BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	58/2019
Date of Institution	22.05.2019
Date of Order	20.11.2019

O/C

In the matter of:

1. Sh. Paval Antony, No. 15/7, Lakshmi Apartments, G-B, 1st Canal Cross Street, Gandhi Nagar, Adyar, Chennai-600020.
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

1. M/s Shree Mahalakshmi Enterprises, Doshi Housing, Doshi Towers, 9th Floor, Poonamalle High Road, Kilpauk, Chennai-600010.

Respondent

Quorum:-

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

Present:-

1. None for the Applicant No. 1.
2. Sh. Sachin, Superintendent, for the Applicant No. 2.
3. Sh. Rupesh Sharma, Advocate and Sh. Manohar Londe, Authorised Representatives for the Respondent.

ORDER

1. The Present Report dated 18.02.2019 has been furnished by the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP), under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the present case are that a complaint dated 30.01.2018 was filed before the Tamil Nadu State Screening Committee on Anti-Profiteering by the Applicant No. 1 alleging profiteering by the Respondent in respect of purchase of a flat in his project "Risington OMR, Karapakkam". The above Applicant had alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) to him by way of commensurate reduction in the price. This complaint was examined and forwarded by the above Committee with its recommendation to the Standing Committee on Anti-profiteering on 29.06.2018 for further action, in terms of Rule 128 (2) of the CGST Rules, 2017.
2. The above complaint was considered by the Standing Committee on Anti-profiteering in its meetings held on 07.08.2018 & 08.08.2018 and

was forward to the DGAP for detailed investigation under Rule 129 (1) of the CGST Rules, 2017.

3. The above Applicant had also submitted the following documents along with his application:-

(a) Form APAF-1.

(b) Copy of the Demand letter.

(c) Copy of e-mail.

4. The DGAP on receipt of the above minutes from the Standing Committee on Anti-profiteering had called upon the Respondent vide his notice dated 12.09.2019 to submit his reply as to whether the ITC benefit was passed on by him to his recipients and also asked him to suo-moto determine the quantum of benefit to be passed on and intimate the same to the DGAP with supporting evidence. The Respondent as well as the above Applicant were afforded opportunity to inspect the non-confidential evidence/information submitted by the other party and the Respondent had availed it on 20.09.2018, however, the above Applicant had not inspected the evidence/information. The Respondent vide his letters dated 19.09.2018, 25.09.2018, 04.10.2018, 15.10.2018, 17.10.2018, 21.12.2018, 27.12.2018, 09.01.2019, 24.01.2019 and 04.02.2019 had furnished his replies. The written submissions of the Respondent are summed up by the DGAP as under:-

a) That the Applicant No. 1 had booked the flat on 24.08.2016.

b) That the Respondent was registered under the works contract service under the erstwhile Service Tax regime wherein Service Tax was not applicable on the consideration payable under the agreement for sale of undivided share of land but the consideration payable under the construction agreement attracted Service Tax.

c) That the advances received from the above Applicant in the pre-GST period were appropriated against the consideration for sale of undivided share of land by the Respondent and after the said consideration was fully paid, Service Tax was duly charged and paid on the advances pertaining to the construction agreement.

d) That the total consideration payable for the sale of undivided share of land was Rs. 33,97,500/- as per the agreement for sale of undivided share of land dated 28.09.2016, registered as Document No. 8818/2016 before the Sub-Registrar, Neelankarai, Chennai.

e) That the total consideration for the construction of the flat was Rs. 55,06,092/- as per the agreement dated 28.09.2016, registered as Document No. 8819/2016 before the Sub-Registrar, Neelankarai, Chennai.

f) That 87.5% of the total consideration was received in the pre-GST period from the above Applicant and after appropriating the advances towards the consideration for undivided share of land, the balance payments were accounted for towards advances under the construction agreement by the Respondent and the Service Tax liability thereon was duly discharged. The amount of consideration received during the pre-GST period was Rs. 43,90,499/- on which Service Tax (@ 6%) liability of Rs. 2,63,429/- had been discharged.

An amount of Rs. 6,100/- was received towards registration fee during the pre-GST period.

g) That the amount receivable under the construction agreement in the post-GST period was Rs. 10,88,988/- after factoring in a discount of Rs. 20,555/-. GST @ 18% on Rs. 10,88,988/- (Rs. 1,96,017/-) was payable by the above Applicant.

h) That the above Applicant was of the view that the amount of Rs. 10,88,988/- should be broken into two towards land and construction. This was also the basis of his complaint. The Respondent had explained to the above Applicant that the advance paid in the pre-GST period had gone towards the full consideration of the land and the balance advance paid in the pre-GST period was subjected to Service Tax. Since the amount due after GST was only under the construction agreement, GST @ 18% was discharged, as and when the instalments were received. The GST rate was 18% for works contract service which was fixed vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017.

i) That so far as the ITC was concerned, nearly 87.5% of the consideration was received in the pre-GST period and very little construction work was done in the post-GST period. Hence, there was not much ITC available post-GST. After considering all the information provided, the above Applicant was fully satisfied and had accepted the price discount and also stated that he would withdraw the complaint which was submitted by him.

j) That the Respondent, vide his letter dated 24.01.2019 had informed that so far as the project under investigation was concerned, it was

yet to be completed and he had not obtained the Completion Certificate (CC)/Occupation Certificate (OC) of the same.

k) That the Respondent had also submitted that even though there was no necessity for him to reverse any ITC, he had by mistake treated the unsold/yet to be completed constructed area as "unsold stock" and had reversed proportionate ITC amounting to Rs. 52,30,085/- (CGST Rs. 31,67,157/- & SGST Rs. 20,62,928/-)

l) That the Respondent had also submitted that the issues raised by the Applicant had been fully resolved. The Applicant had withdrawn the complaint and therefore, further proceedings against the Respondent should be dropped

5. The DGAP's present investigation Report has covered the period from 01.07.2017 to 31.08.2018 and the period for completing the same was extended by this Authority till 28.02.2019 vide its orders dated 20.11.2018 and 22.01.2019 as per the provisions of Rule 129 (6) of the above Rules. The Respondent had also submitted the following documents along with his replies:-

(a) Copies of GSTR-1 and GSTR-3B Returns for the period from July, 2017 to August, 2018.

(b) Copies of Tran-1 Returns for the period from July, 2017 to December, 2017.

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

(d) Electronic Credit Ledger for the period from July, 2017 to August, 2018.

(e) Copies of all the demand letters, receipts and sale agreement/contract and construction agreement in the name of the Applicant Shri Paval Antony.

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

(g) Balance Sheet and Cost Audit Report for F. Y. 2016-17 & 2017-2018.

(h) Details of taxable turnover and ITC for the project "Risington, OMR, Karapakkam".

(i) List of home buyers in the project "Risington, OMR Karapakkam".

6. The DGAP in his above Report has stated that as per the documents submitted by the Respondent, it was revealed that he had executed two separate agreements for the flats booked in both the pre-GST and the post-GST periods, one for the land value and the other for the construction value and was charging GST @ 18% on the consideration received post-GST under the construction agreements. The Respondent had also submitted the demand letters and the payment schedule in respect of the flat booked by the Applicant No. 1. The details of the amount and taxes paid by the Applicant No. 1 to the Respondent are furnished in the Table-'A' below.

Table 'A'

(Amount in Rs.)

