

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

Case No. 49/2019
Date of Institution 16.04.2019
Date of Order 14.10.2019

In the matter of:

1. Mr. Prasanth Nandulamattam S/o Sh. Gangahdhara Sastry, Flat No. 2302, Bankston Rodas Enclave, Hiranandani Estate, Ghodbunder Road, Thane West, Maharashtra-400607.
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

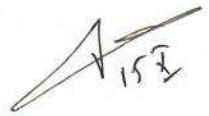
Versus

M/s Bhartiya City Developers Pvt. Ltd., Khatha No. 6/1, Thanisandra Main Road, Chokkanahalli Village, Yelahanka Hobli, Hegde Nagar, Bengaluru North-560064.

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

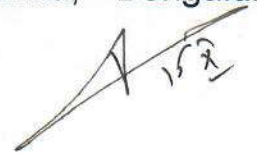


Present:-

1. None for the Applicant No. 1.
2. Sh. Bhupender Goyal, Assistant Director (Cost) and Sh. P. K. Tyagi, Superintendent for the Applicant No. 2.
3. Sh. Vijaya kumar R., Vice-President (Finance) and Sh. Badrinath, Chartered Accountant for the Respondent.

ORDER

1. The present Report dated 25.02.2019 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the present case are that the Karnataka State Screening Committee on Anti-profiteering, vide the minutes of its meeting held on 29.06.2018 had forwarded an application dated 31.05.2018 filed by the Applicant No. 1 to the Standing Committee on Anti-profiteering under Rule 128 of the CGST Rules, 2017. The Applicant No. 1 had alleged in his application that the Respondent had increased the price of the flat after the introduction of GST w.e.f. 01.07.2017 and had not passed on the benefit of Input Tax Credit (ITC) by way of commensurate reduction in the price in respect of supply of construction service to him related to the purchase of Flat No. C1308, Tower-C, in the Respondent's project "Nikoo Homes II", situated in Bhartiya City, Chokkanahalli, Yelahanka, Bengaluru, Karnataka.



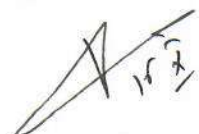
2. The Standing Committee on Anti-profiteering vide the minutes of its meetings held on 07.08.2018 & 08.08.2018 had referred the above application to the DGAP for investigation under Rule 129 (1) of the CGST Rules, 2017 to determine whether the benefits of reduction in the rate of tax or ITC had been passed on by the Respondent to his recipients or not. The application was sent to the DGAP along with the details submitted by the Applicant No. 1 viz. the duly filled in Form APAF-1, copies of intimation letters & receipts, copies of Agreement to Sell and Agreement for Construction, copies of the e-mails sent to the Respondent requesting to pass on the benefit of ITC, cost break-up details of the purchased flat and copies of Aadhar Card & PAN Card as proof of identity.
3. The DGAP in his present Report has stated that perusal of the application showed that the Applicant No. 1 had booked a flat with the Respondent on 16.03.2016 in the pre-GST period and the following demands were raised on the Applicant No. 1 on account of the purchase of the flat by the Respondent, the details of which are furnished in Table-'A' below:-

Table-'A'

(Amount in Rs.)

| Particulars | Basic Sale Price | | Other Charges | Service Tax | VAT | GST | Total | |
|--|------------------|-----------------|---------------|-------------|----------|-----------|-------------|-----------------|
| | Land | Other than Land | | | | | | |
| Agreement Value (A) | 32,68,700 | 51,77,000 | 9,87,260 | 4,09,871 | 5,68,105 | - | 1,04,10,936 | |
| Paid in Pre-GST era (B) | 29,56,450 | - | - | - | - | - | 29,56,450 | |
| Balance to be paid Post GST (C)= (A)-(B) | 3,12,250 | 51,77,000 | 9,87,260 | 4,09,871 | 5,68,105 | - | 74,54,486 | |
| Demanded by the Respondent (D) | 3,12,250 | 51,77,000 | 9,87,260 | - | - | 10,96,331 | 75,72,841 | |
| Excess Demand: (E)= (D) - (C) | | | | | | | | 1,18,355 |

4. The DGAP has also stated that on receipt of the recommendations of the Standing Committee notice dated 06.09.2018 asking the Respondent to reply as to whether the benefit of ITC had been passed on by him to the recipients by way of commensurate reduction in prices or not was issued which also asked him to *suo-moto* determine the quantum of benefit which was not passed on.
5. This Authority had extended the time for concluding the investigation on the request of the DGAP vide its orders dated 0.11.2018 and 29.01.2019 under Rule 129 (6) of the CGST Rules, 2017 till 28.02.2019.
6. The DGAP has carried out investigation in this case from 01.07.2017 to 31.08.2018. Both the parties were also given opportunity to inspect the documents submitted by the other party which was availed by the Respondent on 04.10.018 however, the Applicant No. 1 had expressed his inability to avail the same.
7. The DGAP in his Report has stated that the Respondent has submitted replies vide letters/emails dated 26.09.2018, 09.10.2018, 16.10.2018, 22.10.2018, 28.11.2018, 04.12.2018 and 12.02.2019 in which he has stated that he was engaged in the business of construction of residential flats and commercial projects by executing works contracts. The Respondent has further stated that he had no intention to deny the benefit of ITC to the customers. He has also submitted that taking in to account the size of the project which was spread over 4 to 5 years, in case there was accrual of benefit of ITC, it could only be computed at the end of the project and accordingly, he would pass on the ITC benefit, if any, to the buyers on completion of the project.



8. The Respondent has further submitted that the sale prices of the flats would be dependent on various parameters including surrounding developments, standard of life in that area, facilities like hospitals, schools, public transport, accessibility to various offices, airport, railway station, competition in the market and the demand and supply of homes, irrespective of the costs. He has also claimed that the flats would be sold over a period of 4 to 5 years and the customers who had purchased them in the beginning would enjoy price advantage over the other customers who had purchased them later. The Respondent has further claimed that the cost of constructing a flat was irrelevant in the context of pricing of the flat and therefore, the provisions relating to anti-profiteering, specifically with regard to the availability of ITC, should not be applied to the developers. The Respondent has also submitted that major portion of the works contracts was executed through the registered sub-contractors and hence, the purchase of goods or services which were directly related to the construction, would be done by the sub-contractors. He has also claimed that he had purchased a very small portion of the goods and services as compared to the sub-contractors and therefore, the benefit of ITC had accrued to the sub-contractors and not to him. An approximate break-up of the estimated cost of the project at the stage of project planning, has been furnished in Table-'B' below by the Respondent:-

Table-'B'

