

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

Case No. : 42/2022  
Date of Institution : 06.07.2020  
Date of Order : 22.07.2022

**In the matter of:**

1. Sh. Arnav Datta, 801, Silver Oak, Prestige Residency, Ghodhbunder Road, Thane-400615.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2<sup>nd</sup> Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s. Prescon Realtors and Infrastructure Pvt. Ltd., 201, Prestige Precinct, 2nd Floor, Almeida Road, Panchpakhadi, Thane (W)-400601.

Respondent

Quorum:-

1. Sh. Amand Shah, Technical Member & Chairman,
2. Sh. Pramod Kumar Singh, Technical Member,
3. Sh. Hitesh Shah, Technical Member.



Present:-

1. Sh. Arnav Datta, the Applicant No. 1 in person.
2. Sh. Manoj Kumar Singh, Assistant Commissioner for the DGAP
3. Sh. Vinay Kedia, Director, Ms. Tanvi Kamblı, Sh. Pratik Jain, Sh. Niren Shethia, Sh. Chirag Bhide, Sh. Nirav Vira, Ms. Shruti Nair and Ms. Megha, Consultants, Authorised Representatives for the Respondent.

### ORDER

1. The present Report dated 26.06.2020 has been received from the Director General of Anti-Profiteering (DGAP) after a detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that an application was filed before the Standing Committee on Anti-profiteering, under Rule 128 of the CGST Rules, 2017 by the Applicant No. 1 alleging profiteering in respect of construction service supplied by the Respondent. The above Applicant alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) to him by way of commensurate reduction in the price of the Flat No. 801 purchased from the Respondent in his project "Silver Oak", situated at Ghodhbunder Road, Thane West Prestige Residency on introduction of GST w.e.f. 01.07.2017, in terms of Section 171 of the CGST Act, 2017. The above application was examined by the Standing Committee on Anti-profiteering in its meeting held on 13.09.2019, the minutes of which were received by the DGAP on 09.10.2019, whereby it was decided to forward the same to the DGAP to conduct a detailed investigation in the

matter. Accordingly, investigation was initiated to collect evidence necessary to determine whether the benefit of ITC had been passed on by the Respondent to the Applicant No. 1 in respect of construction service supplied by him.

2. The DGAP has stated that on receipt of the reference from the Standing Committee on Anti-profiteering, a Notice under Rule 129 of the CGST Rules was issued by the DGAP on 23.10.2019, calling upon the Respondent to reply as to whether he admit that the benefit of ITC had not been passed on to the Applicant No. 1 by way of commensurate reduction in price and if so, to *suo moto* determine the quantum thereof and indicate the same in his reply to the Notice as well as furnish all supporting documents. The Respondent was also given an opportunity to inspect the non-confidential evidences/information furnished by the Applicant No. 1 during the period 30.10.2019 to 31.10.2019. However, the Respondent did not avail of this opportunity. The Applicant No. 1 vide e-mail dated 09.03.2020, was afforded an opportunity to inspect the non-confidential documents/reply furnished by the Respondent on 13.03.2020 or 16.03.2020, which the Applicant did not avail of. The DGAP has stated that the period covered by the current investigation was from 01.07.2017 to 30.09.2019.

3. The DGAP has also mentioned that the time limit to complete the investigation was 08.04.2020 in terms of Rule 129(6) of the Rules. However, vide Notification No. 35/2020-Central Tax dated 03.04.2020 where, any time limit for completion/furnishing of any report, has been specified in, or prescribed or notified under the Central Goods and Service Tax Act, 2017 which fell during the period from the 20th day of



March, 2020 to the 29th day of June, 2020, and where completion or compliance of such action has not been made within such time, then, the time limit for completion or compliance of such action, shall be extended up to the 30.06.2020. Accordingly, time limit to complete the investigation was extended up to 30.06.2020.

4. The DGAP has reported that the Respondent had submitted the following documents/information vide letters and e-mails dated 31.10.2019, 07.11.2019, 12.11.2019, 06.01.2020, 07.02.2020, 19.03.2020 and 10.06.2020:-

- a) Copies of GSTR-1 returns for the period July, 2017 to September, 2019.
- b) Copies of GSTR-3B returns for the period July, 2017 to September, 2019.
- c) Tran-1 and Tran-2 for the period July, 2017 to December, 2017.
- d) GSTR-9 return for the F.Y. 2017-18.
- e) Electronic Credit Ledger for the period July, 2017 to September, 2017.
- f) Copies of VAT returns & ST-3 returns for the period April, 2016 to June, 2017.
- g) Copies of all demand letters issued and sale agreement made with the Applicant No. 1.
- h) Copy of Balance Sheet for FY 2016-17, 2017-18 & 2018-19.
- i) Copy of Agreement/Registry between the land owners and the developers for the project "Silver Oak".
- j) Status of the project "Silver Oak" as on 30.09.2019.
- k) Details of VAT, Service Tax, ITC of VAT, Cenvat credit for the period April, 2016 to June, 2017 and output GST and ITC of GST for the period July, 2017 to September, 2019 for all the projects including "Silver Oak".
- l) Copy of Electronic Credit Ledger for the period 01.07.2017 to 30.09.2019.

- m) Cenvat/Input Tax Credit Register for the F.Y. 2016-17, 2017-18, 2018-19 and for the period April, 2019 to September, 2019 reconciled with VAT, ST-3 and GSTR-3B return along with details of credit reversals.
  - n) Details of applicable tax rates, Pre-GST and Post-GST.
  - o) List of home buyers in the project "Silver Oak" along with details of benefit passed on.
  - p) Progress Report submitted to RERA till September, 2019.
5. The DGAP has also stated that the Respondent vide Notice dated 23.10.2019, was informed that if any information/documents were provided on confidential basis, in terms of Rule 130 of the Rules, a non-confidential summary of such information/documents was required to be furnished. The Respondent vide his e-mail dated 10.06.2020 had informed that all the documents and information including copies of the returns submitted were to be considered confidential information and should not be shared with any third party/person.
6. The DGAP on perusal of the subject application, various replies of the Respondent and the documents/evidences on record has mentioned that the main issues for determination were: -
- (i) Whether there was benefit of reduction in rate of tax or ITC on the supply of construction service by the Respondent after implementation of GST w.e.f. 01.07.2017 and if so,
  - (ii) Whether the Respondent passed on such benefit to the recipients by way of commensurate reduction in price, in terms of Section 171 of the CGST Act, 2017.
7. The DGAP has further reported that the Respondent vide his letter dated 06.01.2020 had submitted copies of demand letters issued to the



