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

I. O. No.	:	33/2020
Date of Institution	:	26.03.2020
Date of Order	:	09.12.2020

In the matter of:

1. Sh. Hussain Shoaib Kothalia, R/o 22/1, Venkatesan St. Sakina Apt, Royapuram, Chennai-600001.
2. Sh. Prakash Kandavel, House No. 3/8, EVR, Street, Santhoshpuram, Chennai-600073
3. 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 DRA Aadithya Projects Pvt. Ltd., Regd. Office: 4, Ranka Chambers, 31, Cunningham Road, Bangalore- 560052.

Respondent

Quorum:-

1. Dr. B. N. Sharma, Chairman
2. Sh. J. C. Chauhan, Technical Member
3. Sh. Amand Shah, Technical Member

Present:-

1. None for the Applicants.
2. None for the Respondent.

ORDER

1. The present Report dated 26.03.2020 has been received from the Applicant No. 3 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that the DGAP had received a reference from the Standing Committee on Anti- profiteering on 28.06.2019 to conduct a detailed investigation in respect of an application filed under Rule 128 of the Central Goods and Services Tax Rules, 2017 by the Applicant No. 1 alleging profiteering by the Respondent in respect of purchase of a flat in the Respondent's project "Pristine Pavilion Phase-III". The Applicant No. 1 had alleged that the Respondent had not passed on the benefit of input tax credit (ITC) to him by way of commensurate reduction in

prices and charged GST @12% on the amount due to him against payments.

2. Further, the Applicant No. 2 had also filed an application before the Standing Committee on Anti-Profiteering which was examined by the Standing Committee on Anti-Profiteering in its meeting held on 13.09.2019 and forwarded to the DGAP for detailed investigation in the matter.

3. The DGAP, on receipt of the aforesaid references from the Standing Committee on Anti-profiteering, issued a Notice dated 12.07.2019 under Rule 129 (3) of the CGST Rules, 2017, calling upon the Respondent to reply as to whether he admitted that the benefit of input tax credit had not been passed on to the recipients by way of commensurate reduction in price and if so, to suo moto determine the quantum thereof and indicate the same in his reply to the Notice as well as to furnish all documents in support of his reply. Further, the DGAP gave an opportunity to the Respondent to inspect the non-confidential evidence/information which formed the basis of the above said Notice, during the period from 18.07.2019 to 22.07.2019. However, the Respondent did not avail of the said opportunity. Vide e-mail dated 23.03.2020, the Applicant No. 1 and 2 were also given an opportunity to inspect the non-confidential documents/reply furnished by the Respondent. However, the Applicant No. 1 vide his e-mail dated 23.03.2020 stated that "*due to the outbreak of Corona Virus and country wide lockdown, I will not be able to visit the office at Delhi as I stay in Chennai to inspect the Non-confidential information submitted by M/s DRA.*"

4. The DGAP has covered the period from 01.07.2017 to 30.06.2019 during the current investigation. The time limit to complete the investigation was extended up to 31.03.2020 by this Authority vide its order dated 12.12.2019, in terms of Rule 129 (6) of the Rules.

5. The DGAP has stated that the Respondent had replied vide various letters/ e-mails dated 22.07.2019, 26.07.2019, 06.08.2019, 14.08.2019, 12.12.2019, 16.12.2019, 18.02.2020, 21.02.2020 and 18.03.2020 in response to the above said Notice. The Respondent had submitted the following documents/ information before the DGAP:-

   (a) Copies of GSTR-1 Returns for the period from July, 2017 to June, 2019.

   (b) Copies of GSTR-3B Returns for the period from July, 2017 to June, 2019.

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

   (d) Electronic Credit Ledger for the period from July, 2017 to June, 2019.

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

   (f) Copies of Balance Sheets for FY 2016-17, 2017-18 & 2018-19.

   (g) Details of VAT, Service Tax, ITC of VAT, CENVAT credit for the period from April, 2016 to June,2017 and output GST and ITC of GST for the period from July, 2017 to September, 2019 for all the projects including the "Pristine Pavilion Phase-III".

(h) CENVAT/Input Tax Credit Register for the FY 2016-17, 2017-18, 2018-19 and for the period from April, 2019 to September, 2019 reconciled with VAT, ST-3 and GSTR-3B Return along with details of credit reversals.

(i) Details of applicable tax rates, Pre-GST and Post-GST.

(j) List of home buyers in the project "Pristine Pavilion Phase-III" along with details of benefit passed on.

(k) Copy of Project Report submitted to the RERA.

6. The DGAP has stated that he has scrutinized the references received from the Standing Committee on Anti- profiteering, various replies of the Respondent and the documents/evidences on record and the following issues were to be investigated by him:-

a) Whether there was benefit of reduction in the rate of tax or input tax credit on the supply of construction service by the Respondent, on implementation of GST w.e.f. 01.07.2017 and if so,

b) Whether such benefit was passed on by the Respondent to the recipients, in terms of Section 171 of the Central Goods and Services Tax Act, 2017.

7. The DGAP has further stated that the Para 5 of Schedule-III of the Central Goods and Services Tax Act, 2017 (Activities or Transactions which reads as "Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building". Further, clause (b) of Paragraph 5 of Schedule II of the Central Goods and Services Tax Act, 2017 reads as

"(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier". Thus, the input tax credit pertaining to the residential units and commercial shops which were under construction but not sold was provisional input tax credit which might be required to be reversed by the Respondent if such units remained unsold at the time of issue of the Completion Certificate (CC), in terms of Section 17 (2) & Section 17 (3) of the Central Goods and Services Tax Act, 2017, which read as under:

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

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

Therefore, the DGAP has stated that the ITC pertaining to the unsold units was outside the scope of this investigation and the Respondent was required to recalibrate the selling prices of such units to be sold to the prospective buyers by considering the net benefit of additional input tax credit available to him post-GST.