(Rs. in crores)

| Particulars | Amount | % | Pre-GST | Post GST |
|------------------------------|----------|-----|---------|----------|
| Overall project Cost | 1,129.54 | | | |
| Composition: | | | | |
| Sub-Contractors | 631.07 | 56% | 21.55 | 609.52 |
| Direct purchase of materials | 148.95 | 13% | 16.91 | 132.04 |
| Services | 28.10 | 3% | 5.69 | 22.41 |

| | | | | |
|------------------------------|--------|-----|-------|-------|
| Professional & Consultancy | 31.76 | 3% | 17.78 | 13.98 |
| Statutory Approvals | 15.58 | 1% | 15.58 | - |
| Admin Costs | 47.64 | 4% | 7.67 | 39.97 |
| Finance Cost | 178.95 | 16% | 82.83 | 96.12 |
| Sales Promotion or marketing | 47.50 | 4% | 31.42 | 16.08 |

The Respondent has also argued that being a works contractor, he was eligible to claim credit of VAT and Service Tax charged by his suppliers and the sub-contractors in the per-GST regime and after coming in to force of the GST, the ITC paid on such works was being availed by him and hence, there was no additional benefit in respect of the works which were executed through the sub-contractors.

9. The Respondent has also claimed that the ratio of the order dated 18.09.2018 passed in case No. 7/2018 of Sukhbir Rohilla & others v. M/s Pyramid Infratech Pvt. Ltd. could not be applied in the instant case due to the following reasons: -

- a. the taxable turnover of the Respondent was low in the initial period of construction.
- b. the payments made by the Respondent to the sub-contractors were claimed as deduction from their total turnover in lieu of credit of VAT.
- c. impact of unsold inventory at the time of issue of the completion certificate by way of reversal of credit.

10. The Respondent has also intimated the DGAP that under the Karnataka Value Added Tax (VAT) and Service Tax laws, the

following taxes were payable by him on the construction value (excluding land value), as has been shown in Table- 'C' below:-

Table- 'C'

| S.No. | Type of Levy | Rate of Tax | Abatement | Effective rate of tax |
|-------|-----------------------------|-------------|-----------|-----------------------|
| 1 | Service Tax | 14% | 60% | 5.60% |
| 2 | Central Surcharges & Cesses | 1% | 60% | 0.40% |
| 3 | State VAT | 14.5% | 30% | 10.15% |

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The Respondent has also stated that he had collected 5% VAT from his customers which was lower by 5.15% as compared to his actual tax liability. The collection of VAT at a rate lower than the actual tax rate amounted to passing on the benefit to the customers though not directly related to the GST credits or the anti-profiteering provisions. He has further stated that under the GST the abatement allowed for the value of land was 33.33%, whereas he had taken the value of land as 35% to 40% of the total agreement value which had resulted in lower tax liability for the Applicant No. 1, as has been shown in Table- 'D' below:-

Table- 'D'

(Amount in Rs.)

| Particulars | Adopted by the Respondent as per agreement | If the value is limited to 1/3 |
|--|--|--------------------------------|
| Total value of the contract | 94,32,260 | 94,32,260 |
| Less: Value of land | 32,68,000 | 30,36,733* |
| Taxable value | 60,90,730 | 54,08,267 |
| Non-Taxable Value (Sinking Fund) | 73,530 | 73,530 |
| Tax @ 18% | 10,96,331 | 11,37,959 |
| Deemed benefit to the buyer | 41,628 | |
| As a % of the value of the contract | 0.44% | |
| As a value on per sq. ft. basis | Rs. 25.48 per sq. ft. | |

The DGAP has also intimated that for ascertaining the deduction on account of land under the GST, the Respondent had excluded the Club Membership fee, Annual Maintenance charges and Sinking

fund from the total value of the contract. The detailed computation for 1/3rd value on account of land has been shown in Table- 'E' below:-

Table- 'E'

| Particulars | Amount in Rs. |
|---|----------------------|
| Total Consideration as per agreement excl. taxes | 94,32,260 |
| Less: Club Membership fee | 1,75,000 |
| Less: Annual Maintenance charges | 73,530 |
| Less: Sinking fund | 73,530 |
| Amount considered for calculating land value | 91,10,200 |

11. The DGAP has also informed that the Respondent had submitted that the benefit or the additional cost on account of GST would be computed at the end of the project and the ITC benefit would be passed on to the customers who had entered into the agreements to sell and the agreements for construction on or before 30.06.2017. The Respondent has also submitted that w.e.f. 01.07.2017, the price agreed upon with the customers was all inclusive after considering the market conditions, escalations and GST concession etc., which was mutually negotiated and agreed upon.
12. The Respondent has also submitted copies of the GSTR-1 returns for the period from July, 2017 to August, 2018, copies of GSTR-3B returns for the period from July, 2017 to August, 2018, copies of Tran-1 returns for the transitional credit, copies of VAT & ST-3 returns for the period from April, 2016 to June, 2017, copies of all demand letters, Sale Agreement, Contract issued to the Applicant No. 1, tax rates in pre-GST and post-GST period, copies of Balance Sheets (including all

annexures and profit & loss account) for the FY 2016-17 & FY 2017-18, copy of Electronic Credit Ledger for the period from 01.07.2017 to 31.08.2018, CENVAT/ITC register for the period from April, 2016 to June, 2017, details of turnover, output tax liability, GST payable and ITC availed and list of home buyers in the project "Nikoo Homes-II". The Respondent has also intimated that except copies of the GSTR-1 and GSTR-3B returns for the period from July, 2017 to August, 2018, copies of VAT & ST-3 returns for the period from April, 2016 to June, 2017, copies of all demand letters, Sale Agreement, Contract issued to the Applicant No. 1, all other details/ information were to be treated as confidential, in terms of Rule 130 of the CGST Rules, 2017.

