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

Case No.	:	59/2020
Date of Institution	:	31.01.2020
Date of Order	:	31.08.2020

In the matter of:

1. Shri Venugopal Gella, No 28/58, 3rd Floor, Smiran Arcade, 2nd Main Banashankari, 1st Stage, Bengaluru-560050.
2. Mr. Sanjay Mehta, 305-3, Ground Floor, 1st Main Sitapati Agrahar, Chamrajpet, Bengaluru-560018.
3. 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 Shapoorji Palonji, Legal Name: Relationship Properties Pvt. Ltd.

No. 1/1, Binny Mill Road, Binnypet, Bengaluru-560023.

Respondent

Quorum: -

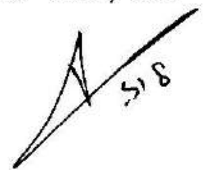
1. Dr. B. N. Sharma, Chairman
2. Sh. J. C. Chauhan, Technical Member
3. Sh. Amand Shah, Technical Member

Present: -

1. Sh. G. Venugopal, the Applicant No. 1, in person.
2. None for the Applicant No 2.
3. Sh. S. S. Gupta and Sh. Ram Kasyapa, Authorised Representatives for the Respondent.

ORDER

1. The present Report dated 31.01.2020, has been received from the Applicant No. 3 i.e. the Director General of Anti-Profiteering (DGAP) after a detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that an application was filed before the Karnataka State Screening Committee on Anti-profiteering by the Applicant No. 1, alleging profiteering by the Respondent in respect of purchase of Apartment No. Emerald-002, in the Respondent's project "PARKWEST-EMERALD", situated at 1 & 1, 1, Hosakerehalli Main Road, Binnyfields, Binny Pete, Jagajeevanram Nagar, Bengaluru, Karnataka-560023. The above Applicant had also alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) to him, on



5. The Applicant No. 1 had also submitted the following documents along with his application:-

   a. Copies of demand letters issued to him, both pre-GST and post-GST.
   b. Copy of the cost breakup for the unit as shared by the Respondent with the Applicant during booking of the unit.
   c. Copy of Aadhaar Card as proof of identity.
   d. Copy of Construction Agreement signed between the Respondent and the Applicant.
   e. Copy of the Agreement for Sale executed between the Respondent and the Applicant.

6. On receipt of the said reference from the Standing Committee on Anti-profiteering, a Notice under Rule 129 (3) of the Rules was issued by the DGAP on 13.05.2019, calling upon the Respondent to reply as to whether he admitted that the benefit of input tax credit had not been passed on to the Applicant No. 1 by way of commensurate reduction in price and if so, to suo moto determine the quantum thereof and indicate the same in his reply to the Notice as well as furnish all the supporting documents. Vide the said Notice, the Respondent was given an opportunity to inspect the non-confidential evidence/ information submitted by the Applicants during the period from 21.05.2019 to 23.05.2019 which the Authorized Signatory of the Respondent availed of on 10.10.2019. Vide e-mail dated 23.09.2019 and 24.01.2020, the Applicant No. 1 and 2 were given an opportunity

implementation of the GST w.e.f. 01.07.2017, in terms of Section 171 (1) of the CGST Act, 2017.

2. The Karnataka State Screening Committee on Anti-profiteering had examined the said application and observed that the Respondent had not passed on the appropriate benefit of input tax credit to the above Applicant as the additional input tax credit available to the Respondent should have been apportioned against the instalments towards the price of the flat. The Karnataka State Screening Committee had forwarded the said application with its recommendation, to the Standing Committee on Anti-profiteering for further action in terms of Rule 128 (1) of the above Rules.

3. The aforesaid reference was examined by the Standing Committee on Anti-profiteering, in its meeting held on 11.04.2019, the minutes of which were received by the DGAP on 02.05.2019, whereby it was decided to forward the same to the DGAP to conduct a detailed investigation in the matter.

4. Further, the Standing Committee on Anti-profiteering vide its minutes of meeting dated 13.09.2019 had forwarded one more application filed by the Applicant No. 2 in respect of purchase of Apartment No. MA-0905, in the Respondent's project "PARKWEST-MAPLE, situated at Ward No. 121, No. 1/1, Hosakere Road, Binny Pete, Binnyfields, Binnypet, Bengaluru, Karnataka-560023, against the Respondent for not passing on the benefit of ITC. As the investigation was already underway, the Applicant No. 2 was made a co-applicant by the DGAP in the ongoing investigation, vide his letter dated 29.11.2018.

g. CENVAT/Input Tax Credit Register for the period from April, 2016 to April, 2019.

h. Copies of Balance Sheets for FY 2016-17 & 2017-18.

i. Tax rates, pre-GST and post-GST.

j. Details of turnover, output tax liability/GST payable and input tax credit availed and its reconciliation with the turnover as per the list of home-buyers.

k. List of home buyers in the project "ParkWest".

10. The DGAP has stated that the subject applications, various replies of the Respondent and the documents/evidence on record have been carefully examined by him and he has found that the main issues for determination were whether there was reduction in the rate of tax or benefit of input tax credit on the supply of construction service by the Respondent after implementation of GST w.e.f. 01.07.2017 and if so, whether the Respondent has passed on such benefits to the recipients, in terms of Section 171 of the CGST Act, 2017.

11. The DGAP has also stated that another aspect was that Para 5 of Schedule-III of the CGST Act, 2017 (Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services) read as "*Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building*". Further, clause (b) of Paragraph 5 of Schedule II of the CGST Act, 2017 read as "*(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration had been received after issuance of*

to inspect the non-confidential documents/reply furnished by the Respondent on 01.10.2019 or 03.10.2019 which they did not avail of.

7. The period covered by the DGAP in the present investigation is from 01.07.2017 to 30.04.2019. The time limit to complete the investigation was extended upto 01.02.2020 by this Authority vide its order dated 31.10.2019, in terms of Rule 129 (6) of the Rules.

8. In response to the Notice dated 13.05.2019, the Respondent has submitted his replies vide letters/e-mails dated 28.05.2019, 17.06.2019, 29.06.2019, 25.07.2019, 16.08.2019, 19.08.2019, 19.10.2019, 21.10.2019, 06.12.2019, 17.12.2019, 19.12.2019 and 26.12.2019.

9. Vide the aforementioned letters/e-mails, the Respondent has submitted the following documents/information before the DGAP:-

   a. Copies of GSTR-1 Returns for the period from July, 2017 to April, 2019.
   b. Copies of GSTR-3B Returns for the period from July, 2017 to April, 2019.
   c. Copy of Electronic Credit Ledger for the period from 01.07.2017 to 30.04.2019.
   d. Copies of Tran-1 Statements for the period from July, 2017 to December, 2017.
   e. Copies of VAT & ST-3 Returns for the period from April, 2016 to June, 2017.
   f. Copies of all demand letters, sale agreement/contract issued in the name of the Applicants.

completion certificate, where required, by the competent authority or after his first occupation, whichever was earlier". Thus, the input tax credit pertaining to the residential units which were under construction but not sold was provisional input tax credit which might be required to be reversed by the Respondent, if such units remained unsold at the time of issue of the Completion Certificate (CC), in terms of Section 17 (2) & Section 17 (3) of the CGST Act, 2017, which read as under:-

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

Section 17 (3) *"The value of exempted supply under sub-section (2) shall be such as might be prescribed and shall include supplies on which the recipient was liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building".*

Therefore, the DGAP has further stated that the input tax credit pertaining to the unsold units was outside the scope of this investigation and the Respondent was required to recalibrate the

selling prices of such units to be sold to the prospective buyers by considering the proportionate additional input tax credit available to him post-GST.

12. The DGAP has also submitted that in response to the Notice of Initiation of investigation dated 13.05.2019, the Respondent vide his submissions dated 29.06.2019 has stated that the allegation made by the Applicant No. 1 that the benefit of input tax credit by way of commensurate reduction in price was not passed on to him was untrue in as much as he had already passed on the benefit of the additional input tax credit which has accrued to him on account of implementation of GST, by way of a corresponding reduction in the price on the demand invoices raised on the above Applicant post implementation of GST which had been termed as 'Reduction on account of GST', vide invoice No. RS0800000112 and RS080000147 dated 27.04.2018 and 28.04.2018 respectively. The Respondent has also provided a copy of the intimation letter dated 18.10.2017 issued to the above Applicant for passing on of the GST benefit. The Respondent has further submitted that on a suo moto basis, he had passed on the benefit of input tax credit to his all customers, who were eligible for this benefit, as on July 01, 2017, by way of commensurate reduction in the prices and tax invoices issued by him reflected a line item for reduction on account of GST.

13. The Respondent vide his submissions dated 14.08.2019 has also furnished details of the input tax credit for the pre-GST period from March, 2016 to June, 2017 and for the post-GST regime from July, 2017 to April, 2019, as were sought from the Respondent. The

Respondent has also placed following points for consideration before the DGAP while computing the profiteering amount:-

a. *There was an increase in the amount of input tax credit availed by the Respondent in the post-GST regime due to increase in rate of taxes*:

   The rate of tax applicable to the works contract services was more than the rate which was applicable in the pre-GST regime and if the GST had not been introduced then the rate of tax would had remained the same. Therefore, the benefit which has accrued to the Respondent was only to the extent of the tax rate which was applicable in the earlier period only and not to the extent of the entire tax being charged on the said works contract services.

   Tax Rate of works contract services under the earlier regime was 16.15% i.e. VAT 10.15% (14.50% X 70%) and Service Tax of 6.00% (15.00% x 40%). However, after GST, the rate of tax on works contract services was 18.00%. Therefore, the benefit arising to the Respondent due to GST was only 16.15% and not entire 18.00% because with the implementation of GST the rate had been increased from 16.15% to 18.00%. Had the GST not been implemented, the cost of the Respondent would have been restricted to 16.15% of the tax only. Therefore, it was submitted that the benefit to the Respondent due to GST was only 16.15% and not 18.00%.

   In view of the above, it was submitted that amount of Rs. 28,99,898/- was not an additional benefit accruing to the

Respondent due to advent of GST on the works contract services. This credit was now available to the him under GST regime only due to increase in the rate of tax under the GST vis-à-vis the earlier regime. Thus, the same must be reduced from the post-GST ITC availed by him.

Further, under the pre-GST regime, services were subject to Service Tax at the rate of 15.00%. and the Respondent was eligible to avail Cenvat credit of these input services. Under the GST, in most of the cases, services were taxable @ 18.00%. Therefore, there was an increase by 3.00% (18.00% - 15.00%) of the ITC available to him. It was submitted that this benefit of extra 3.00% was not due to introduction of GST but due to increase in the rate of tax from 15.00% to 18.00% and therefore, the same should not be considered as a benefit due to GST and accordingly Rs. 3.66,781/- must be reduced from the GST Input tax credit.

b. *<u>Input tax credit of GST pertaining to work done in the pre-GST should not be considered in the GST Regime credit:</u>*

In construction sector, the goods and services were provided before the invoice was raised based on the various internal approvals of the work done and accordingly the invoice was raised. Further, even under the Service Tax laws, service provider was allowed to raise the invoice within 30 days from the provision of service.

In case of certain services like brokerage, service had been provided in the pre-GST regime, however, due to the reasons

mentioned above, invoice had been raised after 1 "July, 2017 i.e. under the GST regime and GST had been charged on the same.

Sample copy of invoice No. JP051/2017 dated 15.03.2018 was submitted by the Respondent vide which it was claimed that the brokerage was for sale of flat to Ms. Mithila Jain and the GST had been charged on the same. However, the agreement for sale between the Respondent and Ms. Jain had already been signed on 21.01.2017. Therefore, it could be seen that the activity in relation to the brokerage i.e. the sale of flat had already taken place in pre-GST regime however, since the invoice had been raised in the GST regime and GST had been charged on the same, ITC had been availed by the Respondent.

It was submitted that though such invoices had been raised in the GST regime and the Respondent had availed ITC on such invoices, these invoices pertained to the activities undertaken in the Pre-GST regime and therefore, they must be considered as input tax availed in the pre-GST regime instead of input tax availed in the GST regime.

Therefore, in view of the above, Rs. 1,39,795/- should not be included in the input tax credit availed in the pre-GST regime.

c. *The credit and taxable value do not synchronise in the same month or the same period:*

The agreement for sale of premises entered into between the buyer and the Respondent specified the milestone for recovery of the amount. The invoice could be raised only on achieving milestones

whereas the credit accrued to the Respondent on incurring expenditure for construction of the project. Therefore, there was no synchronization between the credit availed and the value of taxable service provided by the Respondent during any period. Due to this reason, the percentage of availment of credit during the period would also vary.

In the given case of the PARKWEST-EMERALD project, billing done by the Respondent upto 30.06.2017 was 90%. The same could be seen from the invoice No. 907098646 issued to the Applicant No. 1 dated 29.06.2017 and the schedule of payment as per the contract. However, the work completed upto 30.06.2017 was only 53%. The same could be verified from the RERA certificate of PARKWEST-EMERALD project. Therefore, it could be seen that 90% of the billing had been done for 53% of the work done and in the GST regime, balance 10% billing had been done as against 47% of the work done. Thus, it could be said that there was no synchronization between the work done and the billing which has also led to no synchronization between the credit availment and the billing.

It was also submitted that in order to determine the true profiteering amount, it was important to synchronize the work done / credit with the billing raised on the customers. Since, only 10% of the billing had been done in the GST regime, even input tax credit in synchronization to the same must be considered for anti-profiteering and the balance credit for the 37% of work done for which billing had already been done in the pre-GST regime must be

excluded from the GST input tax credit. The Respondent has also furnished the following details in support of his above claim:-

Particulars	Total Post-GST
Total Credit in GST Regime	4,70,69,461
Factual adjustments	
a) Reduction of credit due to increase in rate of tax on services - Paragraph 1	(3,66,781)
b) Reduction of credit due to increase in rate of tax on works contracts services – Paragraph 1	(28,99,898)
c) Reversal of Credit for Work done prior to GST but bills booked in Post GST (Sales Brokerage) - Paragraph 2	(1,39,795)
Net Credit (47% work done)	4,36,62,987
Less: Credit pertaining to work done under Pre-GST regime as per RERA Registration (37% work done)	(3,43,72,990)
Balance Credit	92,89,997

Accordingly, Rs. 3,43,72,990/- must be excluded from the total ITC availed by the Respondent in respect of PARKWEST-EMERALD Project in the GST regime.

Similarly, for the period under consideration for the pre-GST regime from April, 2016 to June, 2017, the total billing done by the Respondent was 35%. The same could be seen from the invoices which had been raised during the said period. Thus, credit attributable to the work done for the 35% billing must be considered for determining the profiteering amount.