8. The DGAP has observed that prior to 01.07.2017 i.e. before the GST was introduced, the Respondent was eligible to avail credit of Service Tax paid on input services only (no credit was available in respect of Central Excise Duty paid on the inputs) and also input tax credit of VAT paid on inputs was not available to the Respondent. Further, post-GST, the Respondent could avail input tax credit of GST paid on all the inputs and the input services including the sub-contracts. From the information submitted by the Respondent for the period from April, 2016 to June, 2019, the details of the input tax credit availed by him, his turnover from the current project "Pristine Pavilion Phase-III", the ratio of input tax credit to turnover, during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to June, 2019) periods, was furnished in Table- 'A' given below by the DGAP:-

Table- A (Amount in Rs.)

Sr. No.	Particulars	Total (Pre-GST) April, 2016 to June, 2017	Taxable Turnover (July, 2017 to March, 2019)	Total (Post-GST)
1	CENVAT of Service Tax Paid on Input Services used for flats (A)	82,11,527	-	-
2	Input Tax Credit of VAT Paid on Purchase of Inputs (B)		-	-
3	Total CENVAT/Input Tax Credit Available (C)= (A+B)	82,11,527	-	-

4	Input Tax Credit of GST Availed (D)	-	6,22,61,036	6,22,61,036
5	Turnover for Flats as per Home Buyers List (E)	15,79,52,071	46,35,29,737	46,35,29,737
6	Total Saleable Area (in SQF) (F)	1,83,326		1,83,326
7	Total Sold Area (in SQF) relevant to turnover (G)	66,185		1,51,244
8	Relevant ITC [(H)= (C)*(G)/(F) or (D)*(G)/(F)	29,64,554		5,13,65,372
Ratio of ITC Post-GST [(I)=(H)/(E)]		**1.88%**		**11.08%**

9. The DGAP has submitted from the above table-'A' that the input tax credit as a percentage of the turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 1.88% and during the post-GST period (July, 2017 to June, 2019), it was 11.08%. This clearly confirmed that post-GST, the Respondent had benefited from additional input tax credit to the tune of 9.20% [11.08% (-) 1.88%] of the turnover. Accordingly, the profiteering had been examined by comparing the applicable tax rate and input tax credit available in the pre-GST period (April, 2016 to June, 2017) when Service Tax @4.50% was payable with the post-GST period (July, 2017 to June, 2019) when the effective GST rate was 12% (GST @18% along with 1/3rd abatement for land value) on construction service, levied vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Accordingly, on the basis of the figures contained in Table- 'A' above, the comparative figures of the ratio of input tax credit availed/available to the turnover in the pre-GST and post-GST periods as well as the turnover, the recalibrated base price and the excess realization (profiteering) during the post-GST period has been tabulated by the DGAP as is given in Table-'B' below:-

Table- B

(Amount in Rs.)

Sr. No.	Particulars		
1	**Period**	**A**	**July, 2017 to March, 2019**
2	Output GST rate (%)	B	12
3	Ratio of CENVAT credit/ ITC to Total Turnover as per table - 'B' above (%)	C	11.08%
4	Increase in ITC availed post-GST (%)	D= 11.08% *less* 1.88%	9.20%
5	**Analysis of Increase in input tax credit:**		
6	Base Price raised during July, 2017 to March, 2019(Rs.)	E	46,35,29,737
7	GST raised over Base Price (Rs.)	F= E*B	5,56,23,568
8	Total Demand raised	G=E+F	51,91,53,305
9	Recalibrated Base Price	H= E*(1-D) or 90.80% of E	42,08,85,001
10	GST @12%	I = H* B	5,05,06,200
11	Commensurate demand price	J = H+I	47,13,91,201
12	**Excess Collection of Demand or Profiteering Amount**	**K= G–J**	**4,77,62,104**

10. The DGAP has stated from the Table-'B' that the additional input tax credit of 9.20% of the turnover should have resulted in the commensurate reduction in the base price as well as cum-tax price. Therefore, in terms of Section 171 of the Central Goods and Services Tax Act, 2017, the benefit of additional input tax credit was required to be passed on by the Respondent to the respective flat buyers.

11. The DGAP has further stated that on the basis of the aforesaid CENVAT/input tax credit availability in the pre and the post-GST periods and the details of the amount raised/collected by the Respondent from the Applicant and other home buyers during the period from 01.07.2017 to 30.06.2019, the Respondent had benefited by additional amount of input tax credit of Rs. 4,77,62,104/- which included GST @12% on the base profiteered amount of Rs. 4,26,44,736/-. The buyers and unit no. wise break-up of this amount was given in Annexure-15 of the DGAP's Report. The DGAP has also

stated that this amount was inclusive of Rs. 2,74,854/- (including GST) which was the benefit of input tax credit required to be passed on to the Applicant No. 2, mentioned at Serial No. 34 of the above said Annexure. The DGAP did not find the Applicant No. 1 in the flat buyers list of the project. The DGAP has also stated that the said service had been supplied by the Respondent in the State of Tamil Nadu only.

