had booked the units and the net total of the demands raised from such units had only been taken into

consideration. Similarly, in the post-GST period, demands were raised on 1239 buyers who had booked the units, and the net total of demands raised from such units had only been taken into consideration. He has further submitted that If the ITC in respect of those units on which no demands had been raised in the concerned period was considered for calculation of profiteering in respect of those units where demands had been raised in the relevant period, the ITC as a percentage of turnover would be distorted and erroneous. Therefore, the benefit of ITC in respect of these 261 (1500-1239) units should be calculated when the demands would be raised on such units by taking into account the proportionate ITC in respect of such units.

26. The DGAP has also claimed that the benefit of additional ITC of 11.90% of the turnover has, in fact, accrued to the Respondent and the same was required to be passed on to the above Applicant and the other recipients. Thus, the DGAP has alleged that the Respondent has contravened the provisions of Section 171 of the CGST Act, 2017 inasmuch as the additional benefit of ITC @ 11.90% of the turnover (base price) received by the Respondent during the period from 01.07.2017 to 31.03.2019, has not been passed on to the above Applicant and the other recipients. On this account, the Respondent has realized an additional amount to the tune of Rs. 1,04,734/- from the Applicant No. 1 which includes both the profiteered amount @ 11.90% of the turnover (base price) and 12% GST on the said profiteered amount. The DGAP has further alleged that his investigation has revealed that the Respondent has also realized an

additional amount of Rs. 13,34,74,902/- (Rs. 13,35,79,636/- (-) Rs. 1,04,734/-) which includes both the profiteered amount @ 11.90% of the turnover (base price) and GST on the said profiteered amount, from the other recipients as well who were not Applicants in the present proceedings. These recipients were identifiable as per the documents provided by the Respondent giving the names and addresses along with the Unit Nos. allotted to such recipients. Therefore, this additional amount of Rs. 13,34,74,902/- was required to be returned to such eligible recipients.

27. The DGAP has also stated that the present investigation has covered the period from 01.07.2017 to 31.03.2019. Profiteering, if any, for the period post March, 2019, has not been examined by him, as the exact quantum of ITC that would be available to the Respondent in future could not be determined at this stage, when the construction of the Project was yet to be completed. He has further stated that the provisions of Section 171 (1) of the Central Goods and Services Tax Act, 2017 requiring that "a reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices", have been contravened by the Respondent in the present case.

28. The above Report was considered by this Authority in its meeting held on 25.09.2019 and it was decided that the Applicants and the Respondent be asked to appear before this Authority on 22.10.2019. The Respondent was issued notice on 26.09.2019 to explain why the above Report of the DGAP should not be accepted and his liability for

violating the provisions of Section 171 of the CGST Act, 2017 should not be fixed. During the course of the hearings no one appeared for the Applicants and the Respondent was represented by Sh. Manish Gaur, Advocate, Sh. Sanjeev Sharma, DGM-Tax, Sh. Tarun Trehan, CA, Sh. R. Chitkara, Advocate and Ms. Disha, Advocate. The Respondent has filed his written submissions dated 03.12.2019, 17.12.2019, 23.01.2020 and 11.02.2020. The main issues raised by the Respondent have been mentioned in the subsequent paras.

29. That the Standing Committee has erred in referring the matter to the DGAP for further investigation. As per Rule 128 (1) of the of the CGST Rules, 2017 on receipt of an application, the Standing Committee was required to examine the accuracy and adequacy of the evidence provided in the application to determine whether there was *prima facie* evidence to support the claim of an applicant that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of ITC has not been passed on to the recipient by way of commensurate reduction in prices. On the basis of aforementioned provision, the time limit for the Standing Committee to undertake examination of accuracy and adequacy of evidence of an application was 2 months, extendable by a month. In the instant case, the complaint (e-mail) was filed by the Applicant on 07.01.2019. The Standing Committee had examined the above complaint in its meeting held on 11.03.2019 as per the date of minutes of its meeting attached as Annexure-1 to the DGAP's Report. Therefore, the period of 2

months had expired on 06.03.2019 and hence, the present proceedings were not maintainable.

30. That the Report of the DGAP has gone beyond the application submitted by the Applicant No. 1 and was liable to be rejected on this ground alone. As per Rule 128 of the CGST Rules, an anti-profiteering investigation could be initiated only on receipt of a written application from the interested party, Commissioner or any other person. In the instant case, the proceedings were started on the application received from the Applicant Sh. Rahul Kumar. Hence, the investigation could not go beyond the application and could not cover other customers who had not questioned the benefit passed on to them. In this regard, reliance was placed by the Respondent on the following cases:-

1. ***Dinesh Mohan Bhardwaj v. M/s Vrandavaneshwree Automotive Private Limited*** **2018 VIL 01 NAA.**

   Rishi Gupta v. M/s Flipkart Internet Pvt Ltd. **2018 VIL 04 NAA.**
2. ***Kerala State Screening Committee on Anti-Profiteering and anther v. M/s Pulimoottill Silks 2019 (2) TMI 296 NAA.***
3. ***Director General of Anti-Profiteering v. M/s Velbon Vitrified Tiles Pvt. Ltd. 2019 2019 (3) TMI 370 NAA.***
4. ***Fx Enterprise Solutions India Pvt. Ltd. and Ors. v. Hyundai Motor India Limited 2017 Comp 586 (CCI).***

31. That the CGST Act or the Rules did not provide the procedure and mechanism for determination and calculation of profiteering. In the

absence of the same, the calculation and methodology used in the Report was arbitrary and in violation of the principles of natural justice. The Respondent has also added that as per Rule 126, this Authority has power to determine the methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of ITC has been passed on by the registered person to the recipients by way of commensurate reduction in prices but, as on date, CGST Rules have not prescribed any procedure/ methodology/ formula/ modalities for determination/ calculation of 'profiteering'. The Methodology and Procedures, 2018 issued on 19.07.2018 by this Authority under Rule 126 only provided the procedure pertaining to investigation and hearing. However, no method/formula has been notified/prescribed pertaining to calculation of profiteered amount.

32. That the DGAP has arrived at the figures of alleged profiteering on the basis of the difference between the ratio of ITC to the turnover during the pre-GST and the GST periods. This formula for calculating the benefit of additional ITC which has accrued to the Respondent could never yield the correct quantum of profiteering. As the comparison of above ratios was not appropriate for the reason that under the real estate sector, there was no correlation between the turnover and the cost of construction or development of a project. The turnover reflected the amount collected by a developer as per the payment or the booking plan issued by him which was purely based on the market driven strategy. On the contrary, the ITC accrued to a developer on the basis of the actual cost incurred by him while undertaking the

development of a project. Thus, accrual of ITC was not dependent on the amount collected from the buyers. In the pre-GST regime, services were subject to Service Tax @ 15% but under the GST, in most of the cases, the said services were taxable at 18%, therefore, there was an increase of 3% in the ITC available to the Respondent which was not due to any additional benefit but due to increase in the rate of tax.

