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

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| Case No. | 30/2019 |
| Date of Institution | 12.02.2019 |
| Date of Order | 08.05.2019 |

**In the matter of:**

1. Ms. Pallavi Gulati and Sh. Abhimanyu Gulati, H. No. 704, Sector-7/C, Faridabad, Haryana -121006.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Puri Constructions Pvt. Ltd., 11-12A, Ground Floor, Tolstoy House, 15 & 17, Tolstoy Marg, New Delhi.

Respondent

Quorum:-

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

Present:-

1. None for the Applicant No. 1.
2. Sh. Anwar Ali T. P., Additional Commissioner for the Applicant No. 2.
3. Sh. Rakesh Sodhi, Sh. Himanshu Juneja, Sh. Kishor Kunal, Sh. Achal Chawla and Ms. Ruchi Jha for the Respondent.

**ORDER**

1. The present Report dated 27.08.2018, has been received from the Applicant No. 2 i.e. the Directorate General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that vide his application dated 22.01.2018 (Annexure-1 of the Report) submitted to the Standing Committee on Anti-profiteering under Rule 128 of the CGST Rules, 2017, the Applicant No. 1 had alleged profiteering by the Respondent while he had purchased Flat No. T4-2B in the Anand Vilas Project, Sector-81, Faridabad, Haryana-121006

launched by the Respondent. Initially Sh. Dinesh Kumar Madan, H. No. 86/L, Ward No. 10, New Colony, Palwal, Haryana and Shri Ravi Kumar were jointly allotted this flat which was transferred to the Applicant No. 1, however, the Respondent had not allegedly passed on the benefit of Input Tax Credit (ITC) to the above Applicant although he had charged GST @ 12% w.e.f. 01.07.2017.

2. The DGAP has stated in his Report that the above Applicant had booked the flat on 09.05.2017 before the GST had come in to force and following demands had been raised on him by the Respondent as per the Table-'A' given below:-

**Table-"A"**

(Amounts in Rs.)

| Particulars | BSP | DEV | Service Tax & VAT | GST@12% | Total |
|---|---|---|---|---|---|
| Agreement Value (A) | 72,75,000 | 8,73,000 | 4,39,410 | - | 85,87,410 |
| Paid in Pre-GST era (B) | 43,65,000 | 5,23,800 | 2,63,646 | - | 51,52,446 |
| Balance to be paid Post GST (C)= (A)-(B) | 29,10,000 | 3,49,200 | 1,75,773 | - | 34,34,973 |
| Demanded by the Respondent (D) | 29,10,000 | 3,49,200 | - | 3,91,104 | 36,50,304 |
| Excess Demand by the Respondent (E)= (D)-(C) | | | | | 2,15,331 |

3. The DGAP has also stated that the above Applicant had claimed that the Respondent had completed approximately 60% of the project work using inputs which were liable to higher GST @18% or 28% due to which additional ITC benefit had accrued to him. The Applicant No. 1

had also furnished an e-mail dated 28.08.2017 through which he had asked the Respondent why he was not being given the benefit of ITC when GST was being charged from him @12% and vide e-mail dated 28.08.2017, the Respondent had communicated that the benefit of ITC would be calculated at the time of the completion of the project and if due, would be proportionately passed on to the above Applicant. The Applicant No. 1 had also submitted the following documents along with his complaint:-

(a) Duly filled in Form APAF-1

(b) Payment Schedule pre-GST & post-GST

(c) Copy of Tax Invoice post-GST

(d) Copy of Demand Note pre-GST

(e) Statement of GST paid upto 02.01.2018

(f) Copy of receipts of payment

(g) ID proof (Aadhar Card)

(h) Copies of e-mails requesting for passing on the benefit of ITC

(i) Detailed work-sheet

4. The above complaint was considered by the Standing Committee on Anti-profiteering in its meeting held on 09.02.2018 and was forwarded to the DGAP on 28.02.2018 for investigation whether the benefit of ITC had been passed on by the Respondent to the above Applicant or not.

5. The DGAP had issued Notice under Rule 129 of the CGST Rules, 2017 on 14.03.2018 (Annexure-2 of the Report) asking the Respondent to intimate whether he admitted that the benefit of ITC had not been passed on to the above Applicant through

commensurate reduction in the price of the flat and if so, to suo moto determine the quantum of such benefit and communicate the same with necessary evidence. An opportunity to inspect the non-confidential evidences/information submitted by the Applicant No. 1 was also afforded to the Respondent between 21.03.2018 and 23.03.2018 (Annexure-3 of the Report) which he had utilised on 23.03.2018.

6. The DGAP has further stated that the above Applicant vide e-mail dated 08.08.2018 (Annexure-4 of the Report) was given an opportunity to inspect the non-confidential evidences/replies submitted by the Respondent between 10.08.2018 to 14.08.2018 however, he through his letter dated 13.08.2018 had informed the DGAP that the matter had been discussed by him with the Respondent and after being fully satisfied with the clarification given by the Respondent he had no grievance left and therefore, his complaint should be treated to have been withdrawn. The DGAP has also submitted that the present investigation had been conducted from 01.07.2017 to 30.06.2018 and the period for completing the investigation was extended upto 27.08.2018 by this Authority, vide its order dated 15.05.2018, as per the provisions of Rule 129 (6) of the CGST Rules, 2017.

7. The DGAP has further submitted that the Respondent had filed replies to the Notice vide his letters dated 28.03.2018, 12.04.2018, 27.04.2018, 07.05.2018, 17.05.2018, 29.05.2018, 07.06.2018, 12.06.2018, 20.07.2018, 25.07.2018, 31.07.2018, 03.08.2018,

09.08.2018 and 13.08.2018. The contents of the replies given by the Respondent have been given in brief by the DGAP as under:-

I. That the Respondent had intimated his buyers that he intended to compute the benefit of additional ITC at the time of handing over the possession so that correct amount of benefit could be passed on as it was not certain that the customers would take possession or leave the project or transfer the booking after availing benefit of additional ITC or they would pay the construction linked instalments on time or not.

II. That no additional benefit of ITC had accrued after coming in to force of the GST to the Respondent and the benefit of ITC on all the taxes charged from him before GST, was available to him as has been described as under:-

a) All the purchases of marble and steel etc. had been done from the suppliers based in Haryana by paying Value Added Tax (VAT), on which ITC was available under the Haryana VAT Act and no purchases had been made from outside the State.

b) In the service contracts in respect of design, architecture, horticulture work, cutting and testing and painting etc., the contractors were charging Service Tax on which CENVAT credit was available.

c) In one contract, the civil contractor had charged Service Tax and VAT (WCT) from the Respondent on which CENVAT Credit was available and the VAT (WCT) was eligible as deduction under the Haryana VAT Act.

III. That costs of various inputs had increased during the period of agreement for sale executed with the above Applicant, the details of which had been submitted by the Respondent with the reply. He had also claimed that there were several exempted services which formed part of the transaction and in a number of cases ITC had not been allowed and hence its figures were always dynamic.

IV. That the Respondent had requested that except the following documents all other information was to be treated as confidential in terms of Rule 130 of the CGST Rules, 2017:-

a) Buyers agreement (Annexure R-5 to the letter dated 12.06.2018)

b) Customer receipts and demands (Annexure R-5 to the letter dated 12.06.2018)

c) Cost Inflation Index (Annexure R-6 to the letter dated 12.06.2018)

d) Pre-GST and Post-GST tax chart (Annexure R-7 to the letter dated 12.06.2018).

V. That the above Applicant had informed the Respondent vide his letter dated 13.08.2018 that he was withdrawing his application and therefore, the investigation should be closed.

8. The DGAP has intimated that the Respondent had also submitted the following documents:-

(a) Copies of GSTR-1 returns for July, 2017 to June, 2018

(b) Copies of GSTR-3B returns for July, 2017 to June, 2018

(c) Copies of Tran-1 returns for transitional credit availed

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

(e) Copy of ST-2 (Certificate of Service Tax Registration)

(f) Copies of all demand letters and sale agreement/contract issued in the name of Applicant No 1

(g) Tax rates - pre-GST and post-GST

(h) Copy of Cost Audit report for the FY 2016-17

(i) Details of cost indices and cost escalation.

(j) Abridged Cost Statement along with pre-GST impact of input tax credit on cost.

(k) Copy of Electronic Credit Ledger for 01.07.2017 to 25.07.2018

(l) CENVAT/Input Tax Credit register for April, 2016 to June, 2018

(m) List of home buyers in the project "Anand Vilas"

9. The DGAP after investigation has stated that the main issues for determination was whether there were benefits of reduction in the rate of tax or additional ITC on the supply of construction service provided by the Respondent after coming in to force of the GST w.e.f. 01.07.2017 and whether the Respondent had passed on the above benefits to the recipients in terms of Section 171 of the CGST Act, 2017. The DGAP has also stated that the Respondent vide his letter dated 12.04.2018, had furnished copy of the agreement executed by him with the above Applicant for the purchase of one flat measuring 1940 square feet at the basic sale price of Rs. 3750 per square feet, copies of the demand letters and the payment schedule, the details of which were as under:-

**Table-"B"**

(Amount in Rs.)

| S. No. | Payment Stages | Due Date | Basic % | BSP | DEV | Service Tax including SBC & KKC | VAT | CGST | SGST | Total |
|---|---|---|---|---|---|---|---|---|---|---|
| 1 | At the time of Booking | 07.09.2016 | 10% | 7,27,500 | 87,300 | 36,666 | 7,275 | - | - | 8,58,741 |
| 2 | Booking + 60 | 06.11.2016 | 10% | 7,27,500 | 87,300 | 36,666 | 7,275 | - | - | 8,58,741 |
| 3 | Booking + 120 | 05.01.2017 | 10% | 7,27,500 | 87,300 | 36,666 | 7,275 | - | - | 8,58,741 |
| 4 | Booking + 180 | 06.03.2017 | 10% | 7,27,500 | 87,300 | 36,666 | 7,275 | - | - | 8,58,741 |
| 5 | Booking + 270 | 04.06.2017 | 10% | 7,27,500 | 87,300 | 36,666 | 7,275 | - | - | 8,58,741 |
| 6 | Booking + 311 | 15.07.2017 | 10% | 7,27,500 | 87,300 | 36,666 | 7,275 | - | - | 8,58,741 |
| 7 | Booking + 375 | 17.09.2017 | 10% | 7,27,500 | 87,300 | - | - | 48,888 | 48,888 | 9,12,576 |
| 8 | Booking + 420 | 01.11.2017 | 10% | 7,27,500 | 87,300 | - | - | 48,888 | 48,888 | 9,12,576 |
| 9 | Booking + 480 | 31.12.2017 | 10% | 7,27,500 | 87,300 | - | - | 48,888 | 48,888 | 9,12,576 |
| 10 | On App. of OC or within 18 Months of Booking (whichever is later) | Not due till date of application | 5% | 3,63,750 | 43,650 | - | - | 24,444 | 24,444 | 4,56,288 |
| 11 | At the time of offer for possession | | 5% | 3,63,750 | 43,650 | - | - | 24,444 | 24,444 | 4,56,288 |
| | **Total** | | **100%** | **72,75,000** | **8,73,000** | **2,19,996** | **43,650** | **1,95,552** | **1,95,552** | **88,02,750** |

10. The DGAP has also submitted that the claim of the Respondent that the exact amount of ITC would be finally determined and the benefit passed on to the buyers at the time of handing over possession might be correct but the profiteering, if any, had to be computed at a point of time in terms of Rule 129 (6) of the CGST Rules, 2017 and hence the amount of ITC available to the Respondent and the taxable amount realised by him from the above Applicant so far had to be taken into consideration for determining profiteering. The DGAP has further submitted that the contention of the Respondent that a customer might cancel or transfer the booking before taking possession after availing the benefit of additional ITC was valid, however, in such cases the benefit already availed by such a customer would be taken into account while determining the price to be paid by the prospective customer. Therefore, the above contention of the Respondent had no

bearing on his legal liability of passing on the benefit of ITC to the Applicant No. 1, the DGAP has stated.