Applicant No. 1. The details of schedule of payment in installment plan are furnished in Table-A below:-

**Table- 'A'**

Sr.No.	Particulars	Percentage(%) of Payment
1.	On Booking (Earnest Money Deposit)	100000
2.	Within 15 days from date of booking (inclusive of EMD)	9.75%
3.	Upon Execution of Agreement	20.25%
4.	On Completion of Plinth	15.00%
5.	On Completion of 1st Slab	5.00%
6.	On Completion of 5th Slab	5.00%
7.	On Completion of 10th Slab	5.00%
8.	On Completion of 18th Slab	5.00%
9.	On Completion of Roof Slab	5.00%
10.	On Completion of Walls & Internal Plaster of the said Apartment.	5.00%
11.	On Completion of flooring, Bathroom Tiles and Waterproofing of the said apartment.	5.00%
12.	On Completion of External Plumbing, External Plaster and Elevation work of the said apartment floor.	5.00%
13.	On Completion of Electrical Wiring & Switches, lift wells, lift lobbies of the said apartment floor, and Podium around the building.	5.00%
14.	On Completion of Doors & Windows fixing of the said apartment	5.00%
15.	On Intimation of Possession (with Architects Completion Certificate)	5.00%
	TOTAL	100.00%

8. The DGAP has also informed 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) 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 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*

has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever was earlier". Thus, the ITC pertaining to the residential units which were under construction but not sold was provisional ITC which may be required to be reversed by the Respondent, if such units remained unsold at the time of issue of the completion certificate, 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 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"*.

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 investigation and the Respondent was required to recalibrate the selling price of such units to be sold to the prospective buyers by considering the proportionate benefit of additional ITC available to him post-GST.



9. 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 the input services (CENVAT credit of Central Excise Duty was not available) in respect of the flats for the project "Silver Oak" sold by him. The Respondent was not eligible to avail ITC of VAT paid on the inputs, as he was in Composition Scheme. Further, post-GST, the Respondent could avail ITC of GST paid on all the inputs and input services. The DGAP on the basis of the details of the ITC availed by the Respondent, his turnovers from the project "Silver Oak" has furnished the ratios of ITCs to turnovers, during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to September, 2019) periods, in Table-B below:-

**Table-'B'**

(Amount in Rs.)

Sr. No.	Particulars	Total (Pre-GST) April, 2016 to June, 2017	Taxable Turnover (July, 2017 to September, 2019)	Total (Post-GST)
1	CENVAT of Service Tax Paid on Input Services used for flats (A)	84,44,162	-	-
2	Input Tax Credit of VAT Paid on Purchase of Inputs (B)		-	-
3	Total CENVAT/Input Tax Credit Available (C)= (A+B)	84,44,162	-	-
4	Input Tax Credit of GST Availed (D)	-	7,10,66,924	7,10,66,924
5	Turnover for Flats as per Home Buyers List (E)	3,24,07,778	72,36,81,229	72,36,81,229
6	Total Saleable Area (in SQF) (F)	1,31,890		1,31,890
7	Total Sold Area (in SQF) relevant to turnover (G)	7,237		76,366
8	Relevant ITC [(H)= (C)*(G)/(F)/ (D) * (G)/ (F)]	4,63,343		4,11,48,660
<b>Ratio of Input Tax Credit Pre/Post-GST [(I)=(H)/(E)]</b>		<b>1.43%</b>		<b>5.69%</b>

10. The DGAP has claimed from the above Table-'B', that the ITC as a percentage of the turnover that was available to the Respondent during



the pre-GST period (April, 2016 to June, 2017) was 1.43% and during the post-GST period (July, 2017 to September, 2019), it was 5.69% in Project "Silver Oak" which confirmed that post-GST, the Respondent had benefited from additional ITC to the tune of 4.26% [5.69% (-) 1.43%] of the turnover.

11. The DGAP has further observed that the Central Government, on the recommendation of the GST Council, had levied 18% GST (effective rate was 12% in view of 1/3rd abatement for land value) on construction service, vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. The effective GST rate was 12% for flats. Accordingly, on the basis of the figures contained in Table- 'B' above, the comparative figures of the ratios of ITCs availed/available to the turnovers 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 in Table-C below:-

**Table-C** (Amount in Rs.)

Sr. No.	Particulars		
1	<b>Period</b>	<b>A</b>	<b>July, 2017 to September, 2019</b>
2	Output GST rate (%)	B	12
3	Ratio of CENVAT credit/ Input Tax Credit to Total Turnover as per table - 'B' above (%)	C	1.43% (Pre-GST) 5.69% (Post-GST)
4	Increase in input tax credit availed post-GST (%)	D= 5.69% less 1.43%	4.26%
5	<b>Analysis of Increase in input tax credit:</b>		
6	Base Price raised during July, 2017 to September, 2019 (Rs.)	E	72,36,81,229
7	GST raised over Base Price (Rs.)	F= E*B	8,68,41,747
8	Total Demand raised	G=E+F	81,05,22,976
9	Recalibrated Base Price	H= E*(1-D) or 95.74% of E	69,28,52,408
10	GST @12%	I = H* B	8,31,42,289
11	Commensurate demand price	J = H+I	77,59,94,697
12	<b>Excess Collection of Demand or Profiteering Amount</b>	<b>K= G-J</b>	<b>3,45,28,279</b>

