

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

Case No. 75/2019
Date of Institution 19.06.2019
Date of Order 18.12.2019

In the matter of:

1. Shri Suresh Kumar Gupta, A-12 First Floor, Street No. 3, Guru Nanak Pura, Laxmi Nagar, Delhi-110092.
2. Shri Shakti Anand, 43-D, 2nd Floor, J-Pocket, Sheikh Sarai-II, New Delhi-110017.
3. Shri Abhishek Kumar Singh, G9-106, Nirala Greenshire, Gh-03, Sector-2, Greater Noida West, Uttar Pradesh-201306.
4. Shri Anil Singh, G8-1708, Nirala Greenshire, Gh-03, Sector-2, Greater Noida West, Uttar Pradesh-201306.
5. Shri Lalit Kumar, G8-1903, Nirala Greenshire, Gh-03, Sector-2, Greater Noida West, Uttar Pradesh-201306.
6. Shri Rishi Ranjan, G-8-1508, Nirala Greenshire, Gh-03, Sector-2, Greater Noida West, Uttar Pradesh-201306.
7. 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 Nirala Projects Pvt. Ltd., H-121, Sector-63, Noida-201301.

Respondent

Quorum:-

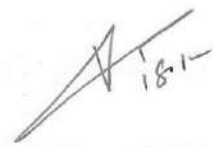
Sh. B. N. Sharma, Chairman

Sh. J. C. Chauhan, Technical Member

Sh. Amand Shah, Technical Member

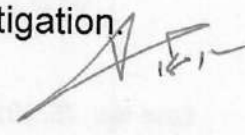
Present:-

1. Sh. Suresh Kumar Gupta, Applicant No. 1 in person.
2. Sh. Shakti Anand, Applicant No. 2 in person.
3. Sh. Abhishek Kumar Singh, Applicant No. 3 in person.
4. Sh. Anil Kumar Singh, Applicant No. 4 in person.
5. Sh. Lalit Kumar, Applicant No. 5 in person.
6. Sh. Rishi Ranjan, Applicant No. 6 in person.
7. Sh. Amit Srivastava, Superintendent and Sh. Shivendu Pandey, Superintendent, for the Applicant No. 7.
8. Sh. Gaurav Gupta, Authorised Representative, Sh. Rakesh Mahajan, Director, Sh. Neeraj Verma, GM (Accounts); Sh. Girish Chand Rajput CA; and Sh. Yudhister Mehtani, CA for the Respondent.



ORDER

1. The present Report dated 24.04.2019 and subsequent Reports dated 07.06.2019 and 19.06.2019 have been received from the Applicant No. 7 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 the Applicant No. 1 had booked a flat in the Respondent's project "Nirala Greenshire" situated at GH-03, Sector-02, Greater Noida West (Uttar Pradesh) and alleged that the Respondent had increased the price of the flat after introduction of GST w.e.f. 01.07.2017 and had not passed on the benefit of input tax credit by way of commensurate reduction in the price to him. The Uttar Pradesh State Screening Committee on Anti-profiteering on prima facie having satisfied itself that the Respondent had not passed on the commensurate benefit of input tax credit to the Applicant No. 1, as the input tax credit available to Respondent was to be apportioned against the instalments towards the price of the flat, had forwarded the said application with its recommendation, to the Standing Committee on Anti-profiteering on 28.07.2018 for further action, in terms of Rule 128 (2) of the above Rules.
2. The above references was examined by the the Standing Committee on Anti-profiteering and vide minutes of its meeting dated 08.10.2018 it had forwarded the same to the DGAP for detailed investigation.



3. The Applicant No. 1 had also submitted documents viz. duly filled in form APAF-1, copies of intimation letters & receipts and copies of the demand letters along with his application.
4. The DGAP upon perusal of the application had found that the Applicant No. 1 had booked a flat with the Respondent on 09.09.2013, i.e. in the pre-GST era. The details of the demands made on the Applicant No. 1 on account of the purchase of the flat have been furnished in table "A" below:-

Table-'A'

(Amount in Rs.)

Particulars	Basic Sale Price including PLC	Other Charges	IFMS @ 20/- per sq. ft.	Service Tax including Cess	GST	ITC Benefit passed on	Total
Agreement Value (A)	44,60,352	56,500	25,600	2,05,811	-	-	47,48,263
Paid in Pre-GST era (B)	31,22,247	-	-	1,30,267	-	-	32,52,514
Balance to be paid Post GST (C)= (A)-(B)	13,38,105	56,500	25,600	75,544	-	-	14,95,749
Demanded by the Respondent (D)	13,38,105	56,500	25,600	-	1,74,660	(41,837)	15,53,028
Excess Demand: (E)= (D) - (C)							57,279

5. The Standing Committee on Anti-profiteering, vide the minutes of its meeting dated 08.10.2018, had forwarded another application dated 07.07.2018 filed by the Applicant No. 2 against the Respondent, in respect of purchase of a flat in the Respondent's present project alleging that the Respondent had not passed on the benefit of ITC by way of commensurate reduction in price, on implementation of GST w.e.f. 01.07.2017.

6. Further, the Standing committee on Anti-profiteering, vide the minutes of its meeting dated 11.03.2019, had forwarded four more applications filed by the Applicants No. 3, 4, 5 and 6 against the Respondent, in respect of purchase of flats in the Respondent's present project alleging that the Respondent had not passed on the benefit of ITC by way of commensurate reduction in prices, on implementation of GST w.e.f. 01.07.2017. The details of the above mentioned four applications are furnished in Table-B below:-

Table-B

S. No.	Name of Applicant	Address	Flat No. in Respondent's Project	Application Date	Sl. No. in Standing Committee Annex-1A	Remark
1	Shri Abhishek Kumar Singh	G9-106, Nirala Greenshire, Gh-03, Sector-2, Greater Noida West, Uttar Pradesh-201306	G9-106	20.11.2018	2	Applicant No. 3
2	Shri Anil Singh	G8, 1708 Nirala Greenshire, Gh-03, Sector-2, Greater Noida West, Uttar Pradesh-201306	G8-1708	24.11.2018	3	Applicant No. 4
3	Shri Lalit Kumar	G8-1903, Nirala Greenshire, Gh-03, Sector-2, Greater Noida West, Uttar Pradesh-201306	G8-1903	20.11.2018	8	Applicant No. 5
4	Shri Rishi Ranjan	G-8, Flat No. 1508, Nirala Greenshire, Gh-03, Sector-2, Greater Noida West, Uttar Pradesh-201306	G8-1508	24.11.2018	9	Applicant No. 6

7. The DGAP upon receiving of the application of the Applicant No. 1 from the Standing Committee on Anti-profiteering on 25.10.2018, had issued a Notice dated 02.11.2018 under Rule 129 (3) of the CGST Rules, 2017, calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the Applicant No. 1 by way of commensurate reduction in price and if so, to suo moto determine the quantum thereof and indicate the same in his reply to the Notice as well as furnish all the supporting documents. The DGAP vide his notice dated 02.11.2018 had also given the Respondent an opportunity to inspect the non-confidential evidences/information submitted by the Applicant No. 1 during the period from 12.11.2018 to 14.11.2018. The Respondent availed this opportunity and visited the DGAP and inspected the documents on 12.11.2018.
8. The DGAP has further submitted that upon receiving of the application of the Applicant No. 2 from the Standing Committee on Anti-profiteering, he had decided to include the Applicant No. 2 as an interested party in the ongoing proceedings. Accordingly, the DGAP had issued a letter dated 16.11.2018 to the Applicant No. 2 and informed him about the above decision.
9. The DGAP has also stated that upon receiving of the applications of the Applicants No. 3, 4, 5 and 6 from the Standing Committee on Anti-profiteering, he had decided to include them as interested parties in the ongoing proceedings. Accordingly, the DGAP had issued a

letter dated 02.04.2019 to the above Applicants and informed them about the above decision.

10. The DGAP, vide e-mail dated 08.04.2019 had also given an opportunity to the above Applicants to inspect the non-confidential documents/reply furnished by the Respondent on 11.04.2019 or 12.04.2019 and all the above mentioned Applicants had availed this opportunity and inspected the non-confidential documents submitted by the Respondent on 11.04.2019.

11. The Applicant No. 1, vide e-mail dated 15.04.2019 had informed that at the time of issuance of demand letters by the Respondent and while obtaining part occupancy certificate from the competent authority, there were many works pending from the Respondent's side and the Respondent had assured him that the same would be completed in future. The Applicant No. 1 further submitted that in December, 2017, the Respondent had obtained the part occupancy certificate from the Noida Authority and collected 100% consideration from all the flat buyers by giving them only 3% GST input tax credit benefit. But there were many common pending works which were required to be completed before giving possession. He further informed the DGAP that at the time of receiving the part occupancy certificate, the flats were in raw shape without sanitary fittings, electric fittings, internal paints and finishing work which were completed in March/April, 2018. Further, the possession of flats was given 4/5 months after the issue of the part occupancy certificate. He also informed that there were many other common works pending for the society as a whole, which were partly provided from time to time like Common Society Park pPartly provided in June, 2018), Car Parking

(partly provided in September, 2018), Temporary Club (partly provided in August, 2018), external paint of building and finishing work (which was promised to be provided by December, 2018 but not provided till March, 2019), Main gate decoration/paint (partly provided in September, 2018) and Common Generator (purchased in September, 2018). It was also informed that the Respondent had not provided many major common amenities like Full Flash Club, Swimming Pool and Long Tennis Court etc. The Applicant No. 1 also submitted that an e-mail dated 30.06.2018 was received from the Respondent, vide which there was a confirmation that he had not provided all the facilities which were common and hence, the above Applicant requested for ITC benefit for the entire project instead of tower-wise benefit.

12. The DGAP had sought extension of time for completing the investigation which was extended by this Authority vide its order dated 15.01.2019 in terms of Rule 129 (6) of the CGST Rules, 2017. The period of the investigation is from 01.07.2017 to 31.12.2018.