33. That the Respondent has already passed on the benefit of ITC to his customers. The essence of anti-profiteering provision was to ensure that the companies, with the introduction of GST, pass on the benefit of reduced output tax rates and increased ITC to the customers by way of commensurate reduction in the prices. The Respondent had estimated the additional benefit which would accrue to him in the "Emerald Estate" Project based on the above factors. Accordingly, he has passed on the benefit of 4.93% to the eligible customers of the above Project by way of reduction in prices due to expected additional ITC which would accrue to the Respondent under the GST regime. However, the DGAP has ignored the same and considered the ratio of ITC to the turnover of the Pre-GST and the Post-GST periods for calculating the benefit of additional ITC which has accrued to the Respondent, which shall never yield the correct quantum of profiteering. The benefit claimed to have been passed on by the Respondent to his customers has been furnished by him as is submitted below:-

Actual Benefit passed on till 30.04.2019	Actual Benefit passed on till 25.11.2019	Balance GST benefit to be passed on
Rs. 2,44,51,98/-	Rs. 7,51,18,802/-	Rs. 19,53,242/-

34. It was further submitted that the DGAP, being a fact-finding authority, should have verified the details submitted by the Respondent and should have reduced the demand to the extent of benefit claimed to have been passed on. However, the DGAP has chosen to ignore the details due to which the demand has been inflated in the Report.

35. That even after applying the methodology adopted by the DGAP in his Report, the calculations made by the DGAP of the alleged profiteering were incorrect due to the following reasons:-

1. VAT credit should have been considered in calculating the total credit pre-GST;
2. WCT (VAT) rebate should have been considered in calculating the total credit pre-GST;
3. The demand notes raised by the Respondent formed part of total turnover for the period under consideration and they should not have been ignored;
4. For GST period, the DGAP has considered saleable area in "*Area sold relevant to turnover*" for even those customers to whom no demand notes were raised; and

5. The Cenvat credit of Service Tax paid on input services, as also ITC credit of GST availed was not factored in the correct quantum of common credit on account of corporate expenses.

36. In this regard, the Respondent has also quoted the following cases decided by this Authority, in his support:-

- ***Director General of Anti-Profiteering and others v. M/. Aster Infrahome Pvt. Ltd. 2019 (11) TMI 1082 NAA.***
- ***Director General of Anti-Profiteering and Others v. M/s Puri Constructions Pvt. Ltd. 2019-VIL-24-NAA.***
- ***Director General of Anti-Profiteering and others v. M/s. Bhartiya City Developers Pvt. Ltd 2019 (10) TMI 863 NAA.***

37. The Respondent has further submitted that if the above submissions were considered, the revised profiteering calculation would be as under:-

(Amount in Rs.)

S. No.	Particulars	Apr' 16 to June' 17	July' 17 to Mar' 19
A	Cenvat Credit of Service Tax Paid on Input Services (A)	5,97,00,611	
B	Rebate of VAT(WCT) paid to registered contractors or sub-contractors (B)	3,80,53,086	
C	VAT Credit (C)	1,259	
D	Total Credit [D = A+B+C]	9,77,54,956	
E	ITC of GST Availed (E)		21,87,56,222
F	Total Turnover as per Home Buyers List (F)	27,21,23,386	1,00,23,41,280
G	Total Saleable Area (In sq. ft) (G)	21,51,306	21,51,306

H	Total Area Sold relevant to turnover as above (H)	11,11,720	18,85,570
I	ITC Relevant to Turnover (F = (D/G*H) or (E/G*H))	5,05,16,356	19,17,34,758
	Ratio of ITC to Turnover (I/F)	18.56%	19.13%
	Profiteering %	**0.56%**	

38. That the present proceedings initiated by this Authority were not sustainable and liable to be dropped due to lack of a Judicial Member in the constitution of this Authority. The Respondent has further submitted that as per Rule 122 of the CGST Rules, this Authority would consist of the following:-

1. A Chairman who has held a post equivalent to secretary to Government of India and
2. Four Technical Members who are or have been Commissioners of State Tax or Central Tax for at least a year.

39. The Respondent has submitted that the Commissioners of State Tax or Central Tax were holding administrative positions and could not be said to have professional qualification of law along with experience in practicing the same. Thus, the Technical Members would not be able to interpret the law on a regular basis and adjudicate the cases properly. In his regard, the Respondent has quoted the law settled in the cases of ***Madras Bar Association v. Union of India 2014 (308) ELT 209 (SC)***, ***Union of India v. R. Gandhi President Madras Bar Association (2010) 11 SCC 1, Rojer Mathew v. South Indian Bank Limited and Ors. 2018 (13) GSTL 129 (SC)***, ***Gujarat Urja Vikas Nigam Limited v.***

Essar Power Limited (2016) 9 SCC 103, L. Chandra Kumar v. Union of India (1997) 3 SCC 261 and R. K. Jain v. Union of India (1993) 4 SCC 119. The Respondent has also submitted that due to the lack of a Judicial Member in the Authority, exercising of judicial/quasi-judicial powers was against the basic structure of the Constitution of India and it took away the independence of judiciary and was against the rule of law.

40. The submissions of the Respondent dated 03.12.2019 and 17.12.2019 were forwarded to the DGAP for his Report. The DGAP vide his supplementary Report dated 24.01.2020 has replied on the issues raised by the Respondent as follows:-

a. **The Standing Committee has erred in referring the matter:-**

The DGAP has submitted that the complaint was forwarded by the Standing Committee on Anti-profiteering vide minutes of the meeting held on 11.03.2019 under Rule 128 of the Central Goods Services Tax Rules, 2017, to conduct a detailed investigation regarding non passing of the benefit of the ITC to the buyers by the builder. Accordingly, investigation has been done for the whole project.

b. **Comparison of ratio of ITC to turnover for pre-GST period and GST period is not the correct mechanism for calculation of profiteering amount:-**

In this regard, the DGAP has clarified that, the extent of profiteering has been arrived at, on case to case basis, by adopting suitable method based on the facts and circumstances of each case as well as the nature of the goods or services supplied. Therefore, determination of the quantum of benefit to be passed on has been arrived at after considering ratio of ITC to turnover for both the periods.

c. **The Respondent has already passed on the benefit of increased ITC leading to profiteering:-**

The DGAP has stated that the Respondent did not submit any evidence during the investigation to prove that the benefit of increased ITC has been passed on to the customers.

d. **The calculation of the alleged profiteering is incorrect:-** Point-wise reply has been submitted by the DGAP as follows:-

i. **The demand notes (petty or otherwise) raised by the Respondent form part of total turnover for the period under consideration and they should not be ignored**:-

The DGAP has reported that the clarification and reasoning for exclusion of petty demand notes has been provided in para 24 of his Report dated 24.09.2019. These petty demands as reflected

in the home-buyers list were issued due to rounding-off of the adjustments or on account of services such as delayed payment charges or transfer charges and interest etc. and not towards the basic cost of the units. Additional ITC was available for providing the main service i.e. construction of residential complexes (SAC 440334) and turnover for other services provided by the Respondent could not be accounted for in the turnover for the obvious reason that it would distort the profiteering calculation.

ii. **Saleable area in Area sold relevant to turnover for even those customers, to whom no demand notes were raised, has been considered:-**

The DGAP has stated that the calculation of profiteering has been done on total area sold only. Only the ITC proportional to relevant sold area has been considered to calculate the quantum of profiteering.

iii. **The Cenvat Credit of Service Tax paid on input services, as also ITC credit of GST availed has not been factored in the correct quantum of common credit on account of corporate expenses:-**

In this regard, the DGAP has reported that the last date of submission of the investigation Report was 24.09.2019. Accordingly, the preparation of draft Report had started at least one week before the last date of submission of the Report. In the instant case all the documents submitted on or before 16.09.2019 were taken into consideration for the purpose of finalisation of calculation of profiteering and Report. Any submission made on that day or after it could not be mentioned in his Report.

iv. **Alleged profiteering has been incorrectly inflated in the report by adding GST:-**

The DGAP has stated that the price paid by the customers included both the base price and also the tax charged on it. Therefore, any excess base price or tax collected from the customers amounted to profiteering which must be returned to them.