12. The DGAP has claimed from Table-'C' above that the additional ITC of 4.26% of the turnover should have resulted in commensurate reduction in the base price as well as cum-tax price. Therefore, in terms of Section 171 of the CGST Act, 2017, the benefit of such additional ITC was required to be passed on to the recipients.
13. The DGAP has deduced from the above calculation explained in Table-C that on the basis of the aforesaid CENVAT/input tax credit availability pre and post-GST and the details of the amount collected by the Respondent from the Applicant No. 1 and other buyers in respect of the flats sold by the Respondent during the period 01.07.2017 to 30.09.2019, the benefit of ITC that needed to be passed on by the Respondent to the buyers of flats came to Rs. 3,45,28,279/- which included 12% GST on the base amount of Rs. 3,08,28,820/-. The unit no. wise break-up of this amount has been given in **Annexure-12** to the Report dated 26.06.2020. This amount was inclusive of profiteered amount of Rs. 2,31,580/- (including GST) which was the profiteered amount in respect the Applicant No. 1 mentioned at serial No. 12 of **Annexure-12**. The DGAP has also stated that the service has been supplied in the State of Maharashtra only.
14. The DGAP has concluded that the benefit of additional ITC of 4.26% of the taxable turnover has accrued to the Respondent and the same was required to be passed on to the Applicant No. 1 and other recipients. The provisions of Section 171 of the CGST Act, 2017 have been contravened by the Respondent inasmuch as the additional benefit of ITC @4.26% of the base price received by the Respondent during the period 01.07.2017 to 30.09.2019, which needed to be passed on by the



Respondent to the buyers of flats came to **Rs. 3,45,28,279/- (Rupees Three Crore Forty Five Lakhs Twenty Eight Thousand Two Hundred and Seventy Nine)** which included 12% GST, had not been passed on to the Applicant No. 1 and other recipients. On this account, the Respondent has realized an additional amount to the tune of Rs. 2,31,580/- (including GST) (mentioned at serial No. 12 of Annexure-12) from the Applicant No. 1 which included both the profiteered amount @4.26% of the taxable amount (base price) and GST on the said profiteered amount. Further, the investigation revealed that the Respondent has also realized an additional amount of Rs. 3,42,96,699/- as mentioned in Annexure-12 which included both the profiteered amount @4.26% of the taxable amount (base price) and GST on the said profiteered amount from 81 other recipients who were not Applicants in the present proceedings. These recipients were identifiable as per the documents on record as the Respondent has provided him names and addresses along with unit no. allotted to them. Therefore, this additional amount of Rs. 3,42,96,699/- was required to be returned to such eligible recipients.

15. The DGAP has also reported that the present investigation covered the period from 01.07.2017 to 30.09.2019. Profiteering, if any, for the period post September, 2019, 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.

16. The above Report was considered by this Authority in its meeting held on 07.07.2020 and the Respondent was issued a notice on 13.07.2020



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 and the Respondent and Applicant No.1 were asked to appear before the Authority on 03.02.2021 via video conferencing due to Covid-19 pandemic. The personal hearing in the matter was held on 03.02.2021 via video-conferencing. Sh. Vinay Kedia, Director, Ms. Tanvi Kambli, Sh. Pratik Jain, Sh. Niren Shethia, Sh. Chirag Bhide and Ms. Shruti Nair, Consultants, appeared on behalf of the Respondent and Sh. Arnav Datta, the Applicant No. 1 appeared in person. Thereafter, before the Order could be passed, one of the Technical Members of the Authority who had heard the matter was transferred out and thereafter the Chairman of the Authority had also left the Authority. Since, the quorum of the Authority of minimum three Members, as provided under Rule 134 was not available till 23.02.2022, the matter could not be decided. With the joining of two new Technical Members in February 2022, the quorum of the Authority was restored from 23.02.2022 and the personal hearing in the matter was accorded to the Respondent and Applicant No. 1 on 25.03.2022 via video-conferencing. Sh. Vinay Kedia, Director, Sh. Pratik Jain, Sh. Niren Shethia, Sh. Nirav Vira and Ms. Megha, Consultants, appeared on behalf of the Respondent and Sh. Arnav Datta, the Applicant No. 1 appeared in person. During the hearing, the Respondent was directed to file his consolidated submissions and the same were filed by him on 15.04.2022.

17. The Respondent vide his submissions dated 29.08.2020, 02.10.2020, 12.11.2020, 02.01.2021, 18.02.2021 and 28.03.2022 has inter alia submitted that:-

**I. Brief background of the Project and the steps taken suo-moto by the Respondent to comply with requirements of Section 171 of GST Act:-**

The Respondent has mentioned that he was engaged in the business of development of residential projects and has developed the Project Prestige Residency, Ghodbunder Road, Thane (west) in three phases. The building Silver Oak forms a part of the project Prestige Residency among other buildings constructed on the plot of land. Silver Oak and Hill View were the last buildings to be constructed in the complex, completed in 2019 and 2017 respectively. Both these buildings, Hill view and Silver Oak, constructed on the same plot of land, were similar in terms of his product offerings, location, amenities, specifications etc. Further, sales for both the projects were more or less carried out simultaneously for the major period of time. Out of the 100 flats in Silver Oak, 7 flats were sold under the pre-GST regime i.e., prior to 1 July 2017 and the remaining 93 flats were sold in the GST regime. The Respondent has also provided an image of the entire complex for ease of understanding the project layout. The Respondent has submitted that the Projects Silver Oak and Hill view were equitable projects for the purpose of determination of pricing, margins and other related factors. While broadly determining the average saleable prices for each of these projects, he had applied his margin on the projected cost of construction and appropriately reduced the benefit of ITC that would be available on such cost. Accordingly, the benefit of credit

available to the Respondent on account of both Service Tax (in the pre-GST regime) and the eligible GST on all procurements (post GST) has been factored into while arriving at the saleable prices for each project. The Respondent has further stated that the Project Hill view was completed prior to GST, and hence, the benefit on account of credit was limited to the eligible CENVAT credit for services used in the construction. However, in the case of Project Silver Oak, the Respondent while determining the average price to be offered to customers, had projected the benefit of ITC that would be available to the Respondent owing to the introduction of GST and the additional benefit that would flow to the Respondent due to eligibility of tax paid on the procurement of goods (on which credit of Excise Duty and VAT/CST was unavailable prior to GST) and factored in such benefit against the construction cost. Notwithstanding the aforesaid points, the Respondent has submitted that the offer prices referred above were subject to various market factors impacting the pricing. However, the Respondent has broadly maintained his average pricing computed on a periodic basis for determining the offer prices of the flats. Further, it was pertinent to note that the market conditions and pricing practically remained constant in the period from 2017 to 2020. This was also evident from the Maharashtra Govt. Ready Reckoner for stamp value, which remained unchanged over three years from 2017 to 2020. He has further submitted that he has provided a broad comparison of the average saleable prices per sq. ft. for the Projects Hill view and Silver Oak for different periods as under:-