13. The DGAP in his Report has stated that the Respondent had vide his letter dated 09.10.2018 submitted a copy of the agreement to sell dated 16.03.2016, agreement to build/construct and demand letters for the sale of Flat No. C1308 to the Applicant No. 1, measuring 1,634 sq. ft., at the basic sale price of Rs. 5,168/- per sq. ft. The details of amounts and taxes paid by the Applicant No. 1 to the Respondent has been furnished in Table-'F' below:-

Table-'F'

(Amount in Rs.)

| S. N o. | Payment Stages | Due Date | BSP | | Other Charges | Service Tax | VAT | GST | Total |
|---------|---|------------|-----------|-----------------|---------------|-------------|-----|--------|-----------|
| | | | Land | Other than Land | | | | | |
| 1 | At the time of Booking | 01.05.2017 | 16,89,000 | - | - | - | - | - | 16,89,000 |
| 2 | On Commencement of Excavation | 15.04.2016 | 4,22,250 | - | - | - | - | - | |
| 3 | On Completion of Foundation | 04.02.2017 | 4,22,250 | - | - | - | - | - | |
| 4 | On Completion of Basement Floor Slab | 26.05.2017 | 4,22,250 | - | - | - | - | - | |
| 5 | On Completion of 3 rd Floor Slab | 10.10.2017 | 3,12,250 | 1,10,000 | - | - | - | 19,800 | 4,42,050 |

| | | | | | | | | | |
|--------------|--|--|------------------|------------------|-----------------|---|---|------------------|--------------------|
| 6 | On Completion of 6 th Floor Slab | 01.04.2018 | - | 4,22,250 | - | - | - | 76,005 | 4,98,255 |
| 7 | On Completion of 9 th Floor Slab | 25.04.2018 | - | 4,22,250 | - | - | - | 76,005 | 4,98,255 |
| 8 | On Completion of 12 th Floor Slab | 03.06.2018 | - | 4,22,250 | - | - | - | 76,005 | 4,98,255 |
| 9 | On Completion of 15 th Floor Slab | 12.07.2018 | - | 4,22,250 | - | - | - | 76,005 | 4,98,255 |
| 10 | On Completion of 18 th Floor Slab | 07.08.2018 | - | 4,22,250 | - | - | - | 76,005 | 4,98,255 |
| 11 | On Completion of 21 st Floor Slab | Not yet due as on 31 st August 2018 | - | 4,22,250 | - | - | - | 76,005 | 4,98,255 |
| 12 | On Completion of 24 th Floor Slab | | - | 4,22,250 | - | - | - | 76,005 | 4,98,255 |
| 13 | On Completion of 27 th Floor Slab | | - | 4,22,250 | - | - | - | 76,005 | 4,98,255 |
| 14 | On Completion of 30 th Floor Slab | | - | 4,22,250 | - | - | - | 76,005 | 4,98,255 |
| 15 | On Completion of Terrace Floor Slab | | - | 4,22,250 | - | - | - | 76,005 | 4,98,255 |
| 16 | On Completion of Flooring and Tiling | | - | 4,22,250 | - | - | - | 76,005 | 4,98,255 |
| 17 | On Possession | | - | 4,22,250 | 9,87,260 | - | - | 2,40,476 | 16,49,986 |
| Total | | | 32,68,000 | 51,77,000 | 9,87,260 | - | - | 10,96,331 | 1,05,28,591 |

14. The DGAP has observed that the contention of the Respondent that he would compute the benefit or additional cost, on account of GST at the end of the project and pass on the ITC benefit might have merit but the profiteering, if any, had to be determined at a given point of time, in terms of Rule 129 (6) of the above Rules and therefore, the additional ITC available to the Respondent, the amounts received by him from the Applicant No. 1 and the other recipients post implementation of the GST, had to be taken into consideration to determine the benefit of ITC that was required to be passed on.

15. The DGAP has also intimated that para 5 of Schedule-III of the CGST Act, 2017 (Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services) reads as "Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, Sale of building". He has further intimated that clause (b) of Paragraph 5 of Schedule II

of the CGST Act, 2017 reads as “(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier”. Based on these provisions the DGAP has stated that the ITC pertaining to the residential units which were under construction but had not been sold was provisional which would be required to be reversed by the Respondent if such units remained unsold at the time of issue of the completion certificate, in terms of Section 17 (2) & Section 17 (3) of the CGST Act, 2017, which read as under:

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

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

16. The DGAP in his Report has also submitted that the ITC pertaining to the unsold units was outside the scope of the investigation and the Respondent was required to recalibrate the selling price of the units to

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be sold by considering the net benefit of additional ITC available to him post-GST.

17. The DGAP has further stated that the Respondent had claimed that the benefit, if any, on account of the ITC which was required to be passed on by way of commensurate reduction in the prices, should not be computed in terms of the recent order dated 18.09.2018 passed by this Authority in the case of M/s Pyramid Infratech Private Limited supra as the facts of the two cases were different. The DGAP has contended that the present project was not an Affordable Housing Scheme as was the case in respect of M/s Pyramid Infratech Private Limited in which all the units were sold at the time of launch of the project before the issuance of the completion certificate, whereas in the present case, the Respondent had not sold all the units till the period covered by this investigation. He has further contended that other facts like the cap on per sq. ft rate to be charged from the customers, manner of raising demand/invoices, eligibility of credit of the VAT amount paid on the purchase of inputs, deduction for payment to sub-contractors consequent to opting for State VAT Scheme and ineligibility for claiming CENVAT credit under the Finance Act, 1994, were different in the case in hand from those of M/s Pyramid Infratech Private Limited and therefore, the facts of the above case and those of the Respondent were clearly distinguishable.
18. The DGAP has also intimated that Section 171 of CGST Act, 2017 provides that in the event of the benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in prices of the goods or services and it simply did not provide a supplier any other means of

passing on the benefit of ITC or reduction in the rate of tax to the consumers. Therefore, the contention of the Respondent that the collection of VAT and Service Tax at lower rate than their actual liability, was a benefit already passed on to the customers, was incorrect and could not be considered as compliance of Section 171 of the CGST Act, 2017. He has also contended that the claim of the Respondent that he had given the deemed benefit of Rs. 41,628/- to the Applicant No. 1, by way of tax on the differential value of land by not applying the deduction of 1/3rd value as the value of land, was also not correct. Therefore, the contention of the Respondent that the allegation of the Applicant No. 1 that no benefit had been passed on was incorrect was also not acceptable. The DGAP has also submitted that the argument of the Respondent that the sale prices of the flats were market-driven and would be dependent on various parameters and that the cost of construction of the flats was irrelevant in the context of fixing their prices was not examined or questioned by him as Section 171 did not give the mandate to regulate the price of the flats, as they were to be determined by the Respondent himself and the above Section only required that any reduction in the rate of tax or the benefit of ITC which had accrued to a supplier, must be passed on to the recipients as both were the concessions given by the Government and the suppliers were not entitled to retain these benefits. He has further submitted that both these benefits must go to the recipients and in case they were not identifiable, the amount so collected by the suppliers was required to be deposited in the Consumer Welfare Funds.