S. No.	Payment Stages	Due Date	% BSP + Other Charges	Applicable Tax rate	BSP	Service Tax including SBC & KKC	GST	Total	Actual Payment	Receipt Date
1	On Booking		10.00%	6%	890,362	0	0	890,362	100,000	24.08.2016
2	Within 30 days of Agreement		20.00%	6%	1,780,718	0	0	1,780,718	400,000	30.09.2016
3	On completion of foundation of respective block		10.00%	6%	890,396	9,675	0	900,071	400,000	30.10.2016
4	On completion of basement of respective block		10.00%	6%	890,359	53,422	0	943,781		
5	On completion of 3rd floor roof slab		7.50%	6%	667,769	40,066	0	707,835		
6	On completion of 7th floor roof slab		7.50%	6%	667,769	40,066	0	707,835		
7	On completion of 11th floor roof slab		7.50%	6%	667,769	40,066	0	707,835	5,738,437	29.11.2016
8	On completion of 15th floor roof slab	07.02.2017	7.50%	6%	667,769	40,066	0	707,835	707,835	07.02.2017
9	On completion of 19th floor roof slab	02.05.2017	7.50%	6%	667,769	40,066	0	707,835	707,835	20.05.2017
10	On completion of external plastering of respective block	14.12.2017	7.50%	18%	655,107	0	117,919	773,026	773,026	07.02.2018
			95.00%		**8,445,787**	**263,427**	**117,919**	**8,827,133**	**8,827,133**	

7. The DGAP has also submitted that the GST @ 18% was charged by the Respondent on the construction value of the flat in the pre-GST and the post-GST period since the Respondent had made two agreements with the home buyers one for the cost of the land and the other for the cost of construction. He has further submitted that the Respondent has not charged any Service Tax on the amount charged towards the cost of the land which was recovered in the pre-GST regime and charged Service Tax @ 6% (15% Service Tax on 40% of the cost of construction) in the

pre-GST regime and GST @ 18% in the post-GST regime on the payments received towards the cost of construction which did not include the land value.

8. Another aspect which the DGAP has referred to was that para 5 of Schedule-III of the CGST Act, 2017, defining activities or transactions which shall be treated neither as a supply of goods nor a supply of services, read as *"Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building."* and Clause (b) of para 5 of Schedule II of the above Act read as *"(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier".* In the light of the above provisions, the DGAP has claimed that the ITC pertaining to the units which were under construction but not sold was provisional ITC which may be required to be reversed by the Respondent, if such units remained unsold at the time of issue of the CC, in terms of Section 17 (2) & Section 17 (3) of the CGST Act, 2017 which read as under:-

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

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

9. The DGAP has further claimed that the ITC pertaining to the unsold units was outside the scope of the present investigation and the Respondent was required to recalibrate the selling prices of such units to be sold to the prospective buyers by considering the net benefit of additional ITC available to him post-GST. He has also stated that prior to 01.07.2017, i.e., before the GST was introduced, the Respondent was eligible to avail credit of Service Tax paid on input services and credit of VAT paid on the purchase of inputs, however, the CENVAT Credit of Central Excise Duty paid on inputs was not admissible as per the CENVAT Credit Rules, 2004, which were in force at that time. The DGAP has also contended that the Respondent had not collected VAT from his customers and discharged his output VAT liability on the deemed 10% value addition to the purchase value of the inputs and therefore, there was no direct relation of the credit of VAT and the turnover reported in the VAT returns of the Respondent during the period from April, 2016 to June, 2017 with the amount actually collected from the home buyers. He has further contended that therefore, the credit of VAT paid on the purchase of inputs and the turnover shown in the VAT returns had not been considered by him for computation of the ratio of ITC to the total turnover for the pre-GST period. He has also informed that in the post-

GST period, the Respondent could avail ITC of GST paid on the inputs and the input services including the sub-contracts. He has further informed that from the information submitted by the Respondent which was duly reconciled with the GSTR-1 and GSTR-3B Returns for the period from July, 2017 to August, 2018 , the details of the ITC availed by him and his total turnover in respect of the project "Risington, OMR Karapakkam" during the pre-GST and the post-GST periods, the ratio of CENVAT/ITC to the turnover was furnished in the Table-B below:-

Table-'B'

(Amount in Rs.)

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	July, 2017 to August, 2018 (post-GST)
(1)	(2)	(3)	(4)	(5)=(3)+(4)	(6)
1	CENVAT credit of Service Tax Paid on Input Services as per ST-3 Returns (A)	35,117,246	9,144,017	44,261,263	-
2	Input Tax Credit of GST Available as per GST Returns (B)	-	-	-	85,034,930
3	Total Turnover as per Home Buyers List (C)			433,760,103	160,488,715
4	Total Saleable Area of Flats in the project (Sq. ft.) (D)			1,461,532	1,461,532
5	Area Sold relevant to turnover as per Home Buyers List (Sq. ft.) (E)			155,036	177,512
6	Relevant CENVAT/Input Tax Credit (F)= [(A)*(E)/(D)] or [(B)*(E)/(D)]			4,695,134	10,328,012
7	**Ratio of CENVAT/ Input Tax Credit to Turnover [(G)=(F)/(C)]**			**1.08%**	**6.44%**

10. The DGAP has also pleaded that it was clear from the Table 'B' that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 1.08% and during the post-GST period (July, 2017 to August, 2018), it was 6.44% which clearly confirmed that post-GST, the Respondent had benefited from additional ITC to the tune of 5.36% [6.44% (-) 1.08%] of the turnover. The DGAP has further pleaded that accordingly, the issue

of profiteering had been examined by him by comparing the applicable tax and the ITC available during the pre-GST period (April, 2016 to June, 2017) when Service Tax @ 6% was payable with the post-GST period (July, 2017 to August, 2018) when the GST rate was 18% on the construction service, as per the Notification No. 11/2017-Central Tax (Rate), dated 28.06.2017. The DGAP on the basis of the figures mentioned in Table 'B' above, the comparative figures of the tax rate, ITC availed/available during the pre-GST and the post-GST periods has computed the recalibrated base price on the basis of benefit of the ITC and the excess collection/ realization by the Respondent (profiteering) which has been tabulated in the Table-'C' below:-

Table-'C'

(Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April,2016 to June,2017	July,2017 to August, 2018
2	Output tax rate (%)	B	6	18
3	Ratio of CENVAT/ Input Tax Credit to Turnover asper Table – B above (%)	C	1.08	6.44
4	Increase in input tax credit availed post-GST (%)	D= 6.44% *less*1.08%	-	5.36%
5	**Analysis of Increase in input tax credit:**			
6	Base Price collected during July, 2017 to August, 2018	E		160,488,715
7	Less: Units cancelled and amount refunded	F		
8	Net Base Price collected during July, 2017 to August, 2018	G=E-F		160,488,715
9	GST Collected @ 18% over Basic Price	H= G*18%		28,887,969
10	Total Demand collected	I=G+H		189,376,684
11	Recalibrated Basic Price	J= G*(1-D) or 94.64% of G		151,886,520
12	GST @18%	K= J*18%		27,339,574
13	Commensurate demand price	L= J+K		179,226,093
14	**Excess Collection of Demand or Profiteering Amount**	**M= I - L**		**10,150,590**

11. The DGAP has also claimed that from Table C above, it was clear that the additional ITC of 5.36% of the turnover should have resulted in commensurate reduction in the base prices as well as cum-tax prices and therefore, in terms of Section 171 of the CGST Act, 2017, the benefit of the additional ITC was required to be passed on to the recipients. On the basis of the aforesaid CENVAT/ITC availability in the pre and the post-GST periods and the details of the amount collected by the Respondent from the Applicant No. 1 and other home buyers during the period from 01.07.2017 to 31.08.2018, the amount of benefit of ITC not passed on or in other words, the profiteered amount has been computed by the DGAP as Rs. 1,01,50,590/- which includes GST @ 18% on the base profiteered amount of Rs. 86,02,195/-.