Period	Avg saleable price per sq. ft.		Difference	Remarks
	Hill view	Silver Oak		
Pre GST	11,456.54*	10,253.00	1,203.54	<p>While determining the projected cost of construction for Silver Oak, the Respondent had anticipated the benefit of ITC that would become available post introduction of GST and appropriately reduced the element of such ITC from the estimated cost.</p> <p>Accordingly, the offer price determined has factored the benefit of ITC available under GST. The average saleable price also included the launch discount offered to the first 7 customers, and hence, was quoted lower than the standard price.</p>

Period	Avg saleable price per sq. ft.		Difference	Remarks
Pre OC#		10,793.12	663.42	<p>The reduction in price was primarily on account of the passing of ITC benefit to the customers. The benefit passed on was higher than the actual amount of additional ITC benefit derived on a per sq. ft. basis (the actual ITC benefit has been discussed below)</p> <p>It was pertinent to note that each and every customer was informed at the time of booking that the agreement value of the flat was exclusive of GST @ 12% which will be payable over &amp; above. Further, the sales contracts were entered into after due</p>

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Period	Avg saleable price per sq. ft.		Difference	Remarks
				consideration of the impact of GST benefit.
Post OC#	12,248.03	11,879.15	368.88	The saleable price for Silver Oak post GST was lower than that of Hill view, since the Respondent was eligible to claim ITC for taxes paid on his construction costs and has been appropriately factored in the cost of construction and ultimately passed on to the customers. Further, the Respondent has also factored in the impact of ITC reversal arising on flats sold post OC.

\* The average price for Hill View computed for agreements entered one year prior to receipt of OC, i.e. prior to February 2017; #OC for Hill View and Silver Oak was received in February 2017 and May 2020 respectively.



- The average percentage reduction between the sale prices of the two projects was around 6.2%. The Respondent has further submitted a CA certificate on the detailed comparison of costs per sq. ft., average sale prices and margins in both projects to substantiate the comparison. Additionally, he has attached the photographs of hoardings projecting the prices offered in both projects.
- The Respondent has tried to establish from the above comparison of prices between the two equitable projects that the prices for the Silver Oak project were arrived at after incorporating the benefit of ITC available to him on procurements made in the post GST period and hence, it was evident that the Respondent has suo-moto passed on the credit benefit appropriately to his customers. The Respondent has further averred that on computing the actual benefit earned by him (i.e. primarily on account of eligibility of ITC on his goods procurements which was unavailable in the erstwhile regime), the benefit passed on to the customers was higher than the quantum of additional ITC. The Respondent has provided below the quantum of ITC benefit per sq. ft. post introduction of GST arising to him:-

Sr. no.	Particulars	Amount (In Rs. Crores)
1	ITC on procurement of goods (FY 2017-18)	1.75
2	ITC on procurement of goods (FY 2018-19)	1.29
3	ITC on procurement of goods (FY 2019-20)	0.39

<b>Total</b>	<b>3.43</b>
<b>ITC benefit per sq. ft. (on total project area)</b>	<b>370 per sq. ft.</b>
<b>Percentage to average sale price (%)</b>	<b>3.45%</b>

- The Respondent has claimed from the above working that he had passed on a higher benefit to his customers as compared to the actual savings to him on account of eligible ITC. The Respondent has stated that despite passing on the benefit by him to all his customers, the Respondent has provided a certain amount again to the Applicant No. 1 merely as a measure to protect his goodwill and maintain the relationship with his customers. Now, since the matter has taken a legal recourse, the Respondent has submitted that since he has already passed on the benefit to the Applicant No. 1, the excess amount paid to him as a mere goodwill measure, be refunded to the Respondent along with 24% interest and resultant cost and damages. The Respondent has suo-moto carried out the necessary compliance required as per the anti-profiteering provision under GST, and has passed on the required amount of benefit arising on additional credits, to all his customers.

## **II. The DGAP Report was based on incomplete facts and information:-**

The Respondent has furnished his submissions i.e. financials, relevant returns, agreement details, etc. during the months of January 2020 to March 2020 to the DGAP and he was unable to provide complete facts and submissions mainly in relation to the project details and steps undertaken by him in compliance to the anti-profiteering provisions due to sudden outbreak of Covid-19 and the resultant lockdown and

movement restrictions. Therefore, he has stated that the investigation Report submitted by the DGAP should not be considered.

**III. Computation of benefit on the basis of the DGAP's methodology was not suitable for the real estate industry and has already been stayed by the Hon'ble Delhi High Court:** - The Respondent has submitted that the approach and methodology adopted by the DGAP needed reconsideration as the same was not suitable for the real estate industry, since there was no link between the accrual of credit and the taxable turnover reported for any selected period. He has further, submitted that similar computation methodology adopted in the case of M/s Pyramid Infratech Pvt. Ltd. was presently under review by the Hon'ble Delhi High Court and interim relief has been provided by granting a stay on the order in question.