12. The DGAP has concluded that the benefit of additional input tax credit to the tune of 9.20% of the turnover which has accrued to the Respondent post-GST was required to be passed on by the Respondent to the Applicant No. 2 and the other recipients. Section 171 of the Central Goods and Services Tax Act, 2017 appeared to have been contravened by the Respondent, in as much as the additional benefit of input tax credit @9.20% of the base price received by the Respondent during the period from 01.07.2017 to 30.06.2019, had not been passed on by the Respondent to the Applicant No. 2 and other recipients. On this account, the Respondent had realized an additional amount to the tune of Rs. 2,74,854/- from the Applicant No. 2 which included both the profiteered amount @9.20% of the base price and GST on the said profiteered amount. Further, the investigation has revealed that the Respondent had also realized an additional amount of Rs. 4,74,87,250/- which included both the profiteered amount @9.20% of the base price and GST on the said profiteered amount, from 151 other recipients who were not Applicants in the present proceedings. These recipients were identifiable as per the documents provided by the Respondent, giving the names and addresses along with unit nos. allotted to such recipients. Therefore,

this additional amount of Rs. 4,74,87,250/- was required to be returned to such eligible recipients. The DGAP has further stated that the present investigation has covered the period from 01.07.2017 to 30.06.2019. Profiteering, if any, for the period post June, 2019, was not examined as the exact quantum of input tax credit that would be available to the Respondent in future could not be determined at this stage, when the Respondent was continuing to avail input tax credit in respect to the present project.

13. The DGAP has also stated that Section 171(1) of the Central Goods and Services Tax Act, 2017, requiring that "any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices", had been contravened by the Respondent in the present case.

14. The above Report was considered by this Authority in its meeting held on 15.05.2020 and it was decided that the Applicants and the Respondent be asked to appear before this Authority on 04.06.2020. The Respondent was issued a notice on 19.05.2020 to explain why the above Report of the DGAP should not be accepted and his liability for violating the provisions of Section 171 of the CGST Act, 2017 should not be fixed. During the course of the proceedings, the Respondent has filed written submissions dated 18.06.2020 in which he has submitted:

a) That the saleable area and number of units in the project Pristine Pavilion Phase-III undertaken by the Respondent were as under:-

Project	Launch Period	Saleable Area (in sq. ft.)	Number of Units
Pristine Pavilion Phase–III	Pre-GST regime (June,16)	183326	177 – Residential 4 – Commercial

The details of units booked under Pristine Pavilion Phase-III in various periods were mentioned below:-

Pristine III	
Number of Units booked as on 30.06.2017[1]	64
Number of Units booked as on 30.06.2019[2]	152

That the details of turnover of the project undertaken by Respondent were as is given below:-

(In Rs.)

Project	Pre-GST Regime (01.04.2016 to 30.06.2017)
	Total Turnover (including advances, adjustments and credit notes)
Pristine Pavilion Phase – III	15,79,52,071
Income other than Pristine Pavilion Phase III	35,51,63,191
Total	51,31,15,262
As per ST-3	51,31,15,262

(in Rs.)

Project	GST Regime (01.07.2017 to 30.06.2019)
	Total Turnover (including advances, adjustments and credit notes)
Pristine Pavilion Phase – III	46,35,29,737
Income other than Pristine Pavilion Phase III	5,73,93,175
Total	52,09,22,912

b) That the DGAP has considered different figures in his investigation Report dated 26.03.2020 while computing the profiteered amount.

He has submitted the difference in the figures in tabular form as is given below:-

Particulars	Amount (As per DGAP)	Amount (As per Respondent)	Reason for difference
CENVAT on Service Tax	82,11,527	1,90,61,193	Due to lack of time, since Respondent was not able to provide with the bifurcation of ITC, the ITC related to Phase III was arrived at on the basis ratio of turnover of Phase III over total turnover, which comes out to be 31%. As discussed in detail later, in real estate sector, the cost incurred by the developer does not depend upon the demand raised as majority of the cost is incurred during the initial stages. Phase II of the Project got completed by May 2016 as can be seen from OC annexed in Annexure 13 and thereafter Phase III was commenced. In light of the same, majority of CENVAT from June 16 onwards relates to Phase III.
VAT Input	-	21,70,114	As per the DGAP, the Respondent was registered under composition scheme in VAT. However, as can be seen from VAT Returns attached in Annexure 12, the Respondent was charging VAT on the value of material sold after adding the margin and was taking credit of material procured. The Respondent adopted this model of paying VAT deliberately from June 16 for Phase III and therefore, entire credit of VAT pertains to Phase III only.
GST Input Gross	6,22,61,036	5,84,63,664	The GST input arrived at by DGAP does not match with GSTR 3B for the said period. Copy of GSTR 3B has been enclosed in Annexure 11. Bifurcation of ITC of GST has already been showcased in para D.1 of the reply. If the figure of Rs. 90,45,228 of input tax credit reversed in March 19 is added to said figure the gross input tax credit of GST comes out to be Rs. 5,84,63,664.
Input Reversal in March 19	66,15,456	90,45,228	It can be seen from GSTR 3B for the period of March 19 that input tax credit reversal done by the Respondent on account of obtainment of OC is Rs. 90,45,228 and not Rs. 66,15,456.
Reversal due to unsold units	1,08,95,664	90,45,228	DGAP Report does not provide with the calculation of said reversal.

The Respondent has also submitted that as per above table, after taking into consideration the formula of DGAP, input tax credit benefit which has accrued to the Respondent on account of implementation of GST came out to be 3.95% instead of 9.20%.

c) That the Respondent had estimated the additional benefit which shall accrued to him in the Pristine III Project based on the above factors. Accordingly, the Respondent has passed on the benefit on the basis of the area to the eligible customers of Pristine III Project, by way of commensurate reduction in prices due to expected additional input tax credit which has accrued to the Respondent under the GST regime. The details of benefit passed on to different category of customers have been submitted by the Respondent as follows:-

Category	Number of Units	Mechanism of ITC benefit passed on to customers
Customers who booked units in earlier regime and advances were received	Units on which benefit passed on = 64	ITC Benefit based on the area has been passed to the customers of 64 units at the time of completion of Pristine III Project by issuance of credit notes. The same can be verified from the statement of accounts and credit notes.
Customers who booked units from 01.07.2017 to 31.03.2020	Number of units booked = 88	GST benefit was factored in the price at which units were booked.

