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

Case No.	65/2020
Date of Institution	12.02.2020
Date of Order	16.10.2020

In the matter of:

1. Sh. Shashank Thakar, Flat No. 13130, Tower-9, Block-A, Plot GH07, Crossing Republic, Ghaziabad, U.P.-101016.
2. Sh. Neeraj Yadav, D-499 A, Street No.14, Sadh Nagar, Palam Colony, New Delhi-110045.
3. Sh. Chiranjeev Singh, D-1 A, Hauz Khas, New Delhi-110016.
4. Sh. Ashish Gupta, Flat No. 142, Housing Board Colony, Jharsa Road, Gurgaon, Haryana-122001.
5. Sh. Progga Biswas, C/o Biplab Sarkar, Manasbhumi, Manikpur, P.O. Italgacha, Kolkata, West Bengal-700079.
6. 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 Alton Buildtech India Pvt. Ltd., Adani House, Plot No. 83, Industrial Area, Sector 32, Gurgaon, Haryana-122001.

Respondent

Quorum:-

Dr. B. N. Sharma, Chairman

Sh. J. C. Chauhan, Technical Member

Sh. Amand Shah, Technical Member

Present:-

1. None for the Applicant No. 1 to 6.
2. Sh. Vishal Agarwal, Advocate, Ms. Tuhina, Advocate, Sh. Naveen Kumar Mittal, Company Representative, Sh. Kunjit Jain, Company Representative and Sh. Amar Mathur, Company Representative for the Respondent.

ORDER

1. A Report dated 14.06.2019 was received from the Applicant No. 6 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the Report were that the Applicant No. 1 to 3 had filed applications before the Haryana State Screening Committee on Anti-profiteering and the Applicant No. 4 and 5 had filed applications before the Standing Committee on Anti-profiteering, under Rule 128 of the CGST Rules, 2017 and submitted that they had purchased flats in the Respondent's project "Aangan" and alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) to them by way of commensurate reduction in

prices of the flats, in terms of Section 171 (1) of the CGST Act, 2017. The Haryana State Screening Committee on Anti-profiteering on prima facie having satisfied itself that the Respondent had not passed on the benefit of ITC had forwarded the applications of Applicant No. 1, 2 and 3 with its recommendation to the Standing Committee on Anti-profiteering for further action, in terms of Rule 128 (1) of the above Rules.

2. The aforesaid references were examined by the Standing Committee on Anti-profiteering, in its meetings held on 27.12.2018, 11.03.2019 and 11.04.2019 and it had forwarded all the 5 applications to the DGAP for detailed investigation under Rule 129 (1).

3. The DGAP on receipt of the applications and supporting documents from the Standing Committee on Anti-profiteering had issued Notice under Rule 129 (3) of the CGST Rules, 2017 on 15.01.2019 calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the above Applicants by way of commensurate reduction in prices charged from them 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 supporting documents. Vide the above mentioned notice dated 15.01.2019, the Respondent was also given opportunity to inspect the non-confidential evidence/information furnished by the above Applicants during the period from 21.01.2019 to 23.01.2019, which he had availed. Vide e-mail dated 22.05.2019, the above Applicants were also given an opportunity to inspect the non-confidential documents/replies furnished by the Respondent on 24.05.2019, 27.05.2019 & 28.05.2019, which they did not avail of.

4. The DGAP has also reported that the period covered by his investigation was from 01.07.2017 to 31.12.2018 and the time limit to complete the investigation was extended up to 06.07.2019 by this Authority, vide its order dated 19.03.2019 in terms of Rule 129 (6) of the CGST Rules, 2017.

5. The DGAP has further reported that the Respondent had submitted his replies vide letters dated 29.01.2019, 08.02.2019, 21.02.2019, 07.03.2019, 14.03.2019 and 24.04.2019 vide which he had stated that there were 3 projects viz. Aangan Phase-1, Aagan Phase-II and Aagan Phase-III being executed by him, which were at different stages of construction, however, no Occupancy Certificate (OC) had been received in respect of any of the phases of these projects. The Respondent had also clarified that the notice had been issued only with respect to the Aangan Phase-I project which was located in Sector 88A & 89A, Pataudi Road, Gurugram (Haryana) and the construction of the residential complex had nearly been completed. Out of the total number of 838 flats in the project, there had been 232 cancellations of the bookings till 31.03.2019, out of which 32 flats had remained unsold as on date. He had also submitted that out of the balance 200 cancelled flats, 117 flats were re-allotted to new buyers in the Service Tax as well as in the GST regime and 83 flats were re-allotted to new applicants on 12.06.2018 as the entire waitlist had already been exhausted at the time of planning for this draw. Booking for the Aangan Phase-II project located in Sector 88A & 89A, Pataudi Road, Gurugram (Haryana) was done in June 2018 i.e. in the GST regime but construction of the residential complex had not commenced till date and Aangan Phase-III project in Sector 99A,

Gopalpur, Gurugram (Haryana) had not yet been launched. He has further submitted that the Aangan Phase-I project was registered and approved under the "Affordable Housing Policy 2013" (AHP). The said Policy was notified under Section 9A of the Haryana Development and Regulation of Urban Areas Act, 1975 vide Notification No. PF-27/48921 dated 19.08.2013, issued by the Town and Country Planning Department, Government of Haryana to facilitate creation of additional affordable housing stock in the urban areas of the State. Annexure-A attached to the above Notification had laid down several parameters and specifications for the project to qualify under the above Policy. Paragraph 5 provided that the allotment rate for units approved at Gurgaon would be Rs. 4,000/- per sq. ft. carpet area plus an additional amount of Rs. 500/- per sq. ft. for the area of the balcony in the flat up to a maximum of 100 sq. ft. would be chargeable, exclusive of Service Tax/GST. Under the above Policy, the Respondent was barred from increasing the rate of sale for the units beyond the maximum cap of Rs. 4,000/- per sq. ft.

6. The Respondent had also stated before the DGAP that under the erstwhile taxation regime, he was registered with the VAT and the Service Tax Authorities. The VAT was leviable on the transfer of property in the goods involved in the construction activity by way of accretion. Since he had engaged contractors to undertake the entire work associated with the construction of the project, the said contractors were discharging the applicable VAT on the goods in respect of which property was transferred through accretion. He had neither collected nor discharged VAT, assessment of the same had not been finalized and the ITC of the VAT had also not been availed

of. Prior to 01.03.2016, the construction service provided by him was subjected to Service Tax and accordingly he was discharging applicable Service Tax and was entitled to avail ITC till 01.03.2016. Therefore, the cost of input tax was not forming part of his cost in as much as the credit of the same was admissible and available to him. Subsequent to 01.03.2016, the construction of the project approved under the AHP was exempted from the levy of Service Tax in terms of Notification No. 25/2015-ST dated 20.06.2012 as amended vide Notification No. 9/2016-St dated 01.03.2016. This exemption was applicable to him and his contractors, which had resulted in a situation where the output tax was exempted but the input services were taxable leading to the tax paid on the input services becoming a cost in his hands. The Respondent further submitted that under the GST regime, the construction of complex intended for sale to a buyer, except when the entire consideration was received after the issuance of Completion Certificate (CC) by the Competent Authority, was a "service" in terms of Schedule II read with Section 7 of the CGST Act, 2017 and he was accordingly discharging applicable GST on the same. The effective rate of GST was 12% on the value of supply. With respect to construction of Phase-I, he had engaged multiple contractors to execute the construction work. He had clear understanding with each contractor that all the goods and services except Steel, required for the construction activity, were within his scope of supply and he had agreed to a contract price with the contractors exclusive of taxes. The Respondent has further stated that under the GST regime, since the construction service supplied by him was now taxable, he was eligible to avail ITC. Accordingly, with

respect to Phase-I of his project, he was entitled to avail total ITC of Rs. 6,13,71,734/ under the GST regime which could be separated into the following broad categories:-

S. No.	Input/Input Services	ITC Available (Rs.)
1.	Construction services supplied by the contractors	4,89,22,956
2.	Steel	69,48,738
3.	Steel (Transitional Credit)	22,43,044
4.	Other Goods (Lifts, Electronics)	8,96,305
5.	Other Services (Advertising, Housekeeping)	23,60,514
Total Credit		**6,13,71,557**

7. The Respondent had also claimed that he had not benefitted or obtained any profit from the availability of ITC under the GST regime so as to pass on the same by way of commensurate reduction in prices in as much as his initial position had been restored and there was no benefit, let alone any additional benefit. This was because unlike any other business where the price and cost was linked and there was flexibility of varying prices in a case where the cost had increased, under the AHP, he was statutorily restrained from increasing the price to recover the additional cost on account of unavailability of ITC in the pre-GST regime. Therefore, the input tax paid had become cost to him and he had to bear the complete incidence of the same in the pre-GST period. Thus, the end customer had not borne any additional cost on account of unavailability of ITC as he had not passed on the burden of such tax by way of

commensurate increase in price. Thus, where the cost of input tax paid had never led to a commensurate increase in price, there could be no contention that now in the GST regime, if the same was available as credit, there should be a commensurate decrease in the price to the customers. The Respondent had further submitted that now that the status quo had been restored, there was no need for a commensurate reduction in price as the additional cost was never passed on to the customers in the pre-GST period. The Respondent had further claimed that even if the comparison of ITC availability alone was drawn between the position under the GST regime and the position immediately before the same (when exemption from payment of Service Tax was available to him and his construction contractors), he had not engaged in profiteering on account of availability of ITC under the GST regime.

8. The Respondent had also contended that majority of the credit now available under the GST regime, which was in respect of the input services received from the construction contractors, was never a cost earlier as the said service provider was exempted from payment of Service Tax and consequently the said contractors had neither discharged Service Tax nor recovered the same from him. Accordingly, out of the total ITC of Rs. 6,13,71,557/- availed by him under the GST regime, the majority, Rs. 4,89,22,956/-, only pertained to credit of tax paid on input construction services rendered by the contractors. Since the price payable to a contractor was exclusive of the applicable taxes, the same was now being recovered from him over and above the basic price of the contract whereas previously there was no such recovery as the contractor was also exempted from

the payment of Service Tax. He has also submitted that for instance, if Rs. 100/- was the basic price of the contract, under the erstwhile regime since there was an exemption from Service Tax, the contractor was only recovering the contract price of Rs. 100/-. However, now under the GST regime, the contractor had to discharge GST at 12%, and hence, he was recovering Rs. 112/- from the Respondent, of which, Rs. 12/- would be available as credit to be offset against the output GST liability on the construction service supplied by him. There was absolutely no gain under the GST regime on account of availability of ITC so as to warrant a commensurate reduction in price.

9. The Respondent has also furnished the following documents/information to the DGAP:-

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

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

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

   (d) Copies of all demand letters and sale agreements/contracts issued in the name of the Applicants.

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

   (f) Copies of Balance Sheets for FY 2016-17& FY 2017-18.

   (g) Copy of Electronic Credit Ledger for the period from 01.07.2017 to 31.12.2018.

   (h) CENVAT/ITC Register for the period from April, 2016 to December, 2018.

(i) Details of VAT, Service Tax, ITC of VAT, CENVAT credit for the period from April, 2016 to June, 2017 and GST & ITC of GST for the period from July, 2017 to December, 2018 for the project "Aangan".

(j) List of home buyers in the project "Aangan".

(k) Copy of Project Report submitted to RERA.

(l) TRAN-1 and TRAN-2 Statements for the period from July, 2017 to December, 2017.

(m) Copies of bills raised by the following vendors/contractors/professionals:-

a. M/s Foresight Realtech Private Limited

b. Mr. Fahan Iqbal Khan

c. Mr. Sandeep Sethi.

(n) Table Showing Types of Flats, Sold/Unsold.

(o) Total CENVAT credit availed and bifurcated between the expenses pertaining to the Aangan Phase-I, Aangan Phase-II and Aangan Phase-III projects.

10. The Respondent in terms of Rule 130 of the CGST Rules, 2017, had also requested to treat the following data/information as confidential:-

i. CENVAT credit/ITC Register for the period from April, 2016 to December, 2018.

ii. List of home buyers of the project.

iii. Copy of Project Report submitted to RERA.

iv. Copies of all demand letters and sale agreements/contracts issued in the name of the Applicants.

v. Copies of bills raised by the following vendors/contractors/professionals:-

a. M/s Foresight Realtech Private Limited

b. Mr. Fahan Iqbal Khan

c. Mr. Sandeep Sethi.

vi. Table Showing Types of Flats, Sold/Unsold.

vii. Total CENVAT credit availed and bifurcated between expenses pertaining to the Aangan Phase-I, Aangan Phase-II and Aagan Phase-III project.

11. The DGAP after carefully examining the applications, the various replies of the Respondent and the documents/evidence on record has observed that the Respondent had submitted Project Report of the project "Aangan" wherein payment schedule for the purchase of flats at the basic sale price of Rs. 4,000/- per sq. ft. carpet area and Rs. 500/- per sq. ft. for the balcony area was enclosed. The details of the payment schedule have been furnished in Table-'A' below:-

Table-'A'

Time of Payment	% of the total price payable
At the time of submission of the Application for allotment	5% of the total price
At the time of Allotment letter	20% of the total price
Within 06 months of the date of Allotment letter	12.5% of the total price
Within 12 months of the date of Allotment letter	12.5% of the total price
Within 18 months of the date of	12.5% of the total price

Allotment letter	
Within 24 months of the date of Allotment letter	12.5% of the total price
Within 30 months of the date of Allotment letter	12.5% of the total price
Within 36 months of the date of Allotment letter	12.5% of the total price

12. The DGAP has also stated that the Respondent had also submitted copies of the demand letters issued to the applicants and the details of the amounts and taxes paid by the applicants to the Respondent which have been furnished in Table-'B' below:-

Table-'B'

Applicant No. 1 **(Amount in Rs.)**

S. No.	Payment Stage	Demand Date	% of BSP	Instalment	Service Tax	GST	Total Amount payable
1	At the time of booking	26.02.2016	5.00%	1,16,518	21,119	-	6,03,709
2	Within 15 days of the date of Allotment letter		20.00%	4,66,072		-	
3	Within 06 months of the date of Allotment letter	11.08.2016	12.50%	2,91,295	-		2,91,295
4	Within 12 months of the date of Allotment letter	12.02.2017	12.50%	2,91,295	-		2,91,295
5	Within 18 months of the date of Allotment letter	16.08.2017	12.50%	2,91,295	-	34,955.40	326,250.40

6	Within 24 months of the date of Allotment letter	19.02.2018	12.50%	2,91,295	-	23,303.60	314598.60
7	Within 30 months of the date of Allotment letter	16.08.2018	12.50%	2,91,295	-	23,303.60	314598.60
8	Within 36 months of the date of Allotment letter		12.50%	2,91,295	-	23,303.60	314598.60
Total			**100.00%**	**23,30,360**	**21,119**	**1,04,866.20**	**24,56,345.20**

Applicant No. 2 & 5 **(Amount in Rs.)**

S. No.	Payment Stage	Demand Date	% of BSP	Instalment	Service Tax	GST	Total Amount payable
1	At the time of booking	26.02.2016	5.00%	1,25,887	22,817	-	6,52,253
2	Within 15 days of the date of Allotment letter		20.00%	5,03,549		-	
3	Within 06 months of the date of Allotment letter	11.08.2016	12.50%	3,14,718	-		3,14,718
4	Within 12 months of the date of Allotment letter	12.02.2017	12.50%	3,14,718	-		3,14,718
5	Within 18 months of the date of Allotment letter	16.08.2017	12.50%	3,14,718	-	37,766.16	3,52,484.16
6	Within 24 months of the date of Allotment	19.02.2018	12.50%	3,14,718	-	25,177.44	3,39,895.44

	letter						
7	Within 30 months of the date of Allotment letter	16.08.2018	12.50%	3,14,718	-	25,177.44	3,39,895.44
8	Within 36 months of the date of Allotment letter		12.50%	3,14,718	-	25,177.44	3,39,895.44
Total			**100.00%**	**25,17,744**	**22,817**	**1,13,298.48**	**26,53,859.48**

Applicant No. 3 **(Amount in Rs.)**

S. No.	Payment Stage	Demand Date	% of BSP	Instalment	Service Tax	GST	Total Amount payable
1	At the time of booking	26.02.2016	5.00%	71,426	12,946		3,70,076
2	Within 15 days of the date of Allotment letter		20.00%	2,85,704			
3	Within 06 months of the date of Allotment letter	11.08.2016	12.50%	1,78,565	-	-	1,78,565
4	Within 12 months of the date of Allotment letter	12.02.2017	12.50%	1,78,565	-	-	1,78,565
5	Within 18 months of the date of Allotment letter	16.08.2017	12.50%	1,78,565	-	21,427.80	1,99,992.80
6	Within 24 months of the date of Allotment letter	19.02.2018	12.50%	1,78,565	-	14285.20	1,92,850.20
7	Within 30 months of the date of Allotment letter	16.08.2018	12.50%	1,78,565	-	14285.20	1,92,850.20
8	Within 36 months of the date of Allotment letter		12.50%	1,78,565	-	14285.20	1,92,850.20
Total			**100.00%**	**14,28,520**	**12,946**	**64283.40**	**15,05,749.40**

13. The DGAP had also claimed that para 5 of Schedule-III of the CGST Act, 2017 (Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services) reads as *"Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building"* and clause (b) of Paragraph 5 of Schedule II of the CGST Act, 2017 reads as *"(b) construction of a complex building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration had been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever was earlier"*. Thus, the input tax credit pertaining to the residential units which were under construction but not sold was provisional input tax credit which would be required to be reversed by the Respondent, if such units remained unsold at the time of issue of the CC, in terms of Section 17(2) & Section 17(3) of the CGST Act, 2017, which read as under:-

Section 17 (2) "Where the goods or services or both were 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 Act, the amount of credit shall be restricted to so much of the input tax as was attributable to the said taxable supplies including zero-rated supplies".