**IV. Section 171 of the CGST Act was ultra vires the Constitution and thus, investigation should be either dropped or kept in abeyance till the constitutional validity was being scrutinized by the Hon'ble High Court:-** The Respondent has submitted that Section 171 of the CGST Act violated Article 19(1)(G) of the Constitution. Right to trade was a fundamental right guaranteed under Article 19(1)(g) of the Constitution of India and included the right to determine prices, and such right could not be taken away without any explicit authority under the law passed by the Parliament or State legislature under Entry 34 of the Concurrent List (List III) of the Seventh Schedule to the Constitution of India. Only in exceptional cases, and in respect of a few specified goods, the Government has enacted laws to control prices. The



Respondent has submitted that the provisions of Section 171 of the CGST Act were not akin to the price control regulations enacted in terms of Entry 34 of the Concurrent List. Consequently, any such effort would be nothing but violation of the freedom of trade guaranteed under the Constitution of India. Therefore, the price control exercised by the DGAP was ultra vires the fundamental rights guaranteed under Article 19(1)(g) of the Constitution of India. In this regard, reliance was also placed on a recent decision in the case of **Abbott Healthcare Pvt. Ltd. vs Union of India & others**, wherein, the issue was constitutional validity of the anti-profiteering provisions provided in the GST law. The Hon'ble Delhi High Court observed that similar petitions were pending with the Court in the case of **Hindustan Unilever Ltd vs Union of India and Jubilant Foodworks Ltd. vs Union of India**. Accordingly, the Hon'ble High Court has stayed further proceedings against the suppliers in the above cases. The Respondent has further stated that the fundamental basis of the investigation was currently under scrutiny of the Hon'ble High Court. Accordingly, the Respondent has submitted that the present investigation against him should be either dropped or at least keep in abeyance till the time constitutional validity was upheld by the Hon'ble Court.

**V. The Incremental credit was considered instead of blocked credit:-**

The Respondent has submitted that the methodology adopted by DGAP was not correct and has failed to consider the following aspects:-

- 1) The DGAP has done the analysis on the basis of the incremental credits arising out of the implementation of GST and thereafter

applied a percentage on the said credits as an anti-profiteering measure.

2) The DGAP has merely done a comparison between the credits available in pre-GST with that available post implementation of GST without analyzing the reasons. The actual reasons for the availability of such incremental credits were not looked into for arriving at the benefits to be passed. He has highlighted that there were primarily 2 reasons for such incremental credits-

➤ Increase in tax rates i.e. tax on services from 15% to 18% and on goods from 22% to 28%;

➤ Availability of blocked credits

3) The Respondent has averred that the rate of tax on services was 15% in pre-GST regime, which was subsequently raised to 18% in GST. The credit availability/eligibility was not changing as Service Tax paid on execution of works contract was earlier available as CENVAT for utilization against the output tax liability; and the same continued to be available as credit under GST. The change on this account was the increase in tax rate from 15% to 18% for which additional working capital was applied.

4) The DGAP should have taken into consideration this aspect as there was no change in the credit availability/ eligibility and only an increase in tax rate was the reason for such incremental credit.

5) Further, in pre-GST regime the credit of Excise Duty/ VAT on inputs was not available as it was explicitly restricted. With the implementation of GST, the said restricted credits were available

for availment and utilization, which needed to be passed on to the customers. The Respondent has also illustrated as below:-

Particulars	Pre GST	Particulars	Post-GST
Sale Price	200	Sale Price	200
Base Cost	100	Base Cost	100
Taxes	10	Taxes	18
Eligibility	Non-Creditable	Eligibility	Creditable
Credit as per return	0	Credit as per return	18

**The DGAP's Approach-** Comparison of 0 with 18 for the purpose of incremental credit

**The DGAP's Report-** Comparison of Rs. 0.84 crores with Rs. 7.11 crores for the purpose of incremental credit

The Respondent has further elaborated that the credit of Rs. 10 which was earlier not available, was available post implementation of GST. Further, due to the increase in tax rates, the amount of tax has increased from Rs. 10 to Rs. 18. Hence, these were the two reasons resulting in an incremental credit for the Respondent. However, the DGAP has merely compared the available credits in both regimes without analysing the reasons for such increase. An increase in the rate of tax cannot be termed as an anti-profiteering benefit in the hands of the Respondent, and hence, such approach should be relooked upon by the DGAP for computation of benefits to be passed on to the customers.

**Approach should be** - Passing of benefits of blocked credits of Rs. 10, now available

**The Respondent's working** – As stated in the above paras, the Respondent has appropriately factored in the element of ITC in his construction cost and has passed on the benefit of a higher amount (as compared to actual benefit) to his customers.



**VI. The Computation of benefit should majorly consider only ITC**

**pertaining to goods:** - The Respondent has stated that the credit of Service Tax paid on services procured for the construction of the project was already available as CENVAT against the taxable Service Tax liability. Such credit on services continued to be available under GST regime as well. Given the above fact, there has been an increase in the rate of tax on services from 15% to 18% from the pre-GST to the current regime, for which additional working capital has been applied. Treating such additional credit arising on account of increased tax rate as a benefit in the hands of the Respondent, would be an incorrect approach, and since the benefit of additional credit was on account of eligibility of taxes paid on goods in the GST regime, which was unavailable earlier, it would be more appropriate to exclude the element of eligible credits on services to compute the appropriate amount of benefit to be passed on. The additional benefit on account of ITC (majorly on goods) amounts to approx. Rs. 3.43 crores, i.e. a benefit of 370 per sq. ft. The Respondent has averred that the actual benefit passed on by the Respondent to his customers was much higher than such amount and hence, there was no question of anti-profiteering or any benefit not being passed on.

**VII. Approach adopted by the DGAP need reconsideration:-**

- 1) Complete Turnover Approach (Billed as well as Un-billed amount of sale flats should be considered)

In arriving at the actual benefits to be passed on to the customers, the DGAP in his Report should have considered the entire turnover of flats sold as the base instead of just considering the turnover reported in GSTR-3B due to the following reasons-

In arriving at the actual benefits to be passed on to the customers, the DGAP in his Report should have considered the entire turnover of flats sold as the base instead of just considering the turnover reported in GSTR-3B due to the following reasons-

- % Completion of projects-

- The Respondent has submitted that if the benefit was required to be passed on to the customers, then the benefit would also be adjusted in the future receivables due from the customers for which sales have already been made. The said quantum of receivables due from the customers should also be taken into consideration for arriving at the actual percentage of benefits to be passed. However, the DGAP in his Report has considered the total ITC attributable to the sold units, but the turnover considered was only the part payment of sold units received from the customers.
- For arriving at the actual benefit, the project should be looked in entirety. For any meaningful comparison there should be common and equitable parameters so that the comparative analysis gave a true and correct view.
- The approach adopted by the DGAP would be more relevant for a trading/manufacturing concern since there was a one to one comparison between sales and purchases. However, the said approach could not be adopted for real estate projects, on account of various factors which inter-alia included the pattern for raising of demands to the customers, accrual of credit and also few uncertain factors such as sales undertaken post OC

and the resultant ITC reversal thereon, changes in procurement rates, etc.