12. The DGAP has also submitted that provisions of Section 171 (1) of the CGST Act, 2017, which required that *"a 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"*, have been contravened by the Respondent as the benefit of additional ITC of 5.36% of the turnover which had accrued to the Respondent and which was required to be passed on to the Applicant No. 1 and the other recipients had not been passed on. He has also averred that on this account, the Respondent had realized an additional amount to the tune of Rs. 41,434/- from the Applicant No. 1 which included both the profiteered amount @ 5.36% of the base price and 18% GST on the said profiteered amount and an additional amount of Rs. 1,01,09,156/- (Rs. 1,01,50,590/- (-) Rs. 41,434/-) which included both the profiteered amount @ 5.36% of the base price and GST on the said profiteered

amount from the other recipients as well who were not Applicants in the present proceedings. He has also informed that these recipients were identifiable as per the documents provided by the Respondent and therefore, this additional amount of Rs. 1,01,09,156/- was required to be returned to such eligible recipients. Therefore, he has claimed that the provisions of Section 171 (1) of the above Act have been contravened by the Respondent. It has also been observed by the DGAP that the Respondent has supplied construction services in the State of Tamil Nadu only. He has further noted that the present investigation covered the period from 01.07.2017 to 31.08.2018 and profiteering, if any, for the period post August, 2018, had not been examined 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.

13. The Respondent was issued show cause notice dated 21.02.2019 to explain why the Report dated 18.02.2019 submitted by the DGAP should not be accepted and his liability for violation of the provisions of Section 171 of the CGST Act, 2017 should not be fixed. He was also asked to state why penalty should also not be imposed upon him under Section 29 and 122-127 of the CGST Act, 2017 read with Rule 21 and 133 of the CGST Rules, 2017. During the course of the proceedings the Applicant No. 1 did not appear, the Applicant No. 2 (DGAP) was represented by Sh. Sachin, Superintendent and the Respondent was represented by Sh. Rupesh Sharma, Advocate and Sh. Manohar Londe, Authorised Representative. The first hearing was fixed on 07.03.2019 however, the Respondent had sought adjournment and the next hearing

was scheduled on 20.03.2019 which was also not attended by the Respondent and next date of appearance was fixed on 09.04.2019 which was attended by the Respondent. The Respondent had also not attended the hearings fixed on 16.04.2019, 22.05.2019 and 30.05.2019.

14. The Respondent vide his submissions dated 05.04.2019 has stated that he was engaged in the construction business and was paying taxes regularly where ever applicable. He had started construction of the project 'Risington' in the year 2014 for building 1228 flats which were booked by the buyers during the pre-GST and the post-GST period totalling to 161 apartments and the balance apartments had remained unsold. The work had commenced during the pre-GST period when he was liable to pay the Service Tax and the VAT. He has also submitted that since his project was located in Tamil Nadu two documents namely Sale Deed for undivided share of land and Builder's agreement for the construction of the apartments were executed by him as per the applicable stamp and the registration laws. On the consideration taken for the land there was no Service Tax and he had discharged the Service Tax on the Builder's agreement. He has further stated that VAT was discharged based on the VAT rates applicable on the items involved under the deemed sale method where a deemed profit of 10% was added to the cost of the material. He has also stated that the advances paid by the customers in the pre-GST regime were first set off against the cost of the land and after the consideration for the land was fully paid, the advances were adjusted against the builder's agreement and applicable Service Tax was also discharged. He has further stated that he had entered into two such agreements with the Applicant No. 1 who

had paid advances in the pre-GST period totalling to 87.5% of the total amounts payable. These advances had been adjusted against the cost of the land which was not liable to Service Tax and on the balance amount Service Tax has been levied. Since the balance 12.5% amount was due post-GST, he had sought 18% GST on the said amount. The Respondent has also claimed that the Applicant No. 1 had doubts on the computations since he was of the view that the deductions on account of cost of land must be adjusted in the 12.5% balance amount also. He has further claimed that he had duly explained to the Applicant No. 1 that the payments due on account of the cost of land had already been completed and the balance payments were due only towards the builder's agreement which attracted Service Tax in the pre-GST period and 18% GST in the post-GST period. He has also contended that he had also provided additional discounts and after verification of the payments and the adjustments made against the land consideration, the Applicant No. 1 had agreed that the method adopted by the Respondent was correct and he had immediately withdrawn the complaint vide his letter dated 25.09.2018 addressed to the DGAP.

15. The Respondent has further contended that the present investigation was apparently based on an application dated 30.01.2018 filed before the Tamil Nadu State Screening Committee under Rule 128 of the above Rules, however, the Applicant No. 1 had withdrawn the complaint and therefore, further proceedings against him should be dropped. He has also argued that after the withdrawal of the complaint had been taken on record the present investigation and the findings recorded without referring to the withdrawal of the complaint were wrong. He has further

argued that as per Rule 128 a written compliant was required to be filed by the interested party, Commissioner or any other person and in the present case the complaint had been filed by the above Applicant who had withdrawn the same vide his e-mail dated 25.09.2018 addressed to the DGAP mentioning that all the issues had been resolved. He has also argued that when the basis for the proceedings namely the complaint did not exist and there was no suo motto initiation of the proceedings, continuing the same despite pointing out the resolution of the issue, submission of a detailed investigation report with adverse findings was completely outside the scope of Section 171 of the above Act. He has also pleaded that it was a fundamental and settled principle of law that no proceedings could lie when the basis on which they had been launched did not exist. He has also referred to the case of ***Gujarat Paraffins Pvt. Ltd. V. Union of India (2012) 282 ELT 33,*** and claimed that in the above case the Hon'ble Gujarat High Court had held that the maxim *sublato fundamento cadit opus* was applicable which stated that if the foundation was removed the superstructure falls meaning thereby that if the initial action was not in consonance with law, the subsequent proceedings would not validate it. He has also submitted that in terms of Rule 129 (3), the DGAP before initiation of investigation was required to issue Notice to the interested parties containing inter-alia information viz. summary of the statement of the facts on which the allegation was based and when a detailed reply had been furnished to him stating that the allegation itself was incorrect and was mere misunderstanding of the mode of operation of the business and the person who had made the complaint was fully satisfied with the explanation given and had duly

communicated the resolution of the dispute to the DGAP, proceeding further with the investigation was itself violation of Rule 129. He has further submitted that the Hon'ble Supreme Court in the case of ***Anil Kumar Singh V. Vijay Pal Singh and Others (2018) 12 SCC 584*** had held that where a plaintiff had filed an application to withdraw the suit whether in full or in part, the plaintiff had the liberty to do so and the defendant could not raise any objection on such prayer. He has also claimed that this decision was applicable in the instant case since the basis for the enquiry namely the complaint had been withdrawn. He has further claimed that the Supreme Court in the case of ***Bijayananda Patnaik V. Satrughna Sahu and Others AIR-1963-SC-1566*** has held that where an application for withdrawal of a suit was filed, the Court had to allow the application and suit stood withdrawn. The Respondent has also submitted that despite his request made vide his letter dated 25.09.2018 that the complaint had been withdrawn and the issue had been amicably resolved, the DGAP had sought data from him which was supplied by him vide his letters dated 04.10.2018 and 27.12.2018, again intimating that the above Applicant had withdrawn the complaint. The Respondent has also alleged that although withdrawal of the complaint was mentioned in his Report by the DGAP it was not discussed in detail and it was recommended that the Respondent had availed benefit of 5.36% of the turnover which was required to be passed on.