d) That supplies which were provided fully in GST regime were not covered into the anti-profiteering provisions directly. In this regard, reference has been drawn to the Order of this Authority in the case of ***Harmeet Kaur Bakshi v. Conscient Infrastructure Pvt. Ltd.*** wherein it was held that in case there was no comparative pre-GST

Input Tax Credit that was accumulated or utilized by the Respondent, the question of profiteering did not arise. In the instant case, the DGAP had calculated the benefit of anti-profiteering for all the 152 customers whose units have been booked before obtaining Occupation Certificate (OC) including the customers whose units were booked post implementation of GST. On implementation of GST, the Respondent had reduced the prices of his units and was not required to pass on any further benefit to the said customers. The same had been duly communicated to the customers who have booked the units Post GST.

e) That the ratio of input tax credit to the turnover of Pre-GST and GST period for calculating the benefit of additional input tax credit accrued to the Respondent shall never yield the correct quantum of anti-profiteering. The comparison of above ratio was not appropriate for the reason that under the real estate sector there was no correlation of turnover with the cost of construction or development of a project. The turnover reflected the amount collected as per the payment or booking plans issued by the developer which was dependent upon marketing driven strategy. On the contrary, the input tax credit accrued to a developer on the basis of the actual cost incurred by him while undertaking the development of a project. Thus, accrual of input tax credit was not dependent on the amount collected from the buyers. Accordingly, calculating the profiteered amount on the basis of turnover could not reflect the correct outcome for the Respondent. It was also submitted that the additional input tax credit in the hands of the Respondent in terms of

Section 171 of the CGST Act would reflect such input tax credit on goods or services which was not available earlier. However, the above approach for calculating the additional benefit which has accrued to the Respondent considered the change in the rate of tax on input goods and services the credit of which was available earlier also and has not considered the tax cost which was earlier blocked in the hands of the Respondent. Hence, the above approach of comparison of ITC to turnover ratio for pre GST and post GST period was not correct.

f) That the CGST Act read with the CGST Rules did not provide the procedure and mechanism for determination and calculation of profiteering. In the absence of the same, the calculation and methodology applied during the proceedings was arbitrary and in violation of the principles of natural justice. The Central Government vide Notification No. 10/2017-Central Tax (Rate) dated 28.06.2017 (amending Notification No. 3/2017-Central Tax) has notified the Anti-profiteering rules which provide for constitution of this Authority, the Standing and the Steering Committees, power to determine the methodology and procedure, duties of this Authority, examination of application, order of this Authority, compliance by the registered person etc. Rule 126 of the CGST Rules contained the provisions regarding the power of this Authority to determine the methodology and procedure. The Respondent has further stated that Rule 126 stated that this Authority has power to determine the methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of input

tax credit has been passed on by the registered person to the recipient by way of commensurate reduction in prices. It is further submitted that as on date, CGST Rules have not prescribed any procedure/ methodology/ formula/ modalities for determining/ calculating 'profiteering'. This Authority under the Goods & Services Tax Methodology and Procedure, 2018 issued on 19.07.2018, has merely provided the procedure to be followed pertaining to the investigation and hearing. It was reiterated that no method/formula has been issued pertaining to the calculation of profiteering amount. Further, Rule 127 of the CGST Rules, prescribed the duties of this Authority whereby it could order reduction in prices, return to the recipient an amount equivalent to the amount not passed on as benefit, imposition of penalty and cancellation of registration under the CGST Act. The duties of this Authority as enumerated in Rule 127 included determination whether benefits consequent to reduction in the rate of tax or allowance of input tax credit were being passed on to the recipients, identification of registered persons who have not passed on the benefits to the recipient and passing of orders effecting reduction in prices. However, the CGST Act and the CGST Rules pertaining to anti-profiteering provisions did not prescribe any computation method or formula to make sure proper compliance with the provisions. Whether such computation must be done invoice-wise, product-wise, business vertical-wise or entity-wise was not prescribed under the law. In this regard, reliance has been placed on the cases of ***Eternit Everest Ltd.*** **v.** ***UOI 1997 (89) ELT 28 (Mad.), Commissioner of Income Tax Bangalore*** **v.**

B. C. Srinivasa Setty, (1981) 2 SCC 460, ***Samsung (India) Electronics Pvt. Ltd. v. Commissioner of Commercial Taxes U. P. Lucknow 2018 [11] GSTL 367*** and ***Union of India v. Suresh Kumar Bansal 2017 (4) GSTL 128 (SC)***.

g) That the investigation could not go beyond the application submitted by the above Applicants. Chapter XV of the CGST Rules contained rules regarding anti-profiteering provisions. Rule 126 provided that this Authority would have power to determine the methodology and procedure for determination whether the reduction in the rate of tax or benefit of credit has been passed on to the recipient. Rule 128 of the CGST Rules contained provisions regarding the examination of application by the Standing Committee and Screening Committees. It could be concluded from the above Rule that an anti-profiteering investigation could be initiated only on receipt of written application from the interested party, Commissioner or any other person. In the instant case, the proceedings were started with the applications received from the above Applicants. Hence, the investigation could not go beyond the applications and cover other customers also who have not questioned the benefit passed on to them. In this regard, reliance has been placed on the following orders of this Authority, wherein investigation, Reports and final orders of this Authority were restricted only to the product for which complaint was filed, in the following cases:-

i. ***U. P. Sales & Services v. M/s Vrandavaneshwree Automotive Private Limited 2018-VIL-01-NAA:*** In this case, the applicant had filed an application alleging that the supplier had not passed on the

benefit of reduced rate of tax on Honda Car having Model No. WR-V 1.2 VX MT (i-VTEC) purchased by the applicant. This Authority in this case while holding that the supplier has not contravened the provisions of Section 171 of the CGST Act, 2017 limited its enquiry and order, only to the particular model of car.

ii. ***Rishi Gupta v. Flipkart Internet Pvt. Ltd. 2018 VIL-04-NAA*:** In this case, the applicant had filed an application stating that he had paid extra amount for Godrej InterioSlimline Metal Almirah to the supplier and by not refunding the same, the supplier was resorting to profiteering in contravention of Section 171 of the CGST Act. This Authority while holding that the supplier has not contravened the provisions of Section 171 of the CGST Act, 2017 limited its enquiry and order, only to the particular model of almirah.

