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

Case No.	53/2019
Date of Institution	06.05.2019
Date of Order	05.11.2019

In the matter of:

1. Sh. Ratish Nair, A 604, Aphrodite, Lodha Paradise, Majiwada, Thane-West, Mumbai, Maharashtra-400601.
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 Man Realty Ltd., 101, Man House, Opp. Pawan Hans, S. V. Road, Vile Parle-West, Mumbai, Maharashtra-400056.

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. Sh. Ratish Nair through his Authorised Representative Sh. R. K. Jain.
2. Sh. Rana Ashok Rajnish, Assistant Commissioner and Shri Shivendu Pandey, Superintendent. for the Applicant No. 2.
3. Sh. Rohit Mansukhani, Head (Finance) and Sh. S. S. Gupta, Chartered Accountant for the Respondent.

ORDER

1. The present Report dated 03.04.2019 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that vide his application dated 18.07.2018 filed before the Maharashtra State Screening Committee on Anti-profiteering under Rule 128 (2) of the CGST Rules, 2017, the Applicant No. 1 had alleged profiteering by the Respondent in respect of purchase of Flat No. 1605, 16th Floor,

Avenue-6 in his project "One Park Avenue", Patlipada Junction, Ghodbundar Road, Thane, Maharashtra-400607. The above Applicant had also alleged that the Respondent had increased the price of the flat after introduction of the GST w.e.f. 01.07.2017 and had not passed on the benefit of Input Tax Credit (ITC) availed by him by way of commensurate reduction in the price of the above flat. The Maharashtra State Screening Committee on Anti-profiteering had found that the Respondent had not passed on the benefit of ITC to the above Applicant as the same should have been computed against the instalments paid by the above Applicant as price of the flat. The above Screening Committee had forwarded the said application with its recommendation to the Standing Committee on Anti-profiteering for further action, in terms of Rule 128 (2) of the above Rules. The aforesaid reference was considered by the Standing Committee on Anti-profiteering, in its meeting held on 06.09.2018, wherein it was decided to forward the same to the DGAP to conduct detailed investigation in the complaint according to Rule 129 (1) of the CGST Rules, 2017.

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

   a) Duly filled in Form APAF-1.

   b) Detailed Comparison of Cost, Pre & Post GST vide Annexure-1.

   c) Cost Sheet.

   d) Booking Form.

e) Revised Quote.

f) Receipt of amounts paid.

g) Copy of Aadhar Card as proof of identity.

3. The DGAP has stated that on examination of the complaint it was found that the Applicant had booked a flat in the project "One Park Avenue", promoted by the Respondent on 25.02.2017 during the pre GST period. The above Applicant had also submitted before the DGAP that the sale agreement was supposed to be registered on the payment of 20% of the agreement value. The details of the demands raised on the above Applicant by the Respondent on account of the purchase of the above flat, were furnished by the DGAP as has been shown in the Table-'A' below:-

Table 'A'

(Amount in ₹)

Particulars	Area (in Sqft)	Basic Cost	S.T. @4.5%	VAT @1%	Registration charges @6%	GST	Other Charges	Total
Agreement Value (pre-GST) (A)	656	₹ 89,39,548	₹ 4,02,280	₹ 89,395	₹ 5,36,373		₹ 3,50,745	₹ 1,03,18,340
Paid in Pre-GST era (B)								₹ 4,62,621
Balance to be paid post GST(C)								₹ 98,55,719
Revised Pricing Post GST (D)	665	₹ 92,27,211	₹ 82,630	₹ 18,362	₹ 5,53,633	₹ 8,86,920	₹ 2,06,874	₹ 1,09,75,630
Excess Demand (E=D-A)								₹ 6,57,290

4. On receipt of the recommendation from the Standing Committee on Anti-profiteering, the DGAP had issued Notice dated 15.10.2018 under Rule 129 (3) of the above Rules, asking the Respondent to intimate as to whether he admitted that the benefit of ITC had not been passed on to the above Applicant by way of commensurate reduction in the price of the flat and in case it was so, to suo moto compute the quantum of the same and mention it in his reply to the Notice along with the

supporting documents. The Respondent was given an opportunity to inspect the non-confidential evidence/information furnished by the above Applicant during the period between 22.10.2018 to 24.10.2018 in accordance with Rule 129 (5) of the above Rules which the Respondent had not availed. Vide e-mail dated 28.03.2019, the above Applicant was also given an opportunity to inspect the non-confidential documents/reply submitted by the Respondent on 01.04.2019. The Authorized Representative of the Applicant had visited the office of the DGAP on 01.04.2019 and inspected the non-confidential data as was provided by the Respondent.

5. The DGAP has covered the period from 01.07.2017 to 30.09.2018 during the current investigation. The time limit to complete the investigation was extended up to 03.04.2019 by this Authority, vide its order dated 31.12.2018, in terms of Rule 129 (6) of the above Rules.

6. The DGAP has also stated that the Respondent had not submitted the required documents even after repeated requests and hence summons under Section 70 of the CGST Act, 2017 read with Rule 132 of the above Rules were issued on 16.10.2018 to Sh. Ramesh Chandra Mansukhani, Chairman of the Respondent to appear on 26.11.2018 and produce the relevant documents, in response to which Sh. Rohit Mansukhani and Sh. Sayyad Mehboob, Authorised Representative of the Respondent had appeared before the Superintendent of the DGAP on 26.11.2018 and submitted the documents.

7. The DGAP has further stated that the Respondent had submitted replies vide his letters/emails dated 06.11.2018, 13.11.2018, 16.11.2018, 22.11.2018, 24.11.2018, 26.11.2018, 27.11.2018, 29.11.2018, 24.01.2019, 12.03.2019 and 29.03.2019. The submissions of the Respondent were summed up by the DGAP as under:-

a) That the above Applicant had not made any payment in the post GST regime and had also defaulted on payment of demands raised in the pre GST regime. Out of the demand of 20% of the agreement value, raised on 04.03.2017 for payment of ₹ 18,36,215/- plus applicable taxes, the above Applicant had paid only ₹ 4,62,622/-, and an amount of ₹ 14,74,585/- had remained unpaid and the Respondent had himself paid the Service Tax and the Value Added Tax (VAT) on the demanded amount.

b) That as per the statutory provisions made under the Real Estate (Regulation & Development) Act, 2016 (RERA), the total carpet area of the flat booked by the above Applicant was revised from 656 Sq. ft. to 665 Sq. ft. and hence, there was an upward revision in the base price of the flat from ₹ 89,39,548/- to ₹ 92,27,211/- which had no connection with the GST.

c) That the Respondent had claimed that discount on account of GST benefit @ 3% was offered to the above Applicant in the revised base price totalling ₹ 2,21,730/- and effective base price of the flat was fixed as ₹ 90,05,481/-, on which taxes,

registration charges, stamp duty and other charges as applicable were payable. As a result, the average cost per square feet had in fact been reduced. The details of the revised costing of the unit, as furnished by the Respondent, are furnished in the Table 'B' below:-

Table 'B'

(Amount in ₹)

Particulars	RERA Area (in Sqft)	Basic Cost	GST Discount @3%	S.T. @4.5%	VAT @1%	Stamp Duty	GST	Other Charges	Total
Agreement Value (pre-GST) (A)	656	₹ 89,39,548		₹ 4,02,280	₹ 89,395	₹ 5,36,373		₹ 3,50,745	₹ 1,03,18,340
Installment Demanded Pre-GST		₹ 18,36,215							
Payment Received		₹ 4,62,622							
Revised Pricing Post GST (D)	665	₹ 92,27,211	₹ 2,21,730						
New Flat Cost	665	₹ 90,05,481		₹ 82,630	₹ 18,362	₹ 5,40,329	₹ 8,87,186	₹ 1,80,000	₹ 1,07,13,988
Consideration Amount less Installemt demanded		₹ 71,69,266					₹ 8,60,312		
Post GST cost with Tax		₹ 90,05,481		₹ 82,630	₹ 18,362	₹ 5,40,329	₹ 8,87,186	₹ 1,80,000	₹ 1,07,13,988

d) That the Respondent had mutually revised the agreements executed by him with his home buyers by offering them discount @ 2-3%, on account of GST benefit, post-GST implementation and the same was offered to the above Applicant also. The Respondent had also submitted documents to support his above claim. The Respondent had provided the trail of emails to show that the revised price was offered to the above Applicant after discussion, but he had not accepted the same.

e) That with the RERA coming into force, it was mandatory for the developers to execute agreements for sale with the home buyers, and the same was communicated to the above Applicant, but he had failed to execute the same. The Applicant No. 1 had also failed to pay instalments as per the buyer's

agreement during the pre-GST period and had also requested the Respondent to cancel his booking, vide his email dated 23.11.2017. The Respondent had also submitted that in view of the Applicant's cancellation request, further discount on account of GST @ 3% was offered vide email dated 27.11.2017, which was again not accepted by the above Applicant.

f) That the above Applicant had approached the Maharashtra Real Estate Regulation Authority constituted under the RERA which vide its order dated 17.04.2018 had directed him to execute the agreement for sale, as per the provisions of Section 13 of RERA, within 30 days of the order. However, without complying with the above order, the Applicant No. 1 had complained to the GST/Anti-Profiteering authorities in October, 2018. Even after filing the complaint, the above Applicant had requested for cancellation of his booking, vide email dated 22.11.2018. The Respondent had cancelled the booking of the above Applicant which was communicated to him vide letter dated 24.11.2018. The details of the communications were furnished by the Respondent in his reply dated 12.03.2019.

g) That the Respondent had provided the reconciliation of home buyers list with the GSTR and ST-3 Returns, to claim that no demand had been raised on the above Applicant in the post GST period. Therefore, the allegation of the Applicant that no

ITC benefit had been passed on to him, was incorrect as he was not a customer of the Respondent any more.

h) That the Respondent had also informed his existing customers that he had already passed input/GST credit by way of additional discount of 2-3% of the original consideration, aggregating to a total amount of ₹ 1,11,61,090/-, which was accepted by the home buyers.

i) That the Respondent had further submitted that in his ST-3 Returns filed during the pre-GST period, figures for both the demands raised and advances received and the cancellation amounts were duly claimed as deductions. The Respondent had also furnished reconciliation of the ST-3 Returns with the total demands raised, advances received and the cancellation amount, vide his email dated 29.03.2019.

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

a) Copies of GSTR-1 Returns for the period from July, 2017 to September, 2018.

b) Copies of GSTR-3B Returns for the period from July, 2017 to September, 2018.

c) Copies of Tran-1 & Tran-2 statements for the period from July, 2017 to December, 2017.

5.11.

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

e) Copies of all demand letters, Sale Agreement/Contract issued to the Applicant.

f) Tax rates - pre-GST and post-GST.

g) Copy of Balance Sheets for the FY 2016-17 & FY 2017-18.

h) Copy of Electronic Credit Ledger for the period from 01.07.2017 to 30.09.2018.

i) CENVAT/Input Tax Credit register for the period from April, 2016 to June, 2017 and July, 2017 to September, 2018.

j) Details of turnover, output tax liability/GST payable and input tax credit availed.

k) Copy of Project report submitted to the RERA.

l) List of home buyers in the project "One Park Avenue".

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

10. The DGAP has further stated that the Respondent, vide his letters dated 16.11.2018 and 29.11.2018 had supplied the sale

agreement/contract and payment plan in respect of the above Applicant, the details of which are mentioned in Table-'C' below:-

Table-'C'

Payment Schedule	
Stages	**Percent of Agreement Value**
Before registration of agreement	9.90%
Immediately after execution and registration of agreement	20.10%
On Initiation of Plinth	7.5%
On Completion of Plinth	7.5%
On Completion of 1st floor Slab	5%
On Completion of 6th floor Slab	5%
On Completion of 11th floor Slab	5%
On Completion of 16th floor Slab	5%
On Completion of 25th floor Slab	5%
On Completion of Walls of the Apartment	2.5%
On Completion of Internal Plaster, flooring, doors and windows of the Apartment upto_____floor	2.5%
On Completion of staircases, lift wells and lobbies upto _____floor	2.5%
On Completion of sanitary fitting upto the _____floor	2.5%
On Completion of elevation of the Apartment's building	5.00%

and completion of lifts of the Apartment's building	
On Completion of water pump, electrical fitting, electro mechanical and environment requirements, entrance lobby/s, Plinth protection	5.00%
On Completion of paving of areas appertain and on other requirements as may be prescribed in this agreement	5%
At the time of handing over of possession of Apartment On or after receipt of Occupation Certificate of Completion Certificate	5%
Total	**100%**

11. The DGAP has also intimated that the Respondent, vide his letter dated 16.11.2018 had submitted copies of the demand letters issued by him to the above Applicant, the details of which are shown as in the Table-'D' given below:-

Table 'D'

(Amount in ₹)

S. No.	Payment Stage	Due Date	Basic %	BSP	Service Tax	Total Amount payable	Amount paid	MVAT	Balance Receivable
1	Booking Amount	14.03.2017	5.00%	4,61,361	20,761	4,82,122	1,00,000		3,82,122
2	On initiation of work	14.03.2017	15.00%	13,74,854	61,868	14,36,723	0		14,36,723
3	MVAT Demand @1% paid amount	30.06.2017					3,62,622	4,427	
4	MVAT@1% Demand raised	31.09.2017						18,362	
Total			**20.00%**	**18,36,215**	**82,629**	**19,18,845**	**4,62,622**	**18,362**	**14,74,585**

12. The DGAP has further intimated that the claim of the Respondent that on account of GST, he had already offered a discount @ 2-3% of the

basic price, as was agreed upon by his customers and therefore, he had passed on the benefit that might accrue to him on account of the GST, may have merit but whether the reduction made or discount offered was commensurate with the increase in the benefit of ITC had to be determined in terms of Rule 129 (6) of the above Rules. He has also contended that the additional ITC available to the Respondent and the amount received by him from the above Applicant and the other home buyers, pre and post implementation of the GST, was required to be taken into account to determine the benefit of ITC which was required to be passed on.