16. The Respondent has also stated that the present proceedings were not maintainable for the reasons that the time lines provided in the GST statute had been breached as was apparent from the following grounds:-

(i) That in terms of Rule 128 of the CGST Rules, 2017 the Standing Committee within a period of 2 months from the date of receipt of a written application was required to examine the accuracy and adequacy of the evidence provided in the application and determine whether there was prima facie evidence to support the claim of the applicant.

(ii) That in the instant case, the Applicant No. 1 had filed an application dated 30.01.2018 before the Tamil Nadu State Screening Committee which had forwarded his application to the Standing Committee vide e-mail dated 18.07.2018 which was 6 months after the date of application.

(iii) That Rule 128 provided that the Standing Committee has to take a decision within a period of 2 months from the date of written application whereas in the instant case, the written application was submitted on 30.01.2018 and the Standing Committee vide its minutes dated 07.08.2018 and 08.08.2018 had forwarded the same to the DGAP which was clearly beyond the time limit specified in Rule 128.

(iv) That there was nothing in Rule 128 to indicate that the time limit commenced from the date of receipt of the application by the Standing Committee from the Screening Committee and no such provisions could be read into the Statute.

(v) That the DGAP's Report in para 1 referred to the application dated 30.01.2018 and minutes of the meetings of the Standing Committee which were received by the DGAP on 30.08.2018. The very fact that the period of 2 months had expired on

30.03.2018 it was evident that the entire proceedings were null and void being violative of Rule 128.

(vi) That Annexure-6 attached to the above Report referred to the request of the DGAP for extension of period for submission of the Report in respect of the present complaint which was misconceived. The request of the DGAP for extension was dated 20.11.2018 in which the complaint of the above Applicant was mentioned even though the DGAP was fully aware that the complaint was no longer in existence, since the above Applicant had withdrawn the complaint and had duly communicated the same to the DGAP vide his letter dated 25.09.2018. Thus, being fully aware that the complaint itself had been withdrawn the complaint and referring to the complaint as if it was in existence and seeking further time from this Authority amounted to suppression of facts.

17. He has also stated that without prejudice to his contention on maintainability and retaining of primary prayer that the proceedings should be dropped since the complaint had been withdrawn, he wished to submit the following:-

(i) That the DGAP had proceeded to calculate that the ITC would be available to him without taking into account the fact that he had applied for CC for the project and he was likely to receive the same during April, 2019.

(ii) That when the CC was issued, in terms of para 5, Schedule-II of the CGST Act, no GST was payable and based on the various amendments made to the CGST Rules and the Notification dated 29.03.2019, he might not be in a position to even retain the ITC which was attributable to the units which would be sold post issue of the CC. When ITC was not going to be available, the entire calculations made vide Table C of the Report were incorrect as they were based on assumptions and presumptions.

(iii) That Rule 42 of the CGST Rules, 2017 had been amended vide Notification No. 16/2019 dated 29.03.2019 w.e.f. 01.04.2019 which stated that 'E' which denoted the value of exempt service during the tax period was now defined as aggregate carpet area of the apartments, construction of which was exempt from tax plus aggregate carpet area of the apartments, construction of which was not exempt from tax but were identified by the promoter to be sold after issue of CC or first occupation whichever was earlier.

(iv) That the effect of the above amendment was that the carpet area of the apartments that were to be sold after issuance of the CC was considered as exempt supply and the ITC attributable to the exempt supply would have to be reversed, therefore, the assumption that the ITC was fully available as per the calculation made in Table C of the Report was incorrect.

(v) That the Explanation attached to Rule 42 introduced w.e.f. 01.04.2019 provided that in the tax period in which the CC was

issued, the value of exempt supply would also include aggregate carpet area of the apartments which had not been booked till the date of issuance of the CC or first occupation whichever was earlier.

18. The Respondent has further stated that the calculations made in Table C identifying 5.36% of the turnover as the benefit of ITC were prima facie incorrect since there was no method or formula mentioned in the Act or the Rules for determination of the benefits to be passed on. In fact the provisions of Section 171 itself were the subject matter of challenge on the Constitutional validity before the Hon'ble Delhi High Court as there was no mechanism provided for identification or determination of benefits. He has also argued that the calculations made by the DGAP which were based on the pre-GST and the post-GST periods and computations of the ratio of credit as 1.08% under the old law and 6.44% under the new law were prima facie incorrect since even the credit availed from 01.07.2017 onwards was required to be calculated in the formula set out in Rule 42 as amended w.e.f. 01.04.2019. He has further argued that normally, in terms of Rule 42, T_4 represented the amount of ITC attributable to the inputs and input services intended to be used exclusively for effecting taxable supplies and the common credit was determined after deducting T_4 and subsequently, the common credit denoted as C_2 was the basis for calculating the ITC attributable to the exempt supply. The Respondent has also contended that the Explanation attached to Rule 42 (f) of the CGST Rules vide Notification No. 16/2019 dated 29.03.2019 w.e.f. 01.04.2019 now provided that T_4

shall be zero during the construction phase because inputs and input services would be commonly used for construction of apartments booked on or before the date of issue of CC or first occupation of the project whichever was earlier and for those flats which were not booked by the said date. He has further contended that if T_4 was taken as zero the entire ITC would become common ITC and based on the formula whereby the exempted supply included the carpet area of the apartments which had not been booked till the date of issue of CC, there would be loss of ITC.

19. He has also submitted that the calculation of benefit of 5.36% of the credit under the post-GST period as against the pre-GST period was incorrect for the following reasons:-

(i) That the DGAP had not taken into account the fact that the cost of the material had increased which had resulted in increase in the cost of construction.

(ii) The Steel prices without factoring the tax element post-GST had increased by 16 to 17%; M Sand by 20%, the Blue Metal had increased by 36% and the Soling Stone used for construction had increased by 46%.

(iii) That this Authority in case No. 9/2018 in the matter of ***Jijrushu N. Bhattacharya V. N. P. Foods (Franchisee of Subway)*** had held that when the base price of Hara Bhara Kabab had been increased from Rs. 130/- to Rs. 135/- and the respondent had increased the price to make good the loss which had occurred due to loss of ITC post-GST rate reduction and the increase

was commensurate with the increase in the cost of production on account of denial of ITC, there was no profiteering and there was no violation of Section 171. He has also pleaded that the ratio of this ruling was applicable in his case since base price of the construction material in the GST regime had gone up and he had not increased the prices to be charged from the customers.

(iv) That the Report was fundamentally flawed as it was based on the assumption that the tax was the only factor relevant to the cost without appreciating the fact that increase in the construction cost by itself has an impact on the pricing and when the cost of construction had gone up in the relevant period, the same was a critical factor which had to be taken into account. He has also maintained that despite the increase in the cost of the construction material, Steel and other services, he had retained the agreement prices and had not increased them.

(v) That despite the increase in the cost of construction after taking into account the overall impact of the GST he had also given an additional discount to his customers which had not been considered by the DGAP in his Report.