11. The DGAP has also intimated that another claim made by the Respondent was that the above Applicant had withdrawn his complaint and hence, the investigation should be closed, however, he has submitted that although the proceedings must flow from an application but there was no legal provision under which it could be withdrawn. He has further intimated that as per the provisions of Rule 129 of the CGST Rules, 2017, he was legally bound to complete the investigation in case of any reference having been received from the Standing Committee on Anti-profiteering and hence withdrawal of an application could legally not be a valid reason for closing the investigation.

12. The DGAP has found that before coming in to force of the GST w.e.f. 01.07.2017, the Respondent was entitled to avail CENVAT credit of Service Tax paid on input services, credit of VAT paid on purchases of the inputs and credit of VAT (WCT) charged by the civil contractor on sub-contracts but the CENVAT credit of Excise Duty paid on inputs was not available. He has further found that post-GST, the Respondent had become entitled to avail ITC on GST paid on inputs and input services including on the sub-contracts. He has also averred that from the information supplied by the Respondent which had been further verified from the invoices issued during the pre-GST period (April, 2016 to June, 2017) and the post-GST period (July, 2017 to June, 2018), the details of the ITC availed by the Respondent and his taxable turnover were as per the Table-C given below:-

**Table-"C"**

(Amount in Rs.)

| S. No. | Particulars | April, 2016 to March, 2017 | April, 2017 to June, 2017 | Total (Pre-GST) | July, 2017 to March, 2018 | April, 2018 to June, 2018 | Total (Post-GST) |
|---|---|---|---|---|---|---|---|
| 1 | CENVAT of Service Tax Paid on Input Services (A) | 167,90,834 | 39,87,427 | 207,78,261 | - | - | - |
| 2 | Input Tax Credit of VAT Paid on Purchase of Inputs (B) | 21,27,046 | 8,23,223 | 29,50,269 | - | - | - |
| 3 | Input Tax Credit of VAT(WCT) paid to Sub Contractors (C) | 107,38,476 | 26,43,641 | 133,82,117 | - | - | - |
| 4 | Total CENVAT/Input Tax Credit Available (D)= (A+B+C) | 296,56,356 | 74,54,291 | 371,10,647 | - | - | - |
| 5 | Input Tax Credit of GST Availed (E) | - | - | - | 532,51,994 | 84,12,610 | 616,64,604 |
| 6 | Total Taxable Turnover (F) | 4243,39,766 | 1127,06,432 | 5370,46,198 | 3843,52,825 | 657,71,797 | 4501,24,622 |
| 7 | **Ratio of CENVAT/ Input Tax Credit Pre-GST [(G)= (D)/(F)] and Ratio of Input Tax Credit Post-GST [(G)=(E)/(F)]** | | | **6.91%** | | | **13.70%** |

13. On the basis of the above Table the DGAP has argued that it was evident that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period was 6.91% and during the post-GST period it was 13.70% and therefore, it was clear that post-GST, the Respondent had benefited from additional ITC to the extent of 6.79% (13.70%-6.91%) of the total turnover. He has further argued that the issue of profiteering had been examined by comparing the applicable tax and the ITC available for the pre-GST period when Service Tax @4.5% and VAT@1% was payable (total tax rate of 5.50%) with the post-GST period when the prevalent GST rate was 12% (GST @18% alongwith 1/3rd abatement on value) on construction service imposed vide Notification No.11/2017-Central Tax (Rate), dated 28.06.2017. He has also computed the comparative figures of ITC availed/available during the pre-GST period and the post-GST period as per the Table-'D' given below:-

**Table-"D"**

(Amount in Rs.)

| S. No. | Particulars | | Pre-GST | Post- GST |
|---|---|---|---|---|
| 1 | Period | A | April,2016to June,2017 | July,2017 to June, 2018 |
| 2 | Output tax rate (%) | B | 5.50% | 12.00% |
| 3 | Total input tax credit availed (Rs.) | C | 371,10,647 | 616,64,604 |
| 4 | Taxable turnover (Rs.) | D | 5370,46,198 | 4501,24,622 |
| 5 | Ratio of input tax credit to taxable turnover (%) | E=C/D | 6.91% | 13.70% |
| 6 | Increase in tax rate post-GST (%) | F= GST Rate *less* pre-GST Tax rate | - | 6.50% |
| 7 | Increase in input tax credit availed post-GST (%) | G | - | 6.79% |
| 8 | **Analysis of Increase in input tax credit:** | | | |
| 9 | Basic Price Pre-GST (per square feet) (Rs.) | H | | 3,750.00 |
| 10 | Service Tax @4.5% (Rs.) | I= H*4.5% | | 168.75 |
| 11 | VAT @ 1% (Rs.) | J=H*1% | | 37.50 |
| 12 | Total per square feet price pre-GST (Rs.) | K=H+I+J | | 3,956.25 |
| 13 | Recalibrated Basic Price after considering additional input tax credit of 6.79% in GST (Rs.) | L= H*(100-G)/100 | | 3,495.38 |
| 14 | GST @12% on recalibrated Basic Price (Rs.) | M= L*12% | | 419.45 |
| 15 | Commensurate price post-GST (Rs.) | N= L+M | | 3,914.82 |

14. The DGAP has also contended that the additional ITC of 6.79% of the taxable turnover, should result in commensurate reduction of cum-tax price from Rs. 3,956.25 per square feet to Rs. 3,914.82 per square feet. He has further contended that as per the provisions of Section 171 of the CGST Act, 2017, the benefit of the additional ITC which had accrued to the Respondent, was required to be passed on to the flat buyers. He has also claimed that the Respondent had not objected to passing on of the benefit of ITC at the time of giving possession of the flat, however, the fact was that the benefit had not been passed on till now. The DGAP has pleaded that the payments received from the above Applicant did not state that the benefit available to the Respondent had been passed on to the Applicant, which showed that the Respondent had retained the benefit which had accrued to him on account of GST. The DGAP has also alleged that by not reducing the basic price by 6.79% due to additional benefit of ITC and by charging

GST at the increased rate of 12% on the pre-GST basic price, the Respondent had violated the provisions of Section 171 of the of the CGST Act, 2017.

15. The DGAP has also stated that on the basis of the CENVAT/ITC available pre and post-GST and the details of the amount collected by the Respondent from his purchasers during the period from 01.07.2017 to 30.06.2018, the amount of benefit of ITC not passed on by the Respondent or the profiteered amount came to Rs. 3,42,31,077/- which included 12% GST on the basic profiteered amount of Rs. 3,05,63,462/-. He has also supplied the details of all the buyers who had purchased flats from the Respondent along with their unit numbers vide Annexure-22 attached with the Report. The DGAP has further stated that the above amount was inclusive of Rs. 1,65,975/- (including 12% GST over the basic amount of Rs. 1,48,192/-) which the Respondent had profiteered from the Applicant No. 1. He has also intimated that the construction service was supplied in the State of Haryana only.

16. The DGAP has also stated that the benefit of additional ITC (6.79%) was more than the increase in the rate of tax (6.5%) which showed that net benefit of ITC had accrued to the Respondent and the same was required to be passed on to the above Applicant and therefore, the provision of Section 171 of the CGST Act, 2017 had been violated by the Respondent as the additional benefit of ITC @6.79% of the basic price received by the Respondent from the above Applicant during the period from 01.07.2017 to 30.06.2018, had not been passed

on to him and the Respondent had collected an additional amount of Rs.1,65,975/- from the Applicant No. 1 which included both the profiteered amount @6.79% of the taxable amount and the GST on the said profiteered amount @12%. The DGAP has further stated that the Respondent had also realized an additional amount of Rs. 3,40,65,102/- including profiteered amount @6.79% of the taxable amount and GST on the profiteered amount @12% from the other home buyers who were not applicants in the present investigation. He has also intimated that all such buyers were identifiable as per the documents received form the Respondent in which their names and addresses along with unit nos. allotted to them had been mentioned.

17. The above Report was considered by the Authority in its meeting held on 28.08.2018 and it was decided that the Applicants and the Respondent be asked to appear before the Authority on 13.09.2018. Since, the Respondent had asked for adjournment of the hearing scheduled on 13.09.2018, it was decided to grant next hearing on 28.09.2018. During the course of the hearing the Applicant No. 1 did not appear, the DGAP was represented by Sh. Anwar Ali T. P., Additional Commissioner and the Respondent was represented by Sh. Rakesh Sodhi, Sh. Himanshu Juneja, Sh. Kishor Kunal, Sh. Achal Chawla and Ms. Ruchi Jha.

18. The Respondent vide his reply dated 11.09.2018 has submitted that the Applicant No. 1 had withdrawn the complaint which alleged that the Respondent had not passed on the benefit of ITC to him which

showed that he was satisfied with the explanation given by the Respondent on the issue of not passing on the benefit of ITC.

19. The Respondent has also submitted that the computation of the benefit/ loss could not be done before completion of the project and he had never denied to pass on the benefit to the buyers as was evident from the correspondence made by him with them. He has further submitted that vide his email dated 28-Jul-2017 he had intimated the above Applicant that the benefit accruing to him, if any, would be calculated at the time of completion of the project and the same would be passed on to him. He has also claimed that the DGAP had also not disputed his this contention as had been mentioned in para 13 of the report. The Respondent has reiterated that the profiteering needed to be computed on the overall project and the benefit would be passed on to the buyers on the completion of the project and calculation of the same before completion would not give true account of the actual benefit/ loss accruing to the Respondent.