13. In response to the Notice dated 02.11.2018 issued by the DGAP, the Respondent vide letters/e-mails dated 16.11.2018, 04.04.2019, 08.04.2019 and 13.04.2019 had submitted that the present project consisted of 8 towers, the details of which have been given in Table-C below:-

Table-C

S.No.	Tower Name	Total Unit (No.)	Total Area (In Sq. Ft.)	Remark	Units Unsold at the time of OC	Area Unsold at the time of OC
1	G6	76	1,19,060			
2	G7	114	1,56,750	OC received on 21.12.2017	18	25130
3	G8	152	1,79,430		16	18615
4	G9	114	1,56,750		35	49930
5	G10	76	1,26,280		29	47440
6	G11	200	2,01,000			
7	G12	200	2,01,000			
8	G14	200	2,01,000			
	Total	1,132	13,41,270		98	1,41,115

14. The Respondent further submitted that he had passed on ITC/Anti-profiteering benefit to his customers @ 3% and Applicants should invariably understand that benefit of ITC was available only to those buyers who had made their bookings before 01.07.2017 which were valid till date. The eligible customers were those whose bookings were valid on implementation of the GST Act. The Respondent further submitted a letter dated 06.01.2018 of the Applicant No. 1 addressed to the Director of the Respondent, informing him about the withdrawal of all pending complaints with the undertaking not to file any complaint in future before any forum. The Respondent also furnished the following documents/information:-

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

- (b) Copies of GSTR-3B Returns for the period July, 2017 to December, 2018.
- (c) Copies of Tran-1 Returns for transitional credit.
- (d) Copies of VAT & ST-3 Returns for the period April, 2016 to June, 2017.
- (e) Copies of all demand letters, sale agreement along with allotment letter, settlement deed, and payment details issued in the name of the Applicants.
- (f) Details of applicable tax rates, pre-GST and post-GST.
- (g) Copy of Audited Balance Sheet (including all annexures and profit and loss account) for FY 2016-17 & FY 2017-18.
- (h) Copy of Electronic Credit Ledger for the period 01.07.2017 to 31.12.2018.
- (i) CENVAT/Input Tax Credit register for the period April, 2016 to December, 2018.
- (j) Details of VAT, Service Tax, ITC of VAT, CENVAT credit for the period April, 2016 to June, 2017 and output GST and ITC of GST for the period July, 2017 to December, 2018 for the project "Nirala Greenshire".
- (k) List of home buyers in the project "Nirala Greenshire".
- (l) Project report submitted to the RERA along with RERA certificate.
- (m) Occupancy Certificate dated 21.12.2017 received from GNIDA.

15. The Respondent further requested that except the data which was readily available in public domain and on service portals, all other

details/ information were to be treated as confidential, in terms of Rule 130 of the CSGT Rules, 2017.

16. Based on the above mentioned documents filed by the Respondent, the DGAP submitted that the main issues for determination were whether there was any benefit of reduction in the rate of tax or input tax credit on the supply of construction service by the Respondent after implementation of GST w.e.f. 01.07.2017 and if so, whether such benefit was passed on to the Applicant No. 1, in terms of Section 171 of the CGST Act, 2017.

17. The DGAP also submitted that the Respondent, vide letter dated 16.11.2018, had submitted a copy of allotment letter dated 29.10.2013 and demand letters for the sale of flat to the Applicant No. 1, measuring 1,280 square feet, at the basic sale price of Rs. 3,485/- per square feet. The DGAP also furnished the details of amounts and taxes paid by the Applicant No. 1 to the Respondent as is given in Table-D below:-

Table-D

(Amount in Rs.)

S. No.	Payment Stages	Due Date	Net BSP including PLC	Other Charges	IFMS @ 20/- per sq. ft.	Service Tax including Cess	GST	ITC benefit	Total
1	At the time of Booking	19.09.2013	6,69,053	-	-	23,699	-	-	6,92,752
2	On 2 nd Instalment	19.10.2013	11,15,088	-	-	39,499	-	-	11,54,587
3	On Casting of 17 th Floor Roof	22.06.2017	13,38,106	-	-	67,069	-	-	14,05,175
4	At the time of offer of	24.10.2017	13,38,105	56,500	25,600	-	1,74,660	(41,837)	15,53,028

possession/offer of possession for fit-out period									
Total	44,60,352	56,500	25,600	1,30,267	1,74,660	41,837	48,05,542		

18. The DGAP further observed that the Respondent had contended that the Applicant No. 1 had withdrawn his complaint and hence, investigation should be closed/dropped and on examination of this submission, the DGAP has observed that the Applicant No. 1 had filed an application under Rule 128 of the Rules on 28.02.2018 which was filed after his letter dated 06.01.2018, addressed to the Respondent. He has also stated that while the present proceedings must necessarily flow from an application but there was no statutory provision for its closure on account of withdrawal of such application. The DGAP also submitted that in terms of Rule 129 of the Rules, the DGAP was under a statutory obligation to complete the investigation in case of receipt of any reference from the Standing Committee on Anti-profiteering and for the above mentioned reasons, the withdrawal of an application was not a legally valid ground to discontinue the proceedings initiated under Rule 129 of the Rules.

19. The DGAP further clarified that the contention of the Respondent that benefit of ITC would be available only to those customers who had made their bookings before 01.07.2017 and their bookings were valid on implementation of GST, was also not correct and in fact, the benefit of ITC would be available on the amount paid/demanded post introduction of GST w.e.f. 01.07.2017, regardless of whether the

booking was made in the pre-GST or the post-GST period. Therefore, new bookings made on or after 01.07.2017 (Post-GST regime) were also fully eligible for the benefit of input tax credit on the consideration paid post-GST.

20. The DGAP also observed that para 5 of Schedule-III of the Central Goods and Services Tax Act, 2017 which states as *(Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services)* reads as "Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building". Further, clause (b) of Paragraph 5 of Schedule II of the Central Goods and Services Tax Act, 2017 reads as "*(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier*". Thus, the ITC pertaining to the residential units which are under construction but not sold was provisional input tax credit which might be required to be reversed by the Respondent if such units remained unsold at the time of issue of completion certificate, 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”.

The DGAP thus mentioned that the ITC pertaining to the unsold units might not fall within the ambit of this 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 them post-GST. The Respondent also submitted that he had received the Occupancy Certificate on 21.12.2017 for 4 towers (Tower- G7, G8, G9 and G10) and had reversed the ITC of Rs. 16,92,066/- in the GSTR-3B Return for August, 2018, in respect of the unsold area of 1,41,115 sq. ft. on the date of receiving Occupancy Certificate for these 4 towers. The Respondent had also reversed Service Tax credit of Rs. 60,13,833/- for the unsold area in these 4 towers.

21. The DGAP further clarified that the Respondent had claimed in his letter dated 16.11.2018 that he had passed on the ITC benefit to his customers @ 3%. However, customers-wise details of such benefit claimed to have been passed on along with documentary evidence, had not been submitted by the Respondent. Further, from the demand letter dated 04.10.2017 (furnished as a part of

Respondent's letter dated 16.11.2018), the Respondent had claimed that the Respondent had passed on the benefit of Rs. 41,838/- to the Applicant No. 1 which worked out to be 3% of the amount collected post-GST. However, the correctness of the amount of benefit so passed on by the Respondent had to be determined in terms of Rule 129(6) of the Rules. Thus, the ITC available to the Respondent and the taxable amount received by him from the Applicants and other recipients post implementation of GST, had to be taken into account for determining the benefit of ITC required to be passed on.

22. The DGAP further observed that prior to 01.07.2017, the Respondent was eligible to avail CENVAT 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 the material time and it was observed by the DGAP that the Respondent had not been collecting VAT from his customers and was discharging his output VAT liability on the deemed 10% value addition to the purchase value of the inputs paid in cash and there was no direct relation between the turnover reported in the VAT returns filed by the Respondent for the period April, 2016 to June, 2017 with the actual amount collected from the home buyers. Therefore, the credit of VAT paid on the purchase of inputs and the VAT turnover had not been considered for computation of the ratio of ITC to the turnover for the pre-GST period. Further post-GST, the Respondent could avail input tax credit of GST paid on inputs and input services including the sub-contracts. The DGAP further submitted that from the information submitted by the Respondent for

the period April, 2016 to December, 2018, the details of the input tax credit availed by him, his turnover from the present project, the ratio of ITC to turnover, during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to December, 2018) periods, had been furnished in Table-E below:-

Table-E

(Amount in Rs.)

S. No.	Particulars	April, 2016 to June, 2017 (Pre-GST)	July, 2017 to March, 2018	April, 2018 to December, 2018	Total (Post-GST)
(1)	(2)	(3)	(4)	(5)	(6)=(4)+(5)
1	CENVAT credit of Service Tax Paid on Input Services (A)	2,78,65,480	-	-	-
2	Input Tax credit of GST Availed (B)	-	4,65,48,236	2,94,91,755	7,60,39,991
3	Less: Reversal of CENVAT credit/ITC for unsold units on the date of receiving OC for Tower-G7, G8, G9 & G10 (C)	60,13,833	16,92,066	-	16,92,066
4	NET CENVAT credit/ Input Tax Credit Available (D)= (A)-(C) or (B)-(C)	2,18,51,647	4,48,56,170	2,94,91,755	7,43,47,925
5	Total Turnover as per Home Buyers List (E)	75,07,17,241	37,81,91,586	9,69,57,033	47,51,48,619
6	Total Saleable Area (in sq. ft.) (F)	13,41,270			13,41,270
7	Less: Unsold Area of Tower- G7, G8,G9 & G10	1,41,115			1,41,115

	where CENVAT/ITC reversed and not considered in this table (G)			
8	Net Saleable Area (in sq. ft.) (H)= (F) – (G)	12,00,155		12,00,155
9	Area Sold relevant to Turnover as per Home buyers List (I)	6,06,200		5,28,210
10	Relevant CENVAT/INPUT TAX CREDIT (J)= [(D)*(I)/(H)]	1,10,37,298		3,27,21,871
11	Ratio of CENVAT/ Input Tax Credit to Turnover [(K)=(J)/(E)*100]	1.47%		6.89%

The DGAP has thus stated from the above Table that the input tax credit as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 1.47% and during the post-GST period (July, 2017 to December, 2018), it was 6.89% which clearly confirmed that post-GST, the Respondent had benefited from additional input tax credit to the tune of 5.42% [6.89% (-) 1.47%] of the turnover.

23. The DGAP also observed that the Central Government, on the recommendation of the GST Council, had levied 18% GST (effective rate was 12% in view of 1/3rd abatement on value) on construction service, vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Accordingly, the profiteering had been examined by comparing the applicable tax and input tax credit available for the pre-GST period (April, 2016 to June, 2017) when effective Service Tax @ 18%.