41. A copy of the Report dated 24.01.2020, submitted by the DGAP under Rule 133 (2A) was supplied to the Respondent vide order dated 27.01.2020 for filing rejoinder, if any. The Respondent has filed re-joinder dated 11.02.2020, the relevant paras of which are mentioned below:-

S. No.	Grounds by Respondent in submissions dated 17.12.2019	DGAP's comments	Respondent's response on DGAP's comments
1	The Standing Committee has erred in referring the matter.	The complaint was forwarded by the Standing Committee on Anti-profiteering vide its minutes of meeting held on 11.03.2019 under Rule 128 of the Central Goods Services Tax Rules, 2017 ('**CGST Rules**'), to conduct a detailed investigation regarding non-passing of the benefit of the ITC to the buyer by the builder. Accordingly, investigation has been done for the whole project.	As already submitted, the present investigation suffers from the **vice of limitation** and thus, reference from standing committee is barred by time limit prescribed in law. Indisputably, the complaint was received by standing committee on **07.01.2019** and the same was examined by standing committee on **11.03.2019** i.e. after delay of 2 months and 4 days Rule 128(1) of law prescribes that the said examination **shall be** concluded within period of two months from the date of receipt of complaint (non-condonable). Accordingly, the reference from standing committee to DGAP for conducting investigation is illegal. On this aspect, the DGAP has not given any finding in its letter dated 24.01.2020 and thus, to that extent, the DGAP's rebuttal to Respondent's submissions is incomplete.
5	The Respondent has already passed on the benefit of increased ITC leading to profiteering.	The Respondent has not submitted any evidence during investigation to prove that the benefit of increased ITC has been passed on to the customers.	During the investigation, the Respondent has submitted that it has passed on benefit of **4.93%** to its customers. However, the same was rejected by DGAP on frivolous grounds and by disregarding the fact of actual disbursement of GST benefit by Respondent to its customers. The Respondent submitted that the only requirement was to pass on the benefit to the customers, which the Respondent did in the present case. Thus, benefit to that extent should be extended to the Respondent. During the course of hearing before NAA also, the Respondent has substantiated the fact of actual disbursal of GST benefit, through the relevant documents, listed below – ❖ **Statement of Accounts (SOAs)** of eligible customers, showing credit by Respondent of GST benefit to said customers. ❖ In case, the GST benefit shown in SOA was settled by **cash**, the copy of **Cheque**, along with the **bank statement** of Respondent, showing debit in its account to that extent. ❖ In case, the balance of GST benefit shown in SOA was adjusted as credit in respect of some other services provided by Respondent like maintenance etc., the **SOAs of said other services**, showing appropriate adjustments. However, the same was not considered by DGAP in its letter dated 24.01.2020 and the rebuttals/observations was given only *qua* the documents submitted during investigation before DGAP. In other words, the DGAP has not taken cognizance of any documents/ submissions made before NAA and it has mechanically made the rebuttals based on its report dated 24.09.2019.
9	**Saleable Area** in "Area sold relevant to turnover" has been	The calculation of profiteering has been done with total area sold only. Only the ITC proportional to relevant	It is submitted that the DGAP has mechanically given this observation without considering the relevant facts and documents involved.

	considered for even those customers to whom no demand notes were raised.	sold area has been considered to calculate the quantum of profiteering.	It is Respondent's submission also that only the ITC proportional to relevant sold area has to be considered. However, the same was not done in the instant case. Reliance is placed on the **Home-buyer's list** submitted by Respondent before DGAP and before NAA. Accordingly, the said observation by DGAP is liable to be rejected.
10	The Cenvat Credit of service tax paid on input services, as also ITC credit of GST availed has not factored in the correct quantum of common credit on account of corporate expenses	In this regard, it is mentioned that the last date of submission of the investigation Report was 24.09.2019. Accordingly, the preparation of draft report starts at least one week before the last date of submission of the Report. In the instant case, all documents submitted on or before **16.09.2019** were taken into consideration for the purpose of finalisation of calculation of profiteering and Report. Any submission made on that day or after it has no mention in this office report and no clarification on its merit could be provided.	At the outset, it is submitted that the observation by DGAP that any submission made on or after 16.09.2019 has no mention in DGAP report dated 24.09.2019 is **factually incorrect**. The DGAP at **Para 23** of its report dated 24.09.2019 has noted that vide **submissions dated 17.09.2019**, the Respondent has submitted the detailed calculation regarding appropriation of common ITC on basis of proportionate area of impugned project. The said submissions dated 17.09.2019 has also been made part of annexures to DGAP report (**Annexure 15**). Thus, the aforesaid observation by DGAP cannot be accepted. The Respondent humbly submits that the correct quantum of credit of service tax paid on input services, as also ITC credit of GST availed should be considered for the purpose of computing profiteering, if any.

42. We have carefully considered all the submissions filed by the Applicants, the Respondent and the other material placed on record and find that the Applicant No. 1, vide his complaint dated 17.01.2019 had alleged that the Respondent was not passing on the benefit of ITC to him on the Flat No. EFP 24-0501, which he had purchased in the "Emerald Floors Premium" Project being executed by the Respondent in Sector-65, Gurugram, in spite of the fact that he was availing ITC on the purchase of the inputs at the higher rates of GST which had resulted in benefit of additional ITC to him and was also charging GST from him @12%. This complaint was examined by the Standing Committee on Anti-Profiteering in its meetings held on 11.03.2019 and was forwarded to the DGAP for investigation who vide his Report dated 24.09.2019 has found that the ITC as a percentage of the total

turnover which was available to the Respondent during the pre-GST period was 9.08% and during the post-GST period this ratio was 20.98% as per the Table-B mentioned above and therefore, the Respondent has benefited from the additional ITC to the tune of 11.90% (20.98% - 9.08%) of the total turnover which he was required to pass on to the flat buyers of this Project. The DGAP has also found that the Respondent has not reduced the basic prices of his flats by 11.90% due to additional benefit of ITC and by charging GST at the increased rate of 12% on the pre-GST basic price, he has contravened the provisions of Section 171 of the CGST Act, 2017. The DGAP has also submitted that the amount of benefit of ITC which has not been passed on by the Respondent or the profiteered amount came to Rs. 13,35,79,636/- which included 12% GST on the basic profiteered amount of Rs. 11,92,67,532/-. The DGAP has also intimated that this amount also included the profiteered amount of Rs. 1,04,734/- including 12% GST on the base amount of Rs. 93,512/- in respect of the Applicant No. 1. He has also supplied the details of all the buyers who have purchased flats from the Respondent along with their unit numbers and the profiteered amount in respect of each buyer vide Annexure-18 attached with the Report.