2) Objective of the GST Act:-

The objective of the GST Act was to give the overall benefit to the customers and the benefits, to be passed on, should be for the entire sales consideration irrespective of the amount demanded. The DGAP report restricted the working only to the amount demanded and the % completion or the entire turnover approach was ignored.

3) Cost incurred has no direct link with Turnover:-

- Cost incurred on construction has no direct link with the Turnover in case of Real Estate Industry. Typically, there was a wide gap between Turnover (i.e. collection from customers) and construction cost at the beginning of project and over the construction lifetime it narrowed. This resulted in lower ITC % to Turnover in the initial period and a higher ITC % to Turnover in the later period.
- Thus, computation of benefit on the basis of percentage of ITC to Sales in the respective regime was not the correct methodology to compute the GST benefit, since there was no synchronisation between the accrual of credit and the value of taxable service during a certain period.
- The below table captured the ratio of ITC to the taxable turnover of three quarters from July 2017 to March 2018 for the Project Silver Oak (i.e. from the post GST period):-

Sr. No.	Particulars	July 17 to Sept 17	Oct 17 to Dec 17	Jan 18 to Mar 18	Total (July 17 to Mar 18)
1	Input tax credit of GST				



Sr. No.	Particulars	July 17 to Sept 17	Oct 17 to Dec 17	Jan 18 to Mar 18	Total (July 17 to Mar 18)
	(A)	5,602,931	13,027,916	12,321,616	30,952,463
2	Total Taxable Turnover (B)	19,767,151	32,717,485	9,274,323	61,758,959
3	Proportionate ITC (C) (A) * Sold area / Saleable area	632,605	1,892,042	2,324,728	5,839,822
4	Ratio of ITC post GST (D) = (C)/(B)	3.20%	5.78%	25.07%	9.46%

4) The Respondent has claimed from above table that the amount of ITC for a certain selected period has no direct link to the turnover booked for such period, i.e. based on the recoveries demanded from the customers. Forming a computation of profiteering benefit by comparing the ITC and turnover figures for incomplete periods would always give absurd results, and hence was not a reliable basis to determine the amount of benefit.

5) Methodology adopted by DGAP not suitable for the real estate industry:-

- The real estate industry followed Accounting Standard-7 for recognition of revenue and costs for the purpose of accounting in the books. Similarly, provisions for recognition of 'taxable income' has been issued by the Government of India in exercise of the powers conferred under section 145(2) of the Income Tax Act, 1961.
- Both the above quoted regulations required recognition of costs and revenue based on the stage/percentage of completion of the contract as on the reporting date. Thus, it was the uniqueness of the construction industry that has been recognized and harmonized by the Government through different regulations and considered

the entire duration of the project which generally spread across multiple financial years and not any specific period from the said duration to determine his taxability.

- The approach adopted by the DGAP, would always give skewed results as it was based on the quantum of credit availed and the consideration received from the customers for that period. The Respondent has captured this analysis by way of a detailed illustration evidencing that the DGAP's computational methodology was inappropriate for the real estate industry. Hence, in the present case, such approach was not reliable to determine the quantum of benefit to be passed on.
  - It can be observed from the given illustration that there was a variation in the anti-profiteering amounts computed for the 3 identical projects A, B, and C through the DGAP method, though the related factors such as costs, stage of completion, taxes, etc. have been assumed to be same. However, the results through the DGAP approach were distorted.
  - Basis the above analysis, he has submitted that the approach and methodology adopted by DGAP needs reconsideration as the same was not relevant for the real estate industry which only works on the basis of percentage completion of the property. Even the architect certification, demand from the customers, approvals from the banks were all based on the stage/percentage completion of the property.
- 6) Assuming methodology adopted by the DGAP stood scrutiny of legislative requirements, there were multiple apparent errors in the

computation done by the DGAP:- Computation considered additional tax of 12% on alleged GST benefit. The Respondent has submitted that the computation of alleged profiteering done by the DGAP considers additional GST of 12% on the amount of benefit that was required to be passed in accordance with the method adopted by him.

- Even where the methodology adopted by the DGAP was considered, the quantum of benefit should have been computed by comparing taxable value (i.e. turnover excluding GST) charged from customer instead of value including GST.
- GST amount collected on the differential base price cannot be construed as profiteering made by the Respondent as the same was duly deposited with the Government and not pocketed by the Respondent. However, the Report deviated from the basic principal of unjust enrichment (as such tax was duly deposited to the Government) and have applied GST of 12% on the GST benefit amount required to be passed as per him.

7) The Basis adopted by the DGAP for allocation of ITC between sold and unsold portion was incorrect:-

- In absence of any prescribed methodology, the DGAP has considered project area as a basis to allocate ITC pertaining to sold and unsold portion of the property. The DGAP has computed "Relevant ITC" by drawing proportion of sold area vis-a-vis saleable area which has been done for both pre-GST and post-GST regime.
- The Respondent has submitted that area was not a correct basis to allocate credit pertaining to sold and unsold portions and "value"



was more logical and correct base. Allocation of credit based on area does not concur with the provisions of GST law which has been explained below

- Under GST law, value was the basis for determining output tax liability payable by any taxpayer. Unless value of goods or services being supplied was not determined, the output tax liability cannot be computed.
- Area was not relevant for GST laws in any manner and his details were required to be submitted under different laws as applicable from time to time.
- Even calculation of benefit to be passed on to the customers have been made based on sale value (i.e. demand price) by the DGAP. Thus, usage of two different basis (i.e. allocation of ITC basis area and distribution of alleged GST benefits basis value) in the same computation would give illogical and absurd results.
- Section 171 of the GST Act also specified that benefit should be passed by way of commensurate reduction in "prices". Hence, it was evident that GST laws also considered the price as a relevant basis for anti-profiteering provisions.

8) ITC reversal on account of sales effected post receipt of completion certificate (CC) / occupation certificate (OC) should be reduced from the total post GST ITC:-

- By virtue of sections 17(2) and 17(3) of the CGST Act, the Respondent was required to carry out a proportionate reversal of ITC attributable to the units sold post the receipt of CC, since such sales were exempted from the payment of GST.