Section 17 (3) "The value of exempt supply under sub-section (2) shall be such as may be prescribed and shall include supplies on

which the recipient was liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building".

Therefore, the ITC pertaining to the unsold units might not fall within the ambit of the DGAP's 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 input tax credit available to him post-GST.

14. The DGAP had further claimed that the Respondent had got permission to start construction activity for the above project on 03.10.2017 i.e. post-GST implementation and no ITC was available to the Respondent in the pre-GST era. Further, as the service of construction of affordable housing, provided by the Respondent, was exempted from the Service Tax vide Notification No. 25/2012-ST dated 20.06.2012 as amended by Notification No. 9/2016-ST dated 01.03.2016, the Respondent was exempted from the Service Tax liability for the receipts in the pre-GST era. Post-GST, the Respondent was eligible to avail ITC of GST paid on inputs and input services. The DGAP had also stated that from the data submitted by the Respondent which had been duly verified from his Returns filed during the post-GST period (July, 2017 to December, 2018), the details of the ITC availed by the Respondent, the Respondent's turnover, the ratios of CENVAT credit/ITC to the turnovers during the pre-GST and the post-GST periods were as have been computed in Table-C below:-

Table-'C'

(Amount in Rs.)

S. No.	Particulars	Pre-GST (01.04.16 to 30.06.2017)	01.07.2017 to 24.01.2018	25.01.2018 to 31.12.2018	Total (Post-GST)
1	ITC of GST Availed (A)	--	2,21,98,229	3,69,30,284	5,91,28,513
2	Total CENVAT/ITC Available (B)	NIL	--	--	--
3	Total Gross Taxable Turnover (C)	42,86,76,500	16,88,07,370	38,90,62,933	55,78,67,303
4	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	3,84,814	3,84,814		3,84,814
5	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to turnover (E)	3,39,120	3,72,079		3,72,079
6	Relevant ITC (F)= (B)*(E)/(D)or (A)*(E)/(D)	NIL	5,71,71,719		5,71,71,719
	Ratio of ITC to Turnover (G) = (F)/(C)*100	**NIL**	**10.25%**		**10.25%**

The DGAP had further stated that from the Table-'C', it was clear that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was NIL and during the post-GST period (July, 2017 to December, 2018), it was 10.25% which clearly confirmed that post-GST, the Respondent had benefited from additional ITC to the tune of 10.25% [10.25% (-) 0%] of the taxable turnover.

15. The DGAP had also observed that in the pre-GST period (April, 2016 to June, 2017), the construction service supplied by the Respondent was exempted from the Service Tax and the Respondent had submitted that he had neither collected nor discharged VAT as assessment of the same had not been finalized and input tax credit of the VAT had also not been availed by him and he had submitted Nil VAT Returns. Therefore, the total tax incidence in the pre-GST period was NIL.

Further, the Central Government, on the recommendation of the GST Council, had levied 18% GST (effective rate was 12% in view of 1/3rd abatement for land value) on construction service vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. The effective GST rate on construction service in respect of affordable and low-cost housing was further reduced from 12% to 8%, vide Notification No. 1/2018-Central Tax (Rate) dated 25.01.2018. In view of the change in the GST rate after 01.07.2017, the issue of profiteering had been examined in two parts i.e. by comparing the ITC and turnover in the pre-GST period when the tax incidence was NIL with those in (1) the post-GST period from July, 2017 to 24.01.2018 when the effective GST rate was 12% and (2) the GST period from 25.01.2018 to 31.12.2018 when the effective GST rate was 8%.

16. Accordingly, on the basis of Table-C above, the comparative ratios of the ITC availed/available to the turnovers, during the pre-GST period and post-GST periods, the recalibrated basic price and the excess realization (Profiteering) in the post-GST period have been furnished by the DGAP in Table-'D' below:-

Table-'D'

Sr. No.	Particulars		Pre-GST	Post- GST		
1	Period	A	01.04.16 to 30.06.2017	July,2017 to January 24th, 2018	January 25th, 2018 to December, 2018	Total July, 2017 to December, 2018
2	Output tax rate (%)	B	NIL	12.00%	8.00%	
3	Ratio of CENVAT/ ITC to Taxable Turnover as per Table – B above (%)	C	NIL	10.25%	10.25%	10.25%
4	Increase in ITC availed post-GST (%)	D	--	10.25%	10.25%	10.25%

	Analysis of Increase in ITC: (Amount in Rs.)					
5	Base Price collected during July, 2017 to December, 2018 (Gross Turnover)	E	--	16,88,04,370	38,90,62,933	55,78,67,303
6	GST Collected on Basic Price @12% or 8%	F= E*12% or 8%	--	2,02,56,524	3,11,25,035	5,13,81,559
7	Total Demand collected post-GST	G=E+F	--	18,90,60,894	42,01,87,968	60,92,48,862
8	Recalibrated Basic Price	H= E*(1-D) or 89.75% of E	--	1,51,50,19,22	34,91,83,982	50,06,85,904
9	GST on recalibrated basic price @12% or 8%	I= H*12% or 8%	--	1,81,80,231	2,79,34,719	4,61,14,949
10	Commensurate demand price	J= H+I	--	16,96,82,153	37,71,18,701	54,68,00,854
11	**Excess Collection of Demand or Profiteering Amount**	**K= G – J**	**--**	**1,93,78,742**	**4,30,69,267**	**6,24,48,008**

17. The DGAP had further stated that from the Table- 'D' above, it was quite clear that the ITC of 10.25% of the turnover should have resulted in commensurate reduction in the base price. Therefore, in terms of Section 171 of the CGST Act, 2017, the benefit of the additional ITC that had accrued to the Respondent, was required to be passed on to the recipients.

18. The DGAP had also submitted that the Respondent had contended that in view of the price cap of Rs. 4000/- per sq. ft. under the AHP, he was prohibited from increasing the price on account of increase in the input cost or input tax in the pre GST regime and hence, any decrease in price on account of increased availability of ITC in the post-GST period was not warranted. But this argument was not legally sustainable in view of the statutory requirement under Section 171 of the CGST Act, 2017. The Respondent could not make good the loss

suffered, if any, in the pre-GST era, by not passing on the benefit of ITC under the GST regime. Similarly, the Respondent had argued that there was no real benefit of ITC as his contractors were not liable to pay Service Tax in the pre-GST period (and hence no credit was available to the Respondent) but in the post-GST period his contractors were discharging GST liability, the credit of which was available to the Respondent. However, this argument was also not acceptable in view of the fact that since the Respondent's contractors could now avail ITC of GST paid by them, which was not available to them in the pre-GST period, they were legally required to pass on its benefit to the Respondent, who, in turn, would have to pass it on to the home buyers.

19. The DGAP had also averred that on the basis of the CENVAT credit/ITC availability pre and post-GST and the details of the amount collected by the Respondent from the above Applicants and other home buyers during the period from 01.07.2017 to 24.01.2018, the amount of benefit of ITC that needed to be passed on by the Respondent to the recipients i.e. the profiteered amount came to Rs. 1,93,78,742/- which included 12% GST on the base profiteered amount of Rs. 1,73,02,448/-. Further, the amount of benefit of ITC that needed to be passed on by the Respondent to the recipients i.e. the profiteered amount during the period from 25.01.2018 to 31.12.2018, was Rs. 4,30,69,267/- which included 8% GST on the base profiteered amount of Rs. 3,98,78,895/-. Thus, the total profiteered amount during the period from 01.07.2017 to 31.12.2018 was Rs. 6,24,48,008/- which included GST (@ 12% or 8%) on the base profiteered amount of Rs.

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5,71,81,399/-. The DGAP had also furnished the home buyer and unit no. wise break-up of the profiteered amount as per Annexure-17 of the Report. The total profiteered amount was inclusive of Rs. 4,32,315/- (including GST) which was the profiteered amount in respect of all the 5 Applicants mentioned at Sr. No. 78, 119, 329, 341 and 465 of Annexure-17. This amount was required to be passed on to the flat buyers including the above Applicants.

20. The DGAP has also observed that the service was supplied in the State of Haryana only by the Respondent.

21. The DGAP had also submitted that the benefit of additional ITC of 10.25% of the turnover which had accrued to the Respondent was required to be passed on to the above Applicants and the other recipients and thus, the provisions of Section 171 of the CGST Act, 2017 had been contravened by the Respondent inasmuch as the additional benefit of ITC @10.25% of the basic price received by the Respondent during the period from 01.07.2017 to 31.12.2018 had not been passed on to the Applicants and other recipients. On this account, the Respondent had realized an additional amount to the tune of Rs. 4,32,315/- (including GST) from the above 5 Applicants which included both the profiteered amount @10.25% of the basic price and GST on the said profiteered amount. The Respondent had also profiteered an amount of Rs. 6,20,15,693/- including the GST from 805 other recipients who were not applicants in the present proceedings. These 805 recipients were identifiable as the Respondent had provided their names and addresses along with unit

nos. allotted to them. Therefore, this additional amount of Rs. 6,20,15,693/- was required to be returned to such eligible recipients.

22. The DGAP had also stated 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 ITC 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.

23. The above Report was considered by this Authority in its meeting held on 18.06.2019 and it was decided to hear the above Applicants and the Respondent on 02.07.2019. A Notice dated 19.06.2019 was also issued to the Respondent to explain why the Report dated 14.06.2019 furnished by the DGAP should not be accepted and his liability for profiteering in violation of the provisions of Section 171 should not be fixed. He was also directed to respond why penalty under Section 29, 122 to 127 of the CGST Act, 2017 read with Rule 21 and 133 of the CGST Rules, 2017 should not be imposed on him.

24. Six personal hearings were accorded to the parties on 02.07.2019, 04.07.2019, 19.07.2019, 07.08.2019, 21.08.2019, and 03.09.2019 out of which 4 hearings were attended by the Respondent and none was attended by the Applicant No. 1 to 6. The Respondent was represented by Sh. Vishal Agarwal, Advocate, Ms. Tuhina, Advocate, Sh. Naveen Kumar Mittal, Company Representative, Sh. Kunjit Jain, Company Representative and Sh. Amar Mathur, Company Representative.

25. The Respondent had filed his first written submissions on 04.07.2019 vide which he had submitted that none of his submissions including his detailed reply dated 25.04.2019, had been considered by the DGAP in his Report dated 14.06.2019. The Respondent had also submitted that he in his submissions dated 25.04.2019 had made elaborate submissions to show and prove that he had not realized any benefit from the availability of ITC under the GST regime, however, the DGAP had completely overlooked and ignored the same in his Report.

26. The Respondent had further submitted that against the ITC availed in the post-GST era of Rs. 5,91,28,513/-, the DGAP had computed the extent of benefit of ITC and the consequent profiteering of Rs. 6,24,48,008/- which was incorrect. He had also stated that the factum of the project having been conceived and its pricing determined therein keeping in mind the availability of CENVAT credit, had also been completely ignored by the DGAP. If the DGAP had considered the correct factual position, then it would be clear that out of the total no. of 838 flats, 833 flats were booked on 11.02.2016 when Service Tax at the rate of 12% + 3% towards cesses was payable on the abated value of the construction service. It was subsequently that the cancellations for the bookings already done (11.02.2016) began and the remainder of the flats were also booked. He had also claimed that most of the cancellations had begun w.e.f. 01.03.2016, when the exemption was available to the Respondent. In accordance with the AHP, the cancelled flats were first allotted to the candidates existing in the waiting list. Post allotment to the waiting list candidates, in respect of the flats which were still vacant, fresh draw was made on

12.06.2018 and the vacant flats were allotted accordingly. He had also stated that the statement relied upon in Annexure-17 of the DGAP's Report dated 14.06.2019 showing the details of the recipient home buyers for the period from 01.07.2017 to 31.12.2018 had been prepared on the basis of the details available as on 31.12.2018 and did not reflect the true state of affairs which had occurred and existed in the pre-exemption period, the exemption period and the post exemption period. In respect of the allotments made in the pre-exemption period (prior to 01.03.2016), when the project was conceived and prices determined, the Respondent was also entitled to CENVAT credit. Further, the price of Rs. 4000/- per sq. ft. which was recoverable from the buyers was excluding taxes, which were to be charged extra on actuals.

27. The Respondent had also argued that the DGAP had overlooked the fact that the Respondent had paid Service Tax to the tune of Rs. 1,35,71,447/- during the period from February to March 2016 and that the CENVAT credit to the tune of Rs. 51,56,352/- was availed and utilized for payment of the same. The Respondent had further argued that it was only with effect from 01.03.2016 that an exemption from payment of Service Tax in respect of Affordable Housing approved under any Housing Scheme of the State Government was available and applicable to the Respondent. This exemption applied not only to the Respondent but also to his sub-contractors who were undertaking the actual construction. Further, only with effect from 01.03.2016, neither was the Respondent liable to pay Service Tax nor was he liable to reimburse Service Tax to his sub-contractors, who in-turn

were also exempt from the levy of Service Tax. The Respondent had also pointed out that the DGAP in his Report dated 14.06.2019 had proceeded on erroneous presumption that no ITC was available to the Respondent in the pre-GST era.

28. The Respondent had also submitted that the DGAP had also overlooked one fundamental aspect that if there was no Service Tax applicable on the services rendered by the sub-contractor in the pre-GST era (01.03.2016-30.06.2017), then how could there be any benefit of ITC (that was not available earlier), which the Respondent was enjoying under the GST era i.e. when the Respondent was not reimbursing the sub-contractor any Service Tax, as none was payable, how could it be said that benefit of ITC had not been passed on in the GST era, when the Respondent had to first reimburse the sub-contractor and thereafter avail credit.

29. The Respondent had also claimed that the DGAP had also overlooked the fact that anti-profiteering proceedings could be initiated only where the benefit of ITC had not been passed on to the recipients by way of commensurate reduction in prices. In view of anti-profiteering measures, what was earlier a cost should under the GST era be available as credit, benefit of which was required to be passed on. In so far as the sub-contractors were concerned, since no Service Tax was payable by them, consequently, the same was not a cost in the hands of the Respondent. Accordingly, the credit of such tax in the GST era could not be termed as a benefit. The Respondent had further claimed that the DGAP had also overlooked the fact that rate of tax in respect of various items such as Steel and other inputs, as also

services (advertisement, housekeeping, etc.) had increased in the GST era from that what was payable under the pre-GST era. He had also stated that the methodology adopted by the DGAP for computing the alleged profiteering was also incorrect and he had submitted the following Table showing the ratio of the CENVAT credit/ITC availed to the total turnover:-

S. No.	Particulars	Pre-GST (01.02.2016 to 28.02.2016)
1	Input Tax Credit of GST availed (A)	Nil
2	Total CEVVAT/ Service Tax Credit Availed(B)	51,56,352/-
3	Total Turnover (C)	38,61,54,794/-
4	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	3,84,814
5	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to Turnover (E)	3,82,713
6	Relevant ITC (F)= (B)*(E)/ (D) or (A)*(E)/ (D)	51,28,199/-
7	Ratio of Input Tax Credit to Turnover (G)= (F)/ (C)*100	1.32

30. He had further submitted computation of profiteering applying the basis adopted by the DGAP in the pre-GST era as per the following Table:-

S. No.	Particulars	Pre- GST (01.02.2014 to 28.02.2016)	Post-GST (01.07.2017 to 31.12.2018)
1	Input Tax Credit of GST Availed (A)	Nil	5,91,28,513- 4,89,22,956*=1,02,05,557/-

2	Total CENVAT/ Service Tax Credit Availed (B)	51,56,352/-	
3	Total Turnover (C)	38,61,54,794/-	55,78,67,303/-
4	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	3,84,814	3,84,814
5	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to Turnover (E)	3,82,713	3,72,079
6	Relevant ITC (F)= (B)*(E)/(D) or (A)*(E)/(D)	51,28,199/-	98,67,815/-
7	Ratio of Input Tax Credit to Turnover (G) = (F)/(C)*100 (%)	1.32	1.76

*GST paid to Contractors which was exempt earlier.

He has also contended that as per the ratios of CENVAT credit/input tax credit to total turnovers, the incremental percentage of ITC available was 1.76-1.32= 0.44% and 0.44% of 55,78,67,303/- = 24,54,616 /- which should be the profiteered amount. The incremental credit available to the Respondent was Rs. 24,54,616/-. Further, on Steel items, which were procured by him, additional GST of 3.5% (12.5% Excise Duty + 2% CST against which GST was now being paid at 18%) had not been factored in. If the incremental credit on account of 3.5% of such additional GST payable was reduced, the incremental credit would further reduce. The incremental tax of 3% over the rate of Service Tax of 15% on services such as house-keeping, advertisement etc. also needed to be factored in.