4.5% was payable on construction service with the post-GST period (July, 2017 to December, 2018) when the effective GST rate was 12% on construction service. On the basis of the above Table, the comparative figures of tax rate, input tax credit availed/available in the pre-GST and post-GST periods as well as the turnover, the recalibrated base price and the excess realization (Profiteering) during the post-GST period, has been tabulated by the DGAP in the Table-F below:-

Table- F

(Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April,2016 to June,2017	July,2017 to December, 2018
2	Output tax rate (%)	B	4.50	12
3	Ratio of CENVAT credit/ Input Tax Credit to Total Turnover as per table - 'E' above (%)	C	1.47	6.89
4	Increase in input tax credit availed post-GST (%)	D= 6.89% less 1.47%	-	5.42
5	<u>Analysis of Increase in input tax credit:</u>			
6	Total Base Price excluding PLC & Other Charges raised during July, 2017 to December, 2018	E		47,51,48,619
7	GST raised @ 12% over Base Price	F= E*12%		5,70,17,834
8	Total Demand raised	G=E+F		53,21,66,453
9	Recalibrated Base Price	H= E*(1-D) or 94.58% of E		44,93,95,564
10	GST @12%	I = H*12%		5,39,27,468
11	Commensurate demand price	J = H+I		50,33,23,032
12	Excess Collection of Demand or Profiteering Amount	K= G – J		2,88,43,422

24. The DGAP has also submitted that from the Table given above, it was clear that the additional input tax credit of 5.42% of the taxable turnover should have resulted in the commensurate reduction in the base price as well as cum-tax price. Therefore, in terms of Section 171 of the Central Goods and Services Tax Act, 2017, the benefit of such additional input tax credit was required to be passed on to the recipients. The DGAP further submitted that the Respondent had not contested that any such benefit would eventually had to be passed on to the recipients and in fact, the Respondent had submitted that he had passed on an amount of Rs. 41,838/- (i.e. 3% of the amount collected post-GST) to the Applicant No. 1, which had been duly verified from the demand letter dated 04.10.2017 submitted by the Respondent.

25. The DGAP further submitted that on the basis of the aforesaid CENVAT credit/input tax credit availability pre and post-GST and the details of the amounts collected by the Respondent from the Applicants and other home buyers during the period 01.07.2017 to 31.12.2018, the amount of benefit of input tax credit not passed on to the recipients or in other words, the profiteered amount had come out to be Rs. 2,88,43,422/- which included GST @ 12% on the base profiteered amount of Rs. 2,57,53,055/-. This amount was also inclusive of Rs. 7,76,266/- (including GST on the base amount of Rs. 6,93,094/-) which was the profiteered amount in respect of the Applicants and the details of the same had been given in Table-"G" below:-




Table-G

(Amount in Rs.)

S. No.	Name of Applicant	Flat No. in Respondent's Project	Sl. No. in Annex-21	Amount Paid During July, 2017 to December, 2018	Amount of benefit to be passed on
1	Sh. Suresh Kumar Gupta	G9-705	68	12,72,825	77,266
2	Sh. Shakti Anand	G7-2003	520	28,89,600	1,75,410
3	Sh. Abhishek Kumar Singh	G9,-106	609	19,58,600	1,18,895
4	Sh. Anil Kumar Singh	G8, 1708	642	20,05,578	1,21,747
5	Sh. Lalit Kumar	G8-1903	350	27,57,960	1,67,419
6	Sh. Rishi Ranjan	G-8, 1508	646	17,86,266	1,08,433
Total				1,26,70,829	7,69,170

26. The DGAP has also observed that the Respondent had supplied the service in the State of Uttar Pradesh only.

27. The DGAP has also submitted that the above computation of profiteering was with respect to 418 home buyers, whereas the Respondent had booked 692 units till 31.12.2018 (excluding 53 flats booked in Tower-G7, G8, G9 and G10 after receiving the Occupancy Certificate on which the GST was not charged) out of which 274 customers had booked the flats in the pre-GST period and also paid the booking amount in the pre-GST period but they had not paid any consideration during the post-GST period 01.07.2017 to 31.12.2018 (period under investigation). Therefore, if the ITC in respect of those

274 units was calculated in respect of 418 units where payments had been received after GST, the ITC as a percentage of taxable turnover would have been distorted and erroneous. Therefore, the benefit of ITC in respect of these 274 units should be calculated when the consideration was received from such units by taking into account the proportionate input tax credit in respect of those 274 units.

28. The DGAP thus concluded that the benefit of additional ITC to the tune of 5.42% of the turnover had accrued to the Respondent post GST and the same was required to be passed on to the above Applicants and other recipients. The DGAP also mentioned that the provisions of Section 171 of the CGST Act, 2017 were contravened by the Respondent, in as much as the additional benefit of ITC @5.42% of the base price received by the Respondent during the period 01.07.2017 to 31.12.2018, had not been passed on to the Applicants and the other recipients and on this account, the Respondent had realized an additional amount to the tune of Rs. 7,69,170/- from the above Applicants as per the Table-E given in para 25 of his report which included both the profiteered amount @5.42% of the base price and GST on the said profiteered amount. Further, the DGAP's investigation has revealed that the Respondent had also realized an additional amount of Rs. 2,80,74,252/- which included both the profiteered amount @5.42% of the base price and GST on the said profiteered amount, from other recipients as well who were not Applicants in the present proceedings. Those recipients were identifiable as per the documents provided by the Respondent, giving the names and addresses along with unit nos. allotted to such

recipients. Therefore, this additional amount of Rs. 2,80,74,252/- was required to be returned to such eligible recipients.

29. The DGAP has further mentioned that the present investigation covered the period from 01.07.2017 to 31.12.2018 and profiteering, if any, for the period post December, 2018, had not been examined as the exact quantum of input tax credit that 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.

30. The above Report was considered by this Authority in its meeting held on 29.04.2019 and it was decided to hear the Applicants and the Respondent on 17.05.2019. Accordingly, a Notice dated 01.05.2019 was issued to the Applicants and the Respondent. The Respondent was also issued show cause notice dated 01.05.2019 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 the provisions of Sections 122-127 of the above Act read with Rule 133 of the CGST Rules, 2017 and his registration under the above Act should also not be cancelled.

31. Four personal hearings were accorded to the parties on 17.05.2019, 29.05.2019, 11.06.2019 and 24.06.2019. During the course of the hearing, Sh. Suresh Kumar Gupta, the Applicant No. 1, Sh. Shakti Anand, the Applicant No. 2, Sh. Abhishek Kumar Singh, the Applicant No. 3, Sh. Anil Kumar Singh, the Applicant No. 4, Sh. Lalit Kumar, the Applicant No. 5, Sh. Rishi Ranjan, the Applicant No. 6 were present in person, the Applicant No. 7 was represented by Sh.

Amit Srivastava, Superintendent and Sh. Shivendu Pandey, Superintendent and the Respondent was represented by Sh. Gaurav Gupta, Authorised Representative, Sh. Rakesh Mahajan, Director, Sh. Neeraj Verma, GM (Accounts); Sh. Girish Chand Rajput CA and Sh. Yudhister Mehtani, CA.

32. The Respondent filed his first written submissions on 17.05.2019 in which he stated that the intent of the law as per the provisions Section 171 of the CGST Act, 2017 was to stop the inflationary tendency post advent of GST and to pass the benefit of cost reduction to the buyer. He further claimed that as per Black's Law Dictionary – 'Profiteering' was "taking advantage of unusual or exceptional circumstances to make excessive profit" and thus, anti profiteering should mean a measure to curb this tendency of making excessive profits and in the present case, when such profits arose on account of taxes. Thus, the intent of the legislature was not to curb the profits of a supplier which he was making in his normal course of business prior to GST but to curb his tendency to pocket any net profit which arose post GST on account of taxes (i.e. net of any cost increase so that he could retain his normal profits). This Section provided that any output tax reduction benefit or benefit because of ITC which had accrued to the supplier and which was related to the supply, should be passed on to the buyer. Thus, it was only the effective tax (output tax minus ITC available against such output) which was to be collected from the recipient. He further submitted that in case of benefit of ITC, it was to be worked out as to how much of the ITC which was inbuilt in costs of the supplier prior to GST, was

made available to such Supplier post GST and thus, such benefit should have been passed to the buyer as the cost of the supplier for manufacture or provision of such supply had gone down. Thus, if the credit which had formed earlier part of the cost and had been increased leading to reduction in cost to the Supplier, such benefit of reduced cost should not have been pocketed by the supplier and should have been passed on to the buyer.

33. He further submitted that he had duly paid the benefit of Rs. 1,96,62,371/- to his customers during the period from 01.07.2017 to 31.12.2018 and thus, this amount needed to be reduced from the total profiteered amount. He also stated that the DGAP's report dated 24.04.2019 had not factored the benefit which has been passed on by him to his buyers. He also contended that benefit was given by way of reduction of basic price and then GST was charged on such reduced price. He also furnished sample invoices and sample copies of demand notices to prove that he had passed on the benefit of minimum 3% to the buyers. The Respondent further submitted that the benefit could not be given in equated percentage to all customers and the Authority should attribute the benefit of input tax credit to the limited extent of such Input tax credit as was attributable to tax payable in respect of such credits. Thus, the attribution of ITC if given equally as a percentage to the buyers whose building was almost complete and whose only last instalment was receivable would be incorrect and shall lead to unnecessary cost of such benefit on the value of other flats which were still under construction or whose value of output was yet to be received. He further submitted that there were

costs which were not attributable towards the old flats which had been sold and thus, ITC on such costs should have been attributable to only those flats to which they related to such as brokerage charges commission paid on the flats sold after 01.07.2017 and the advertisement expenses incurred which related to the flats which were unsold as on 1.7.2017 etc. Thus, giving benefit of ITC to all flats would channelize benefits of other buyers to those buyers who were not part of such costs.

34. The Respondent further submitted that he had passed more benefit to the customers whose construction had been done post 01.07.2017, while customers whose construction had been done majorly prior to 30.06.2017 had been passed less benefit since equating benefit to all customers would be injustice to the customers who were eligible for benefits arising out of their part of construction. The Respondent further submitted that while his working of benefit has considered the period upto 31.12.2018, only part period had been considered for ITC availed prior to GST while the project had started in 2012, which was liable to give skewed results.

35. The Respondent also stated that the present project was started in FY 2011-12 and the project land acquisitions, drawings and ground plans, approvals from the authorities and other similar works had been started in the FY 2012-13 and thus, while the costs were initiated since the FY 2012-13, the bookings had come later. Similarly, the construction costs had started even without all flats being booked and thus, constructions costs were heavy as compared

to the receipts against such flats. The cost of construction and the demands made from the buyers in different year were as under:-

Particular	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	Total
Cost expended on project	87,41,53,435	18,68,312	44,82,20,862	6,91,951,814	8,09,512,872	635548561	3,46,12,55,855
Demands issued	34250824	443912221	459347959	442228066	617750589	651612703	2649202362

He further said that the above figures had been taken from the audited balance sheets and Service Tax and GST Returns.