(vi) That the calculations made in Table C were also incorrect for the following reasons:-

- That the turnover post-GST which was Rs. 16,04,88,715/- also included the instalments paid by the buyers who had booked

apartments in the pre-GST period and the instalments due in the post-GST period from such customers amounted to Rs. 5,84,74,134/- and hence the eligibility of credit was also restricted to that amount whereas in the Table C it had been assumed that the full credit had been utilized.

- That the ratio calculated was therefore wrong since it had factored Rs. 16,04,88,715/- as the total turnover without eliminating the fact that the instalments pertaining to the pre-GST customers were smaller and the CENVAT credit was also proportionately reduced.

(vii) That the calculation methodology adopted by the DGAP to arrive at the percentage of the credit post-GST was fundamentally flawed since the project was an ongoing project and was likely to receive the CC in the month of April, 2019. As on the date of the proceedings, only 161 apartments had been booked and to assume that all the customers would qualify for the benefits without factoring the CC and the loss of ITC made the entire proceedings null and void.

(viii) That the calculation of the DGAP to arrive at the percentage of credit available to him under the old law was also fundamentally flawed as the calculation had been done for the period from 2016 whereas the project had started in the year 2014 and the availability of credit ought to have been calculated from 2014 which would in turn increase the percentage of credit available

to him under the pre-GST regime thereby reducing the difference of credit available under the pre-GST vis-à-vis the post-GST regime.

20. Vide his submissions dated 16.04.2019 the Respondent has submitted that the proceedings were not maintainable since the complaint had been withdrawn by the Applicant No. 1 and the proceedings were also time barred in terms of Rule 128 of CGST Rules and there was no other project except this project which was being executed by him. He has also attached his own calculations as per the Table C of the DGAP's Report. He has also stated that the law had completely changed due to Notification No. 3/2019 dated 29.03.2019 w.e.f 01.04.2019 whereby if the CC was obtained, the above Notification contemplated reversal of ITC availed from 1st July, 2017 including TRAN credit based on the ratio of the carpet area of unbooked apartments as against the carpet area of all the apartments. He has applied for the CC and was likely to get the same by the end of April, 2019 and once the CC was obtained the ITC would have to be reversed. Therefore, there was no question of benefit of ITC and hence the same was not required to be passed on, he has claimed.

21. The above submissions dated 16.04.2019 of the Respondent were sent to the DGAP for filing his Report, who vide his Report dated 24.04.2019 has submitted that he had no comments to offer on para 1 & 2 of the above submissions while the contents of para 3 & 4 had already been addressed in his Report dated 18.02.2019. The DGAP vide his final

Report dated 21.05.2019 has submitted that the worksheet submitted by the Respondent covered the pre-GST period from April, 2014 to June, 2017 while his investigation Report dated 18.02.2019 covered the pre-GST period from April, 2016 to June, 2017 and hence the two worksheets were not comparable. He has further submitted that in case of all such investigations he had taken the period between 01.04.2016 to 30.06.2017 for the pre-GST period.

22. Vide his submissions dated 30.05.2019 the Respondent has stated that even though he had not received the CC but according to Rule 42 and 43 of the CGST Rules as amended by Notification No. 16/2019-CT dated 29.03.2019 the amount of ITC which would be required to be reversed for unbooked flats on receipt of the CC would be Rs. 16,66,27,208/- and no ITC would be left in his credit ledger after such reversal and hence there could not be any question of profiteering.

23. We have carefully considered the Report of the DGAP, submissions made by the Respondent and based on the record it is revealed that the following issues need to be addressed in the present case:-

a. Whether there was reduction in the rate of tax on the service provided by the Respondent w.e.f. 01.07.2017?
b. Whether there was any net additional benefit of ITC to the Respondent which was required to be passed on by him to his recipients?
c. Whether there was any violation of the provisions of Section 171 of the CGST Act, 2017 by not passing on the above benefits by the Respondent?

24. It is revealed from the record that the Respondent had started construction of the project 'Risington' in the year 2014 for building 1228 apartments out of which 161 flats has been sold. It is also revealed that the Applicant No. 1 had filed an application before the Tamil Nadu State Screening Committee under Rule 128 (2) of CGST Rules, 2017 on 30.01.2018 alleging that he had purchased a flat from the Respondent in the above project but he had not passed on the benefit of ITC by commensurate reduction in the price of the flat after coming in to force of the GST to him. This application was forwarded to the Standing Committee by the above Committee on 29.06.2018 on its prima facie satisfaction that the Respondent had not passed on the above benefit. The Standing Committee had also examined the above application in its meetings held 0n 07.08.2018 and 08.08.2018 and sent the same to the DGAP with its recommendation to conduct detailed investigation as per Rule 129 (1) of the above Rules. The DGAP after conducting detailed investigation vide his Report dated 18.02.2019 has stated that the Respondent has not passed on the benefit of ITC to his customers and has profiteered an amount of Rs. 1,01,50,590/- @ 5.36% of the turnover.

25. The Respondent has submitted that the present investigation was based on an application dated 30.01.2018 filed by the above Applicant which had been withdrawn by him on 25.09.2018 and hence the present proceedings were not maintainable. Perusal of the Anti-Profiteering Application Form (APAF-1) filled by the above Applicant along with his application dated 30.01.2018 shows that against Sr. No. D 9 of the above Form against the "Amount of benefit not passed on after adjusting difference between Post GST and Pre GST actual price/value" an

amount of Rs. 26,614/- has been mentioned as amount of benefit not passed on which clearly proves that the above Applicant had claimed that the above amount had not been passed on to him which was due to him as benefit of additional ITC. Perusal of the complaint filed by the above Applicant on 30.01.2018 also shows that it is worded as under:-

"Myself Booked flat with Doshi - Risington, OMR, Karapakkam, in Sept. 2016. Construction /land agreement and welcome letter was signed with proper disbursement schedule. I paid 87.5% disbursement as per the agreement and on time. Since GST was incorporated from July 2017, for the remaining 12.5% disbursement builder is not following the agreed schedule and asking to pay more on account of GST i.e. Charging 18% GST on construction plus land cost. To my knowledge, GST of 18% can be charged to construction disbursement value but not on the land value which has now become a dispute. Builder is not agreeing and saying that the cost initially paid is all apportioned to land cost as per their accounting procedure and company policy. I mentioned to them that this doesn't match the disbursement agreement we signed in Sept. 2016. I also mentioned that for a new fiat 12.5% disbursement, GST is very much less compared to my flat. But builder is asking to pay as per their demand which I am not in agreement. I also told the builder that this is anti-profiteering as per GST law. I have now been asked to pay interest cost as well for the delay in payment. Don't know how to progress and requesting your help. Have attached the documents for reference and I am willing to share any original docs. as per your request. I am also attaching the following:" (Emphasis supplied)

Therefore, it is further clear from the above Application that the Applicant No. 1 had specifically pleaded denial of passing of the benefit of ITC which fell under the anti-profiteering provisions of the GST law. Therefore, the contention of the Respondent that the above Applicant had not mentioned denial of passing of the ITC benefit in his above application is incorrect.

26. It is also revealed from the perusal of the application dated 25.09.2019 filed by the above Applicant before the DGAP for withdrawal of the complaint that it states as under:-

"I had written an e-mail on 30.01.2018 with reference to a flat that I had booked in September, 2016 with Shree Mahalaxmi Enterprises. Subsequently, I met the builders and all the information that I had sought was made available to me and all the issues raised by me were fully resolved to my satisfaction. In such circumstances, I request you to treat my application to the Anti-Profiteering Authority as withdrawn."