31. The Respondent had filed his next written submissions on 19.07.2019 vide which he submitted that the project "Aangan" was registered and approved under the "AHP 2013" which laid down several parameters

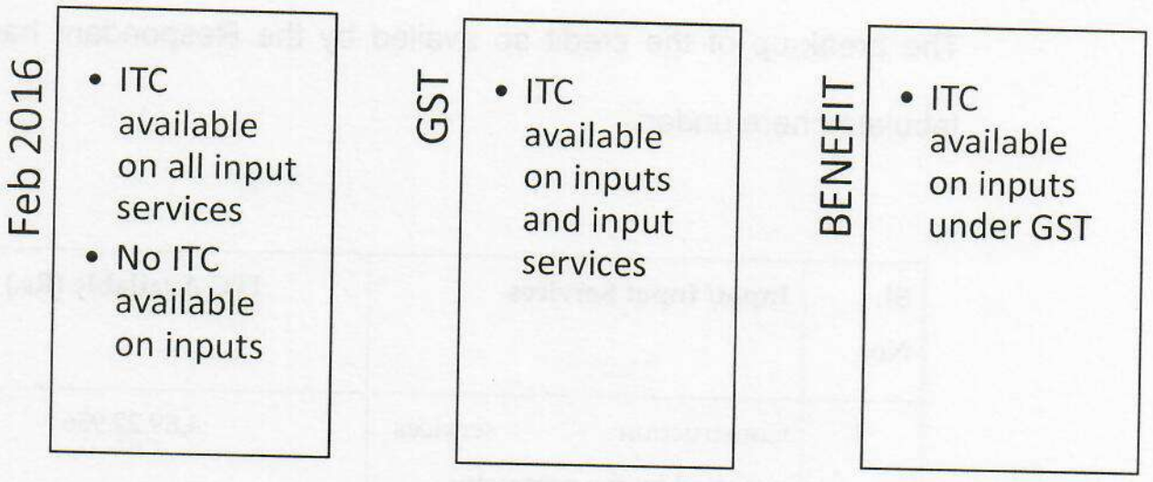
and specifications which were required to be satisfied before the project could qualify under the AHP such as the allotment rate for the units approved at Gurgaon was Rs. 4,000/- per sq. ft. with an additional amount of Rs. 500/- per sq. ft. for the balcony area in a flat limited to 100 sq. ft., exclusive of Service Tax/GST. He had further submitted that under the AHP, he was barred from increasing the allotment rate for the units beyond the maximum cap of Rs. 4,000/- per sq. ft. Hence, even if the actual cost exceeded the projected cost, or an additional tax was required to be borne which could not be availed as credit, the said increased cost could not be recovered from the customers by hike in the rate of allotment. He had also stated that he had applied for grant of license under the AHP and was granted the same vide License No. 81 of 2014 dated 08.08.2014 which was annexed as Annexure-A. At the time of applying for the grant of license under the Scheme, construction service in relation to projects approved under the AHP were subjected to the levy of Service Tax. Accordingly, the Respondent was eligible to avail ITC on the tax paid on input services and capital goods and the same was not factored in as a projected cost. After grant of the license under the AHP, the Respondent had initiated the necessary groundwork for launching the project. During this period, he had appointed various service providers such as consultants, brokers, security agents, surveyors and marketing agencies etc. The Respondent had applied for and obtained registration with the Service Tax authorities in February, 2016. He had also submitted that the approved development plans for the project covered a total saleable carpet area (excluding balcony area) of 3,84,814 sq. ft. In the month of February, 2016, applications for

allotment were invited and the allotment was made on the basis of the draw. In February, 2016, the Respondent had received applications for allotment of 3,82,713 sq. ft. area which was allotted to the applicants. He had further submitted that as provided in the AHP, 25% of the payment had become due on allotment and accordingly the Respondent had discharged Service Tax in the month of February, 2016 to the tune of Rs. 1,35,71,447/- on a turnover of Rs. 38,61,54,974/-. Out of the tax of Rs. 1,35,71,447/-, Rs. 84,15,095/- were paid in cash while Rs. 51,56,352/- were paid by utilization of the CENVAT credit. He had also enclosed ST-3 Return for the period from October-2015 to March-2016, and an extract of the Respondent's CENVAT Register for the month of February-2016 in his support.

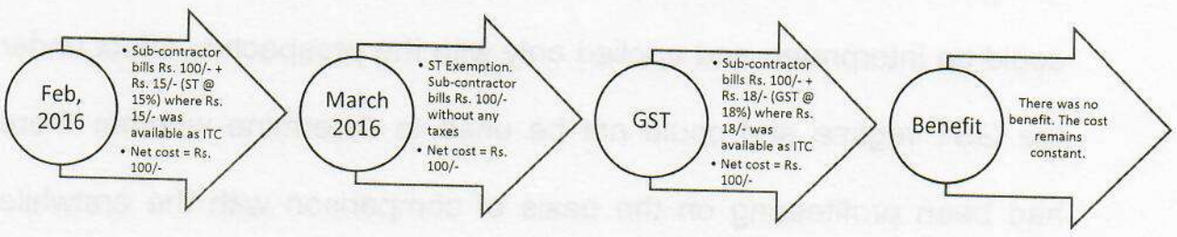
32. The Respondent had also submitted that the credit which he had availed was only in respect of the services of brokerage, consultancy, advertisement and security etc. which was mentioned in his CENVAT Register for the month of February-2016. Thereafter, w.e.f. 01.03.2016, construction service pertaining to the original works in relation to any housing scheme of a State Government in respect of low-cost houses up to a carpet area of 60 sq. mt. per house was exempted from the levy of Service Tax effective from 01.03.2016 vide item (ca) of Entry 14 of the Notification No. 25/2012-ST dated 20.06.2012. As a consequence, the Respondent was ineligible to avail ITC of the tax paid on inputs, input services and capital goods and the same became a cost in his hands. Further, the Respondent was not entitled to recover the said increased cost from the buyers in view of the maximum cap of Rs. 4000/- per sq. ft. mandated under the AHP. Subsequent to 01.03.2016, the Respondent had awarded the

construction work of the project to a sub-contractor. The sub-contractor was obligated under the contract to provide all goods and services, except Steel required for undertaking the work. The consideration payable under the contract was exclusive of applicable taxes and the construction service supplied by the sub-contractor under the AHP was also exempted from the levy of Service Tax in terms of the aforesaid exemption. Consequently, the sub-contractor had not levied any Service Tax on the service rendered by him nor the Respondent had reimbursed the sub-contractor the Service Tax component. Further, Service Tax was neither a cost to the Respondent nor it was reimbursed by him. He had also furnished a copy of the Price Schedule agreed upon between the sub-contractor and the Respondent for payment of consideration exclusive of taxes.

33. The Respondent had also contended that after the implementation of the GST w.e.f. 01.07.2017, the construction of a complex intended for sale to a buyer, except when the entire consideration was received after the issuance of CC by the Competent Authority, was leviable to GST under Schedule-II read with section 7 of the CGST Act, 2017. Since the Respondent had not yet obtained the CC/OC till date and he was engaged in the provision of taxable construction services, he was eligible to avail ITC under the GST regime. However, once the Respondent had obtained the CC/OC, he was liable to reverse the ITC claimed in respect of the sold flats. He had further contended that in February, 2016 when the project was launched the Respondent was eligible for all credits except that on inputs, which was now available under the GST regime. He had also compared his eligibility to the ITC as is given below:-



34. The Respondent had also argued that if his eligibility to avail ITC was compared with respect to the time when the construction services were exempted from the levy of Service Tax w.e.f. 01.03.2016 till 31.12.2018, it would be clear that other than credit on inputs and input services (other than construction services), there was no input tax benefit obtained under the GST regime. Insofar as construction services were concerned, the services rendered by the sub-contractor were also exempted and consequently were not a cost to the Respondent. He had further argued that the cost of the sub-contractor had remained constant through all the tax periods as was clear from the illustration given below:-



35. He had also pleaded that with respect to Phase-I of the project, he had provisionally availed ITC of Rs. 5,91,28,513/- under the GST regime. The break-up of the credit so availed by the Respondent has been tabulated here under:-

Sl. No.	Input/ Input Services	ITC Available (Rs.)
1.	Construction services supplied by the contractor	4,89,22,956
2.	Steel	69,48,738
3.	Other Goods (lifts, electronics)	8,96,305
4.	Other Services (advertising, housekeeping)	23,60,514
Total Credit		**5,91,28,513**

36. The Respondent had also contended that the DGAP in his Report dated 14.06.2019 had not considered that the project had been launched in February, 2016, when the Respondent had availed CENVAT credit of the tax paid on input services and also that under the GST regime, only the initial status quo had been restored and that accordingly, there was no benefit of ITC obtained by the Respondent. He had further submitted that Section 171 of the CGST Act, 2017 could be interpreted and applied only with the prospective effect under the GST regime and could not be used to determine whether there had been profiteering on the basis of comparison with the erstwhile regime.

37. The Respondent had also cited the judgements recorded in the cases of ***State of Punjab v. Bhajan Kaur 2008 12 SCC 112*** wherein it was held that "a statute was presumed to be prospective unless held to be retrospective, either expressly or by necessary implication." and ***Zile Singh v. State of Haryana 2004 8 SCC 1***, wherein it was held that it was a cardinal principle of construction that every statute was prima facie prospective unless it was expressly or by necessary implication made to had a retrospective operation. Thus, Section 171(1) could not be made applicable to any case prior to the date on which it came into effect i.e. 01.07.2017. Therefore, for the purposes of this Section, the earliest baseline with reference to which the profiteering angle could be looked in was the effective date of 01.07.2017.

38. He had also claimed that even if the above Section was attempted to be given retrospective applicability, its language thwarted any such attempt as was evident from the following:-

Section 171(1) referred to "reduction in the rate of tax on any supply". The tax on supply came to be levied for the first time only on 01.07.2017 in terms of Section 9 read with Section 7 of the CGST Act, 2017. As there was no tax on supply prior to 01.07.2017, the question of rate of tax on supply being lower on 01.07.2017 than before (amounting to profiteering) could never arise. Thus, rate of tax on supply could be reduced only after its introduction on 01.07.2017. Therefore, even if the total indirect tax rate under the erstwhile regime was higher on 30.6.2017 than the total GST rate on 01.07.2017 and the Respondent did not reduce the price on 01.07.2017, it would not fall foul of Section 171(1). However, the

Respondent would fall foul of the said Section if he did not reduce the price of his supply on 02.07.2017 if the rate of GST was reduced on 02.07.2017 in comparison with the rate as on 01.07.2017.

39. It was further claimed by the Respondent that the DGAP's analysis was entirely pinned on the untenable assumption that "ITC" tantamounted to "CENVAT credit", however, this interpretation was without any basis, logic or support. The term "ITC" had been defined in Section 2(62) of the CGST Act, 2017 as under:-

"(62) "input tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes— (a) the integrated goods and services tax charged on import of goods; (b) the tax payable under the provisions of sub-sections (3) and (4) of section 9; (c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act; (d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or (e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act, but does not include the tax paid under the composition levy;"

40. From the above definition, it was evident that the "ITC" was the credit of IGST, CGST, SGST and UGST none of which existed prior to 01.07.2017. In other words, "ITC" was not even in existence prior to 01.07.2017. Thus, even if the overall amount of "ITC" substantially increased on 01.07.2017 under the GST laws as compared to the

corresponding amount of CENVAT and VAT credit available on 30.6.2017 under the erstwhile laws and the Respondent did not reduce the price on 01.07.2017, he did not fall foul of Section 171(1) because "ITC" did not exist prior to 1.7.2017, which disabled comparison thereof with reference to the period prior to 01.07.2017. Thus, whether the benefit of ITC had been passed on or not in terms of section 171(1) could not be determined by making any reference to a date prior to 01.07.2017. He had also submitted that even Section 171(2) of the CGST Act, 2017 read with Rule 127(i) of the CGST Rules, 2017 supported the abovementioned interpretation of the prospective applicability of Section 171(1). In terms of Section 171(2) read with Rule 127(i), this Authority was *inter alia* required to determine whether any reduction in the rate of tax on any supply had been passed on to the recipients by way of commensurate reduction in prices. A rate of tax could not be reduced with effect from a date prior to the date of its imposition which meant that GST rates could not had been reduced prior to 01.07.2017, which necessarily implied that any determination regarding any reduction in the rate of tax could be made only with reference to 01.07.2017 or thereafter but not with reference to any date prior to 01.07.2017. The same also applied with regard to determining whether the benefit of ITC had been passed on to the recipients of the supply of goods or services. In view of the above, it was submitted that Section 171(1) only had prospective applicability and hence could not be relied upon in the present proceedings to determine whether there had been any profiteering on the basis of the comparison between the position under the erstwhile regime and the GST regime.

41. He had also submitted that if profiteering under Section 171 was intended to be computed on the basis of a comparison between the erstwhile regime and the GST regime, the legislature would have clearly provided a mechanism for computing the same with reference to the position under the erstwhile regime. The Respondent had also stated that under the GST law, there was no mechanism prescribed by the legislature for computing the alleged profiteering on the basis of comparison with the position under the erstwhile regime vis-à-vis the GST regime.

42. He had also contended that no benefit had been realized by him from the availability of ITC under the GST regime and hence there was no benefit to be passed on to the recipients as was required under the provisions of Section 171 of the CGST Act, 2017. The mere availability of ITC should not be the criterion to ascertain whether there had been any profiteering but the criterion should be to determine whether the Respondent had obtained "benefit" from the same. The Respondent had also submitted various definitions of the word "benefit" from different dictionaries and stated that the determination whether a benefit had been obtained necessarily entailed a comparative exercise between the present and the previous scenario to discern whether any additional advantage had been gained. The DGAP in his Report dated 14.06.2019 had presumed that the entire ITC availed in the post-GST regime was a benefit to him and had held the same to be profiteering. The DGAP had failed to appreciate that for the credit to be a "benefit", the same had to be a cost under the previous regime. Where the tax

component, as in the case of the construction services by the sub-contractor which were exempted, was never a cost to the Respondent, the same could not be considered a "benefit" now when credit was available on payment of tax. In the present case, on comparison between the scenarios, it was evident that the Respondent had not obtained any "benefit" from the availability of ITC under the GST regime.

43. He had also stated that majority of the credit now available under the GST regime, which was in respect of the input services received from the sub-contractors, was never a cost earlier as the said service providers were exempted from payment of Service Tax and consequently the contractors neither discharged Service Tax nor recovered the same from the Respondent. Accordingly, out of the total ITC of Rs. 5,91,28,513/- availed by the Respondent under the GST regime, the majority, Rs. 4,89,22,956/-, only pertained to credit of tax paid on input construction services rendered by the sub-contractors. Since the price payable to the sub-contractors was exclusive of applicable taxes, the same was now recoverable from the Respondent over and above the basic price of the contract whereas previously there was no such recovery as the sub-contractors were also exempted from the payment of Service Tax. Thus, there was no benefit under the GST regime on account of availability of ITC so as to warrant a commensurate reduction in price and accordingly there could be no contravention of Section 171 of the CGST Act.

44. He had also contended that the DGAP in his Report dated 14.06.2019 had overlooked the fact that in February, 2016 when Service Tax was discharged and CENVAT credit was availed, the Respondent was eligible to avail the credit of tax paid on all input services. Since CENVAT credit was available on tax paid on all input services, there could not be any benefit of ITC flowing in the post-GST era as Service Tax paid on input services was never a cost to the Respondent as credit was available in respect of the same. Due to the Service Tax exemption introduced w.e.f. 01.03.2016, the credit of tax paid by service providers had become cost to the Respondent, however, with the introduction of GST, the status quo had been restored. He had further contended that restoration of the status quo could not be regarded as benefit flowing under the GST regime.

45. He had also stated that he had not obtained any benefit under the GST regime with regard to the ITC available on account of the input construction services supplied by the sub-contractors becoming taxable under the GST regime. Accordingly, the entire quantum of credit available on account of the same must be excluded from the quantum of ITC available under the GST regime. Thus, the benefit, if any, at its highest would be only in respect of the tax paid on inputs as when the project was launched in February, 2016, the Respondent was discharging Service Tax on the allotment turnover and had availed CENVAT credit on input services as also when Service Tax was exempted w.e.f. 01.03.2016, the Respondent was not eligible to avail credit of the tax paid on the inputs.

46. He had further stated that even if there was benefit obtained with respect to inputs and input services under the GST regime, even then, the extent of benefit would be limited to 14.5% in respect of inputs and 15% in respect of input services.