36. The Respondent also submitted that the first booking of the project was made in January 2013 during which booking amount ranging between 5-10% was taken from a customer and then the customer was to make payments over a period of time as per his plan which may be construction linked or period linked. Some of the customers had even opted for making payment only at the time of booking and possession and thus, their amounts were received only during these two events. There were other customers who had got their flats cancelled and thus, their amounts were also returned from time to time. The Respondent also stated that the costs and receipts were not parallel as the costs always preceded the revenue. While the construction of the four towers (G-7, 8, 9, 10) was complete to the extent of 86% upto 30.06.2019, their demands were pending to the tune of 26.08% and thus, the demands pending were more as compared to his completion and thus, while, ITC was attributable to only 11% of its pending construction cost, the demands were to be

raised for 26% of total consideration. He also furnished the working of construction completion and pending receipts of the four towers (G-7 to 10) as on 30.06.2017.

37. The Respondent has also submitted the revised computation of the profiteered amount as per his own calculations and the same is furnished in Table-H below:-

Table-H

(Amount in Rs.)

S. No.	Particulars	April, 2012 to June, 2017 (Pre-GST)	July, 2017 to March, 2018	April, 2018 to December, 2018	Total (Post-GST)
(1)	(2)	(3)	(4)	(5)	(6)=(4)+(5)
1	CENVAT credit of Service Tax Paid on Input Services (A)	7,83,99,689	-	-	-
2	Input Tax Credit GST Availed (B)	-	4,65,48,236	2,94,91,755	7,60,39,991
3	Less: Reversal of CENVAT credit/ITC for unsold units on the date of receiving OC for Tower-G7, G8, G9 & G10 (C)	60,13,833	16,92,066	-	16,92,066
4	NET CENVAT credit/Input Tax Credit Available (D)= (A)-(C) or (B)-(C)	7,23,85,856	4,48,56,170	2,94,91,755	7,43,47,925
5	Total Turnover as per Home Buyers List (E)	1,85,94,87,094	37,81,91,586	9,69,57,033	47,51,48,619
6	Total Saleable Area (in sq. ft.) (F)	13,41,270			13,41,270
7	Less: Unsold Area of Tower -G7, G8, G9 & G10 where CENVAT/ITC reversed and not considered in this table (G)	1,41,115			1,41,115
8	Net Saleable Area (H)= (F)-(G)	12,00,155			12,00,155
9	Area Sold relevant to Turnover as per Home Buyers List (I)	8,12,740			5,28,210
10	Relevant CENVAT/INPUT TAX CREDIT (J)= [(D)*(I)/(H)]	4,90,19,402			3,27,21,871
11	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover [(K)=(J)/(E)*100]	2.64%			6.89%
12	Increase/Decrease in input tax credit availed post-GST (%) (L)			(L) =(6.89%-2.64%)	4.25%

38. He has further contended that if the above working was to be adopted, then the profiteering was to be computed as under:-

Table-I

(Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April, 2016 to June, 2017	July, 2017 to December, 2018
2	Output tax rate Working	B	4.50	12
3	Ratio of CENVAT credit/ Input Tax Credit to Total Turnover as per table - 'E' above (QM)	C	2.64	6.89
4	Increase in input tax credit availed post-GST (%)	D= 6.89% less 2.64%	-	4.25
5	Analysis of Increase in input tax credit:			
6	Total Base Price excluding PLC & Other Charges raised during July, 2017 to December, 2018	E		47,51,48,619
7	GST raised @ 12% over Base Price	F= E*12%		5,70,17,834
8	Total Demand raised	G=E+F		53,21,66,453
9	Recalibrated Base Price	H= E*(1-D) or 95.75% of E		45,49,54,803
10	GST @12%	I = H*12%0		5,45,94,576
11	Commensurate Demand Price	J = H+I		50,95,49,379
12	Excess Collection of Demand or Profiteering Amount	K= G — J		2,26,17,073

Thus, he has contended that the profiteered amount should be reduced to Rs. 2,26,17,073/- out of which the the benefit of Rs. 1,96,62,371/- on account of reduced cost had already been given to the buyers. Since the benefit was given to certain buyers at a higher rate (more than 6%), this deficiency shall also be passed on in the future.

39. The Respondent also submitted that the DGAP in his report dated 26.04.2019, had ignored the ITC of VAT as was availed by him in the pre-GST regime which was incorrect since the ITC of VAT was available as was evident from the returns filed by him. He has also

furnished the summary of VAT as has been availed by him in different years which is given below:-

Financial Year	Amount of Purchases	VAT Credit availed
2012-13	28,582	1,148
2013-14	4,08,63,325	22,84,654
2014-15	13,79,70,179	90,46,689
2015-16	19,94,89,537	1,18,49,414
2016-17	26,70,61,999	1,94,52,495
2017-18	1,49,43,518	16,47,675
Total		4,42,82,075

The Respondent has also submitted that the argument given by the DGAP in his report dated 26.04.2019 that there was no direct relation between the turnover reported in the VAT returns filed by the Respondent for the period April, 2016 to June, 2017 with the actual amount collected from the home buyers was incorrect and the DGAP had failed to appreciate the fact that the VAT output liability had existed on the Respondent in the pre GST regime and in absence of the ITC of VAT, such cost of VAT would have increased the price of the flats sold to the buyers in pre GST regime itself. He further furnished the calculation of profiteered amount by considering the VAT input and the same has been given in a Table-J below:-

[Handwritten signature]
16/1

Table J (Basic) (With VAT Input)

(Amount in Rs.)

S. No.	Particulars	April, 2012 to June, 2017 (Pre-GST)	July, 2017 to March, 2018	April, 2018 to December, 2018	Total (Post-GST)
(1)	(2)	(3)	(4)	(5)	(6)=(4)+(5)
1	CENVAT credit of Service Tax Paid on Input Services (A)	7,83,99,689	-	-	-
2	VAT Input available (B)	4,42,82,075			
3	Input Tax Credit GST Availed (C)	-	4,65,48,236	2,94,91,755	7,60,39,991
4	Less: Reversal of CENVAT credit/ITC for unsold units on the date of receiving OC for Tower-G7, G8, G9 & G10 (D)	60,13,833	16,92,066	-	16,92,066
5	NET CENVAT credit/Input Tax Credit Available (E)= (A+B)-(D) or (C)-(D)	11,66,67,931	4,48,56,170	2,94,91,755	7,43,47,925
6	Total Turnover as per Home Buyers List (F)	1,85,94,87,094	37,81,91,586	9,69,57,033	47,51,48,619
7	Total Saleable Area (in sq. ft.) (G)	13,41,270			13,41,270
8	Less: Unsold Area of Tower -G7, G8, G9 & G10 where CENVAT/ITC reversed and not considered in this table (H)	1,41,115			1,41,115
9	Net Saleable Area (I)= (G)-(H)	12,00,155			12,00,155
10	Area Sold relevant to Turnover as per Home Buyers List (J)	8,12,740			5,28,210
11	Relevant CENVAT/INPUT TAX CREDIT (K)= [(E)*(J)/(I)]	7,90,07,040			3,27,21,871
12	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover [(L)=(K)/(F)*100]	4.25%			6.89%
13	Increase/Decrease in input tax credit availed post-GST (%) (M)		(M) =(6.89%-4.25%)		2.64%

The Respondent from the above Table has submitted that it was evident that the net ITC benefit to be passed on to the buyers should have been 2.64%, while the Respondent had already passed on the benefit to the tune of minimum of 3% to all his customers and thus, no effective demand remained against the Respondent.

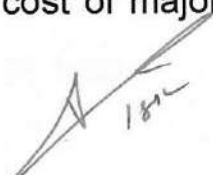
40. The Respondent also submitted that the DGAP's report had considered the ITC benefit ignoring the rise in prices post GST which had countered the benefit of profiteering to that extent. He also stated that the amount of ITC as was forming part of cost prior to GST and then made available as cost reduction to the Respondent should only be available as benefit to be passed on to the buyers and if the entire ITC without factoring the cost increase was considered as ITC benefit available under Section 171 of CGST Act, then it would mean increasing cost of the Supplier to benefit the customers.

41. The Respondent further cited the order passed in the Case No. 3/2018 dated 04.05.2018 in the matter of **Kumar Gandharv v. KRBL Ltd.**, by this Authority vide which the Respondent has claimed that when the prices were increased partially due to the rise in the prices of paddy crops the Authority had accepted the contention of the Respondent in that case. Thus, in present case also, there was increase in costs and thus, benefit of entire ITC could not be attributed to fall in cost of the supplier. He further submitted that the major components of cost of construction on which ITC was availed post 30.06.2017 were as under:-



Nature of Cost	Amount in Rs.
Steel	9,09,02,615
Cement	1,48,94,089
RMC	2,23,35,438
Contractors	12,27,81,950
CP Sanitary Fittings	97,36,486
Aluminium Works	1,98,98,689
Marketing Costs	1,18,62,736
Security Services	47,09,911
Admin Costs	70,44,847
Payment to Greater Noida Authority	2,21,32,669
Finance Costs	2,78,32,285
RCM	20,90,685
Others	5,99,05,866

The Respondent has also submitted that amongst the above costs, no cost benefit had accrued to the Respondent on account of Marketing Costs, Admin Costs, Payment to Greater Noida Authority, Finance Charges, Reverse charges as none of their credits had gone to reduce the cost of the Respondent. Such costs had only increased to the tune of increase in the rate of GST levied thereon and accordingly, such values were not considered for computation of the profiteering amount. Also, in the case of Aluminium works, the base cost of aluminium had gone up post GST and thus, no benefit on that account had accrued in terms of reduction of cost due to ITC. He also furnished the details of the ITC benefit accruing in the cost of major raw materials which has been given as under:-



A. Steel

Particular	Before GST	Post GST
Average Purchase price	31.91	45.04
Rate of Tax	4.00	18.00
Tax credit as available to Respondent	1.23	6.87
Effective Cost to Respondent	30.68	38.17
Increase in Cost		7.49
Net Benefit accruing to Respondent		(7.49)
Total Value of Steel Purchased(without ITC)		107,944,192
Net Benefit as available to Respondent		(2,11,81,609)

B. Cement

Particular	Before GST	Post GST
Average Purchase price	246.33	267.07
Rate of Tax	16.50	28.00
Tax credit as available to Respondent	34.89	58.42
Effective Cost to Respondent	211.44	208.65
Increase in Cost		(2.80)
Net Benefit accruing to Respondent		2.80
Total Value of Steel Purchased		1,90,93,994
Net Benefit as available to Respondent		2,00,184

C. RMC

Particular	Before GST	Post GST
Average Purchase price	5,257.26	5,028.85
Rate of Tax	14.00	18.00
Tax credit as available to Respondent	645.63	767.11
Effective Cost to Respondent	4,611.62	4,261.74

[Handwritten signature]
18/12

Increase in Cost	(349.89)
Net Benefit accruing to Respondent	349.89
Total Value of Steel Purchased	2,64,26,602
Net Benefit as available to Respondent	18,38,672

D. Sanitary Fittings

Particular	Before GST	Post GST
Average Rate of ITC available	14.5%	28%
Increase in ITC benefit		13.5%
Total Value of Fittings Purchased		97,36,486
Net Benefit as available to Respondent		13,14,425

He has also furnished the copies of ledgers along with sample copies of invoices and also stated that since the fittings were procured post GST, he had assumed full benefit available on conservative basis.