19. The DGAP has also stated that the claim of Respondent that 56% of the total project cost was attributable to the sub-contract charges and the benefit, if any, of additional ITC was enjoyed by the sub-contractors and not him, was not tenable as there should be no extra liability on the Respondent on account of the GST charged by the sub-contractors, as the sub-contractors, who had availed ITC on the materials purchased by them, would have passed on such benefit to the Respondent.
20. The DGAP has also submitted that prior to 01.07.2017, i.e., before the GST had come in to force the Respondent was eligible to avail CENVAT credit of Service Tax paid on the input services and the credit of the VAT paid on the purchase of inputs and deduction of the payments made to the sub-contractors from the VAT turnover, however, the CENVAT credit of the Central Excise Duty paid on the inputs was not admissible as per the CENVAT Credit Rules, 2004. He has further submitted that post-GST, the Respondent could avail ITC on the GST paid on all the inputs and input services including the sub-contracts. The DGAP has also claimed that based on the information submitted by the Respondent for the period from April, 2016 to August, 2018, the details of the ITC availed by him, his turnover from the project "Nikoo Homes-II", the ratio of ITC to turnover, during the pre-GST period from April, 2016 to June, 2017 and post-GST period from July, 2017 to August, 2018 periods, has been computed and furnished in Table-'G' below:-



Table-'G'

(Amount in Rs.)

| S. No. | Particulars | April, 2016 to March, 2017 | April, 2017 to June, 2017 | Total | July, 2017 to March, 2018 | April, 2018 to August, 2018 | Total |
|--------|--|----------------------------|---------------------------|----------------|---------------------------|-----------------------------|----------------|
| | | | | (Pre-GST) | | | (Post-GST) |
| (1) | (2) | (3) | (4) | (5)=(3)+(4) | (6) | (7) | (8)=(6)+(7) |
| 1 | CENVAT of Service Tax Paid on Input Services (A) | 5,76,63,260 | 1,85,41,614 | 7,62,04,874 | - | - | - |
| 2 | Credit of VAT Paid on Purchase of Inputs (B) | 53,85,784 | 41,53,319 | 95,39,103 | - | - | - |
| 3 | Rebate of VAT(WCT) for the payment made to registered Contractors or Sub-contractors (C) | 1,53,18,163 | 40,68,155 | 1,93,86,318 | - | - | - |
| 4 | Input Tax Credit of GST Availed (D) | - | - | - | 13,07,42,364 | 13,09,35,260 | 26,16,77,624 |
| 5 | Total CENVAT/VAT/Input Tax Credit Available (E)= (A)+(B)+(C) or (D) | 7,83,67,207 | 2,67,63,088 | 10,51,30,295 | 13,07,42,364 | 13,09,35,260 | 26,16,77,624 |
| 6 | Total Turnover including land value as per Home Buyers List (Flats sold upto 31.08.2018) (F) | 1,24,76,16,268 | 27,28,76,998 | 1,52,04,93,266 | 1,70,02,48,800 | 75,79,97,814 | 3,30,38,55,442 |
| 7 | Total Saleable Area (in sq. ft.) (G) | | | 27,00,020 | | | 27,00,020 |
| 8 | Area Sold relevant to Turnover as per Home buyers List (Flats sold upto 31.08.2018) (H) | | | 16,86,966 | | | 22,33,585 |
| 9 | Relevant CENVAT/INPUT TAX CREDIT (I)= [(E)*(H)/(G)] | | | 6,56,85,155 | | | 21,64,72,180 |
| 10 | Ratio of CENVAT/ Input Tax Credit to Turnover [(J)=(I)/(F)] | | | 4.32% | | | 6.55% |

The DGAP has further claimed that as per the Table-'G' above, the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period from April, 2016 to June, 2017 was 4.32% and during the post-GST period from July, 2017 to August, 2018, it was 6.55% which clearly confirmed that post-GST, the Respondent had benefited from additional ITC to the tune of 2.23% [6.55% (-) 4.32%] of the turnover.

21. The DGAP has also intimated that the Central Government, on the recommendation of the GST Council, had levied GST @18% on the construction service, vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 and accordingly, the profiteering had been examined by comparing the applicable tax rate and the ITC available to the Respondent during the pre-GST period when Service Tax @6% and VAT @10.15% was payable (total tax rate of 16.15% on the construction value) with the post-GST period when the GST rate was

18% on the construction value. On the basis of the figures contained in Table-'G' above the recalibrated base price and the excess collection (Profiteering) during the pre-GST and the post-GST periods, has been tabulated by the DGAP in Table-'H' below:-

Table-'H'

(Amount in Rs.)

| S. No. | Particulars | | Pre-GST | Post- GST |
|-----------|--|---------------------------------|---------------------------|----------------------------|
| 1 | Period | A | April, 2016 to June, 2017 | July, 2017 to August, 2018 |
| 2 | Output tax rate on Construction Service (%) | B | 16.15 | 18.00 |
| 3 | Ratio of CENVAT/ Input Tax Credit to Total Turnover as per Table - I above (%) | C | 4.32 | 6.55 |
| 4 | Increase in input tax credit availed post-GST (%) | D= 6.55% less 4.32% | - | 2.23 |
| 5 | Analysis of Increase in input tax credit: | | | |
| 6 | Total Base Price excluding land value raised during July, 2017 to August, 2018 | E | | 2,04,02,02,792 |
| 7 | Less: Base Price raised during July, 2017 to August, 2018 (Flats sold after 01.07.2017 as per new agreement) | F | | 11,43,05,220 |
| 8 | Base Price raised during July, 2017 to August, 2018 (Flats sold upto 30.06.2017) | G=E-F | | 1,92,58,97,572 |
| 9 | GST raised @ 18% over Base Price | H= G*18% | | 34,66,61,563 |
| 10 | Total Demand raised | I=G+H | | 2,27,25,59,135 |
| 11 | Recalibrated Base Price | J= G*(1-D) or 97.77% of E | | 1,88,29,50,056 |
| 12 | GST @18% | K = J*18% | | 33,89,31,010 |
| 13 | Commensurate demand price | L = J+K | | 2,22,18,81,066 |
| 14 | Excess Collection of Demand or Profiteered Amount | M= I – L | | 5,06,78,069 |

22. The DGAP has claimed from Table-'H' above that the additional ITC of 2.23% of the taxable turnover should have resulted in the commensurate reduction in the base prices as well as cum-tax prices. Therefore, in terms of Section 171 of the CGST Act, 2017, the benefit of the additional ITC was required to be passed on to the recipients. He has further claimed that the Respondent had not contested that any such benefit would have to be passed on to the recipients at the time of giving possession of the flats, however, the fact was that this had not been done so far by him. The payments received from the

Applicant No. 1 and the other recipients did not show that the benefit had been passed on by the Respondent, which meant that the Respondent had retained the benefits on account of additional ITC and by not reducing the pre-GST base prices by 2.23% on account of the additional benefit of ITC and charging GST at the increased rate of 18% on the pre-GST base prices, the Respondent had contravened the provisions of Section 171 of the of the CGST Act, 2017.