47. He had also submitted that under the erstwhile regime, the rate of Excise Duty on goods/inputs (including Steel) was 12.5% and the Central Sales Tax was 2%, hence, the cost borne by the Respondent was 14.5% at the highest. However, under the GST regime, most goods/inputs were subjected to the GST @ 18%. Therefore, under the GST regime the Respondent was paying an incremental tax of 3.5%, which was being recovered from him by his suppliers. Therefore, even to avail the ITC under the GST regime, the Respondent was paying additional tax of 3.5%. Therefore, the said additional payment of 3.5% tax under the GST regime could not be considered a benefit as the said amount was not payable under the erstwhile regime. Accordingly, at the highest, the benefit if any available to the Respondent under the GST regime was only limited to 14.5% of credit on inputs which was not available to him under the erstwhile regime.

48. He had also claimed that assuming that there was benefit with respect to input services and under the erstwhile regime, the rate of Service Tax on various input services was 15%, hence, the cost borne by the Respondent was consequently also 15%. However, under the GST regime, most input services under consideration were subjected to GST @ 18%. Therefore, under the GST regime the Respondent was paying an incremental tax of 3%, which was

being recovered from him by his suppliers. Therefore, even to avail ITC under the GST regime, the Respondent was paying additional tax of 3%. Therefore, the said additional payment of 3% tax under the GST regime could not be considered a benefit as the said amount was not payable under the erstwhile regime. Accordingly, at the highest, the benefit if any available to the Respondent under the GST regime was only limited to 15% of credit which was not available to him under the erstwhile regime.

49. He had further claimed that the logic advanced by the DGAP was flawed inasmuch as he had made an incorrect assumption that previously, the cost of tax paid on inputs/ input services was passed on and was being borne by the recipient, so now when credit was available and the tax was no longer a cost, the benefit of credit should be passed on to the recipients. However, the determination of profiteering necessarily entailed a comparative exercise between the extent of ITC available and the price charged under the erstwhile regime vis-à-vis the GST regime. The DGAP had wrongly assumed that the costing of the service directly varied with the availability of ITC. Therefore, under the erstwhile regime, it was presumed that since the ITC formed part of the cost, the same was factored into the costing and pricing of the service and accordingly recovered from the recipient of the service. On this understanding, the DGAP had assumed that since the ITC was available to the Respondent, it was no longer a cost to him, but was still being recovered from the recipient as the costing and pricing of the service had not commensurately changed. However, it was submitted that this

assumption was incorrect as the cost of input tax paid was never borne by the customer and the said cost was being borne by the Respondent and could not be recovered due to the maximum price cap of Rs. 4000/- per sq. ft. mandated under the AHP. In fact, during the period of construction, the price of Steel had gone up several folds from Rs. 23,027/- per MT exclusive of taxes to Rs. 38,200/- per MT exclusive of taxes, yet the Respondent had not been able to pass on this increased cost to his customers. Thus, given the statutory limitations under the AHP, unlike any other business where an increase in costs led to an increase in price, the price that could had been charged by the Respondent always had remained fixed at Rs. 4000/- per sq. ft. regardless of any increase in costs. Thus, where the cost of input tax never led to a commensurate increase in price, there could be no contention that now if the same was available as credit, there should be a commensurate decrease in price to the customer, as the customer was never bearing the cost of the same. Accordingly, where the recipient was not bearing the cost of the same, there could not be any requirement to reduce price in lieu of availability of ITC under the GST regime.

50. The Respondent had also contended that he had made detailed submissions before the DGAP during the investigation demonstrating how he did not obtain any benefit from the availability of ITC under the GST regime, however, the DGAP in his report had neither addressed nor dealt with the same. The Respondent had reiterated his submissions on facts to demonstrate that he had not obtained any benefit on account of availability of ITC under the GST

regime. In 2014, the Respondent had applied for a license under the AHP by submitting his proposals on the basis of which he was entitled to charge a maximum of Rs. 4000/- per sq. ft. While computing his costs, he had to consider and account for every expense that would form part of the cost, including the prices of goods and services, taxes and duties etc. At the time of preparing his cost statement, the construction service being provided by the Respondent was subjected to Service Tax and accordingly, he was entitled to avail credit of input tax paid for providing the taxable output service. Since the Respondent was eligible to take ITC, the same was not a cost to him and did not form part of his cost statement. Thereafter, on 01.03.2016, the construction services supplied by the Respondent in relation to projects approved under the AHP were exempted from the levy of Service Tax. Thus, since the Respondent was engaged in the provision of exempted services, he was no longer eligible to avail ITC. Accordingly, the entire input tax so paid had to be incurred by the Respondent and formed a part of his costs. However, since the said cost was not even factored into the Respondent's cost statement and further, he could not raise his sale price due to the limitations of the AHP, he was compelled to bear the entire additional cost of taxes that was previously available to him as credit. Therefore, since the Respondent could not change the price from Rs. 4000/- per sq. ft. to cover his increased costs on account of unavailability of ITC, he was constrained to bear the entire excess cost. Upon the introduction of GST, on 01.07.2017, the construction services being supplied by the Respondent were made taxable again and therefore he was eligible to avail ITC. Thus,

while determining the price of Rs. 4000/- per sq. ft., the input taxes paid which were assumed to be a pass through, once again became a pass through under the GST regime.

51. He had also mentioned that in view of the aforementioned explanation, he did not gain any benefit from the availability of ITC under the GST regime so as to pass on the same by way of commensurate reduction in price. The end recipient had never borne any additional cost on account of such unavailability of ITC as he had not, nor could have, passed on the commensurate increase in price to the customer.

52. He had also submitted that the quantum of ITC availed by him, as on date, was the entire credit pertaining to the construction activity undertaken by him for providing the output service, however, the eligibility to take credit was limited to the extent of services supplied. The construction activity undertaken by the Respondent was a supply of services in terms of clause (b) of entry 5 of Schedule II to the CGST Act, 2017, which reads as under:-

"(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration had been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever was earlier."

Accordingly, the sale of flats before issuance of the CC/OC was a supply of construction services subject to GST, in respect of which,

ITC was admissible. However, the sale of flats after issuance of the above certificates might not qualify as a supply of construction services subject to GST and, consequently, ITC pertaining to the same might have to be reversed.

53. The Respondent had also stated that presently the entire credit availed by the Respondent might pertain to the goods and services used for supplying construction services on the sale of flats prior to issuance of CC/OC. Section 17(2) of the CGST Act, 2017, restricted the amount of ITC admissible to the amount attributable to the taxable supply which reads as under:-

"(2) Where the goods or services or both were 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 exempted supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as was attributable to the said taxable supplies including zero-rated supplies."

Accordingly, in terms of the aforesaid sub-section (2), the entitlement to avail ITC was restricted to the credit attributable to taxable supplies. Thus, the amount of credit attributable to exempted supplies might be reversed. He had also submitted that the term "exempt supply" had been defined in Section 2(47) of the CGST Act, 2017 to mean supply of any goods or services or both which attracted nil rate of tax or which might had been wholly exempted

from tax under Section 11, or under section 6 of the Integrated Goods and Services Tax Act, and included non-taxable supply. He had also submitted that the term "non-taxable supply" had been defined in Section 2(78) of the CGST Act, 2017 to mean a supply of goods or services or both which was not leviable to tax under this Act or under the Integrated Goods and Services Tax Act. Accordingly, the sale of flats after issuance of the CC/OC might be a non-taxable or exempted supply under the CGST Act, 2017, credit in respect of which, might be required to be reversed by the Respondent. Thus, the figure of credit available to the Respondent as on date might be only provisional and subject to reversal on the basis of flats unsold at the time of issuance of CC/OC.

54. The Respondent had further stated that in the present case, he had availed ITC pertaining to the entire construction activity, however, the same was provisional and might be subjected to proportionate reversal attributable to vacant flats at the time of issuance of CC/OC which meant that the amount of ITC actually admissible to the Respondent could only be determined once the number of unsold flats at the time of issuance of CC/OC was known. However, the figure of unsold flats at the time of issuance of the CC/OC could not be known at this point as the same entirely depended on the procedure prescribed under the AHP. He had also submitted that since the said figure was not and could not be known at the given time, consequently, the extent of reversal that might be required was also unknown as the quantum of ITC actually available to him was not discernible and when the actual quantum of credit itself was

unknown, the anti-profiteering proceedings on account of the same could not be sustained and were untenable.

55. He had also claimed that he might be liable to reverse ITC in respect of the project as he had chosen the option to discharge GST at the rate of 1% under the Notification No. 3/2019 dated 29.03.2019. As a condition for the same, the Respondent would be required to compute reversal of ITC in accordance with the formula prescribed in the said Notification. This reversal of ITC was required to be made by the due date for filing the return in the month of September following the end of the financial year 2018-19. Therefore, the credit as on date was only provisional and could not be used as a basis for computing profiteering, if any.

56. The Respondent had further claimed that the methodology adopted by the DGAP for computing the alleged profiteering was also incorrect. The DGAP had computed the extent of profiteering by obtaining and comparing the ratios of ITCs to turnovers under the erstwhile regime (April, 2016 – June, 2017) vis-à-vis the GST regime. However, the said ratios only indicated how much of the turnover related to the ITC while making the fundamentally incorrect assumption that the ITC shared a correlation with the turnover earned. It was also submitted by the Respondent that the turnover was based on payment based on time and had absolutely no relation to the actual work completed and goods/services used for the same. Accordingly, there was no relationship or correlation between the ITC available and the turnover earned.

57. The Respondent had also contended that the DGAP had wrongly presumed that the payment of GST by the sub-contractors and availability of credit thereof, was an absolute benefit to the Respondent while overlooking and discarding the fact that there was no requirement to pay Service Tax itself under the erstwhile regime (from 01.03.2016 onwards). Thus, the DGAP had fallaciously assumed that since credit was available under the GST regime, the entire quantum was a benefit, while ignoring the fact that now GST had to be paid to obtain the credit whereas under the erstwhile regime, there was no tax payable itself.

58. The Respondent had further contended that in view of the submissions made above, even after applying the methodology adopted by the DGAP in his Report, the profiteered amount computed by the DGAP was incorrect. The DGAP in his report had failed to note that the Respondent's project had started in February, 2016 (prior to the exemption introduced on 01.03.2016) and had availed CENVAT credit on input services. The comparison being drawn by the DGAP had to be with respect to the credit availed in the month of February, 2016 vis-à-vis the credit availed under the GST regime. Accordingly, for an ideal comparison, it was imperative to exclude the ITC availed in the GST regime on account of construction services provided by the sub-contractor as in the month of February, 2016 there was no sub-contractor appointed by the Respondent.

59. The Respondent had filed his next written submissions on 21.08.2019 vide which he had submitted the details sought by this Authority vide its order dated 07.08.2019 i.e. break-up of turnover of the pre-GST

era mentioned in his written submissions dated 19.07.2019 and computation of the amount of profiteering as per his own calculation which is given in the Table below:-

S. No.	Particulars	Pre- GST (01.02.2016 to 28.02.2017)	Post GST (01.07.2017 to 31.12.2018)
1	Incremental Input Tax Credit of GST Availed (A)	0	82,86,713/-
2	Total CENVAT/ Service Tax Credit Availed (B)	51,56,352/-	
3	Total Turnover (C)	38,61,54,794/-	55,78,67,303/-
4	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	3,84,814	3,84,814
5	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to Turnover (E)	3,82,713	3,72,079
6	Relevant ITC (F)= (B)*(E)/(D) or (A)*(E)/(D)	51,28,199/-	80,12,473/-
7	Ratio of Input Tax Credit to Turnover (G) = (F)/(C)*100 (%)	**1.32%**	**1%**

60. The Respondent had filed his next written submissions on 03.09.2019 vide which he has reiterated his submissions dated 19.07.2019. He had also furnished the following Tables:-

A. <u>Assuming all Input Tax Credit other than construction sub-contractor credit was a benefit arising in the GST era, the benefit of ITC would be as is given below:</u>

S. No.	Particulars	Pre- GST (01.02.2016 to 28.02.2016)
1	Input Tax Credit of GST Availed	5,91,28,513/-
2	ITC Attributable to construction Sub-Contractor	4,89,22,956/-
3	ITC benefit post GST	1,02,05,557/-

The profiteering calculation as per the formula adopted by the DGAP, on the above incremental ITC benefit after excluding amount paid to the sub-contractor from total turnover, had been furnished as per the Table given below:-

S. No.	Particulars	Pre-GST (01.02.2016 to 30.06.2017)	Post-GST (01.07.2017 to 31.12.2018)
1	Incremental Input Tax Credit of GST Availed (A)	0	1,02,05,557/-
2	Total CENVAT/ Service Tax Credit Availed (B)	51,56,352/-	1,02,05,557/-
3	Total Turnover	81,48,31,294/-	55,78,67,303/-
4	Amount paid to for sub-contractors' services	16,64,69,113/-	37,76,84,190/-
5	Turnover excluding subcontractor services (C)	64,83,62,181/-	18,01,83,113/-
6	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	3,84,814	3,84,814
7	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to	3,39,120	3,72,079

	Turnover (E)		
8	Relevant ITC (F)= (B)*(E)/(D) or (A)*(E)/(D)	45,44,071	98,67,815
9	Ratio of Input Tax Credit to Turnover (G) = (F)/(C)*100 (%)	0.70%	5.48%
10	Difference in ratio (H)		4.78%
11	Profiteering, if any (I) (H*C)		86,04,995

61. The Respondents had also mentioned that he had availed credit of tax paid on Steel and other goods and also on services such as Architecture and Advertisements etc. in the post-GST era. If the service of "construction of complex" provided by the Respondent was not exempted in the pre-GST regime, the Respondent would have been able to avail credit of Service Tax of 15% paid on his input services. Since, there was an exemption on construction of complex services, the entire tax paid by the service provider was a cost to the Respondent. Similarly, in respect of goods, the Respondent had been paying Excise Duty @ 12.5% and CST @ 2% that was effectively tax/duty @ 14.5% on the inputs being purchased by him. Thus, if the services provided by the Respondent were not exempted in the pre-GST era, the Respondent would have been eligible to a credit of 14.5%. As against it, under the GST, the supply of goods would attract 18% tax and therefore ITC available was 18%. Thus, the benefit, if any, would at the maximum be of the 14.5%, as the incremental ITC of 3.5% (18%-14.5%) was not a cost in the hands of the Respondent earlier also. He had also furnished

the following Table by assuming that all ITC other than construction sub-contractor's credit and the incremental ITC (3% towards services and 3.5% towards goods) was a benefit arising in the GST era, as has been given below:-

Note	Particulars	Amount
	ITC availed on Steel and other goods	78,45,043/-
A	Cost towards taxes in Pre-GST Excise (12.5%) and CST (2%)	63,19,618/-
	Services Tax paid on services other than construction sub-contractor services	2,360,514/-
B	Cost towards Service Tax in Pre-GST era (15%)	1,967,095/-
	Benefit of ITC (A+B)	8,286,713/-

62. The Respondent had further furnished the following Table showing computation of profiteering, applying the basis adopted by the DGAP, however after excluding from the ITC considered post-GST, ITC in respect of the sub-contractors and the incremental ITC (3% towards services and 3.5% towards goods) and after excluding the amount paid to the sub-contractors from the total turnover for the relevant period:-

S. No.	Particulars	Pre- GST (01.02.2016 to 30.06.2017)	Post GST (01.07.2017 to 31.12.2018)
1	Incremental Input Tax Credit of GST Availed (A)	0	82,86,713/-
2	Total CENVAT/	51,56,352/-	82,86,713/-

	Service Tax Credit Availed (B)		
3	Total Turnover	81,48,31,294/-	55,78,67,303/-
4	Amount paid to for sub-contractors' services	16,64,69,113/-	37,76,84,190/-
5	Turnover excluding subcontractor services (C)	64,83,62,181/-	18,01,83,113/-
6	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	3,84,814	3,84,814
7	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to Turnover (E)	3,39,120	3,72,079
8	Relevant ITC (F)= (B)*(E)/(D) or (A)*(E)/(D)	45,44,071/-	80,12,473/-
9	Ratio of Input Tax Credit to Turnover (G) = (F)/(C)*100 (%)	**0.70%**	**4.45%**
10	**Difference in ratio (H)**		**3.75%**
11	**Profiteering, if any (I) (H*C)**		**67,49,653/-**

63. The Respondent had also furnished the following Tables to substantiate his above mentioned claims:-

A1. <u>Profiteering calculation as per DGAP format- without excluding sub-contractors turnover from total turnover:-</u>

S. No.	Particulars	Pre- GST (01.02.2016 to 30.06.2017)	Post GST (01.07.2017 to 31.12.2018)
1	Incremental Input Tax Credit of GST Availed (A)	0	10205557

2	Total CENVAT/ Service Tax Credit Availed (B)	5156352	10205557
3	Total Turnover (C)	814831294	557867303
6	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	384814	384814
7	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to Turnover (E)	339120	372079
8	Relevant ITC (F)= (B)*(E)/(D) or (A)*(E)/(D)	4544071	9867815
9	Ratio of Input Tax Credit to Turnover (G) = (F)/(C)*100 (%)	0.56%	1.77%
10	**Difference in ratio (H)**		**1.21%**
11	**Profiteering, if any (I) (H*C)**		**Rs. 67,56,756/-**

A.2 Profiteering calculation as per the formula adopted by the DGAP, on the above incremental ITC benefit after excluding amount paid to the sub-contractors from total turnover:-

S. No.	Particulars	Pre- GST (01.02.2016 to 30.06.2017)	Post GST (01.07.2017 to 31.12.2018)
1	Incremental Input Tax Credit of GST Availed (A)	0	1,02,05,557/-
2	Total CENVAT/ Service Tax Credit Availed (B)	51,56,352/-	1,02,05,557/-
3	Total Turnover	81,48,31,294/-	55,78,67,303/-
4	Amount paid to for sub-contractors' services	16,64,69,113/-	37,76,84,190/-
5	Turnover excluding	64,83,62,181/-	18,01,83,113/-

	subcontractor services (C)		
6	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	3,84,814	3,84,814
7	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to Turnover (E)	3,39,120	3,72,079
8	Relevant ITC (F)= (B)*(E)/(D) or (A)*(E)/(D)	45,44,071	98,67,815
9	Ratio of Input Tax Credit to Turnover (G) = (F)/(C)*100 (%)	0.70%	5.48%
10	Difference in ratio (H)		4.78%
11	Profiteering, if any (I) (H*C)		86,04,995

B.1 Assuming all Input Tax Credit other than construction sub-contractor credit and the incremental ITC (3% towards services and 3.5% towards goods) was a benefit arising in the GST era:-

Note	Particulars	Amount
	ITC availed on Steel and other goods	78,45,043/-
A	Cost towards taxes in Pre-GST Excise (12.5%) and CST (2%)	63,19,618/-
	Services tax paid on services other than construction sub-contractor services	2,360,514/-
B	Cost towards Service Tax in Pre-GST era (15%)	1,967,095/-
	Benefit of ITC (A+B)	8,286,713/-

B.2 Profiteering calculation as per DGAP formula without excluding sub-contractors turnover from total turnover:-

S. No.	Particulars	Pre- GST (01.02.2016 to 28.02.2016)	Post-GST (01.07.2017 to 31.12.2018)
1	Incremental Input Tax Credit of GST Availed (A)	Nil	82,86,713/-
2	Total CENVAT/ Service Tax Credit Availed (B)	51,56,352/-	
3	Total Turnover (C)	38,61,54,794/-	55,78,67,303/-
4	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	3,84,814	3,84,814/-
5	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to Turnover (E)	3,82,713	3,72,079/-
6	Relevant ITC (F)= (B)*(E)/(D) or (A)*(E)/(D)	51,28,199/-	8,012,473/-
7	Ratio of Input Tax Credit to Turnover (G) = (F)/(C)*100 (%)	1.32	1

From the above Table, it was clear that the ratio of credit availed in pre-GST era was lesser than the GST availed in the post-GST era, therefore there was no profiteering.