20. The Respondent has also pleaded that as per entry 5 (b) of 'Schedule II' of the CGST Act, 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 was deemed to be supply of service liable to GST, however, the said entry specifically excluded the cases where the entire consideration had been received after issuance of completion certificate or after its first occupation. He has further pleaded that 'Schedule III' of the CGST Act listed the activities or transactions which should be treated neither as a supply of goods nor

a supply of services which covered, sale of land and subject to clause (b) of paragraph 5 of Schedule II, sale of building and accordingly, in case the building/ flat was sold post completion, it would be considered neither supply of goods nor supply of services. He has also contended that as per section 17 (2) of the CGST Act in case the goods or services or both were used by the registered person partly for effecting taxable supplies and partly for effecting exempt supplies the amount of credit shall be restricted to so much of the input tax as was attributable to the taxable supplies. He has further contended that the value of the exempt supply included sale of land and subject to clause (b) of paragraph 5 of Schedule II, sale of building and therefore, the sale of building post completion was considered as exempt supply wherein the Respondent would be required to reverse the ITC. He has also stated that the Respondent was constructing flats under the project 'Anand Vilas', the total saleable area of which was 11,54,550 square feet, out of which he had been able to sell only 6,67,065 square feet which accounted for only 58% of the total saleable area. The Respondent has also mentioned that the above project was started in the year 2013 and was likely to be completed by March 2019 and during the last 4 years he had sold only 58% of the total saleable area and no flat had been sold since July 18 and hence at this point of time he was not in a position to determine how many flats would be sold before completion. He has further mentioned that in case if the flats were not sold before the completion, it would amount to sale of the building as per Schedule III of the GST law which would result in

reversal of the ITC. The Respondent has also contended that the ITC which had been taken in to account for computation of the profiteered amount was based on all the credit availed by him till the time, assuming that he would be able to sell all the flats before completion, however, in case no sale could be made before completion, he would be required to reverse the proportionate credit to the extent of 42% of the area which was still unsold. He has also argued that due to the reversal of ITC which might happen later on, it would be incorrect to infer that the entire ITC was the benefit accruing to the Respondent. The Respondent has further argued that he was required to follow the guidelines issued by the Real Estate Regulatory Authority (RERA) Haryana according to which he could not increase the price of the flats and if the benefit computed by the DGAP was passed on to the buyers without taking in to account the reversals on the unsold flats, he would not be able to recover the amount from the buyers due to the Real Estate (Regulation and Development) Act, 2016 and therefore, the profit/ loss should be calculated on the completion of the project. He has also claimed that he was yet to receive the balance instalments from the buyers and if any benefit would accrue due to additional ITC it would be passed on and adjusted in the last instalment.

21. The respondent has also submitted that the Real Estate Sector had unique complexities due to long turnaround time unlike manufacture of goods and construction of a building was a long drawn process. He has further submitted that the manufacturing of goods took short time and hence computing of the benefit per unit was easy due to

availability of exact quantities and prices of the inputs used per unit and the time taken for manufacturing but it took substantial period of time to construct a building. He has also claimed that the input output ratio varied considerably since the start of the project till its completion due to various factors which included change in the tax rate and change in the prices of the inputs as construction period extended from 4-5 years and therefore, it was difficult to compute the benefit/ loss merely for the impugned period.

22. The Respondent has further claimed that the rate of GST had been changed on various goods/ services during the last one year of its implementation and the Government had reduced rates on over 200 products on 15th Nov 2017 and about 50 products on 27th Jul 2017 and therefore, in case there was any reduction in the tax rate in future, ITC would also be reduced and hence accurate computation of the benefit would be possible only when the project was completed.

23. The Respondent has also submitted that he was not in agreement with the computation of the profiteered amount of Rs. 3,42,31,077/- calculated by the DGAP as it included the GST of Rs. 36,67,615/- in the above amount which he had already paid to the Government and hence it should be excluded for the purpose of computation of the benefit. The Respondent has further submitted that a mere difference in the ITC availed in the pre and the post GST era could not be said to be the profit which had accrued to the Respondent and there were a number of factors which were required to be taken in to account for calculating the benefit. The Respondent has also claimed that he was

eligible to take ITC in the pre GST regime as well however, the rate of tax on services had increased from 15% to 18% post GST and the rate of tax on goods had also increased from 5.25% VAT to 18%/ 12%/ 28% post GST. He has also furnished the comparison of tax rates under the erstwhile and post GST regime as under:-

| Sr. No. | Description of goods/services | Tax rate under erstwhile regime | Post GST tax rate |
|---|---|---|---|
| 1. | Architect | 15% | 18% |
| 2. | Brokerage | 15% | 18% |
| 3. | Steel | 5.25% | 18% |

He has further claimed that he would be paying tax at the rate of 18%/28% on the inputs instead of 5.25%/13.125%, due to which ITC would increase but it could not be considered as additional benefit which had arisen to the Respondent.

24. The Respondent has also contended that he had made purchases during the pre-GST period and hence the benefit of CENVAT credit of Excise Duty paid on the inputs was not available for providing the construction services under the erstwhile regime, however the same was available in the GST regime on the basis of which the DGAP had computed the benefit which had accrued to him. The Respondent has further contended that the DGAP had not taken in to account the fact that he was engaged in procurement of goods from traders and he was not aware whether the trader was purchasing such goods from a trader or manufacturer and therefore, the benefit of Excise Duty, if any, had accrued to the vendor of the Respondent and not to him which

had not been passed on to him. The Respondent has also highlighted that the prices of the goods procured by him had not reduced post GST. He has also claimed that as per the provisions of Section 171 of the CGST Act, any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit had to be passed on to the recipients by way of commensurate reduction in prices and it was the duty of the supplier to do so and the law did not require the recipient to pass on the benefit and hence the Respondent would be in a position to pass on the benefit only if the same had accrued to him, however, there was no benefit of Excise Duty to the Respondent as he was purchasing goods from the traders and therefore, the benefit which had not accrued to him could not be passed on by him.

25. The Respondent has also pleaded that he was a bonafide and law abiding dealer who was filing his Statutory Returns and he had not violated any provisions of the law and had never denied to pass on the benefit, however the accurate computation of the same was required as he would not be able to recover the wrongly passed on benefit and therefore, he had been requesting to allow him to pass it on on the completion of the project. He has further pleaded that in view of his submissions the imposition of penalty was not warranted. The Respondent also prayed that he was in the process of computing the actual benefit/loss which had accrued to him with the reasonable assumption for the unsold area which required reversal of ITC and would submit the same to the Authority and requested for grant of 15 days time for quantifying the benefit and submit the same. The

Respondent further prayed that personal hearing be granted to him before any decision was taken in this matter with liberty to produce relevant evidence.

26. The Respondent vide his submissions dated 28.09.2018 reiterated the submissions which were made by him on 11.09.2018 and additionally submitted that the DGAP had mentioned in his Report that the Respondent had not denied his liability to transfer the benefit. However, the same could not be computed before completion of the project, as accurate computation of the same was required as it would not be posssible to recover it if it was passed on wrongly. He has also prayed that he should be allowed to pass on the benefit after the completion of the project and therefore, the imposition of penalty was not warranted. He has also argued that it was well settled that imposition of penalty was a quasi-criminal adjudication and hence, the *mens rea* or malafide intent ought to be necessarily present, which was absent in the present case. He has also cited the cases of **Hindustan Steel Limited v. State of Orissa (1970) 25 STC 211 (SC)** and **CST v. Sanjiv Fabrics 2010-TIOL-71-SC-CST** wherein it has been held that *mens rea* was an essential ingredient for imposition of penalty. He has also quoted the case of **Bharjatiya Steel Industries v. Commissioner Sales Tax, U.P. 2008 (11) SCC 617** in which it was held that:-

*"An assessing authority has been conferred with a discretionary jurisdiction to levy penalty. By necessary*

*implication, the authority may not levy penalty. If it has the discretion not to levy penalty, existence of mens rea becomes a relevant factor."*

He has also placed reliance on the case of **Sumeet Industries Ltd. v. Commissioner of Central Excise, Surat 2004 (164) E.L.T. 335 (Tri - Mumbai)]**, in which the Hon'ble Tribunal has held that:

*"power to levy the penalty should not be ordinarily imposed unless there is a deliberate defiance of law or contumacious or dishonest conduct or a conscious disregard to an obligation is established in the facts of a case".*

He has also cited the judgement passed in the case of **Assistant Commercial Taxes Officer v. Rishab Special Yarns Limited (2008) 011VST 0032J, in which** the Hon'ble Rajasthan High Court has held as under:-

*"In my considered opinion, mere contravention of provisions of Section 78 (2) of the Act of 1994 cannot authorise the assessing officer to impose penalty under*

*Section 78 (5) of the Act of 1994 unless there is mens rea on the part of the trader. Apart from this, mens rea is an essential ingredient for imposing penalty. The word "mens rea" does not bear a literal meaning (i.e. "bad mind" or guilty mind) because one who breaks the law even with the best of motives still commits a crime. The language is no longer meant to convey the idea of general malevolence characteristic of early common law usage. The true translation is criminal intention or recklessness. Words typically imposing a mens rea requirement include wilfully, maliciously, fraudulently, recklessly, negligently, corruptly, feloniously and wantomly.*

*The fundamental principle pertaining to mens rea is based on the maxim actus non facit reum nisi mens sit rea. (the intent and act must both concur to constitute the crime). Meaning thereby an act does not make a man guilty without guilty intention to do the guilty act which is made penal by the statute or common law..."*

Based on the above judgements the Respondent has argued that the penalty proposed to be imposed by the impugned notice under Section

29 and 122-127 of the CGST Act read with Rule 133 of CGST Rules, was not justifiable and hence it might not be imposed.

27. The Respondent has also requested to take into account the amount of reversal of ITC due to unsold flats and allow him to pass on the benefit at the time of completion of the project so that correct amount of benefit could be passed on and no penalty should be imposed on him on this account. He has further requested that since the beneficiaries/ buyers were identifiable it would not be difficult to pass on the benefit with the last instalment.

28. Further, hearing in the case was held on 11.10.2018 during which the Respondent has submitted the following details:-

- Purchase summary for 'Anand Vilas' project-Annexure-2
- Summary of payment details and pending dues-Annexure-3
- Payment Schedule-Annexure-4
- Detail of buyers with pending instalments-Annexure-5
- Project details-Annexure-6
- Details of taxes collected from buyers till date-Annexure-7
- Undertaking to pass-on the benefit on completion of the project-Annexue-8

29. The Respondent has also stated that the benefit of ITC accruing to the Respondent was not certain due to variation in the project cost and the GST rates which was evident from the uneven purchase pattern of the Respondent given in Annexure-2. He has further stated that the ITC of the Respondent was varying due to the changes in the rates of

GST on the inputs and hence it was difficult to ascertain the costs and pass on the benefit before closure of the project. He has also claimed that 42% of the total saleable area had not been sold as on 30.06.2018 as was evident from Annexure-3 and since the ITC was required to be reversed on the unsold area the accurate computation of the benefit could not be made at this stage. He has further claimed that after completion of the project no GST could be charged and the ITC has to be reversed however, the DGAP had calculated the benefit on the assumption that the whole area would be sold therefore, the calculation of the benefit made by the DGAP was incorrect. He has also contended that as per the RERA guidelines he could not increase the prices of the flats and in case the benefit was passed on at this stage the wrongly passed benefit could not be recovered. He has further contended that he vide the payment schedule (Annexure-4) had stated that *"all other additional charges and taxes as applicable, in terms of application form, shall be payable along with last instalment"* therefore, *bona-fide* intention of the Respondent to pass-on the benefit was clear. The Respondent has also submitted that the reversal of the ITC should be taken in to account while computing the benefit to be passed on and accordingly, he had computed the benefit on the basis of the area sold i.e. 58% of the total saleable area vide Annexure-5. He has also mentioned that the benefit accruing to him was due to the ITC which pertained to all the buyers as the construction was being undertaken in respect of all the units and the inputs were also being used for all of them whether the instalment was

due/paid by the buyer post introduction of GST or not. He has further mentioned that the benefit computed by the DGAP was based on the instalments received which was accruing only to the buyers who had paid instalment(s) post introduction of GST however, he had also computed the benefit to be passed on the basis of the instalment(s) received. He has also claimed that the amount of benefit was Rs. I1,97,77,709/- as per Annexure-5, after considering reversals on account of the unsold flats. He has further claimed that each buyer should be entitled to benefit, however, had he computed the same on the basis of the instalment(s) received, no benefit would be passed on to those buyers who had not purchased flats post GST. Therefore, he has submitted that the benefit should be given on the basis of the area sold which would be more correct and rational mechanism for passing on the benefit. The Respondent has also prayed to consider the amount of reversal of credit due to unsold flats and requested to allow him to pass on the benefit at the time of completion of the project and also not to impose penalty.