The Respondent has further submitted that the application in an anti-profiteering case acted as foundation and base of investigation. In the present case, the applications were received only from the above 2 Applicants hence, the investigation could not go beyond their applications and cover the other customers also who have not questioned the benefit passed on to them. This Authority could not *suo moto* assume jurisdiction with regard to other recipients of the Respondent, on receipt of reference from the Standing Committee to conduct a detailed investigation in the matter of the above Applicants. It was also submitted that this Authority could not exceed its jurisdiction by submitting its findings for other unit buyers who have not filed any application. It was further submitted that an application filed by an unsatisfied applicant might be compared to a

show cause notice for a tax proceeding wherein the assessee was required to show as to why tax, interest, penalty, etc. should not be levied and collected from him. It was settled principle of law that an order adjudicating a show cause notice could not travel beyond the scope of a show cause notice. In this regard reliance has been placed on the case of ***Toyo Engineering India Limited v. CC, Mumbai 2006 (201) ELT 513 (SC), Reckitt & Colman of India Ltd. v. CCE*** **1996 (88) ELT 641 (SC)** and ***Fx Enterprise Solutions India Pvt. Ltd. and Ors. v. Hyundai Motor India Limited 2017 CompLR 586 (CCI).***

15. The above submissions of the Respondent were supplied to the DGAP for filing clarifications under Rule 133 (2A) of the CGST Rules, 2017. Accordingly, the DGAP has filed his clarifications dated 17.08.2020 which have been mentioned below:-

<u>On the issue of CENVAT Credit of Service Tax</u>:

In this regard, the DGAP has submitted that the contention of the Respondent that CENVAT Credit Amount as per DGAP's Report was Rs. 82,11,527/- whereas it should have been Rs. 1.90,61,193/- was not acceptable. From the perusal of documents, the DGAP has observed that at the time of the investigation the Respondent was requested several times to submit the bifurcation of CENVAT Credit for the period from 01.04.2016 to 30.06.2017 related to the Pristine Pavilion Phase-III but he did not submit the same and this fact has also been admitted by the Respondent. The DGAP has conducted investigation on the basis of information available in statutory Returns

submitted by the Respondent. The Respondent did not produce separate CENVAT Credit Register for each project. Non-submission of separate CENVAT Register during the investigation covering a large period of time has led to doubt. Hence, the claim that CENVAT amount of Rs. 1,90,61,193/- pertained to the project under investigation appeared to be doubtful. In the absence of any reasonable evidence or justification that CENVAT credit of Rs 1,90,61,193/- was actually for the said project, the same could not be accepted.

On the issue of VAT Input:

The DGAP has submitted that the Respondent himself has admitted that he was registered under the Composition Scheme in VAT. Hence, he was not eligible to avail the VAT input credit. Further, The contention of the Respondent that since he was filing VAT Returns which showed that he was charging VAT on material sold was not relevant as prior to 01.07.2017 i.e. before the GST was introduced, the Respondent was eligible to avail credit of Service Tax paid on input services & credit of VAT paid on purchase of inputs but the CENVAT Credit of Central Excise Duty paid on inputs was not admissible as per the CENVAT Credit Rules, 2004, which were in force at the material time. In the instant case, the Petitioner was not collecting VAT from his customers and was discharging his output liability under the Composition Scheme i.e. 1% on purchase value. Hence, there was no direct relation of turnover reported in the VAT Returns with the amount collected from the homebuyers. Therefore, credit of VAT paid on purchase of inputs and VAT turnover has not been considered for

working of the computation of input tax credit ratio to taxable turnover in Pre-GST regime.

On the issue of Gross GST Input Tax Credit:

The DGAP has submitted that that the monthly Input Tax Credit available to the Respondent as per the GSTR-3B Returns, the details of ITC available and reversal were as is given in the Table below:-

(Amount in Rs.)

GSTR-3B	IGST	CGST	SGST	Total
GST Input Credit availed during the period July, 2017 to March, 2019	18,71,368	3,14,29,619	3,14,29,895	6,47,30,882
Amount Reversed in the Month of March, 2019	11,96,785	70,98, 187	7,90,341	90,85,313

The Respondent has incorrectly placed the facts as the ITC reversed was not going to change the profiteering as it was calculated with respect to the sold flats only i.e. the live customers whereas, the reversal of credit was related to the unsold units. In the calculation of ratio of ITC to turnover, the relevant ITC and relevant area were considered. Hence, ITC of unsold units was never part of the calculation and was required to be reversed. From the above Table, the DGAP has also observed that the total ITC available was Rs. 6,47,30,882/- in place of Rs. 6,22,61.036/-. The difference has occurred inadvertently as in the month of March, 2019 the Respondent, in the GSTR-3B Return, had shown net available ITC as negative figure (on account of reversal) and

adding of negative figure decreased the total credit available. On proper addition, the monthly credit accrued to the Respondent was Rs 6,47,30,882/-. Since, the total ITC in GST regime was Rs. 6,47,30,882/- whereas in the DGAP's Report dated 26.03.2020 the ITC was shown as Rs. 6,22,61,036/- and thus, there was a difference of Rs. 24,69,846/- in the figure reported and the actual Figure. The DGAP has stated that the difference in the ITC might lead to change in the profiteering.