13. The DGAP has further contended that para 5 of Schedule-III of the CGST Act, 2017 (Activities or Transactions which should be treated neither as a supply of goods nor a supply of services) reads as "*Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building*". Further, clause (b) of Paragraph 5 of Schedule II of the above Act 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 had been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier"*. Thus, he has argued that the ITC pertaining to the residential units which were under construction but not sold was provisional which might 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 above Act which read as under:

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

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

Therefore, he has argued that the ITC pertaining to the unsold units was outside the scope of his investigation and the Respondent was required to recalibrate the selling price of such units to be sold to the prospective buyers by considering the net benefit of additional ITC available to him post GST.

14. The DGAP has further argued that Section 171 of the CGST Act, 2017 which governed the anti-profiteering provisions reads as *"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."* Thus, the legal requirement was

that in the event of benefit of ITC or reduction in the rate of tax, there has to be commensurate reduction in the prices of the goods or services and the above Section did not provided a supplier of the goods or services any other means of passing on the benefits of ITC or reduction in the rate of tax to his customers. The DGAP has also averred that the Respondent had submitted that the benefit of ITC had been passed on by offering discount @ 2-3% of the agreed upon base price, to all the existing customers, post introduction of GST. The DGAP has further averred that the same discount was also offered to the above Applicant who had opted to cancel his booking and was not a customer of the Respondent any more. He has also claimed that the Applicant had defaulted in his payments even before coming in to force of the GST and requested for cancellation of his booking which was done as per the terms of the agreement. The DGAP has further claimed that as the Applicant was no more a customer of the Respondent and hence his allegation was incorrect and the same could not be considered towards compliance of provisions of Section 171 of the above Act.

15. The DGAP has also informed that before coming in to force of the GST w.e.f. 01.07.2017, the Respondent was eligible to avail CENVAT credit of Service Tax paid on the input services, however, CENVAT credit of the Central Excise Duty paid on inputs was not admissible to him as per the CENVAT Credit Rules, 2004. He has further informed that post GST, the Respondent was eligible to avail the ITC of GST paid on all the inputs and input services including the sub-contracts. He has also

submitted that as per the information supplied by the Respondent for the period from April, 2016 to September, 2018, the details of the ITC availed by him, his turnover from the project "One Park Avenue" and 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 September, 2018 periods was as per the Table-'E' below:-

Table 'E'

(Amount in ₹)

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	July, 2017 to March, 2018	April, 2018 to Sep, 2018	Total (Post-GST)
1	2	3	4	(5)=(3)+(4)	6	7	(8)=(6)+(7)
1	CENVAT of Service Tax Paid on Input Services (A)	63,88,078	56,40,799	1,20,28,877	-	-	-
2	Credit of VAT Paid on Purchase of Inputs (B)	0	0	0	-	-	-
4	Input Tax Credit of GST Availed (C)	-	-	-	3,41,65,547	1,51,21,014	4,92,86,561
5	Total CENVAT/VAT/Input Tax Credit Available (D)= (A)+(B) or (C)	63,88,078	56,40,799	1,20,28,877	3,41,65,547	1,51,21,014	4,92,86,561
6	Total Turnover as per Home Buyers List (Flats sold upto 30.09.2018) (E)			27,83,31,886			18,19,61,336
7	Total Saleable Area (in sq. ft.) (F)			2,82,936			2,82,936
8	Area Sold relevant to Turnover as per Home buyers List (Flats sold upto 30.09.2018) (G)			1,37,948			84,643
9	Relevant CENVAT/INPUT TAX CREDIT (I)= [(E)*(H)/(G)]			58,64,788			1,47,44,544
10	**Ratio of CENVAT/ Input Tax Credit to Turnover [(J)=(I)/(F)]**			**2.11%**			**8.10%**

16. The DGAP has claimed from the Table-'E' mentioned above that the ITC as a percentage of the total turnover of the Respondent during the pre GST period (April, 2016 to June, 2017) was 2.11% and during the post GST period (July, 2017 to September, 2018), was 8.10%, which clearly confirmed that post GST, the Respondent had benefited from the additional ITC to the tune of 5.99% [8.1% (-) 2.11%] of the turnover. He has further claimed that the Central Government, on the recommendation of the GST Council, had levied 18% GST on construction service (after one third abatement towards the cost of

land, effective GST rate was 12% on the gross value), vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Accordingly, he had contended that the profiteering had been computed by comparing the applicable tax and the ITC available to the Respondent during the pre GST period from April, 2016 to June, 2017 when the Service Tax @ 4.5% and VAT@ 1% was payable (total tax rate was 5.5% on the basic price) with the post GST period from July, 2017 to September, 2018 when the GST rate was 12% on the gross value. On the basis of the figures contained in Table-'E' above, the comparative figures of the ITC availed/available as a percentage of the turnover in the pre and post GST periods, the recalibrated base price and the excess collection i.e. the profiteering during the post GST period, has been tabulated by the DGAP as per the Table-'F' below:-

Table 'F'

(Amount in ₹)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April,2016to June,2017	July,2017 to Sep 2018
2	Output tax rate (%)	B	5.50%	12.00%
3	Ratio of CENVAT/ Input Tax Credit to Total Turnover asper Table - E above (%)	C	2.11%	8.10%
4	Increase in input tax credit availed post-GST (%)	D	-	5.99%
5	**Analysis of Increase in input tax credit:**			
6	Total Basic Demand raised during July, 2017 to September, 2018	E		181,961,336
7	GST charged	F= E*12%		22,412,632
8	Total demand	G		204,373,968
9	Recalibrated Base Price	H=E*(1-D) or 94.01% of E		171,061,852
10	GST @12%	I		20,527,422
11	Commensurate demand price	J=H + I		191,589,274
12	**Excess Collection of Demand or Profiteered Amount**	**K=G - J**		**12,784,694**

17. The DGAP has observed from the Table-'F' that the additional ITC of 5.99% of the taxable turnover should have resulted in commensurate

reduction in the base prices as well as cum-tax prices of the houses and therefore, as per the provisions of Section 171 of the CGST Act, 2017, the benefit of additional ITC was required to be passed on to the home buyers. He has also pleaded that by not reducing the pre GST base prices by 5.99% on account of additional benefit of ITC and charging GST @ 12% on such higher base prices, the Respondent had contravened the provisions of the above Section. However, as no demand had been raised on the above Applicant in the post GST period, no benefit of additional ITC was required to be passed on to him.

18. The DGAP has also contended that on the basis of the aforesaid CENVAT/ITC availability in the pre and post GST periods and the demands raised by the Respondent on the above Applicant and other home buyers on account of value of construction on which GST liability @ 12% was discharged by the Respondent during the period from 01.07.2017 to 30.09.2018, the amount of benefit of ITC not passed on to the recipients or in other words, the profiteered amount came to ₹ 1,27,84,694/- which included GST on the base profiteered amount of ₹ 1,14,14,905/-. The names of the home buyers of flats sold up to 30.09.2018 and unit no. wise break-up of the profiteered amount has been given in Annexure-18 of the DGAP's Report. The DGAP has further contended that since no demand was raised on the above Applicant and no payment was made by him during the post GST period, no benefit of additional ITC was required to be passed on to him, as had been mentioned at Serial No. 90 of Annexure-18 of the

Report. It was also intimated that the Respondent had supplied construction services in the State of Maharashtra only.

19. The DGAP has also stated that the Respondent had claimed to offer discount of 2-3% of the original cost of the flats to 81 home buyers aggregating to 56,905 Sq. ft. and thereby benefit to the tune of ₹ 1,11,61,090/-, had already been passed on, however, the eligibility of such benefit, claimed to have been passed on by the Respondent to the home buyers, was subject to the satisfaction of this Authority.

20. The DGAP has further stated that the present investigation covered the period from 01.07.2017 to 30.09.2018 and profiteering, if any, for the period post September, 2018, had not been examined by him as the exact quantum of ITC which would be available to the Respondent in future could not be determined at this stage, when the construction of the project was yet to be completed. In view of the aforementioned findings, the DGAP has contended that the provisions of Section 171(1) of the CGST Act, 2017, requiring that *"any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit should be passed on to the recipient by way of commensurate reduction in prices"*, had been contravened by the Respondent in the present case.

21. The above Report was considered by the Authority in its meeting held on 09.04.2019 and it was decided that the Applicants and the Respondent be asked to appear before the Authority on 25.04.2019. The Respondent was issued notice on 09.04.2019 to explain why the

above Report of the DGAP should not be accepted and his liability for violating the provisions of Section 171 of the CGST Act, 2017 should not be fixed along with imposition of penalty as per Section 122-127 of the above Act read with Rule 21 & 133 of the CGST Rules, 2017 and his registration under the above Act should also not be cancelled. Since, the Respondent had asked for adjournment of the hearing scheduled on 25.04.2019, it was decided to grant next hearing on 09.05.2019. During the course of the hearings the Applicant No. 1 was represented by Sh. R. K. Jain, Authorised Representative, the DGAP was represented by Smt. Neelam Kapur, Superintendent and the Respondent was represented by Sh. Rohit Mansukhani, Head (Finance) and Sh. S. S. Gupta, CA. The Respondent has filed his written submissions on 09.05.2019, 17.05.2019, 30.05.2019 and 23.07.2019 and the above Applicant has filed written submissions on 25.04.2019, 30.04.2019, 08.05.2019 and 30.05.2019. The main issues raised by the above Applicant and the Respondent vide their submissions are mentioned in the subsequent paras.

22. The Applicant No. 1 vide his submissions dated 25.04.2019 has raised objections against the Report of the DGAP and stated that the Respondent had deposited an amount of Rs. 16,072/- only in cash against the total output GST liability of Rs. 2,25,17,438/- during the investigation period from 01.07.2017 to 30.09.2018, as per GSTR-3B returns filed by him from July 2017 to August 2018, as per the Annexure-1 attached by the Applicant. He has also stated that based on the above amount of ITC claimed by the Respondent and his total

taxable value, the profiteering was 11.99% of the turnover. He has further stated that after commensurate reduction in the prices of the flats, the actual amount of profiteering worked out to be Rs. 2,07,64,080/- as against Rs. 1,27,84,694/- calculated by the DGAP which was refundable to all the buyers along with 18% interest including those buyers who had surrendered their units, till the date of cancellation, as they were identifiable.

23. Raising objection against the contents of para 12 (a) of the DGAP's Report the above Applicant has submitted that the Respondent had not raised any demand vide his letter dated 04.03.2017 attached as Annexure-2 by him as no such letter was received by him nor this letter was mentioned in any subsequent communications by him and hence the same appeared to be forged in the back date. He has further submitted that he had booked the flat against nominal amount to be paid every year and rest of the amount was to be funded by the Bank and accordingly, he had paid the booking amount of Rs. 1,00,000/- on 25.02 2017 and second instalment of Rs. 3,62,622/- on 16.03.2017. However, the Respondent had increased the total price of the flat arbitrarily which was beyond the reach of the Applicant. He has also claimed that the Respondent had registered himself under the RERA on 14.09.2017 only and hence his liability to pay instalments had not arisen on 04.03.2017. He has also drawn attention to the demand letters dated 21.09.2017 (Annexure-3) and 30.06. 2017 (Annexure-4) wherein the Respondent had only demanded the amount payable as arrears of Value Added Tax (VAT) which did not include the amount

mentioned in the letter dated 04.03.2017 and there was also no mention of the above letter in these two letters.

24. With regard to para 12 (b) of the DGAP's Report the above Applicant has contended that the Respondent had increased the carpet area of the flat from 656 sq. ft. to 665 sq. ft. resulting in increase in the base price of the flat from ₹ 89,39,548/- to ₹ 92,27,211/-, by misusing the provision of RERA. He has further contended that as per the Maharashtra Ownership of Flats Act 1963 (MOFA), the carpet area was required to be separately mentioned in the agreement however, the same was not defined in the above Act. He has also stated that after coming in to force of the RERA the carpet area had been duly defined which included the floor area of an apartment excluding the area covered by the external walls, balcony and dry area but included the area covered by the internal walls. He has also claimed that since the RERA had included the area covered by the internal walls in its definition, the carpet area would always be marginally higher than the pre RERA carpet area even though the entire dimensions of the building had remained the same. Therefore, he has alleged that the Respondent had wrongly increased the area of his flat by 9 sq. ft. (1.37%) than the earlier carpet area by including area of the internal walls and also increased the base price by 3.22% (Rs. 92,27,211/- - Rs. 89,39,548/- =Rs. 2,87,663/-) although there was no change in the approved plan of the flat and hence the price should not have been increased. He has also alleged that even if it was assumed that there

was increase in the size of the flat by 1.37% the overall increase in the base price was 3.22%.