30. Further, hearing in the case was held on 28.10.2018 wherein the Respondent has submitted the following details:-

- Annexure-2: Project status of all other projects
- Annexure-3: Certified copies of Occupancy Certificates (OCs)
- Annexure-4: Details of projects whose OCs have been obtained post GST
- Annexure-5: Letter sent to customers intimating that benefit has been passed on in respect of all on going projects

- Annexure-6: Press statements
- Annexure-6: Case law

31. The Respondent has also stated that no penalty should be imposed on him as he had passed on the benfit which had accrued to him to his customers subject to the modification at the time of completion of the project. He has further stated that no malafide intention had been established on the part of the Respondent not to pass on the benefit to his customers and in fact, he had discharged his obligation as per the provisions of Section 171 of the CGST Act and hence penalty was not attracted in his case.

32. The Respondent has also submitted that in accordance with the anti-profiteering clause he had passed on the benefit in respect of the Anand Vilas project not only to the Applicant No. 1 but to all the buyers who had purchased flats. He has also contended that without prejudice to the disagreement on the methodology of computation of the benefit, he had passed on the benefit on account of ITC subject to modification and credited the same to all the buyers and intimation had also been given to them as per Annexure-5. He has further submitted that he had also passed on the benefit accuring to the customers of his other projects also in respect of which OCs had been applied post GST on a non-prejudice basis. He has also pleaded that there was no *mens rea* or malafide intent in the instant case and imposition of penalty was not sustainable. He has further pleaded that he had never refused to pass on the benefit which was evident from the correspondence made between him and his customers, however it was his contention that the

benefit could be passed only at the time of completion of the project as accurate computation of the benefit was required to be done.

33. The Respondent has also argued that the anti-profiteering clause had been recently introduced in the law and in the absence of any mechanism/timeline, the Authority ought to act leniently in respect of imposition of penalty. He has also claimed that the Government and the GST Council through this clause wanted to ensure that the rate rationalization benefit was passed on to the society at large in the shape of reduced prices. He has also quoted the then Finance Secretary to the Government of India stating that this Authority would investigate only those cases which had mass impact and not small cases and threfore, he has pleaded that no penalty should be imposed on him. He has also contended that the Government of India was laying great stress on the ease of doing business and was promoting business activities for employment generation and hence, the imposition of penalty in the absence of mens rea or wrong doing, would be detrimental to the business. He has further contended that the CGST Act did not provide for imposition of penalty in the cases of profiteering as it was not covered under Section 122–127 of the CGST Act read with Rule 133 of the CGST Rules. It was also submitted that none of the said provisions of the CGST Act contemplated levy of penalty in the cases where the Respondent had been benefited due to introduction of GST and the benefit had not been passed on to the recipients by commensurate reduction in the prices which were still prone to modification at the time of completion. He has further

submitted that the real estate industry being dynamic and governed by the contractual obligations of the parties through the Buyer's Agreements and the sale considerations, it was advised and it was understanding of the Respondent to pass on the benefit of ITC only on closure of the obligations of the parties. He has also argued that under Rule 133 of the CGST Rules penalty could be imposed as was specified under the CGST Act and since there was no corresponding provision in the Act to impose penalty for contravention of Section 171 no penalty could be imposed as it was well settled that the penalty had to be prescribed in the main statute/Act itself. He has further argued that the Rules could not prescribe penalty by travelling beyond the provisions of the Statute/Act and such exercise of power amounted to "excessive delegation". He has also pleaded that in a similar situation of Sikkim State Lottery Rule imposing a fee of Rs. 2,000/- per lottery draw on the distributor was struck down by the Hon'ble Sikkim High Court in the case of **Shubh Enterprises v. Union of India; W. P. (C) No. 41 OF 2013** decided on 14.10.2015 which was later on affirmed by the Hon'ble Supreme Court on the grounds of excessive delegation since the parent statute i.e. the Lottery Regulation Act, 1998 did not envisage such a fee. Similarly, the Hon'ble Madras High Court had struck down Rule 3 (ee) of the Gold Control Rules, 1969 since it did not contain any guidelines for the licensing authorities to determine "too low a turnover" holding that the Rule would work differently for different individuals depending upon the particular officer, as per the law settled in the case of **B. Narasimhalu Chettiar v. Government of**

**Tamil Nadu 89 LW 55.** He has also contended that in his case even if the profiteering was established maximum penalty of Rs. 25000/- under Section 125 of the CGST/SGST Act could be imposed.

34. The Respondent has also submitted that the Show Cause Notice issued to him had merely mentioned the provisions of Section 122-127 of the CGST Act and Rule 133 of the CGST Rules, without specifying the exact allegations against him and the above Sections were not attracted in his case except for Section 125 which was general in nature. It was further submitted that it was obligatory to point out the allegation specifically in order to enable the Respondent to make appropriate submissions in his defence and since the notice was general it was bad in law for being vague and arbitrary and the penalty proceedings were required to be dropped. He has also cited the judgement recorded by the Hon'ble Apex Court in the case of **Kaur & Singh v. CCE, New Delhi, 1997 (94) ELT 289 (SC)**, wherein the Hon'ble Court has held as under:-

*"2. The assessee was issued a notice dated 10th December, 1981, to show cause why a penalty should not be imposed upon it under Rule 9 (2) of the Central Excise Rules, 1944, and why Central Excise duty should not be collected from it on goods cleared without payment of the same during the year 1980-81. The notice, it is common ground, was issued after the expiration of the period of six months. It could, therefore, have been issued only upon the basis that the assessee was guilty of fraud or of collusion*

*or of wilful mis-statement or suppression of facts or of contravention of the provisions of the Act or the Rules with intent to evade payment of Excise duty; this because, by the time the show cause notice was issued, Rule 9(2) had been amended to incorporate therein the period specified in Section 11A of the Act. The show cause notice does not set out any particulars in respect of fraud or collusion or wilful mis-statement or suppression of facts or contravention with intention to evade the payment of Excise duty. Not only does it not give any such particulars, it does not even make a bare allegation.*

4. *This Court has held that the party to whom a show cause notice of this kind is issued must be made aware of the allegation against it. This is a requirement of natural justice. Unless the assessee is put to such notice, he has no opportunity to meet the case against him. This is all the more so when a larger period of limitation can be invoked on a variety of grounds. Which ground is alleged against the assessee must be made known to him, and there is no scope for assuming that the ground is implicit in the issuance of the show cause notice. [See Collector of Central Excise v. H.M.M. Limited, 1995 (76) E.L.T. 497 and Raj Bahadur Narayan Singh Sugar Mills Limited v. Union of India, 1996 (88) E.L.T. 24].*"

35. The Respondent has also cited the judgment passed by the Hon'ble Supreme Court in the case of ***CCE v. HMM Ltd., 1995 (76) ELT 497 (SC)***, wherein the Hon'ble Court has ruled as under:-

*"2. .....There is considerable force in this contention. If the Department proposes to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the excise department places reliance on the proviso it must be specifically stated in the show cause notice which is the allegation against the assessee falling within the four corners of the said proviso. In the instant case that having not been specifically stated the Additional Collector was not justified in inferring (merely because the assessee had failed to make a declaration in regard to waste or by-product) an intention to evade the payment of duty. The Additional Collector did not specifically deal with this contention of the assessee but merely drew the inference that since the classification list did not make any mention in regard to this waste product it could be inferred that the assessee had apparently tried to evade the payment of excise duty."*

The Respondent has therefore, argued that in the absence of invocation of specific provision with respect to imposition of penalty, the entire notice regarding levy of penalty deserved to be dropped.

36. The Respondent has also submitted that the methodology of computation of profiteered amount applied by the DGAP was arbitrary as there was no acceptable methodology to demonstrate the absence of 'profiteering' as neither the CGST Act nor the CGST Rules provided the guidelines/methodology for ascertaining the quantum of 'profiteering' by the supplier and the same methodology could not be applied in all the cases due to different business models, tax structure and production cycle etc. The Respondent has further submitted that the DGAP had assessed the profiteered amount by merely computing the difference in the ratio of ITC to the taxable turnover under the pre-GST and the post-GST era however, it had not been taken in to account that the rates of tax under both the regimes on the outward supplies made by the Respondent had also varied which had not been considered by the DGAP in his report. In this regard, the Respondent has quoted the findings given by this Authority in the case of **Kumar Gandharv v. KRBL Limited 2018-VIL-02-NAA, Case No. 3/2018 decided on 04.05.2018** as under:-

*"6. We have carefully heard the Respondent and also perused the material placed on the record and it is revealed that the "India Gate Basmati Rice" sold by the Respondent was not liable for tax before the implementation of the GST and after coming into force of the CGST Act, 2017 it was levied GST @ 5% w.e.f. 22.09.2017. The Respondent was also made eligible to avail ITC w.e.f. the*

*above date. However, the ITC claimed by the Respondent was not sufficient to meet his output tax liability and he had to pay the balance amount of tax in cash as is evident from the perusal of the table prepared by the DGSG. It is also apparent from the returns filed by the respondent for the months of September, 2017, October, 2017 and November, 2017 that the ITC available to him as a percentage of the total value of taxable supplies was between 2.69% to 3% whereas the GST on the outward supply of his product was 5% which was not sufficient to discharge his tax liability. Moreover in this case the rate of tax has been increased from 0% to 5% instead of reduction in the same. Therefore, there appears to be no reason for treating the price fixed by the Respondent as violation of the provisions of the Anti-Profiteering clause."*

37. The Respondent has also claimed that there was no nexus between the instalments received and the ITC as the ITC was dependent on the goods and services purchased by the Respondent and the taxable turnover was based on the instalments received from the buyers. He has further claimed that the Respondent might not have received any instalment from the buyers during a specific period however, the construction would have continued and therefore, ITC would be available. He has also contended that in case instalments were due from lesser number of buyers, it would always increase the ratio of ITC to the taxable turnover and vice-versa. He has further contended that

in this case also no instalment was due from 01-07-2017 to 30-06-2018 from the buyers of 130 flats however, it could not be stated that the inputs and the input services had not been obtained for the flats purchased by these buyers. Therefore, he has claimed that the computation made by the DGAP had not considered the various factors which would have impacted the profiteered amount.