The Respondent also submitted that the Contractors had passed cost benefit ranging around 4% to 6% to him as their average 5% cost reduction was considered and accordingly, total benefit on the total cost of Contractors on the basis of the above rate worked on their total cost of Rs. 9,88,54,538/- amounted to Rs. 49,42,727/-.

42. He has further furnished the summary of the overall benefit of decrease in costs on account of ITC as under:-

Nature of Cost	Cost Benefit post GST
Steel	(2,11,81,609)
Cement	200,184
RMC	18,38,672

Contractors	49,42,727
CP sanitary Fittings	13,14,425
Total Benefit on account of increased ITC	1,28,85,601
Total demand issued post 30.06.2017	47,51,48,619
Benefit to be passed to customers as%	2.71%
Already given (minimum considered)	3%
To be given / (Excess given)	(5.71)%

Thus, he has contended that the effective benefit in cost due to change in tax rate post GST was negative. In case of steel, the effective cost of the Respondent had increased and thus, no benefit of reduction of cost could be passed on to the buyers. He also submitted that despite increase in costs of certain materials, he had passed on the benefit of at least 3% to his buyers which was more than the worked out benefit.

43. The Respondent further contended that the distribution of major portion of ITC over a particular area was wrong. The DGAP had divided the ITC between 01.07.2017 to 31.12.2018 with the area of customers whose consideration had been received during such period without appreciating that the correlation of such ITC should have been made on the basis of stage of completion of flats of such customers and not on their absolute area. He also contended that while for towers G6 to G10, most of the construction had already been completed, the ITC of only finishing services and common area could have been attributed to them, while for other towers the entire cost could have been attributed. Further, in case the ITC was distributed to the current customer demands only, less ITC would

have been attributed to the future customers or future demands of sold flats. He also suggested that the area to which ITC was being attributed should have been considered on a weighted average basis and not absolute area as the weighted average shall align the future liability against such credits. He has also submitted the following workings as an alternate considering the weighted average area, as is given below:-

S. No.	Particulars	April, 2012 to June, 2017 (Pre-GST)	July, 2017 to March, 2018	April, 2018 to December, 2018	Total (Post-GST)
(1)	(2)	(3)	(4)	(5)	(6)=(4)+(5)
1	CENVAT credit of Service Tax Paid on Input Services (A)	7,83,99,689	-	-	-
2	Input Tax Credit GST Availed (B)	-	4,65,48,236	2,94,91,755	7,60,39,991
3	CENVAT credit/Input Tax Credit Available (C) = (A) or (B)	7,83,99,689	4,65,48,236	2,94,91,755	7,60,39,991
4	Total Turnover as per Home Buyers List (D)	1,85,94,87,094	37,81,91,586	9,69,57,033	47,51,48,619
5	Total Saleable Area (in sq. ft.) (E)	13,41,270			13,41,270
6	Weighted Area Sold relevant to Turnover as per Home Buyers List (F)	5,70,071			1,45,663
7	Relevant CENVAT/INPUT TAX CREDIT (G) = [(C)*(F)/(E)]	3,33,21,698			82,58,030
8	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover [(H)=(G)/(D)*100]	1.79%			1.74%
9	Increase/Decrease in input tax credit availed post-GST (%) (I)		(I) =(1.74%-1.79%)		-0.05%



He has also claimed that the working for weighted average of area was based on the demands issued for such area and was computed as under:-

Period	Units Sold up to 30.06.2017		Units Sold after 30.06.2017	Total
	Demand Raised up to 30.06.2017	Demand Raised From 01.07.2017 to 31.12.2018	Demand Raised From 01.07.2017 to 31.12.2018	Total Demand Raised From 01.07.2017 to 31.12.2018
Area of Taxable Units Sold (a)	8,12,740	8,12,740	36,055	8,48,795
Total Consideration of Flats Sold (Basic) (b)	2,65,10,37,104	2,65,10,37,104	11,76,99,605	2,76,87,36,709
Demand Raised (Basic) (c)	1,85,94,87,094	39,66,04,906	7,85,43,713	47,51,48,619
% of Invoice Raised (d) = (c)/(b)*100	70.14%	14.96%	66.73%	17.16%
Weightage Area in relation of Demand (e) = (a)*(d)	5,70,071	1,21,589	24,060	1,45,663

Thus, he has submitted that the effective ITC benefit had reduced and there was no unpassed benefit of ITC which remained to be given by him.

44. The Respondent further stated that the Applicant No. 1 had mentioned in his complaint that no benefit of ITC had been given to him and total tax had been collected from him. The Respondent has also claimed that If that would have been the case, he should have paid tax of Rs. 1,64,490/- on the last instalment of Rs. 13,38,105/- paid by him. He has further claimed that it was evident that the benefit of Rs. 40,142/- was given to the above Applicant and with the reduced amount of tax of Rs. 1,24,348/- he had paid total amount of Rs. 14,62,453/- only as his last instalment and similar benefit of ITC was given on the GST payable on possession charges. He also

contended that on the total possession charges of Rs. 82,100/-, the GST leviable was Rs. 10,170/-, out of which benefit of ITC of Rs. 1695/- was given and net tax of Rs. 8,475/- was collected from the above Applicant. Thus, the buyer had only paid total amount of Rs. 90,575/-. Therefore, total benefit of ITC of Rs. 41837/-, was allowed to the Applicant No. 1. Thus, the claim of the Applicant No. 1 that no benefit of ITC had been passed to him was incorrect. He has also stated that similar claims made by other Applicants were also based on the wrong facts.

45. The Respondent also submitted that the Applicant No. 1 had already taken due benefits at the time of making final payment and he had again raised his demand without any basis. He further requested not to impose any penalty on him as there was no contravention of Section 171 of the CGST Act since he had advanced the benefit on the future instalments due from his customers. He also cited the judgement passed in the case of **Godrej Foods Ltd v. Union of India 1993 (68) E.L.T. 28 (SC)**, wherein it was held that if there was no material on record placed by the Department to establish that any material facts were suppressed by the petitioners or there was any misrepresentation on his part with the intention to evade duty, the extended period of limitation was clearly inapplicable. He also cited the judgement given in the case of **Perfect Mechanical Industries Limited v. CCE 2004 (169) ELT 219 (Tri.-Del.)**, wherein the Hon'ble Tribunal deleted the penalty by holding that:-

"The penalties have to be imposed on the ground of suppression of information regarding clearance of scrap. In the SCN, we

have not come across any specific allegation that the party had suppressed any such information. Accordingly, penalties imposed have been set aside."

He also referred to the judgements passed in the cases of **CCE v. H.M.M. Ltd.** (76) E.L.T. 497, **Metal Forgings v. Union of India** 2002 (146) E.L.T. 241, **Nashik Strips P. Ltd.** 2011 (264) E.L.T. 576 (Tri.- Mumbai), **Satia & Company** 2010 (262) E.L.T. 530 (Tri.- Ahmd.), **CCE Chandigarh v. Krishi Rasyan Export Pvt. Ltd.** 2009 (240) E.L.T. 468 (Tri.- Del.) in his support. He has also cited the judgement passed in the case of **CCE Ludhiana v. FAS Kusum Ispat (P) Ltd.** 2009 (240) E.L.T. 13 (P & H) wherein it was held that in the case of shortage of inputs, mens rea - intention to evade payment of duty is absent, no penalty can be imposed.

46. The Respondent has further cited the judgements given in the cases of **Smitha Shetty v. CCE**, 2004 (156) ELT 84 which was approved by the Hon'ble High Court in the case of **CCE v. Sunitha Shetty** 2004 (174) ELT 313 (SC) wherein it was held that in the absence of any mens rea penalty should not be levied. He has also quoted the judgement passed by the Hon'ble Supreme Court in the case of **Hindustan Steel Ltd. v. State of Orissa**, in which it was held that:-

"The discretion to impose penalty must be exercised judicially. Penalty will ordinarily be imposed in case the party acts deliberately in defiance of law....., but not in cases where there is technical or venial breach of the provisions of the Act or where

the breach flows from bona- fide belief that the offender is not liable under the Act. An order imposing penalty for failure to carry out a statutory obligation is the result of quasi-judicial proceeding. Penalty will not be ordinarily imposed unless the party either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligations. Penalty will not be imposed merely because it is lawful to do so. Even if a minimum penalty is prescribed, the authority will be justified in refusing to impose penalty, when there is a technical or venial breach of the Act or where the breach follows from a bona fide belief that the offender is not liable to act in the manner prescribed by the Statute."

47. The Applicant No. 1 has also filed written submissions dated 17.05.2019 vide which he has submitted that he had received the GST benefit of 3% of the basic amount demanded by the Respondent in Nov-Dec. 2018. He further submitted that there was lot of balance work which was to be done by the Respondent at the time of handing over of the Flat to him. He also added that there were certain common facilities which were yet to be provided by the Respondent such as Club Building, Gym, Swimming Pool, Tennis Court and Painting for which the Applicant No. 1 had already paid and should have gotten the benefit of additional ITC. He also mentioned that the Respondent had given full GST benefit to only some of the buyers, but since the present project was a common project, the benefit should be passed on to the each and every buyer.

48. The Respondent has filed further written submissions on 28.05.2019 vide which he has submitted the details of total number of flats in 8 towers, sold and unsold during the pre and post GST periods as on 31.12.2018 and the methodology for credit reversal used by the Respondent. He has also claimed that his Auditor had made provision of CENVAT Credit reversal to the tune of Rs. 60,13,833/- which had been reflected in Schedule 24 of the Audited Financial Statement for the FY 2017-18. He also stated that the figures reflected in the Financial statements were also considered by the DGAP in his Report dated 24.04.2019. However, his Service Tax liability was being scrutinised by the Director General of GST Intelligence and the above mentioned reversal was arrived at Rs. 25,10,391/- in respect of the four towers viz., G7 to 10 by him. He has also furnished a copy of reply submitted by him for final approval of the Director General (DG). He has also acknowledged that the above mentioned amount had been duly deposited and the final order from the DG was awaited. He has also furnished copies of monthly returns (GSTR 3B) of GST for the period from July 2017 to December 2018. He has also submitted copies of the acknowledged receipts of the above Applicants showing ITC benefit of 3% which was reduced from the amounts payable by the Applicants during the period from July 2017 to December 2018. He has also furnished copies of acknowledgement receipts of buyers of towers to whom benefit of ITC had been given by way of reduction in their instalments. He has further furnished the sample copies of Credit Ledger of 6 Applicants and 4 other customers. He has also claimed that all the customers were given the benefit by way of reduction in the prices payable by

them towards their flats and thus, the ITC benefit was given as reduction in the amount payable by the customers. He has also enclosed the date wise and Tower wise details of ITC benefit of 3% passed on to the recipients by way of reduction in their prices.