On the issue of benefits of Increased Input Tax Credit passed on by Respondent:

The DGAP has submitted that the Respondent has not provided any evidence which can prove that he has passed on the ITC benefit to his customers. Further, profiteering was worked out on a particular project as a whole and not partially. If the Respondent did not reduce the rates for new customers who have booked units after implementation of GST, then Section 171 of the COST Act 2017 was applicable and profiteering on the same needed to be worked out.

On the issue of comparison of ratio of Input Tax Credit to turnover for pre-GST period and GST period is not the correct mechanism for calculation of anti-profiteering amount:

In this regard, the DGAP has submitted that there was direct relation of input tax credit availed with that of output tax to be paid, as the use of input tax credit was only towards making payment of its output liability and no refund of unutilized input tax credit could be allowed under Section 54 (3) of the Central Goods and Services Tax Act, 2017. Further, in the instant case, the DGAP has observed from the schedule of payment that the payment to be made by the home-buyers was

directly linked with the construction of the project. The contention of the Respondent was incorrect as in terms of Section 171 any additional benefit accrued to him on account of GST implementation has to be passed on to the eligible buyers as per the payments made by them. Further, ITC benefit, if any, has to be passed on to each customer therefore, comparing ITC to Turnover ratio in the pre-GST & post-GST period to arrive at a figure on individual level which was proportionate to their payment made to the Petitioner was correct in terms of Section 171.

On the issue of absence of specified procedure and mechanism for calculation of profiteering:

In this regard, the DGAP has submitted that the "Methodology and Procedure" has been notified by this Authority vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. The main contours of the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and the benefit of ITC were enshrined in Section 171 (1) of the CGST Act, 2017 itself which stated that "*Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" It was clear from the perusal of the above provision that it mentioned "reduction in the rate of tax on any supply of goods or services" which did not mean that the reduction in the rate of tax was to be taken at the level of an entity/group/company for the entire supplies made by it. Therefore, the benefit of tax reduction has to be passed on at the level of each supply of Stock Keeping Unit (SKU) to each buyer of such SKU and in case it was not passed on the

profiteered amount has to be calculated on each SKU. Therefore, the contention that the profiteered amount should be computed at the entity/group/company level was untenable. Further, the above Section mentioned "any supply" i.e. each taxable supply made to each recipient thereby clearly indicating that netting off of the benefit of tax reduction by any supplier was not allowed. A supplier could not claim that he has passed on more benefit to one customer therefore he would pass less benefit to another customer than the benefit which was actually due to that customer. Each customer was entitled to receive the benefit of tax reduction on each product purchased by him. The word "commensurate" mentioned in the above Section gave the extent of benefit to be passed on by way of reduction in the prices which has to be computed in respect of each supply based on the benefit of input tax credit as well as the existing base price (price without GST) of the supply. The computation of commensurate reduction in prices was purely a mathematical exercise which was based upon the above parameters and hence it would vary from product to product and hence no fixed mathematical methodology could be prescribed to determine the amount of benefit which a supplier was required to pass on to a recipient or the profiteered amount.

However, to give further clarifications and to elaborate upon the legislative intent behind the law, this Authority has been empowered to determine/expand the Procedure and Methodology in detail. However, one formula which fits all could not be set while determining such a "Methodology and Procedure" as the facts of each case were different. In one real estate project, date of start and completion of the project,

price of the house/commercial unit, mode of payment of price, stage of completion of the project, timing of purchase of inputs, rates of taxes, amount of ITC availed, total saleable area, area sold and the taxable turnover realised before and after the GST implementation would always be different than the other project and hence the amount of benefit of additional ITC to be passed on in respect of one project would not be similar to another project. Issuance of OC/ CC would also affect the amount of benefit of ITC as no such benefit would be available once the above certificates were issued. Therefore, no set parameters could be fixed for determining methodology to compute the benefit of additional ITC which would be required to be passed on to the buyers of such units.

Further, the facts of the cases relating to the Fast Moving Consumer Goods (FMCGs), restaurants, construction and cinema houses were completely different and therefore, the mathematical methodology employed in the case of one sector could not be applied in the other sector otherwise it would result in denial of the benefit to the eligible recipients. Further, applying the same mathematical methodology of FMCG sector to a supplier of a cinema sector would in fact lead to erosion of justice in the name of uniformity.

In light of above facts, quantum of profiteering was quantified by the DGAP after taking into account the particular facts of each case. Hence, there could not be one-size-fits-all mathematical methodology.

Without prejudice to the above, the investigation cannot go beyond the applications submitted by Sh. Hussain Shoaib and Sh. Prakash Kandavel:

In this regard, reference has been made to Section 171(1) of the Central Goods and Services Tax Act, 2017 which reads as "*Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" Thus, the legal requirement was abundantly clear that in the event of a benefit of Input Tax Credit or reduction in rate of tax, there must be a commensurate reduction in *prices* of the *any supply of goods or services*.

Therefore, the law prescribed that the benefit of reduction in rate of tax or benefit of increase in ITC should result in commensurate reduction in prices of *any Supply* and accordingly, the DGAP was justified in examining all the supplies made by the Respondent beyond the application filed by the above Applicants.