23. The DGAP has also quantified the profiteered amount on the basis of the aforesaid CENVAT/ITC availability pre and post-GST and the details of the amounts collected by the Respondent from the Applicant No. 1 and the other home buyers towards the value of construction on which GST liability @ 18% had been discharged by the Respondent during the period from 01.07.2017 to 31.08.2018 and the amount of benefit of ITC not passed on to the recipients or in other words, the profiteered amount which came to Rs. 5,06,78,069/- including GST on the base profiteered amount of Rs. 4,29,47,516/-. The home buyer and unit no. wise break-up of the above amount has been given in Annex-17 of the DGAP Report. This amount is inclusive of Rs. 58,450/- including GST on the base amount of Rs. 49,534/- which was the profiteered amount in respect of the Applicant No. 1, mentioned at Serial No. 520 of Annex-17. The DGAP has also intimated that the Respondent had supplied construction services in the State of Karnataka only.
24. The DGAP has further intimated that the above computation of profiteering was with respect to 1061 home buyers from whom construction value had been received by the Respondent during the

period from 01.07.2017 to 31.08.2018 excluding the flats sold post 01.07.2017 having area of 13,84,246 Sq. ft., whereas the Respondent had booked 1713 flats till 31.08.2018. The Respondent has also claimed that effective from 01.07.2017, he had sold 409 flats at the prices agreed by the customers as all-inclusive prices, after considering the market conditions, escalations, demand-supply balance, GST concession, development in the locality, location of the land, proximity to educational institutions/ hospitals/ airport etc. and the prices so fixed were mutually negotiated and agreed upon as per Clause 6.4 of the Agreement to Sell which reads as "The Purchaser hereby agrees that the consideration agreed herein is based on the mutual negotiations between the Purchaser and the Seller as on the date of the application for allotment. It is made clear that after considering the above fact, the Purchasers shall have no right to claim any ITC benefits of sellers or reduction in cost due to changes in GST or renegotiate on the considerations in comparison with the other purchasers and/or for whatsoever reasons." The DGAP has claimed that the above argument of the Respondent had merit and therefore, the ITC pertaining to the above 409 units was outside the scope of this investigation as the selling prices of these units were negotiated between the home buyers and the Respondent taking into consideration the benefit of ITC. He has further claimed that out of the remaining 1304 flats [(1713) - (409)], 243 customers had booked the flats in pre-GST period and also paid instalments in the pre-GST period but they had not paid any consideration towards construction during the post-GST period from 01.07.2017 to 31.08.2018 (period

covered by investigation) and in case ITC in respect of these 243 units was taken into account to calculate the profiteering in respect of 1061 units where payments towards construction value had been received post-GST, the ITC as a percentage of turnover would be distorted and erroneous. Therefore, he has contended that the benefit of ITC in respect of these 243 units should be calculated when the consideration towards construction would be received from the concerned home buyers, by taking into account the proportionate ITC in respect of such units.

25. The DGAP has concluded that the benefit of additional ITC of 2.23% of the turnover has accrued to the Respondent which was required to be passed on to the Applicant No. 1 and other flat buyers who had entered into the agreements with the Respondent upto 30.06.2017. He has also argued that the Respondent had contravened the provisions of Section 171 of the CGST Act, 2017 in as much as the additional benefit of ITC had not been passed on by him to the Applicant No. 1 and the other recipients as the Respondent had realized an excess amount of Rs. 58,450/- from the Applicant No. 1 which included both the profiteered amount @2.23% of the taxable turnover and the GST on the said profiteered amount. The DGAP has also claimed that his investigation has revealed that the Respondent has also realized an additional amount of Rs. 5,06,19,619/- which included both the profiteered amount @2.23% of the taxable turnover and the GST on the above profiteered amount, from other recipients who had entered into agreements with the Respondent upto 30.06.2017 as well but who were not Applicants in the present proceedings. He has further

claimed that the above recipients were identifiable as per the documents provided by the Respondent as their names and addresses along with the unit nos. allotted to such recipients were mentioned in these documents and therefore, this additional amount of Rs. 5,06,19,619/- was required to be returned to these eligible recipients.

26. The above Report was considered by the Authority in its sitting held on 05.03.2019 and it was decided to issue notice to the Respondent asking him to explain why the Report submitted by the DGAP in which allegation of violation of the provisions of Section 171 of the above Act has been levelled against him should not be accepted and penalty imposed. The Applicants and the Respondent were asked to appear before the Authority on 27.03.2019 for hearing. Six personal hearings were accorded to the parties on 27.03.2019, 11.04.2019, 24.04.2019, 10.05.2019, 21.05.2019 & 14.06.2019 wherein the Applicant No. 1 was not present. Applicant No. 2 was represented by Sh. Bhupender Goyal, Assistant Director (Cost) and Sh. P. K. Tyagi, Superintendent. The Respondent was represented by Sh. Vijayakumar R., Vice-President (Finance) and Sh. Badrinath, Chartered Accountant. The Respondent was not present during the hearings scheduled on 11.04.2019, 10.05.2019 & 14.06.2019 as he had sought adjournments. The Respondent has attended the hearings held on 27.03.2019, 24.04.2019, 21.05.2019.
27. The Respondent has filed his first written submissions on 27.03.2019 vide which he has stated that computation of profiteered amount should be based on the cost and not the sale realisations. He has also stated that the provisions relating to profiteering clearly mandated that

any benefit of additional ITC which had become available due to GST should be passed on to the customers by way of commensurate reduction in the price of the goods or services supplied. He has further stated that the prices of the flats would be lower at the beginning of the project when compared to the prices when the project execution had begun and approached completion. He has also submitted that the 'cost incurred' or the 'cost to be incurred' on the project should be considered as the basis for computing the profiteered amount instead of the realisations from the customers. He has further submitted that the prices of the residential units per sq. ft. varied from time to time and were influenced by various external factors and variation in the selling prices would not have any impact on the input credits and therefore, input credit of taxes which was the basis for anti-profiteering calculations was based on purchases/inward supplies and was not linked to the outward supplies/sales.

28. The Respondent has also claimed that the tax paid on services was not a real benefit when compared to the pre-GST regime since, as a works contractor, he was eligible to claim full credit of Service Tax @15% paid on all input services and he was also eligible to claim ITC on GST @18% paid on all input services effective from 01.07.2017 and therefore, there was no additional benefit. He has further claimed that the change was essentially in the rate of tax which has increased from 15% to 18%. The Respondent has also contended that the methodology adopted by the DGAP, compared the total amount of ITC claimed during the pre-GST regime with the GST regime. The mere fact that the GST rate was enhanced from 15% to 18% on services

would mean additional ITC when compared in absolute rupee terms, however, the additional 3% was paid by him, either to the service provider or under the reverse charge mechanism and the same was then claimed as ITC and thus, there was no additional ITC benefit that had accrued to him after the implementation of the GST.