As submitted above, Rs. 3,43,72,990/- was the input tax credit for 37% of the work done. Therefore, Rs. 3,25,14,990/- was for the 35% of the work done and the remaining credit was for work and billing done prior to April, 2016. Accordingly, the credit for the 2% work

amounting to Rs. 18,58,000/- and credit availed during the period from April, 2016 to June, 2017 should not be considered as input tax credit of pre-GST regime for the purpose of anti-profiteering calculations since the same also pertained to the period prior to April, 2016 as the invoicing was done in the period prior to April, 2016. He has also submitted the following details:-

Particulars	Total Pre-GST
Total Credit in Pre-GST regime – (A)	4,50,88,505
Factual adjustments	
a) Addition of credit pertaining to work done prior to GST regime 1,39,795 and invoice raised in GST regime - Paragraph 2 – (B)	1,39,795
b) Work done prior to April-16 but invoice raised, and credit availed after April-16 - (C A + B)	(4,52,28,300)
Net Credit - (D)	0
Add: Credit pertaining to work done under Pre-GST regime as 3,25,14,990 per RERA Registration	3,25,14,990
Balance Credit	3,25,14,990

d. *The turnover was not for the entire project area and the credit in the pre and post GST must be computed based on the area relevant to the turnover in the said regime:*

It could be seen from Table-1 that the gross turnover was Rs. 84,70,76,887/-(2016-17) and Rs. 9,06,12,248/-(Apr-Jun 2017). Therefore, the total gross turnover was Rs. 93,76,89,135/. Further, total area of the project was 3,24,725 sq. ft. whereas the turnover was only for 3,17,887 sq. ft. Therefore, the total credit of Rs. 3,25,14,990/- must be re-computed based on the area relevant to the turnover. Therefore, the credit of Rs. 3,18,30,295/-

(3,25,14,990*3,17,687/3,24,725) must be considered for determining the benefit derived by the Respondent.

Similarly, in the post GST regime, the total turnover was Rs. 27,93,70,499/ and the area relevant to the turnover was 3,15,742 sq. ft. The credit of Rs. 92,89,997/- as computed in for 3 above must be re-computed after giving effect to the credit mentioned in above para. Therefore, the revised figure of credit would be Rs. 90,33,004/- (92,89,997*3,15,742/3,24,725). The customer-wise break-up of the above stated gross turnover was given in Annexure-6. Revised Table by considering the above points was submitted by the Respondent as follows:-

Particulars	Pre-GST	Post-GST
Cenvat/ITC	3,18,30,295	90,33,004
Turnover	93,76,89,135	27,93,70,499
Ratio	3.39%	3.23%

14. The DGAP has also submitted that the Respondent vide his submissions dated 21.10.2019 had submitted the legal position regarding availability of input tax credit in the pre-GST regime, which is as under:-

a. <u>*The credit of Service Tax & VAT was admissible to the Respondent:*</u>

In the pre-GST regime, the credit of Service Tax on input services was admissible to the Respondent under rule 2 (1) of the Cenvat Credit Rules, 2004 which was utilised to pay the Service Tax. The Respondent was also allowed to avail the credit of VAT paid on purchase of goods under Section 10 of the Karnataka Value Added Tax Act, 2003 (KVAT Act) which was utilised to pay outward VAT liability. The same has been explained below:-

a) Works contractors operating in Karnataka were allowed to opt either for the regular scheme or for the composition scheme. Works contractors who opted to pay tax under the Composition Scheme were governed by the provisions contained in Section 15 of the KVAT Act, which read as under:-

15. Composition of tax.-

(1) Subject to such conditions and in such circumstances as might be prescribed, any dealer other than a dealer who purchases or obtains goods from outside the State or from outside the territory of India, liable to pay tax as specified in Section 4 and,

(a) whose total turnover does not exceed an amount as might be notified by the State Government which shall not exceed fifty lakh rupees, and who was not a dealer falling under clause (b) or (c) of ta) (d) below

(b) who was a dealer executing works contracts, or

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(4) Any dealer opting for composition of tax shall not be permitted to claim any input tax on any purchases made by him.

Works contractors who had opted to go under Section 15 (1) (b) of the KVAT Act, reproduced above, were not entitled to avail of input tax credit, in terms of Section 15 (4) reproduced above.

b) Works contractors who had opted to go under the regular scheme were entitled to avail input tax credit. The term 'sale' was defined under Section 2 (29) of the KVAT Act, as under:

(29) 'Sale' with all its grammatical variation and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes, -

c) The provisions relating to input tax credit, as contained in Section 10 of the KVAT Act were as under:-

10. Output tax, input tax and net tax-

(1) Output tax in relation to any registered dealer means the tax payable under this Act in respect of any taxable sale of goods made by that dealer in the course of his business, and includes tax payable.

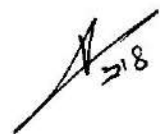
(2) Subject to input tax restrictions specified in Sections 11, 12, 14, 17 and 18 input tax in relation to any registered dealer means the tax collected or payable under this Act on the sale to him of any goods for use in the course of his business, and includes the tax

on the sale of goods to his agent who purchases such goods on his behalf subject to the manner as might be prescribed to claim input tax in such cases.

(3) Subject to input tax restrictions specified in Sections 11, 12, 14, 17, 18 and 19, the net tax payable by a registered dealer in respect of each tax period shall be the amount of output tax payable by him in that period less the input tax deductible by him as might be prescribed in that period and relatable to goods purchased during the period immediately preceding five tax periods of such tax period, if input tax of such goods was not claimed in any of such five preceding tax periods and shall be accounted for in accordance with the provisions of this Act.

(4) For the purpose of calculating the amount of net tax to be paid or refunded, no deduction for input tax shall be made unless a tax invoice, debit note or credit note, in relation to a sale, had been issued in accordance with Section 29 and was with the registered dealer taking the deduction at the time any return in respect of the sale was furnished, except such tax paid under sub-section (2) of Section 3.

(5) Subject to input tax restrictions specified in Sections 11, 12, 14, 17, 18 and 19, where under sub-section (3) the input tax deductible by a dealer exceeded the output tax payable by him, the excess amount shall be adjusted or refunded together with interest, as might be prescribed.



It was clear from the above, that works contractors who had opted to go under the regular scheme were entitled to avail of the benefit of input tax credit. ITC was allowed to be taken by the works contractors on purchase of all goods and materials and there was no restriction. As a works contractor, the Respondent had claimed input tax credit of the eligible goods, materials and capital goods as allowed under Section 10 read with Section 11 and his assessments under the KVAT Act were completed till June 30, 2017. It was evident from the said returns that he had claimed VAT credit.

b. *The benefit to be passed on to the customer was only to the extent of the Excise Duty levied on raw materials purchased by the Respondent for construction of the building:*

Section 171 of the CGST Act, 2017 provided for provisions pertaining to Anti-Profiteering under the GST. There was no reduction in the rate of tax. On the contrary, the tax rate on construction activity had increased in the post-GST regime. Hence, there was no question of profiteering.

As explained in Para I above, credit of Service Tax and VAT was admissible to the Respondent. Thus, only the credit of the Excise Duty levied on the goods was not admissible to him in the pre-GST regime. On advent of GST, entire credit on purchases was now available to him. Thus, the additional benefit on introduction of GST was only the component of Excise Duty with respect to the materials used in the execution of the project during the GST period.

It could be seen that the total assessable value of procurement was Rs. 4,40,18,823/- and Excise Duty benefit (@ 12.5%) on the same would had been Rs. 55,37,108/- which needed to be passed on to the customers u/s 171 of CGST Act 2017. The HSN wise details of the materials procured along with the rate of Excise Duty have been given as under:-

Sr. No.	Name of Material	HSN Code	Rate of Excise Duty
1	Sanitary Fittings	Chapter 73 or 74 or 76 (depending on the material)	12.50%
2	Doors	Chapter – 44. 4418	12.50%
3	Electrical Equipment and Item	Chapter – 84.	12.50%
4	Furniture	Chapter – 94. 9403/9405	12.50%
5	Sliding Window	Chapter – 76. 7610	12.50%
6	Tiles	Chapter – 69.	12.50%

The Respondent had estimated that the amount of benefit would be Rs. 50,37,790/- on the basis of estimated procurement cost and accordingly he had passed on the same to the customers. He had passed on the benefit to the extent of 2% of the balance demand to be raised on the customers. He had raised 90% of the invoicing in the pre-GST regime. Accordingly, he had passed on benefit to the customers at the rate of 2% on the 10% value of the total consideration from all the customers.

The customer wise data of the benefit amounting to Rs. 50,37,790/- passed on to the customers has been furnished vide Annexure-3. Further, the sample copies of invoices of the 5 customers showing that the amount of input tax credit benefit had been passed on to them were attached as Annexure-4. It could be seen from the working that the total Excise Duty benefit accruing to the Respondent was Rs. 55,37,108/-. The total work done in the pre-GST regime in this project was 53%. Thus, it was clear from the above list of materials that the balance 47% work was carried out in the post-GST regime. However, in post-GST regime, the Respondent had billed only 10% to the customers. Thus, the benefit which was required to be passed on account of the purchase of these materials was only Rs. 11,78,108 (i.e. 55,37,108/47*10). However, he had already passed on Rs. 50,37,790/- GST benefit to his customers. Thus, there was no additional liability payable u/s 171 of CGST Act.

c. *The credit and the taxable value do not synchronize in the same month or the same period:*

The agreement for sale of premises entered into between the buyer and the Respondent had specified the milestones for recovery of the amount. The invoice could be raised only on achieving milestones whereas the credit accrued to the Respondent on incurring expenditure for construction of the project. Therefore, there was no synchronization between the credit availed and the value of taxable service provided by the Respondent during any period. Due to this reason, the percentage of availment of credit during the period

would also vary. In the given case of the PARKWEST-EMERALD project, billing done by the Respondent upto 30.06.2017 was 90%. However, the work completed upto 30.06.2017 was only 53%. Details of completion of work and the percentage of invoicing done to the customers was as follows:-

Sr. No.	Month	% of Work Done (Cost)	% of Demand Raised
1	April 2016	38%	55%
2	June 2017	53%	90%
3	March 2019	100%	100%

Therefore, it could be seen that 90% of the billing had been done for the 53% of the work done in the pre-GST period and in the GST regime, balance 10% billing had been done as against 47% of the work done. Thus, it could be said that there was no synchronisation between the work done and billing which also led to no synchronisation between the credit availment and billing.

It was also submitted that in order to determine the correct profiteering amount, it was important to synchronize the work done/credit with the billing raised on the customers. Hence, 37% (90%-53%) of work done in the post-GST period did net pertain to the corresponding billing in the post-GST period. Therefore, GST input tax credit on 37% of work done corresponded to the pre-GST billing to customers and thus there was no actual benefit which has accrued to the customers by comparison of Input-Output ratios

15. The DGAP has also claimed that the Respondent has submitted that the credit on input services was admissible to him under Rule 2 (l) of the Cenvat Credit Rules 2004 which was utilized to pay the Service Tax. The Respondent has also submitted that he was allowed to avail the credit of VAT paid on the purchase of goods under Section 10 of the KVAT Act which was utilised to pay outward VAT liability. Under the KVAT Act, works Contractors who opted to go under the Regular Scheme were entitled to avail the input tax credit. The term 'Sale' as defined under Section 2 (29) (v) (b) of the KVAT Act, included transfer of property in goods involved in the execution of a works contract. The DGAP has further claimed that upon analysing the KVAT Act and the invoices raised by the Respondent to the home-buyers it was observed that VAT for works contracts was levied @14.5% on 70% of the construction value of the demand made from the home-buyers. Thus, it was evident that there was a direct correlation between the demand made from the home buyers and the VAT charged from them.

16. From the perusal of the submission of the Respondent the DGAP has also stated that VAT was charged on the works contract agreement executed between the buyers and the Respondent in terms of the explicit definition provided in Section 2 (29 (b) of the KVAT Act. Hence, the claim of admissibility of VAT credit by the Respondent and its inclusion while deciding the costing of units was found to hold true and input tax credit of VAT in the pre-GST period was considered to determine the additional benefit of input tax credit post implementation of GST. Even though the contention of the Respondent that in his case, only the erstwhile Excise Duty on the goods purchased by him

was not available to him as credit in pre-GST period and only the same should be considered as additional credit post-GST, in determination of profiteering, however determination of profiteering by the DGAP has not accounted for the item wise availability of input tax credit for the goods or services pre and post-GST implementation and hence, the same was not accounted for the calculation of the profiteering by the DGAP.

17. The DGAP has further stated that the Respondent vide his submissions dated 06.12.2019 had raised the contention that the methodology of calculation of profiteering by the DGAP was incorrect as the DGAP had been comparing turnover with the input tax credit to arrive at the profiteering. In this regard the Respondent's submissions with reference to his project *PARKWEST-EMERALD* and clarifications of the DGAP thereof have been mentioned as under:-

a. *The profiteering working prepared by the DGAP was incorrect as the DGAP had compared the credit vis-a-vis turnover and computed the benefit arising under the GST. It was submitted that the profit to the Respondent had remained the same irrespective of the rate of GST charged on the product. The same could be seen from the following Table-A where it was assumed that the sale price was Rs. 120/-:-*

Table 'A' **(Amount in ₹)**

S. No.	GST Rate of Input	Cost of Input	GST Amount	Total Invoice Value	ITC under GST	Net Cost to Company	Selling Price	Gross Profit	Ratio as per DGAP working
(A)	(B)	(C)	(D)=C*B	(E)=C+D	(F)=D	(G)=E-F	(H)	(I)= H-G	(J)=D/H
1	28%	100	28	128	28	100	120	20	23.33%
2	18%	100	18	118	18	100	120	20	15.00%
3	12%	100	12	112	12	100	120	20	10.00%
4	5%	100	5	105	5	100	120	20	4.17%

It could be seen that just because the GST rate had increased/decreased on a particular product, the ITC working done by the DGAP had changed drastically. However, the gross profit and cost to the Respondent had remained constant irrespective of the GST rate on the product. This showed that the working done by the DGAP suffered from inherent fallacy and could not be accepted.