38. The Respondent has also argued that this Authority had travelled beyond its power by increasing the scope of investigation. He has further argued that in the present case the DGAP had started investigation in respect of a single unit of Anand Vilas Project launched by the Respondent however, the complaint was withdrawn by the Applicant No. 1 and the report submitted by DGAP also pertained to the above project and the proceedings before the Authority were initially restricted to the scope of the above however, during the course of the proceedings, the Authority had asked the Respondent about his other projects also. He has further argued that as per Rule 133 (4) if the Authority was of the view that further investigation was required in the matter after the DGAP's investigation, it could for reasons to be recorded in writing, refer the matter to the DGAP to cause further investigation or inquiry. Therefore, he has contended that in view of the above provision it was incumbent upon the Authority to seek report from the DGAP before proceeding to pass any order with respect to other projects of the Respondent and the power of investigation could not be taken over by the Authority in the absence of any such prescription under the CGST Act / Rules. The Respondent has also

stated that without prejudice to the above, as a provisional measure he had also passed on the benefit which had accrued to the buyers of the other projects also in respect of which OCs had been obtained post GST. He has also attached copies of the letters sent to the buyers intimating that the benefit had been passed on in respect of the on-going projects i.e. the Emerald Bay and the Aman Vilas. The Respondent finally prayed that the present proceedings may be dropped and penalty may not be imposed.

39. In continuation of the earlier submissions, the Respondent has filed additional submissions dated 05.11.2018 in which he has furnished status of all the projects along with the details of the benefit passed vide Annexure-1, details of compliances in respect of the projects vide Annexures-2A, 2B & 2C, sample letter of intimation to buyers vide Annexure-3 and reasons for difference between the area sold of the projects in his submissions dated 11.10.2018 vide Annexure-4. He has also stated that out of the total 11 projects OCs had been received in respect of 8 projects and the buyers had occupied them after registration of the conveyance deeds. He has further stated that sale of land as per Schedule III of the CGST Act and clause 5 (b) of Schedule II was not to be treated as supply of goods or services therefore, ITC would not be available on the sale of the flats of 6 projects after receipt of OCs and hence, the provisions of Section 171 of the CGST Act should not be applicable on these projects. He has also claimed that the difference in the area sold in annexures furnished through his letter dated 11-Oct-2018 was due to inadvertent error while

calculating the total area pertaining to the buyers who had paid instalments post GST.

40. The submissions dated 26.11.2018 and 05.11.2018 filed by the Respondent were forwarded to the DGAP for his counter replies and he vide his Reports dated 16.11.2018 and 12.11.2018 respectively has stated that all the issues raised by the Respondent pertained to the Authority and hence, no Report was being filed. The DGAP was again asked to file a comprehensive reply on 20.11.2018 on the issues raised by the Respondent. The DGAP has accordingly submitted revised investigation Report dated 28.12.2018, the brief facts of which are as follows:-

a. **On the issue of details of all the projects and the benefit passed on in respect of all the on-going projects by the Respondent:** The DGAP has stated that as per the provisions of Rule 129 (1) of the CGST Rules, 2017, if the Standing Committee on Anti-profiteering was of the view that there was prima facie evidence to come to the conclusion that a supplier had not passed on the benefit of reduction in the rate of tax on the supply of goods or services or the benefit of ITC to his recipients by way of commensurate reduction in the prices, it should forward the case to the DGAP for a detailed investigation and hence he could investigate the complaint only when the above Committee had referred the matter to him. He has also stated that accordingly, he had confined the scope of

investigation to only that project on the basis of the RERA registration in respect of which the anti-profiteering application had been received and for which direction to investigate had been given by the Standing Committee. He has further stated that the investigation had covered all other recipients in that project, in addition to the Applicant No. 1. He has also contended that due to shortage of staff and other infrastructure he was not in a position to investigate all the projects of a supplier against which allegation of profiteering had been made.

b. **On the Issue of the modalities and mechanism of Anti-profiteering:** The DGAP has submitted that the Respondent had mentioned that there were no guidelines/methodology for computing the quantum of "profiteering" by the supplier. In this regard, it has been contended by the DGAP that as per Rule 126 of the CGST Rules, 2017, the Authority had been empowered to determine the methodology and procedure for determination as to whether the reduction in the rate of tax or the benefit of ITC had been passed on by a registered person to the recipients by way of commensurate reduction in prices or not. He has also submitted that this Rule did not stipulate that the Authority should prescribe the methodology and procedure to quantify the amount of profiteering and hence the quantum of profiteering had to be computed on a case to case basis analysis by devising appropriate method as per the nature and

facts of each case and no uniform methodology could be prescribed for determination of the quantum of benefit to be passed on. He has further stated that in Rule 126, the word used was 'determine' and not 'prescribe'.

c. **On the issue of the CGST Act, 2017 that it does not contemplate levy of penalties:** The DGAP has submitted that this issue pertained to the proposal of the Authority to impose penalty on the Respondent which was the exclusive domain of the Authority and he being the investigative arm could not file any Report on the same.

d. **On the issue that the NAA had travelled beyond its scope of investigation:** The DGAP has claimed that this issue did not pertain to him hence, no Report was being filed.

41. The DGAP after examination of the documents submitted by the Respondent during the hearing held on 05.11.2018, has stated that a notice was issued to the Respondent on 04.12.2018 asking him to furnish details of the home buyers along with the area sold and in response, the Respondent had submitted further documents on 11.12.2018 & 18.12.2018. The DGAP has also stated that in view of the various submissions made by the Respondent before the Authority and him he had re-examined the Report dated 27.08.2018 filed by him and after taking in to account the revised details of the area sold by the Respondent as per the home-buyer's list, the ITC availed and the Respondent's taxable turnover during the period from April, 2016 to June, 2017 (i.e. pre-GST) and during the period from July, 2017 to

June, 2018 (i.e. post-GST), the ratio of CENVAT/Input Tax Credit and the taxable turnover, pre-GST & post-GST, was as per the details furnished in Table-E below:-

**Table-"E"**

(Amount in Rs.)

| S. No. | Particulars | April, 2016 to March, 2017 | April, 2017 to June, 2017 | Total (Pre-GST) | July 2017 to June, 2018 (Post-GST) |
|---|---|---|---|---|---|
| 1 | CENVAT of Service Tax Paid on Input Services (A) | 1,67,90,834 | 39,87,427 | 2,07,78,261 | - |
| 2 | Input Tax Credit of VAT Paid on Purchase of Inputs (B) | 21,27,046 | 8,23,223 | 29,50,269 | - |
| 4 | Total CENVAT/Input Tax Credit Available (C)= (A+B) | 1,89,17,880 | 48,10,650 | 2,37,28,530 | - |
| 5 | Input Tax Credit of GST Availed (D) | - | - | - | 6,16,64,604 |
| 6 | Total Taxable Turnover (E) | 42,43,39,766 | 11,27,06,432 | 53,70,46,198 | 50,10,60,283 |
| 7 | Total Saleable Area (in Sq ft.) as per Submission dated 28.09.2018 to NAA (F) | | | 11,54,550 | 11,54,550 |
| 8 | Sold Area (in Sq. ft.) relevant to above turnover as per Home Buyers List (G) | | | 5,78,095 | 3,75,400 |
| 9 | Relevant Proportionate input tax credit [(H)= (C*G)/(F)] or [(H)= (D*G)/(F)] | | | 1,18,81,118 | 2,00,50,143 |
| 10 | **Ratio of CENVAT/Input Tax Credit Pre-GST & Post-GST [(I)= (H)/(E)]** | | | **2.21%** | **4.00%** |

42. The DGAP has also claimed that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 2.21% and during the post-GST period (July, 2017 to June, 2018), was 4.00% which showed that post-GST, the Respondent had benefited from the additional ITC to the tune of 1.79% [4.00% (-) 2.21%] of the taxable turnover. He has further claimed that as per the revised details given in the Table-E above, the comparative figures of ITC availed/available during the pre-GST period and the post-GST period, were computed in the Table-'F' as under:-

**Table-"F"**

(Amount in Rs.)

| S. No. | Particulars | Pre-GST | Post- GST |
|---|---|---|---|

| 1 | Period | A | April,2016 to June,2017 | July,2017 to June, 2018 |
|---|---|---|---|---|
| 2 | Output tax rate (%) | B | 5.50% | 12.00% |
| 3 | Ratio of CENVAT/ Input Tax Credit to Taxable Turnover asper Table - A above (%) | C | 2.21% | 4.00% |
| 4 | Increase in tax rate post-GST (%) | D= 12% *less* 5.50% | - | 6.50% |
| 5 | Increase in input tax credit availed post-GST (%) | E= 4.00% *less*2.21% | - | 1.79% |
| 6 | **Analysis of Increase in input tax credit:** | | | |
| 7 | Base Price raised during July, 2017 to June, 2018 (Other Than Cancelled Units) | F | | 44,37,82,127 |
| 8 | Other than Base Price raised during July, 2017 to June 2018 | G | | 5,72,78,156 |
| 9 | Total Taxable Value raised during July, 2017 to June, 2018 | H=F+G | | 50,10,60,283 |
| 10 | GST Collected @ 12% over Basic Price | I= F*12% | | 5,32,53,855 |
| 11 | GST Collected @ 18% over other than Basic Price | J = G*18% | | 1,03,10,068 |
| 12 | Total GST Collected | K = I+J | | 6,35,63,923 |
| 13 | Total Demand collected | L=H+K | | 56,46,24,206 |
| 14 | Recalibrated Basic Price | M= F*(1-E) or 98.21% of F | | 43,58,38,427 |
| 15 | GST @12% | N = M*12% | | 5,23,00,611 |
| 16 | Recalibrated other than Basic Price | O = G*(1-E) or 98.21% of G | | 5,62,52,877 |
| 17 | GST @18% | P = O*18% | | 1,01,25,518 |
| 18 | Commensurate demand price | Q = M+N+O+P | | 55,45,17,433 |
| **19** | **Excess Collection of Demand or Profiteering Amount** | **R= L–Q** | | **1,01,06,773** |

43. The DGAP has also argued that the additional ITC of 1.79% of the taxable turnover should result in commensurate reduction in the base prices of the flats and hence as per the provisions of Section 171 of the CGST Act, 2017, the benefit of the additional ITC which had become available to the Respondent, was required to be passed on to the flat buyers. He has also re-computed the profiteered amount after taking in to account the CENVAT/ITC availability pre and post-GST and the details of the instalments received by the Respondent from the Applicant No. 1 and the other home buyers during the period from 01.07.2017 to 30.06.2018 and stated that the amount of benefit of ITC which had not been passed on by the Respondent to his customers or the profiteered amount came to Rs. 1,01,06,773/- which included GST (@ 12% or 18%) on the base profiteered amount of Rs. 89,68,979/- and which also included an amount of Rs. 49,169/- (including GST on

the base amount of Rs. 43,655/-) which was profiteered by the Respondent from the above Applicant. The details of the home buyers and the unit no. wise break up of the amount of Rs. 89,68,979/- has been furnished by the DGAP vide Annexure-22 (revised).