It is clear from the above that the complaint was withdrawn as a compromise between the above Applicant and the Respondent which the above Applicant could not have done as it amounts to abetment of the offence committed by the Respondent under Section 171 (1) of the CGST Act, 2017. The above Applicant has also not claimed in his above application that he had been paid the benefit of ITC which he had claimed to have been denied to him as per the APAF-1 Form. Therefore,

he has not only compromised his interest but also of the other 161 house buyers by his above withdrawal. Therefore, in such circumstances the present investigation has been rightly conducted by the DGAP.

27. It would also be pertinent to mention here that there is no provision either in the CGST Act, 2917 or the CGST Rules, 2017 which allows withdrawal of the application once it has been filed. It will also be appropriate to mention here that the DGAP is bound to proceed with the investigation once recommendation for such investigation has been made by the Standing Committee, under Rule 129 (1) of the above Rules and submit his Report under Rule 129 (6) and he has no option of terminating the investigation on the withdrawal of the complaint. The DGAP is further legally bound to proceed with the investigation once he has reasons to believe that violation of the provisions of Section 171 of the above Act has been made. Therefore, the above contention of the Respondent is not tenable and hence the same cannot be accepted.

28. The Respondent has also referred to the case of ***Gujarat Paraffins Pvt. Ltd. V. Union of India (2012) 282 ELT 33,*** wherein the Hon'ble Gujarat High Court had held that the maxim *sublato fundamento cadit opus* was applicable which stated that if the foundation was removed the superstructure falls. Perusal of the facts of the above case reveals that the above petitioner had challenged the constitutional validity of Notification No. 14/97 issued on 03.05.1997 under Section 87 of the Finance Act, 1997 whereby the above Notification was sought to be applied on the import of Non-APM products by the above petitioner. The Hon'ble Court had held that the petitioner constituted a separate class

and hence the above notification did not apply to him and hence it was unconstitutional. However, in the present case no tax liability has been imposed on the Respondent nor he constitutes a separate class and hence the law settled in the above case does not apply in his case.

29. The Respondent has also claimed that he had submitted a detailed reply to the DGAP in response to his notice issued under Rule 129 (3) of the above Rules stating that the allegation made by the above Applicant was incorrect and was mere misunderstanding and on being satisfied with the explanation given by him the above Applicant had withdrawn the complaint therefore, no further investigation could have been carried out. In this connection it would be pertinent to mention that the above Applicant was not entitled to withdraw the complaint once its cognizance had been taken by the Screening Committee, Standing Committee as well as the DGAP as there is no provision of withdrawal of the application in the above Act or the Rules, once it has been filed. The above Applicant also appears to have been withdrawn the above complaint dated 25.09.2018 due to undue influence exercised on him by the Respondent as has been mentioned above. It is also apparent from the perusal of the Report filed by the DGAP that the Respondent had infact not passed on the benefit of ITC to his customers and therefore, he cannot escape his liability on the ground that the complaint had been withdrawn.

30. The Respondent has also placed reliance on the case of ***Anil Kumar Singh V. Vijay Pal Singh and others (2018) 12 SCC 584*** in which it was held that where a plaintiff had filed an application to withdraw the

suit whether in full or in part, the plaintiff had the liberty to do so and the defendant could not raise any objection to such prayer. He has further placed reliance on the case of ***Bijayananda Patnaik V. Satrughna Sahu and Others AIR 1963 SC 1566*** in which it was held that where an application for withdrawal of a suit was filed, the Court had to allow the application and suit stood withdrawn. Perusal of the case of ***Anil Kumar Singh*** supra shows that in this case the trial court had allowed the plaintiff to withdraw the suit under Order XXIII Rule 1 of the Civil Procedure Code (CPC) 1908 whereas the Hon'ble High Court had set aside the above order of the trial court whereas the Hon'ble Supreme Court had upheld the order of the trial court. Therefore, it is clear that the above proceedings had been conducted under the provisions of the CPC which do not apply in respect of the present proceedings and hence it is respectfully submitted that the law settled in the above case is not being followed. Perusal of the case of ***Bijayananda Patnaik*** mentioned above shows that it pertains to the interpretation of the provisions of the Representation of People Act, 1951 which has a clear provision for withdrawal of the appeal whereas there is no such provisions in the CGST Act, 2017 and hence the above case does not help the Respondent.

31. The Respondent has also contended that the present proceedings were not maintainable for the reason that the time lines provided in the CGST statute had been breached. In this connection it would be appropriate to refer to the provisions of Rule 128 of the CGST Rules, 2017 which govern the time lines in the anti-profiteering proceedings. The above

Rule at the time of the filing of the complaint by the above Applicant on 30.01.2018 read as under :-

Rule 128: Examination of Application by the Standing Committee and Screening Committee

(1) The Standing Committee shall, within a period of two months from the date of the receipt of a written application, in such form and manner as may be specified by it, from an interested party or from a Commissioner or any other person, examine the accuracy and adequacy of the evidence provided in the application to determine whether there is prima-facie evidence to support the claim of the applicant that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has not been passed on to the recipient by way of commensurate reduction in prices.

(2) All applications from interested parties on issues of local nature shall first be examined by the State level Screening Committee and the Screening Committee shall, upon being satisfied that the supplier has contravened the provisions of section 171, forward the application with its recommendations to the Standing Committee for further action.

Perusal of the provisions of Rule 128 (1) clearly shows that the applications received by the Standing Committee are to be disposed of within a period of two months from the date of receipt by it and not from

the date when the application was received by the Screening Committee. The above Committee can neither dispose of an application within the period of 2 months which is not lying before it nor it can presume which application is pending before the Screening Committee. Since the application dated 30.01.2018 filed by the above Applicant before the Screening Committee was forwarded by it on 29.06.2018 to the Standing Committee and it was considered and recommended to the DGAP for detailed investigation by the Standing Committee in its meetings held on 07.08.2018 and 08.08.2018, it was forwarded well within the prescribed limit of two months, therefore, the claim of the Respondent that the application was not disposed of within the above time limit is not tenable. Perusal of Rule 128 (2) also shows that no time limit had been prescribed for disposing off an application by the Screening Committee and hence forwarding of the application dated 30.01.2018 to the Standing Committee on 18.07.2018 is not hit by the limitation of 2 months as has been contended by the Respondent. The DGAP had received the above application on 30.08.2019 which is also well within the prescribed time limit of 2 months as per Rule 128 (1). Therefore, all the objections raised by the Respondent on this ground are frivolous and hence they cannot be accepted.

32. It has also been submitted by the Respondent that the request of the DGAP for extension of the period for submission of the Report was misconceived since the complaint was not in existence. This claim of the Respondent is untenable since the DGAP was bound to investigate the above complaint once it had been forwarded to him by the Standing Committee as per Rule 129 (1) of the above Rules and therefore, his

request for extension of the time for completing investigation as per the provisions of 129 (6) was correct.

33. The Respondent has also argued that the DGAP had calculated the benefit of ITC without taking in to consideration that once the CC was received by the Respondent he would be required to reverse the ITC as per the provisions of para 5, Schedule-II of the CGST Act and the Notification dated 29.03.2019. In this connection it would be appropriate to mention that the present computation of the profiteered amount pertains to the period w.e.f. 01.07.2017 to 31.08.2018 during which the Respondent has not obtained the CC therefore, the provisions of para 5 mentioned above do not apply in his case. Similarly the provisions of Notification dated 29.03.2019 would be applicable prospectively only and any benefit availed by the Respondent on account of the additional ITC will have to be passed on by him till 31.03.2019. Therefore, both the above contentions of the Respondent are incorrect and hence, the same cannot be accepted.