The DGAP has stated that as the Anti-profiteering provisions were independent of the costing and profit component, the contentions raised by the Respondent were not acceptable.

b. *The Respondent was allowed to avail the credit of Service Tax levied on the supply of services and credit of KVAT levied on the supply of goods in the pre-GST regime only the credit of Excise Duty was not allowed to the Respondent. On the advent of GST, the Respondent had become eligible to avail the credit of all tax components including the Excise Duty. Thus, the Respondent had received the benefit only to the extent of Excise Duty which was levied on the goods as the same was not admissible in the pre-GST regime. The Respondent had computed the benefit as per the records which was as follows:-*

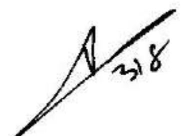
Particular		Amount
Selling Price of Flat (assuming 20% profit margin)	A	120
Total Cost of Flat	B	100
Less: Land Cost @31% of selling price	C = 31% of A	(37.20)
Construction cost	D = B (-) C	62.80
Less 40% of construction cost towards pure services like labour	E = 40% of D	(25.12)
Cost of Material	F = D (-) E	37.68

Less: Non-Excisable material cost (like sand)	G = 40% of F	(15.07)
Cost of Excisable material	H = F (-) G	22.61
Excise Duty @12.50% included in the above cost	I = H/112.5*12.5	2.51
Percentage of Excise Duty on selling price	H = I/A*100	2.09
Balance demand to be raised as on 30th June 2017 was 10%		
Benefit of Excise Duty on selling price to be passed on the to the customers was 10% of Excise Duty to be passed	K = 10% of J	0.2%

The Respondent had passed on the benefit at the rate of 2.0% on the balance demand. Thus, he had already passed on additional benefit of 1.8% (2.0% -0.2%).

In this regard, the DGAP has submitted that the Respondent's contention was not tenable in the context of the GST regime. The purpose of GST was not only to extend the ITC in respect of Excise Duty on inputs used in construction service but to allow ITC of GST paid on all inward supplies of goods and services. However, in view of proper intimation to the home-buyers and reduction in the basic cost on account of GST benefit extended in compliance of Section 171 being duly mentioned with description as "Less: Reduction towards Section 171 of the CGST Act, 2017", in the demand letters, such benefits extended by the Respondent shall be accounted for in determination of amount of profiteering and properly adjusted.

c. *Without prejudice to other submissions, it was submitted by the Respondent that the benefit received due to increase in the rate of credit needed to be distributed to the customers. In the given case, the*



Respondent had received average input tax credit at the rate of 12%, i.e. 6% CGST and 6% SGST.

In the state of Karnataka, the Respondent was allowed to avail the credit of VAT on inwards. The computation of VAT credit as per the provisions of KVAT Act, was as follows:-

Total project cost = Rs. 100

Land Cost @ 30% = Rs. 30

Construction Cost = Rs. 70 (Rs. 100 (-) Rs. 30)

Material Cost was 70 % of Construction Cost = Rs. 49 (70% of Rs. 70)

VAT levied at the rate of 14.5% = Rs. 7 (approx.)

Thus, it could be seen that the Respondent used to avail the credit amounting to Rs. 7 approx. in the pre-GST regime; however on advent of GST, the Respondent had received Rs. 6 as state credit only. Thus, the Respondent had not received any additional benefit on the advent of GST.

Similarly, the Respondent was allowed to avail credit of Service Tax levied on services. As per the provisions of the Finance Act, 1994, 30% of component in the value inclusive of land was service. Thus, in case total project cost was Rs. 100, value of service in the said component was Rs. 30. The Service Tax was levied at the rate of 15%. Thus, the Respondent used to receive the credit amounting to Rs. 4.5 (15% of Rs. 30). On advent of GST, the Respondent was receiving the benefit of Rs. 6 as central credit. Thus, the Respondent

*was receiving benefit amounting to Rs. 1.5 which was 1.25% (i.e. Rs. 1.5/120*100). The Respondent had already passed on 2.0% benefit. Thus, he had already passed on additional benefit of 0.75% (2.0% - 1.25%). Further, if the benefit was determined on combining the state and the centre tax, the Respondent had received benefit of Rs. 0.5 (Rs. 1.5 (-) Rs. 1) whereas the Respondent had passed on Rs. 2.4 (i.e. 2.0% of Rs. 120).*

In this regard, the DGAP has stated that the accrual of input tax credit was looked as a whole and item-wise or service wise availability of input tax credit pre and post-GST was not compared for determination of additional benefits of input tax credit during the computation of profiteering, hence the above contention had not been looked into. However, on account of proper intimation to the home-buyers and reduction in the basic cost on account of GST benefit as extended by the Respondent in compliance of Section 171 being duly mentioned with description as "Less: Reduction towards Section 171 of the CGST Act, 2017", in the demand letters, the benefits extended by the Respondent have been accounted for in determination of amount of profiteering and properly adjusted.

d. *The Respondent has also worked out the Excise Duty benefit on the actual materials procured from the start of the GST till handing over of the possession which was Rs. 55 Lakhs for the PARKWEST-EMERALD project as per the following details:-*

GST Benefit to be passed on to Emerald Customers for units sold until 30th June 2017- Reviewed in Sept 2019	
	In Rs.
Particulars	GST Impact
Tax Benefits due to GST	
ED impact on actual materials procured from Jul-17 till handover	55,02,353
Total Cost impact on account of GST (A)	55,02,353
Total Saleable area to be constructed (In Sq. Feet) (C)	3,24,725
Total Area sold till date of introduction of GST (In Sq. Feet) (D)	3,17,887
Value of Cost reduction to be passed to the customer E- (A*D/C)	53,86,485
Statement of benefits to be passed on to the customer	
Particulars	
Balance Demand note to be issued for a executed portion of development (In Rs)	29,18,92,241
Benefits on account of GST to be passed on to the customers (In Rs)	53,86,485
Reduction to be passed on to the customers on balance value (In %)	1.84%

The Respondent had already passed on 2.0% benefit. Thus, he had already passed on additional benefit of 0.16% (2.0% - 1.54%).

On this issue, the DGAP has stated that the Respondent's contention regarding item wise incidence of tax and availability of input tax credit in the pre and the post-GST era and actual benefits arising out of credit of Excise Duty and the pending bills and demand notes to be issued for the executed portion of development was not looked into by the DGAP during computation of profiteering. However, proper intimation to the home-buyers and reduction in the basic cost on account of GST benefit extended in compliance of Section 171 being duly mentioned with

description as "Less: Reduction towards Section 171 of the CGST Act, 2017", in the demand letters by the Respondent it has been accounted for in determination of amount of profiteering and properly adjusted.

18. The DGAP has mentioned regarding the project "PARKWEST-MAPLE" that the Respondent vide his submissions dated 06.12.2019 had raised some more contentions stating that the profiteering worked by the DGAP was incorrect as the DGAP had compared the turnover with the input tax credit to arrive at the profiteering. In this regard, the points raised by the Respondent and the clarifications filed by the DGAP are as below:-

a. *No refund of overflow of credit:*

The Respondent has claimed that the credit which was availed by him was utilized against the output liability arising out of sale of flats. Usually, at the end of the construction stage, finishing activity was carried out for which huge expenditure was incurred on tiles, marbles and bathroom fittings etc. The Respondent was entitled to Input tax credit on the GST charged on such items. However, it was possible that the outward liability at that stage might be much less than the ITC accrued. The excess ITC accrued to the Respondent could not be claimed as refund owing to restriction imposed vide Notification No. 15/2017-Central Tax (Rate) dated 28.06.2017. The said notification reads as follows:-

"In exercise of the powers conferred by sub-section (3) of section 54 of the CGST Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council hereby notifies that no refund of unutilized input tax credit shall be allowed under sub-section (3) of

section 54 of the said CGST Act, in case of supply of services specified in sub-item (b) of item 5 of Schedule-II of the CGST Act."

It was also submitted that there was no guarantee that the ITC accrued to the Respondent would get utilized against the output liability. If the output liability was lesser than the ITC accrued, then the excess ITC was nothing but cost to the Respondent. The ratio computed by the DGAP for arriving at 'profiteering' amount did not take this into consideration. Hence, the same was flawed and could not be relied upon.

The DGAP has stated that the Respondent's contention regarding refund of overflow of credit for the service being provided by him couldn't be ascertained by the DGAP and hence the contention of no refund of overflow of credit had not been looked into. However, prima facie it appeared that as the taxable value of output service being provided by the Respondent was more than the value on which credit was availed, hence,there should not be any overflow or excess credit that has accrued to the Respondent.

b. <u>*Reversal of credit at the end of the project:*</u>

As per Schedule-III "Sale of land and, subject to clause (b) of para 5 of Schedule-II, sale of building" was neither supply of goods nor supply of service. Para 5 (b) of Schedule-II reads as follows:-

"(b) "construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration had been

received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever was earlier."

It could be seen that once the Completion Certificate was received, the sale of flats would not be subject to GST.

Section 17 (3) of the GST Act reads as follows:

"(3) "The value of exempted supply under sub-section (2) shalt be such as might be prescribed and shall include supplies on which the recipient was liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule-II, sale of building"."

Thus, the Respondent would be liable to reverse the proportionate input tax credit to the extent of flats sold after receipt of Completion Certificate. Hence, the credit which had been availed during the period from July, 2017 onwards would also proportionately be reversed by the Respondent which could not be computed today.

The DGAP has claimed in this regard that the Respondent's above contention held no merit, as the calculations of the DGAP had only considered the sold area and proportionate input tax credit for the purposes of calculation of profiteering and hence the contention of reversal of credit at the end of project held no merit.

c. *It was further submitted that the Respondent had initially worked out benefit estimate of 2.5% on the balance consideration to be billed to the customers after the implementation of the GST after taking into consideration the estimated inflation and contingencies. Further the Respondent had reviewed the status of actual benefit accruing till Sept.*

2019 and found that the actual benefit was working out to be lesser than the initial estimate. Mentioned below are the arguments of the Respondent in this regard.

i. As already submitted, the Respondent was allowed to avail the credit of Service Tax and KVAT levied by the vendors in the pre-GST regime and only the credit of Excise Duty was not allowed to the Respondent, therefore, on advent of the GST, the Respondent had received the credit of all tax components including the Excise Duty. Thus, the Respondent had received the benefit only to the extent of Excise Duty as the same was not admissible in the pre GST regime. The Respondent had computed the benefit as per the records which was as follows:-

Particular		Amount
Selling Price of Flat (assuming 20% profit margin)	A	120
Total Cost of Flat	B	100
Less: Land Cost @31% of selling price	C = 31% of A	(37.20)
Construction cost	D = B (-) C	62.80
Less 40% of construction cost towards pure services like labour	E = 40% of D	(25.12)
Cost of Material	F = D (-) E	37.68
Less: Non-Excisable material cost (like sand)	G = 40% of F	(15.07)
Cost of Excisable material	H = F (-) G	22.61
Excise Duty @12.50% included in the above cost	I = H/112.5*12.5	2.51
Percentage of Excise Duty on selling price	H = I/A*100	2.09
Balance demand to be raised as on 30th June 2017 was 55%		
Benefit of Excise Duty on selling price to be passed on the to the customers was 55% of Excise Duty to be passed	K = 55% of J	1.15%

The Respondent had passed on the benefit at the rate of 2.5% on the balance demand. Thus, the Respondent had already passed on additional benefit of 1.35% (2.5% -1.15%).

ii. Without prejudice to other submissions, it was submitted that the benefit received due to increase in the rate of credit needed to be distributed to the customers. In the given case, the Respondent had received average input tax credit at the rate of 12%, i.e., 6% CGST and 6% SCST.

In the State of Karnataka, the Respondent was allowed to avail the credit of VAT on the purchase of goods. The computation of VAT credit as per the provisions of KVAT Act, was as follows:-

Total project cost = Rs. 100

Land Cost @ 30% = Rs. 30

Construction Cost = Rs. 70 (Rs. 100 (-) Rs. 30)

Material Cost was 70 % of Construction Cost = Rs. 49 (70% of Rs. 70)

VAT levied at the rate of 14.5% = Rs. 7 (approx.)

Thus, it could be seen that the Respondent used to avail the credit amounting to Rs. 7 approx. in the pre-GST regime, however on advent of GST, the Respondent had received Rs. 6 as state credit only. Thus, the Respondent had not received any additional benefit on advent of GST.

Similarly, the Respondent was allowed to avail credit of Service Tax levied on services. As per the provisions of the Finance Act,

1994, 30% of component in the value inclusive of land was service. Thus, in case total project cost was Rs. 100, value of service in the said component was Rs. 30. The Service Tax was levied @ 15%. Thus, the Respondent used to receive the credit amounting to Rs. 4.5 (15% of Rs. 30). On the advent of GST, the Respondent was receiving benefit of Rs. 6 as central credit. Thus, Respondent was receiving benefit amounting to Rs. 1.5 which was 1.25% (i.e. Rs. 1.5/120*100). The Respondent had already passed on 2.5% benefit. Thus, additional benefit of 1.25% (2.5% - 1.25%) had been passed on. Further, if benefit was determined on combining the state and the central taxes, the Respondent had received benefit of Rs. 0.5 (Rs. 1.5 (-) Rs. 1) whereas the Respondent had passed on Rs. 3 (i.e. 2.5% of Rs. 120).

iii. The Respondent had also worked out the Excise Duty benefit on the material actually procured from the start of GST till Sept. 2019 the value of which was Rs. 2.85 Crore for the PARKWEST-MAPLE project and the future expected benefit was of Rs. 5.41 Crore. With this the GST benefit worked out to be 2.25% as is given below:-

GST Benefit to be passed on to Maple Customers for units sold until 30th June 2017- Reviewed in Sept 2019	
	In Rs.
Particulars	GST Impact
Tax Benefits due to GST	
ED impact on actual materials procured from Jul-17 to Sept19	2,85,34,060
ED impact on Materials required for Balance completion as on sept	5,41,49,645
Total Cost impact on account of GST (A)	8,26,83,705

Total Saleable area to be constructed (In Sq. Feet) (C)	7,82,263
Total Area sold till date of introduction of GST (In Sq. Feet) (D)	5,19,454
Value of Cost reduction to be passed to the customer E- (A*D/C)	5,49,05,296
Statement of benefits to be passed on to the customer	
Particulars	
Balance Demand notes to be issued for unexecuted portion of development (In Rs)	2,43,77,19,741
Benefits on account of GST to be passed on to the customers (In Rs.)	5,49,05,296
Reduction to be passed on to the customers on balance value (In %)	2.25

The Respondent had already passed on 2.5% benefit. Thus, he had already passed on additional benefit of 0.25% (2.50% - 2.25%).

The DGAP has also stated that the above contention of the Respondent was reiteration of facts already given for the other project "PARKWEST-EMERALD" and only the benefits as already passed on were accounted for while computing the amount of profiteering.