44. The DGAP has also mentioned that the above computation of the profiteered amount was in respect of the 155 flat buyers whereas, the Respondent had booked 303 flats till 30.06.2018, out of which 148 buyers had booked them in the pre-GST period and also paid the booking amount in this period but they had not paid any consideration during the period between 01.07.2017 to 30.06.2018 post-GST, the period for which the investigation was being carried out. He has further mentioned that if the ITC in respect of these 148 units was calculated with reference to the 155 units where payments had been received after GST had come in to force, the ITC as a percentage of taxable turnover would be distorted and it would be erroneous and hence, the the benefit of ITC in respect of these 148 units should be calculated when the consideration had been received post-GST by taking into account the proportionate taxable turnover in respect of these 148 Units. He has also intimated that in view of the details of outward supplies of the construction service furnished by the Respondent, it was found that the service was supplied in the State of Haryana only. The DGAP has further mentioned that the Respondent vide Annexure-2A attached to his submissions dated 05.11.2018 had submitted before the Authority that he had passed on the benefit of Rs. 1,97,77,419/- to the 303 flat buyers including the units under

cancellation and accordingly, a summary of the category wise profiteering & the benefit passed on has been furnished by him in the Table-'G' given below:-

**Table-"G"**

(Amount in Rs.)

| S. No. | Category of Customers | No. of Units | Area (in Sqf) | Amount Received Post GST | Profiteering Amt. as per Annex-22 | Benefit claimed to have been Passed on by Respondent | Difference | Remark |
|---|---|---|---|---|---|---|---|---|
| A | B | C | D | E | F | G | H=F-G | I |
| 1 | Applicant | 1 | 1,940 | 24,38,844 | 49,169 | 53,994 | (4,825) | Excess Benefit passed on. |
| 2 | Other Than Applicant | 92 | 2,25,420 | 38,99,63,392 | 78,64,128 | 62,73,889 | 15,90,239 | Further Benefit to be passed on as per Annex-24 |
| 3 | Other Than Applicant | 62 | 1,48,040 | 10,86,58,047 | 21,93,476 | 41,20,249 | (19,26,774) | Excess Benefit passed on. List Attached as Annex-25 |
| 4 | Other Than Applicant | 127 | 2,85,845 | - | - | 79,55,638 | (79,55,638) | No Consideration Paid Post-GST, However, Respondent passed on benefit. List Attached as Annex-26 |
| 5 | Other Than Applicant | 3 | 5,820 | - | - | - | - | No Consideration Paid Post-GST & No benefit passed. List Attached as Annex-26 |
| 6 | Other Than Applicant | 3 | 8,120 | 86,78,966 | - | 2,25,996 | (2,25,996) | Cancelled Units. List Attached as Annex-26 |
| 7 | Other Than Applicant | 18 | 41,235 | - | - | 11,47,653 | (11,47,653) | Disputed Units as per Respondent's Submission dated 18.12.2018. List Attached as Annex-27 |
| 8 | Other Than Applicant | 206 | 4,38,130 | - | - | - | - | Unsold Units |
| | **Total** | **512** | **11,54,550** | **50,97,39,249** | **1,01,06,773** | **1,97,77,419** | **(96,70,646)** | |

45. The DGAP has also contended that the benefit claimed to have been passed on by the Respondent was less than what he should have passed on in respect of 92 cases (Sr. 2 of the above table) amounting to Rs. 15,90,239/- and the benefit claimed to have been passed on by the Respondent was higher compared to what he should passed on in respect of the 63 recipients of the flats including the Applicant No. 1 (Sr. 1 & 3 of above table) amounting to Rs. 19,31,599/-. He has further contended that the Respondent has also stated to have passed on the benefit amounting to Rs. 93,29,286/- in respect of 148 buyers of the flats who had not paid any consideration post GST. The DGAP has found that the additional ITC benefit of 1.79% of the taxable turnover

which had accrued to the Respondent was required to be passed on to the Applicant No. 1 and the other recipients and therefore, the provisions of Section 171 of the CGST Act, 2017 had been violated by the Respondent as the additional benefit of ITC @1.79% of the base price received by the Respondent during the period from 01.07.2017 to 30.06.2018 had not been passed on to the Applicant No. 1 and the other buyers and the Respondent had realized an additional amount of Rs. 49,169/- from the Applicant No. 1 which included both the profiteered amount @1.79% of the taxable amount (base price) and the GST on the said profiteered amount, however, the Respondent has claimed to have passed on Rs. 53,994/- during the hearings therefore, the Respondent has passed on excess amount of Rs. 4,825/- (53,994/- (-) 49,169/-) which might be adjusted against the future demands from the above Applicant. He has also claimed that the investigation had revealed that the Respondent had realized an additional amount of Rs. 15,90,239/- which included both the profiteered amount @1.79% of the taxable amount (base price) and the GST on the said profiteered amount from 92 other recipients who were not Applicants in the present proceedings and since they were identifiable as per the documents furnished by him therefore, this additional amount of Rs. 15,90,239/- was required to be returned to such eligible buyers.

46. The revised Report filed by the DGAP was considered by the Authority and it was decided that the Applicants and the Respondent be asked to appear before the Authority on 15.01.2019. Since, the

Respondent had asked for adjournment of the hearing scheduled on 15.01.2019, the Authority decided to accord next hearing opportunity on 21.01.2019. During the hearing, the Respondent has filed reply dated 19.01.2019 on the DGAP's revised Investigation Report as follows:-

i. The Respondent has submitted that the benefit of ITC pertained to all the buyers on account of the area sold to each of them and on the basis of his understanding of the proceedings before this Authority and the previous report of the DGAP, he had already passed on the benefit of ITC to all the buyers although he had not received consideration from all of them post GST. He has also submitted that the benefit if any, had accrued to him due to ITC which pertained to all the buyers as the construction was under progress in respect of all the units and the inputs were also being used for all of them irrespective of the fact whether the instalment was due/paid by the buyer post introduction of GST or not. He has also attached details of the benefit passed as per Annexure-A.

ii. The Respondent has also claimed that vide 'Table B' of the reply of the DGAP the GST realised from the buyers had been considered as the profiteered amount, which was not correct as it had been paid to the Government. The Respondent has further claimed that the GST amount of Rs. 11,37,794/- collected on the increased sale consideration had been deposited with the Government even if it was collected in excess and the same

should not be included in the profiteered amount and therefore, the revised profiteered amount should be taken as Rs. 89,68,938/- (79,43,655+10,25,279). He has also contended that the additional benefit to be passed on to the buyers would be Rs. 7,53,217/- and not Rs. 15,90,239/- as had been calculated vide Annexure-B and the excess benefit passed on to the buyers would be Rs. 22,22,072/- as per the revised calculation shown in Annexure-C.

iii. The Respondent has further contended that the DGAP has claimed in his Report that after taking in to account the profiteered amount of Rs. 15,90,239/- which was payable to the flat buyers the Respondent had paid an amount of Rs. 96,70,646/- in excess to them and hence the total extra benefit was Rs. 1,12,56,061/- (96,70,646 +15,90,239). He has also stated that the DGAP had suggested to adjust this amount against the future instalments however, it would not be possible to do so and hence he should be allowed to adjust the same against the amount which was payable by the Respondent.

47. The Authority, during the hearing held on 21.01.2019, had directed the Respondent to submit the details of the instalments received by him from the buyers from 01.07.2018 to 31.12.2018 and the ITC benefit passed on by him to them on these instalments. He was also asked to submit compliance of Section 171 of the CGST Act, 2017 in case of his other on going projects and Occupation/Completion Certificates in case of the completed projects as he had himself admitted during the course of the hearings that he was executing other

projects also and had taken suo moto initiative to pass on the benefit of additional ITC which he had received on these projects. The Respondent, vide his submissions dated 04.02.2019 has submitted the following points and documents:-

a. Detail of instalments received post GST till 31st Dec 2019 as per Annexure-A

b. OCs of the completed projects as per Annexure-B

c. The Respondent has further submitted that he had not sold any unit under the Project Anand Vilas after 30th June, 2018.

48. The submissions of the Respondent were forwarded to the DGAP on 06.02.2019 and the DGAP vide his Report dated 12.02.2019 has stated that:-

a. As the OC for the project had already been applied and was expected to be received shortly, it would not be correct to re-quantify the profiteered amount by extending the period of investigation till 31.12.2018 as it would amount to re-investigation of the case, leading to complete reworking of the availability of ITC, area sold, taxable turnover and the profiteered amount. He has also stated that the exact quantum of benefit of ITC to be passed on could be ascertained only after the project was completed when there would be no further accrual of ITC to the Respondent. Therefore, he has suggested that the present proceedings based on his Report dated 27.08.2018 and subsequent Report dated 21.12.2018 should be finalised and the Respondent should be asked to pass on the balance benefit to the flat buyers after completion of the project,

based on the area sold after 30.06.2018, consideration received after 30.06.2018 and the ITC availed after 30.06.2018.

b. The DGAP has also submitted that no Report was being filed on the details of the OCs issued in respect of other completed projects which were not part of the present investigation.

49. The Respondent vide his submissions dated 11.02.2019 has also stated that he had already submitted the details of the instalments received post GST till 31.12.2018 and also the status and the OCs of the completed projects. He has further stated that the DGAP by comparative analysis of the period from April 2016 till June 2017 and July 2017 till June 2018 had filed his Report on 27.8.2018, wherein the profiteered amount had been calculated and he had already passed on the benefit of ITC to all the buyers as per the above Report. He has further submitted that the DGAP had submitted a revised Report on 28.12.2018 in which the methodology adopted was different from the earlier Report and the profiteered amount had been reduced however, he had already passed on the ITC benefit to all the buyers which was higher than what had been computed in the revised Report dated 28.12.2018.

50. The Respondent vide his submissions dated 06.03.2019 has stated that he had already supplied the required information and explanation regarding the pre-GST and the post-GST data/figures to the DGAP who had also filed his detailed investigation Report on 27th August, 2018 which included the unsold area and the Revised Report on 28th Dec., 2018 which excluded the unsold area and he had already

passed on the ITC benefit to all the buyers on the basis of the area sold while the DGAP, vide his revised Report dated 28th Dec., 2018, had adopted different methodology and computed amount of profiteering by excluding the unsold area as compared to the original Report dated 27th August, 2018. He has further submitted that in view of this matter may be concluded.

51. We have carefully considered all the Reports filed by the DGAP, submissions of the Respondent and the other material placed on record and find that the Applicant No. 1 had booked Flat No. T4-2B on 09.05.2017 with the Respondent in his Anand Vilas Project located in Sector 81, Faridabad, Haryana for total consideration of Rs. 85,87,410/- as per the details furnished by the DGAP in Table A of his Report. It is also revealed from the record that the above Applicant vide his complaint dated 22.01.2018 had alleged that the Respondent was not passing on the benefit of ITC to him inspite of his request made through email dated 28.08.2017 although he had completed 60% of the work and was availing ITC on the purchase of the inputs at higher rates of GST which had resulted in bebefit of additional ITC to him and was also charging GST from him @12%. The above complaint was examined by the Standing Committee in its meeting held on 09.02.2018 and was forwarded to the DGAP for investigation who vide his Report dated 27.08.2018 had found that the ITC as a percentage of the total turnover which was available to the Respondent during the pre-GST period was 6.91% and during the post-GST period this ratio was 13.70% as per the Table C mentioned

above and therefore, the Respondent had benefited from the additional ITC to the tune of 6.79% (13.70%-6.91%) of the total turnover which he was required to pass on to the flat buyers of this project. He has also stated that the additional ITC of 6.79% of the taxable turnover, should result in commensurate reduction of cum-tax price from Rs. 3,956.25 per square feet to Rs. 3,914.82 per square feet as per Table D of his Report however, the Respondent had not reduced the basic prices of his flats by 6.79% due to additional benefit of ITC and by charging GST at the increased rate of 12% on the pre-GST basic price, he had contravened the provisions of Section 171 of the of the CGST Act, 2017. The DGAP has further submitted that the amount of benefit of ITC which had not been passed on by the Respondent or the profiteered amount came to Rs. 3,42,31,077/- which included 12% GST on the basic profiteered amount of Rs. 3,05,63,462/-. The DGAP has also intimated that the above amount was inclusive of Rs. 1,65,975/- (including 12% GST over the basic amount of Rs. 1,48,192/-) which the Respondent had profiteered from the Applicant No. 1. He has also supplied the details of all the buyers who had purchased flats from the Respondent along with their unit numbers vide Annexure-22 attached with the Report.