B.3 Calculation after excluding amount paid to sub-contractors from the total turnover:-

S. No.	Particulars	Pre- GST (01.02.2016 to 30.06.2017)	Post GST (01.07.2017 to 31.12.2018)
1	Incremental Input Tax Credit of GST Availed (A)	0	82,86,713/-

2	Total CENVAT/ Service Tax Credit Availed (B)	51,56,352/-	82,86,713/-
3	Total Turnover	81,48,31,294/-	55,78,67,303/-
4	Amount paid to for sub-contractors' services	16,64,69,113/-	37,76,84,190/-
5	Turnover excluding subcontractor services (C)	64,83,62,181/-	18,01,83,113/-
6	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	3,84,814	3,84,814
7	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to Turnover (E)	3,39,120	3,72,079
8	Relevant ITC (F)= (B)*(E)/(D) or (A)*(E)/(D)	45,44,071/-	80,12,473/-
9	Ratio of Input Tax Credit to Turnover (G) = (F)/(C)*100 (%)	**0.70%**	**4.45%**
10	**Difference in ratio (H)**		**3.75%**
11	**Profiteering, if any (I) (H*C)**		**67,49,653/-**

64. The Respondent had also claimed that he had considered the credit availed by him in the pre-GST era as also the entire taxable turnover from 1.02.2016-30.06.2017 and had arrived at the ratio of credit to the turnover. The same had been compared with the ratio of incremental credit arrived in working B above with the turnover ratio post-GST. The exclusion of ITC on construction sub-contractors as also the incremental ITC (3% towards services and 3.5% towards goods) had been done to enable an ideal comparison. The Respondent had also furnished the copies of his Tran-1 and Tran-2 Statements.

65. The Respondent had also submitted the following Table showing computation of profiteering, applying the basis adopted by the DGAP, however after excluding from the ITC considered post-GST, ITC in respect of sub-contractors and the incremental ITC (3% towards services and 3.5% towards goods), as is given below:-

S. No.	Particulars	Pre- GST (01.02.2016 to 30.06.2017)	Post GST (01.07.2017 to 31.12.2018)
1	Incremental Input Tax Credit of GST Availed (A)	0	82,86,713/-
2	Total CENVAT/ Service Tax Credit Availed (B)	51,56,352/-	82,86,713/-
3	Total Turnover	81,48,31,294/-	55,78,67,303/-
4	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	3,84,814	3,84,814
5	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to Turnover (E)	3,39,120	3,72,079
6	Relevant ITC (F)= (B)*(E)/(D) or (A)*(E)/(D)	45,44,071/-	80,12,473/-
7	Ratio of Input Tax Credit to Turnover (G) = (F)/(C)*100 (%)	**0.56%**	**1.44%**
8	**Difference in ratio (H)**		**0.88%**
9	**Profiteering, if any (I) (H*C)**		**49,01,414/-**

66. Clarifications were sought from the DGAP on the Respondent's submissions dated 03.09.2019. The DGAP vide his Report dated 27.09.2019 had stated that the illustration given in the first Table was entirely incorrect for the reason that the Respondent had claimed "Input Tax Credit of GST availed as Rs. 5,91,28,513/- for the period from 01.02.2016 to 28.02.2016 (Pre-GST)" which was not

feasible as there could not be ITC of GST before the GST period i.e. before 01.07.2017. Since there was no GST before 01.07.2017, then how ITC of Rs. 4,89,22,956/-could be attributed to construction by the sub-contractor. Moreover, the time period (pre-GST) considered in the DGAP's Report was from 01.04.2016 to 30.06.2017 which was exclusive of the period 01.02.2016 to 28.02.2016. The DGAP had also submitted that in the second Table also, the illustration given was incorrect as the first Table itself was incorrect. The input tax credit would be available to the Respondent only when the Respondent was paying tax (GST) on the inputs and input services during the course of the supply of the construction service by the Respondent. It implied that the Input tax would always be a cost/expenditure to the Respondent first but while discharging the tax liability, the credit of same could be utilized which was benefit to the Respondent in the GST regime. The DGAP had further submitted that since the construction of affordable houses was exempted from the Service Tax in pre-GST era then the taxes paid by the Respondent were cost to the Respondent but these were included in the project cost and were simultaneously recovered from the customers/recipients by him. Now on introduction of GST @ 18% w.e.f. 01.07.2017 on the construction service, the Respondent was eligible to take credit on the inputs and input services received by him. Thus, it was clearly a benefit to the Respondent. Further, all the Tables furnished by the Respondents were on the basis of the assumptions of the Respondent which had nothing to do with the facts on record. He had also stated that all other facts/ queries

raised by the Respondent had been explained in his Report dated 14.06.2019.

67. This Authority after carefully considering all the Reports filed by the DGAP, submissions of the Respondent and other material placed on record had observed certain discrepancies in the DGAP's Report dated 14.0.2019 and accordingly ordered reinvestigation in the matter in terms of 133(4) of CGST Rules, 2017 on the following issues vide its I.O. No. 20/2019 dated 13.12.2019:-

(i) Whether no CENVAT Credit was available to the Respondent in the pre-GST regime in spite of the fact that he had claimed availing of CENVAT credit and payment of Service Tax?

(ii) An amount of Rs. 5,91,28,513/- had been availed by the Respondent as ITC as per the GST Returns, however, the DGAP had claimed that during the period from July, 2017 to December, 2018, profiteered amount was Rs. 6,24,48,008/-. Since the Respondent had claimed that the amount of profiteering in the DGAP's Report was greater than the amount of ITC availed by the Respondent in post-GST period as reflected in statutory returns, it was imperative that the mathematical calculations of profiteering were reinvestigated by the DGAP.

(iii) No finding had been given by the DGAP on the issue of number of units cancelled and/or re-allotted by the Respondent, which was required to be investigated.

68. As per the directions of this Authority passed vide I.O. No. 20/2019 dated 13.12.2019 under Rule 133 (4), the DGAP has furnished his Report dated 12.02.2020, in accordance with Rule 129 (6) of the CGST Rules, 2017. The DGAP has stated that at the time of submission of the Report dated 14.06.2019, the Respondent had submitted all the requisite information and data which was sufficient to carry out the current re-investigation. Accordingly, during the re-investigation the Respondent was not asked to submit any data again. Hence, the case has been re-investigated again on the basis of the earlier data submitted by the Respondent.

69. The DGAP has also stated that regarding the first issue of whether CENVAT Credit was available to the Respondent in the pre-GST regime, the DGAP has observed that with effect from 01.03.2016, the service of construction of affordable housing, provided by the Respondent, was exempted from Service Tax, vide Notification No. 25/2012-ST dated 20.06.2012 as amended by Notification No. 9/2016-ST dated 01.03.2016. Therefore, the Respondent was exempted from the Service Tax liability for the receipts in the pre-GST era. Further, the Respondent had got permission to start construction activity for the project on 03.10.2017 i.e. post-GST implementation and hence no CENVAT/input tax credit was available to the Respondent in the pre-GST era. Moreover, it was pertinent to mention that the period in the pre-GST era considered in the earlier investigation Report dated 14.06.2019, was from 01.04.2016 to 30.06.2017 i.e. the period in which the Respondent was exempted from the Service Tax liability as per the aforesaid Notification. Hence it was very much clear that during the pre-GST period from

01.04.2016 to 30.06.2017, there could not be availability of any CENVAT credit to the Respondent.

70. The DGAP has further stated that regarding the second issue of amount of profiteering of Rs. 6,24,48,008/-, as submitted vide Para 20 of his Report dated 14.06.2019, the amount of benefit of input tax credit that needed to be passed on by the Respondent to the recipients or the profiteered amount was given in the Table below:-

Table

(Amount in Rupees)

Particulars	Period from 01.07.2017 to 24.01.2018 (GST @ 12%)	Period from 25.01.2018 to 31.12.2018 (GST @ 8%)	Total
Base profiteered amount	1,73,02,448	3,98,78,951	**5,71,81,399**
Amount of GST at applicable rate	20,76,294	31,90,316	**52,66,610**
Total profiteering	**1,93,78,742**	**4,30,69,267**	**6,24,48,008**

71. Therefore, the DGAP has claimed that the total profiteered amount during the period from 01.07.2017 to 31.12.2018 came out to be Rs. 6,24,48,008/- which included GST (@ 12% or 8%) of Rs. 52,66,610/- on the base profiteered amount of Rs. 5,71,81,399/-. Hence, the base amount of profiteering was less than the actual input tax credit of Rs. 5,91,28,513/- availed by the Respondent because the input tax credit considered for profiteering was proportionate to the sold units only and the total amount of profiteering of Rs. 6,24,48,008/- included

GST (@ 12% or 8%) of Rs. 52,66,766/- on the base profiteered amount of Rs. 5,71,81,399/-.

72. The DGAP has also submitted that the legislative intent behind Section 171 of the CGST Act, 2017 was to pass on the benefit of the tax rate reduction or benefit of input tax credit by way of reduction in price. Thus, the legal requirement was that in the event of benefit of input tax credit or reduction in rate of tax, there must be a commensurate reduction in prices of the goods or services. The price included both basic price and the tax charged on it. Therefore, any excess amount collected from recipients, even in the form of tax, must be returned to the recipients. The DGAP has also submitted that by not reducing the base price commensurately, the Respondent had forced his customers/recipients to pay extra tax which they were not liable to pay. Therefore, the amount of extra tax (GST) on the increased base price was an amount paid by the customers/recipients which they were not supposed to pay. Moreover, if any supplier had charged more tax from the recipients, the aforesaid statutory provisions would require that such amount be refunded to the eligible recipients or alternatively deposited in the Consumer Welfare Funds (CWFs), regardless of whether such extra tax collected from the recipients had been deposited in the Government account or not. Besides, any extra tax returned to the recipients by the supplier by issuing credit notes could be declared in the Return filed by such supplier and his tax liability would stand adjusted to that extent in terms of Section 34 of the CGST Act, 2017. Therefore, option was always open to the Respondent to return the tax amount to the recipients by issuing credit notes and adjusting his

tax liability for the subsequent period to that extent. Therefore, it was clear that the profiteered amount would also include the excess tax (GST) paid by the customers/recipients and hence the amount of profiteering of Rs. 6,24,48,008/- was correct.

73. The DGAP has also reported that the issue regarding the number of units cancelled and/or re-allotted by the Respondent was examined and it was found that there were total 838 number of flats in the project. The period covered in the instant case was from 01.07.2017 to 31.12.2018. As per the home buyers list provided by the Respondent, as on 31.12.2018, 814 number of flats were sold by the Respondent. Accordingly, as on 31.12.2018, only 24 flats had remained unsold. Therefore, those 814 flat buyers were those customers/recipients who had made payments to the Respondent in the post-GST period from 01.07.2017 to 31.12.2018 and accordingly the benefit of input tax credit was required to be passed on by the Respondent to these customers/recipients only or in other words, the profiteered amount of Rs. 6,24,48,008/- was computed in respect of these 814 home buyers only. However, the details of the flats which remained unsold and/or were cancelled/re-allotted as submitted by the Respondent were as on 31.03.2019 which was beyond the period of current investigation. Therefore, these details as on 31.03.2019 had no relevance with the fact that as on 31.12.2018, there were 814 number of sold flats and 24 numbers of unsold flats.

74. The DGAP has thus stated that the allegation that the Respondent did not pass on the benefit of input tax credit consequent to the implementation of GST w.e.f. 01.07.2017 was correct and the base price of the flats was not reduced commensurately by the

Respondent when there was additional benefit of the input tax credit on implementation of GST w.e.f. 01.07.2017. Hence the benefit of such additional input tax credit was not passed on by the Respondent to his recipients by way of commensurate reduction in price. Thus, by not reducing the base price of the flats consequent to the additional benefit of input tax credit on implementation of GST, the commensurate benefit of input tax credit was not passed on by the Respondent to the recipients and thus he had profiteered in terms of Section 171 of the CGST Act, 2017. The total amount of profiteering covering the period from 01.07.2017 to 31.12.2018 has been worked out as Rs. 6,24,48,008/- (Rupees Six Crore Twenty Four Lakhs Forty Eight Thousand and Eight only) by the DGAP.

75. The above Report was considered by this Authority in its meeting held on 13.02.2020 and it was decided to hear the Applicants and the Respondent on 03.03.2020. Accordingly, notice dated 14.02.2020 was issued to the Respondent to explain why the Report dated 12.02.2020 should not be accepted and his liability for violation of the provisions of Section 171 of the CGST Act, 2017 should not be fixed.

76. Two personal hearings were given to the parties on 03.03.2020 and 17.03.2020. The Respondent was represented by Ms. Tuhina, Advocate and Sh. Naveen Kumar Mittal, Company Representative, however, none was attended by the Applicant No. 1 to 6.

77. The Respondent has filed his written submissions on 03.03.2020 vide which he has stated that the DGAP has submitted his investigation report without adhering to the principles of natural justice and without seeking any explanation or granting him an opportunity to explain the Respondent's position. The Respondent has also stated that insofar

as the first issue whether no CENVAT credit was available to the Respondent in the pre-GST regime was concerned, inspite of the fact that he had claimed availing of CENVAT credit and payment of tax, the DGAP has proceeded on the erroneous premise that the permission to start construction was received on 03.10.2017 and hence no CENVAT credit was available in the pre-GST era. The Report did not set out the basis on which this presumption had been arrived at which was not only factually incorrect but even otherwise completely irrelevant in determining the Respondent's entitlement to CENVAT credit.

78. The Respondent has further stated that the DGAP had overlooked the fact that for rendering construction services there was no statutory requirement/compulsion to obtain permission to start construction. An assessee was entitled to avail credit on all the services utilised for being in the business of rendering construction services. Prior to the commencement of the actual activity of construction, there were a host of activities such as identifying the land, getting permissions, appointing a consultant to advise on construction, appointing agents to market a project and architect services etc. which were required to be purchased. In the instant case, the Respondent had, in the month of February 2016, availed credit of the tax paid on services of brokerage, consultancy, advertisement and security etc. He had also discharged Service Tax on the amount of allotment received by him from his customers. The Respondent has also submitted that the DGAP's Report dated 12.02.2020 had overlooked the statutory provisions of the Finance Act, 1994 and the finding that he was not entitled to avail any

CENVAT credit during the pre-GST era was completely baseless and unsustainable.