19. The DGAP has also clarified that the Respondent has submitted that in the present case, he had planned to develop several towers spread across different phases and he was in the process of developing many towers at present, each of these towers was initiated at a different point of time, that the progress of each tower was at a different stage and the Completion Certificates had been obtained for some of the towers. The Respondent has further submitted that in terms of the provisions of the RERA Act, promoter was legally bound to register his on-going as well as new projects and maintain separate accounts for

each of the projects. In compliance, he had obtained RERA registration for each of the on-going projects as well as for the other planned towers and hence each of them should be considered as a separate project. The Respondent vide his submissions dated 17.12.2019 has provided the details of the credit availed and the turnover realised during the pre and the post GST regime for each project. The Respondent has also informed that he was maintaining separate accounts for each of these projects and it was established that each of the projects was different from another. In this regard, the invoices made available by the Applicant No . 1 and 2 along-with their applications specifically mentioned the names of the projects as PARKWEST and PARKWEST Phase-2. Hence, the DGAP has submitted that the credit of one project might not be clubbed with the other project else it would jeopardize the interest of the home-buyers of one project at the cost of benefit to the other.

20. The DGAP has further clarified that the Respondent vide his submissions dated 07.12.2019 has submitted that the Input tax credit for the completed projects included the input tax credit for the maintenance services being supplied by him with respect to the specific project and the same had no correlation with the construction service and hence the same was beyond the purview of profiteering. In this regard, the Respondent's submissions and legal provisions cited by him were analysed by the DGAP and found to be relevant and applicable. Accordingly, for the purpose of determination of profiteering, for the Project PARKWEST-EMERALD, the input tax credit availed has been excluded by the DGAP from the amount of

input tax credit availed on account of maintenance service received after issuance of Completion Certificate.

21. The DGAP has also stated that the Respondent has further contended that he had duly intimated his all customers regarding passing on of the benefits on account of introduction of GST. The Respondent's contention in this regard was in line with the documents submitted by both the Applicants, wherein they had claimed that the benefits passed on to them were not adequate and commensurate with the additional benefits that would accrue consequent upon the implementation of GST. The communication made by the Respondent with his home-buyers and the demand letters issued post-GST were examined on a random basis to verify this claim and the veracity of claims was found to be true by the DGAP. Reference might be made to the communication from the Respondent to the Applicant No. 2 made on 18.10.2017, wherein the Respondent has mentioned that on account of GST implementation, it was expected that there would be a reduction in the cost of construction due to abolition of erstwhile taxes. The relevant text of the Respondent's impugned letter has been reproduced by the DGAP below:-

"At this stage, the implementation of GST was under progress across the country in our windows might or might not be clear about the quantum of benefits / credit he would actually be able to pass on to us against all the procurements/contacts. We have, however, analyzed the overall commercial scenario and had decided to pass on the benefits of transition to GST from the erstwhile tax regime. We value

you as our customer and we are keen to pass the benefits arising out of GST input tax credit. Please know that you are hereby entitled to receive a discount of 12.5% of the agreement value what amounts which was yet to build. This means, 2.5% of demands would be adjusted on all future installments and on installment payment featured build on or after July 1st 2017.

We also wish to inform you that these benefits would not be applicable for transactions such as maintenance charges, electricity and water charges, infrastructure charges or any additional charges that was payable at the time of possession or earlier, over and above agreement value of the apartment as the case might be."

In the demand letters issued post-GST to the Applicant No. 2, there was a reference to the benefit so extended, as reduction towards Section 171 of the CGST Act 2017 and the amount in proportion of the balance amount yet to be billed was duly reduced from the actual demand. Similarly, in the invoices issued to the Applicant No. 1, as submitted by the Applicant as well as the Respondent, whose unit was in another tower, there was reference to reduction in the cost on account of GST. On perusal of the communication by the Respondent to his home-buyers in advance, intimating them of the benefits on account of GST it appeared that the intention of the Respondent to pass on benefits on account of additional input tax credit due to implementation of GST might be correct and the same was reflected in his demand letters also. The benefits already passed on by the Respondent to his home-buyers had been found to be in compliance

of the provisions of Section 171 of the Act by the DGAP and the same were accounted for while determining profiteering. Further, the DGAP needed to find out whether the benefits so passed on by the Respondent were commensurate vis-à-vis the additional input tax credit available to him in the post-GST era or not.

22. The DGAP has also submitted that the Respondent has claimed that the credit availed by him was utilized against the liability arising out of sale of flats and usually at the end of construction stage finishing activities were carried out for which huge expenses were incurred on tiles, marble and bathroom fittings etc. The Respondent was entitled to input tax credit on the GST charged on such items and it was possible that the output liability at that stage was much less than the ITC accrued. The excess ITC accrued to the Respondent could not be claimed as refund owing to the restriction imposed vide Notification No. 15/2017- Central Tax (Rate) dated 28.06.2017. In light of the above, the Respondent has submitted that there was no guarantee that the ITC accrued to the Respondent would get utilized against the output liability and if the output liability was lesser than the ITC accrued, then this excess ITC was nothing but cost to him. The Respondent has further submitted that the ratio arrived at by the DGAP for arriving at profiteering amount did not take this into consideration and hence it was flawed and could not be relied upon.

23. The DGAP has also stated that the Respondent's claim that as per Schedule–III-"Sale of Land" and subject to clause (b) of para 5 of Schedule-II-"Sale of Building" was neither supply of goods nor supply of service. Also, once the Completion Certificate was received, the

sale of flats would not be subject to GST. Thus, the Respondent would have liability to reverse the proportionate input tax credit to the extent of the flats sold after receipt of the Completion Certificate. Hence, the credit which had been availed during the period from July, 2017 onwards would also proportionately have to be reversed by him which could not be considered today. In this regard, the Respondent's contention holds no merit, as calculations of DGAP has considered the sold area and proportionate input tax credit only for the purposes of calculation of profiteering and hence the same could not be accepted.

24. The DGAP has also mentioned that the Respondent contends that even though no methodology for determination of such benefits had been notified by the authorities, based on the stage of construction of each tower, balance amount to be billed and estimates of input tax credit that would accrue to them, the Respondent had calculated on his own the quantum of benefit and offered it as discount in the net original agreement value. The Respondent has submitted that he had initially worked out benefit estimate of 2.5% on the balance consideration to be billed to the customers after implementation of the GST after taking into consideration the estimated inflation and other contingencies. Further, on review of the status of actual benefit accruing till September, 2019, he had found that the actual benefit was working out to be lesser than the initial estimate. The Respondent has also submitted that the sale of units didn't have a fixed price and for all the units booked post implementation of GST in his projects, the additional benefits on account of input tax credit had already been accounted for in the Flat Price Sheet at the time of booking. To

substantiate his claim, the Respondent has submitted copies of the Flat Price Sheet for the project PARKWEST-MAPLE, wherein irrespective of the cost of the unit, area of the unit or the date of booking, there was a line with description "Input Tax Credit/GST Benefit" whereby 2.5% of the total consideration had been reduced. The prospective home-buyers of the project were intimated in advance of the benefits being offered on account of benefit of input tax credit in the Flat Price Sheet and subject to the agreement with the benefits so offered, agreement between the builder and the buyers for the units was signed. As the benefit on account of input tax credit had already been accounted for this category of home-buyers hence, the benefit so passed was not even reflected as turnover in the statutory returns or home-buyers list and the relevant turnover and the area had not been taken into account, for the purpose of calculation of profiteering or else it would have a cascading effect on calculation of profiteering. In the home-buyers list provided by the Respondent all such home-buyers were identifiable from the date of booking and status as "Live NBPID". The DGAP has contended that only those home-buyers who were existing as on the date of implementation of the GST i.e. 01.07.2017 and from whom further demands had been raised were the subject of this investigation to determine whether benefit commensurate to the additional ITC available had been passed on to them or not. Those home-buyers who had entered into agreement to purchase units, after implementation of GST, after accepting the one time reduction in the base price towards benefits of input tax credit which was evident in the Flat Cost Sheets, were out of the ambit of profiteering.

25. The DGAP has also submitted that on perusal of the documents and the evidence submitted by the Respondent, it was evident that the Respondent had duly intimated his home-buyers regarding passing on of the benefit of additional input tax credit on account of GST. The same was also established from the invoices raised to the home-buyers and the intimation letters sent by the Respondent to the home-buyers.

26. The DGAP has further submitted that the claim of the Respondent that the benefit so offered by reduction in the base prices had been duly incorporated might have merit but whether the reduction made or discount offered was commensurate with the increase in the benefit of input tax credit or not had to be determined in terms of Rule 129 (6) of the Rules. Therefore, the additional input tax credit available to the Respondent and the amounts received by him from the above Applicants and other recipients, both pre and post implementation of GST, had to be taken into account to determine the benefit of input tax credit that was required to be passed on.

27. The DGAP has also mentioned that the point for consideration was the submission of the Respondent regarding different projects on a portion of the land to be treated separately or not? The Respondent had submitted that each tower was launched at a different point of time, pricing decisions of units in each of the different towers varied from the previous one based upon a number of factors and as required under prevailing Rules, separate credit accounts for each of the towers were maintained. Further, under the RERA, a Central legislation, applicable on the Real Estate Sector which was implemented in Karnataka on

10.07.2017, almost coinciding with the GST implementation, the Respondent had registered each tower as a separate project under RERA and maintained separate accounts for each of them which was also evident from his invoices. On analysis of the details made available by the Respondent, it was clear that each of the phase had commenced on a different date, details of input tax credit of input services and KVAT accrued had been separately maintained for each of the phases as per the Cenvat Credit Rules, 2004 and tax liability of Service Tax and KVAT was separate for each of these phases. Occupancy Certificates had already been received for the PARKWEST-OLIVE, PARKWEST-EMERALD and PARKWEST-MULBERRY phases and possession of units had been handed over to the home buyers. In case of PARKWEST-MAPLE, the work had commenced on 25.10.2016, whereas work had commenced for another phase PARKWEST-SAPHIRE only after implementation of the GST w.e.f. 21.02.2018 (date of commencement certificate) and the last two phases were yet to be completed. As PARKWEST-EMERALD phase had commenced before implementation of the GST and Completion Certificate had been obtained for the same, the benefit of actual additional input tax accruing for this phase could be ascertained easily whereas for the PARKWEST-MAPLE, the purview of this investigation was limited only up to the period covered in this investigation. The DGAP has further mentioned that If different towers were considered as one project and credit of one tower was clubbed with the other tower, it could jeopardize the interest of the home-buyers of one tower at the cost of another. Further, given the different

stages of construction of each tower, the Completion Certificates received for some of them, whereas others being in different stages of construction life cycle, the ratio of input tax credit to the turnover for all the towers clubbed together might not be accurate and would give erroneous results. In this scenario, where separate books of accounts had been maintained by the Respondent for each tower, separate purchase register and input tax credit ledger had been maintained for each phase, reconciliation of credit and turnover for each tower with the statutory returns had been provided which had been duly verified and found to be in order, it was very logical to consider each of them as a separate project, the DGAP has claimed. As the two complaints pertained to the project "PARKWEST-EMERALD" and "PARKWEST-MAPLE" respectively, the ambit of this investigation had been kept limited to these two projects only.

28. The DGAP has also stated that the Respondent's claim that he had intimated his home buyers about the benefits on account of introduction of GST had been verified randomly by examining the correspondence made with the home-buyers in this regard, demand letters issued to the home-buyers and the description used in the demand letters and was found to be correct. The Respondent in the demands made to the home-buyers had duly reduced the benefit offered on account of GST with description as "Less: Reduction towards Section 171 of the CGST Act, 2017", and hence, had passed on the benefit that had accrued on account of GST. It was required to be seen whether the reduction was commensurate with the benefits and for this purpose, the original base price was considered to

determine the exact quantum of profiteering. The benefits already passed on needed to be deducted from the final amount of profiteering as applicable. Further, as separate account of input tax credit of VAT and input services for each tower in pre-GST period and input tax credit in post-GST era was maintained, it would only be prudent to calculate the benefits separately for each of the two projects.

29. The DGAP has further stated 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 Excise Duty paid on the inputs was not admissible as per the CENVAT Credit Rules, 2004, which were in force at the material time. Moreover, since the Respondent was paying VAT @14.50% on 70% of the construction value under the KVAT Regular Scheme, he was eligible to avail input tax credit of VAT paid on the inputs. Further, post-GST, the Respondent could avail the input tax credit of GST paid on all the inputs and input services. From the information submitted by the Respondent for the period from April, 2016 to April, 2019, the details of the input tax credit availed by him, his turnover from the project "PARKWEST-EMERALD" and "PARKWEST-MAPLE", the ratios of input tax credit to the turnovers, during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to April, 2019) periods, have been furnished by the DGAP as is given in Table-'B' and 'C' below:-

Table- B (Amount in Rs.)

S. No.	Particulars	(Pre-GST) April, 2016 to June, 2017	(Post-GST) July, 2017 to December, 2018
1	Credit of Service Tax Paid on Input Services (A)	2,26,47,009	-
2	Input Tax Credit of VAT Paid on Inputs (B)	2,24,41,497	-
3	Total CENVAT/VAT/Input Tax Credit Available (C)= (A+B)	4,50,88,506	-
4	Input Tax Credit of GST Availed (D)	-	2,69,66,615
5	Total Turnover from Residential and Commercial Area (E)	93,76,89,135	28,41,61,628
6	Total Saleable Residential Area in sq. ft. (F)	3,24,725	4,35,219
9	Sold Area Relevant to Turnover in sq. ft. (I)	3,17,590	3,06,611
10	ITC proportionate to Sold Area (J)	4,40,97,802	1,89,97,932
11	**Ratio of CENVAT/ VAT/Input Tax Credit to Turnover (K=J/E)**	**4.70%**	**6.69%**

Table- C (Amount in Rs.)

S. No.	Particulars	(Pre-GST) April, 2016 to June, 2017	(Post-GST) July, 2017 to December, 2018
1	Credit of Service Tax Paid on Input Services (A)	2,28,10,678	-
2	Input Tax Credit of VAT Paid on Inputs (B)	1,14,85,719	-
3	Total CENVAT/VAT/Input Tax Credit Available (C)= (A+B)	3,42,96,397	-
4	Input Tax Credit of GST Availed (D)	-	14,68,34,737
5	Total Turnover from Residential and Commercial Area (E)	1,23,31,51,501	1,76,66,14,794
6	Total Saleable Residential Area in sq. ft. (F)	7,82,263	7,82,263
9	Sold Area Relevant to Turnover in sq. ft. (I)	5,53,382	5,26,389
10	ITC proportionate to Sold Area (J)	2,42,61,673	9,88,05,888
11	**Ratio of CENVAT/ VAT/Input Tax Credit to Turnover (K=J/E)**	1.97%	5.59%

30. The DGAP has stated from the Table-'B' that the input tax credit as a percentage of the turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 4.70% and during the post-GST period (July, 2017 to April, 2019), it was 6.69%. This clearly confirmed that post-GST, the Respondent had benefited from

additional input tax credit to the tune of 1.99% [6.69% (-) 4.70%] of the turnover for the project PARKWEST-EMERALD. Similarly, from the above Table-'C', it was clear that the input tax credit as a percentage of the turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 1.97% and during the post-GST period (July, 2017 to December, 2018), it was 5.59%. This clearly confirmed that post-GST, the Respondent had benefited from additional input tax credit to the tune of 3.62% [5.59% (-) 1.97%] of the turnover for the project PARKWEST-MAPLE.