25. The above Applicant has also submitted that he had received the cost sheets pre GST and post GST periods in which GST discount @ 3% had been allowed (Annexure-5) which showed that the Respondent had increased the basic price by 3.2% and allowed GST discount @ 3%. He has further submitted that the revised agreement value / base price demanded by the Respondent with the revised quote dated 27.11.2017 was Rs. 92,27,211/- which was also mentioned in the Booking Form and which was supposed to include the agreement value of Rs. 89,39,548/- and all other charges like 2 year maintenance charges, Gas, Electricity & Water connection charges and Registration charges amounting to Rs. 2,78,909/- (Annexure-6). He has also stated that in the final cost sheet sent vide his email dated 18.11.2018 (Annexure-7 of his submissions), the Respondent had converted the above amount as revised agreement value / base price and was also charging other charges separately which were earlier included in Rs. 92,27,211/- and thus the total price of the flat had been increased by Rs. 6,57,290/- from Rs. 1,03,18,340/- to Rs. 1,09,75,630/-. He has further stated that effectively, the overall base price was increased by 0.7% and no benefit had been passed on to him towards the ITC by commensurate reduction in the base price, which was fixed prior to 01.07.2017.

26. In respect of para 12 (e) of the DGAP's Report the above Applicant has stated that there was significant change in the price compared to

what was agreed on the basis of which the booking was made and the booking amount was paid. He has also claimed that the price had arbitrary been increased by citing the GST legislation however, no mention was made of the ITC benefit. He has further claimed that since there was no agreement on the price, the Respondent was either supposed to refund the booking amount as per common trade practice or to agree on commensurate reduction in the price and since no intention of passing on of the full benefit of ITC availed by the Respondent was shown by him he had no other option but to complain to the Anti-profiteering Committee. He has also contended that there was no requirement in the RERA to register an agreement within 30 days on the basis of incorrect pricing offered by the Respondent and as a buyer he had every right to protest and complain to the appropriate authorities since profiteering has been done by the Respondent. The above Applicant has also pleaded that the Respondent had not given him further discount of GST @ 3% vide email dated 27.11.2017 as has been claimed by him and the total discount of 3% was only offered to him and it was never intimated that the same was on account of GST benefit, however, the above discount was mentioned in the cancellation letter sent in November, 2018 only (Annexure-8 of the Applicant). He has also contended that the Respondent had clearly mentioned in the above letter that there has been revision in the cost of the flat post implementation of the GST.

27. With regard to para 12 (f) of the DGAP's Report regarding approaching the Maharashtra Real Estate Regulatory Authority, the above Applicant

has averred that he had done so due to arbitrary increase in the total cost of the flat. He has further averred that the above Authority vide its order dated 17.04.2018 (Annexure-9) had directed the Respondent to provide revised cost sheet enabling him to make an informed decision. It was also mentioned by the above Authority that the Applicant could also approach the concerned authorities of GST in case the benefit of ITC had not been passed on to him. Accordingly, the Respondent had provided a fresh quote on 25.05 2018 (Annexure-10) which did not pass any ITC benefit and on the contrary increased the overall base price illegally.

28. The above Applicant has also claimed that he had sought an appointment with the Respondent to discuss the matter but his request was ignored and hence he had approached this Authority. He has also alleged that without waiting for the order of the Authority under Section 171 of the Act the Respondent instead of refunding the booking amount had unilaterally cancelled his booking and forfeited the booking amount which amounted to vendetta as was clear from Bullet No. 4 of second page of the cancellation letter dated 24.11.2018 (Annexure-8). He has also contended with respect to para 12 (g) of the Report that unilateral cancellation of the booking by the Respondent was illegal as it was done due to the reason that he had approached this Authority.

29. Contesting the contents of para 12 (h) of the Report the above Applicant has stated that the Respondent has claimed that total discount of ₹ 1,11,61,090/-, had been accepted by all the home

buyers, however, on his inquiry the home buyers had stated that the Respondent had arbitrarily increased the carpet area and the price and later reduced the price by offering discount therefore, effectively no benefit of ITC was passed and the discount of 2-3% was in the base price only. He has further stated that no supporting evidence was produced by the Respondent from the home buyers to prove his claim.

30. The Applicant No. 1 has also contended that as per Table E of the Report, the figures mentioned in column nos. 7 & 8 with regard to saleable area and the sold area relevant to turnover had no relevance as the total output liability was based on the turnover achieved on monthly basis and the GST was collected on that turnover only. As and when un-sold saleable area would be sold, proportionate GST would be determined during that particular month and output liability would again be either set-off against the ITC or paid in cash during that month only and hence, giving any discount for the same during the investigation period was not justified. He has also argued that no such discount was allowed towards un-sold saleable area vide Order No. 7/2018 passed on 18.09.2018 by this Authority in the case of Sukhbir Rohilla & others v. M/s Pyramid Infratech Pvt. Ltd.

31. The above Applicant has also pleaded that the provisions of Section 17 (2) of the CGST Act, 2017 were not applicable in the present case since the goods and services used were for construction of housing property and entire ITC was available for set off, on monthly basis, till the Occupancy Certificate (OC) was issued. He has further pleaded that the un-utilized ITC could be reversed only when the OC was

received and at that point of time, the builder had the right to determine the price independently and the above Section which was essentially for bifurcating the ITC for different types of inputs having different tax rates / were Zero rated or Exempted from tax could not be applied to the construction service, in which the nature of tax applicability got changed at the relevant point of time and thus, for the purpose of calculating profiteering, overall ITC utilized needed to be taken into consideration.

32. The Applicant has also claimed that the entire saleable area must have been sold at different rates as per the normal practice where there was no ceiling fixed by the regulatory authorities and hence, any consideration of ITC based on the sq. ft. area would not be justified and the best way would be to allow ITC benefit based on the amount, as the GST was also charged on the amount and not on the sq. ft. area. The above Applicant has also stated that the Respondent had shown lesser amount of GST payable in the GSTR-3B return for the month of November, 2017 by an amount of Rs. 1,02,508/-. The above Applicant has further stated that the Respondent had issued demand letter dated 21.09.2017 to him and to the other buyers (Annexure 13) in which the GSTIN and the dates were mentioned but the same were not in the appropriate format as per the CGST Act, 2017 and it had not been mentioned in them that they were "Tax Invoices" though GST had been demanded through them and hence action against the Respondent should be taken for violation of the above Act.

5.11

33. The above Applicant has also claimed that in Row No. 4 of Table E of the Report the ITC availed has been shown as Rs. 4,92,86,561/- which was the ITC available as per the monthly GSTR-3B returns filed by the Respondent and not the ITC availed which was required to be corrected. Further, as per Row No. 6, total turnover had been mentioned as Rs. 18,19,61,336/-, however, as per the GSTR-3B returns filed by the Respondent the total turnover was Rs. 18,76,45,356/- as per Annexure-1 prepared by him. He has further claimed that in Row No. 9 of the above Table, the relevant ITC has been shown as Rs. 1,47,44,544/- and as per the GSTR-3B returns filed by the Respondent, the total tax paid out of the ITC was Rs. 2,23,98,858/-. He has also stated that after making necessary correction of Rs. 1,02,508/- as mentioned above, the total tax paid out of ITC was Rs. 2,25,01,366/- as per the details given in Annexure-1 and hence, the ratio of ITC to turnover was 11.99% without considering any saleable area and un-sold area. The above Applicant has also contended that in Row No. 6 of Table F supra the total basic demand raised has been stated as Rs. 18,19,61,336/- but as per the GSTR-3B returns filed by the Respondent the total of same was Rs. 18,76,45,356/-. Similarly, the amount of profiteering was Rs. 2,07,64,080/- instead of Rs. 1,27,84,694/-. He has further contended that in para 25 of the DGAP's Report, the figure of profiteered amount of Rs. 1,27,84,694/- was not correct as GST @ 12% has again been deducted and the net profiteering amount of Rs. 1,14,14,905/- has been arrived at. He has also submitted that while making the

comparison, GST @ 12% has been added in both the figures and hence a mistake had been committed and therefore, details given in Annexure-18 should be amended and the actual profiteering of Rs. 2,07,64,080/- should be determined without reduction of 12% GST.

34. The above Applicant has also argued that the benefit of ITC could not be appropriated by the Respondent as it was a concession given by the Government from its own tax revenue and hence the Respondent was legally bound to pass on its benefit. He has further argued that the Govt. had repeatedly clarified that with effect from 01.07.2017, under the GST, full ITC was available for offsetting the headline rate of 12% and hence, the input taxes embedded in the flat should not form part of the cost of the flat. He has also claimed that with effect from 25.01.2018, the Govt. has again clarified that the builders shall not be required to pay GST on the construction service of flats etc. in cash but would have enough ITC to pay the output GST and they should not recover any GST payable on the flats from the buyers. They could recover GST from the buyers only if they recalibrated the prices of the flats after factoring in the full ITC available in the GST regime and reduced the ex-GST prices of flats. He has further claimed that the Respondent has been persistently demanding GST @ 12% despite the provisions of the Anti-profiteering measures in the CGST Act, 2017 and the Rules and despite repeated media reports, objections by the buyers and also numerous number of mails etc. he had not re-calibrated the price of the flats knowingly. He has also enclosed the

sequence of events vide Annexure-14 attached to his above submissions.

35. The above Applicant vide his submissions dated 30.04.2019 has stated that the DGAP in his Report, vide para 19, has relied on clause (b) of Paragraph 5 of Schedule II of the above Act to arrive at the value of exempt ITC for the tax period from 01.07.2017 to 30.09.2018 and also on Section 17 (3) for calculating exempted value of ITC. He has further stated that Rule 42 and Rule 43 and the Notification No. 16/2019-Central Tax (Rate) dated 29th Mar 2019 provided a detailed mechanism vide which the exempted value of the ITC could be calculated. Therefore, he has argued that as per amended Rule 42 (1) (f) the value of T4 would be zero during the construction phase and entire ITC would be treated as common ITC as "*the amount of input tax credit attributable to inputs and input services intended to be used exclusively for effecting supplies other than exempted but including zero rated supplies, be denoted as 'T4'.*

36. He has further argued that it was also provided in the explanation attached to Rule 42 that "For the purpose of this clause, it is hereby clarified that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the said Act, value of T4 shall be zero during the construction phase because inputs and input services will be commonly used for construction of apartments booked on or before the date of issuance of completion certificate or first occupation of the project, whichever is earlier and those which are not booked by the said date."

Therefore, he has claimed that for the purpose of calculation of profiteering entire ITC, since T4 was Zero, should be taken into consideration as available subject to Rule 42 (1) (i).

37. He has also submitted that under Rule 42 (1) (i) a proviso has been added through the Notification No. 16/2019-Central Tax (Rate) dated 29.03.2019 which provided clarification on the manner in which the ITC on exempt supplies was to be taken in respect of each tax periods which is quoted under:-

"Provided that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the Act, the value of E/F for a tax period shall be calculated for each project separately, taking value of E and F as under:-

E= aggregate carpet area of the apartments, construction of which is exempt from tax plus aggregate carpet area of the apartments, construction of which is not exempt from tax, but are identified by the promoter to be sold after issue of completion certificate or first occupation, whichever is earlier;

F= aggregate carpet area of the apartments in the project;

Explanation 1: In the tax period in which the issuance of completion certificate or first occupation of the project takes

place, value of E shall also include aggregate carpet area of the apartments, which have not been booked till the date of issuance of completion certificate or first occupation of the project, whichever is earlier;

Explanation 2: Carpet area of apartments, tax on construction of which is paid or payable at the rates specified for items (i), (ia), (ib), (ic) or (id), against serial number 3 of the Table in the notification No. 11/2017-Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 690(E) dated 28th June, 2017, as amended, shall be taken into account for calculation of value of E in view of Explanation (iv) in paragraph 4 of the notification No. 11/2017-Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 690(E) dated 28th June, 2017, as amended."

38. The Applicant No. 1 has accordingly calculated the available ITC as per Rule 42 and Notification No 16/2019-Central Tax (Rate) dated 29.03.2019 as under:-.

Table Showing Calculation of Available Input Tax Credit Table A

Details	Explanation	Available (Rs.)
Turnover	Total Turnover during Tax Period (1 Jul 17 to 30 Sep 18)	187,645,356
T	Total Input Tax Credit	22,517,438
T1	Input Tax pertaining to Personal Exp.	Nil
T2	Attributable to Exempt Services	Nil
T3	Exempt Services as provided U/sec 17(5)	Nil

T4	As per Latest Notification T4 will be Zero till issuance of OC	Nil
C1	C1= T-(T1+T2+T3)	22,517,438
C2	C2= C1-T4	22,517,438
E	During the Tax Period 1-Jul-17 to 1 Sep 18 1) The Carpet area exempt from Tax was Nil 2) No Units identified to be sold after receipt of OC. All the units where offered for Sale hence this will also be Nil 3) Hence (1) + (2) = 0	Nil
F	Total Carpet area under sale (Saleable Area provided in DGAP report)	2,82,936
D1	D1= C2*(E/F)	Nil
D2	Since no info is shared regarding services used for Personal Use	Nil
C3	C3 = C2-(D1+D2) Total ITC available post Reversal	22,517,438

Hence the above Applicant has claimed that as per the above calculations, the total ITC available post reversal of exempt ITC in accordance with Section 17 (2) was Rs. 22,517,438/-.