16. The above clarifications of the DGAP were supplied to the Respondent for filing re-joinder vide order dated 24.08.2020. Accordingly, the Respondent has filed re-joinder on 16.09.2020. The Respondent has re-iterated his previous submissions and submitted some additional contentions on the clarifications filed by the DGAP. The additional contentions of the Respondent are as follows:-

Regarding CENVAT credit amount of Rs. 1,90,61,193 which pertains to the project under investigation:

The Respondent has submitted that he had received notice from the DGAP on 18th March 2020 for submission of bifurcation of the CENVAT credit from the Register for the period from 01.04.2016 to 30.06.2017 related to the Pristine Pavilion Phase- III project, by 20th March 2020. Extracting details of the period from 2016-17 in March 2020 was a tedious task and required considerable amount of time. Further, the staff of the Respondent which was required to collate the said details was engaged in filing of GSTR-3B Return, in light of the same, the Respondent required additional time for arranging the CENVAT Register. Further, the Respondent had asked for extension of time limit from DGAP till 31st March 2020 via e-mail dated 18.03.2020. However, without considering the said e-mail, the DGAP had submitted his Report on 26.03.2020. He has further submitted that in the case of ***DGAP v. M/s Patanjali Ayurveda Limited,*** the DGAP has himself reinvestigated the matter as information was not provided in the proper format. Further, no proper reason has been provided by the DGAP for disregarding the amount of CENVAT credit submitted by the Respondent. The Respondent has also annexed the CENVAT Register as **Annexure-1** with his submissions.

Regarding VAT Credit:

The Respondent has also stated that he has never admitted that he was registered under the composition scheme in any of the correspondence held with the DGAP. The Respondent has been registered under the normal scheme and the same could be verified through the VAT Returns submitted for the said period.

Regarding reversal of ITC taken into consideration for calculation of profiteering:

The Respondent has further submitted that the DGAP for calculation of the profiteered amount has compared the ratio of input tax credit to turnover of the pre-GST regime with that of the post-GST regime. The ITC in respect of the sold units was to be considered for calculating the anti-profiteering benefit. Out of Rs. 6,47,30,882/- of the total credit availed through the GSTR-3B Returns, an amount of Rs. 90,85,313/- belonged to the unsold units and therefore, the same had been reversed and he has claimed net ITC of Rs. 5,84,63,664/- in the GST regime which should be taken into consideration for determining the amount of profiteering. He has also placed reliance on the cases of ***Vivek Gupta & Disha Gupta v. M/s Gurukripa Developers & Infrastructure Pvt. Ltd.***, ***Shri Deepak Kumar Khurana v. M/s Sattva Developers Pvt. Ltd.***, ***Shri Gaurav Gulati v. M/s Paramount Propbuild Pvt. Ltd.*** and ***Suresh Kumar Gupta v. M.s Nirala Porjects Pvt. Ltd.*** The Respondent has also submitted that he has reversed ITC in relation to unsold units and the same has been considered for determining the amount of profiteering in the calculation submitted by him. Therefore, the contention of the DGAP that gross ITC should be taken for arriving at the amount of profiteering was liable to be set aside.

Regarding increased input tax credit not passed on by the Respondent:

The Respondent has also claimed that all the credit notes issued in relation to the passing on of the benefit to the customers who had booked the units before implementation of the GST, have been submitted by him vide his submissions dated 18th August 2020. He has further claimed that there were 64 customers who had booked the unit in the pre-GST regime and total benefit amounting to Rs. 57,88,095/- has been passed on to the said customers by way of issuance of credit notes.

Regarding Post GST Customers:

The Respondent has also contended that the ITC benefit was factored in the contract prices charged from the customers who had booked the flats after introduction of GST. Sample copies of allotment letters sent to the new customers have also been submitted by the Respondent wherein it was stated that the prices under the agreement had been determined after considering the benefit of input tax credit available to the Respondent in accordance with Section 171 of the CGST Act.

17. The above re-joinder was supplied to the DGAP for filing clarifications under Rule 133 (2A) of the CGST Rules, 2017 vide Order dated 18.09.2020. Accordingly, the DGAP has filed clarifications dated 07.10.2020. Clarifications filed by the DGAP are as follows:-

Clarification regarding CENVAT Credit amount of Rs. 1,90,61.193/-:

The DGAP has submitted that at the time of investigation the Respondent was requested several times to submit the bifurcation of CENVAT credit for the period from 01.04.2016 to 30.06.2017, related to Pristine Pavilion Phase-III project but the Respondent did not submit the same. Therefore, the DGAP has conducted investigation on the basis of

the information and the statutory Returns submitted by the Respondent. As regards the request of re-investigation on the basis of fresh CENVAT credit details submitted by the Respondent, the DGAP has stated that there could be difference between the CENVAT credit claimed by the Respondent and the CENVAT credit taken for computation in the Investigation Report. Therefore, the profiteering might vary accordingly and the DGAP could not re-investigate the issue suo moto.

Clarifications on VAT credit:

The DGAP has further submitted that in the instant case the Respondent has not been collecting VAT from his customers and had discharged his output VAT liability on the deemed 10% value addition to the purchase value of the inputs. Therefore, there was no direct co-relation to the credit of VAT and the turnover reported in the VAT Returns for the period from April, 2016 to June, 2017. Hence, the credit of VAT paid on purchase of inputs and VAT turnover was not considered for computation of input tax credit ratio to total turnover in pre-GST period.