31. The DGAP has also observed that the Central Government, on the recommendation of the GST Council had levied 18% GST on the construction service (after one third abatement towards value of land, effective GST rate was 12% on the gross value), vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Accordingly, the profiteering had been examined by comparing the applicable tax rate and input tax credit available to the Respondent during for the pre-GST period (April, 2016 to June, 2017) when Service Tax @ 4.5% and VAT@ 14.50% on the construction value were leviable (total tax rate was 11.6% on the basic price) with the post-GST period (July, 2017 to April, 2019) when the effective GST rate was 12% on the gross value.

32. On the basis of the figures contained in Table-'B' and 'C' above, the comparative figures of input tax credit availed/available as a percentage of the turnover in the pre-GST and the post-GST periods, the recalibrated base prices as well as the excess collection (profiteering) during the post-GST period, have been tabulated by the DGAP as is given in Table-'D' and 'E' below:-

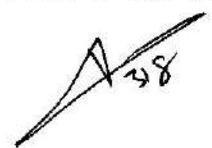


Table-D (Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April,2016to June,2017	July,2017 to April, 2019
2	Output tax rate (%)	B	11.60%	12.00%
3	Ratio of CENVAT/VAT/GST Input Tax Credit to Total Turnover as per Table - B above (%)	C	4.70%	6.69%
4	Increase in input tax credit availed post-GST (%)	D	-	1.99%
5	**Analysis of Increase in input tax credit:**			
6	Total Basic Demand during July, 2017 to April, 2019	E		28,41,61,628
7	GST @12%	F		3,40,99,395
8	Total Actual Demand	G=E+F		31,82,61,023
9	ITC Benefits to be passed on Basic Price	H=E*D or 1.99% of E		56,54,816
10	Recaliberated Basic Price	I=E-H		27,85,06,812
11	GST @12%	J= I*12%		3,34,20,817
12	Recaliberated Cum-tax Price	K=I+J		31,19,27,629
13	Profiteering Amount	L=G-K		63,33,394
14	Less: Benefits passed towards as Reduction in towards Section 171 of the CGST Act, 2017	M		47,91,129
15	GST @12%	N=M*12%		5,74,935
16	Net Benefit passed on	O=(M+N)		53,66,064
17	**Excess Collection of Cum-tax Demand raised or Profiteered Amount**	**P=H-O**		**9,67,330**

Table-E (Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April,2016to June,2017	July,2017 to April, 2019
2	Output tax rate (%)	B	11.60%	12.00%
3	Ratio of CENVAT/VAT/GST Input Tax Credit to Total Turnover as per Table - B above (%)	C	1.97%	5.59%
4	Increase in input tax credit availed post-GST (%)	D	-	3.62%
5	**Analysis of Increase in input tax credit:**			
6	Total Basic Demand during July, 2017 to April, 2019	E		1,76,66,14,794
7	GST @12%	F=E*12%		21,19,93,775

8	Total Actual Demand	G=E+F		1,97,86,08,569
9	ITC Benefits to be passed on Basic Price	H=E*D or 3.62% of E		6,39,51,456
10	Recaliberated Basic Price	I=E-H		1,70,26,63,338
11	GST @12%	J= I*12%		20,43,19,601
12	Recaliberated Cum-tax Price	K=I+J		1,90,69,82,939
13	Profiteering Amount	L=G-K		7,16,25,630
14	Less: Benefits passed towards as Reduction in towards Section 171 of the CGST Act, 2017	M		3,68,13,855
15	GST @12%	N=M*12%		44,17,662
16	Total Benefit passed on	O=(M+N)		4,12,31,517
17	**Excess Collection of Cum-tax Demand raised or Profiteered Amount**	**P=H-O**		**3,03,94,113**

33. From the Table-'D' above, the DGAP has stated that the additional input tax credit of 1.99% of the turnover should have resulted in commensurate reduction in the basic prices as well as cum-tax prices for the home-buyers of the project "PARKWEST-EMERALD". Similarly, From Table-'E' above, it was clear that the additional input tax credit of 3.62% of the turnover should have resulted in commensurate reduction in the basic prices as well as cum-tax prices for the home-buyers of the project "PARKWEST-MAPLE". Therefore, in terms of Section 171 of the CGST Act, 2017, the Respondent had not reduced the basic prices for the buyers of these two projects commensurate to the additional benefit accrued and this benefit of the additional input tax credit was required to be passed on by the Respondent to the recipients. In other words, by not reducing the pre-GST basic prices on account of additional benefit of input tax credit and charging GST @12% on the pre-GST basic prices, the Respondent appeared to have contravened the provisions of Section 171 of the CGST Act, 2017.

34. On the basis of the aforesaid CENVAT/input tax credit availability in the pre and the post-GST periods and the demands raised by the

Respondent from the Applicants and other home buyers towards the value of construction on which GST liability @ 12% was discharged by the Respondent during the period from 01.07.2017 to 30.04.2019, the amount of benefit of input tax credit not passed on to the recipients or in other words, the profiteered amount comes to **Rs. 9,67,330 /-** which included GST on the base profiteered amount of ₹ 8,63,687/-. However, no benefit is due to the Applicant No. 1 as the Respondent has already passed on an amount of Rs. 31,823/- to him which was due to him. The buyer and unit no. wise break-up of the profiteered amount of the flats sold up to 30.04.2019 of the project **PARKWEST-EMERALD** has been given by the DGAP vide **Annexure-21** of his Report. The amount of benefit of input tax credit not passed on to the recipients or in other words, the profiteered amount comes to Rs. 3,03,94,113/- which included GST on the base profiteered amount of Rs. 2,71,37,601/- in respect of the buyers of the flats sold upto 30.04.2019 for the project **PARKWEST-MAPLE** as per **Annexure-22** of the Report. In respect of the Applicant No. 2, the amount of profiteering was Rs. 74,929/-. It was also observed that the Respondent had supplied construction services in the State of Karnataka only.

35. The DGAP has further stated that the above computation of profiteering was with respect to 336 home buyers in respect of project 'PARKWEST-MAPLE' and 144 home buyers in the case of Project 'PARKWEST-EMERALD. As the project 'PARKWEST-EMERALD' had been completed, neither GST was applicable on the flats sold after issuance of the Completion Certificate nor shall any benefit under Section 171 of the CGST Act, 2017 would be applicable on the sales

effected now. For the project 'PARKWEST-MAPLE', the above calculation was for all the live customers as on 31.07.2017. For the units sold post-GST implementation, the cost of the units was mutually agreed upon between the buyers and the Respondent which included the benefits of GST and hence such units were beyond the purview of Section 171 of the CGST Act, 2017.

36. The DGAP has also contended that the benefit of additional input tax credit had in fact accrued to the Respondent and the same was required to be passed on to the Applicant No. 2 and the other eligible recipients. Section 171 of the CGST Act, 2017 had been contravened by the Respondent, inasmuch as the benefit of additional input tax credit on the demand raised by the Respondent during the post-GST period from 01.07.2017 to 30.04.2019, had not been commensurately passed on to the above Applicant and the other recipients. On this account, the Respondent had realized an excess amount to the tune of ₹ 74,929/- from the Applicant No. 2 which included both the profiteered amount on the basic price to the tune of ₹ 66,900/- and the GST on the said profiteered amount. Further, the investigation has revealed that the Respondent had realized an excess amount of Rs. 3,13,61,443/- (Rs. 9,67,330+ Rs. 3,03,94,113) on both the above projects which included both the profiteered amount on the basic prices and GST on the said profiteered amount. All the recipients were identifiable as the Respondent had provided their names and addresses along with unit nos. allotted to them. Therefore, this additional amount of ₹ 3,13,61,443/- was required to be returned to all the eligible recipients including the Applicant No. 2.

37. The above Report was considered by this Authority in its meeting held on 04.02.2020 and it was decided that the Applicants and the Respondent be asked to appear before this Authority on 25.02.2020. The Respondent was issued notice dated 05.02.2020 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 Sh. G. Venugopal, the Applicant No. 1, was present in person, no one appeared for the Applicant No. 2 and the Respondent was represented by Sh. S. S. Gupta and Sh. Ram Kasyapa, Authorised Representatives. The Respondent has filed written submissions dated 25.02.2020 during the hearing. The main contentions raised by the Respondent vide his above submissions are discussed in the subsequent paras.

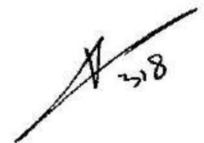
38. The Respondent has submitted that it could be seen from Section 171 of the CGST Act, 2017 that the benefit received on account of reduction in the tax rate or in the input tax credit should be passed on to the customers. There was no reduction in the rate of tax. On the contrary, the tax rate on construction activity has increased in post-GST regime. Hence, there was no question of profiteering on account of reduction in the tax rate. He has also submitted that in the pre-GST regime, the credit of Service Tax on input services was admissible to the Respondent under Rule 2 (l) of Cenvat Credit Rules, 2004 which was utilised to pay the Service Tax. Further, the Respondent was also allowed to avail the credit of VAT paid on purchase of goods under Section 10 of the KVAT Act, which was utilised to pay the outward VAT liability. The Respondent has further submitted that the total Excise

Duty benefit accruing to him was Rs. 55,02,353/- with respect to PARKWEST-EMERALD project. Thus, the total benefit to be passed on u/s 171 could be maximum of Rs. 55,02,353/-. Similarly, the total Excise Duty benefit accruing to the Respondent was Rs. 2,85,34,060/- with respect to the PARKWEST-MAPLE project. Thus, the total benefit to be passed on u/s 171 could be maximum of Rs. 2,85,34,060/-.

39. The Respondent has also stated that the method of calculation adopted by the DGAP in computing the profiteering amount in Table-B was incorrect. The DGAP has claimed that the Respondent was entitled to 4.70% Cenvat Credit as compared to the turnover during the pre-GST period. The ratio on the same basis was 6.69% during the post-GST period. The higher ratio had resulted in profiteering. On the basis of this calculation, the DGAP has computed profiteering amount of Rs. 66 Lakh. The Respondent has submitted that the DGAP has not considered the facts mentioned below while calculating the profiteering:-

a. In the construction industry, the credit may accumulate in a particular period but the tax liability with respect to the same might arise in a different period.

b. The total profiteered amount as calculated by the DGAP was Rs. 63.33 Lakh (inclusive of tax) which included Rs. 35,463/- (inclusive of tax) to be passed on to the Applicant No. 1. He has collected Rs. 2,669/- excess from the above Applicant on account of GST. The extra tax collected was Rs. 2,669/- but the benefit to be passed on as per the DGAP was

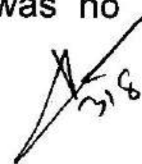


Rs. 35,463/- which itself showed that there was gross error in the calculation made by DGAP.

c. There was increase in the amount of input tax credit availed by the Respondent in the post-GST regime due to increase in the rates of tax. Tax rate on the works contract service under the pre-GST regime was 16.15% i.e. VAT 10.15% (14.50% X 70%) and Service Tax @ 6.00% (15.00% X 40%). However, after the GST was implemented, the rate of tax on works contract service was 18.00%. This benefit of extra 1.85% was not due to introduction of GST but due to increase in the rate of tax from 16.15% to 18.00%. Therefore, the additional 1.85% should not be considered as a benefit received by the Respondent.

d. The input tax credit of GST pertaining to the work done in pre-GST regime should not be considered in the GST regime credit. In construction sector, the goods and services were provided before the invoice was raised. The invoice was raised based on the various internal approvals of the work done. Therefore, an amount of Rs. 1,39,795/- with respect to PARKWEST-EMERALD project should not be included in the input tax credit availed in the GST regime and instead it must be included in the input tax credit availed in the pre-GST regime.

e. The credit and the taxable value do not synchronize in the same month or the same period. The agreement for sale of premises entered into between the buyer and the Respondent specified the milestone for recovery of the amount. The invoice could be raised only on achieving milestones whereas the credit accrued to the Respondent on incurring expenditure for construction of the project. Therefore, there was no



synchronization between the credit availed and the value of taxable service provided by the Respondent during any period.

40. The Respondent has also submitted that the credit which was being availed by him was utilised against the output liability arising out of sale of flats. Usually, at the end of the construction stage, finishing activity was carried out for which huge expenditure was incurred on tiles, marble and bathroom fittings etc. The Respondent was entitled to input tax credit on the GST charged on such items. However, it was possible that outward liability at that stage might be much less than the ITC accrued. The excess ITC accrued to the Respondent could not be claimed as refund owing to the restrictions imposed under Notification No. 15/2017-Central Tax (Rate) dated 28.06.2017.

41. The Respondent has further submitted that he has collected Rs. 37,290/- excess from the Applicant No. 2 on account of GST. The extra tax collected from the above Applicant was Rs. 37,290/- but the benefit to be passed on as per the DGAP was Rs. 74,229/- which showed that there was gross error in the calculation made by the DGAP.

42. The Respondent has also claimed that the method of computation of GST benefit by the DGAP has led to irrational results when the gross profit and cost of the Respondent has remained constant. The DGAP has compared the credit vis-à-vis the turnover and has computed the benefit arising under the GST. It was submitted that the profit to the Respondent has remained same irrespective of the rate of GST charged on the material. It was further submitted that the entire exercise undertaken by the DGAP was to find out whether any 'Profiteering' has been done by the Respondent on account of introduction of GST. As per

Section 171, any benefit arising due to advent of GST was to be passed on to the customer. Therefore, anything that was a 'cost' in the pre-GST period and was no more a cost to the Respondent in the GST regime was the benefit which needed to be passed on to the customers.