29. The Respondent has also claimed that pricing of flats was market driven and was not based on cost as it would be based on the different parameters like surrounding developments, standard of life of that area/social infrastructure facilities such as hospitals, schools, public transport and accessibility to various offices, access to airport and railway station and pricing of competitors and the demand and supply of the homes irrespective of their cost.
30. The Respondent has further claimed that the developers always aimed to achieve an overall betterment in the prices of the flats which would be sold over a period of 4 to 5 years from the date of launch of the project and even after obtaining the occupation certificate, therefore, the customers who had purchased flats initially would have price advantage over the customers who had purchased flats at a later point in time, irrespective of the GST. He has also contended that the cost of constructing a flat was wholly irrelevant in the pricing mechanism which had no role to play and the provisions relating to anti-profiteering more specifically on the availability of credits should not be applied to the developers.
31. The Respondent has further stated that the project generally took 4 to 5 years to complete, thus, the comparison of the input credits with output taxes should mandatorily be undertaken covering the entire life

span and comparing of the output taxes with input credit for a part of a period or for the company as a whole would lead to incorrect understanding and analysis. He has also contended that in the construction and sale of residential flats, the total turnover, taxable turnover and the output tax liability was a function of sale of new units out of the total inventory and on the contrary, the inward supplies and the input taxes was a function of work completion and speed of project execution which did not have any correlation.

32. The Respondent has further contended that the comparison of the output tax and the input tax as a ratio to the turnover and within themselves would be an acceptable analysis for businesses which were season agnostic or where the sale and purchase commenced and was concluded within a very short duration e.g. consumer durables and food items etc., which could not be applied where the business was seasonal and hence, in all such cases, the ratios would be heavily skewed when applied for the season or off-season only. He has also argued that it was for this reason that under the Value Added Tax law and the CENVAT Credit Rules, 2004 a provision for true-up and true-down was introduced. He has further argued that under the VAT law in Karnataka it was called 'partial rebating scheme' and under Rule 6 (3) the CENVAT Credit Rules, 2004 the same provision was made. It was provided under these provisions that the claimant of ITC had to compute the ratio of taxable and exempt turnovers for the relevant year as a whole after March 31st of the financial year and re-compute the ITC attributable to exempt turnovers based on the turnover ratio for the "complete year". He has therefore, claimed that

the above provisions should be applied in this case also, where the benefits, if any, due to GST should be computed on the basis of project as a whole and not for a specified period, as it could give absurd results.

33. The Respondent has also contended that the applicability of the provisions of Section 171 of the CGST Act, 2017 in the instant case needed a thorough reconsideration and its provisions should be applied for a project as a whole and not for a specific period in isolation by using ratio or extrapolation techniques, as was done in the Report of the DGAP which has distorted the computation and the analysis.

34. The Respondent has further contended that through the press releases dated 24.02.2019 and 19.03.2019, the GST Council has recommended that the rate of GST on contracts for sale of residential units would be reduced from effective rate of 12% to 5%, but without ITC. This amendment would further negatively impact the cost of the project due to withdrawal of benefit of ITC which was granted earlier. He has also stated that the Karnataka VAT and the Service Tax components which were factored as eligible credits would now become cost of the project, under the new scheme of taxation. In the light of the denial of ITC and the consequent increase in the cost of the project, the Respondent has requested that before concluding the anti-profiteering proceedings the impact of this amendment on the project cost and alleged profiteering amount should be considered. He has also stated that the above amendment would not only take away all the benefits which the GST was to provide for the project but even the

VAT and Service Tax components which were initially factored as eligible credits. He has again reiterated that he would compute and determine the ITC benefit that would accrue to him on account of the additional ITC and pass on the same to the eligible customers at the end of the project.

35. The Respondent vide his submissions dated 09.05.2019 and 11.06.2019 has reiterated his earlier stand and stated that he would compute and determine the ITC benefit that would accrue to him and would pass on the same to the eligible customers at the end of the project.

36. Supplementary Report was sought from the DGAP on the issues raised by the Respondent through his above submissions. The DGAP vide his Report dated 16.04.2019 has claimed that the Respondent has submitted that the 'cost incurred' or the 'cost to be incurred' on the project should be considered as the basis for computing the alleged profiteered amount instead of the realisations from the customers, however, it was clear that the Respondent was not eligible to avail the CENVAT/ITC of many taxes like the Central Excise Duty, Central Sales Tax, Karnataka Entry Tax, Countervailing Duty and Special Additional Duty of Customs etc. during the pre-GST regime and after introduction of the GST, the Respondent was eligible to avail the ITC paid on all the inputs and input services including the sub-contracts. He has further claimed that the additional ITC availed by the Respondent could only be utilized to discharge the GST liability on output supplies. He has also contended that the "cost incurred" or "cost to be incurred" approach suggested by the Respondent, was

merely based on estimated/assumed figures. He has further contended that Section 171 of the CGST Act, 2017 cast an obligation on the suppliers to pass on the benefit of reduction in the rate of tax or the benefit of ITC to the recipients by way of commensurate reduction in prices, therefore, the approach & methodology adopted by him was in consonance with the provisions of Section 171 of the above Act.

37. We have carefully perused the DGAP's Reports, the written submissions of the Respondent and all the other material placed on record. The issues to be decided by this Authority in this case are as under:-

- 1) Whether there was any violation of the provisions of Section 171 (1) of the CGST Act, 2017 in this case?
- 2) If yes then what was the quantum of profiteering?

38. Perusal of Section 171 of the CGST Act, 2017 shows that it provides as under:-

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

39. It is clear from the plain reading of Section 171 (1) mentioned above that it deals with two issues one relating to the passing on of the benefit of reduction in the rate of tax and the second pertaining to the passing on of the benefit of the ITC. On the issue of reduction in the