79. The Respondent has further submitted that without prejudice to the above, the DGAP had failed to take cognizance of the fact that when he had bid for the project and had fixed a rate of Rs. 4000 per sq. ft. (excluding applicable Service Tax), he was entitled to avail input tax credit on all the input services. Subsequently, vide Notification No. 09/2016-ST dated 01.03.2016, affordable housing projects were granted absolute exemption from payment of Service Tax. Consequently, he could not avail CENVAT credit of the tax paid by his service providers and offset it against his output tax liability, which he would have been entitled to recover in cash from his customers. The introduction of GST had only brought him back to the same position as he was before the introduction of the exemption in March 2016. The only benefit of input tax credit that he could be alleged to have received, as a consequence of introduction of GST, was in respect of the Central Excise Duty at the rate of 14.5% paid on inputs such as Steel and Cement.

80. With respect to the finding on the second issue given by the DGAP in his Report i.e. the profiteering amount would include the excess GST paid and thus the amount of Rs. 6,24,48,008/- was correct, the Respondent has submitted that this Authority vide its I.O. dated 13.12.2019 had pointed out that the amount of profiteering could not be in excess of the ITC availed, as Section 171 of the CGST Act applied only in a case where the benefit of input tax credit had not been passed on to the recipients by way of commensurate reduction in prices. Accordingly, the DGAP had no basis to contend that the

amount of profiteering was Rs. 6,24,48,008/-, which was in excess of the ITC of Rs. 5,91,28,513 /- availed by the Respondent. The Respondent has also given the number of units cancelled and re-allotted by him.

81. The Respondent has filed his next written submissions dated 17.03.2020 vide which he has furnished the details of Turnover, Service Tax paid and CENVAT Credit availed during the month of February 2016 and chronology of the project along with relevant certificates/documents.

82. We have carefully considered the Reports filed by the DGAP, all the submissions and the documents placed on record and the arguments advanced by the Respondent and find that the Respondent is executing his "Aangan" project in Gurgaon, Haryana which has been approved under the "AHP 2013". The said AHP was notified under Section 9A of the Haryana Development and Regulation of Urban Areas Act, 1975 vide Notification No. PF-27/48921 dated 19.08.2013, issued by the Town and Country Planning Department, Government of Haryana to facilitate creation of affordable housing stock in the urban areas of the State. The above project has three phases out of which the Angan Phase-I project is subject matter of the present proceedings. It has also been revealed that the Applicants No. 1, 2 & 3 had complained to the Haryana State Screening Committee on Anti-profiteering on 16.10.2018, 24.09.2018 and 31.10.2018 respectively that the above Respondent was not passing on the benefit of ITC to them on the flats which they had purchased from him in the project, as per the provisions of Section 171 of the above Act. The above 3 complaints were examined by the Standing

Committee on Anti-profiteering in its meeting held on 27.12.2018 and were forwarded to the DGAP for detailed investigation as per the provisions of Rule 129 (1) of the CGST Rules, 2017. It has further been revealed that the Applicant No. 4 vide his application dated 19.02.2019 and the Applicant No. 5 vide his application dated 24.02.2019 had complained to the Standing Committee on Anti-Profiteering that the above Respondent was not passing on the benefit of ITC to them on the flats which they had purchased from him in the above project. The above 2 complaints were examined by the Standing Committee in its meetings held on 11.03.2019 and 11.04.2019 respectively and were forwarded to the DGAP for detailed investigation as per the provisions of Rule 129 (1) of the CGST Rules, 2017. Accordingly, the DGAP had investigated all the five complaints together and submitted his Report dated 14.06.2019 under Rule 129 (6) of the CGST Rules, 2017. The present investigation pertains to the period from 01.07.2017 to 31.12.2018.

83. The Respondent had raised a number of objections against the Report dated 14.06.2019 filed by the DGAP and after carefully considering the same this Authority vide its I.O. No. 20/2019 dated 13.12.2019 had directed the DGAP to further investigate the matter on the issues mentioned in para supra in terms of Rule 133 (4) of the above Rules and to furnish fresh Report. The DGAP has carried out further investigation as per the above order and furnished his Report dated 12.02.2020 as per the provisions of Rule 129 (6). In both the Reports the profiteered amount has been computed as Rs. 6,24,48,008/- by the DGAP for the period from 01.07.2017 to 31.12.2018.

84. It is also apparent from the above Reports that the DGAP has found that in respect of the Phase-I of the Aagan project the CENVAT credit/ITC as a percentage of the total turnover which was available to the Respondent during the pre-GST period was Nil and during the post-GST period this ratio was 10.25% as per the Table-C mentioned above. Therefore, the Respondent has benefited from the additional ITC to the tune of 10.25% (10.25% - 0%) of the total turnover in respect of the above Phase which he was required to pass on to the flat buyers of the above Phase. The DGAP has also found that the Respondent has not reduced the basic price of his flats by 10.25% in case of the above Phase due to additional benefit of ITC and by charging GST at the increased rates of 12% w.e.f. 01.07.2017 to 24.01.2018 and 8% w.e.f. 25.01.2018 to 31.12.2018 on the pre-GST basic price, he has contravened the provisions of Section 171 of the CGST Act, 2017. The DGAP has also submitted that the amount of benefit of ITC which has not been passed on by the Respondent or the profiteered amount came to Rs. 6,24,48,008/- which included 12% or 8% GST on the basic profiteered amount. The DGAP has also intimated that this amount also included the profiteered amount of Rs. 4,32,315/- including 12% or 8% GST in respect of the Applicant No. 1 to 5. He has also supplied the details of all the buyers who have purchased flats from the Respondent along with their unit numbers and the profiteered amount in respect of each buyer vide Annexure-17 attached with his Report, who are required to be passed on the above amount as benefit of ITC.

85. The computation of the ratio of CENVAT credit and ITC of VAT to the total turnover for the period from 01.04.2016 to 30.06.2017 and of the

ITC to the total turnover for the period from 01.07.2017 to 31.12.2018 for the above Phase of the project as per Tables C and D has been done by the DGAP so that the benefit of ITC due to each flat buyer could be calculated. Calculation of the above ratios was required to be done to compute the additional benefit of ITC which has become available to the Respondent after implementation of the GST w.e.f. 01.07.2017. The above ratios have further been calculated after taking in to account the sold area relevant to the turnover during both the above periods and the ITC relevant to the sold area. Unless these ratios are computed it cannot be ascertained if the Respondent has availed benefit of additional ITC post-GST and if he has availed it what is the amount of benefit of ITC to be passed on to the buyers. The above ratios have further been computed on the basis of the information supplied by the Respondent in his Returns or the ITC Registers and hence their authenticity is beyond doubt. The DGAP has also calculated the profiteered amount as per the details given in Table C and D on the basis of the above ratios to compute the benefit of ITC due to each home buyer as per Annexure-17 in respect of the above Phase. However, no benefit has been computed on the unsold area so that in case it remains unsold till the CC/OC is received the ITC could be reversed on it. Therefore, the mathematical methodology employed by the DGAP to compute the above ratios as well as the profiteered amount as per the Tables C and D supra is logical, reasonable, appropriate and in consonance with the provisions of Section 171 (1) of the above Act. The above mathematical methodology has also been approved by this Authority

in all such cases of real estate sector where benefit of additional ITC is to be passed on and hence the same can be relied upon.

86. The Respondent has filed his first written submissions on 04.07.2019 vide which he has submitted that against the ITC availed in the post-GST era of Rs. 5,91,28,513/-, the DGAP had computed the extent of benefit of ITC and the consequent profiteering of Rs. 6,24,48,008/- which was incorrect as the profiteered amount could not exceed the amount of ITC. In this regard perusal of Table-C of the Report dated 14.06.2019 and Table-A of the Report dated 12.02.2020 filed by the DGAP shows that the Respondent has availed ITC of Rs. 5,91,28,513/- w.e.f. 01.07.2017 to 31.12.2018 whereas the base profiteered amount is Rs. 5,71,81,399/- which is less than the amount of ITC availed by him. On the above base profiteered amount an amount of Rs. 52,66,610/- has been computed as the GST @ 12% w.e.f. 01.07.2017 to 24.01.2018 and @ 8% w.e.f. 25.01.2018 to 31.12.2018 due to which the total profiteered amount of Rs. 6,24,48,008/- has been calculated. The above amount of GST is required to be added in the profiteered amount as the Respondent had forced his buyers to pay the above amount of GST on the additional price which he could not have charged from them as he should have commensurately reduced the price due the benefit of ITC which was available to him. As per the provisions of Section 171 (3A) the above amount falls in the explanation of the 'profiteered' amount as the Respondent has denied benefit of the above amount to his buyers. Therefore, the profiteered amount computed by the DGAP is correct

and hence, the objection raised by the Respondent in this regard cannot be accepted.

87. He has also stated that the factum of the project having been conceived and its pricing determined keeping in mind the availability of CENVAT credit during the pre-GST period had also been completely ignored by the DGAP. On this claim perusal of para 5 of the AHP promulgated vide Notification No. PF-27/48921 dated 19.08.2013 shows that the maximum allotment rate of Rs. 4000/- per sq. ft. on carpet area basis was fixed for the Gurgaon area, where this project is located, by the Government of Haryana w.e.f. 19.08.2013 after taking in to account the cost of the construction material and the input services as well as the benefit of CENVAT credit and the ITC available during the pre-GST period. The above rate had not been revised by the State Government after grant of exemption from levy of Service Tax w.e.f. 01.03.2016 and consequent unavailability of CENVAT credit on input services to the builders. The State Government has also not revised the allotment rate after coming in to force of the GST although the Respondent has started availing benefit of ITC on all the inputs and input services w.e.f. 01.07.2017 which he was not entitled to avail during the pre-GST period. The Respondent has also been given waiver of the license fee and IDC as per para 6 (i) of the AHP. As per para 5 (ii) (b) of the AHP the Respondent is also entitled to allot 5% flats at his discretion. All the taxes, cesses and fee are also to be borne by the buyers. Hence, there has been no impact of denial of benefit of CENVAT credit on the rate of allotment otherwise the State Government would have revised it during the pre-GST period.

Therefore, his above claim is not correct and hence, the same is not tenable.

88. The Respondent has further stated that the DGAP had not considered that 833 flats were booked on 11.02.2016 when the Service Tax was payable and most of the cancellations had begun w.e.f. 01.03.2016, when the exemption was available and the cancelled flats were first allotted to the wait listed buyers after which fresh draw was made on 12.06.2018 and hence, Annexure-17 of the DGAP's Report dated 14.06.2019 had been prepared on the basis of the details available as on 31.12.2018 and did not reflect the true state of affairs which had existed in the pre-exemption period, the exemption period and the post exemption period as in respect of the allotments made in the pre-exemption period (prior to 01.03.2016), when the project was conceived and prices determined, the Respondent was entitled to CENVAT credit. In this connection it would be appropriate to note that the Service Tax due on the price charged from the buyers by the Respondent during the month of February 2016 was paid by the buyers as per the provisions of the AHP and therefore, there was no effect of cancellations on the rate of allotment. At the time of fresh draw for the allotment of the flats on 12.06.2018 and the subsequent allotments the Respondent was already getting the benefit of ITC and hence it also did not have any impact on the allotment rate. As has been mentioned in para supra the denial of benefit of CENVAT credit on the input services w.e.f. 01.03.2016 had also no impact on the price of the flats as it was not revised by the Government of Haryana. The Respondent had also started getting benefit of ITC during the post-

GST period to which he was not entitled earlier and all the taxes were also to be paid by the buyers themselves and several concessions had also been granted to him through the above Policy. The claim that Annexure-17 did not reflect the correct status of allotments is not correct as the rate of allotment which was fixed under the AHP after considering all the relevant factors has remained unchanged and was not enhanced by the State Government. Therefore, Annexure-17 reflecting position of allotment as on 31.12.2018 has been correctly prepared and hence, the above contention of the Respondent is not tenable.

89. The Respondent has also argued that the DGAP had overlooked the fact that the Respondent had paid Service Tax of Rs. 1,35,71,447/- from February to March 2016 and CENVAT credit of Rs. 51,56,352/- was availed by him. The above contention of the Respondent is not correct as with effect from 01.03.2016 exemption from payment of Service Tax in respect of Affordable Housing Schemes had been given by the State Government as per Notification No. 25/2012-ST dated 20.06.2012 amended vide subsequent Notification No. 9/2016-ST dated 01.03.2016 and hence, there is no question of any Service Tax being levied and discharging of its liability by utilising the CENVAT credit during the month of March, 2016. Claim of payment of Service Tax during the month of February 2016 is also not borne out from the record as the Respondent has not produced evidence to the effect that he had obtained registration under the above Tax during the month of February 2016. Service Tax was not leviable on the Respondent before registration and hence he was not eligible to avail the CENVAT

credit. The Respondent has also not produced the assessment order for the month of February 2016 which can establish that he was entitled to the benefit of CENVAT credit. The DGAP has only taken the period w.e.f. 01.04.2016 to 30.06.2017 for computation of the ratio of CENVAT credit to turnover for the pre-GST period during which no Service Tax was leviable and hence its credit was not taken in to account by the DGAP. This exemption was also available to his sub-contractors and therefore, the Respondent had not reimbursed the Service Tax to them during the month of March, 2016. Therefore, the above argument of the Respondent is not plausible and hence it cannot be accepted.

90. The Respondent has further argued that the DGAP in his Report dated 14.06.2019 had proceeded on erroneous presumption that no ITC was available to the Respondent in the pre-GST era. In this connection it would be pertinent to mention that the Respondent has not produced any Return or ITC Register or assessment order which can prove that the Respondent has earned ITC on the VAT paid by him and discharged his VAT liability by utilising it during the pre-GST period. He has himself not shown the amount of benefit of ITC on VAT in his various submissions. Further the Respondent cannot earn ITC on the GST paid by him during the pre-GST period as GST was not leviable during the above period. Hence, the above contention of the Respondent is untenable.

91. The Respondent has also submitted that the DGAP had also overlooked that if there was no Service Tax applicable on the services rendered by the sub-contractor w.e.f. 01.03.2016 to 30.06.2017 then

how could there be any additional benefit of ITC in the post-GST period. In this regard it would be appropriate to mention that the amount of ITC available to the Respondent during the post-GST period has to be computed on the basis of the entire GST paid on the purchase of goods and services and its calculation is not dependent on the levy of Service Tax during the pre-GST period. Since, the Respondent was not eligible to claim CENVAT credit on the Service Tax and ITC on the VAT during the pre-GST period, the entire amount of ITC available to him during the post-GST period amounts to additional benefit of ITC which he is liable to pass on to the buyers as per the provisions of Section 171 (1). Further, the sub-contractor engaged by the Respondent has also become eligible to avail ITC during the post-GST period which he is liable to pass on to the Respondent by reducing his prices. Therefore, the above plea of the Respondent cannot be accepted.

92. The Respondent has further submitted that the DGAP had also not considered that anti-profiteering measures stipulated that what was earlier a cost should under the GST era be available as credit, which was not the case in the present context since no Service Tax was payable by the sub-contractors and consequently, the same was not a cost in the hands of the Respondent and accordingly, the credit of such tax in the GST era could not be termed as a benefit. As mentioned in the para supra it is clear that the whole amount of ITC of Rs. 5,91,28,513/- which has become available to the Respondent during the post-GST period has to be considered as the additional benefit of ITC which is required to be passed on to the buyers. The

Respondent cannot deny the benefit of ITC on the ground that it did not constitute cost to him during the pre-GST period as there is no such provision in Section 171 (1) which stipulates that the benefit of ITC shall be passed only if it was a cost to the Respondent during the pre-GST period. The Respondent is required to pass on the benefit even if he has become eligible to avail it during the post-GST period as it is a concession granted to him from the public exchequer. Payment of Service Tax alone during the pre-GST period cannot determine the benefit of ITC and hence, the above claim of the Respondent is devoid of merit and hence it is untenable.

93. The Respondent has also claimed that the DGAP had also overlooked that the rates of tax in respect of goods and services had increased in the GST era from what were payable under the pre-GST era and hence, there was no benefit of additional ITC to him. The above claim of the Respondent is not established from the perusal of the rates of tax imposed on the goods and services used in the construction service post implementation of GST which shows that the GST rates are either less or equal or slightly more than the taxes which were leviable on them in the pre-GST period and due care has been taken by the GST Council while fixing such rates. Whereas no benefit of ITC was available on the Central Excise Duty and other State taxes and Cesses during the pre-GST period, there is full benefit of ITC on all such taxes and cesses during the post-GST period and the Respondent does not have to pay even a single penny from his pocket on account of passing on the benefit of ITC. Therefore, the above contention of the Respondent is not maintainable.

94. He has also stated that the methodology adopted by the DGAP for computing the alleged profiteering was incorrect. He has also submitted a Table claiming that the ratio of ITC availed to the total turnover during the pre-GST period w.e.f. 01.02.2016 to 28.02.2016 was 1.32%. Perusal of the Table shows that the Respondent has based his computation on the CENVAT credit of Rs. 51,56,352/- which he has claimed to have availed during the one month of February 2016. The above claim of the Respondent cannot be accepted as the methodology adopted by the DGAP for computation of the profiteered amount is in consonance with the provisions of Section 171 (1) and is based on the comparison of the ratios of CENVAT credit and ITC to the turnovers during the pre and the post-GST periods. The Respondent has also admitted in his submissions that the above amount of CENVAT credit was availed by him during the months of February and March 2016 but as discussed in para supra there is no evidence on record to establish his above claim. Hence, the above amount cannot be considered for computation of the pre-GST ratio of CENVAT credit to turnover as no Service Tax was leviable during the month of March 2016 as it had been exempted by the State Government. Moreover, computation of the ratio of 1.32% on the basis of CENVAT credit of one month which has not been established by the Respondent by producing the Registration certificate or assessment order has no reasonable justification and therefore, it cannot be taken in to account and objectively compared with the post-GST ratio. Hence, the above contention of the Respondent cannot be admitted.