18. We have carefully considered all the submissions filed by the Applicants, the Respondent and the other material placed on record and it is revealed that the Applicant No. 1 & 2, vide their complaints had alleged that the Respondent was not passing on the benefit of ITC to them on the purchase of the flats in his 'Pristine Pavilion Phase-III project' even though he was availing ITC on the purchase of the inputs at the higher rates of GST which had resulted in the benefit of ITC to him and that the Respondent was also charging GST from them @12%. The complaints were examined by the Standing Committee and were

forwarded to the DGAP on 28.06.2019 and 13.09.2019 respectively for investigation. The DGAP, vide his Report dated 26.03.2019 has found that the ITC as a percentage of the total turnover which was available to the Respondent during the pre-GST period was 1.88% and during the post-GST period this ratio was 11.08%, details of which have been given in Table-A of the DGAP's Report. Accordingly, the Respondent has benefited from ITC to the tune of 9.20% (11.08% - 1.88%) of his total turnover during the post-GST period which he was required to pass on to the flat buyers of his above project as has been shown in Table-B of the Report. It is also revealed that the Respondent has not reduced the basic prices of his flats by 9.20% on account of benefit of ITC although he has been charging his homebuyers, GST at the increased rate of 12% on the pre-GST basic prices. Therefore, it is apparent that the Respondent has contravened the provisions of Section 171 of the CGST Act, 2017. The amount of the benefit of ITC which has not been passed on by the Respondent i.e. the profiteered amount comes to Rs. 4,77,62,104/- including the GST applicable on the basic profiteered amount of Rs. 4,26,44,736/- as per Annexure-15 of the Report. The above aggregate amount of profiteering also includes the profiteered amount of Rs. 2,74,854/- (inclusive of GST as applicable) in respect of the Applicant No. 2. However, no profiteered amount has been computed in respect of the Applicant No. 1 as his name does not figure in the list of the home buyers.

19. In this regard perusal of Para 7-10 (c) of the Clarifications dated 17.08.2020 furnished by the DGAP under Rule 133 (2A), on the

submissions of the Respondent shows that he has made the following admission:-

"From the above Table and Annexure-A attached, it is observed that the total ITC available is Rs. 6,47,30,882/- in place of Rs. 6,22,61,036/-. The difference has occurred inadvertently as in month of March, 2019 the Noticee, in the GSTR-3B Return, had shown net available ITC as negative figure (on account of reversal) and adding of negative figure decreased the total credit available. Copy of GSTR-3B for the month of March, 2019 is attached as Annexure-B for ready reference. On proper addition, the monthly credit accrual to the Noticee is Rs. 6,47,30,882/-. Since, the total ITC in GST regime was Rs. 6,47,30,882/- whereas in the DGAP Report dated 26.03.2020 the ITC was shown as Rs. 6,22,61,036/- and thus, there is a difference of Rs. 24,69,846/- in the figure reported and the actual figure. The difference in the ITC may lead to change in the amount of profiteering."

20. Therefore, it is clear from the above admission of the DGAP that the amount of profiteered amount would change due to the difference in the amount of ITC considered by the DGAP in his Report and the amount of ITC which was available to the Respondent. Accordingly, the profiteered amount is required to be computed again by the DGAP along with the entitlement of each eligible buyer.

21. It is also apparent from the record that the Respondent has claimed that he has passed on the benefit of ITC amounting to Rs. 49,453/- along with GST @12% of Rs. 5,934/- to the Applicant No. 2 and Rs. 51,18,389/- along with GST @12% of Rs. 6,14,219/- to the 63 other

buyers, which has not been verified by the DGAP by way of obtaining acknowledgments from the buyers. Accordingly, verification of passing on of the benefit of ITC as has been claimed by the Respondent is required to be done in respect of all such buyers.

22. It is also evident from the record that the Respondent has claimed to have passed on the ITC benefit of Rs. 57,87,995/- on account of the profiteering established against him for the period from July 2017 to March 2019. Therefore, the Respondent is also liable to pass on interest @18% on the profiteered amount to the flat buyers from the dates from which he has received the additional amount of consideration from them till the passing on of the ITC benefit, as he has used this amount in his business, as per the provisions of Section 171 (1) of the CGST Act, 2017 read with Rule 133 (3) (b) of the above Rules. It has not been explained in the Report whether the Respondent has passed on the ITC benefit along with the applicable interest or not. Accordingly, the same is also required to be computed by the DGAP.

23. The Respondent has also claimed that he has already factored in the benefit of ITC in the prices of the flats which he has sold after implementation of the GST which is also required to be verified.

24. Therefore, without going in to other merits of the present case the Report dated 26.03.2020 furnished by the DGAP cannot be accepted due to the reasons mentioned above and accordingly, the DGAP is directed to further investigate the present case under Rule 133 (4) of the CGST Rules, 2017 up to 31.10.2020 or till the date of grant of Completion Certificate, whichever is earlier, on the issues mentioned

above and submit a detailed Report under Rule 129 (6) of the above Rules. If required the DGAP shall be at liberty to take assistance of the field Tax Authorities of the Central and the State Government who are directed to extend all cooperation to the DGAP in terms of Rule 136 of the CGST Rules, 2018 and Para 38 of the "Methodology & Procedure" framed under Rule 126 of the CGST Rules, 2017 notified on 28.03.2018 by this Authority. The respondent is also directed to extend all assistance to the DGAP during the course of further investigation of the present case.

25. A copy each of this order be supplied to the Applicants and the Respondent for necessary action. File be consigned after completion.

Sd/-
(Dr. B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

(A. K. Goel)
NAA, Secretary

F. No. 22011/NAA/158/DRA/2020/6432-35 Dated: 09.12.2020
Copy To:-

1. M/s DRA Aadithya Projects Pvt. Ltd., Regd. Office:4, Ranka Chambers, 31 Cunningham Road, Banglore-560052.
2. Sh. Hussain shoaib Kothalia, R/o 22/1, Venkatesan St. Sakina Apt., Royapuram, Chennai – 600001.
3. Prakash Kandavel, House No. 3/8, EVR, Street, Santhoshpuram, Chennai - 600073.
4. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 211d Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gale Market, New Delhi-110001.
5. Guard File/NAA Website.

A. K. GOEL
SECRETARY, NAA