tax rate, it is revealed from the DGAP's Report that there has been no reduction in the rate of tax as the same was 16.15% in the pre-GST period and 18% in the post-GST period hence the only issue to be examined is as to whether there was any additional benefit of ITC with the introduction of GST. It is also revealed from Table G of the Report submitted by the DGAP that the Respondent has availed CENVAT/VAT credit of Rs. 10,51,30,295/- during the pre-GST period from April, 2016 to June, 2017 and ITC of Rs. 26,16,77,624/- during the post-GST period from July, 2017 to August, 2018. It is also apparent that the DGAP has taken area sold relevant to the turnover as per the home buyers list of the flats sold till 31.08.2018 as 16,86,966 sq. ft. for the pre-GST period and 22,33,585 sq. ft. for the post-GST period. He has further calculated the relevant CENVAT credit for the pre-GST period from April, 2016 to June, 2017 as Rs. 6,56,85,155/- and relevant ITC for the post-GST period as Rs. 21,64,72,180/- from July, 2017 to August, 2018 and reported that the pre-GST ratio of CENVAT to turnover came to 4.32% and the same ratio for the post-GST period was 6.55% and hence the Respondent has availed additional benefit of ITC after coming in to force of the GST w.e.f. 01.07.2017 of 2.23% (6.55%-4.32%) which he was required to pass on to his buyers as per the provisions of Section 171 (1) of the above Act. The DGAP as per Table H has further reported that the Respondent has not passed on the benefit of additional ITC of 2.23% and has in excess collected/profiteered an amount of Rs. 5,06,78,069/- from the house buyers which he was required to pass on to them. The DGAP has also intimated that the Respondent has

profiteered an amount of Rs. 58,450/- from the Applicant No. 1 including the GST and an amount of Rs. 5,06,19,619/- (Total 5,06,78,069/-) from the rest of the house buyers which was required to be paid to both of them. The DGAP has further intimated that the Respondent has supplied the construction service in the State of Karnataka only.

40. The Respondent during his submissions has stated that computation of the profiteered amount should be based on the cost and not the sale realisations. However, a plain reading of Section 171 (1) of the above Act shows that the Respondent is legally bound to pass on the benefit of additional ITC which he has availed post coming in to force of the GST by commensurate reduction in the prices of the flats. This benefit can be computed only after comparing the ITC and the sales realisation for both the pre-GST and post-GST periods. The cost incurred or to be incurred cannot be taken in to consideration as only the benefit of additional ITC is required to be passed on which cannot be calculated after taking in to consideration the cost of the flats. This benefit is further to be apportioned to the buyers on the basis of the realisation made from each of them and therefore also the cost cannot be considered during computation of the above benefit. It is also clear from the above Section that only the benefit of additional ITC which the Respondent has availed on the purchase of the inputs is to be passed on which has no connection with the prices of the flats which he may have charged from time to time on account of various factors and hence, it has no link with the outward supplies or sales. Therefore, the contentions of the Respondent made in this regard are untenable.

41. The Respondent has also claimed that the tax paid on services was not a real benefit when compared to the pre-GST regime as it has been increased from 15% to 18%. However, the claim of the Respondent is not correct as it is the total benefit of additional ITC which he has been given on account of purchase of goods and services which is required to be passed on and not only the ITC earned on the services. It is apparent from Table G supra that the Respondent has availed additional benefit of ITC to the extent of 2.23% of the turnover which he is required to pass on. The Respondent has also claimed full ITC on the GST paid on the services purchased by him and hence he has not suffered any additional burden and hence the claim made by the Respondent on this ground cannot be accepted.
42. The Respondent has also submitted that the prices of the flats were market driven and depended on various other parameters irrespective of their costs. It would be relevant to mention here that as has been admitted by the Respondent himself cost has no bearing on the prices of the flats hence the same cannot be considered for calculation of the profiteered amount and only the benefit of additional ITC which has accrued to the Respondent post-GST is required to be considered, therefore, the credit of ITC is very much relevant while computing the profiteered amount and hence the arguments of the Respondent made in this behalf are irrelevant.
43. The Respondent has also contended that the comparison of the input credits with output taxes should be done covering the entire life span of the project and comparing of the output taxes with input credit for a part of a period would lead to incorrect assessment of profiteering. The

contention of the Respondent made in this behalf may be correct as Section 171 (1) of the above Act mandates passing on of the benefit of additional ITC which has accrued to the Respondent during the entire life of the project before occupancy certificate is issued however, it has to be taken in to consideration that the housing projects have long gestation period whereas the ITC is being availed by the Respondent every month. The Respondent cannot enrich himself at the expense of the flat buyers by denying them the benefit of ITC till completion of the project while he uses the same in his business for discharging his output tax liability every month. Therefore, the Respondent has to make periodical assessment of the ITC benefit and pass it on to the eligible flat buyers. The Respondent can always make adjustments in case more or less benefit is passed on at the final computation and payment of the benefit. Therefore, this contention of the Respondent cannot be accepted.

44. The contention of the Respondent that the turnover and the output tax liability and the inward supplies and the ITC availed on them had no correlation for calculation of the profiteered amount is not correct as the profiteered amount has to be calculated by computing the ratio of CENVAT/ITC to turnover.
45. The Respondent has further contended that the comparison of the output tax and the input tax as a ratio to the turnover and within themselves would be acceptable for computing profiteering in respect of the consumer goods but the same could not be done in respect of the real estate. He has also argued that it was for this reason that under the Value Added Tax law and the CENVAT Credit Rules, 2004 a

provision for 'true-up' and 'true-down' was introduced which was referred to as the 'partial rebating scheme' under the Karnataka VAT laws and the same provision was made under Rule 6 (3) the CENVAT Credit Rules, 2004 and hence, the benefit should be computed for the whole project and not for a specified period. In this connection it would be relevant to mention that the additional benefit of ITC has to be computed and passed on till such benefit is available/availed by the Respondent as per the provisions of Section 171 (1) of the above Act. Since the same is spread over a long period of time periodical calculation of the ITC benefit has to be made and benefit passed on to the buyers as they cannot be forced to pay more price than what is due from them after reducing the prices commensurately.

46. The Respondent has also contended that the provisions of Section 171 of the CGST Act, 2017 in the instant case should be applied for the project as a whole and not for a specific period. As already discussed above computation of the ITC benefit has to be made periodically as the Respondent is availing the benefit of ITC every month to discharge his output tax liability and using the amount of ITC in his business. Therefore, the flat buyers cannot be forced to wait till the completion of the project over a period of 4 to 5 years to claim the benefit of ITC and pay more price than what they should pay after commensurate reduction in the prices of the flats. In case the Respondent insists on passing on the benefit of ITC to the buyers after the completion of the project he should also claim the benefit of ITC after completion of the same. He cannot apply different yardsticks for availing and passing on of the benefit of the ITC. Therefore, the

arguments of the Respondent made on this account are frivolous and hence they cannot be accepted.