39. On the basis of Input Tax Credit Available as per Table A, the percentage of profiteering has been computed by the Applicant No. 1 as under:-

Table showing calculation of Profiteering Table B

Sr No	Particulars		Amount in Rs.
1	Turnover	A	18,76,45,356
2	Available ITC as per Sec 17(2) calculated in accordance with Rule 42 and Rule 43- Post GST Period	B	2,25,17,438
3	GST Paid In Cash	C	16,072
4	CENVAT Available as per Table E DGAP report for Pre GST Period @ 2.11 % of Turnover	C	39,59,317
5	Profiteering	(D=B-C)	1,85,42,049
6	**Profiteering Percentage**	**(E=D/A)**	**9.88%**
7	Re-Calibrated Rate in Percentage	(F=100%-E)	90.12%
8	Re-Calibrated Price	(G=A X F)	16,91,05,995
9	GST @ 12%	(H=G*12%)	2,02,92,719
10	Commensurate demand price (total of turnover+GST)	(I=G+H)	18,93,98,714
11	**Profiteering Amount / Excess collection of demand**	**(J=A+B-I)**	**2,07,64,080**

The above Applicant has also claimed that the total amount of profiteering during the tax period from 1 Jul 2017 to 30 Sep 2018 worked out to Rs. 20,764,080/- as against Rs. 12,784,694/- as has been mentioned in Table F of DGAP's Report.

40. The Applicant No. 1 in his submissions dated 08.05.2019 in response to the Report dated 03.05.2019 furnished by the DGAP has stated that the above Report has been prepared on the basis of the documents and evidence submitted by the Respondent which was not correct and was misleading. He has also stated that he had rebutted each and every point mentioned in the DGAP's first Report dated 03.04.2019 along with evidence on the basis of which further investigation was required to be carried out. He has further stated that the method used for the calculation of profiteering was inconsistent with provisions of Section 17 (2) and (3) and Rule 42 & 43. The above Applicant has also claimed that the contents of para 12 (b) of the above Report which stated that the increase in the agreement value from Rs. 89,39,548/- to Rs. 92,27,211/- was due to the provisions of RERA were completely incorrect as there has been no increase in dimension or measurement of flat in the pre GST or the post GST period or the pre RERA or post RERA period. He has also contended that the Respondent has increased the price of the flats by 3% and then given discount of 2-3%. Since there was no change in the area of the flats there should not have been any increase in the prices which amounted to profiteering. He has further contended that as per the D.O. letter No. WM-10(31)2017 dated 06.08.2018 the DGAP has right

to take assistance of the State Legal Metrology Controllers to ascertain the claims made by the Respondent.

41. Vide his written submissions dated 30.05.2019 the above Applicant has raised objections against the submissions dated 17.05.2019 filed by the Respondent and the DGAP's Report. He has also alleged that after implementation of the RERA and GST, the Respondent had revised the price of the flat to Rs. 1,09,75,629/- and increased it by Rs. 6,57,289/- and hence he had filed the present complaint against the Respondent on 18.07.2018. He has further stated that the Respondent had furnished the following cost sheets during the hearing:-

Shared by Man Realty

OPA Cost Sheet on Booking	
Avenue	6
RERA Carpet Area	656
Flat No	1605
FLOOR	16
TYPE	2 BHK
Flat Cost	8,939,548
Discount	-
New Flat Cost	**8,939,548**
Installment Demanded	1,836,215
Service tax @ 4.5%	82,630
Consideration Amount less inst. demanded	7,103,333
Service tax @ 4.5%	319,650
Final Consideration Amount with taxes	**9,341,828**
Stamp Duty	536,373
Registration Charges	30,000
Vat	89,395
Other Charges	278,909
Servie Tax @15%	41,836
Total Cost	**10,318,341**

OPA Cost Sheet with Discount 3%		
Avenue	6	**Increase**
RERA Carpet Area	665	1.4%
Flat No	1605	
FLOOR	16	
TYPE	2 BHK	
Flat Cost	9,227,211	3.2%
GST Discount @3%	221,730	
New Flat Cost	**9,005,481**	0.7%
Installment Demanded	1,836,215	
Service tax @ 4.5%	82,630	
Consideration Amount less inst. demanded	7,169,266	
GST @12%	860,312	
Final Consideration Amount with taxes	**9,948,423**	
Stamp Duty	540,700	
Registration Charges	30,000	
Vat	18,362	
Other Charges	150,000	
GST @18%	27,000	
Total Cost	**10,714,485**	**3.8%**

He has further alleged that it was clear from the above Table that the Respondent has made contradictory claims and has not been able to explain the reason for increase in the base price on which he has

claimed to have passed discount. As per the above Table the Respondent has given discount of Rs. 2,21,730/- only as against the increase in cost of the flat by Rs. 2,87,663/- (Rs. 92,27,211/- - Rs. 89,39,548/-). He has further alleged that even after the discount the increase in cost was to the tune of Rs. 65,933/- in addition to the GST of Rs. 8,60,312/- on which no ITC benefit was offered by the Respondent although he was claiming ITC benefits since July, 2017. He has therefore contended that the total increase in the price of the flat was Rs. 9,26,245/- (Rs. 65,933/-+Rs. 8,60,312/-) and even if an amount of Rs. 3,19,650/- being the Service Tax @ 4.5% was reduced, the net increase in the cost of the flat was Rs. 6,06,595/- (Rs. 9,26,245 - Rs. 3,19,650/-). The above Applicant has also claimed that the Respondent had initially increased the price citing RERA by about 4% and later reduced the price by claiming to have provided discount of 2-3% arbitrarily which was not uniform. He has further claimed that the base value had increased post GST as no ITC Benefit was allowed to any buyer and the discount offered was only to adjust the increase in the prices of flats to attract timely payments which could not be treated as ITC benefit.

42. The above Applicant has also contended that the Respondent has claimed that no methodology has been prescribed by the Authority for computing the profiteering amount and hence he had done a rough calculation and passed on 2% discount as ITC. He has further contended that the Respondent had no intention to pass on the benefit of ITC and he had tried negotiating with each buyer who so ever had

approached him due to increase in the base price and provided marginal reduction to few buyers randomly. The Applicant has also argued that the Respondent being a registered person should have approached the Advance Ruling Authority as has been provided under Chapter XVII of the CGST Act, 2017 to seek clarification on computation of the exempted ITC if he was not sure how to calculate the benefit of ITC. The above Applicant has further argued that as per the RERA remedies under Section 11 (5) and Section 12 were available to him. The above Applicant has also contended that the provisions of Rule 42 (1) (f) and Rule 43 (1) (b) were declaratory in nature which clarified the method of calculation of exempt ITC and hence they should be applied retrospectively. The Applicant has also relied on the "Principles of Statutory Interpretation provided by Justice G. P. Singh" and the cases of Keshav Lal Jetha Lal Shah v. Mohan Lal Bhagwan Das, Commissioner of Income Tax v. Gold Coin Health Food Private Limited, Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. 1987 SCR (2) 1, Commercial Tax Officer, Rajasthan v. M/S Binani Cement Ltd. & another (Civil Appeal No. 336 of 2003 decided on 19.02.2014), LIC v. D. J. Bahadur (1981) 1 SCC 315 : 1981 (1) SCR 1083 and Gobind Sugar Mills Ltd. v. State of Bihar (1999) 7 SCC 76 to claim that the intent of the amendments made in Rule 42 (1) (f) and Rule 43 (1) (b) was to bring clarity in respect of exempt ITC for construction supply which was earlier missing in the above provisions and since the intent was declaratory,

these rules should be applied retrospectively as no liability was imposable on the Respondent by such application.

43. The Applicant has also claimed that the construction supply was different from the supply of goods or services as in the case of construction supply the transactions of sale were spread over a long period of time which covered multiple assessment tax periods and the cost and the revenue were misaligned which led to anomaly in the calculation of exempt ITC at a particular point of time. He has further claimed that for each tax period, the Respondent was not required to reverse the ITC pertaining to the unsold inventory and he had right to completely avail the available input tax credit and hence in order to calculate the correct amount of profiteering, the above amendments should be taken into consideration.

44. The Respondent in his submissions dated 09.05.2019 has stated that in order to execute the projects, he was incurring various costs on inputs which on the advent of GST were presumed to go down due to reduction in cascading effect of taxes which were a cost in the pre-GST regime. He has also stated that as the law was at the developing stage and no basis to determine any such benefit had been prescribed in the provisions of the GST, he, based on the taxes and duties incurred on the total construction cost in the projects completed in the past had assumed that savings between 2% to 3% of the balance consideration receivable from the customers could be passed as benefit. He has further stated that the RERA had come in to effect from 01.05.2017 due to which the carpet area of the flats was revised

and hence, the consideration of the flats was liable to be increased. However, he had not increased the consideration of the flats and passed on additional 2 to 3% discount which was also communicated to the customers, a sample copy of the email was attached as Annexure-2 by him. He has also submitted a copy of the agreement executed with a customer wherein the revised consideration after discount was mentioned, as Annexure-3. He has also claimed that in line with the above he had already agreed to pass on the benefit to his customers as was evident from his email dated 10.10.2017 sent to a customer wherein it was communicated that an amount of Rs. 1,59,085/- has been given as discount on account of GST benefit. Other customers were also sent similar emails on 10.10.2017, sample copies of which were attached by him as Annexure-4. He has further claimed that he had received the notice for investigation from the DGAP on 15.10.2018 however, he had already passed on the benefit.

45. The Respondent has also submitted that in the case of the Applicant No. 1 he had decided to increase the consideration by Rs. 1,26,593/- on account of increase in the carpet area by 9 sq. ft., however, he had agreed to pass a discount of Rs. 1,47,820/- at the rate of 2% of the balance consideration which was increased to Rs. 2,21,730/- vide communication dated 27.11. 2017, post discussion with him which was evident from Annexure-5. He has further submitted that the above fact has also been recorded by the DGAP in Para 12 (h), 27 and Table B of para 12 of the Report, which showed that an amount of Rs. 2,21,730/- has been passed on as ITC benefit to the

above Applicant. The Respondent has also contended that he has passed on benefit of Rs. 1,11,61,090/- to his customers and has complied with the provisions of Section 171 of CGST Act, 2017. It is further contended by him that since no mechanism has been provided in the GST provisions to quantify the amount of profiteering and hence, the mechanism of distribution of the benefit opted by him and the DGAP was different. He has also stated that the amount payable/receivable by different customers due to difference in the mechanism of distribution shall be set off internally and the proceedings against him should be dropped.

46. The Respondent has also stated that the above Applicant has already cancelled the flat booked with him and hence he did not have any locus standi in the matter which was also clear from Para 12 (f) of the DGAP's Report. He has further stated that the Applicant was also not the "recipient" of the service and hence he was not entitled to maintain the present proceedings. He has also claimed that this Authority has prescribed "Procedure & Methodology" in exercise of Rule 126 of CGST Rules, 2017 and vide its para 9, it has been provided that the Authority may inquire into an alleged contravention on receipt of information from an 'interested party'. He has also stated that the term 'interested party' has been defined in Explanation (c) of Chapter XV as follows:-

"(c) "interested party" includes-

a. suppliers of goods or services under the proceedings; and

b. recipients of goods or services under the proceedings;

c. any other person alleging, under sub-rule (1) of rule 128, that a registered person has not passed on the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices."

Based on the above explanation the Respondent has claimed that the Applicant was not the recipient of services and hence he ceased to be an 'interested party' in the matter. Since, the entire investigation was based on the complaint of a person who was not an 'interested party', the demand raised as per the report of DGAP must be set aside.

47. The Respondent has also submitted that he has already passed on benefit of Rs. 1,11,61,090/- to his customers on the gross amount without considering GST which the DGAP has failed to verify. He has further submitted that the facts to substantiate the same were as follows:-

- The list of such home buyers was also provided to the DGAP which was annexed as Annexure 18 to the DGAP's Report.
- In para 12 (h) of the DGAP's report, it was mentioned that the Respondent has passed on the benefit of GST to his customers.
- In para 18 of the Report, it has been observed that the argument of benefit having been passed on by the Respondent might have merit.
- In para 20 of the Report, it has been observed that the Respondent has agreed to pass on 2-3% of the amount as benefit to all the existing customers. The said discount was also offered to the

Applicant but he had cancelled the flat and hence no benefit should be given to him.

- Despite having all the information, the DGAP has concluded in Para 27 that benefit claimed to have been passed on was subject to satisfaction of this Authority.

48. It is also submitted by the Respondent that the DGAP being a fact-finding authority should have verified the details submitted by him and should have reduced the demand to the extent of benefit already passed on. However, the DGAP has chosen to ignore the details furnished by him due to which the demand has been inflated in the Report, he has alleged.