- The post GST ITC considered by the DGAP also included such ITC which was required to be reversed by the Respondent (ITC reversal for Silver Oak towards post CC / OC sales was approx. Rs. 0.9 crores).
- As per Section 171 of the GST law, the Respondent was required to pass on the benefit of any additional ITC available in the hands of the Respondent to his customers by way of commensurate reduction in prices.
- However, given that the Respondent was liable to reverse ITC to the extent of flats sold after receipt of CC / OC, such ITC cannot be termed as a benefit available with the Respondent. Hence, including such amount in the computation for determining the anti-profiteering benefit would not be a correct approach. The Respondent has stated that expecting him to pass on a benefit to the customers which was over and above the benefit actually available with him was unreasonable and hence such amount should be deducted from the ITC considered for the post GST period.
- The Respondent has further submitted that the quantum of such ITC reversal depended on the sales undertaken post CC / OC which was not determinable up to such date. Hence, the actual benefit to be passed on to the customers could be computed only on receipt of OC.
- The Respondent has highlighted that he has already passed on the benefit of the complete ITC and has not added the impact of such ITC reversal to the price of his pre-OC sales.

**VIII. No methodology or guidelines prescribed under GST laws to ascertain benefit to be passed:-**

1) Absence of detailed guidance for computing profiteering:-

- In terms of Section 171 of the CGST Act, any reduction in the rate of tax on supply of goods and/or services or the benefit of enhanced ITC shall be passed on to the recipient by way of commensurate reduction in prices. The Respondent has noted that this Authority has been constituted with specific powers granted to it under Chapter XV of the CGST Rules. Rule 126 of the CGST Rules empowered this Authority to determine the methodology and procedure to determine whether the taxpayer has complied with the provisions of Section 171 of the CGST Act. The relevant extract of Rule 126 of the CGST Rules was reproduced hereunder:-

*"Rule 126. Power to determine the methodology and procedure: The authority may 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 ITC has been passed on by the registered person to the recipient by way of commensurate reduction in prices."*

In view of the above, the Respondent has submitted that the CGST Act and the CGST Rules empowered this Authority to lay down the methodology for determining the manner in which the benefit of reduced GST rate or enhanced credit be passed on to the recipient. However, no precise computation methodology or principles have been laid down by the Authority. The methodology to be prescribed



by this Authority must capture the basic principles that would be relevant to all industries keeping in view the common trade practices which would ensure that Section 171 of the CGST Act was interpreted in a uniform manner across all taxpayers. Such methodology was the crux of Section 171 of the CGST Act because the same would ensure equity, consistency and uniformity in defining the scope of Section 171 of the CGST Act.

2) No machinery provisions available under GST law and hence, charging provisions of anti-profiteering would fail in this case:-

- The Respondent has stated that this Authority was constituted to curb unfair profit-making activities by the trading community so as to ensure that the traders did not profiteer on account of reduction in GST rate or enhanced GST credit under the GST regime. Further, the GST Flyer on this Authority published by the Central Board of Indirect and Customs (CBIC) provided an overview of the anti-profiteering provisions stipulating that this Authority has been constituted to examine whether the suppliers of goods and/or services have passed on the benefit of reduced GST rate or enhanced ITC by way of commensurate reduction in the prices of goods and/or services so as to ensure that the consumer was protected from arbitrary price increase in the name of GST.
- The Respondent has noted that the methodology for determining whether the taxpayer has passed on the benefit of reduced rate of GST or increased ITC by way of commensurate reduction in prices was one of the essential ingredients of Section 171 of the CGST Act. In the absence of the aforesaid methodology, the entire

proceedings would be a futile exercise. He has placed reliance on the Apex Court's decision in the case of **CIT vs. B. C. Srinivasa Shetty**, wherein, the question of imposition of tax on capital gains on the goodwill of a newly commenced business was involved. The Apex Court had held that the computation and charging provisions form the essence of any tax legislation and that the failure of the computation provision would automatically result in failure of the charging provisions. The relevant extract of the Apex Court decision was reproduced hereunder:-

*"Section 45 was a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with him can be applied for determining the chargeable profits and gains. All transactions encompassed by Section 45 must fall under the governance of his computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by Section 45 to be the subject of the charge."*

In light of the plethora of judgments passed by the Hon'ble Supreme Court, it was a settled position that where there was no machinery for assessment, the law being vague, it would not be open to the authorities to arbitrarily assess to tax. Reliance in this regard was placed on the following decisions:-

- **K.T. Moopil Nair vs. State of Kerala;**
- **Rai Ramkrishna vs. State of Bihar;**

- **State of A.P. vs. Nalla Raja Reddy;**
  - **Vishnu Dayal Mahendra Pal vs. State of U.P.; and**
  - **D.G. Gose and Co. (Agents) (P) Ltd. vs. State of Kerala**
- However, the DGAP had initiated the anti-profiteering investigation with a pre-conceived notion that the Respondent had not passed on the benefit of the reduced GST rate to his customers. Such arbitrariness would render the entire investigation conducted by the DGAP an otiose exercise resulting in grave injustice to him. In this regard, he referred to the Apex Court's decision in the case of **Natural Resources Allocation** wherein it was held as under:-

*"Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which were rational, informed with reasons and guided by public interest etc. All these principles were inherent in the fundamental conception of Article 14. This was the mandate of Article 14 of the Constitution of India."*

The Respondent has submitted that this Authority might issue suitable guidelines for computation of the extent of profiteering and direct the DGAP to submit the revised report in accordance with such guidelines.

**IX. Factors affecting pricing in real estate industry:-** The Respondent has further averred that real estate industry was a service industry and



was different than a manufacturing/trading concern. The real estate industry has its own mode of operation, pricing, marketing, service delivery. Real estate industry differed from region to region, state to state and city to city. In real estate industry the price being offered to different customers was dependent on multiple factors such as demand and supply, stage of completion of the property, working capital requirement, holding capacity of the developer, change in the rate of stamp duty, payment schedule of the customer, advance payments from the customers, etc. Few of the factors were listed below basis which the final price was negotiated: -

- Market dynamics with respect to unsold inventory and changing demand and supply;
- Payment plan taken by customer e.g. Construction linked payment, 20:80 payment scheme, 10:90 payment scheme etc.
- Operational schemes/discounts- Festival offers on Akshay Tritiya, Gudi Parva, free stamp duty/registration etc.
- Stage of construction for e.g. booking in pre-launch of project vs booking at considerable completion of project.
- Prices of competitor in near vicinity, location preference of customer.