95. He has also computed the profiteered amount by applying the basis adopted by the DGAP as per the Table submitted by him which shows that the ratio of CENVAT credit to total turnover during the pre-GST period w.e.f. 01.02.2016 to 28.02.2016 was 1.32% and during the post-GST period w.e.f. 01.07.2017 to 31.12.2018 this ratio was 1.76% and hence the incremental ITC benefit of ITC was only 0.44%. In this context it would be relevant to mention that no conclusion can be drawn by comparing figures of one month of February 2016 with the 18 month period from 01.07.2017 to 31.12.2018. Moreover, the figures of CENVAT credit of Rs. 51,56,352/- for the month of February 2016, total turnover of Rs. 38,61,54,794/-, total sold area relevant to total turnover of 3,82,713 sq. ft. and relevant CENVAT credit of 51,28,199/- for the period from 01.02.2016 to 28.02.2016 are not based on any Return or the ITC Register or the list of house buyers and hence the ratio of 1.32% computed for the above month is illogical and arbitrary and hence it cannot be relied upon. The Respondent has also arbitrarily deducted ITC of Rs. 4,89,22,956/- from the ITC of Rs. 5,91,28,513/- which was available to him during the period w.e.f. 01.07.2017 to 31.12.2018 by claiming that the GST equivalent to the above amount was paid by him to his contractors. The above claim of the Respondent is frivolous as the Respondent is eligible to claim ITC on the entire GST which he has paid during the post-GST period to his contractors and hence, no such deduction can be made by him on the above ground. Accordingly, the ratio of 1.76% computed for the post-GST period is wrong. Therefore, the incremental benefit of 0.44% claimed by the Respondent is incorrect and hence the profiteered

amount of Rs. 24,54,616/- calculated by the Respondent cannot be accepted.

96. The Respondent has also averred that on Steel items additional GST of 3.5% (12.5% Excise Duty + 2% CST against GST of 18%) and incremental tax of 3% over the Service Tax of 15% against the GST of 18%, needed to be factored in while computing the profiteered amount. As discussed above the Respondent is availing full benefit of ITC on the rates of GST on the purchase of Steel items as well as the services and hence he has no ground to claim factoring in of the above incremental increases in the rates of tax as they do not impose cost on him. Moreover, his suppliers have also become eligible to claim benefit of ITC on the Steel items and the services which they are supplying to the Respondent and hence they are legally bound to pass on the benefit of ITC to the Respondent in the shape of reduced prices. The Respondent cannot misappropriate the amount of ITC and treat it as his profit as this benefit flows to him from the precious tax revenues of the Central and the State Government which they have forgone in the public interest. Therefore, the above contention of the Respondent is untenable.

97. The Respondent has filed his next written submissions on 19.07.2019 vide which he has submitted that in February 2016 allotment of 3,82,713 sq. ft. area was done due to which 25% payment became due and accordingly he had discharged Service Tax in the month of February 2016 to the tune of Rs. 1,35,71,447/- on a turnover of Rs. 38,61,54,974/-. Out of the tax of Rs. 1,35,71,447/-, Rs. 84,15,095/- were paid in cash while Rs. 51,56,352/- were paid by utilization of

CENVAT credit. He has also enclosed ST-3 Return for the months of October 2015 to March 2016 and an extract of the CENVAT credit Register. He has also contended that he was required to be given the benefit of the above amount of CENVAT credit while calculating the ratio of CENVAT credit to turnover during the pre-GST and it was also to be taken in to account while computing the profiteered amount as this amount had become cost to him w.e.f. 01.03.2016 when Service Tax was exempted and he had not taken this amount at the time of the fixation of the allotment rate nor increased his allotment rate post exemption. In this connection perusal of the ST-3 Return (Annexure-B) submitted by the Respondent for the months of October 2015 to March 2016 shows that he has entered the above figures of Service Tax and CENVAT credit availed in the Return filed for the month of February and March 2016. An amount of Rs. 24491/- has been shown to have been paid during the month of March 2016 as Service Tax in cash which is incorrect as no such tax was leviable during the above month due to its exemption. The Return also shows that an amount of Rs. 1,35,46,956/- has been paid as Service Tax on the taxable turnover of Rs. 38,61,54,974/- for the month of February 2016 out of which an amount of Rs. 83,90,604/- has been shown to have been paid in cash and an amount of Rs. 51,56,352/- has been paid from the CENVAT credit. The Respondent has himself admitted that he was eligible to charge Service Tax from the flat buyers and hence he has not paid Service Tax from his account. Therefore, payment of Service Tax during the month of February 2016 due to receipt of price from the buyers does not constitute cost to him and hence it was not required to be taken in to account while calculating the profiteered amount.

Perusal of the CENVAT credit Register (Annexure-C) submitted by the Respondent shows that he has claimed CENVAT credit on invoices which were issued during the months of July 2015 to March 2016. The Respondent has himself admitted vide para 5 of his submissions dated 19.07.2019 that he had applied and obtained registration for Service Tax during the month of February 2016. Therefore, the Respondent was not eligible to claim CENVAT credit on the invoices obtained by him during the months of July to January 2016. It is also not clear on which date the Respondent was registered under the Service Tax during the month of February 2016 as he has not attached the Registration certificate and therefore his claim of obtaining registration during the above month cannot be taken to be correct. It is also revealed from the CENVAT credit Register that 37 invoices out of total 62 invoices have been issued during the month of February 2016 which raises serious doubts on the genuineness of these invoices. Further the Respondent is also not eligible to claim CENVAT credit for the month of March 2016 as the State Government had granted exemption on payment of the Service Tax w.e.f. 01.03.2016 and hence, the CENVAT credit claimed by the Respondent on the invoices issued during the month of March 2016 is not correct. The Respondent has also made contradictory claims by stating on the one hand that he had paid Service Tax on the price collected by him from the buyers and on the other hand he has contended that he had become entitled to CENVAT credit on the purchases of input services. The Respondent has also not submitted the assessment order of the Service Tax paid during the above period. Accordingly, the claim of the Respondent that he has paid an amount of Rs. 51,56,352/- from the CENVAT credit

cannot be accepted as the same is not borne out from the perusal of the Return and the CENVAT credit Register submitted by the Respondent and hence he cannot claim that denial of the above credit amounted to cost which he was not able to compensate as he could not increase the allotment rate. The above CENVAT credit was also not required to be taken in to account while calculating the ratio of credit to turnover or the profiteered amount as the Respondent is not eligible to avail the same due to the reasons mentioned above. The Respondent could not have increased the allotment rate of Rs. 4000/- per sq. ft. as he had no authority to do so as per the terms of the AHP which he had accepted and also in view of the several concessions which had been granted to him vide paras 5 (ii) (b) and 7 of the above Policy. Therefore, all the contentions made by the Respondent on the above grounds are not maintainable and hence they cannot be accepted.

98. The Respondent has also submitted that subsequent to 01.03.2016, he had awarded the construction work to sub-contractors who were to provide all goods and services except Steel. Since the Service Tax was exempted w.e.f. 01.03.2016 he had not paid the same to his sub-contractors and hence it was not a cost to him. He has also attached copies of contracts executed by him with his sub-contractors vide Annexures D-1 and D-2 of his submissions. The above claim of the Respondent has no impact on passing on the benefit of ITC as the payment of Service Tax is not a condition precedent to the passing on the benefit of ITC as it is dependent on the amount of ITC which has become available to the Respondent during the post-GST period.

Even if he has not paid Service tax to his sub-contractors during the month of March 2016 he cannot deny the benefit of ITC. Accordingly, the above contention of the Respondent is not tenable.

99. The Respondent has further submitted that the DGAP had not considered that the project had been launched in February, 2016, when the Respondent had availed CENVAT credit on input services and under the GST regime the initial status quo had been restored and hence there was no benefit of ITC obtained by the Respondent. In this regard it would be relevant to mention that as has been discussed above the Respondent was not entitled to the benefit of CENVAT credit during the month of February 2016 due the reasons mentioned in detail and hence there is no question of the restoration of the status quo ante. Moreover, benefit of additional ITC during the post-GST period is required to be computed on the entire amount of ITC available to the Respondent after deducting the amount of CENVAT credit. Since, no CENVAT credit was available to the Respondent during the pre-GST period, the entire ITC available during the post-GST period amounts to the benefit of additional ITC which is required to be passed on by the Respondent to his buyers. Hence, the above plea of the Respondent is incorrect.

100. He has also stated that Section 171 of the CGST Act, 2017 could be interpreted and applied only with the prospective effect under the GST regime and could not be used to determine whether there had been profiteering on the basis of comparison with the erstwhile regime. In the context of this claim it would be appropriate to mention that the amount of CENVAT or ITC earned on VAT during the pre-GST period

is required to be compared with the amount of ITC available during the post-GST period to arrive at the quantum of ITC benefit as it is only the additional ITC available during the post-GST period which is required to be passed on as per the provisions of Section 171 (1). This benefit is to be passed only w.e.f. 01.07.2017 when the provisions of Section 171 (1) have come in to force and no benefit is to be passed before the above date. Therefore, the above claim of the Respondent cannot be accepted as the provisions of Section 171 are being applied prospectively only.

101. The Respondent has also cited the judgements recorded in the cases of ***State of Punjab v. Bhajan Kaur 2008 12 SCC 112*** and ***Zile Singh v. State of Haryana 2004 8 SCC 1*** wherein it was held that it was a cardinal principle of construction that every statute was prima facie prospective unless it was expressly or by necessary implication made to have a retrospective operation. In this regard it would be pertinent to note that the provisions of Section 171 (1) are not being applied retrospectively in the present case as no liability has been fixed on the Respondent for passing on the benefit of ITC before 01.01.2017, when the above Section has become enforceable. Therefore, the law settled vide both the above judgements is not applicable in the facts of the present case and hence it is not being followed.

102. He has also claimed that as per Section 171 (1) rate of tax could be reduced only on 01.07.2017 and hence he would fall foul of the said Section if he did not reduce the price of his supply on 02.07.2017. In this regard it would be relevant to mention that in the present case the issue of reduction in the rate of tax is not involved as it is the issue of "benefit of ITC" which is to be settled as the Respondent is liable to

pass on the benefit of ITC as per the provisions of the above Section. Hence, the above contention of the Respondent is incorrect.

103. It was further claimed by the Respondent that the DGAP's analysis that the "ITC" tantamounted to "CENVAT credit" was untenable as per the definition of "ITC" given in section 2 (62) of the CGST Act, 2017, as it was not in existence prior to 01.07.2017. Thus, even if the amount of "ITC" had substantially increased on 01.07.2017 as compared to the corresponding amount of CENVAT credit and VAT credit available on 30.6.2017 and the Respondent did not reduce his price on 01.07.2017, he did not fall foul of section 171(1) because "ITC" did not exist prior to 1.7.2017. The above argument of the Respondent is not correct as CENVAT credit and ITC did exist both under the Service Tax as well as the VAT during the pre-GST period as per the provisions of the CENVAT Credit Rules, 2004 and Section 2 (1) (w) of the Haryana VAT Act, 2003 under which a registered dealer was eligible to claim full adjustment of the amount which he had paid as Service tax or VAT against his tax liability and claim refund if the amount of tax paid was more than his liability. The same benefit of ITC is available to a dealer on the payment of GST. Therefore, the CENVAT credit and the ITC on VAT can be safely compared with the ITC available on the GST. The DGAP has accordingly compared the amount of CENVAT credit or ITC which the Respondent had availed or not availed during the pre-GST period with the ITC which has become available to him in the post-GST period so that the additional benefit obtained by the Respondent could be passed on to the buyers as per the provisions of Section

171 (1). Moreover, Section 2 (62) of the CGST Act, 2017 does not define ITC as it defines only input tax. The ITC can be claimed under the provisions of Section 16 of the above Act only after satisfying the conditions mentioned therein. Therefore, all the claims made by the Respondent are wrong and hence he is liable to pass on the benefit of additional ITC which has become available to him w.e.f. 01.07.2017.

104. He has further claimed that even Section 171 (2) of the CGST Act, 2017 read with rule 127 (i) of the CGST Rules, 2017 supported his interpretation of prospective applicability of Section 171 (1) as rate of tax could not be reduced prior to 01.07.2017. Similarly, whether the benefit of ITC had been passed on could be determined only w.e.f. 01.07.2017. As discussed in para supra the provisions of Section 171 (1) have not been invoked retrospectively in the present case and the benefit of ITC is required to be passed on by the Respondent only w.e.f. 01.07.2017. The amount of CENVAT credit or ITC on VAT available before 01.07.2017 is required to be compared with the amount of ITC available after 01.07.2017 only to determine whether the Respondent has obtained any benefit of additional ITC or not. The Respondent is unnecessarily trying to misconstrue the provisions of Section 171 (2) and Rule 127 (i) by wrongly comparing the reduction in the rate of tax with the benefit of ITC and hence, the claim made by the Respondent on the above ground is not maintainable.

105. He has also contended that if profiteering was intended to be computed on the basis of a comparison between the erstwhile regime

and the GST regime, the legislature would have clearly provided a mechanism for computing the same. In this regard it would be pertinent to note that Section 171 (1) requires to pass on the benefit of ITC to the recipients by commensurate reduction in the prices for determining which the whole amount of ITC available to a supplier after 01.07.2017 cannot be considered as it includes the amount of CENVAT credit and ITC on VAT which a supplier was already availing before 01.07.2017 and which has already been taken in to account while fixing prices of a flat/house during the pre-GST period. It is only the additional amount of ITC to which a supplier has become entitled after 01.07.2017 which is required to be compared with the credits available during the pre-GST period and accordingly prices are to be reduced commensurately. The legislature is not required to prescribe the detailed mathematical methodology to compute the above benefit as the same depends on different factors in respect of different projects as well as various sectors like real estate and capital goods. The mathematical methodology applied by comparing the pre-GST benefit of CENVAT credit and ITC on VAT and post-GST ITC to compute the profiteered amount in the present case is appropriate, reasonable, justifiable and in consonance with the provisions of Section 171 (1) and hence, the same can be safely relied upon. In case the Respondent is not satisfied with the same he could have suggested his own methodology but he has failed to do so. Therefore, the above contention of the Respondent is not tenable.

106. The Respondent has further contended that the Malaysian Government under the "Price Control and Anti-Profiteering

(Mechanism to Determine Unreasonably High Profit) (Net Profit Margin) Regulations 2014 (Annexure-F) has prescribed methodology for computing the profiteered amount by comparing the pre and post-GST prices whereas no such Regulations have been framed under the CGST Act, 2017. In this regard it would be appropriate to state that the above Regulations had been framed to control prices whereas no such provision has been made in the CGST Act as it would be against the provisions of Article 19 (1) (g) of the Constitution. In this Country the suppliers are free to fix their prices and no fetters can be imposed on their right to do so. It is strange that the Respondent is advocating regulation of prices when he is not willing to pass on the benefit of ITC which has been granted to him out of the public exchequer. The Malaysian Government has since withdrawn the above Regulations as well as the GST. Therefore, the above contention of the Respondent is untenable.

107. He has also claimed that no benefit had been realized by him from the availability of ITC under the GST regime and hence no benefit was to be passed on to the recipients. The Respondent has also submitted various definitions of the word "benefit" from different dictionaries and stated that the determination whether a benefit had been realized necessarily entailed a comparative exercise between the present and the previous scenario to discern whether any additional advantage had been gained. He has further submitted that the DGAP had failed to appreciate that for the credit to be a "benefit", the same had to be a cost under the previous regime. The above claim of the Respondent is frivolous as there is no doubt that

he has become eligible to additional benefit of ITC under the GST regime as he has started to get benefit of ITC on the Central Excise Duty which he was paying as part of the price of the goods which he was purchasing from his suppliers during the pre-GST period. He has also become entitled to the ITC on the Entry Tax and other cesses and duties imposed by the State Government. The Central Excise Duty and the Entry Tax were earlier costs to him during the pre-GST regime and by becoming eligible to get ITC on them he has obtained benefit of ITC which he is required to pass on to his buyers. The definitions of benefit quoted by the Respondent fully apply in the present case. Accordingly, the above claims of the Respondent are not maintainable.