43. The Respondent has further claimed that the DGAP has computed the profiteered amount as Rs. 63.33 Lakh for the PARKWEST-EMERALD project. This amount included the base price as well as 12% GST on the same. The profiteered base price was Rs. 56,54,816/-. The balance amount of Rs. 6,78,578/- was towards the GST. Similarly, for the PARKWEST-MAPLE project the total amount of profiteering calculated by the DGAP was Rs. 7,16,25,630/- i.e. base price of Rs. 6,39,51,456/- and GST to the tune of Rs. 76,74,175/-. It was also submitted that the excess collection made by the Respondent was only Rs. 6,96,06,272/-. The excess GST collected has duly been deposited with the Government and the Respondent had not retained it. Hence, the same could not be considered as profiteered amount to be passed on to the customers. It was submitted that the term 'profiteering' has been described in various dictionaries as follows:-

- **Black's Law Dictionary** - Taking advantage of unusual or exceptional circumstances to make excessive profits.
- **Law Lexicon** - To seek or obtain excessive profits, one who was given to making excessive profits.
- **Shorter Oxford English Dictionary** - Make or seek to make an excessive profit.

- **Mount vs Welsh** - Any conduct or practice involving the acquisition of excessive profit.
- **Islamic Academy of Education vs State of Karnataka** - Profiteering would mean taking advantage of unusual or exceptional circumstances to make excessive profits.

It was also submitted that from the above definitions it was evident that only those amounts which have been collected and kept with the Respondent could be termed as "profiteering" on the part of the Respondent. Amounts which have been paid by the Respondent to the Government or to the customers as a part of the GST benefit could not be considered as 'profiteering'.

44. The Applicant No. 1 has also filed written submissions dated 02.03.2020. The main contentions of the Applicant No. 1 have been discussed in the subsequent paras.
45. The above Applicant has submitted that the Respondent has done disproportionate billing and work. He has also submitted that the Respondent had admitted that the work done as on July, 2017 was 53% while the amount collected from him was 90% of the consideration value of the apartment. In the present case when the Respondent had collected 53% of value of the apartment as on July 2017 and balance 47% in the GST period, the ITC benefit should have been extended to 47% money collectable in the GST period.
46. The above Applicant has also submitted that the computation of profiteering for his Unit (E002) was as follows :-

Reference	Value (Rs.)	2% - AP (Rs.)	Remark
10% of Amount paid in GST	15,91,132	31,823	**Benefit Passed**
47% of Works executed in GST (Rs.15,91,132/10%*47%	74,78,320	1,49,566	**Estimated to be Passed**
	Short paid	**1,17,744**	**Profiteering**

He has also submitted that as per his computation, Rs. 1.17 Lakh additionally should be paid back by the Respondent to him for his unit.

47. The above Applicant has further depicted the percentage of ITC on the expenses incurred by the Respondent as follows:-

Particulars	Pre GST	Post GST
Turnover	93,76,89,135	27,93,70,499
CENVAT/ITC	4,50,88,505	4,70,69,461
	4.81%	16.85%

He has claimed that the above Table indicated that the ITC benefits were higher in the GST regime.

48. The Applicant No. 1 has also submitted that the profiteering working was applied only on Rs. 92 Lakh by the DGAP. In this regard he has claimed that most of the ITC benefit was available in the GST era owing to the Excise Duty credits. The Respondent had agreed that most of the ITC has accrued at the finishing stage on the purchase of the tiles, marble and bathroom fittings etc., therefore, buyers should be entitled for more ITC benefit in the GST era.

49. The Applicant No. 1 has also contended that there was mis-match in the purchases made by the Respondent. He has also added that project wise cost was not shared, however the same had been arrived at as per the RERA submissions. He has further added that out of total cost of Rs. 1,71,55,78,824/-, submitted to the RERA in July 2017, the amount spent till date and the future construction cost was Rs. 64.51 Crore. Therefore, If the procurement of materials post GST was Rs. 64.51 Crore profiteering computation could not be restricted to procurement of Rs. 4.42 Crore.

50. The above Applicant has also submitted that the Anti profiteering measures should be looked from the benefit derived by the Respondent and not restricted to the percentage of the money collected from the home buyers post GST.

51. The Applicant No. 1 has further submitted that the project **"PARKWEST"** consisted of several buildings being developed on the property bearing No. 1/1 (Old No. 31), Hosakere Road, Binnypet, Bengaluru-560023, by the Respondent. Owners of the land had entered into Joint Development Agreement with the Respondent and details of towers launched from time to time as per RERA were submitted by him as follows :-

Project Name	RERA Start Date	RERA End Date	Land Cost	Construction cost	Total cost	% complet ed as on rera applic at ion date	Amount collected as on application date	Amount spent as on application date	Occupan cy Certificat e Date
OLIVE - TOWER 1	05/03/2015	31/07/2018	1,30,04.56,577	1,83,89,32,517	3,13,93,89,094	58%	2,59,81,59,445	2,36,59.92,483	18/12/2017
EMER ALD - TOWE R 2	**01/05/2015**	**30/09/2018**	**98,14,43,272**	**1,37,92,67,435**	**2,36,07,10,707**	**53%**	**2,10,24,74,178**	**1,71,55,78,824**	18/12/2017

MULBE RRY - TOWER 3	21/07/2015	30/11/2018	1,28,90,88,424	1,84,07,15,999	3,12,98,04,423	51%	2,70,12,14,193	2,23,58,51,927	Apr 2017
MAPLE - TOWER 4	25/10/2016	31/12/2020	2,33,20,11,848	3,03,29,07,126	5,36,49,18,974	18%	1,41,14,10,284	1,41,14,10,284	
SAPPHI RE-TOWER 5	29/07/2017	31/12/2021	1,78,37,04,257	2,28,78,78,066	4,07,15,82,323	2%	19,28,04,846	2,03,74,44,617	
MAGN OLIA - TOWER 6	18/09/2018	03/04/2022	1,31,51,49,546	1,70,26,05,278	3,01,77,54,824	0%	-	-	
MAHO GANY - TOWER 7	15/11/2018	31/03/2023	98,34,00,706	1,11,80,00,000	2,10,14,00,706	0%	-	-	

52. The submissions of the Applicant No. 1 and the Respondent were forwarded to the DGAP vide Order dated 06.03.2020 for filing clarifications under Rule 133 (2A). The DGAP has filed his clarifications on 25.06.2020 which have been discussed in the subsequent paras.

53. On the issue of disproportionate billing and work done, the DGAP has stated that the contention of the Applicant No. 1 was not relevant as the profiteering was calculated on the basis of the ITC availed and the turnover of the Respondent. The turnover of the Respondent was calculated on the basis of the demands raised and the advances received. On this basis only, the GST was paid. Thus the percentage of work done had no relation with the calculation of profiteering.

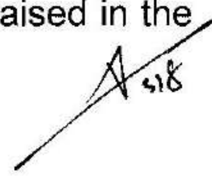
54. On the issue of the computation of profiteering the DGAP has stated that the contention of the Applicant No. 1 was not acceptable as the computation of profiteering for all the units had been done in the same manner i.e. the increase in input tax credit available in the post GST period was calculated for each unit. Accordingly, commensurate reduction in base price as well cum tax price for all the home buyers was arrived at and was proposed to be passed on to each recipient.

55. On the issue of percentage of ITC on the expenses incurred, the DGAP has stated that the contention of the Applicant No. 1 was not relevant as the profiteering calculation proposed by him had not looked into the aspect of ratio of the ITC (%) on the expenses incurred. The investigation was limited to the accrual of additional benefit of input tax credit as mandated under Section 171 of CGST Act, 2017.

56. On the issue of excess ITC towards the end of the project, the DGAP has stated that the contention of the above Applicant was not relevant as the ITC accrued post GST period had been taken into record in his Report and the investigation was limited to the accrual of additional benefit of input tax credit as mandated under Section 171 of CGST Act, 2017.

57. On the issue of mismatches in the purchases made by the Respondent, the DGAP has stated that the contention of the above Applicant was not relevant as the profiteering calculation methodology used by the DGAP had not looked into the aspect of costing of the project and future cost yet to be incurred and the benefit of ITC that shall accrue on such expenditure.

58. On the issue of allocation of anti-profiteering logic being different for each home-buyer, the DGAP has stated that the contention of the above Applicant was not acceptable as the concept of profiteering was related to the time of supply of service i.e. each taxable supply made to each recipient would attract profiteering, if any. In the instances where there was absence of demand from the home-buyers in the GST regime and all the demand had already been raised in pre-GST regime, there did not arise any question of profiteering. Hence, for those units where entire amount was demanded prior to GST regime or no demand had been raised in the



GST regime, during the period covered in investigation, no profiteering could be calculated.

59. The clarifications filed by the DGAP were forwarded to the Respondent and the Applicants vide order dated 07.07.2020 for filing rejoinder. In this regard, the Respondent has filed rejoinder dated 16.07.2020. The main contentions raised by the Respondent vide his rejoinder are discussed in the following paras.

60. The Respondent has submitted that the Applicant No. 1 has claimed that the benefit derived has less nexus to monies collected in the GST regime but more nexus towards the work executed in the GST period. Accordingly, the Applicant No. 1 has submitted that even though the amount collected was 90% as on 30th June, 2017 and the work done was 53% only, the Applicant No. 1 was entitled to the extent of 47% work done in the GST regime, even though monies collected would only be 10%. It was submitted by the Respondent that the contention of the Applicant No. 1 was incorrect and baseless. If there was no demand in the GST regime, there was no question of benefit being received by the Respondent. The Applicant No. 1 had already synchronised the credit with the turnover in his submission to the DGAP report on 20.02.2020. The demand raised provided the amount to be received by the Respondent. The Respondent could not receive more money than demand. The turnover and the input tax credit needed to be synched and the turnover had more nexus than the work done. Therefore, the statement of the Applicant No. 1 that the benefit has less nexus to the monies collected in GST regime but more nexus towards the work executed in the GST period could not be accepted.

61. The Respondent has also submitted that the Applicant No. 1 had pointed out that the ratio of credit to the turnover in the pre-GST regime was 4.81% whereas in the post GST regime it was 16.85% which indicated that the input tax credit benefits were higher. It was submitted that the Respondent had already furnished detailed response in his submissions dated 25.02.2020 to substantiate that the ratio of input tax credit being higher in post-GST regime did not automatically translate into additional GST benefit to the Respondent and various other factors needed to be considered. The Respondent had computed the benefit on his own accord and passed on 2% benefit.

62. The Respondent has further submitted that the Applicant No. 1 has claimed that majority of the ITC has accrued in the end stage of the project and therefore, the entire ITC availed in the GST regime must have been considered for calculation of profiteering. The Respondent has added that the claim made by the Applicant No. 1 had already been accepted by the Respondent that a lot of ITC accrued at the end stage of the project which would happen in the GST regime. However, the same needed to be synchronised with the demands already raised by the Respondent in the Service Tax regime.

63. The Respondent has also stated that the Applicant No. 1 has pointed out that the future construction cost of the Respondent as per the details given to RERA as on July, 2017 was Rs. 64,51,31,383/- whereas as per the submissions of the Respondent, excisable product procurement cost in the GST regime would be Rs. 4,42,96,860/-. The Applicant No. 1 has submitted that the profiteering calculation should not be restricted to Rs. 4.42 Crore and entire cost of Rs. 64.51 Crore should be considered. It was

submitted that in RERA, Rs. 64,51,31,383/- was towards construction cost. The said cost included various costs like works contract service, labour charges, professional fee, architect fee and procurement of material, etc. Under the erstwhile regime Respondent was eligible to avail Cenvat credit on input services. Excise Duty which was earlier levied on materials was not available as Cenvat credit earlier and was now available as ITC under the GST. Therefore, the only benefit available to the Respondent in terms of Section 171 was the Excise Duty which was a cost earlier. The Excise Duty was not levied on the works contract charges or other services. Further, the Excise Duty benefit was not received on procurement of all materials. Materials were received from traders also who did not charge Excise Duty. Therefore, the list of procurement cost provided by the Respondent was only to the extent of Rs. 4,42,96,860/-. This list contained all procurements on which the Excise Duty would have been levied and the benefit would have been received by the Respondent. Therefore, the claim of the Applicant No. 1 was not tenable.

64. 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 and 2, vide their respective complaints had alleged that the Respondent was not passing on the benefit of ITC to them on apartments Nos. Emerald-002 and MA-0905 respectively which they had purchased in the "PARKWEST-EMERALD" and "PARKWEST-MAPLE" projects respectively being executed by the Respondent in Bengaluru, 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 them @12%. These complaints were examined by

the Standing Committee on Anti-Profiteering in its meetings held on 11.04.2019 and 13.09.2019 respectively and were forwarded to the DGAP for investigation who vide his Report dated 31.01.2020 has found that in respect of the project "PARKWEST-EMERALD" the ITC as a percentage of the total turnover which was available to the Respondent during the pre-GST period was 4.70% and during the post-GST period this ratio was 6.69%, as per the Table-B mentioned above and in respect of the project "PARKWEST-MAPLE" the ITC as a percentage of the total turnover which was available to the Respondent during the pre-GST period was 1.97% and during the post-GST period this ratio was 5.59%, as per the Table-C mentioned above. Therefore, the Respondent has benefited from the additional ITC to the tune of 1.99% (6.69% - 4.70%) and 3.62% (5.59% - 1.97%) of the total turnover in respect of the projects PARKWEST-EMERALD and PARKWEST-MAPLE respectively which he was required to pass on to the flat buyers of these projects. The DGAP has also found that the Respondent has not reduced the basic prices of his flats by 1.99% in case of the project PARKWEST-EMERALD and 3.62% in case of the project PAERKWEST-MAPLE due to additional benefit of ITC and by charging GST at the increased rate of 12% on the pre-GST basic prices, 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. 9,67,330/- in case of the project PARKWEST-EMERALD and Rs. 3,03,94,113/- in the case of the project PARKWEST-MAPLE which included 12% GST on the basic profiteered amount. The DGAP has also intimated that this amount also included the profiteered amount of Rs.

74,929/- including 12% GST in respect of the Applicant No. 2 whereas there was nil profiteered amount in respect of the Applicant No. 1 as the ITC benefit already passed on to the Applicant No. 1 was higher than the profiteered amount. 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-21 and Annexure-22 attached with his Report in respect of the projects PARKWEST-EMERALD and PARKWEST-MAPLE respectively.