47. The Respondent has further contended that the rate of GST on sale of residential units has been reduced from 12% to 5% without ITC which would increase the cost of the project. Perusal of the Notification No. 03/2019-Central Tax (Rate) dated 29.03.2019 issued by the Central and the State Govts. shows that the rate of GST on construction service has been reduced from 12% to 5% without benefit of ITC w.e.f. 01.04.2019. However, the same has no effect on the present investigation as the same has been carried out w.e.f. 01.07.2017 to 31.08.2018 during which the Respondent has duly availed the benefit of ITC which he is bound to pass on to the flat buyers as per the provisions of Section 171 (1) of the above Act. Therefore, the argument advanced by the Respondent in this behalf is not tenable.
48. The Respondent has also claimed that he was getting the major portion of the work executed through the sub-contractors and hence he was not getting the benefit of ITC. However, this contention of the Respondent is not correct as he is fully entitled to claim benefit of ITC on the payments made to the sub-contractors. He has further claimed that he had collected VAT @5.15% from his customers which was lower than the actual rate of VAT and hence he had passed on the benefit of ITC to them. This plea of the Respondent is not valid as the benefit has to be passed on by commensurate reduction in the prices of the flats as per the provisions of Section 171 (1) of the above Act and hence charging VAT at low rate cannot be taken to be passing on of the benefit. Similarly, charging value of the land as 35% to 40% of

the total consideration instead of 33.33% as prescribed under the above Act, does not amount to passing on the benefit of ITC. The Respondent has also argued that the findings recorded in the case of M/s Pyramid Infratech Pvt. Ltd. supra did not apply in his case. The claim made by the Respondent is incorrect as the basic methodology applied in both the cases is similar except that some parameters are different. The DGAP has also cited the provisions of Schedule-III, para 5 of Schedule-II and Section 17 (2) and (3) of the CGST Act, 2017 to claim that the ITC will have to be reversed in respect of those flats which would be sold after issue of the completion certificate of the project. In this connection it would be pertinent to mention that the above provisions are not applicable in the facts of the present case as the completion certificate has not been issued yet.

49. It is also clear from the Report of the DGAP that the profiteered amount has been computed in respect of 1061 home buyers only from whom instalments have been received by the Respondent during the period from 01.07.2017 to 31.08.2018 whereas the Respondent has booked 1713 flats till 31.08.2018. It is further clear that the Respondent has sold 409 flats w.e.f. 01.07.2018 at the prices which were mutually agreed upon as per Clause 6.4 of the Agreement to Sell executed between the buyers and the Respondent which specifically provides that the buyers shall not claim ITC benefit. The DGAP has stated in his Report that the above contention of the Respondent had merit and therefore, the ITC pertaining to the above 409 units was not considered by him during the investigation. Since the above agreements have been executed by mutual consent of both the parties

they are binding on both of them, however, it is clarified that the above claim of the Respondent shall be subject to well settled principles that no flat buyer can be forced to forfeit his right of claiming benefit of ITC and any agreement executed in violation of the provisions of Section 171 (1) of the above Act shall be void.

50. It is also revealed from the Report that out of the remaining 1304 flats [(1713) - (409)], 243 customers have booked the flats and also paid part consideration during the pre-GST period but they have not paid any instalment during the post-GST period and in case the ITC in respect of these 243 units was taken into consideration to calculate the profiteered amount, the ITC as a percentage of turnover would be erroneous and hence, the benefit of ITC in respect of these 243 units should be calculated when the consideration would be received from the concerned home buyer by taking into account the proportionate ITC. This contention of the DGAP is correct and hence the Respondent is directed to compute the ITC benefit in respect of these units after instalments are received from the flat buyers and pass on the same as per their entitlement.
51. Based on the above facts it has been established that the methodology adopted by the DGAP while computing the percentage ratio of CENVAT/ITC to the turnovers for the pre-GST and the post-GST periods is correct and accordingly it is held that the Respondent has benefited from the additional benefit of ITC to the extent of 2.23% (6.55%-4.32%) and profiteered an amount of Rs. 5,06,78,069/- including the GST from his customers. This amount also includes an amount of Rs. 58,450/- including the GST which he has profiteered

form the Applicant No. 1 and he is required to pass on the above amount to the eligible house buyers whose details have been mentioned in Annexure-17 of the Report submitted by the DGAP.

52. Accordingly, this Authority determines the profiteered amount as Rs. 5,06,78,069/- in terms of Rule 133 (1) of the CGST Rules, 2017 and directs the Respondent to pass on the benefit of Rs. 58,450/- to the Applicant No. 1 and Rs. 5,06,19,619/- to the rest 1060 flat buyers as per Annexure-17 of the DGAP Report, along with interest @18% per annum to all the 1061 recipients from the dates from which the above amount was collected by him from them till the payment is made, in terms of Rule 133 (3) (b) of the above Rules, within a period of 3 months from the date of this order. This Authority under Rule 133 (3) (a) of the CGST Rules, 2017 further 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. The Respondent shall also pass on the benefit of ITC which may accrue to him after 31.08.2018 to the eligible house buyers. The concerned Commissioner CGST/SGST shall ensure that the above benefit is passed on to the eligible recipients.
53. It is also evident from above that the Respondent has denied benefit of ITC to his customers and resorted to profiteering in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has thus committed an offence under section 171 (3A) of the above Act and therefore, he is liable for imposition of penalty under the above Section. Accordingly, a Show Cause Notice be issued to him directing

him to explain as to why the penalty prescribed under Section 171(3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him.

54. The Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Karnataka to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent 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 Karnataka through the DGAP within a period of 4 months from the date of receipt of this order.
55. A copy each of this order be supplied to the Applicants, the Respondent and the Commissioners CGST/SGST Karnataka for necessary action. File be consigned after completion.

Sd/-
(B. N. Sharma)
Chairman

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

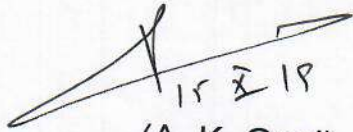
Sd/-
(R. Bhagyadevi)
Technical Member

Sd/-
(Amand Shah)
Technical Member



Certified copy

o/c


15.10.19

(A. K. Goel)
Secretary, NAA

File No. 22011/NAA/16/Bhartiya/2019 /5737-5742 Dated: ~~14.06.2019~~
Copy to:- 15.10.2019

1. Shri Prasanth Nandulamattam S/o Sh. Gangahdhara Sastry, Flat No. 2302, Bankston Rodas Enclave, Hiranandani Estate, Ghodbunder Road, Thane West, Maharashtra-400607

2. M/s Bhartiya City Developers Pvt. Ltd., Khatha No. 6/1, Thanisandra Main Road, Chokkanahalli Village, Yelahanka Hobli, Hegde Nagar, Bengaluru North-560064.
3. Commissioner, State GST Department, Vanijya Therige Karyalaya-1, 1st Main Road, Gandhinagar, Bengaluru-560009.
4. Commissioner, GST, Central Revenue Buildings Annexe, Queens Rd, Shivaji Nagar, Bengaluru, Karnataka 560001
5. Director General Anti-Profitteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
6. NAA website/Guard File.

AFZIP