108. He has also stated that majority of the credit available under the GST regime which was in respect of the input services received from the sub-contractors was never a cost earlier as the said service providers were exempted from payment of Service Tax. Since the price payable to the sub-contractors was exclusive of applicable taxes, the same was now recovered from the Respondent over and above the basic price of the contract whereas previously there was no such recovery as the sub-contractor was also exempted from the payment of Service Tax. Thus, there was no benefit under the GST regime on account of availability of ITC. In this regard it would be appropriate to mention that the Respondent has become entitled to the benefit of ITC on the full amount of GST which he is now paying to his sub-contractors. During the pre-GST period since the Central Excise Duty and the Entry Tax were part of the price of the service

which he was getting from his sub-contractors he was not getting ITC on them. The Respondent is also getting full ITC on the purchases made by him from his sub-contractors and is not required to pay even a single penny from his pocket. Moreover, the sub-contractors have also become eligible to additional benefit of ITC in the post-GST regime which they are bound to pass on to the Respondent by reducing the prices of their services. Therefore, there is no doubt that the Respondent is availing benefit of additional ITC on the costs which were being borne by him earlier and hence the above claim of the Respondent cannot be accepted.

109. He has further stated that under the erstwhile regime, the rate of Excise Duty was 12.5% and the Central Sales Tax (CST) was 2%, hence, the cost borne by the Respondent was 14.5% whereas under the GST regime, the rate of GST was 18%. Therefore, he was paying an incremental tax of 3.5%, which was being recovered from him by his suppliers and which could not be considered a benefit as the said amount was not payable under the erstwhile regime. Accordingly, the benefit if any available under the GST regime was only limited to 14.5%. The above contention of the Respondent is incorrect as the Respondent is getting full benefit of ITC of GST@ 18% which he is paying to his suppliers and is not getting benefit @ 14.5%. The Respondent cannot misappropriate the balance ITC @ 3.5% on the ground that it was not being paid by him in the pre-GST period, since this concession is being granted to him from the public exchequer and he is not paying this amount from his account. Therefore, the claim of the Respondent that the incremental tax of

3.5% cannot be considered as benefit is completely farfetched. Accordingly, the Respondent is required to pass on the entire amount of ITC which has become available to him during the post-GST period and hence, the above contention of the Respondent is not tenable.

110. He has also claimed that under the erstwhile regime, the rate of Service Tax on input services was 15% whereas under the GST regime most input services were subjected to GST @ 18%. Therefore, under the GST regime the Respondent was paying an incremental tax of 3%, which was being recovered from him by his suppliers which could not be considered as the benefit as it was not payable under the erstwhile regime, hence, under the GST regime the benefit was only limited to 15%. As discussed in para supra the above claim of the Respondent is wrong as the Respondent is availing full benefit on the 18% GST paid on services during the GST regime which he is required to be passed on.

111. He has further claimed that the DGAP had made an incorrect assumption that previously the cost of tax paid on inputs/ input services was being borne by the recipients, so now when credit was available and the tax was no longer a cost, the benefit of tax should be passed on to the recipients. He has also stated that the DGAP had wrongly assumed that the costing of the service directly varied with the availability of ITC which was incorrect as the cost of input tax paid was never borne by the buyers as it was being borne by the Respondent and could not be recovered due to the maximum price cap of Rs. 4000/- per sq. ft. Accordingly, when the recipient was not

bearing the cost of the tax, there could not be any requirement to reduce price in lieu of availability of ITC under the GST regime. In this regard it would be pertinent to mention that the assumption made by the DGAP that when the burden of tax was being borne by the buyers during the pre-GST period which was now available as benefit of ITC to the Respondent the same should be passed on to the buyers is correct as the Respondent cannot deny the benefit of ITC to the buyers as he was getting the benefit on ITC on those taxes and cesses on which he was not getting ITC in the pre-GST regime. Accordingly, he is required to pass on the benefit of ITC which has become available to him post-GST. The second assumption made by the DGAP that the costing of the service directly varied with the availability of ITC was also correct as such availability would result in reduction in the cost which would culminate in commensurate price reduction as per the provisions of Section 171 (1). There is no question of increase in the rate of allotment of Rs. 4000/- as the Respondent is getting full benefit of GST which is being paid by him and hence there has been no increase in his costs. Accordingly, the Respondent is required to reduce the above rate of allotment commensurate with the benefit of ITC. Therefore, the above contention of the Respondent is not maintainable.

112. The Respondent has also contended that he had made detailed submissions before the DGAP how he did not obtain any benefit from the availability of ITC under the GST regime but the DGAP in his Report had not addressed the same. However, perusal of both

the Reports dated 14.06.2019 and 12.02.2020 furnished by the DGAP shows that the DGAP has addressed all the issues raised by the Respondent vide Annexure-E of his submissions, during the course of his investigation. The DGAP was also not required to give opportunity of being heard to the Respondent as there is no such provision in the CGST Act or the Rules to do so. Such opportunity is to be granted by this Authority which has been duly given to the Respondent and hence the above claims of the Respondent are untenable.

113. He has further contended that the construction activity undertaken by him was supply of services in terms of clause (b) of entry 5 of Schedule II attached to the CGST Act, 2017 on which he was entitled to the benefit of ITC but it was subject to the provisions of Section 17 (2) according to which his entitlement to avail ITC was restricted to the credit attributable to the taxable supplies. Thus, the amount of credit attributable to exempted and non taxable supplies might be reversed. Accordingly, the sale of flats after issuance of the CC/OC might be required to be reversed by the Respondent. Thus, the figure of credit available to the Respondent as on date was only provisional and therefore, the benefit to be passed on could be determined only when actual number of unsold flats was known after issue of the OC. In this regard it would be relevant to mention that as per Table-C of the Report dated 14.06.2019 the ratios of CENVAT credit/ITC on VAT/ITC on GST have been computed for the pre and post-GST period by taking in to consideration the total sold area relevant to turnover and the relevant ITC to the sold area.

Accordingly, as per Table-D of the Report the profiteered amount has been computed only on the sold area. Therefore, entitlement to the benefit of ITC has been calculated as per Annexure-17 only in respect of those buyers who have purchased the flats and paid the instalments during the post-GST period and it has not been computed in respect of the unsold flats. Since the ITC pertaining to the unsold flats has not been taken in to account while calculating the benefit of ITC there would be no problem in reversing the ITC in respect of the unsold flats at the time of issue of the OC/CC. The Respondent cannot force the buyers to wait for the benefit of ITC till the number of unsold flats is known at the time of the issue of the CC/OC when the project would be completed, which may take several years, when he himself is enjoying the benefit of ITC every month by availing it to discharge his tax liability. The Respondent cannot adopt different yardsticks while availing the benefit of ITC himself and while passing it on to the buyers and therefore, he should also pass on the benefit every month. Therefore, the above claim of the Respondent is wrong and hence it cannot be accepted.

114. The Respondent has also submitted that he might be liable to reverse the ITC in respect of the project as he had opted for the option to discharge GST at the rate of 1% under the Notification No. 3/2019 dated 29.03.2019. In this connection perusal of the above Notification shows that it is to be implemented w.e.f. 01.04.2019 whereas the present computation of the ITC benefit pertains to the period w.e.f. 01.07.2017 to 31.12.2018 only, therefore, there would be no effect on

the computation of the ITC benefit of the above Notification. Accordingly, the above claim of the Respondent is not correct.

115. The Respondent has further submitted that the methodology adopted by the DGAP for computing profiteering was incorrect as the ratios of ITC to turnover had no correlation as the turnover was based on the payment whereas ITC was based on the actual work completed and goods/services used for the same. In this connection perusal of Table-A of the Report shows that the payment of the price is directly linked to the time period of 36 months as the project is to be completed within a period of 4 years (48 months) as per para 1 (iv) of the AHP. Accordingly, the Respondent is required to frame schedule for construction of the project within 48 months and link it with the payment schedule. Therefore, there is direct correlation between the turnover and the ITC. Moreover, the Respondent is required to pass on the benefit of ITC every month and in case more or less benefit is passed on during any month the same can always be adjusted subsequently. Therefore, the above submission of the Respondent is untenable.

116. The Respondent has also contended that the DGAP had wrongly presumed that the payment of GST to the sub-contractor and availability of credit thereof was an absolute benefit to the Respondent. In this connection it would be appropriate to mention that the presumption of the DGAP is correct as the Respondent is availing full benefit of ITC on the GST paid by him to his sub-contractor and is not paying it from his own account. Therefore, the entire amount of ITC available to him in the post-GST period is a

benefit which was not available to him during the pre-GST regime. The Respondent is not paying GST from his own funds and therefore, he cannot misappropriate the ITC which has now become available to him from the public exchequer and he has to pass it on to his buyers. Therefore, the above plea of the Respondent is not maintainable.

117. The Respondent has further contended that the DGAP had failed to note that the Respondent's project had started in February, 2016 and he had availed CENVAT credit on input services. The comparison being drawn by the DGAP had to be with respect to the credit availed in the month of February, 2016 vis-à-vis the credit availed under the GST regime. As has been discussed in detail in para supra the Respondent has wrongly availed CENVAT credit on input services during the month of February 2016. The CENVAT credit shown to have been claimed for one month of February 2016 can also not be compared with the ITC available to him during the post-GST period of 18 months w.e.f. 01.07.2017 to 31.12.2018. Such a comparison would be entirely unreasonable, illogical, incorrect and against the provisions of Section 171 (1). Hence, the above claim of the Respondent is not maintainable.

118. The Respondent has filed his next written submissions on 21.08.2019 vide which he has submitted break-up of the turnover of the pre-GST era and computation of the amount of profiteering as per his own calculations and claimed that the ratio of CENVAT credit to turnover during the month of February 2016 was 1.32% whereas it was 1% during the post-GST period and hence there was no profiteering. Perusal of the Table submitted by the Respondent in this regard

shows that he has taken Rs. 38,61,54,794/- as turnover during the month of February 2016 and Rs. 51,56,352/- as the CENVAT credit. Both the above amounts are incorrect as per the reasons detailed in para supra as the Respondent was not eligible to claim credit of CENVAT during the month of February 2016 and the turnover mentioned in the invoices issued during the above month as per Annexure-C was different than the turnover mentioned in the ST Return filed vide Annexure-B. Similarly he has arbitrarily taken the ITC during the post-GST period as Rs. 82,86,713/- whereas as per the Returns and the ITC Register maintained by the Respondent himself the correct amount of ITC is 5,91,28,513/-. Therefore, both the ratios computed by the Respondent are wrong and hence they cannot be relied upon.

119. The Respondent has filed his next written submissions on 03.09.2019 vide which he has furnished a number of Tables and claimed that the ITC other than attributable to the sub-contractors credit which amounted to Rs. 1,02,05,557/- was the only benefit arising in the GST era which could be passed on. The above claim of the Respondent is completely wrong as the Respondent has availed ITC of Rs. 5,91,28,513/- during the post-GST period from which the ITC of Rs. 4,89,22,956/- attributable to the sub-contractors cannot be reduced as the Respondent has availed an amount of Rs. 5,91,28,513/- as benefit of ITC. The entire amount of 4,89,22,956/- paid by the Respondent to his sub-contractors has been duly availed as ITC by the Respondent which amounts to the benefit of ITC.

120. The Respondent has also computed the pre and post-GST ratios as 0.70% and 5.48%, additional benefit of ITC of 4.78% of the turnover and profiteered amount as Rs. 86,04,995/- vide another Table submitted by him, perusal of which shows that he has again arbitrarily taken the figures of CENVAT credit and turnover for the period w.e.f. 01.02.2016 to 30.06.2017 and compared them with the wrong figures of ITC and turnover for the period w.e.f. 01.07.2017 to 31.12.2018. The Respondent has no reason to deduct the amount paid by him to his sub-contractors from the turnovers during both the above periods. Therefore, the above ratios and the profiteered amount computed by the Respondent is absolutely wrong and hence they cannot be taken cognizance of.

121. The Respondent has further furnished another Table of computation of profiteering after excluding from the ITC considered post-GST, ITC in respect of the sub-contractors and the incremental ITC (3% towards services and 3.5% towards goods) and after excluding the amount paid to the sub-contractors from the total turnover for the relevant period and has calculated the pre and post-GST ratios as 0.70% and 4.45%, benefit of ITC as 3.75% and total profiteered amount as Rs. 67,49,653/-. As discussed in the para supra the calculation of the ratios and the profiteered amount is completely wrong and hence it cannot be considered.

122. The Respondent has also prepared another Table without excluding sub-contractor's turnovers from the total turnovers and arrived at the ratios of 0.56% and 1.77% for the pre and the post-GST periods respectively, additional benefit of ITC of 1.21% of the turnover and

profiteered amount of Rs. 67,56,756/-. As already discussed these ratios and the profiteered amount has been computed on the wrong and arbitrary figures of ITCs and turnovers and hence the same cannot be taken in to account.

123. The Respondent has also furnished another Table showing computation of profiteering after excluding from the ITC considered post-GST, ITC in respect of the sub-contractors and the incremental ITC (3% towards services and 3.5% towards goods) and arrived at the pre and post-GST ratios of 0.56%, 1.44%, additional benefit of ITC of 0.88% and profiteered amount of Rs. 49,01,414/-. All the above computations are wrong and arbitrary and hence they are not worth consideration.

124. Based on the above findings this Authority hereby determines the profiteered amount as Rs. 6,24,48,008/- as per the provisions of Section 171 (1) read with Rule 133 (1) of the above Rules which includes GST @ 12% or 8% on the base profiteered amount of Rs. 5,71,81,399/-. The above amount shall be paid by the Respondent to the eligible buyers as per the details given in Annexure-17 of the DGAP's Report dated 14.06.2019 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 eligible buyers. The above amount is also inclusive of an amount of Rs. 4,32,315/- including the GST which is the profiteered amount in respect of the Applicant No. 1 to 5 as per the details given at Sr.

No. 78, 119, 329, 341 and 465 of Annexure-17. 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 Haryana for claiming benefit of ITC.

125. In view of the above facts, this Authority under Rule 133 (3) (a) of the CGST Rules, 2017 read with Sub-Section 171 (1) further orders that the Respondent shall reduce the price to be realized from the buyers of the flats commensurate with the benefit of ITC received by him as has been detailed above.

126. 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. However, since the provisions of Section 171 (3A) have come in to force w.e.f. 01.01.2020 whereas the period during which violation has occurred is w.e.f. 01.07.2017 to 31.12.2018, hence the penalty prescribed under the above Section cannot be imposed on the Respondent retrospectively. Accordingly, Show Cause Notice directing him to explain why the penalty prescribed under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him is not required to be issued.

127. This Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Haryana to monitor this order under

the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by the Authority is passed on to all the eligible buyers. A report in compliance of this order shall be submitted to this Authority by the Commissioners CGST/SGST Haryana through the DGAP within a period of 4 months from the date of receipt of this order.

128. It is also clear from para 3.1, 3.2 and 3.3 of Annexure-E of the submissions dated 19.07.2019 filed by the Respondent that the "Aangan" project being executed by the Respondent has two other parts known as Phase-II and Phase-III which are apparently under construction. It is also apparent that all the three phases of the project have been registered under the same GSTIN and one Return is being filed by the Respondent in respect of all the three phases. The ITC is also being availed by the Respondent from the common pool of all the phases. Therefore, there are sufficient reasons to believe that the Respondent is liable to pass on the benefit of ITC on these two Phases also as per the provisions of Section 171 (1) of the above Act and hence, the issue of passing on the benefit of ITC by the Respondent in respect of these two phases is required to be examined as per the provisions of Section 171 (2). Accordingly, the DGAP is directed to investigate the above two Phases of the project as per the provisions of Rule 133 (5) of the CGST Rules, 2017 read with Section 171 (2) of the above Act and submit his Report accordingly.

129. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was required to be passed within a period of 6 months from

the date of receipt of the Report from the DGAP under Rule 129 (6) of the above Rules. Since, the present Report has been received by this Authority on 12.02.2020 the order was to be passed on or before 11.08.2020. However, due to prevalent pandemic of COVID-19 in the Country this order could not be passed on or before the above date due to *force majeure.* Accordingly, this order is being passed today in terms of the Notification No. 65/2020-Central Tax dated 01.09.2020 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes & Customs under Section 168 A of the CGST Act, 2017.

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

Sd/-

(Dr. B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Member(Technical)

Certified Copy

16.X.20

(A.K. Goel)
Secretary, NAA

File No. 22011/NAA/47/Alton/2019 Dated:16.10.2020

Copy To:-

1. M/s Alton Buildtech India Pvt Ltd, Adani House, Plot No. 83, Industrial Area, Sector 32, Gurgaon-122001
2. Sh. Shashank Thakar, Flat No. 13130, Tower-9, Block-A, Plot GH07, Crossing Republic, Ghaziabad, U.P-101016.
3. Sh. Neeraj Yadav, D-499 A, Street No.14, Sadh Nagar, Palam Colony, New Delhi-110045.
4. Sh. Chiranjeev Singh, D-1 A Hauz Khas, New Delhi-110016.
5. Sh. Ashish Gupta, Flat No. 142, Housing Board Colony, Jharsa Road, Gurgaon Haryana-122001.
6. Sh. Progga Biswas,C/O Biplab Sarkar Manasbhumi, Manikpur P.O. Italgacha, Kolkata West Bengal-700079 .
7. 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.
8. The Commissioner of State Tax, Vanijya Bhawan, Plot No. 1-3, Sector-5, Panchkula, Haryana-134151.
9. The Commissioner, CGST Gurugram, Plot No. 36 & 37, Sector-32, Gurugram, Haryana-122001.
10. Guard File.

16.X.20

A. K. GOEL
SECRETARY, NAA