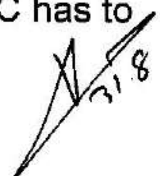
65. The computation of the ratio of CENVAT and VAT to the total turnover for the period from April, 2016 to June, 2017 and of the ITC to the total turnover for the period from July, 2017 to April, 2019 for both the above projects as per Tables B and C has been done by the DGAP so that the benefit due to each flat buyer can be calculated. Calculation of the above ratios was also required to be done to compute the additional benefit of ITC which has become available to the Respondent. The above ratios have further been calculated after taking in to account the sold area relevant to the turnover during both the above periods and the ITC relevant to the sold area. Unless these ratios are computed it cannot be ascertained if the Respondent has availed benefit of additional ITC and if he has availed it what is the amount of benefit of ITC to be passed on to the buyers. The above ratios have further been computed on the basis of the information supplied by the Respondent in his Returns or the ITC Registers and hence their authenticity is beyond doubt. The DGAP has also calculated the profiteered amount as per the details given in Table D and E on the basis of the above ratios to compute the benefit of ITC due to each home buyer as per Annexure-21 and 22 in respect of both the above projects. However,

no benefit has been computed on the unsold area so that in case it remains unsold till the Occupation Certificate is received the ITC could be reversed on it. Therefore, the mathematical methodology employed by the DGAP to compute the above ratios as well as the profiteered amount as per the Tables C to E supra is logical, reasonable, appropriate and in consonance with the provisions of Section 171 (1) of the above Act. The above mathematical methodology has also been approved by this Authority in all such cases of real estate sector where benefit of additional ITC is to be passed on and hence the same can be relied upon.

66. The Respondent has submitted that after coming in to force of the GST he had become entitled to the ITC of Excise Duty only which amounted to Rs. 55,02,353/- in respect of the PARKWEST-EMERALD project as per Annexure-2 and Rs. 2,85,34,060/- for the PARKWEST-MAPLE project as per Annnexure-8 submitted by him and hence, he was required to pass on the above amounts only as the benefit of ITC. In this regard it would be pertinent to mention that there is no provision in Section 171 which states that the Respondent is required to pass on the benefit of Excise Duty only therefore, the entire amount of additional ITC which has become available to the Respondent in the post GST period has to be taken in to account to compute the benefit which he is required to pass on. The exact quantum of additional ITC which has become available to the Respondent is abundantly clear from the Tables B to E mentioned above and the ITC Registers as well as the monthly Returns filed by him while discharging his output tax liability and hence, there is no ambiguity on the benefit of additional ITC which he has received. The Respondent has given no reasons why he has availed the full benefit of ITC and not restricted it to

the amount of Excise Duty while paying the GST. The Respondent cannot misappropriate the benefit of ITC which has been granted to him by the Central as well as the State Government out of their precious tax revenue to benefit the buyers and therefore, he has to pass on the entire additional ITC which has accrued to him in the post-GST period. He can also not use it in his business or reflect it as his profit. The Respondent is also not required to pay even a single penny out of his own pocket to pass on the above benefit. Therefore, he cannot enrich himself at the expense of the buyers who are vulnerable, unorganised and voiceless. Therefore, the above contention of the Respondent is frivolous which cannot be accepted.

67. The Respondent has also submitted that as per the provisions of Rule 129 the DGAP was required to investigate on which products the ITC was available in the pre and the post GST period and hence, the claim of the DGAP that he has not investigated the above aspect was against the provisions of the above Rule. In this regard it would be relevant to note that there is no provision under Section 171 (1) or Rule 129 which states that DGAP is required to investigate the ITC on each good or service purchased by the Respondent during the pre and post GST periods. The intent of Section 171 (1) is only to pass on the benefit of additional ITC which has become available to the Respondent w.e.f. 01.07.2017, the exact quantum of which is available to the DGAP from the CENVAT/VAT and ITC Registers as well as the Returns filed by the Respondent himself while discharging his tax liability by utilising the ITC. Therefore, the DGAP is not required to investigate the benefit of ITC on each good and service purchased by the Respondent as the entire amount of additional ITC has to



be taken in to account for passing on its benefit. Accordingly, the above claim of the Respondent cannot be accepted.

68. The Respondent has further submitted that 53% of the work in the PARKWEST-EMERALD project had been completed in the pre-GST period and material in the post GST period as per Annexure-2 was purchased to complete the balance 47% work. Since, only 10 percent amount was demanded from the buyers in the post GST period as 90% amount had already been received in the pre-GST period, therefore, only an amount of Rs. 11,70,713/- was required to be passed on as benefit of ITC. The above contention of the Respondent is not tenable due to the reason that the benefit has to be computed on the basis of the additional ITC as well as the turnover received by the Respondent during the post-GST period and it has no connection with the percentage of work completed or percentage of the amount received or purchases made by the Respondent.

69. The Respondent has also claimed that the computation of the profiteered amount as per Table B was incorrect as there was no correlation between the accrual of ITC and raising of the demand as he could not raise the demand unless a particular mile stone was achieved whereas the ITC accrued as per the construction carried out. He has also given the time schedule for raising the demand as per Table-3. In this connection it would be relevant to refer to the admission of the Respondent mentioned in para supra that he had completed 53% of the construction work in the pre-GST period and also received 90% amount of consideration from the buyers during the above period. It is quite evident from Table-3 that 90% of the consideration was to be paid only on completion of the external plastering after construction of entire 15 floors of the project. Therefore, it is apparent

from the claim of the Respondent that he had compelled his buyers to pay 90% of the consideration in the pre-GST period while he had completed only 53% of the work therefore, the contention of the Respondent that he could not raise the demand unless the stage of construction mentioned in the agreement was reached is absolutely wrong and incorrect.

70. The Respondent has further claimed that he had collected Rs. 2,669/- only in excess from the Applicant No. 1 on account of GST as per Table-4 whereas the DGAP has reported that he was entitled to the benefit of Rs. 35,463/- which was more than the demand raised on the above Applicant. In this connection it would be relevant to mention that the benefit of ITC has to be computed on the basis of the amount of consideration received by the Respondent from the above Applicant during the post-GST period which has no connection with the excess GST claimed to have been received by the Respondent from the Applicant No. 1. Perusal of Sr. No. 86 of Annexure-21 of the Report shows that the Applicant No. 1 has paid consideration amount of Rs. 15,91,133/- post-GST and he was entitled to the ITC benefit of Rs. 31,664/-. However, he has already been passed on benefit of Rs. 31,823/- by the Respondent which is more than the benefit to which he is entitled and hence, no further benefit is required to be passed on to him.

71. The Respondent has also contended that there has been increase in the rates of tax in the GST regime on works contracts and Service Tax and hence, no additional benefit has accrued to him. In this connection perusal of Table-B shows that the ratio of CENVAT/VAT to total turnover during the pre-GST period was 4.70% whereas it was 6.69% during the post-GST period in respect of the PARKWEST-EMERALD project. Hence, the

Respondent has received additional benefit of 1.99% of the turnover in respect of the above project. The Respondent has not produced any evidence to establish that in case there was increase in the rate of tax he was not given ITC on the increased rate of tax and he had to bear the extra burden of tax. The Respondent has also received the benefit of ITC in the shape of reduced prices of the goods and services purchased by him from his suppliers as they have also become entitled to the benefit of ITC in the post-GST period. Therefore, the above contention of the Respondent is not established from the record and hence, an amount of Rs. 24,814/- and Rs. 13,52,876/- cannot be reduced from the ITC due to increase in the rate of Service Tax and the Works Contract Tax.

72. The Respondent has further claimed that the ITC available on the work done in the pre-GST period should not be considered in the post-GST period as the invoices in the construction sector are issued after the goods and services are received. The above claim of the Respondent is not tenable as the ITC accrues only on fulfilling of conditions prescribed under Section 16 of the CGST Act, 2017 and in case they have been met in the post-GST period the ITC cannot be counted in the pre-GST period. As per the provisions of Section 16(2)(a) the ITC would accrue only when the tax invoice is in the possession of the Respondent and has been reflected in the concerned monthly Return furnished by him as per Section 16(2)(d). Since, the invoice No. JP051/2017 dated 15.03.2018 (Annexure-3) has been received in the post-GST period, has been reflected in the Return filed during the above period and the ITC has also been availed in the post-GST period, the ITC which has accrued on it has to be considered during the above period only. Execution of the sale agreement with Mrs. Mithila

Jain on 19.10.2016 during the pre-GST period does not permit the Respondent to apportion the ITC which has accrued to him in the post-GST period in the pre-GST period as per the provisions of Section 16 and hence, an amount of Rs. 1,39,795/- cannot be included in the pre-GST period.

73. The Respondent has also argued that the ITC and the taxable value do not synchronise in the same month as the invoice can be raised only on achieving the mile stone whereas ITC accrues on incurring expenditure. He has further argued that for computing profiteering it was important to synchronise the work done and the ITC availed with the billing raised on the buyer. He has also cited invoice No. 907098646 dated 30.06.2017 (Annexure-5) vide which 90% amount of consideration has been received from the Applicant No. 1 in the pre-GST period whereas the work done in the above period was only 53% as per the RERA Certificate (Annexure-6) and 10% billing was done for the balance 47% work done in the post-GST period. Therefore, as per Table-5 an amount of Rs. 2,00,34,421/- of ITC pertaining to the pre-GST period in respect of the PARKWEST-EMERALD project should be excluded from the ITC available during the post-GST period. As has been submitted in para supra the Respondent could have received the 90% consideration only after he had completed construction of 15 floors of the project as per the agreement executed with the Applicant No. 1 however, he had forced him to pay more amount than what he was entitled to receive as the work completed was only 53%. Therefore, it is clear that the benefit of ITC has to be computed on the basis of the ITC available to the Respondent and the turnover received by him at a particular time. The Respondent had no right to raise 90% of the demand

against the 53% work done in the pre-GST period. Therefore, the excess demand of 37% raised in the pre-GST period was illegal and incorrect. Therefore, an amount of Rs. 2,00,34,421/- of pre-GST ITC on the illegally raised excess demand of 37% cannot be excluded from the post-GST ITC. As the Respondent is availing benefit of ITC every month to discharge his tax liability he also has to pass on the benefit every month. The buyers cannot be compelled to wait till the completion of the project to avail benefit of ITC. In case of less or more payment of benefit of ITC to the buyers the Respondent can always adjust the amount subsequently. Therefore, no synchronisation is required to be done between the ITC and the turnover while passing on the benefit of ITC.

74. The Respondent has also argued that during the pre-GST period total billing of 35% was done as per the invoices attached as Annexure-7. As the ITC for 37% work was Rs. 2,00,34,421/- the ITC for the 35% work would be Rs. 1,89,51,480/-. Therefore, an amount of Rs. 10,82,942/- being ITC on the 2% work should not be considered during the pre-GST period. Vide Table-6 the Respondent has computed the balance ITC as Rs. 1,89,51,480/-. The Respondent has also submitted revised Table-B as per his own calculations as per Table-7 in which the CENVAT/ITC ratios for the pre and post-GST periods have been shown as 1.98% and 1.34% claiming that there was no additional benefit of ITC. In this Context it would be appropriate to mention that the Respondent is making contradictory and fallacious claims on the percentage of work done in the pre and the post-GST periods as well as the demands raised during the above periods. As has been explained in para supra percentage of billing has no connection with the computation of the benefit of ITC and hence the above contention

the Respondent cannot be accepted. Perusal of Table-6 shows that the Respondent has added an amount of Rs. 1,39,795/- as ITC for the pre-GST period and excluded an amount of Rs. 4,52,28,300/- from the pre-GST period on the ground that the work was done prior to April, 2016 but the invoices were received and ITC availed after April, 2016. The above additions and subtractions have no basis and are wrong and incorrect as the Respondent cannot include or exclude the ITC against the provisions of Section 16 of the Act as per his own whims and fancies. Perusal of Table-7 shows that the Respondent has arbitrarily taken the amount of CENVAT/VAT available to him during the pre-GST period as Rs. 1,89,51,480/- whereas the DGAP has taken the above amount as Rs. 4,50,88,506/- in Table-B of his Report which is based on the CENVAT/VAT and ITC Registers as well as the Returns filed by the Respondent himself. The ITC for the post-GST period has been shown by the Respondent as Rs. 54,14,708/- as compared to the amount of Rs. 2,69,66,615/- in Table-B. The Respondent has accordingly calculated the ration of CENVAT/VAT to turnover for the pre-GST period as 1.98% and ratio of ITC to turnover during the post-GST period as 1.34% against the ratios of 4.70% and 6.69% during the post-GST period computed by the DGAP. It is quite clear that the Respondent has taken the amount CENVAT/VAT/ITC of pre and post-GST period without any basis whereas the figures of theCENVAT/VAT/ ITC considered by the DGAP are based on documentary evidence. Therefore, the ratios computed by the DGAP are correct and reliable. Therefore, the above claims of the Respondent are frivolous and hence the same cannot be accepted.

75. The Respondent has stated in respect of the project PARKWEST-MAPLE that the benefit has to be passed to the extent of the Excise Duty of Rs. 2,85,34,060/- which he had paid on the purchase of the material as per the details given in Annexure-8. In this connection it is reiterated that the benefit has to be calculated on the entire additional ITC which has become available to the Respondent and it cannot be restricted to the amount of Excise Duty. The DGAP could not have computed the benefit input wise as there is no such provisions in Section 171. The Respondent cannot misappropriate the ITC other than which he has earned on account of Excise Duty as it has been granted to him out of the public exchequer in the interest of the buyers. Therefore, the above claim of the Respondent cannot be accepted.

76. The Respondent has also stated that maximum purchases are made at the time of finishing of the project due to which huge ITC is generated which cannot be utilised as per the provisions of Notification No. 15/2017-Central Tax (Rate) dated 28.06.2017 as the output tax liability is very less. He has further stated that the DGAP has not investigated this aspect under Rule 129 and hence his Report could not accepted. In this context it would be pertinent to mention that the Respondent has not produced any evidence either before the DGAP or during the present proceedings to establish that he would not be able to utilise the amount of ITC due to the restriction imposed by the Notification dated 28.06.2017. Keeping in view that the Respondent has realised an amount of Rs. 170,26,63,338/- as price from the buyers and his output tax liability would be Rs. 20,43,19,601/- there is hardly any chance of his not utilising the whole amount of ITC. Therefore, the above contention of the Respondent is hypothetical and is without any

proof and hence no investigation can be conducted on it by the DGAP as per Rule 129. Hence, the above argument of the Respondent is not maintainable.

77. The Respondent has also submitted that the calculation of ratios of 1.97% and 5.59% for the pre and the post-GST periods as per Table-E of the Report in respect of the PARKWEST-MAPLE project was not correct as there was no synchronisation between the ITC and the turnover as the demand could not be raised before the prescribed milestone is achieved. As already explained in the paras supra no synchronisation is required between the ITC and the demand to pass on the benefit of ITC as the Respondent has not been raising demand as per the milestones. The Respondent has himself admitted that he had collected 90% demand against the 53% work done during the pre-GST period which has no synchronisation with the turnover and ITC and hence his above claim is incorrect. He has to pass on the benefit of ITC every month as he is himself availing the ITC every month to pay his GST liability which he cannot deny on the ground that there is no synchronisation in the ITC and the demand.