49. The Respondent has also contended that the method of calculation adopted by the DGAP in computing the profiteered amount shown in Table E was incorrect as the DGAP in para 21 has claimed that the Respondent was entitled to 2.11% CENVAT credit as compared to the turnover during the pre GST period and the ratio on the same basis was 8.10% during post GST period which has resulted in profiteering of Rs. 1.27 Crores as per Table F. Raising objections against the above computation of the profiteered amount the Respondent has argued that in the construction industry, the credit might accumulate in a particular period but the tax liability with respect to the same might arise in a different period. He has further argued that the construction activity might go on gradually which results into accrual of CENVAT credit, however, demand notices were raised as per the milestones

mentioned in the agreement and unless the milestone was achieved, the Respondent could not raise demand on the customers. He has also submitted that as per the agreement with the buyers, the milestones specified after applicability of the RERA were as per the Table C given in the Report of the DGAP. He has further submitted that the milestones specified prior to applicability of the RERA were as follows:-

Stage	Description	Percentage
1	Token Plus Booking Amount	19.90
2	On Initiation of Basement	10
3	On Initiation of Plinth	10
4	On initiation of Podium Slab	4
5	On initiation of 1st Slab	3
6	On initiation of 3rd Slab	3
7	On initiation of 5th Slab	3
8	On initiation of 7th Slab	3
9	On initiation of 9th Slab	3
10	On initiation of 11th Slab	3
11	On initiation of 13th Slab	3
12	On initiation of 15th Slab	3
13	On initiation of 17th Slab	3
14	On initiation of 19th Slab	3
15	On initiation of 21st Slab	3
16	On initiation of 23rd Slab	3
17	On initiation of 25th Slab	3
18	On initiation of 27th Slab	3
19	On initiation of Top Slab	3
20	On initiation of Brickworks	3
21	On initiation of Flooring	3
22	On Possession	5
	Total	100

He has therefore, averred that in the pre GST regime, the customer had to pay up to 20% of the total amount at the time of booking which was not construction linked and thus, the tax liability on the said value arose to the Respondent but he had very less CENVAT credit since the work done would be minimal as compared to the demand raised,

whereas in the post GST regime the customer has to pay up to 30% of the total amount at the time of agreement and which was not construction linked. Similarly, in vice-versa situation, after 25th floor slab was cast, demand could be raised only on completion of the walls of the apartment, however, credit accrued to him on the construction work carried out between completion of the 25th floor slab and walls of all the apartments. He has further averred that the demand for recovery of the instalments based on milestones could only be raised for the premises which were sold, although the expenses were incurred on the entire project, therefore, if the proportion of the premises sold was less than the total area to be constructed, the utilization of the credit would be higher. He has also claimed that the agreement for sale of premises between the buyer and the developer specified the milestones for recovery of the amount and the invoice could be raised only on achieving of the milestones when the credit accrued on incurring of expenditure on construction and therefore, there was no synchronization between the accrual of credit and the value of taxable service during any period. He has further claimed that due to this reason, the percentage of utilization of credit during the period would also vary as was evident from Table E of the Report of the DGAP as under:-

Sr. No	Particulars	July 2017 to March 2018	April 2018 to September 2018	Total (Post GST)
1	Input tax credit of GST availed (A)	3,41,65,547	1,51,21,014	4,92,86,561
2	Total Taxable Turnover (B)	4,19,35,865	14,00,25,471	18,19,61,336

3	Total saleable area (C)	2,82,936	2,82,936	2,82,936
4	Area sold relevant to turnover (D)	84,643	84,643	84,643
5	Relevant Credit – (E) = A*D/C	1,02,20,949	45,23,595	1,47,44,544
6	Ratio of Input Tax Credit Post GST (F=E/B)	24.37%	3.23%	8.10%

On the basis of the above the Respondent has contended that the ratio of availment of the ITC to the taxable turnover for the period from July-2017 to March-2018 was 24.37% and for the period from April-2018 to September-2018 was 3.23% and the average percentage of availment which has been shown in Table- E was 8.10%. Thus, he has further contended that the variation in the utilization of credit between the two periods both falling under the GST regime itself substantiated that there was no synchronization between the accrual of credit and raising of demand. He has also stated that in the present case, only excavation and basement work was started in the pre GST regime and the CENVAT credit of Rs. 1.20 Crore mainly pertained to the services like marketing and legal etc., however, demands of Rs. 27.83 Crore have been raised on the customers which were not construction linked. He has further stated that the demand was only of 20-30% of the amount at the time of booking of the flats but the corresponding expenditure incurred was only 6.2% of the project cost which showed that the method adopted by the DGAP was incorrect. He has also claimed that in this case the expenditure was incurred during mid August-2018 to Setpember-2018 for Tower 6 when the activity of 11th floor slab was going on, however, the demand could not be raised in October 2018 as the milestone was not achieved. He has also

submitted that the total credit on account of 11th floor slab was taken in the calculation shown in Table E, but there was no corresponding taxable turnover and thus, the credit had accrued and was availed but corresponding income had not accrued. A summary of the above claim has been given by the Respondent as follows:-

Bldg.	Demand Notice Prior to 30-09-2018	Milestone for prior demand	First Demand Notice after 30-09-2018	Milestone for subsequent demand	Credit to be reduced for period
Tower – 6	15-08-2018	6th Floor Slab	29-10-2018	11th Floor Slab	15-08-2018 to 30-09-2018

Accordingly, he has claimed that the credit availed figure during the post GST period from 15.08.2018 to 30.09.2018 amounting to Rs. 77,04,291/- must be reduced in Table E.

50. The Respondent has also contended that in the pre GST regime, services were subject to Service Tax at the rate of 15% but under the GST, in most of the cases, they were taxable at 18%, therefore, there was an increase of 3% in the ITC available to the Respondent which was not due to any additional benefit but due to increase in the rate of tax. This credit was available to him even before the GST and hence, he could not be asked to transfer this additional credit to the customers. He has shown the impact due to increase in tax rate of services as follows:-

Particulars	Pre-GST	Post-GST
ITC (assuming services of Rs. 100 received from a vendor)	15	18
Taxable turnover	120	120
% of Credit	12.5%	15%

Based on the above the Respondent has stated that if the value of service received and value of service provided pre and post GST had remained the same, there was an increase of 2.5% of ITC, however, in reality, there was no additional benefit arising to him as he had paid additional 3% tax to the service providers and taken ITC of the same. Thus, he has further stated that in order to arrive at the correct profiteered amount the credit figures must be revised for the services availed by him during the period from July 2017 till September 2018 as per the following Table:-

Sr. No.	Particular		Amount
1	Taxable Value of Input Services (pure service contracts)	A	15,10,53,932
2	ITC availed on these services (18%)	B	2,68,83,251
3	Service Tax if leviable – 15%	C = A * 15%	2,24,02,709
4	**Additional input tax credit**	**D = (B – C)**	**44,80,542**

He has also submitted that this amount of Rs. 44,80,542/- was not an additional benefit thus the same must be reduced from the post GST period for calculation as given in Table E of the DGAP report.

51. The Respondent has also pleaded that in the pre GST era, he has availed CENVAT credit of Rs. 1,20,28,877/- for total saleable area of

2,82,936 sq. ft. and the area sold relevant to the taxable turnover of that period was 1,37,948 sq. ft. and therefore, the DGAP has considered proportionate CENVAT credit of Rs. 58,64,788/-, similarly, for the GST period, the DGAP has worked out the proportionate ITC to be Rs. 1,47,44,544/-. However, he has submitted that area considered by the DGAP as 1,37,948 sq. ft. in Table E as area sold in the pre GST regime was not correct. As stated in the Annexure-18 of the Report, the total area of the flats sold was 1,22,050 sq. ft. in the pre GST regime and in the post GST regime, area measuring 5,598 sq. ft. has been sold and thus the area sold relevant to the taxable turnover of Rs. 27,83,31,886/- for the period from April-16 to June-17 was only 73,837 sq. ft. in the pre GST regime. Similarly, area sold relevant to the taxable turnover of Rs. 18,19,61,336/- for the period from July-17 to Sept.-18 was only 44,901 sq. ft. in the post-GST regime. The reason for the demand being raised against only few customers was that the market situation on advent of GST was not good as around 30% the bookings of the pre GST regime had been cancelled in the post GST regime, i.e., area measuring to 43,005 sq. ft. area had been cancelled which has also been noted in Annexure 18 of the Report. He has also claimed that the DGAP has considered the area pertaining to the total sales even if there was no demand notice issued for the same during the period. The customer-wise area sold, and amount charged statement has been attached by the Respondent as Annexure-6. He has further submitted that out of area measuring 43,005 sq. ft., demand pertaining to 7,855 sq. ft. was raised in the pre GST regime

which was included in the taxable turnover of Rs. 27,83,31,886/-. He has also contended that since the flats were cancelled therefore, the taxable turnover and its corresponding area should not be included in the pre GST figures considered by the DGAP. The details of the customers who had purchased the area measuring 7,855 sq. ft. and who were included in the pre GST taxable turnover has been attached by him as Annexure-7. Accordingly, he has claimed that the area relevant to turnover in the pre GST regime was 65,892 sq. ft. (73837-7855) and in the post GST regime it was 44,901 sq. ft. He has therefore, contended that accordingly the proportionate ITC must be re-calculated as per the relevant area sold. He has submitted the following Table to substantiate his claim:-

Particular	Pre-GST	Post-GST
CENVAT/ITC	31,39,142	58,87,921
Turnover	27,83,31,886	18,19,61,336
Ratio	**1.13%**	**3.21%**

The break-up of the above calculation has been given by the Respondent in Annexure-8.

52. The Respondent has also claimed that the DGAP has also included 12% GST charged by him from the customers in the profiteered amount which was evident from para 25 of the DGAP's Report as the basic profiteered amount has been shown as ₹ 1,08,99,484/-. He has further claimed that the DGAP has wrongly mentioned that the base profiteered amount was Rs. 1,14,14,905/- as the balance amount of ₹ 18,85,210/- was towards the GST and hence, the excess collection made by him was only ₹ 1.08 Crore as the excess GST collected has

duly been deposited with the Government, therefore, the same could not be considered as the profiteered amount to be passed on to the customers. He has also relied on the following definitions of profiteering to support his case:-

- Black's Law Dictionary - The taking advantage of unusual or exceptional circumstances to make excessive profits
- Law Lexicon - To seek or obtain excessive profits, one who is given to making excessive profits
- Shorter Oxford English Dictionary - Make or seek to make an excessive profit
- Mount vs Welsh - Any conduct or practice involving the acquisition of excessive profit
- Islamic Academy of Education vs State of Karnataka - Profiteering would mean taking advantage of unusual or exceptional circumstances to make excessive profits.

On the basis of the above definitions he has argued that only that amount which has been collected and kept by him could be termed as "profiteering" and the amount which have been paid by him to the Government or to the customers as a part of the GST benefit could not be considered as 'profiteering' and therefore, an amount of Rs. 18,85,210/- collected as GST and paid to the Government should be excluded from the profiteered amount. He has further argued that the excess amount collected by him excluding the GST amount was Rs. 1,08,99,484/- whereas the benefit passed by him was Rs.

1,11,61,090/- and thus, he has passed on excess benefit to the customers.

53. The Respondent has also claimed that the DGAP in para 23 and Table F of his Report has considered rate of tax as 12% in the post GST period and the rate of tax in the pre GST regime of Service Tax and VAT has been taken to be 4.5% and 1% respectively which has been assumed to be applicable on the entire agreement value. He has further claimed that as per Section 9 of the CGST Act, 2017 the tax shall be levied on supply of goods or services on which the value was determined under section 15 of the Act at such rate as may be notified by the Government and thus, the notified rate must be considered as the 'tax rate'. He has also argued that the DGAP has concluded that the increase in the tax rate was only 6.5% [12% GST–(4.5% Service Tax + 1% VAT)] which was incorrect. In this connection he has contended that in the pre GST period Service Tax was payable on the services; whereas VAT was payable on the goods. He has further contended that the rate of tax on services was 15% payable on 30% (70% was abatement) of the total value as per Notification No. 26/2012-ST dated 20-6-2012 and although the rate of VAT was different from State to State it was in the range of 1% on the total value including the value of the land. He has also stated that in the post GST period, the rate of tax on construction service was 18%, but for determining the value, abatement of 1/3rd of the value of agreement towards land was allowed and thus, if the agreement value was Rs. 100/- the tax was payable on Rs. 67/- only. He has further stated that as per the judgment passed in

the case of Larsen & Toubro Ltd., reported as 2014 (34) STR 481 (SC) service provided by the builder/developer was classified as works contract and therefore, value of land included in the price was required to be excluded to arrive at the taxable value under section 15 of the CGST Act, 2017. He has also claimed that the rate of tax was always applied on the taxable value which was also required to be declared in the ST-3 returns under the Service Tax regime and GSTR-3B returns under the GST regime and hence, the rate of tax must be determined based on the rate applicable on the taxable value. Therefore, in order to make the rates in the pre and post GST comparable, rate of tax in the pre GST period needed to be determined on the same basis i.e. after permitting abatement of 33% from total value. He has also submitted that abatement of 70% from the total value was permitted under Notification No. 26/2012-ST dated 20-6-2012, thus, tax at the rate of 15% was payable on 30% of total value due to which Service Tax of Rs. 4.5 (15% on Rs.30) was payable on Rs. 100/- which included value of land and if the value of land was excluded the rate of Service Tax would be 6.72%. (4.5/67 x 100). Similarly, the rate of VAT was 1% in Maharashtra and therefore, to determine the rate of VAT after abatement of 33% (for value of land) from total value, VAT rate would be 1.49% [1/67 x 100]. Thus, the total rate of tax on construction service in the pre GST regime based on the principle laid in the GST regime was 8.21% (6.72% + 1.49%) and therefore, increase in rate of tax on comparing the same with the GST regime was 9.79% (18 – 8.21) and not 6.5% as has been concluded by the DGAP. The Respondent has

also argued that increase in the rate of tax on the outward supply made by him was more than the increase in the credit available to him after coming in to force of the GST by 9.8% and therefore, there was no profiteering in his case. The Respondent has also relied upon the Order No. 3/2018 dated 04.05.2018 passed by this Authority in the case of M/s KRBL Ltd. wherein it was held that if the increase in tax rate was more than the increase in the credit amount, there was no additional benefit which was required to be passed on.