43. The Respondent has stated in his submissions that the Standing Committee on Anti-Profiteering had not examined the complaint filed by the Applicant No. 1, which was received by it on 07.01.2019, within the prescribed limit of 2 months as per Rule 128 (1) of CGST Rule, 2017 and hence, the present proceedings were barred by limitation. Perusal of the records of the Standing Committee shows that out of

the total 4 Members of the above Committee, 3 Members viz. Sh. O. P. Dadhich, Principal Commissioner (Customs-Preventive), Sh. Himanshu Gupta, Principal Commissioner CGST and Smt. Ashima Barar, Excise & Taxation Commissioner Haryana had either been promoted or transferred and hence there was no quorum to hold the meeting of the Committee and it had ceased to function w.e.f. 22.01.2019. The above Committee was reconstituted by the GST Council, as per Rule 123 (1) of the CGST Rules, 2017 vide its OM No. F. No. 129 Anti-Profiteering/GSTC/2017/Pt./53 dated 20.02.2019 and Sh. Pranesh Pathak, Commissioner CGST, Faridabad, Sh. Sanjay Mangal, Commissioner CGST (Audit), Gurugram, Sh. H. Rajesh Prashad, Commissioner State Tax, Govt. of NCT of Delhi and Sh. Amit Kr. Agarwal, Excise & Taxation Commissioner Haryana were appointed as members of the Committee. The reconstituted Committee had examined the above complaint in its meeting held on 11.03.2019 and recommended it for detailed investigation vide minutes of its meeting held on 11.03.2019, which have been attached as Annexure-1 by the DGAP with his Report dated 24.09.2019. Perusal of the minutes shows that the above complaint was mentioned at Sr. No. 11 of Annexure 1-A and has been duly considered and referred for detailed investigation to the DGAP under Rule 129 (1) of the above Rules. Therefore, it is evident that there was neither legally constituted Standing Committee on Anti-Profiteering between the period from 22.01.2019 to 20.02.2019, as per Rule 123 (1) of the CGST Rules, 2017 nor there was quorum to hold meetings of the above Committee, in view of which the above complaint could not have been examined

by the above Committee. It is further evident that the above complaint was considered by the Committee on 11.03.2019 within a period of 20 days from the date of its constitution on 20.02.2019. Therefore, the above complaint has been considered by the above Committee within a period of 2 months prescribed under Rule 128 (1) of the above Rules and has been duly referred for detailed investigation as per Rule 129 (1) of the CGST Rules, 2017 to the DGAP. Accordingly, the investigation carried out by the DGAP in pursuance of the recommendation made by the above Committee in terms of Rule 129 (1) of the above Rules is perfectly in consonance with the provisions of Rule 128 (1). Consequently the present proceedings are legally correct and binding on the Respondent. Therefore, the above contention of the Respondent is untenable.

44. The Respondent has also stated that the investigation carried on by the DGAP has gone beyond the application submitted by the above Applicant as it was to be limited to his benefit only and it could not cover the other customers who had not questioned the benefit passed on to them. In this regard it would be relevant to refer to the provisions of Section 171 (1) and (2) of the CGST Act, 2017 which provide as under:-

"(1). *Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.*

(2). The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether ITCs availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him."

45. It is clear from the perusal of Sub-Section 171 (1) that both the benefits of tax reduction and ITC are required to be passed on by the suppliers to the buyers by commensurate reduction in the prices as they are the concessions which have been granted to them from the public exchequer in the interest of the consumers. Sub-Section 171 (2) provides that the Central Government may on the recommendations of the GST Council constitute an Authority to **examine** whether the input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the prices of the goods or services or both supplied by him. Therefore, this Authority has jurisdiction to examine all such cases in which the above benefits are required to be passed on suo moto or to get them investigated through the DGAP and its power to do so is not circumscribed by any restriction to the effect that it cannot examine those cases in respect of which no complaint has been made. It is also apparent from the provisions of Rule 129 (1) that the DGAP shall investigate and collect necessary evidence in all such cases in which rate of tax has been reduced or the benefit of ITC has been

granted which is required to be passed on to the buyers and submit his Report to this Authority under Rule 129 (6) and hence he is bound to investigate all those cases where benefit of ITC or tax rate is required to be passed on.

46. It would also be pertinent to mention here that the Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs vide its Office Order No. 05/Ad.IV/2018 dated 12.06.2018 in pursuance of the Government of India (Allocation of Business) 34th Amendment Rules, 2018 has assigned the following duties to the DGAP:-

a) Conduct of investigation to collect evidence necessary to determine whether the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices, in terms of Section 171 of the Central Goods and Services Tax Act, 2017 and the rules made thereunder.

b) Responsibility for coordinating anti-profiteering work with the National Anti-profiteering Authority, the Standing Committee and the State level Screening Committees."

47. Therefore, it is apparent from the above OM that the DGAP is charged with the responsibility to investigate and collect evidence necessary to determine whether both the above benefits have been passed on or not. No fetters have been placed either in the CGST Act, 2017 or Rule 129 of the CGST Rules, 2017 which provide that the DGAP shall

restrict his investigation to the complained goods or services and he would overlook commission of an offence which has been committed in respect of the provisions of Section 171 (1) if it comes to his notice during the course of the investigation. Since, the DGAP is the investigating arm of this Authority any Report furnished by him to this Authority has to cover all the cases of denial of the above benefits once they have come to his notice keeping in view that this Authority has mandate to examine all such cases, determine the amount of benefit and provide relief to the affected buyers. The DGAP is bound to bring before this Authority all such cases in which both the above benefits have not been passed on irrespective of the fact whether any complaint has been received concerning them or not once they have come to his notice. The Respondent cannot be allowed to deny benefit of ITC to the other house buyers under the above pretext and misappropriate the amount of benefit of ITC which he is not to pay from his pocket. Accordingly, the DGAP has rightly investigated the benefit of ITC to be passed on to the other flat buyers of the Project in addition to the above Applicant and hence, the investigation conducted by him in this regard is legal and is in consonance with the provisions of Section 171 and the Rules framed under Chapter XV of the CGST Rules, 2017 and therefore, the above claim of the Respondent is not correct and hence, it cannot be accepted.