49. The Respondent has also filed his submissions on 10.06.2019 vide which he has reiterated his submissions dated 17.05.2019 and also submitted that the DGAP in Table E of his Report dated 24.04.2019 has taken CENVAT Credit for the period from April 1, 2016 to June 30, 2017 and not for the entire five years. However, the Cenvat credit for the purpose of reversal in Sr. No. 3 was computed on the basis of five year credit figures and thus, the computation itself had considered two different periods for two figures and thus, the CENVAT Credit should also have been taken for the entire period prior to GST i.e. since 01.04.2012. He further stated that the PLC and other charges formed integral part of Sale consideration of flat and the same should have been taken in the sale consideration in Sr. No. 5 of Table E of the DGAP's Report dated 26.04.2019.

50. The Respondent further furnished the revised working incorporating the impact of the above mentioned issues:-



Table

(Total Taxable Turnover, With VAT Input and reversal of CENVAT as per DGGSTI)

Period from Start of the Project

(Taxable Turnover include PLC & Other Charges)

(Amount in Rs.)					
S. No.	Particulars	April, 2012 to June, 2017 (Pre-GST)	July, 2017 to March, 2018	April, 2018 to December, 2018	Total (Post-GST)
(1)	(2)	(3)	(4)	(5)	(6)=(4)+(5)
1	CENVAT credit of Service Tax Paid on Input Services (A)	78,399,689	-	-	-
2	VAT Input available (B)	44,282,075			
3	Input Tax Credit GST Availed (C)	-	46,548,236	29,491,755	76,039,991
4	Less: Reversal of CENVAT credit/ITC for unsold units on the date of receiving OC for Tower-G7, G8, G9 & G10 (D)	2,510,391	1,692,066	-	1,692,066
5	NET CENVAT credit/Input Tax Credit Available (E)= (A+B)-(D) or (C)-(D)	120,171,373	44,856,170	29,491,755	74,347,925
6	Total Turnover as per Home Buyers List (F)	1,946,454,610	414,618,281	103,137,211	517,755,492
7	Total Saleable Area (in sq. ft.) (G)	1,341,270			1,341,270
8	Less: Unsold Area of Tower - G7, G8, G9 & G10 where CENVAT/ITC reversed and not considered in this table (H)	141,115			141,115
9	Net Saleable Area (I)= (G)-(H)	1,200,155			1,200,155
10	Area Sold relevant to Turnover as per Home Buyers List (J)	812,740			528,210
11	Relevant CENVAT/INPUT TAX CREDIT (K)= [(E)*(J)/(I)]	81,379,557			32,721,871
12	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover [(L)=(K)/(F)*100]	4.18%			6.32%
13	Increase/Decrease in input tax credit availed post-GST (%) (M)		(M) =(6.32%-4.18%)		2.14%

Based upon the above working, the Respondent has claimed that the net ITC benefit to be passed on to the buyers should have been 2.14% while the Respondent had already passed on the benefit to the tune of minimum 3% to all his customers and thus, no effective demand remained against the Respondent.

51. He has further stated that since the entire figures were not considered for the purpose of determining profiteering, the profiteering had to be computed for the project as a whole. This methodology if worked upon after one year would have given different results. For example, if there was no major expenditure in the next one year but amounts were being recovered from the buyers, the ratio of ITC available to total value would fall and would reduce the ratio of profiteering for the supplier. Thus, the methodology was vague and could not be used till the completion of the project and would give varied results whenever there was a change in the period. The Respondent has also mentioned that the common works which belonged to the entire project and whose credit was attributable to the entire project had been divided only on the area of 8 towers of Phase I and thus, the attribution was in itself wrong which left no space of giving benefit of such ITC to the future flat buyers. He had also furnished the list of common facilities which had been given below:-

Facilities Already Constructed in Phase-I Consisting of 8 Towers (Tower G6, G7, G8, G9, G10, G11, G12 & G14)		Facilities to be Constructed in Phase-II (Which is yet to be launched)	
1	STP	1	Tennis Court
2	Under Ground Water Tank	2	Club Building
3	Electric Sub-station including Transformer & DG Set	3	Swimming Pool
4	Electric Meter Room (NPCL)	4	Main Entry Gate
5	DG Exhaust Pipe Line	5	Water Feature Wall
6	Organic Waste Disposal Plant		
7	Amphitheatre		
8	Badminton Court		
9	Kids Playing Area		
10	Basket Ball Court (Half)		
11	GYM Equipments with Indoor games in AC temp. Structure		
12	Temp. AC Club & Community Hall		
13	Side Entry Gate		

He has thus submitted that such attribution of ITC to the present Towers would lead to more ITC being attributed to present towers while depriving the benefit to the future towers and flat owners.

52. The Respondent has also mentioned that the computation and methodology for calculation of benefit was not available in the public domain and was provided by the DGAP only vide his Report dated 26.04.2019. Thus, the Respondent was never aware as to how one should compute profiteering amount including factors like, how much period was to be taken into consideration for ITC ratios, what sales amount should have been taken for computing such ratios and when not to consider any available credit etc. He has also submitted that there were several countries which had enacted Anti Profiteering provisions, viz., Australia and Malaysia and had provided a methodology in public domain for computation of profiteering amount.

He has further explained the methodology adopted by the above mentioned countries. However, since no such methodology was determined and provided to the taxpayers, thus, the taxpayer had been left to determine such methodology at a future date while he was expected to pass the benefit as computed using such methodology at the advent of GST. He also stated that a mechanism which had never been provided to a supplier could not be determined later to the detriment of the taxpayer.

53. The Respondent has also filed submissions on 24.06.2019 vide which he has submitted:-

- i) Comparison of computation of the profiteered amount as per the formulae provided by the DGAP stating the reasons for variation of figures with those adopted by the DGAP.
- ii) Working of his basis of estimated calculation of the 3% ITC benefits which was passed to the Applicants. The same is give below in a table:-



Calculation of ITC benefit to be passed on to Customers under Anti Profiteering						
	Total Estimated Cost	Estimated Cost to be incurred in GST regime	VAT/ Service Tax Rate	GST Rate	% of ITC benefit passed	Additional ITC
Budgeted Cost for Project						
STRUCTURE						
Steel	52,44,36,570	14,73,00,240	4.00	18.00	14.00	2,06,22,034
Cement	13,68,09,540	7,36,50,120	16.50	28.00	11.50	84,69,764
RMC	18,24,12,720	4,91,00,080	14.50	18.00	3.50	17,18,503
Bricks	9,12,06,360	2,45,50,040	5.00	5.00	-	-
Sand, Rodi etc.	7,98,05,565	4,29,62,570	5.00	5.00	-	-
Electrification (HS) (Electric Sub Station, Meter Room & DG Exhaust Pipe Line, generators, LT panel room)	5,70,03,975	2,28,01,590	14.50	18.00	3.50	7,98,056
Plumbing (HS) (Includes STP, Water Tank & Organic Waste Plant, sewerage drainage system)	3,42,02,385	1,14,00,795	14.50	18.00	3.50	3,99,028
Design & Development Charges	1,71,01,193	30,68,755	15.00	18.00	-	-
Landscaping & Facilities (Includes Badminton/ Basket Ball Court, Kids Playing Area, Amphitheatre, Temp. Club & Gym, Jogging Track, Gazebo, Entry Gate)	5,35,83,737	83,32,040	14.50	18.00	3.50	2,91,621
Lift	5,47,23,816	2,24,48,313	16.15	18.00	1.85	4,15,294
FINISHING WORKS						
Tiles	9,12,06,360	4,56,03,180	14.50	18.00	3.50	15,96,111
Paint	4,56,03,180	2,89,39,100	14.50	18.00	3.50	10,12,869
Doors & Windows	9,12,06,360	5,78,78,200	14.50	18.00	3.50	20,25,737
Sanitary/ CP Fitting & Chinaware	4,56,03,180	4,03,39,895	14.50	18.00	3.50	14,11,896
Electrification (LS)	6,84,04,770	2,98,13,325	14.50	18.00	3.50	10,43,466
Plumbing (LS)	2,28,01,590	1,22,75,020	14.50	18.00	3.50	4,29,626
Labour Charges	68,40,47,700	19,62,44,127	15.00	18.00	-	-
Total (a)	2,28,01,59,000	81,67,07,390				4,02,34,004
Total Saleable Area	13,41,270					
Cost Rate per sq. ft.	1,700					
Total Area of the Project						

(b)						13,41,270
Area Sold till 30.06.2017						
(c)						8,12,740
Unsold Area as on 30.06.2017						
(d)						5,28,530
Demand to be raised after 30.06.2017 for Area sold upto 30.06.2017 (including PLC & Other Charges)						
(e)						86,06,38,123
ITC to be passed on relevant to sold area upto 30.06.2017 (ITCxSold Area/Total Area)						
(f)= [(a)/(b)*(c)]						2,43,79,718
% of ITC benefit to be passed (Relevant ITC/ Demand to be raised) (g)=[(f)/(e)]						2.83%

The Respondent has also submitted that no ITC benefit existed in case (especially services) where such input tax credit was received on increase in cash flow. The Respondent was paying less tax and was getting full credit in the earlier regime. Presently, he was getting full credit for tax paid, and thus, no ITC was available as additional benefit to him. Further, the cost related to unsold units was not considered.

54. Clarifications were also sought from the DGAP on the Respondent's submissions dated 28.05.2019 and 10.06.2019. The DGAP vide his Reports dated 07.06.2019 and 19.06.2019 has submitted that all the facts/ queries raised by the Respondent had been explained in his report dated 24.04.2019.