52. The Respondent was issued notice dated 29.08.2018 to explain why the above Report of the DGAP should not be accepted and his liability for violating the provisions of Section 171 of the CGST Act, 2017 should not be fixed along with imposition of penalty as per Section 122-127 of the above Act read with Rule 133 of the CGST Rules, 2017

and his registration under the Act should also not be cancelled. The Respondent in his submissions has repeatedly stated that the Applicant No. 1 had withdrawn the complaint in which it was alleged that the Respondent had not passed on the benefit of ITC to him, on being satisfied with the clarification given by him on the issue of benefit of additional ITC and hence the investigation conducted against him should have been dropped. However, this contention of the Respondent is not acceptable as there is no provision in the above Act or the Rules framed under it to withdraw the complaint once it has been made by following the prescribed procedure and despite withdrawal the offence of profiteering remains and therefore, the DGAP has rightly persued the investigation. Moreover, once violation of the provisions of Section 171 (1) of the above Act had come to the notice of the DGAP he was legally bound to ascertain the truth of the allegation after conducting detailed investigation as per the provisions of Rule 129 (1) of the CGST Rules, 2017 as it not only adversely affects the interests of the common buyers but also amounts to wrongful appropration of the concession which has been granted by the Central as well as the State Government by sacrificing their own revenue and hence no illegality has been committed by him by launching the present investigation against the Respondent.

53. The Respondent has also stressed that the computation of the benefit/ loss could not be done before completion of the project. It is apparent from the record that the above project was launched by the Respondent in the year 2013 and was likely to be completed by

March, 2019 after a lapse of a period of about 6 years whereas he had been regularly availing the benefit of additional ITC w.e.f. 01.07.2017 to pay his output tax liability by appropriating the benefit of ITC which he was required to pay to the flat buyers. The Respondent can not be allowed to enrich himself at the cost of of the buyers and keep them waiting till the project was completed and hence he is legally bound to pass on the benefit periodically to them by computing the same on the basis of the ITC availed as well the instalments paid by them. Any reversal of ITC due to unsold flats could have been factored by him during the course of calculation of the benefit and had any of the buyers surrendered his allotment after availing the benefit of ITC the same could also have been taken in to consideration while selling the flat to the subsequent buyer. The contention of the Respondent that he had not got any benefit of additional ITC after coming in to force of the GST w.e.f. 01.07.2017 as he was already availing this benefit during the pre GST regime is also not borne out from the record as he has got benefit of 1.79% of additional ITC after coming in to force of the GST as is apprent from the perusal of Table E mentioned above. The Respondent has also claimed that he had no malafide intention of not paying the benefit of ITC to the flat buyers is also not borne out from the record as he had not taken any effective steps to release the benefit till the present proceedings were launched. All the claims made by the Respondent in this regard are not correct and hence they are not tenable.

54. It would be pertinent to mention here that the Respondent through his submissions dated 11.09.2018 had sought time of 15 days to compute the benefit of ITC which he was required to pass on as per the provisions of Section 171 of the CGST Act, 2017 to the above Applicant as well as rest of the house buyers which was granted to him. Accordingly, he has himself computed and passed on the benefit of Rs. 53,994/- to the above Applicant and Rs. 1,97,23,425/- to rest of the flat buyers the details of which have also been furnished by him through his subsequent submissions.

55. The Respondent has also pleaded that as per entry 5 (b) of 'Schedule II' and 'Schedule III' of the CGST Act, 2017 where a building/flat is sold after issuance of the OC the ITC availed on it was required to be reversed and since he had sold only 58% of the total saleable area he would have to reverse ITC in respect of the balance 42% area and he also could not increase the prices of the flats as per the RERA guidelines and hence the exact benefit of ITC could not be determined at this stage. However, the above argument of the Respondent is not correct as the benefit was required to passed on only to those buyers who had paid the instalments after coming into force of the GST and on the sold area only as the unsold area was not to be taken into consideration while computing the benefit.

56. The Respondent has also claimed that the Real Estate Sector had long gestation period and the rates of tax were being changed frequently due to which the benefit of ITC could not be calculated periodically. However, the claim of the Respondent can not be

accepted as the buyers can not be compelled to wait till the completion of the project when the Respondent is utilising the additional ITC every month to discharge his output tax liability, the benefit of which he is legally bound to pass on to the flat buyers. Moreover, any change in the rates of tax is duly reflected in the quantum of ITC available to the Respondent and in case there is additional benefit of ITC only then the same is required to be passed. It is apparent from the data supplied by the Respondent that he had got additional benefit of 1.79% ITC which was required to be passed on by him to the flat buyers and hence the argument advanced by the Respondent in this behalf is without any merit.

57. The Respondent has also contended that he was not in agreement with the computation of the profiteered amount by the DGAP as it included the GST which had been deposited by him in the Govt. account. The plea taken by the Respondent on this ground is fallacious as by forcing the flat buyers to pay more price by not releasing the benefit of additional ITC and by collecting tax @12% on this additional realisation he has denied the benefit of additional ITC to them by not reducing the prices of the flats commensurately. Had he not collected additional GST the buyers would have paid less price and by doing so he has denied them the benefit of additional ITC which amounts to violation of Section 171 of the above Act. Both the Central as well as the State Government had no intention of collecting the additional GST as they had forfeited their revenue in favour of the flat buyers to provide them accommodation at affordable prices and by

compelling the buyers to pay the same the Respondent has not only defeated the intention of the above Goverments but has also acted against the interests of the house buyers hence the contention of the Respondent is not justifiable and therefore, the GST collected by him on the additional realisation has rightly been included in the profiteered amount by the DGAP.

58. The Respondent has also contended that he had made purchases from the traders who had not passed on the benefit of ITC to him and hence he could not further pass on the same to the house buyers. This pleading of the Respondent goes completely against the provisions of Section 171 (1) of the above Act as every registered person is required to pass on the benefit of additional ITC on every supply by commensurate reduction in the prices. Since the Respondent is a person duly registered under the above Act he is legally liable to pass on the benefit and he cannot deny the same on the ground that he had not received the benefit from his suppliers. The Respondent can always claim the benefit from his suppliers if he thinks that it is due to him by following the legal options but he cannot contend that he would not pass on the benefit to his recipients on this ground and hence his claim is ultra vires of the above Section.

59. The Respondent has also stated that no penalty should be imposed on him as he had voluntarily passed on the benefit which had accrued to him to his customers subject to the modification/recalculation at the time of completion of the project. He has further stated that no malafide intention had been established on

his part and he had discharged his obligation as per the provisions of Section 171 (1) of the CGST Act and hence penalty was not attracted in his case. However it is apparent from the record that the Respondent had not released the benefit for a period of about one year and tried to avoid its release on various grounds viz. that it would not be possible to compute the same before the completion of the project and that he would be required to reverse the ITC on the unsold flats. He has passed the benefit only after the present proceedings were initiated against him which shows that he was not willing to comply with the provisions of Section 171 (1) of the above Act and therefore this act of the Respondent falls foul of the provisions of the above Section which makes him liable for penalty as per the provisions of the CGST Act, 2017 and the Rules framed under it.

60. The Respondent has also raised objection on the methodology followed by the DGAP while calculating the profiteered amount however, it is not maintainable as profiteering in each case has to be determined on the basis of the facts of each case and no straight jacket formula can be fixed for calculating the same as the facts of each case differ. The methodology applied in the case where the rate of tax has been reduced and ITC disallowed cannot be applied in the case where the rate of tax has been reduced and ITC allowed. Similarly the methodology applied in the case of Fast Moving Consumer Goods (FMCGs) cannot be applied in the case of construction services. Even the methodology applied in two cases of construction service may vary on account of the period taken for

execution of the project, the area sold and the turnover realised. The Respondent has himself admitted that the same methodology could not be applied in each case and hence he should have no objection on the methodology which had been adopted in his case based on the ITC availed, area sold and the instalments received after 01.07.2017. Further the Authority under Rule 126 of the CGST Rules, 2017 has already notified the 'Procedure & Methodology' for determination of the profiteered amount vide its Notification dated 28.03.2018 however, as has been stated above the same has to be applied on case to case basis. It would also be appropriate to mention here that this Authority has power to 'determine' the methodology and not to 'prescribe' it as per the provisions of the above Rule and therefore, no set prescription can be laid while computing profiteering. Hence the objection raised by the Respondent on this ground is frivolous and without legal force.

61. The Respondent has also argued that the anti-profiteering Section has been introduced to ensure that the rate rationalization benefit was passed on to the society and only cases of mass impact were to be investigated. He has further contended that the CGST Act, 2017 did not provide for imposition of penalty under Section 122–127 read with Rule 133 of the CGST Rules. He has further pleaded that since there was no corresponding provision in the Act to impose penalty for contravention of Section 171, no penalty could be imposed as it was well settled that a penalty has to be prescribed in the main statute/Act itself and therefore, imposition of penalty would amount to excessive delegation. The Respondent has also submitted that the Show Cause

Notice issued to him on 29.08.2018 has merely mentioned the provisions of Section 122-127 of the CGST Act and Rule 133 of the CGST Rules, without specifying the exact allegations against him and the above Sections were not attracted in his case except for Section 125 which was general in nature. Perusal of the notice dated 29.08.2018 issued to the Respondent shows that he has been intimated that it was proposed to impose penalty under Section 122-127 of the CGST Act, 2017 read with Rule 133 of the CGST Rules, 2017 and also to cancel his registration if the allegation of profiteering was proved against him, however, no specific instances of violation of the above Sections have been mentioned in the above Notice. Therefore, the proposed imposition of penalty under the above Sections and cancellation of his registration is not sustainable unless specific allegations how he had violated the provisions of the above Sections are levelled against him. Therefore, the above notice is ordered to be withdrawn to the extent that it proposes to impose penalty on him as per the provisions of the above Sections and the Rule. However, rest of the contents of the above show cause notice will continue to operate.