48. In this regard, the Respondent has placed reliance on the case of ***Dinesh Mohan Bhardwaj and another v. M/s Vrandavaneshwree Automotive Private Limited,*** decided by this Authority vide its order dated 27.03.2018 passed in Case No. 1/2018. However, in the above

case the Applicant had been granted the benefit of ITC and hence there was no ground to investigate the other similar cases as the Respondent had passed on the benefit of ITC, whereas in the present case the Respondent has not passed on the benefit of ITC and hence he has been rightly investigated by the DGAP in respect of all the flat buyers to whom he has denied the benefit. Hence, the above case cannot be relied upon in the facts of the present case. In the case of ***Rishi Gupta and another v. M/s Flipkart Internet Pvt. Ltd.***, decided by this Authority on 18.07.2018 vide Case No. 5/2018, the Respondent was only an e-commerce platform and was not supplier of the complained product and hence there was no ground to investigate him in respect of the other products. Therefore, the above case does not support the case of the Respondent. In the case of ***Kerala State Screening Committee on Anti-Profiteering and another v. M/s Pulimoottill Silks*** decided on 04.02.2019 by this Authority vide Case No. 8/2019, it was found that there was no reduction in the rate of tax and hence, the provisions of Section 171 of the above Act were not attracted in the above case. Therefore, the above case cannot be relied upon. The case of ***Kerala State Screening Committee on Anti-Profiteering and another v. M/s Velbon Vitrified Tiles Pvt. Ltd.*** decided on 01.03.2019 vide Case No. 13/2019 by this Authority, is also of no help to the Respondent as in this case the Respondent had passed on the benefit of tax reduction. In the case of ***Fx Enterprise Solutions India Pvt. Ltd. and others. v. Hyundai Motor India Limited 2017 Comp 586 (CCI),*** the Hon'ble Competition Commission of India had directed its Director General to conduct investigation on a

specific issue whereas in the present case no such direction was passed by this Authority and hence the above case has no bearing on the facts of the present case and therefore, reliance cannot be placed on this case.

49. The Respondent has also claimed that Section 171 of the CGST Act, 2017 or Chapter XV of the CGST Rules or the 'Methodology and Procedure' dated 19.07.2018 issued by this Authority under Rule 126 has not prescribed the 'Methodology and Procedure' for passing on the benefit of ITC or computation of the profiteered amount. In this respect it would be pertinent to mention that the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and ITC has been clearly explained in Section 171 (1) of the CGST Act, 2017 itself which states that "*Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" It is clear from a cursory perusal of the above Sub-Section that it mentions "reduction in the rate of tax or benefit of ITC" which means that the benefit of tax reduction or ITC has to be passed on by a registered supplier to his buyers since both the above benefits are granted by sacrificing tax revenue by the Central and the State Governments and they cannot be appropriated by a registered person. It also signifies that the above benefits are to be passed on each product or unit of construction or service to every buyer and in case they are not passed on, the denial of benefit or the profiteered amount has to be computed for which investigation has to be conducted in respect of all such products/units/services. What would be the

'profiteered amount' has been clearly mentioned in the explanation attached to Section 171 which is quoted as under:-

"Explanation:- For the purpose of this section, the expression "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services of both."

These benefits can also not be passed on at the entity/organisation/branch level as the benefits have to be passed on to each and every buyer at each product/unit/service level by treating them equally. The above provision also mentions "any supply" which means each taxable supply made to each buyer thereby making it evident that a supplier cannot claim that he has passed on more benefit to one customer therefore he would pass less benefit or no benefit to another customer than what is actually due to that customer. Each customer is entitled to receive the benefit of tax reduction or ITC on each product or unit or service purchased by him of course subject to his entitlement. The word "commensurate" mentioned in the above Sub-Section provides the extent of benefit to be passed on by way of reduction in the prices which has to be computed in respect of each product or unit or service based on the tax reduction or the additional ITC which has become available to a registered person after coming in to force of the CGST Act, 2017. Accordingly, the benefit of additional

ITC would depend on the comparison of the ITC/CENVAT which was available to a builder in the pre-GST period with the ITC available to him in the post GST period w.e.f. 01.07.2017. Computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from product to product or unit to unit or service to service and hence no fixed mathematical methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a buyer. Similarly, computation of the profiteered amount is also a mathematical exercise which can be done by any mathematics or accounts knowing person. However, to further explain the legislative intent behind the above provision, this Authority has been empowered to determine the 'Procedure and Methodology' which has been determined by it vide its Notification dated 28.03.2018 and not 19.07.2019 under Rule 126 of the CGST Rules, 2017. However, no set formula, which can cover all the sectors or the products or the services, can be fixed which can be made applicable in all the cases of passing on the above benefits or for computation of the profiteered amount, while determining such a "Methodology and Procedure" as the facts of each case are different. In the case of one real estate project, date of start and completion of the project, price of the flat/shop, mode of payment of price or instalments, stage of completion of the project, rates of taxes pre and post GST implementation, amount of CENVAT and ITC availed/available, total saleable area, area sold and the taxable turnover received before and after the GST implementation would always be different from the other project and

hence the amount of benefit of additional ITC to be passed on in respect of one project would not be similar to the other project. Therefore, no set procedure/methodology/guidelines can be framed for determining the benefit of additional ITC which has to be passed on to the buyers of the units. Moreover, this Authority under Rule 126 has been empowered to 'determine' Methodology & Procedure and not to 'prescribe' it. Similarly, the facts of the cases relating to the sectors of FMCGs, restaurant service, construction service and cinema service are completely different from each other and therefore, the mathematical methodology employed in the case of one sector cannot be applied in the other sector. Moreover, both the above benefits have been given by the Central as well as the State Governments as a special concession out of their tax revenue in the public interest and hence the suppliers are not required to pay even a single penny from their own pocket and therefore, they are bound to pass on the above benefits as per the provisions of Section 171 (1) which are abundantly clear, unambiguous, mandatory and legally enforceable. The above provisions also reflect that the true intent behind the above provision, made by the Central and the State legislatures in their respective GST Acts is to pass on the above benefits to the common buyers who bear the burden of tax. The Respondent is trying to mislead by wrongly claiming that he was required to carry out complex mathematical computations for passing on the benefit of ITC which he could not do in the absence of the procedure and methodology. However, his claim is absolutely incorrect as he was only required to calculate the additional ITC which has become due to him after coming in to force of

the GST w.e.f. 01.07.2017. When the Respondent can utilise the benefit of ITC which has become available to him after the above date while discharging his output GST liability, he can also pass on its benefit to the flat buyers. However, the Respondent is embezzling the above benefit by utilising it in his business and is enriching himself at the expense of the vulnerable sections of the society. Hence, no methodology and procedure or guidelines or elaborate mathematical calculations are required to be prescribed separately for passing on the benefit of ITC. The Respondent cannot deny the benefit of ITC to his customers on the above ground as Section 171 provides clear cut methodology and procedure to compute both the benefits. Therefore, the above contention of the Respondent is frivolous and hence the same cannot be accepted.