78. The Respondent has further submitted that he had collected an excess amount of Rs. 37,290/- on account of GST from the Applicant No. 2 as has been computed vide Table-9 but the DGAP has shown the benefit to be passed on to him as Rs. 74,229/- which was incorrect. In this regard perusal of Sr. No. 22 of Annexure-22 vide which the benefit of ITC has been calculated in respect of the above Applicant shows that he has paid an amount of Rs. 59,73,300/- post-GST on which he was entitled to the ITC benefit of Rs. 2,16,233/- out of which benefit of Rs. 1,49,333/- has

already been passed on by the Respondent. Hence, he is entitled to the benefit of Rs. 66,900/- + Rs. 7,329/- as GST which comes to Rs. 74,229/-. Therefore, the computation of Rs. 37,290/- as excess GST claimed by the Respondent is incorrect and hence it cannot be accepted.

79. The Respondent has also claimed that there has been increase in the rates of tax on the services and the works contracts and hence no additional benefit of ITC has accrued to him. He has further claimed that the ITC pertaining to the pre-GST period should not be counted in the post-GST period and an amount of Rs. 14,94,078/- as per Annexure-9 should be reduced from the ITC pertaining to the post-GST period. Both the above issues have been dealt in detail in para supra and hence they are not being discussed here. Since both the above claims of the Respondent are frivolous they cannot be accepted. Accordingly, the above amount of Rs. 14,94,078/- cannot be reduced from the post-GST ITC. Similarly the ITC on the brokerage paid to Mr. Sanjay H. Sethiya vide invoice No. 32A/010332018 dated 01.03.2018 attached as Annexure-10 cannot be counted during the pre-GST period in terms of Section 16 of the above Act as the above tax invoice has been issued in the post-GST period.

80. The Respondent has further claimed that the amount of work done in the pre-GST period in respect of the project was 18% as is evident from Annexure-12, however, the demand raised during the above period was 45% out of which 20% demand was raised before April, 2016 and during July, 2017 to September, 2019 the work done was 63% and he had raised demand to the extent of 90%, hence there was no synchronisation between the accrual of ITC and the demand raised due to which the benefit of ITC computed by the DGAP was wrong. It is clear from the self-

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admission of the Respondent that he was not raising demand as per the provisions of the agreement but was raising it arbitrarily forcing the buyers to pay more amount than what they were required to pay. Therefore, the claim of synchronisation of the Respondent is completely incorrect and hence it cannot be accepted. Therefore, the computations made by the Respondent vide Table-10 are wrong and hence an amount of Rs. 8,14,21,489/- cannot be reduced from the ITC of the post-GST period. Similarly, the calculations made by the Respondent on account of billing of 45% in the post-GST period where the work done was only 18% as per Table-11 and Table-12 are utterly wrong, unreasonable and illogical and hence the same cannot be accepted.

81. The Respondent has also contended that the ratios computed by the DGAP in respect of the project PARKWEST-MAPLE vide Table-C of his Report should be 4.32% for the pre-GST period and 5.17% for the post-GST period instead of 1.97% and 5.59% as per the Report of the DGAP. In this connection it is revealed from the Table-13 prepared by the Respondent that he has arbitrarily shown the amount of pre-GST ITC as Rs. 7,53,90,268/- and post-GST ITC as Rs. 5,42,80,993/- as compared to the pre-GST/CENVAT ITC of Rs. 3,42,96,397/- and post-GST ITC of Rs. 14,68,34,737/- shown by the DGAP in Table-C. While the amount shown by the DGAP is based on the documentary evidence there is no such evidence produced by the Respondent. Therefore, the ratios calculated by the Respondent are incorrect and arbitrary and hence, they cannot be relied upon. Therefore, the profiteering of Rs. 1,50,16,226/- computed by the Respondent on the additional benefit of 0.85% is completely incorrect and hence the same cannot be accepted.

82. The Respondent has also argued that the computation of profiteered amount made by the DGAP was wrong as the gross profit and cost of the Respondent had remained same as was evident from Annexure-14. In this regard it would be relevant to mention that the benefit of additional ITC has to be calculated on the basis of the additional ITC which has become available to the Respondent during the post-GST period as compared to the ITC which he had earned during the pre-GST period and the cost and gross profit of the Respondent has no connection with passing on of the benefit. Section 171 of the Act also does not provide that both the above factors are required to be considered while passing on the benefit of ITC. Therefore, the above contention of the Respondent is untenable.

83. The Respondent has also pleaded that an amount of Rs. 6,78,578/- collected as GST in respect of the PARKWEST-EMERALD project and an amount of Rs. 76,74,175/- collected as GST on the PARKWEST-MAPLE project has been deposited with the Government and hence the same cannot be treated as the profiteered amount. He has also cited the various definitions of profiteering in his support. In this connection it would be appropriate to mention that the Respondent has not only collected excess prices from his buyers which they were not required to pay due to the benefit of ITC but he has also compelled them to pay additional GST on these excess prices which they should not have paid. The Respondent has thus defeated the objective of both the Central and the State Government to provide the benefit of ITC to the ordinary buyers by sacrificing their tax revenue. The Respondent was legally not required to collect the excess GST and therefore, he has not only violated the provisions of the CGST Act, 2017 but has also acted in contravention of the provisions of Section

171 (1) of the above Act as he has denied the benefit of tax reduction to the ordinary buyers by charging excess GST. Had he not charged the excess GST the buyers would have paid less price while purchasing flats from the Respondent and hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit denied by the above Respondent. It would also be appropriate to state here that price includes GST also. The definitions of profiteering quoted by the Respondent are not relevant as what would constitute the profiteered amount has been defined in Section 171 (3A) of the above Act. Therefore, the above contention of the Respondent is untenable and hence it cannot be accepted.

84. The Applicant No. 1 vide his submissions dated 04.03.2020 has stated that the benefit of ITC should not be computed on the basis of the amount of consideration paid by him in the post-GST period and it should be based on the ITC availed by the Respondent. In this connection it would be pertinent to mention that the benefit has been computed on the basis of the additional ITC which has become available to the Respondent in the post-GST period but the same is required to be computed in the case of the above Applicant proportionate to the amount paid by him during the post-GST period only and it cannot be paid to him on the amount which he has paid during the pre-GST period as the benefit has become applicable only after coming in to force of the GST. Therefore, the above claim of the Applicant No. 1 is not tenable.

85. The above Applicant has also stated that since the Respondent has collected 47% amount in the post-GST period the ITC benefit should be passed on the 47% value. He has further stated that the benefit which has

accrued to the Respondent has less nexus with the amount received by him and more with the work completed. In this context it would be relevant to mention that 47% is the percentage of completion of the work achieved by the Respondent and not the percentage of the amount collected by him. As explained in para supra percentage of completion of work has no correlation with the amount of benefit as it has to be computed on the basis of the comparison of the CENVAT/VAT/ITC and the turnovers received by the Respondent during the pre and the post-GST periods and hence, the above contention of the above Applicant cannot be accepted.

86. The above Applicant has also submitted that he was entitled to benefit of Rs. 1,49,566/- on account of the 47% work completed in the post-GST period out of which he has received Rs. 31,823/- and balance amount of Rs. 1,17,744/- was still due to him. However, as been discussed above the Applicant is entitled to the benefit of Rs. 31,664/- only in proportion to the consideration which he has paid during the post-GST period and not on the basis of the percentage of completion of work during the above period. Since, he has already been passed on an amount of Rs. 31,823/- as benefit of ITC no further benefit is required to be passed on to him. Hence, the above contention of the Applicant is untenable and he is not eligible for further benefit of Rs. 1,17,744/- as has been claimed by him.

87. The Applicant No. 1 has further submitted that the profitability of the Respondent has increased by 1% in the year 2017-18 as compared to the year 2016-17 and his ITC has also increased from 4.81% in the pre-GST period to 16.85% during the post-GST period and hence, he should get the benefit accordingly. In this connection it would be relevant to mention that profitability has no connection with determination of the benefit and hence

the same cannot be considered. However, the additional benefit of ITC which the Respondent has received in the post-GST period has been duly taken in to account while determining the benefit of ITC.

88. The above Applicant has also claimed that the Respondent has admitted that maximum ITC would be available at the time of finishing of the project therefore, the percentage of ITC available at the time of finishing should be applied for all the purchases made in the post-GST regime. In this connection it would be appropriate to mention that the percentage of ITC available at the time of finishing cannot be applied uniformly on rest of the purchases made during the post-GST period as it would be against the provisions of Section 16 of the CGST Act, 2017 as the ITC would accrue on the basis of the value, date of purchase and tax rate of the purchases and hence, the above claim of the Applicant cannot be accepted.

89. The Applicant No. 1 has further claimed that the Respondent had admitted before the RERA that an amount of Rs. 64.51 Crore was to be spent on rest of the construction to be done in the post-GST period however, during the present proceedings he has claimed that he had made purchases to the tune of Rs. 4.42 Crore only which has resulted in denial of benefit of ITC to the home buyers. On this issue it would be relevant to mention that cost of the project has no correlation with the determination of the benefit of ITC as has been discussed in detail in para supra and hence, the above claim of the Applicant is incorrect.

90. The above Applicant has also contended that the benefit has to be given uniformly and it cannot be passed on the basis of the consideration paid by the home buyer in the post-GST period. He has also cited the cases of flat Nos. E-206, E-104, E-1004, E-1103 etc. in this regard. However, as has

been submitted above the benefit has to be passed on the basis of amount of consideration paid by a buyer in the post-GST period. Since, the Applicant No. 1 has already been passed on the benefit of ITC based on the amount of consideration paid by him during the post-GST period no further benefit is required to be passed on to him. Hence, the above argument of the Applicant cannot be accepted.

91. It is established from the perusal of the above facts that the Respondent has benefited from the additional ITC to the tune of 1.99% of the total turnover in respect of the project **PARKWEST-EMERALD** during the period from July, 2017 to April, 2019 which he was required to pass on to the buyers of the flats of the above project by commensurately reducing the prices of the flats which he has not done and hence he has violated the provisions of Section 171 (1) of the CGST Act, 2017. Accordingly, as per the provisions of Section 171 (2) of the above Act read with Rule 133 (1) of the CGST Rules, 2017 the profiteered amount is determined as **Rs. 9,67,330/-** which also includes the GST on the base profiteered amount of Rs. 8,63,687/- in respect of the above project. Since, the Respondent has already passed on an amount of **Rs. 31,823/-** to the Applicant No. 1 which was due to him, hence, no further benefit is to be passed on to the above Applicant. The details of the buyers of the flats of the PARKWEST-EMERALD project sold upto 30.04.2019 along with their unit Nos. and the amount of benefit due to them have been given in **Annexure-21** of the Report dated 31.01.2020. These buyers are identifiable as per the documents placed on record and therefore, the Respondent is directed to pass on an amount of Rs. 9,67,330/- to the flat buyers mentioned in the above Annexure along with the interest @ 18% per annum in terms of

Section 171 (1) read with Rule 133 (3) (b) of the above Rules from the dates from which the above amounts were 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-21 attached with the Report dated 31.01.2020.

92. The Respondent has also availed benefit of ITC of 3.62% of the total turnover in respect of the project **PARKWEST-MAPLE** during the period from July, 2017 to April, 2019 which he was required to pass on to the flat buyers of the above project which he has failed to do and hence the provisions of Section 171 of the CGST Act, 2017 have been contravened by the Respondent and thus an amount of **Rs. 3,03,94,113/-** inclusive of GST @ 12% on the base amount of Rs. 2,71,37,601/- is determined as the profiteered amount as per the provisions of Section 171 (2) and Rule 133 (1). Further, the Respondent has realized an additional amount of **Rs. 74,929/-** which includes both the profiteered amount @ 3.62% of the taxable amount (base price) of Rs. 66,900/- and 12% GST on the said profiteered amount from the Applicant No. 2. The details of the profiteered amount and buyers of the above project have been mentioned by the DGAP in **Annexure-22** of his Report dated 31.01.2020. These buyers are identifiable as per the documents placed on record and therefore, the Respondent is directed to pass on the amounts of **Rs. 3,03,19,184/-** and **Rs. 74,929/-** to the other flat buyers and the Applicant No. 2 respectively along with the interest @ 18% per annum in terms of Section 171 (1) read with Rule 133 (3) (c) of the above Rules from the dates from which the above amounts were 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-22 attached with the Report dated 31.01.2020.

93. 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 projects commensurate with the benefit of ITC received by him as has been detailed above. Since the present investigation is only up to 30.04.2019 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 above Applicants or any other buyer shall be at liberty to approach the Karnataka State Screening Committee to initiate fresh proceedings against the Respondent as per the provisions of Section 171 of the CGST Act, 2017.

94. 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 projects 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 for violation of the provisions of Section 171 (1) during the period from 01.07.2017 to 30.04.2019 and therefore, he is apparently liable for imposition of penalty under the provisions of the above Section. However, perusal of the provisions of Section 171 (3A) under which penalty has been prescribed for the above violation shows that Section 171 (3A) has been inserted in the CGST Act, 2017 w.e.f. 01.01.2020 vide Section 112 of the Finance Act, 2019 and it was not in operation during the period from 01.07.2017 to 30.04.2019 when the

Respondent had committed the above violation and hence, the penalty prescribed under Section 171 (3A) cannot be imposed on the Respondent retrospectively. Accordingly, notice for imposition of penalty is not required to be issued to the Respondent.

95. This Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Karnataka 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.

96. 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 31.01.2020 the order was to be passed on or before 30.07.2020. 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 Central Goods & Services Tax Act, 2017.

97. A copy each of this order be supplied to all the Applicants, the Respondent, Commissioners of Central Goods & Services Tax (CGST) and the State

Goods & Services Tax (SGST), Karnataka for necessary action. File be consigned after completion.

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

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

sd/-
(Amand Shah)
Member(Technical)

Certified Copy

31.8.2020

(A. K. Goel)
Secretary, NAA

F. No. 22011/NAA/135/Relationship/2020/4372-78 Date: 31.08.2020
Copy To:
1. M/s. Relationship Properties Pvt. Ltd., No. 1/1, Binny Mill Road, Binnypet, Banglore-560 023.
2. Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
3. Shri Venugopal Gella, No. 28/58, 3rd Floor, Smiran Arcade, 2nd Main Banashankari, 1st Stage, Banglore-560050, Karnataka.
4. Shri Sanjay Mehta, 305-3, Ground Floor, 1st Main Sitapati Agrahar, Chamrajpet, Banglore-560 018.
5. Commissioner of commercial Taxes, vanijya therige karyalaya, 1st main road, Gandhinagar, Bangalore- 560 009.
6. Chief Commissioner of CGST, Bangalore Zone, C.R. Building, Queen's Road, Bengaluru.
7. NAA Website/Guard File.

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