62. The Respondent has also cited the following cases in his support on the issue of imposition of penalty which are being relied upon and the show cause notice issued for imposition of penalty is being ordered to be withdrawn. However, the rest of the cases cited by the Respondent are not relevant to the facts of the present case at this stage and hence they are not being followed:-

1. **Shubh Enterprises v. Union of India; W. P. (C) NO. 41 of 2013 decided on 14.10.2015.**
2. **B. Narasimhalu Chettiar and others v. Government of Tamil Nadu 89 LW 55.**
3. **Kaur & Singh v. Collector of Central Excise, New Delhi, 1997 (94) ELT 289 (SC).**
4. **Collector of Central Excise v. HMM Ltd., 1995 (76) ELT 497 (SC).**

63. The Respondent has also argued that this Authority had travelled beyond its jurisdiction by increasing the scope of investigation by including the projects which were not investigated by the DGAP. However, perusal of the record shows that the Respondent had himself come forward and furnished details of his other projects and claimed that he had passed on the benefit of ITC in respect of his other projects also. He has voluntarily submitted full details of the flat buyers, the area sold, the amount of instalments received and the benefit of ITC which was to be passed on to them. He has also furnished copies of the letters and the credit notes through which the benefit has been released in favour of the buyers. The above action of the Respondent appears to have been taken to avoid the consequences of Section 171 of the above Act when he had realised that he was legally bound to pass on the benefit of additional ITC availed by him to the flat buyers. Therefore, the allegation made by the Respondent in this regard is false and cannot be accepted.

64. It is also apparent from the record that the DGAP has submitted revised investigation Report dated 28.12.2018, in which he has stated that after taking in to account the revised details of the area sold by the Respondent, the ITC availed and the Respondent's taxable turnover during the period from April, 2016 to June, 2017 (i.e. pre-GST) and during the period from July, 2017 to June, 2018 (i.e. post-GST), the ratio of CENVAT/ITC to the taxable turnover, pre-GST was 2.21% and during the post-GST period, it was 4.00% which shows that post-GST, the Respondent has benefited from the additional ITC to the tune of 1.79% [4.00% (-) 2.21%] of the taxable turnover which was required to be passed on to the buyers by the Respondent. It would be appropriate to mention here that vide his Report dated 27.08.2018 the pre-GST ratio had been computed as 6.19% and the post-GST ratio had been shown as 13.70% as per Table C mentioned above and the Respondent was held to have availed additional ITC to the tune of 6.79%. The revised ratio calculated by the DGAP has not been challenged by the Respondent, moreover the same is based on the information supplied by the Respondent and therefore, the same is being treated to be correct.

65. The DGAP has also re-computed the profiteered amount after taking in to account the CENVAT/ITC availability pre and post-GST and the details of the instalments received by the Respondent from the Applicant No. 1 and the other home buyers during the period from 01.07.2017 to 30.06.2018 and stated that the amount of benefit of ITC which has not been passed on by the Respondent to his customers or

the profiteered amount came to Rs. 1,01,06,773/- which included GST (@ 12% or 18%) on the base profiteered amount of Rs. 89,68,979/- and which also included an amount of Rs. 49,169/- (including GST on the base amount of Rs. 43,655/-) which was profiteered by the Respondent from the above Applicant. The details of the home buyers and the unit no. wise breakup of the amount of Rs. 89,68,979/- has been furnished by the DGAP vide Annexure-22 (revised) against which no objection has been raised by the Respondent and hence the same can be relied upon. On the basis of the aforesaid facts the amount of benefit of ITC which has not been passed on by the Respondent to the recipients or in other words, the profiteered amount as per the provisions of Rule 133 (1) of the CGST Rules, 2017 is determined as Rs. 1,01,06,773/- which includes GST (@ 12% or 18%) on the base profiteered amount of Rs. 89,68,979/-. This amount is also inclusive of Rs. 49,169/- (including GST on the base amount of Rs. 43,655/-) which is the profiteered amount in respect of the Applicant No. 1.

66. The DGAP has also mentioned that the above computation of the profiteered amount was in respect of the 155 flat buyers whereas, the Respondent had booked 303 flats till 30.06.2018, out of which 148 buyers had booked them in the pre-GST period and also paid the booking amount in this period but they had not paid any consideration during the period between 01.07.2017 to 30.06.2018 post-GST. He has further mentioned that if the ITC in respect of these 148 units was calculated with reference to the 155 units where payments had been received after GST had come in to force, the ITC as a percentage of

taxable turnover would be distorted and erroneous and hence, the benefit of ITC in respect of these 148 units should be calculated when the consideration had been received post-GST by taking into account the proportionate taxable turnover in respect of these 148 Units. It is observed from the documents placed on record as well as the above submissions of the DGAP that there are total 512 flats out of which 209 flats have remained unsold and 303 flats have been sold by the Respondent. Out of the above 303 flat buyers the Respondent has received consideration post GST, only from 155 flat buyers. Therefore the ITC benefit is required to be passed on to the 155 buyers only at this stage and benefit should be passed on to the other buyers at a later stage when demands would be raised against them and payments received.

67. The DGAP has further mentioned that the Respondent vide Annexure- 2A attached to his submissions dated 05.11.2018 had submitted before the Authority that he had passed on the benefit of Rs. 1,97,77,419/- to the 303 flat buyers including the units under cancellation. The DGAP has also stated that the benefit claimed to have been passed on by the Respondent was less than what he should have passed on in respect of 92 cases (Sr. 2 of the Table G mentioned in para supra) amounting to Rs. 15,90,239/- (Annexure-24 of the Report) and the benefit claimed to have been passed on by the Respondent was higher (Annexure-25 of the Report) compared to what he should have passed on in respect of the 63 recipients of the flats including the Applicant No. 1 (Sr. 1 & 3 of Table G mentioned

above) amounting to Rs. 19,31,599/-. He has further contended that the Respondent has also stated to have passed on the benefit amounting to Rs. 93,29,286/- in respect of 148 buyers of the flats who had not paid any consideration post GST. The above claims made by the DGAP appear to be based on the analysis of the data supplied by the Respondent and after careful perusal of Table G mentioned above appear to be accurate.

68. The DGAP has also found that the additional ITC benefit of 1.79% of the taxable turnover which had accrued to the Respondent was required to be passed on to the Applicant No. 1 and the other recipients and therefore, the provisions of Section 171 of the CGST Act, 2017 had been violated by the Respondent as the additional benefit of ITC @1.79% of the base price received by the Respondent during the period from 01.07.2017 to 30.06.2018 had not been passed on to the Applicant No. 1 and the other buyers and the Respondent had realized an additional amount of Rs. 49,169/- from the Applicant No. 1 which included both the profiteered amount @1.79% of the taxable amount (base price) and the GST on the said profiteered amount. He has also claimed that the investigation had revealed that the Respondent had realized an additional amount of Rs. 15,90,239/- which included both the profiteered amount @1.79% of the taxable amount (base price) and the GST on the said profiteered amount from 92 other recipients who were not Applicants in the present proceedings and since they were identifiable as per the documents furnished by him therefore, this additional amount of Rs. 15,90,239/-

was required to be returned to such eligible buyers. Since the above claims made by the DGAP are based on the information supplied by the Respondent and have also not been objected to by him they are treated to be correct.

69. The issue that needs to be dwelled upon is as to whether there was a case of not passing on of the benefit of ITC and whether the provisions of Section 171 of CGST Act, 2017 are attracted in the present case. Perusal of Section 171 (1) of the CGST Act, 2017 shows that it provides as under:-

> "Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."

70. It is established from the perusal of the above facts of the case that the provisions of Section 171 of the CGST Act, 2017 have been contravened by the Respondent as he has profiteered an amount of Rs. 1,01,06,773/- inclusive of GST @ 12% or 18% on the base profiteered amount of Rs. 89,68,979/-. The Respondent has also realized an additional amount to the tune of Rs. 49,169/- from the Applicant No. 1 which includes both the profiteered amount @1.79% of the taxable amount (base price) and GST on the said profiteered amount. The Respondent has also realized an additional amount of Rs. 15,90,239/- which includes both the profiteered amount @1.79% of the taxable amount (base price) and GST on the said profiteered

amount from 92 other flat buyers who were not Applicants in the present proceedings as per Annexure-24 of the Report. These buyers are identifiable as per the documents placed on record and therefore, the Respondent is directed to pass on this amount of Rs. 15,90,239/- along with interest @18% per annum to these 92 flat buyers from the dates from which the above amount was collected by him from the buyers till the payment is made.

71. In view of the above facts this Authority under Rule 133 (3) (a) of the CGST Rules, 2017 orders that the Respondent shall reduce the prices to be realized from the buyers of the flats commensurate with the benefit of ITC received by him as has been detailed above. Since the present investigation is only up to 30.06.2018 any benefit of ITC which accrues subsequently shall also be passed on to the buyers by the Respondent. The Annexures submitted by the Respondent through his submissions dated 11.10.2018 and 05.11.2018 which comprise of the details of suo moto payments made by him through various modes are taken on record.

72. It is also evident from the above narration of facts that the Respondent has denied benefit of ITC to the buyers of the flats being constructed by him in his Anand Vilas Project in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has thus realized more price from them than what he was entitled to collect and has also compelled them to pay more GST on the additional realisation than what they were required to pay by issuing incorrect tax invoices and hence he has committed an offence under section 122

(1) (i) of the CGST Act, 2017 and therefore, he is liable for imposition of penalty under the provisions of the above Section. Accordingly, a Show Cause Notice be issued to him directing him to explain why the penalty prescribed under Section 122 of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him. The above act of the Respondent appears to be deliberate, contumacious and conscious violation of the provisions of the CGST Act, 2017. Since a specific allegation of issuing incorrect invoices has been levelled against the Respondent he would have sufficient opportunity to state his defence on the above charge. He can also raise his other objections which have been mentioned above during the course of the hearing on the issue of imposition of penalty.

73. The Respondent has himself admitted that he has passed on the additional ITC benefit of Rs. 1,99,42,985/- in respect to the project "Emerald Bay" and Rs. 53,19,592/- in respect to the project "Aman Vilas" being executed by him. Since the above claim of the Respondent is required to be verified the DGAP is directed to investigate the issue of passing on the benefit of additional ITC in respect of the above two projects and submit his Report within a period of 3 months from the receipt of this order in terms of Rule 133 (4) of the CGST Rules, 2017.

74. The Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Haryana to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by the Authority is passed on to all the

eligible buyers. A report in compliance of this order shall be submitted to this Authority by the Commissioners CGST /SGST within a period of 4 months from the date of receipt of this order.

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

-Sd-
(B. N. Sharma)
Chairman

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

-Sd-
(R. Bhagyadevi)
Technical Member

-Sd-
(Amand Shah)
Technical Member

Certified copy

9.5.19

(A.K.Goel)
Secretary NAA

F.No.22011/NAA/69/PuriC/2018 Dated: 09.05.2019

1. Ms. Pallavi Gulati and Sh. Abhimanyu Gulati, H. No. 704, Sector-7/C, Faridabad, Haryana -121006.
2. **M/s Puri Constructions Pvt. Ltd., 11-12A, Ground Floor, Tolstoy House, 15 & 17, Tolstoy Marg, New Delhi.**
3. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001,
4. Principal Secretary to the Govt. of Haryana, Town & Country Planning Department, Haryana, SCO 71-75, Sector-17C, Chandigarh-160017,
5. Commissioner, Commercial Tax, Vanijya Bhawan, Plot No. 1-3, Sector-5, Panchkula, Haryana-134151.
6. NAA website/Guard File.