50. The Respondent has further claimed that the DGAP has arrived at the profiteered amount on the basis of the difference between the ratio of ITC to the turnover under the pre-GST and the post-GST periods which was not correct as there was no correlation between the turnover and the cost of construction. In this connection it would be appropriate to state that what is the quantum of benefit of additional ITC available to the Respondent which he is required to pass on to his buyers, can only be computed after it is compared with the ITC/CENVAT which has available to him in the pre-GST period with the ITC available to him in the post-GST period. Accordingly, the ratio of ITC/CENVAT to turnover available/obtained by the Respondent during the pre-GST period and the ratio of ITC to turnover available/obtained by the Respondent in the post GST period has to

be calculated. The value of the turn overs realised by the Respondent during both the above period is relevant as it is relatable to the various stages of construction which is further relatable to the availability of ITC earned by the Respondent on the purchases of the goods and services made by the Respondent during the pre and the post GST periods to achieve a particular stage of construction. Therefore, there is correlation between the ITC and the turnover on the basis of ratios of which the amount of benefit can be computed keeping in view the area purchased by a buyer and the price paid by him in the post-GST period. Since, the benefit is to be passed on the entire project any more or less passing of the benefit periodically by the Respondent can always be adjusted at the time of completion of the project. However, the benefit has to be passed on every month as the Respondent is availing the ITC which has become available to him post-GST every month to discharge his output GST liability while filing his GST Returns. The Respondent cannot force his buyers to wait for the benefit till the completion of the project which may take further 3-4 years when he is enjoying the benefit every month and utilising their share of benefit in his business. The above methodology has been applied by the DGAP in all such previous cases of real estate sector and has been approved by this Authority vide its orders passed in such cases. The above methodology is reasonable, justified, accurate and correct and is in consonance with the provisions of Section 171 as has been mentioned in para supra and hence the same can be relied upon. Accordingly, the methodology employed while computing the benefit of ITC which is required to be passed on by the Respondent is

held to be correct and binding on the Respondent and all the contrary claims made in this regard by him are rejected.

51. The Respondent has also contended that in pre-GST regime, services were subject to Service Tax at the rate of 15% but under the GST they were taxable at 18%, therefore, there was an increase of 3% in the ITC available which was not due to any additional benefit. In this connection it would be relevant to mention that the Respondent is getting full credit of ITC even if the rate of GST on services has increased from 15% to 18%. Therefore, he cannot claim that he would appropriate the ITC which has additionally become available to him post-GST on services. Moreover, the additional benefit of ITC is not to be computed not only on services but is also to be computed on the goods purchased by the Respondent which constitute very high percentage of his service. The Respondent has also availed the benefit of ITC by paying less on his purchases as his vendors have also become eligible for benefit of ITC which they have passed on to him. Therefore, the above contention of the Respondent is untenable.

52. The Respondent has further contended that he has already passed on benefit of Rs. 2,44,51,98/- till 30.04.2019, Rs. 7,51,18,802/- till 25.11.2019 and only benefit of Rs. 19,53,242/- was required to be passed on. He has also submitted the details of the ledger accounts of the flat buyers who have been passed on the benefit of ITC. In this connection perusal of the Report dated 24.09.2019 of the DGAP shows that he had not submitted the details of the passing on the benefit of ITC to the DGAP even though he has claimed to pass on the benefit on 30.04.2019 when the DGAP was still investigating the case.

His claim of passing on the benefit has also not been verified by the DGAP. The Respondent has also not produced any evidence before this Authority which can establish that the Respondent has passed on the above benefit. Therefore, the above contention of the Respondent cannot be accepted on his mere assertion.

53. The Respondent has also argued that the VAT credit earned by him during the pre-GST period should have been considered in calculating the total credit pre-GST. In this regard perusal of the Report dated 24.09.2019 furnished by the DGAP shows that the Respondent was eligible to claim ITC on the VAT paid by him on the inputs purchases made by him. However, in his submission dated 18.07.2019 attached as Annexure-10 with the Report, the Respondent has claimed VAT credit of ₹ 1259/- and turnover of ₹ 9,591/- in respect of the above Project for the period from April, 2017 to June, 2017, whereas no VAT turnover and VAT credit has been claimed for the period from April, 2016 to March, 2017. It is also revealed that the total VAT paid on the purchases made by the Respondent in the State amounted to ₹ 2,67,07,322/- on all the projects being executed by the Respondent in Haryana and not on the impugned project alone. This amount was different from the amount which was claimed by the Respondent in his VAT Returns. The Respondent has also not supplied details of the breakup of the purchases made in respect of the complained Project to justify either the credit of VAT or the VAT turnover. Since, there is no direct co-relation between the turnover reported in the VAT Returns for the period from April, 2016 to June, 2017, filed by the Respondent and their reconciliation with the actual consideration collected from the

home buyers, the credit of VAT and the VAT turnover has rightly not been included by the DGAP for computation of the ratio of ITC to the turnover for the pre-GST period since no details have been supplied by the Respondent himself and he has also not reflected them in his VAT Returns. Therefore, the above argument of the Respondent is not tenable.

54. The Respondent has further argued that he should also have been given the benefit of WCT (VAT) while calculating the total credit of pre-GST ITC. On this aspect perusal of the Report of the DGAP shows that in his submission dated 18.07.2019 (Annex-10) the Respondent had claimed credit of rebate of WCT (VAT) paid to the registered contractors or sub-contractors during the pre-GST period. However, perusal of the VAT Returns filed by the Respondent himself shows that no deduction on account of WCT (VAT) was claimed by him on account of payments made to the work contractors in respect of the above Project. Since, the Respondent has not claimed benefit of WCT (VAT) in his VAT Returns he cannot claim the same at this stage. The Respondent has contended that he was to claim the credit as per Section 42 of the Haryana VAT Act, 2003 after assessment of his contractors had been finalised. The above claim of the Respondent appears to be an afterthought as he has neither shown the details of WCT (VAT) in his VAT Returns which he was legally obliged to do under the above Act nor he has produced order of the appropriate Assessing Authority passing the assessment order in respect of his works contractors, even after a lapse of a period of almost 4 years as per the requirement of Section 42 of the above Act. Accordingly, the

above arguments of the Respondent are hollow and hence they cannot be relied upon.

55. The Respondent has also pleaded that the demand notes raised by the Respondent formed part of the total turnover for the period under consideration and they should not have been ignored. In this regard perusal of the record shows that the Respondent vide his e-mail dated 02.08.2019 attached as Annexure-12 with the Report, had submitted the home-buyers data in which he had mentioned several entries which were either negative or were showing very petty figures. The DGAP had sought clarification from the Respondent in this regard in reply to which the Respondent has intimated vide his reply dated 17.09.2019 attached as Annexure-15 that such petty demand notes were issued due to rounding off the adjustments and the amount did not pertain to the demand notes raised on the buyers. The Respondent had also informed that some petty demands were raised on account of services such as delayed payment charges or transfer charges and were not on account of the basic cost of the units. Therefore, the DGAP has excluded those demand notes which were showing negative values or had petty demands upto ₹ 1,000/- to get a more accurate figure of turnover. It is also apparent from the record that the additional ITC was available for providing the main service i.e. construction of residential complexes and turnover for other services provided by the Respondent was also available which could not be accounted for in the turnover as it would distort the profiteering calculation. The reasons given by the DGAP for not taking in to account the negative and petty amounts shown in the demand notes

are reasonable and justified as the above notes do not comprise part of the turnover to be realised by the Respondent on account of the cost of the flats and therefore, the above claim of the Respondent cannot be accepted.