54. In his submissions dated 17.05.2019 the Respondent has reiterated the submission which were made by him on 09.05.2019 and further added that at the time of booking of the flat a person was required to fill up an enquiry form and then to confirm the booking an application form was required to be filed which indicated the total consideration payable for the flat. He has also stated that as per the terms and conditions specified in the application form it was clearly mentioned in para Nos. 10, 11 & 16 that the "Common Area Maintenance (CAM) Charges including building CAM and Federation CAM, sinking fund, advance property tax, club usage charges and select other reimbursements shall be payable as actual. The agreement for sale shall be executed and registered in favour of the intending allottee(s) within a reasonable time. Cost of all stamp duty and registration/mutation, documentation charges, etc. as applicable will be extra and shall be borne by the intending allottee(s). The intending allottee(s) shall pay as and when demanded by the Company, VAT, Stamp Duty and Registration Charges/Mutation Charges and all other incidental and legal expenses

for execution and registration of Agreement for Sale/mutation of the Flat in favour of the intending allottee(s). The intending allottee(s) agrees to pay the total sale price and other charges of flat as per the payment plan to be mentioned in the Allotment letter/Agreement sale."

He has also claimed that it was evident from the above that the other charges were payable in addition as had been mentioned in the application form. He has further claimed that the above Applicant has paid Rs. 4,62,622/- within a month of booking which roughly amounted to 5% of the basic flat cost of Rs. 92,27,211/-. Thus, the Applicant had also considered the basic flat cost without other charges as Rs. 92,27,211/- otherwise the applicant would have only paid 5% of Rs. 89,39,548/-. Therefore, he has claimed that the agreed amount without other charges was Rs. 92,27,211/- on which 2% GST discount was offered by him to the above Applicant as per his email dated 10.10.2017. He has further claimed that the GST was made effective w.e.f. 01.07.2017 and due to incorporation of Section 171, he has offered the discount which was nothing but the GST discount and not 'normal business discount'. He has also stated that during the initial phase of introduction of GST, its impact on the cost of input and input services was difficult to be assumed therefore, on adhoc basis, he had decided to pass on 2% GST discount. However, many customers had approached him again therefore, in such cases he had increased the discount to 3%.

55. The Respondent has also claimed that the above Applicant has computed the profiteered amount as Rs. 2,07,64,080/- by considering

the amount of credit utilised by him and arrived at the ratio of 9.88% as compared to the ratio of 5.99% computed by the DGAP which was incorrect.

56. The Respondent has also stated that Section 171 of the CGST Act, 2017 provided for passing on the profiteered amount on account of reduction in the cost and since the opening balance and the procurement to be done in future did not pertain to a particular period therefore utilisation figures could not be used for computing the profiteered amount. It is further stated by him that the above Applicant has objected that the reversal of ITC should not be considered for the computation of profiteered amount which was incorrect. He has also submitted that the DGAP has computed the profiteered amount for various companies under the real-estate sector by using the same principle as has been adopted in Table E of the DGAP Report. He has further submitted that the principle followed by the DGAP was correct and therefore, re-computing of the profiteered amount based on some other principle would be wrong. It is also contended by him that the demand letter issued to the above Applicant was prepared by him on 04.03.2017 and the entry for the same in the books of accounts was also made on the same date. He has further contended that the taxable value of the demand raised on the Applicant and the Service Tax amount was also reflected in the Service Tax returns filed by him for the period from October 2016 to March 2017. He has also submitted a copy of ledger to substantiate the transaction which took place on 04.03.2017 which has been attached as Annexure-1 along with the Certificate of CA

which has been attached as Annexure-2. It is further contended by him that a demand letter was never signed by the customer and the demand letter submitted by him to the DGAP for verification did not contain the signature of the Applicant. It is also submitted by him that the increase in the price on account of RERA has no relevance with the provisions of Section 171 of the CGST Act, 2017. He has also claimed that the booking value of the flat in the booking form/ application form was Rs. 92,27,211/- and increase in the price pointed out by the above Applicant actually had not taken place at all which could be ascertained from the email dated 10.10.2017 sent by him to the Applicant intimating that on account of RERA the price would increase only by Rs. 1,26,593/- and in the same mail itself it has been mentioned that the Respondent was not charging for the increased area which could be substantiated by the revised cost sheet in the same mail wherein 2% discount has been given. The Respondent has also claimed that the above Applicant has stated that he had held discussions with many other home buyers who had objected to the increase in the price and only then the Respondent had given discount of 2-3% which was also not acceptable to them. The Respondent has pleaded that since no other home buyer had lodged any complaint the claim made by the above Applicant on this behalf was not correct.

57. The Respondent has also claimed the profiteered amount could not be computed on the value of the flats sold as the cost of consideration could rightly be apportioned based on the area. He has further claimed that the above view was also affirmed by introduction of new

mechanism of reversal of ITC under Rule 42 of the CGST Rules, 2017 brought into effect from 01.04.2019 vide Notification No. 16/2019-CT dated 29.03.2019. Even in the said rule reversal of ITC for the construction industry has been provided by bringing in the mechanism to reverse the credit based on saleable area, whereas for other industries the reversal has been provided based on the amount, in view of which the objection of the Applicant could not be accepted. The Respondent has also argued that the above Applicant has wrongly tried to point out that the entire ITC availed by the Respondent was available on the date of investigation and nothing needed to be reversed. He has also claimed that the above Applicant has only pointed out the provisions of Rule 42 (1) of the CGST Rules, 2017 and has not referred to Rule 42 (3) wherein calculation of the reversal needed to be done on receipt of OC by considering the entire ITC availed by the project from 01.07.2017.

58. The Respondent has also submitted that no GST benefit was required to be passed on to the new customers as the flats have been booked after GST has been implemented and there was no additional benefit of GST to the Respondent which needed to be passed on to such customers. He has further submitted that the agreements entered into with these customers have fixed price for the sale of the flats which excluded GST and the Respondent has duly charged 12% GST to them as per the agreed terms, hence, there was no benefit of pre GST regime which would accrue to these customers. However, he has stated

that without prejudice to the above submissions, the benefit at 2.09% may be passed on by the Respondent to the above customers.

59. In his submissions dated 30.05.2019 the Respondent has given the customer wise GST discount passed on to all the 65 flat owners as per Annexure-1 during the post GST period and details of the demands which have been raised on 61 flat buyers amounting to Rs. 18,19,61,336/- as per Annexure-6 attached to his submissions dated 09.05.2019. He has also claimed that the total discount passed on to all the 65 flat buyers was Rs 1,11,61,090/- on the total value as per the agreements less the value of the demands raised in pre GST regime. Thus, the discount has been provided on all the demands which would be raised/would be raised in the post GST regime. He has also claimed that the GST discount passed on to the 61 flat buyers on which the demands have been raised was Rs. 92,54,051/- which was attached as Annexure-2.

60. The Respondent has also alleged that the DGAP has calculated the profiteered amount in respect of the five buyers on whom no demand has been raised in the post GST period, the details of which have been attached as Annexure-3 and therefore, the profiteered amount should be reduced by Rs. 3,32,326/- as the Respondent was required to pass on ITC benefit of 2.09% which amounted to Rs. 38,02,991/- (18,19,61,336 * 2.09%) only.

61. He has also submitted details of the project as follows:-

a) Total number of flats in the project was 429 having total area of 2,82,936 sq. ft.

b) Total number of flats sold in the pre GST period was 153 which were having total area of 1,22,050 sq. ft. which was wrongly taken by DGAP as 1,37,948 sq. ft.

c) Flats booked in the pre GST period and cancelled up to date were 51 having total area of 43,005 sq. ft.

d) Number of flats on which demands were raised in the post GST period up to September 2018 was 61 which were having total area of 44,901 sq. ft.

62. The Respondent has further submitted the details of the project as on 01.04.2019 as under:-

i) 95 flats having total area measuring 70,287 sq. ft. were sold.

ii) 334 flats having total area measuring 2,12,649 sq. ft. were unsold.

iii) 73 flats having total area measuring 62,348 sq. ft. were cancelled.

63. The Respondent has also contended that every applicant was required to fill-up an application form in which the sale price of the flat was specified on which he has given discount. He has further contended that the application form of the applicant was also submitted along with his submissions filed on 22.05.2019 which showed that the sale price agreed with him was Rs. 92,27,211/- and the GST discount has been offered by reducing the price from the agreed price.

64. In his submissions dated 23.07.2019 the Respondent has stated that the discount given by him was not the commercial discount as the price of the flat was not increased factually which was conveyed to the above Applicant vide letter dated 24.11.2018.

65. The Respondent has also stated that the above Applicant has pointed out that the Respondent should have approached the Advance Ruling Authority in case he was not aware of the methodology and procedure to compute the benefit of ITC to be passed on. The Respondent has claimed that he had not claimed that there was no procedure to determine the exempt ITC and he had only mentioned that there was no prescribed procedure or mechanism to determine the amount of ITC to be passed on to the customers and accordingly, he has passed on the benefit on adhoc basis.

66. The Respondent has also contended that the Applicant No. 1 has pointed out arithmetical errors on the part of the DGAP in the Table F of his Report which were required to be corrected. He has further contended that the GST amount @12% amounted to Rs. 2,18,35,360/- only and thus, the profiteered amount mentioned at Sr. No. 12 of the Table F would be Rs. 1,22,07,422/- instead of Rs. 1,27,84,694/-. Similarly the taxable value as per the GSTR-3B returns was Rs. 18,76,45,356/- as against the DGAP's figure of Rs. 18,19,61,336/- and the GST amount as per the GSTR-3B returns was Rs. 2,25,17,438/- as against Rs. 2,24,14,930/-. He has claimed that this difference was on account of the mechanism applied by the DGAP as he has considered the demand figures pertaining to the construction service only and has not considered the other taxable transactions not related to the profiteered amount and hence the figures considered by the DGAP were correct. He has also claimed that Section 17 (2) and 17 (3) of the CGST Act, 2017 applied on the reversal of ITC only in the case of

completion of the projects and could not be applied during the construction phase of the project.

67. The submissions of the Applicant No. 1 were forwarded to the DGAP on 25.04.2019 for his Report. The DGAP vide his Report dated 03.05.2019 has stated that the issues raised by the Applicant No. 1 have already been addressed in his detailed Investigation Report dated 03.04.2019.

68. We have carefully considered all the submissions filed by the Applicant No. 1, the Respondent and the other material placed on record and find that the Applicant No. 1 along with his wife Mrs. Reshmi Nair had filled Application Form on 12.02.2017 vide Application No. OPA1108 for the allotment of Flat No. 1605, 16th Floor, Avenue-6 of the "One Park Avenue" project situated in Thane, Maharashtra floated by the Respondent (Annexure-1 of the DGAP Report). He had also made payment of Rs. 1,00,000/- vide cheques No. 000027 dated 14.02.2017 drawn on the HDFC Bank by way of earnest money for booking of the above flat and had agreed to pay the balance price fixed by the Respondent and execute the agreement. As per para 8 of the above form the Applicant had agreed to make prompt payment of the instalments and as per para 9 he had also consented that the all other taxes, duties and cesses shall be separately paid by him. He vide para 10 had further agreed that the charges on account of CAM, Sinking Fund, Property Tax, Club Fee and reimbursements shall also be paid additionally by him. The sale agreement was also to be executed by him within a reasonable time as per para 11 of the application form. The above flat was allotted to him on 25.02.2017 for a total consideration of

Rs. 1,03,18,340/- as per the details furnished by the above Applicant vide Annexure-14 of his submissions dated 25.04.2019. He had also paid first instalment of Rs. 3,62,622/- on 16.03.2017.

69. It is also revealed from the record that the above Applicant vide his complaint dated 18.07.2018 (Annexure-1 of the Report) had alleged that the Respondent had increased the price of the flat after introduction of GST and was not passing on the benefit of ITC to him in spite of the fact that he was availing ITC on the purchase of the inputs at higher rates of GST which had resulted in benefit of additional ITC to him and was also charging GST from him @12%. The above complaint was forwarded by the Maharashtra State Screening Committee to the Standing Committee on Anti-Profiteering for further action. The complaint was examined by the Standing Committee in its meeting held on 06.09.2018 and was forwarded to the DGAP for investigation who vide his Report dated 03.04.2019 has found that the ITC as a percentage of the total turnover which was available to the Respondent during the pre GST period was 2.11% and during the post GST period this ratio was 8.10% as per the Table E mentioned above and therefore, the Respondent had benefited from the additional ITC to the tune of 5.99% (8.10% - 2.11%) of the total turnover which he was required to pass on to the flat buyers of this project. The DGAP has also found that the Respondent has not reduced the basic prices of his flats by 5.99% due to additional benefit of ITC and by charging GST at the increased rate of 12% on the pre GST basic price, he has contravened the provisions of Section 171 of the CGST Act, 2017. The DGAP has

further submitted that the amount of benefit of ITC which has not been passed on by the Respondent or the profiteered amount came to Rs. 1,27,84,694/- which included 12% GST on the basic profiteered amount of Rs. 1,14,14,905/-. The DGAP has also intimated that there was no demand raised on the Applicant No. 1 in the post GST era therefore, the amount of profiteering in case of the Applicant No. 1 was nil. He has also supplied the details of all the buyers who have purchased flats from the Respondent along with their unit numbers and the profiteered amount vide Annexure-18 attached with the Report.

70. The Applicant No. 1 has stated in his submissions that the Respondent has paid only Rs. 16,072/- in cash and utilised Rs. 2,25,17,438/- from the ITC to discharge his output tax liability and hence the profiteering was 11.99% of his turnover and not 5.99%. However, the claim made by the above Applicant is not correct as he has taken the whole amount of ITC which the Respondent has utilised for payment of his output tax liability whereas for calculation of profiteered amount only the relevant ITC proportionate to the sold area is to be taken for computation of the profiteered amount as is clear from Table E supra of the Report wherein relevant ITC of Rs. 1,47,44,544/- has been computed for the post GST period and Rs. 58,64,788/- for the pre GST period. Hence, the ratio of ITC to the turnover has rightly been computed by the DGAP as per Table E of his Report.