34. The Respondent has also quoted the provisions of Rule 42 and 43 of the CGST Rules, 2017 amended vide Notification No. 16/2019 dated 29.03.2019 and stated that as per the above amendment the carpet area of the apartments that were to be sold after issuance of the CC was considered as exempt supply and the ITC attributable to the exempt supply would have to be reversed, therefore, the assumption that the ITC was fully available as per the calculation made in Table C of the Report was incorrect. The above claim of the Respondent is not relevant in respect of the present case since the CC has not yet been obtained by the Respondent, therefore, there is no question of reversal of the ITC. Moreover, as per the Table C the DGAP has considered only that amount

of ITC which has been availed by the Respondent on the area which he has sold as is clear from Sr. No. 6 of Table C. The Respondent is required to pass on the benefit of the relevant ITC only to those buyers who had purchased the flats in the pre-GST period and made payment of due amount in the post-GST period. Nowhere the Respondent has been asked to pay the benefit in respect of the unsold flats and the ITC available on such flats would be available to him for reversal in case these flats are not sold. Accordingly, the above contention of the Respondent is incorrect.

35. The Respondent has further stated that the calculations made in Table C identifying 5.36% of the turnover as the benefit of ITC were prima facie incorrect since there was no method or formula mentioned in the Act or the Rules for determination of the benefits to be passed on. In this connection it would be pertinent to mention that Section 171 (1) of the CGST Act, 2017 clearly states that "Any reduction in the 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". Therefore, the intention of the legislature is amply clear from the above provision which requires that the benefit of tax reduction or ITC is required to be passed on to the customers by commensurate reduction in prices and the same cannot be retained by the suppliers. In exercise of the powers conferred on this Authority under Rule 126 of the CGST Rules, 2017 it has already notified the 'Procedure & Methodology' for determination of the profiteered amount vide its Notification dated 28.03.2018. However, the mathematical methodology for determination of the profiteered amount has to be applied on case to case basis depending on the facts of each case and no set formula can be fixed for calculating the same as the facts of each case

differ. The mathematical methodology applied in the case where the rate of tax has been reduced and ITC disallowed cannot be applied in the case where the rate of tax has been reduced and ITC allowed. Similarly, the mathematical methodology applied in the case of Fast Moving Consumer Goods (FMCGs) cannot be applied in the case of construction services. Even the methodology applied in two cases of construction service may vary on account of the period taken for execution of the project, the area sold and the turnover realised. The Respondent has himself admitted that the same methodology could not be applied in each case and hence he should have no objection on the methodology which had been adopted by the DGAP in his case, based on the ITC availed, area sold and the instalments received after 01.07.2017. It would also be appropriate to mention here that this Authority has power to 'determine' the methodology and not to 'prescribe' it as per the provisions of the above Rule and hence, no set prescription can be laid while computing profiteering. Therefore, the above contention of the Respondent cannot be accepted as the mathematical methodology adopted by the DGAP while computing the benefit of ITC @ 5.36% of the turnover is correct.

36. The Respondent has also pleaded that the calculations made by the DGAP which were based on ratios of the CENVAT/ITC availed during the pre-GST and the post-GST periods were prima facie incorrect as they were required to be calculated as per the provisions of Rule 42 and 43 as amended w.e.f. 01.04.2019. As already discussed above the Respondent has not received the CC yet and hence, the ITC is not required to be reversed at this stage as per the provisions of the above Rules as well as the notification and

hence the computation made by the DGAP based on the above ratios is correct.

37. He has also submitted that the calculation of benefit of ITC of 5.36% of the turnover was also wrong as there has been increase in the cost of the construction material. In this connection it would be pertinent to mention that the above benefit is only required to be computed in respect of the benefit of additional ITC which the Respondent had received. It is evident from the perusal of Table C that the Respondent had an amount of Rs. 4,42,61,263/- available as CENVAT credit during the pre-GST period and an amount of Rs. 8,50,34,930/- as ITC during the post-GST, therefore, it is clear that he had availed additional benefit of ITC. There is also no question of increase in the cost of the material on account of the GST since his suppliers were also receiving the benefit of ITC which they were required to pass on to him. The Respondent has himself received the benefit of ITC on the GST paid on the construction material and hence he cannot claim that his construction cost had increased. The Respondent has also claimed that he had given discount to his customers which is contradictory to his argument of increase in the cost of the material.

38. The Respondent has also cited the order of this Authority passed in Case No. 9/2018 in the matter of ***Jijrushu N. Bhattacharya V. N. P. Foods (Franchisee of Subway)*** and claimed that in the above case it was held that when the base price of Hara Bhara Kabab had been increased from Rs. 130/- to Rs. 135/- and the respondent had increased the price to make good the loss which he had incurred due to loss of ITC post-GST rate reduction and the increase was commensurate with the increase in the cost of production on account of denial of ITC, there was no profiteering. He has

also pleaded that the ratio of this ruling was applicable in his case since his base price of the construction material in the GST regime had gone up and he had not increased the prices to be charged from the customers. Perusal of the facts of the above case shows that in respect of the case of ***Jijrushu N. Bhattacharya*** supra the rate of tax had been reduced from 18% to 5% with denial of ITC and hence the Respondent was entitled to increase his prices by the amount of denial of ITC to the extent of 11.80%. However, in the present case although the rate of tax has been increased from 6% to 18% the benefit of ITC has been given to the Respondent and hence as per the provisions of Section 171 (1) of the above Act the Respondent is required to pass on the additional benefit of ITC which he has received after coming in to force of the GST. Therefore, the above case is of no help to the Respondent.

39. The Respondent has also claimed that his turnover post-GST was Rs. 16,04,88,715/- which also included the instalments paid by the buyers who had booked apartments in the pre-GST period and the instalments due in the post-GST period from such customers amounted to Rs. 5,84,74,134/- and hence the eligibility of credit was also restricted to that amount whereas in Table C it had been assumed that the full credit had been utilized. However, perusal of Table C shows that the above turnover has been taken by the DGAP from the GSTR-3B Returns filed by the Respondent and hence the same could not include the pre-GST instalments amounting to Rs. 5,84,74,134/- as has been claimed by the Respondent and hence the above claim of the Respondent is incorrect.

40. The Respondent has also objected to the calculation methodology adopted by the DGAP to arrive at the percentage of the ratio of ITC to turnover post-

GST as it was an ongoing project in which only 161 apartments had been booked and therefore, all the customers were not entitled to the above benefit. However, perusal of Table C and D submitted by the DGAP shows that the above benefit has been computed in respect of those flats only which have been sold in the pre-GST period and instalments on which have been received in the post-GST period. The additional benefit has also been calculated on the basis of the area sold during both the above periods and the proportionate ITC availed during these periods as is apparent from Sr. No. 5 and 6 of Table C. The profiteered amount has further been computed on the basis of the turnover realised by the Respondent during the post-GST periods as it evident from Sr. No. 14 of Table D. It has also been specifically mentioned in para 26 of the Report dated 18.02.2019 by the DGAP that the profiteering has been computed only in respect of the period between 01.07.2017 to 31.08.20198 and profiteering if any, after the above period has not been examined as the exact quantum of ITC that would be available to the Respondent in future could not be determined at present when the construction was yet to be completed. Therefore, the above contention of the Respondent is wrong and hence the same cannot be accepted.