56. The Respondent has also alleged that the DGAP has considered saleable area in the "*Area sold relevant to turnover*" for even those customers, on whom no demand notes were raised and hence, his computation of the ratio of ITC to turnover was incorrect. In this regard it would be appropriate to mention that for computing the above ratio, the area sold relevant to turnover was required for calculating the proportionate ITC as no benefit of ITC can be passed on those units which have not been sold and in case they are not sold till issue of the CC the ITC in respect of unsold flats would have to be reversed as per the provisions of the CGST Act. In case the saleable area was not included in the "*Area sold relevant to turnover*" there would be no ITC left for reversal in case some units were not sold before the issue of CC. Moreover, the benefit of ITC is required to be passed to each buyer on the basis of the amount realised from him which would depend on the area purchase by him. Therefore, the above claim of the Respondent is not correct and hence, the same is unacceptable.

57. The Respondent has further alleged that the CENVAT credit of Service Tax paid on the input services, as also the ITC of GST availed was not factored in the correct quantum of common credit on account of corporate expenses. However, perusal of the Report of the DGAP shows that the Respondent has not furnished the details of the credit of CENVAT and ITC which he has claimed to have received on

account of the purchases made at the Corporate Office level, which should have been included in the computation of ratio of ITC. In this connection it would be relevant to mention that the Respondent has not supplied the details of the credit of CENVAT and ITC during the course of the investigation nor he has submitted them during the present proceedings and hence, the above claim of the Respondent cannot be accepted.

58. The Respondent has also claimed that as per his own computations the ratio of ITC to turnover during the pre-GST period was 18.56% and during the post-GST period it was 19.31% and therefore, the additional benefit of ITC was 0.56% whereas he has already passed on the benefit of 4.93%. In this connection it would be appropriate to mention that the Respondent has included the credit of WTC (VAT) and VAT while computing the ratio of ITC to turnover during the pre-GST period which he has been held not entitled to claim as per the reasons detailed supra. The figures of total turnover, total area sold relevant to turnover and ITC relevant to turnover have also been taken by the Respondent without furnishing evidence and hence, the ratio of ITC to turnover computed by the Respondent for the pre and post-GST periods and the profiteered amount are wrong and hence, the same cannot be relied upon.

59. The Respondent has also cited the law settled in the case of ***Santosh Kumari and others v. M/s Aster Infrahome Pvt. Ltd.,*** decided on 19.11.2019 by this Authority vide Case No. 57/2019, Case No. 30/2019 decided on 08.05.2019 by this Authority of ***Pallavi Gulati and another v. M/s Puri Constructions Pvt. Ltd.*** and Case No. 49/2019

decided on 14.10.2019 in respect of ***Prasanth Nandulamattam and another v. M/s. Bhartiya City Developers Pvt. Ltd.*** by this Authority and argued that he should also be granted the benefit of ITC which he has earned on the WCT (VAT) and VAT during the period between April, 2016 to June, 2017. However, as has been mentioned above the Respondent is not entitled to the benefit of ITC of WCT (VAT) and VAT as he has not reflected them in his VAT Returns which he has himself filed during the above period. In the absence of cogent and reliable evidence the above claim made by the Respondent cannot accepted. Hence, the above cases do not help his cause.

60. The Respondent has also contended that the constitution of this Authority is bad in law as the it does not have any Judicial Member and in doing so he has placed reliance on the judgment passed by the Hon'ble Supreme Court in the case of ***Union of India v. R. Gandhi President Madras Bar Association (2010) 11 SCC 1.*** The facts of this case are not relevant in the present case as in the above case, the Hon'ble Supreme Court was reviewing the Constitutional validity of Part I-B and I-C of the Companies Act, 1956 inserted by the Companies (2nd Amendment) Act, 2002 by virtue of which the National Company Law Tribunal (NCLT) which took over the functions of the Hon'ble High Courts was established and in that sense, the Hon'ble Supreme Court had held that as the NCLT was to discharge the functions of a High Court, its members should as nearly as possible, have the same position and status as the Hon'ble High Court Judges enjoyed, by ensuring that the persons who were nearly equal in rank, experience or competence to the Hon'ble High Court Judges should

be appointed as the members of the NCLT. In the present case, no such power of adjudication has been taken away from the Hon'ble High Courts or any other Court and this Authority has been established with the statutory mandate under Section 171 of the CGST Act, 2017 to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the prices of the goods or services or both supplied by him. Furthermore, even the Hon'ble Supreme Court in the case of R. Gandhi Supra has recognized that there could be an Authority which may have only Technical Members while holding that "...Some highly specialised fact-finding Tribunals may have only Technical Members, but they are rare and are exceptions...". It is also noteworthy here that there are several other authorities like the Telecom Regulatory Authority of India (TRAI); Securities and Exchange Board of India (SEBI); National Medical Commission (earlier, Medical Council of India); Institute of Chartered Accountants of India (ICAI); Central Consumer protection Authority and the Authorities on the Advance Rulings on the Central Excise and the Goods and Services Tax which do not have a Judicial Member. In this connection it is also submitted that the Parliament and all the State Legislatures (31 States and Union Territories), the GST Council which is a constitutional body created under the 101st Amendment of the Constitution and the Central and the State Governments in their wisdom have not found it necessary to provide for a Judicial Member in this Authority due to its highly specialized and technical functions.

61. Similarly, in the case of ***Madras Bar Association v. Union of India 2014 (308) ELT 209 (SC)***, the constitutional validity of the National Tax Tribunal Act 2005 and the Constitution (Forty-Second) Amendment Act, 1976 was challenged on the ground of violating the basic structure of the Constitution. The National Tax Tribunal was vested with the power of adjudicating appeals which included a substantial question of law arising from the orders passed by the appellate authorities under the specific tax enactments. Prior to the 2005 Act, the jurisdiction to adjudicate these appeals lied with the jurisdictional High Court. Therefore, the facts of the case of ***Madras Bar Association Supra*** are also not applicable to the facts of the present case as no substitution of the jurisdiction of the Hon'ble High Courts has taken place under the CGST Act, 2017.

62. Therefore, the sequitur of the above discussion is that this Authority has not replaced or substituted any function which the Courts were performing hitherto. Though it performs quasi-judicial functions but it cannot be equated with a judicial tribunal. Also, it performs its functions in a fair and reasonable manner in accordance with the Act but does not have the trappings of a Court and therefore, absence of a Judicial Member does not render the constitution of this Authority unconstitutional or legally invalid.

63. As stated earlier this Authority has been established under Section 171 of the CGST Act, 2017 with the statutory mandate to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the prices of the goods or services or both supplied by

him, which is a highly specialised fact-finding and technical work which requires intimate knowledge of the Central and the State Goods and Services Tax Acts, the Central Sales Tax Act, 1956, the State Value Added Tax Acts of all the States and Union Territories of the country, the Finance Act, 1994 (Service Tax) and all other connected tax laws which only an officer who has dealt with these Acts/laws can have. Therefore, as per Rule 122 of the CGST Rules, 2017 it has been provided that a person who is appointed as Chairman of this Authority should have held a post equivalent to the Secretary to the Government of India and the Technical Members should have worked as Commissioners of State or the Central Tax for one year before they are appointed as such. Accordingly, the Chairman and the Technical Members of the Authority are being appointed by the competent authority (Appointments Committee of the Cabinet) of the Union Cabinet keeping the requirements of the above mandate of the GST law in perspective. Moreover, the orders passed by this Authority are further subject to the judicial review and therefore, the Respondent should not have any grievance on this account. Therefore, the above contentions of the Respondent are not tenable.