71. The above Applicant has also raised objections against the genuineness of the demand letter dated 04.03.2017 (Annexure-2 of his submissions dated 25.04.2019) written by the Respondent to him and

has claimed that it has been forged. However, perusal of the record shows that the above Applicant has admitted vide Annexure-14 of his submissions that he had booked a flat in the above project of the Respondent on 25.02.2017 and hence he was liable to pay 20% of the consideration as per the schedule of payment mentioned in Table C of the Report, as per para 8 of the terms and conditions mentioned in the application form. However, he has paid only 5% of the demand by depositing Rs. 4,62,622/- against the demand of Rs. 14,36,723/- raised through the above letter. He had also not paid arrears of the VAT of Rs. 18,362/- demanded by the Respondent vide Annexure-3 and 4 attached by the Applicant which he was required to pay as per para 9 of the application form. Even if it is admitted that he has not received the above letter he was himself required to make payment as per para 8 and 9 mentioned above which he has not done. His liability to pay the amount demanded by the Respondent had arisen as per the terms of his allotment and he cannot claim that he was not bound to pay the same till the Respondent had obtained registration under the RERA. The Respondent has produced evidence including the entries made in his account books to prove that he had infact written the above letter and hence the above allegation of the Applicant is not correct.

72. The above Applicant has also claimed that the Respondent had arbitrarily increased the area and the price of the flat after coming in to force of the RERA. Although, this Authority has no mandate to look in to the increase in the area as per the above Act but it has certainly mandate to look in to the price rise affected by the Respondent post

implementation of GST w.e.f. 01.07.2017 and it is revealed that he has increased the basic price of the flat by Rs. 2,87,683/- i.e. by 3.22% in respect of the above Applicant from Rs. 89,39,548/- to Rs. 92,27,211/- as is clear from Table B of the Report as well as the cost sheet submitted by the Respondent which has been mentioned in para 41 supra, on the ground that there was increase in the carpet area as well as due to implementation of the GST. Perusal of Annexure-4 submitted by the Respondent on 09.05.2019 shows that he has also increased the price in respect of other buyers also on the above grounds in the months of November/December 2017, which he could not have done as he was required to reduce the price commensurately as per the benefit of ITC which he had started receiving after coming in to force of the GST w.e.f. 01.07.2017 and hence the allegation made by the above Applicant in this regard is correct.

73. The above Applicant has also contended that the Respondent has wrongly increased the gross price of his flat by Rs. 6,57,290/- from Rs. 1,03,18,340/- to Rs. 1,09,75,630/-. He has similarly increased the prices of the flats which he has sold to the other buyers. The above contention of the Applicant is correct as is apparent from Table A of the Report of the DGAP which states that the Respondent has infact increased the gross price of the flat bought by the Applicant as well as the other buyers. However, the claim made by the Applicant that the charges on maintenance and registration etc. were included in the base price of Rs. 89,39,548/- is not correct as is apparent from para 9 and 10 of the application form.

74. The above Applicant has also stated that his allotment was cancelled as he had made complaint to this Authority. In this connection it would be relevant to mention that the above Applicant was fully entitled to file complaint for violation of the provisions of Section 171 of the CGST Act, 2017 on 18.07.2018 (Annexure-1 of the Report) as he was having subsisting relationship of recipient with the Respondent as booking of his flat was cancelled by the Respondent on 24.11.2018 only.

75. The above Applicant has also claimed that his allotment was arbitrarily cancelled by the Respondent due to his filing of the present complaint. However it is clear from the perusal of the emails enclosed as Annexure-5 by the Respondent that the above Applicant himself wanted to cancel the booking as far back as October/ November 2017 and hence his allegation that his booking was cancelled as an act of vendetta is not borne out from the record. Further, the Respondent has cancelled his allotment as per the terms of para 5 of the application form vide his letter dated 24.11.2018 which were agreed to by the Applicant himself and therefore, he cannot resile from his commitment.

76. There is no evidence to suggest that the other home buyers had not accepted the discount of Rs. 1,11,61,090/- offered by the Respondent and hence the allegation made by the above Applicant could not be established.

77. The above Applicant has also submitted that the figures mentioned in column Nos. 7 & 8 of Table E of the DGAP Report of saleable area and sold area were not relevant. However, this argument of the Applicant is wrong as the above figures are very much relevant for calculation of the

profiteered amount and hence the argument made by the Applicant in this regard cannot be accepted.

78. The Applicant has also claimed that the provisions of Section 17 (2) of the above Act were not applicable while computing profiteering which is wholly untenable as ITC was required to be calculated after taking in to account the provisions of the above Section.

79. The above Applicant has also submitted that it was wrong to consider ITC based on the area for calculation of profiteering and it should be computed on the basis of the amount charged for the flat. However, this contention of the Applicant is seriously flawed as the ITC benefit has to be calculated on the basis of the area purchased by each buyer and the amount paid by him post GST.

80. The above Applicant has also claimed that the Respondent has paid less GST of Rs. 1,02,508/- during the month of November, 2017 and the description of ITC mentioned in column No. 4 of Table E as ITC availed was required to be shown as the ITC available. He has further claimed that the figure of turnover given in column No. 6 of Table E should be Rs. 18,76,45,356/- and not Rs. 18,19,61,336/-. The Applicant has further claimed that the figures given in column No. 6 of Table F supra were not correct. He has also submitted that the profiteered amount ought to be Rs. 2,07,64,080/- instead of Rs. 1,27,84,694/- and this amount was also not correct as GST had been added twice in it. However, the above contentions of the Applicant have not been admitted by the DGAP vide his Report dated 03.05.2019 and he has maintained that the Report submitted by him was correct as it was

based on the returns filed by the Respondent. Perusal of the record also shows that the above figures are correct and hence the above claims of the Applicant cannot be accepted.

81. The above Applicant has also pleaded that the Respondent was legally bound to pass on the benefit of ITC and reduce his prices commensurately as per the provisions of the above Act as well as the clarifications issued by the Govt. The above argument of the Applicant is correct and the Respondent is bound to follow the provisions of Section 171 of the CGST Act, 2017.

82. The Applicant has also contended that the DGAP has relied on the provisions of Section 17 (2) and 17 (3) of the CGST Act, 2017 and clause (b) of para 5 of Schedule II while calculating the value of ITC but he has not taken in to account the provisions of Rule 42 and 43 of the CGST Rules, 2017 which provide detailed mechanism for calculation of the same. Perusal of Rule 42 of the CGST Rules, 2017 shows that it provides "Manner of determination of input tax credit in respect of inputs or input services and reversal thereof" and Rule 42 (1) (i) of the above Rules provides the method of calculation of ITC attributable to exempt supplies. Rule 43 provides "Manner of determination of input tax credit in respect of capital goods and reversal thereof in certain cases". Thus, it is apparent that whereas the provisions of Section 17 (2) and 17 (3) provide the overall basis for calculation and reversal of the ITC, the provisions of Rule 42 and 43 provide the detailed mechanism for calculating the same. Therefore, the calculation of available ITC of Rs. 2,25,17,438/-post reversal given by the Applicant in Table A cannot be

accepted as the Respondent has not obtained the OC and hence there is no question of reversal of ITC, hence, the provisions of Rule 42 and 43 as have been applied by the above Applicant do not apply in the present case. The calculation of profiteered amount of Rs. 2,07,64,080/- as per Table B is also not correct as it has not been calculated on the basis of the relevant ITC in proportion to the area sold and is based on the ITC computed vide Table A. Therefore, the contentions of the above Applicant made in this behalf are frivolous and hence they do not merit consideration.

83. The above Applicant has also contended that the Respondent has increased the basic price of the flat from Rs. 89,39,548/- to Rs. 90,05,481/- by 3.2% and had offered him discount of Rs. 2,21,730/- @ 3% which clearly showed that the above discount had been given to cover the enhanced price and no benefit of ITC was given to him. The above contention of the Applicant has merit as the Respondent has increased the base price of the flat due to the provisions of RERA and coming in to force of the GST and hence the same is correct. It is abundantly clear from the perusal of letter dated 24.11.2018 (Annexure-8 submitted by the Applicant), written by the Respondent to the above Applicant in which he had claimed that there has been revision in the cost of his flat due to implementation of the GST (Bullet Point No. 4) and he had offered him discount of 2% due to this increase which was subsequently increased to 3% vide his email dated 18.11.2018 (Annexure-7 of the Applicant). This statement of the Respondent is completely incorrect as there was bound to be commensurate reduction

in the price of the flat due to the additional ITC w.e.f. 01.07.2017 and not increase. As per Table given in para 41 supra the increase has been shown on account of increase in the area of the flat due to coming in to force of the RERA. Therefore, the Respondent has made contradictory claims which only go to establish that this discount was not give due to the additional benefit of ITC which the Respondent has availed but just to set off the cost increased by him so that the Applicant did not cancel the bookings. The Respondent has similarly given discount of 2-3% arbitrarily and selectively to the other home buyers as is apparent from his emails enclosed with his submissions as Annexure-4 as well as Annexure-18 enclosed by the DGAP with his Report. The Respondent was at liberty to approach the Advance Ruling Authority in case he was not able to compute the benefit of ITC to be passed on to the buyers. Therefore, he cannot claim that he was not able to pass on the above benefit as he had no mechanism to do so.

84. The Applicant has also relied on the "Principles of Statutory Interpretation provided by Justice G. P. Singh" and the cases of Keshav Lal Jetha Lal Shah v. Mohan Lal Bhagwan Das, Commissioner of Income Tax v. Gold Coin Health Food Private Limited, Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. 1987 SCR (2) 1, Commercial Tax Officer, Rajasthan v. M/S Binani Cement Ltd. & another (Civil Appeal No. 336 of 2003 decided on 19.02.2014), LIC v. D. J. Bahadur (1981) 1 SCC 315 : 1981 (1) SCR 1083 and Gobind Sugar Mills Ltd. v. State of Bihar (1999) 7 SCC 76 to claim that the intent of the amendments made in Rule 42 (1) (f) and Rule 43 (1) (b) of

the CGST Rules, 2017 was to bring clarity in respect of the exempt ITC for construction supply which was earlier missing in the above provisions and since the intent was declaratory, these rules should be applied retrospectively as no liability was imposable on the Respondent by such application. In this regard it is submitted that as has been discussed in para supra above the provisions of Rule 42 (1) (f) and 43 (1) (b) are not applicable in the present case as has been proposed by the Applicant as the Respondent has not obtained OC as yet. There is also no provision of applying them retrospectively in the CGST Act, 2017 or the notification issued under it as the law requires that in case a notification is to be implemented retrospectively the intention has to be mentioned in the notification itself. Therefore, the above judgements cited by the Applicant do not further his cause. The Order No. 7/2018 passed on 18.09.2018 by this Authority in the case of Sukhbir Rohilla & others v. M/s Pyramid Infratech Pvt. Ltd. is also of no help to him as the relevant ITC has been calculated after taking in to account the unsold area in that case also.

85. The above Applicant has also claimed that the Respondent was not required to reverse the ITC on the unsold houses. The above claim is contrary to the provisions of Section 17 and clause (b) of para 5 of Schedule II of the CGST Act, 2017 and hence the same cannot be accepted.

86. The Respondent has claimed that he has passed on the GST benefit of 2-3% to his customers as he was not able to compute the exact benefit. However, this claim of the Respondent is incorrect as firstly he has

increased the prices of the flats on the ground that their area had increased due to the RERA provisions and secondly he has given different discounts to different buyers. The Respondent has submitted copy of the email (Annexure-2) addressed to one Sh. Shailesh Nanaware in his support which shows that a discount of Rs.1,59,085/- @ 2% has been given to him due to increase in the cost based on the increase in the area as per the RERA norms. Perusal of the emails enclosed as Annexure-4 by the Respondent also shows that the allottees have been given different discounts due to increase in the area of their flats and there is no mention of the discount being offered on account of the ITC benefit. The Respondent has also not produced any evidence to prove that the above discount was computed by him on the basis of the ITC availed by him. There is also no entry in his ledgers to show that this discount was due to ITC benefit. Therefore, there is no ground to believe that the above discount as well as the additional discount was given on account of the ITC benefit and there is no doubt that this discount was given only due to commercial reasons and hence the contention made by the Respondent in this regard cannot be accepted.

87. The Respondent has also claimed that he had offered to pass on discount of Rs. 2,21,730/- to the above Applicant on account of GST benefit. However, the same is not borne out from the record as the above amount has been offered after the price of the flat was increased as is abundantly clear from the cancellation letter dated 24.11.2018. Similarly an amount of Rs. 1,11,61,090/- claimed to have been given to

the other home buyers by the Respondent also does not pertain to the benefit of GST. The DGAP has nowhere stated in para 12 (h) and 20 of his Report that the Respondent had passed on the benefit of ITC to the home buyers. He also could not verify the amount of the discount passed on by the Respondent in his Report. Therefore, the contention made by the Respondent is this regard is not tenable and hence the above amount cannot be reduced from the profiteered amount.

88. The Respondent has also stated that the above Applicant was not an "interested party" and hence he had no locus standi to file complaint against him. However, as has been discussed above the Applicant had filed the complaint on 18.07.2018 whereas the Respondent had cancelled his booking on 24.11.2018 and hence the above Applicant fell within the definition of interested party as per the explanation given under Rule 137 (c) b of the CGST Rules, 2017 as he was recipient of the service supplied by the Respondent at the time of filing of the complaint. Otherwise also "any other person" can file complaint for violation of the provisions of Section 171 of the above Act as per Rule 128 (1) of the above Rules and therefore, the above Applicant is fully entitled to file the present complaint. Accordingly, the above contention of the Respondent cannot be accepted.