55. We have carefully considered all the Reports filed by the DGAP, submissions of the Respondent and the Applicant No. 1 and other material placed on record and find that the Applicant No. 1 had

booked Flat No. G-9 705 on 09.09.2013 with the Respondent in his "Nirala Greenshire" project located in Greater Noida West (Uttar Pradesh). It is also found that the Applicants No. 2 to 6 had also booked their flats bearing No. G7-2003, G9-106, G8-1708, G8-1903 and G-8-1508 respectively with the Respondent in the above project. It is also revealed from the record that the Applicant No. 1 vide his complaint dated 28.02.2018 had alleged that the Respondent had increased the price of the flat after introduction of GST w.e.f. 01.07.2017 and had not passed on the benefit of input tax credit by way of commensurate reduction in price. Applicant No. 2 to 6 had also filed complaints and had alleged that the Respondent had increased the prices of the flats after introduction of GST w.e.f. 01.07.2017 and had not passed on the benefit of input tax credit by way of commensurate reduction in prices. The above complaints were examined by the Screening Committee and the Standing Committee in their meetings and were forwarded to the DGAP for investigation who vide his Report dated 24.04.2019 has found that the ITC as a percentage of the total turnover which was available to the Respondents during the pre-GST period was 1.47% and during the post-GST period this ratio was 6.89% as per the Table-E mentioned above and therefore, the Respondent had benefited from the additional ITC to the tune of 5.42% [6.89% (-) 1.47%] of the total turnover which he was required to pass on to the flat buyers of this project. He has also claimed that the Respondent had not reduced the basic prices of his flats by 5.42% due to additional benefit of ITC and thus, he had contravened the provisions of Section 171 of the CGST Act, 2017. The DGAP vide his Report dated 24.04.2019 has

further submitted that the amount of benefit of ITC which had not been passed on by the Respondents or the profiteered amount came to Rs. 2,88,43,422/- which included 12% GST on the basic profiteered amount of Rs. 2,57,53,055/-. The DGAP has also intimated that the above amount was inclusive of Rs. 7,76,266/- (including GST) which the Respondents had profiteered from the Applicants. He has also supplied the details of all the buyers who had purchased flats from the Respondents along with their unit numbers vide Annexure-21 attached with the Report in which the profiteered amount of Rs. 2,88,43,422/- has been computed.

56. The Respondent has claimed in his submissions that the meaning of profiteering as per the Black's Law Dictionary was taking advantage of unusual or exceptional circumstance to make excessive profit. However, Section 171 (3A) of the CGST Act, 2017 defines the profiteered amount as:-

“(3A) Where the Authority referred to in sub-section (2), after holding examination as required under the said sub-section comes to the conclusion that any registered person has profiteered under sub-section (1), such person shall be liable to pay penalty equivalent to ten per cent. of the amount so profiteered:

Provided that no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority.



Explanation.—For the purposes of this section, the expression “profiteered” shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both.”

Therefore, it is clear that the definition of profiteering given by the Respondent is not correct and the profiteered amount has to be calculated as per the Explanation attached to the above Sub-Section.

57. The Respondent has further contended that he has duly passed on the benefit of minimum 3% which amounts to Rs. 1,96,62,371/- to his customers during the period from 01.07.2017 to 31.12.2018 and thus, this amount needs to be reduced from the total demand. He has also stated that the DGAP's Report dated 24.04.2019 had not factored the benefit which has been passed by him to his buyers. He has also claimed that the benefit was given by way of reduction of basic price and then GST was charged on such reduced price. The Respondent in this regard has submitted the sample invoices of the demands raised against the Applicant No. 1 to 6 vide his submissions dated 29.05.2019 which show that he has passed on the ITC benefit to the above Applicants. However, perusal of the sample invoices suggests that the DGAP has computed the additional benefit in respect of the above Applicants as per Annexure-21 of his above Report which is more than the amount which the Respondent has claimed to have passed on. Further, the amount of benefit which he has claimed to have passed on to the other recipients has not been

verified by the DGAP. The Respondent has also submitted samples of invoices of Tower wise ITC credit given to the customers which reflects that he has reduced the ITC from the total invoice value. However, perusal of the sample invoices also shows that the DGAP has computed the additional benefit in respect of the above customers more than what the Respondent has claimed to have passed on. Perusal of tax invoice issued to one Mr. Kumar Gaurav, who has been allotted unit No. G7-501 in the above project by the Respondent shows that an entry has been made in it as "Less: Input Tax Credit" on 17.11.2017. However, the DGAP has computed the benefit to be passed on to Mr. Kumar Gaurav as Rs. 1,49,930/- which is higher than what the Respondent has claimed to have reduced from the total invoice value. Perusal of other sample invoices also suggests the same. Since, the above invoices have not been verified by the DGAP nor any reliable and irrefutable evidence has been produced by the Respondent to establish the genuineness of these invoices hence his above claim cannot be accepted on his mere statement.

58. The Respondent has further submitted that he had passed more benefit to the customers whose flats were constructed post 01.07.2017, while the customers whose flats were constructed prior to 30.06.2017 had been passed less benefit. In this connection it would be worthwhile to state that the benefit has to be passed on for the entire project commensurate to the amount paid by a buyer in the post-GST period on the additional ITC availed by the Respondent which has no connection with the stage of construction. There is also no equating of the benefit to all the customers as the benefit would

depend on the area and the amount paid by each customer. The DGAP has also correctly taken in to account the ITC w.e.f. April 2017 to June 2017 for the pre GST period to make comparison with the equivalent period in the post GST period and hence the above period is not required to be considered from 2012. Therefore, the above claims of the Respondent are not correct.

59. The Respondent has also submitted that there was no match between the cost incurred by him and the demands raised by him as per the Chart submitted by him. However, it is mentioned that there cannot be correlation between the demands raised and the costs incurred as both depend on different parameters. However, the benefit has to be passed on periodically by him on the basis of the additional ITC availed by the Respondent and the turnover received by him. The Respondent cannot ask the flat buyers to wait till the construction is completed.

60. The Respondent has also raised objection on the methodology followed by the DGAP while considering the ITC period post GST and he has himself computed three different ratios of additional input tax credit. While computing the ratio of additional benefit of ITC of 2.64% availed by him during the post GST period in the Table submitted by him the Respondent has claimed that the DGAP had wrongly claimed that there was no correlation between the VAT reported in his Returns and the amount of turnover collected from the buyers. In this connection it would be relevant to mention that the Respondent has not collected VAT from the buyers and has discharged his VAT liability by adding 10% to the purchase value of the inputs paid in

cash and hence the DGAP has rightly not taken the ITC of VAT in to account while calculating the ratio of ITC to turnover during the pre GST period as per Table E.

61. While computing the ratio of additional ITC of 4.25% for the post GST period vide the Table prepared by him the Respondent has claimed that the CENVAT credit of Service Tax paid on the Input Services for the period from April, 2012 to June, 2017 i.e. in the pre-GST regime should be Rs. 7,83,99,689/-, Total Turnover as per Home Buyers List should be Rs. 1,85,94,87,094/- and Area Sold relevant to Turnover as per Home Buyers List should be 8,12,740 sq. ft.. He has further claimed that if the above figures were to be taken in to account then the profiteered amount should be Rs. 2,26,17,073/-, out of which the benefit of Rs. 1,96,62,371/- on account of reduced cost has already been given to the buyers. Since the benefit was given to certain buyers at a higher rate (more than 6%), the balance amount would also be passed in the future. However, perusal of Table E of the DGAP's Report dated 24.04.2019 shows that DGAP has taken CENVAT credit of Rs. 2,78,65,480/- and an amount of Rs. 75,07,17,241/- was taken as Turnover and the figure of Rs. 6,06,200 sq. ft. has been taken as the sold area for the pre-GST period. The above figures were taken by the DGAP on the basis of the information supplied by the Respondent himself to the DGAP during the investigation. Therefore, the Respondent cannot go back from his earlier stand and supply the above figures without any credible and cogent evidence which he has failed to produce. Accordingly, the above ratio of 4.25% cannot be relied upon.



62. The Respondent has also calculated ratio of additional ITC benefit as (-) 0.05% as per the Table prepared by him. The Respondent has claimed that the area to which the ITC was being attributed should have been considered on a weighted average basis and not in absolute terms as the weights would align the future liability against the credits. However, it would be pertinent to mention here that the benefit of additional ITC has to be passed on as per the area purchased by each buyer as well as on the amount of instalments paid by him during the post GST period and has no relation with the stage of construction of the project. Hence, the above ratio of -0.05% computed by the Respondent cannot be taken in to account as by no stretch of imagination it can be argued that the Respondent has not availed benefit of additional ITC post GST implementation.

63. While computing the additional benefit of ITC for the post GST period the Respondent has arrived at the ratio of 2.14% on the ground that the DGAP in Table E of his Report dated 24.04.2019 had wrongly taken CENVAT Credit for the period from April 1, 2016 to June 30, 2017, whereas he should have taken it for the entire five years. However, the period considered by the DGAP for the pre-GST period matches with the period taken for the post GST period and in case the entire period of 5 years is taken then the above ratio would be distorted and hence the DGAP has rightly taken the above period for calculation of the additional benefit. Accordingly, the above ratio of 2.14% cannot be considered for passing on the benefit of ITC.

64. He has also stated that the CENVAT credit for the purpose of reversal in Sr. No. 3 of Table E was computed on the basis of five

year credit figures and thus, the computation itself had considered two different periods and thus, the CENVAT Credit should also have been taken for the entire period prior to GST i.e. since 01.04.2012. In this connection it would be relevant to mention that reversal of CENVAT credit is subject to the CENVAT Rules, 2004 and has no connection while calculating the ratio of ITC to turnover. Moreover the reversal is dependent on the area unsold and hence there is no relation with the period. Therefore, the above argument of the Respondent is not maintainable.

65. He has further stated that the PLC and other charges formed integral part of sale consideration of flats and the same should have been taken in the sale consideration in Sr. No. 5 of Table E. However, the above contention of the Respondent is frivolous since the above charges are being separately charged by the Respondent. Therefore, they cannot be included in the sale consideration. Therefore, the above claim of the Respondent cannot be accepted.

66. The Respondent has also claimed to have passed on the benefit of 3% to his buyers and has also furnished calculation of the same vide the Table prepared by him which shows this benefit as 2.83%. However, perusal of the above Table shows that it has been prepared on the basis of the estimated cost incurred or to be incurred during the pre and the post GST periods. Since the Respondent has based his calculations on the estimated figures the same cannot be taken to be correct as the same have been taken as per the convenience of the Respondent and are not based on the actual cost incurred by the Respondent.

67. The Respondent has also furnished Tables to prove that he has not got benefit of cost on the purchase of Steel, Cement, RMC, Sanitary fittings and Aluminium Works. He has also claimed that no benefit had accrued to him on the service supplied by the contractors as well as on marketing, security, administrative, payments made to NOIDA Authority and the Financial costs. Accordingly, he has contended that the net benefit of cost due to tax rate change was (-) 5.71%. However, the above claim of the Respondent is not correct as he is entitled to receive ITC on all his purchase of inputs and input services in the post GST period. Benefit of reduction in prices has also been passed on to him by his suppliers as they have become entitled to the ITC post implementation of the GST. The data used by the Respondent while preparing the above Tables has also not been verified by any agency or the DGAP. Hence, his above claim is incorrect and cannot be accepted.