64. The Respondent has also quoted the judgements passed in the following cases to support his above contention:-

(i) ***Rojer Mathew v. South Indian Bank Limited and Ors. 2018 (13) GSTL 129 (SC)***.

(ii) ***Gujarat Urja Vikas Nigam Limited v. Essar Power Limited (2016) 9 SCC 103.***

(iii) L. Chandra Kumar v. Union of India (1997) 3 SCC 261 and R. K. Jain v. Union of India (1993) 4 SCC 119.

However, it is respectfully submitted that as has been stated in para supra the law pronounced in the above cases is not relevant in the facts of the present case and hence, the law settled in the above cases in not being relied upon.

65. The Respondent has also alleged that the DGAP has wrongly included the GST in the profiteered amount. However, as far as the issue of including the GST charged by the Respondent in the profiteered amount is concerned the DGAP has correctly included it in the profiteered amount as the Respondent has not only charged additional prices from his customers on the flats purchased by them which they were legally not bound to pay as they were entitled to the benefit of ITC due to which the prices should have been commensurately reduced but he has also forced them to pay additional GST on the illegally charged prices which they should not have paid. Had he not charged extra GST the customers would have paid less prices and thus got the benefit of ITC. The Central as well as the Government of Haryana have sacrificed their tax revenue in favour of the flat buyers to give them benefit of reduced prices which the Respondent has denied and thus, he has defeated the very aim of passing on the benefit of ITC. Therefore, the illegally charged additional GST has been rightly included in the profiteered amount by the DGAP.

66. The Respondent has further alleged that the method of calculation adopted by the DGAP while computing the profiteered amount in Table-C based on the computations made in Table-B was incorrect. Perusal of Table-B shows that the ratios of CENVAT/ITC to turnover for the pre and post-GST periods have been computed on the basis of the Returns filed by the Respondent during the pre and post-GST periods which have been duly verified by the DGAP. Therefore, the Respondent cannot contend that the above Table is incorrect. The computations made in Table-C are also based on the figures mentioned in Table-B which are based on the information supplied by the Respondent himself in respect of the turnover and the area sold by him and hence, he cannot find fault with the above Table. It is also clear from the above Tables that the additional benefit of ITC can only be calculated by comparing the credit of CENVAT availed by the Respondent during the pre-GST period with the ITC availed by him during the post-GST period to calculate the benefit which should be passed on to the buyers as per the provisions of Section 171 (1) of the above Act. The mathematical methodology applied by the DGAP while computing the above ratios and benefit as per the above Tables is correct and the same can be relied upon.

67. It is established from the perusal of the above facts that the Respondent has benefited from the additional ITC to the extent of 11.90% of the turnover during the period from July, 2017 to March, 2019 and hence the provisions of Section 171 of the CGST Act, 2017 have been contravened by the Respondent as he has not passed on the above benefit to his customers and thus he has profiteered an

amount of **Rs. 13,35,79,636/-** inclusive of GST @ 12% on the base profiteered amount of Rs. 11,92,67,532/-. Further, the Respondent has realized an additional amount of **Rs. 1,04,734/-** which includes both the profiteered amount @ 11.90% of the taxable amount (base price) and 12% GST on the said profiteered amount from the Applicant No. 1. He has further realized an additional amount of Rs. 13,34,74,902/- which includes both the profiteered amount @ 11.90% of the taxable amount (base price) and 12% GST on the said profiteered amount from the 1,238 flat buyers other than the Applicant No. 1. The details of the profiteered amount and the buyers have been mentioned by the DGAP in **Annexure-18** of his Report dated 24.09.2019. These buyers are identifiable as per the documents placed on record and therefore, the Respondent is directed to pass on an amount of Rs. 13,35,79,636/- and the amount of Rs. 1,04,734/- to the other flat buyers and the Applicant No. 1 respectively along with the interest @ 18% per annum from the dates from which the above amount was collected by him from them till the payment is made, within a period of 3 months from the date of passing of this order as per the details mentioned in Annexure-18 attached with the Report dated 24.09.2019.

68. Accordingly, this Authority under Rule 133 (3) (a) of the CGST Rules, 2017 orders that the Respondent shall reduce the prices to be realized from the buyers of the flats of the above Project commensurate with the benefit of ITC received by him as has been detailed above. Since the present investigation is only up to 31.03.2019 any benefit of ITC which accrues subsequently shall also be passed on to the buyers by the Respondent. The concerned Commissioner CGST/SGST shall

ensure that the above benefit is passed on to the eligible flat buyers. In case the above benefit is not passed on by the Respondent the Applicant No. 1 or any other buyer shall be at liberty to approach the Haryana State Screening Committee to initiate fresh proceedings against the Respondent as per the provisions of Section 171 of the CGST Act, 2017.

69. It is also evident from the above narration of the facts that the Respondent has denied benefit of ITC to the buyers of the flats being constructed by him in his above project in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and he has thus resorted to profiteering. Hence, he has committed an offence under Section 171 (3A) of the CGST Act, 2017 and therefore, he is apparently liable for imposition of penalty under the provisions of the above Section. Accordingly, a Show Cause Notice be issued to him directing him to explain why the penalty prescribed under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him.

70. This Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Haryana to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by the Authority is passed on to all the eligible buyers. A report in compliance of this order shall be submitted to this Authority by the Commissioners CGST /SGST within a period of 4 months from the date of receipt of this order.

71. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was required to be passed within a period of 6 months from the

date of receipt of the Report from the DGAP under Rule 129 (6) of the above Rules. Since, the present Report has been received by this Authority on 25.09.2019 the order was to be passed on or before 24.03.2020. However, due to prevalent pandemic of COVID-19 in the Country this order could not be passed on or before the above date due to *force majeure*. Accordingly, this order is being passed today in terms of the Notification No. 35/2020-Central Tax dated 03.04.2020 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes & Customs under Section 168 A of the CGST Act, 2017.

72. A copy each of this order be supplied to both the Applicants, the Respondent, Commissioners CGST/SGST, Haryana for necessary action. File be consigned after completion.

Sd/-
(Dr. B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

15.5.2020

(A. K. Goel)
NAA, Secretary

F. No. 22011/NAA/86/Emaar/2019 Date: 15.05.2020

Copy To:-

1. M/s Emaar MGF Land Ltd., Emaar Business Park, Mehrauli Gurgaon Road, Sikanderpur, Sector-28, Gurgaon-122002.
2. Shri Rahul Kumar, B-5/22, 1st Floor, Safdurjang Enclave, New Delhi -110029.
3. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. The Commissioner of State Tax, Vanijya Bhavan, Plot No. 1-3, Sector-5, Panchkula, Haryana- 134151,
5. The Commissioner, CGST Gurugram, Plot no. 36 & 37, Sector-32, Gurugram, Haryana-122001,
6. Principal Secretary to Govt. of Haryana, Town & Country Planning Department, Plot No. 3, Sec-18A, Madhya Marg, Chandigarh-160018,
7. Guard File.

15.5.2020

A. K. GOEL
SECRETARY, NAA