89. The Respondent has also contended that there was no correlation between the accrual of the ITC and the demand raised and hence the methodology adopted by the DGAP to calculate the profiteered amount was incorrect. However, perusal of the methodology applied by the DGAP shows that the ratio of additional benefit which was required to

be passed on by the Respondent has correctly been taken in to account as otherwise the benefit cannot be computed for the various home buyers who have purchased flats having different area and paid different amounts on demand. Mere accumulation of ITC in a particular period and accrual of tax liability in a different period cannot result in wrong computation of the ITC benefit. Perusal of the Table mentioned in para 49 supra clearly shows that the ratio of ITC post GST period has been computed by the Respondent as 8.10% which exactly matches with the calculation made by the DGAP in Table E of his Report. Therefore, the argument advanced by the Respondent in this behalf cannot be accepted as the above ratio has been correctly computed by the DGAP and there is no ground for reduction of an amount of Rs. 77,04,291/- from the ITC availed for the period from 15.08.2018 to 30.09.2018.

90. The Respondent has also submitted that the tax on the input services has been increased from 15% to 18% and hence he had not got additional benefit of ITC which he was required to pass on. In this connection it would be pertinent to mention that the Respondent has got benefit of ITC on goods as well and it is only the additional benefit of ITC, from his own supplies in the value chain, which he has availed post GST which he is required to pass on. It is established from the returns filed by the Respondent that he had earned relevant additional ITC of Rs. 58,64,788/- during the pre GST period and Rs. 1,47,44,544/- during the post GST period @ 2.11% and 8.10% of the turnover respectively during the above periods which has resulted in additional benefit of

5.99% of the turnover to him which he is bound to pass on. Hence, there is no basis for reduction of an amount of Rs. 44,80,542/- from the ITC post GST for calculation of the above ratio.

91. The Respondent has also alleged that the DGAP has considered sold area as 1,37,948/- sq. ft. during the pre GST period and 84,643 sq. ft. during the post GST period which was not correct as the above areas were 73,837 sq. ft. and 44,901 sq. ft. only. He has further alleged that the DGAP has taken in account an area of 7,885 sq. ft. of those flats also the bookings of which were cancelled. Perusal of the record shows that the above area has been taken by the DGAP on the basis of the information supplied by the Respondent and hence he cannot resile from his earlier statements given before the DGAP and therefore, the relevant ITC calculated as per the area sold relevant to turnover in Table E of the Report is correct. Hence the above contention of the Respondent is not tenable.

92. The Respondent has also contended that he was not in agreement with the computation of the profiteered amount made 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 Governments but has also acted against the interests of the house buyers hence the contention of the Respondent is not justified and therefore, the GST collected by him on the additional realisation has rightly been included in the profiteered amount by the DGAP and there is no question of reducing an amount of Rs. 18,85,210/- from the profiteered amount which has been forcibly collected by him from the flat buyers.

93. The Respondent has also cited the definition of profiteering given by various sources and submitted that he could be accused of profiteering if he had retained the extra amount collected by him but as he had deposited the GST collected by him with the Govt. no allegation of profiteering could be made against him. However, as discussed in para supra this claim of the Respondent is not correct as he has taken advantage of exceptional circumstances to make excessive profit and hence he has violated the provisions of Section 171 of the above Act.

94. The Respondent has also contended that the DGAP has taken the pre GST rate of tax as 5.5% and post-GST the rate has been taken as 12% showing increase of 6.5%. However, if the rates were applied after considering the abatement then the increase in the rate of tax would come to 9.79% and therefore, the rate of tax had infact been increased

on the construction service and he had not availed any benefit of additional ITC. Accordingly, no benefit was required to be passed on as per the order dated 04.05.2018 passed by this Authority in the case of M/s KRBL Ltd. In this connection it would be appropriate to mention that the Respondent is required to pass on the benefit of additional ITC and not the benefit of reduction in the rate of tax as per the provisions of Section 171 of the above Act and perusal of his returns which he has himself filed during the pre and post GST period shows that he has availed additional benefit of ITC of 5.59% of the turnover as the relevant ITC for the pre GST period was Rs. 58,64,788/- and for the post GST period it was Rs. 1,47,44,544/-. There is also no relevance of comparing the pre-and post GST tax rates after taking in to account the abatement which was available during the above two periods as the benefit is not to be passed on the basis of reduction in the rate of tax. The case of M/s KRBL does not help the Respondent as in that case there was no benefit of additional ITC to the above party and hence the above case is of no help to him. The claim made by the Respondent on this ground is farfetched and hence the same is untenable.

95. The Respondent has also stated that it was specifically mentioned in the application form that the maintenance charges, stamp duty, reimbursements and taxes etc. shall be charged extra from the allotees and the above Applicant has also deposited Rs. 4,62,622/- being 5% of the price of Rs. 92,27,211/- of the flat and hence he had accepted that other charges would be levied extra. The claim made by the Respondent is based on the contents of paras 9 and 10 of the

application form which the above Applicant has himself filled and accepted and hence the contention of the above Applicant that the above price included the extra charges is not correct. However, the contention of the Respondent that he had offered GST discount to the above Applicant is not correct as the same was offered due to increase in the price of the flat which amounted to normal business discount and by no stretch of imagination it can be held to have been passed on account of benefit of ITC. Further claim of the Respondent that he has given adhoc 2% discount as it was difficult to compute the benefit initially is also not correct as the same has been given to offset the cost which he has increased due to increase in the area of the flats or due to implementation of GST. He has also offered 3% discount to only those flat buyers who had declined to accept his offer of 2%. Passing of discounts as per the convenience of the Respondent as is evident from Annexure-18 of the Report is without any rationale and thus is arbitrary and amounts to violation of the provisions of Section 171. The above facts prove beyond any doubt that the discounts given by the Respondent were nothing but commercial discounts offered to avoid cancellations and have no relation whatsoever with passing on of the benefit of additional ITC.

96. The Respondent has also argued that the above Applicant had wrongly computed the profiteered amount as Rs. 2,07,64,080/- with ratio of 9.88%. He has further argued that the DGAP has calculated the above amount as Rs. 1,27,84,694/- at the ratio of 5.99% of the turnover as per Table F supra which is correct and logical. The Respondent has also

admitted that the methodology applied for computation by the DGAP was based on the same principle which he had applied in all similar cases and hence the same was correct and therefore, the above computation made by the above Applicant was incorrect and could not be relied upon. Since the Respondent has himself admitted the correctness of the profiteered amount it is held that the Respondent has resorted to profiteering in violation of the provisions of Section 171 of the above Act. There is also evidence to suggest that the letter dated 04.03.2017 was written by the Respondent to the above Applicant as there are entries to that effect in his record as per Annexure-1 and the CA certificate submitted by the Respondent as Annexure-2 with his submissions dated 17.05.2019 also supports his plea.

97. The Respondent has also claimed that the profiteered amount could not be computed on the value of the flats sold as the cost of consideration could rightly be apportioned based on the area. He has further argued that introduction of new mechanism of reversal of ITC under Rule 42 of the CGST Rules, 2017 for reversal of ITC for the construction industry provided for reversal of the ITC credit on the saleable area, whereas for other industries the reversal has been provided based on the amount, accordingly, the objection of the Applicant could not be accepted. The above argument of the Respondent has merit and hence the same is logical. The Respondent has also argued that the above Applicant has wrongly tried to point out that the entire ITC availed by the Respondent was available on the date of investigation and nothing needed to be reversed. However, the above claim of the Applicant is not correct as

the ITC is required to be reversed when flats would be sold after receipt of the OC and hence the above argument of the Applicant cannot be accepted.

98. The Respondent has also claimed that he was not required to pass on the benefit of ITC to the buyers who had purchased the flats after coming in to force of the GST. However, it is made clear that the Respondent is required to recalibrate the prices of the flats which he would sell post GST keeping in view the availability of ITC.

99. The Respondent has also submitted the details of the discount amounting to Rs. 1,11,61,090/- which he has claimed to have passed on to the 65 buyers as per Annexure-6 of his submissions dated 09.05.2019. He has also claimed that the DGAP has wrongly computed the profiteered amount in respect of 5 flat buyers on whom no demand was raised post GST and hence the above amount should be reduced by Rs. 3,32,326/-. The claim made by the Respondent is not correct as the above discount has been passed to set off the price increase made by the Respondent by increasing area of the flats under the RERA and on account of GST as has been discussed above. Hence, the above discount cannot be held to have been passed on account of benefit of additional ITC which the Respondent has got. The plea of the Respondent that the DGAP has computed profiteered amount in respect of 5 flat buyers on whom no demand was raised is also not correct as the above amount has been computed on the basis of the information supplied by the Respondent himself. Moreover, the present computation of the profiteered amount is only interim w.e.f. 01.07.2017

to 30.09.2018 as the final calculation would have to be made at the time of issue of the OC and hence all such claims made by the Respondent can be taken cognizance of at the relevant point of time.

100. The Respondent has also given details of the above project stating that the total number of flats was 429 having total area of 2,82,936 sq. ft. out of which 153 flats having area of 1,22,050 sq. ft. had been sold during the pre GST period. Booking of 51 flats has been cancelled which was done during the pre GST period having area of 43,005 sq. ft. He has also submitted that demands were raised in respect of 61 flat buyers having area of 44,901 sq. ft. in the post GST period.

101. The Respondent and the above Applicant have also raised objection on the methodology followed by the DGAP while calculating the profiteered amount however, the same 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. 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 methodology applied in this case was correct in principle and hence he should have no objection on the computation of the profiteered amount. Therefore, the objection raised by the Respondent and the Applicant on this ground is frivolous and without legal force.

102. It is established from the perusal of the above facts 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. 1,27,84,694/- inclusive of GST @ 12% on the base profiteered amount of Rs. 1,14,14,905/-. Further, the Respondent has realized an additional amount of Rs. 1,27,84,694/- which includes both the profiteered amount @5.99% of the taxable amount (base price) and GST on the said profiteered amount from the flat buyers who were not Applicants in the present proceedings as per Annexure-18 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. 1,27,84,694/- along with interest @18% per annum to these flat buyers from the dates from which the above amount was collected by him from these buyers till the payment is made, within a period of 3 months from the date of passing of this order. The above amount shall be paid as has been mentioned in Column No. 21 of Annexure-18 without taking in to account the discount mentioned in Column No. 24 of the above Annexure. The Respondent has submitted details of the discounts amounting to Rs. 1,11,61,090/- which he has claimed to have paid to the 65 home buyers as per Annexure-1 submitted by him on 30.05.2019 however it cannot be considered as passing on of the benefit of additional ITC as the above discount has been given by the Respondents to set off the prices which he had increased and not on account of the benefit of ITC. Accordingly, the discount of Rs. 1,11,61,090/- claimed to have been paid to the house buyers by the Respondent cannot be held as the benefit of ITC and hence, the claims made by the Respondents in this behalf cannot be accepted.

103. As discussed above the Applicant is not entitled to the benefit of additional ITC as his allotment has been cancelled by the Respondent on his own request. Therefore, the relationship of recipient and supplier stands terminated between the above Applicant and the Respondent w.e.f. 24.11.2018 and therefore, he is not entitled to the benefit of additional ITC as per the provisions of Section 171 of the CGST Act, 2017. He has further not paid the amount which he was required to pay in the pre and post GST period as per the terms of his allotment to become eligible for passing on of the benefit of ITC and therefore also he is not entitled to the above benefit.

104. 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 30.09.2018 any benefit of ITC which accrues subsequently shall also be passed on to the buyers by the Respondent.

105. It is also evident from the above narration of the facts that the Respondent has denied benefit of ITC to the buyers of the flats being constructed by him in his One Park Avenue project in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has thus resorted to profiteering. Hence, he has committed an offence under Section 171 (3A) of the CGST Act, 2017 and therefore, he is apparently liable for imposition of penalty under the provisions of the above Section. Accordingly, a Show Cause Notice be issued to him directing

him to explain why the penalty prescribed under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him. Accordingly, the notice dated 09.04.2019 vide which the Respondent was directed to show cause why action under Section 29 and 122-127 of the CGST Act. 2017 should not be taken against him is hereby withdrawn.

106. The Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Maharashtra 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.

107. A copy each of this order be supplied to both the Applicants, the Respondent, Commissioners CGST/SGST Maharashtra as well as the Principal Secretary (Town & Planning), Government of Maharashtra 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

(A. K. Goel)
Secretary, NAA

F. No. 22011/NAA/28/ManR/2018/6175-6121 Date: 06.10.2019

Copy To:-

1. M/s Man Realty Ltd., 101, Man House, Opp. Pawan Hans, S. V. Road, Vile Parle-West, Mumbai, Maharashtra-400056.
2. Sh. Ratish Nair, A 604, Aphrodite, Lodha Paradise, Majiwada, Thane-West, Mumbai, Maharashtra-400601.
3. Director General, Directorate 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.
4. Chief Commissioner, CGST, Mumbai Zone, GST Building, 115 M.K. Road, OPP, Churchgate Station, Mumbai- 400020.
5. Commissioner, Commercial Taxes, Office of the Commissioner of State Taxes, 8th floor, Goods and Services Tax (GST) Bhavan, Mazgaon, Mumbai - 400010.
6. Principal Secretary, Urban Development Department, 4th Floor, Main Building, Mantralay, Hutatma Rajguru Chowk, Mumbai.
7. Guard File/NAA Website.

7.11.19

O/C