41. The Respondent has also averred that the calculation of the percentage of credit available to him under the pre-GST period as per Table C was flawed as it has been done for the period from 2016 whereas the project had started in the year 2014 and the availability of credit ought to have been calculated from 2014. In this connection perusal of the Report dated 21.05.2019 filed by the DGAP shows that he had taken the period from April, 2016 to June, 2017 for the computation of ITC available to the

Respondent uniformly in respect of all such case of construction service to arrive at the benefit of additional ITC. In this respect it would be pertinent to mention that the basis adopted by the DGAP is not going to adversely affect the interest of the Respondent as he would have to calculate the benefit of additional ITC after the completion of the project on the basis of the actual amount of ITC availed and the total turnover received and therefore, any excess or less payment of ITC can be suitably adjusted by him.

42. The Respondent has also attached his own calculations on the line of Table C of the DGAP's Report and claimed that the pre-GST ratio was 1.55% and the post-GST ratio was 3.03% and hence the additional benefit of 1.48% was only available as compared to the ratio of 5.36% computed by the DGAP. However, perusal of the Table prepared by the Respondent shows that he has taken in to account the ITC w.e.f. April, 2014 to June, 2016 and hence there is going to be difference in the computation of the benefit. Hence, the above plea of the Respondent is incorrect.

43. The Respondent has also contended that he had applied for the CC and was likely to get the same by the end of April, 2019 and once the above certificate was obtained the ITC would have to be reversed. However, the Respondent has failed to submit the CC during the course of the proceedings and therefore, the above argument of the Respondent is not plausible. Otherwise also even after receipt of the CC the amount of ITC which the Respondent has not released on the unsold flats would still be available to him which he can very easily reverse and hence the above claim of the Respondent is frivolous.

44. Based on the above facts it is clear as per Table C supra that during the pre-GST period from April. 2016 to June, 2017 the Respondent was paying tax @ 6% which was increased to 18% during the post-GST period and hence there was increase in the rate of tax and therefore, the Respondent is not liable to pay the benefit of tax reduction to his customers. However, the Respondent has availed CENVAT credit on the Service Tax during the pre-GST period from April, 2016 to June, 2017 amounting to Rs. 4,42,61,283/-, collected an amount of Rs. 43,37,60,103/- from his customers as turnover, has sold an area of 1,55,036 Sq. Ft. relevant to the above turnover during the above period, has availed relevant amount of ITC of Rs. 46,95,134/- and accordingly, the ratio of CENVAT to the ITC was 1.08% during the pre-GST period. It is also clear as per the above Table that the ITC available to the Respondent in the post-GST period from July, 2017 to August, 2018 was Rs. 8,50,34,930/- and his turnover was Rs. 16,04,88,715/-. He had also sold an area of 1,77,512 Sq. Ft., relevant to the above turnover during the above period. The proportionate ITC availed by the Respondent was Rs. 1,03,28,012/- on the basis of which ratio of ITC to turnover comes to 6.44%. Therefore, it is abundantly clear that the Respondent has benefited from the additional benefit of ITC to the tune of 5.36% (6.44%-1.08%) of the turnover which he is required to pass on to his customers as per the provisions of Section 171 of the above Act. Since the above figures of ITC and turnover have been taken form the Returns filed by the Respondent himself and the figures of sold area have been supplied by the Respondent himself, the same cannot be disputed by the Respondent and can be relied upon and accordingly, the above computations are held to be correct. Therefore, the profiteered amount is

determined as Rs. 1,01,50,590/- which includes GST @12% on the base profiteered amount of Rs. 86,02,195 as per Annexure-17 of the Report dated 18.12.2019 for the period w.e.f. 01.07.2017 to 31.08.2018 in terms of Rule 133 (1) of the CGST Rules, 2017. It is also revealed that the Respondent has profiteered an amount of Rs. 41,434/- from the Applicant No. 1 including the GST.

45. It is established from the perusal of the above facts of the case that the provisions of Section 171 of the CGST Act, 2017 have been contravened by the Respondents as he has failed to pass on the benefit of additional ITC to his customers. Accordingly, he is directed to pass on an amount of Rs, 41,434/- to the above applicant and an amount of Rs. 1,01,09,156/- (Rs. 1,01,50,590-Rs. 41,434/-) to the other flat buyers who are not Applicants in the present proceedings. The above amounts shall be paid within a period of 3 months from the date of issue of this Order to the Applicant No. 1 and the other eligible house buyers by the Respondent along with interest @18% from the date from which these amounts were realised by the Respondent from them, till they are paid as per the provisions of Rule 133 (3) (b) of the CGST Rules, 2017, failing which the above amounts shall be recovered by the concerned Commissioner CGST / SGST and paid to the eligible house buyers.

46. From the above discussions it is clear that the Respondent has profiteered by an amount of Rs. 1,01,50,590/- during the period of investigation from 01.07.2017 to 31.08.2018. Therefore, 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. The present investigation is

only up to 31.08.2018 therefore, any additional benefit of ITC which shall accrue subsequently shall also be passed on to the buyers by the Respondent as per the provisions of Section 171 (1) of the CGST Act, 2017. In case this additional benefit is not passed on to the Applicant No. 1 or other buyers they shall be at liberty to approach the State Screening Committee Tamil Nadu for initiating fresh proceedings under Section 171 of the above Act against the Respondent. The concerned CGST or SGST Commissioner shall take necessary action to ensure that the benefit of additional ITC is passed on to the eligible house buyers in future.

47. It is evident from the above that the Respondent has denied the benefit of ITC to the buyers of the flats being constructed by him in contravention of the provisions of Section 171(1) of the CGST Act, 2017 and has thus profiteered as per the explanation attached to Section 171 of the above Act. Therefore he is liable for imposition of penalty under Section 171 (3A) of the CGST Act, 2017. Therefore, a Show Cause Notice be issued to him directing him to explain why the penalty prescribed under the above sub-Section read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him. Accordingly, the notice dated 21.02.2019 vide which it was proposed to impose penalty on the Respondent under Section 29 and 122-127 of the above Act read with Rule 21 and 133 of the CGST Rules, 2017 is hereby withdrawn to that extent.

48. Further the Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Tamil Nadu 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 buyers as per Annexure-17 of the Report. A report in compliance of this order shall be

submitted to this Authority by the concerned Commissioners within a period of 4 months from the date of receipt of this order.

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

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(R. Bhagyadevi)
Member(Technical)

Sd/-
(Amand Shah)
Member(Technical)

Certified Copy

20.11.19

(A. K. Goel)
NAA, Secretary

F. No. 22011/NAA/02/Maha/2019/6412-18 Date: 20.11.2019

21.11.19

Copy To:-

1. M/s. Shree Mahalakshmi Enterprises, Doshi Housing, Doshi Towers, 9th floor, Poonamalle High Road, Kilpauk, Chennai-600010.
2. Mr. Paval Antony, No. 15/7, Lakshmi Apartments, G-B, 1st Canal Cross Street, Gandhi Nagar, Adyar, Chennai-600020, Tamilnadu.
3. The Commissioner of State Tax, PAPJM Building, Greams Road, Chennai-600006.
4. The Commissioner, CGST Chennai, 26/1, Uthamar Gandhi Rd,. Thousand Light West, Nungambakkam, Chennai-600034.
5. Office of Director of Town and Country Planning, 807, Anna Salai, Chennai-600002.
6. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
7. Guard File/ Website.

20.11