68. The Respondent vide his submissions dated 28.05.2019 has claimed that he has made provision of CENVAT Credit reversal to the tune of Rs. 60,13,833/-, however, his Service Tax liability was being scrutinised by the Director General GST (Intelligence) and the above mentioned reversal has been determined as Rs. 25,10,391/-. Therefore, the DGAP has wrongly considered the reversal as Rs. 60,13,833/-, against Sr. No. 3 of Table E and therefore the ratio of CENVAT/ITC to turnover computed for the pre GST period was incorrect. In this connection it would be appropriate to state that the reversal ordered by the DG GST (Intelligence) has not attained finality yet and in case the above amount is finally confirmed the Respondent

can adjust it accordingly in the future while passing on the benefit of additional ITC.

69. The above Applicant has also contended that the Respondent has passed on benefit of ITC @3% of the turnover. He has further contended that the Respondent has not provided all the facilities which he was bound to provide as per the terms of sale agreement when he had handed over possession of the flats. He has also stated that the Respondent has not passed on the above benefit to all the flat buyers. In this connection it would be appropriate to mention that this Authority has no mandate to direct the Respondent to provide all the facilities which he has not provided, therefore, the above Applicant may approach the competent forum.

70. The Respondent has also stated that no methodology had been prescribed in the above Act and the Rules as well as by this Authority to compute the benefit to be passed on to the buyers. In this connection it would be relevant to refer to the provisions of Section 171 (1) of the CGST Act, 2017 which clearly state 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. This Authority has been duly constituted under Section 171 (2) of the above Act and in exercise of the powers conferred on it under Rule 126 of the CGST Rules, 2017 has 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 fixed formula can be set for calculating the same as the facts of each case are different. 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 mathematical 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. It would also be appropriate to mention here that this Authority has power to 'determine' the methodology and not to 'prescribe' it as per the provisions of the above Rule and therefore, no set prescription can be laid while computing profiteering. It would be further relevant to mention that the power under Rule 126 has been granted to this Authority by the Central Govt., as per the provisions of Section 164 of the above Act which has approval of the Parliament. Rule 126 has further been framed on the recommendation of the GST Council which is a constitutional body created under the Constitution (One Hundred and First Amendment) Act, 2016. Therefore, the above power has both legislative sanction as well as incorporation in the CGST Act, 2017 and the CGST Rules, 2017. The delegation provided to this Authority under the above Rule is clear, precise, unambiguous

and necessary and is well within the provisions of the Constitution and therefore, it has been rightly conferred on this Authority. Hence, the objections raised by the Respondent in this regard are frivolous and without legal force.

71. The Respondent has also claimed that Australia and Malaysia have enacted legislation in which method for computing profiteering has been provided. In this connection it is submitted that both these countries have framed Acts to regulate prices however, the CGST Act, 2017 does not provide for price regulation. Hence, the above contention of the Respondent is incorrect.

72. His further contention regarding the case of **Kumar Gandharv v. M/s KRBL Ltd.** in Case No. 3/2018 decided on 04.05.2018 is also incorrect and is not applicable in the present case since no rate reduction had occurred in the above case and no benefit of additional ITC had become due to the Respondent. Therefore, the provisions of Section 171 (1) of the above Act were not attracted.

73. The Respondent had also cited the decisions of the Hon'ble Apex Court given in the case of **Godrej Foods Ltd v. Union of India, 1993 (68) E.L.T. 28 (SC)**. Perusal of this judgement shows that it involved levy of excise duty which is not the issue in the present case. Hence, it is respectfully submitted that the above case does not help the Respondent.

74. He has also quoted the case of **Perfect Mechanical Industries Limited v. CCE 2004 (169) ELT 219 (Tri.-Del.)** in this regard. Perusal of this judgement shows that it involved appeals against the demands of duty on scrap and the penalty imposed which is again not the issue

in the present case. Hence, it is respectfully submitted that the above case does not help the Respondent.

75. He has also referred to the judgement passed in the case of **CCE v. H. M. M. Ltd. 1995 (76) E.L.T. 497**. Perusal of this judgement shows that in this case, the Tribunal has held that the metal screw cap put on the bottle of Horlicks is not a part of manufacturing process. However, the same question is not involved in the present case. Hence, it is respectfully submitted that the above case also does not help the Respondent.

76. He has also relied upon the case of **Metal Forgings v. Union of India 2002 (146) E.L.T. 241** in which the issue was related to whether the products manufactured by the appellant fall under Tariff Item 68 and whether the demand of the revenue was barred by limitation. However, the same is not the issue in the present case. Hence, it is respectfully submitted that the above case also does not help the Respondent.

77. He has also placed reliance on the judgements passed in the cases of **Nashik Strips P. Ltd. 2011 (264) E.L.T. 576 (Tri.-Mumbai)**, **Satia & Company 2010 (262) E.L.T. 530 (Tri.-Ahmd.)**, **CCE, Chandigarh v. Krishi Rasyan Export Pvt. Ltd. 2009 (240) E.L.T. 468 (Tri.-Del.)**, **CCE Ludhiana v. FAS Kusum Ispat (P) Ltd. 2009 (240) E.L.T. 13 (P & H)**, **Smitha Shetty v. CCE, 2004 (156) ELT 84**, **CCE v. Sunitha Shetty, 2004 (174) ELT 313 (SC)** and **Hindustan Steel Ltd. v. State of Orissa** in his support but all these cases also do not come to the rescue of the Respondent since the present proceedings and the computation are strictly in accordance with the provisions of Section 171 (1) & (2) of the CGST Act, 2017 and facts of

these cases are at variance with the instant case. Therefore, it is respectfully submitted that the above cases are not being followed.

78. We also observe that the provisions of Section 171 of the CGST Act, 2017 are aimed at ensuring that the recipient gets the commensurate benefit, in the form of reduction of price, in case of any tax rate reduction and/or incremental benefit of ITC (i.e. a sacrifice made by the Govt. from its tax kitty) and the method of interpretation of this provision has been given in the text of Section 171 of the CGST Act, 2017 itself. We observe that the said provision clearly links profiteering to be a function of each supply of goods or services or both and hence, profiteering needs to be computed at the level of each invoice and not at the entity level or any consolidated level. From a complete reading of Section 171 of the Act *ibid*, it is amply clear that the total quantum of profiteering by an entity/registrant is the sum total of all the benefits that stood denied to each of the recipients/consumers individually. The intent of the words "commensurate reduction" is also clearly explained by the words "by reduction in price".

79. Accordingly, the Authority hereby determines the profiteered amount as Rs. 2,88,43,422/- as per the provisions of Rule 133 (1) of the above Rules. The above amount shall be paid by the Respondent to the eligible buyers as per the details given in Annexure-21 of the DGAP's above Report within a period of 3 months from the date of passing of this order along with interest @18% per annum from the date from which the above amount was collected by him from the buyers till the payment is made failing which it shall be recovered by the concerned Commissioner CGST/SGST and paid to the concerned

eligible buyers. The ITC for the balance period of the project shall also be passed on by the Respondent otherwise the buyers shall be at liberty to approach the State Screening Committee Uttar Pradesh.

80. 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.
81. The Applicants No. 1, 2 and 5 vide their submissions dated 17.05.2019 have admitted that they have received 3% benefit of ITC, therefore, the above Applicants shall be passed benefit by reducing the above amount from the amount as has been computed by the DGAP vide Annexure-21 of his Report.
82. It is also evident from the above narration of facts that the Respondent has denied benefit of ITC to the buyers of the flats being constructed by him in his present project in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has committed an offence under Section 171 (3A) of the above Act and therefore, he is liable for imposition of penalty under the provisions of the above Section. Accordingly, a Show Cause Notice be issued to him directing him to explain as to why the penalty prescribed under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him. Accordingly, the notice dated 01.05.2019 vide which it was proposed to impose penalty under Section 29, 122-127 of the above Act read with Rule 21 and 133 of the CGST Rules, 2017 is withdrawn to that extent.
83. This Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Uttar Pradesh 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 Uttar Pradesh through the DGAP within a period of 4 months from the date of receipt of this order.

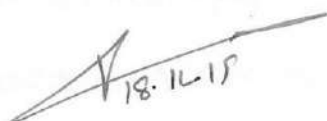
84. A copy each of this order be supplied to the Applicants, the Respondent, Commissioners CGST/SGST Uttar Pradesh as well as the Principal Secretary (Town & Planning), Government of Uttar Pradesh for necessary action. File be consigned after completion.

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Technical Member

Certified copy



(A. K. Goel)
Secretary, NAA



F. No. 22011/NAA/39/Nirala/2019

Dated: 18.12.2019

Copy To:-

1. M/s Nirala Projects Pvt. Ltd., H-121 Sector-63, Noida-201301.
2. Sh. Suresh Kumar Gupta, A-12 First Floor, Street No. 3, Gurunanak Pura, Laxmi Nagar, Delhi-110092.
3. Shri Shakti Anand, 43 D, 2nd Floor, J-Pocket, Sheikh Sarai-II, New Delhi-110017
4. Shri Abhishek Kumar Singh, G9-106, Nirala Greenshire, Gh-03, Sector-2, Greater Noida West, Uttar Pradesh-201306.
5. Shri Anil Singh, G8, 1708 Nirala Greenshire, Gh-03, Sector-2, Greater Noida West, Uttar Pradesh-201306.

6. Shri Lalit Kumar, G8-1903, Nirala Greenshire, Gh-03, Sector-2, Greater Noida West, Uttar Pradesh-201306.
7. Shri Rishi Ranjan, G-8, Flat No. 1508, Nirala Greenshire, Gh-03, Sector-2, Greater Noida West, Uttar Pradesh-201306.
8. Commissioner of Commercial Taxes, Office of the Commissioner, Commercial Tax, U.P. Commercial Tax Head Office Vibhuti Khand, Gomti Nagar, Lucknow, Uttar Pradesh- 226010.
9. Chief Commissioner of Central Goods & Services Tax, Meerut Zone Opp. CCS University, Mangal Pandey Nagar, Meerut, Uttar Pradesh- 250004.
10. Principal Secretary (Town & Planning), Government of Uttar Pradesh, TCG / 1-A-V/5, Vibhuti Khand, Gomti Nagar, Lucknow-226010.
11. 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.
12. NAA Website/Guard File.



12/12/18