18. The DGAP has filed clarifications vide letters dated 15.09.2020 and 29.10.2020 on the above submissions of the Respondent which has been given as under:-

a) **The DGAP's Report was based on incomplete facts and information: -**

The Respondent has submitted that the DGAP has submitted his Report on the basis of incomplete data/documents and his submissions were ignored etc. In this regard, it was submitted that the

NOI was issued on 23.10.2019. In reply, the Respondent submitted a letter dated 30.10.2019 showing inability to submit data/documents and sought 4 weeks' extension. After that a reminder dated 06.11.2019 was issued to the Respondent. In reply to the reminder, the Respondent vide his letter dated 12.11.2019 sought 4 weeks' time to submit data. When nothing was heard from the Respondent after 4 weeks, second reminder was issued to the Respondent on 16.12.2019 for submission of required information by 27.12.2019. The Respondent submitted desired information on 06.01.2020, 07.02.2020 and 19.03.2020. Vide letter dated 10.06.2020, the Respondent declared all data/information submitted as confidential. Nowhere, it was mentioned by the Respondent that the data/information submitted by him was incomplete. Therefore, above allegation of the Respondent was not correct. 8

- b) **Computation of benefit on the basis of the DGAP's methodology was not suitable for the real estate industry and has already been stayed by the Hon'ble Delhi High Court:-** The power to determine Methodology & Procedure has been delegated to the this Authority under Rule 126 of the CGST Rules, 2017 as per the provisions of Section 164 of the CGST Act. The above delegation has been granted to this Authority and functions and powers to be exercised by the Authority have been approved by Legislature. The Authority in exercise of power delegated to it under the Rule 126 has notified the Methodology and Procedure vide Notification dated 28.03.2018 which was also available on its website. However, no fixed/uniform mathematical methodology can be determined as the facts of each

case differ. Therefore, the determination of the profiteered amount has to be done by taking into account particular facts of each case. As the facts of each case were different in a Real Estate project like percentage of completion of project; different proportion ITC availed because of different purchase pattern of inputs like cement, steel, fittings, etc.; area sold; taxable turnover etc. before or after the GST implementation. All these factor have been carefully considered in preparation of Report in the Respondent's case.

- c) **Section 171 of the CGST Act was ultra vires the Constitution and thus, investigation should be either dropped or kept in abeyance till the Constitutional validity was being scrutinized by the Hon'ble High Court:-** It was incorrect to say that Section 171 of the CGST Act, 2017 was unconstitutional as it nowhere infringed upon the fundamental right to carry business. It was submitted that the mandate of Section 171 was limited to the extent of protecting the interest of consumers by ensuring that both the benefits of tax reduction and ITC which were sacrificed by the Central and the State Governments from precious tax revenue, needed to be passed on to the end consumers who bear the burden of tax. The Respondent was absolutely free to exercise his right to practice any profession, or to carry on any occupation, trade or business, as per the provisions of Article 19 (1) (g) of the Constitution. He could also fix his prices and profit margins in respect of the supplies made by him. The intent of the Section 171 is the welfare of the consumers who are voiceless, unorganized and vulnerable.



Entries 33 and 34 of the Concurrent List of the Seventh Schedule of the constitution mentioned below have no relevance in this matter as the DGAP has not fixed the price or business method:-

[33. Trade and commerce in, and the production, supply and distribution of,—

(a) the products of any industry where the control of such industry by the Union was declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b) foodstuffs, including edible oilseeds and oils;

(c) cattle fodder, including oilcakes and other concentrates;

(d) raw cotton, whether ginned or unginned, and cotton seed;

and

(e) raw jute.]

[33A. Weights and measures except establishment of standards.]

34. Price control.

The contention of the Petitioner made with respect to cases of **Abbott Healthcare Private Limited & Anr Vs Union of India & Ors. (Hon'ble Delhi High Court) W.P.(C) No. 4213/2019** was not relevant in the present case as the Hon'ble Court observed that there were other petitions pending which have raised a similar challenge of the constitutional validity of the Section 171 of the CGST Act and other provisions apart from challenging the orders of the this Authority. These included WP (C) 378 of 2019 (**Hindustan Unilever Ltd. v. Union of India**) and WP (C) 2347 of 2019 (**Jubilant Foodworks Ltd.**

*v. Union of India*). Therefore all the cases raising similar issues were bundled together and final decision was yet to come.

- d) **Incremental credit considered instead of blocked credit:-** 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 the input services (CENVAT credit of Central Excise Duty was not available) in respect of the flats for the project "Silver Oak" sold by him. The Respondent was not eligible to avail ITC of VAT paid on the inputs, as he was functioning under Composition Scheme. Further, post-GST, the Respondent could avail ITC of GST paid on all the inputs and input services.

With regard to increase in the burden of output tax it was submitted that the Respondent had charged the same from his customers. As regards the blocked credit, it was mentioned that the credit which was not available in the pre GST era was part of his cost and post GST this credit became available, the same should have been passed on to the recipients in terms of the provisions of Anti-Profiteering.

- e) **Computation of benefit should majorly consider only ITC to goods:-** Cenvat credit of goods was not available pre GST to the Respondent. The Respondent was eligible to get credit of Service Tax in pre-GST. Post-GST credit of entire input was allowed which nullified the effect of Service Tax Credit and resulted in the additional benefit due to implementation of GST. Therefore, all available factors have been carefully considered in the Report and benefits pre-GST and post-GST have been compared for working out profiteering.

- f) **Approach adopted by the DGAP needed reconsideration:-**The DGAP has investigated the matter as prescribed by the Anti-Profiteering law and guidelines issued by this Authority. Period of July, 2017 to September, 2019 has been taken for investigation and the same was compared with the nearest previous period i.e. (April, 2016 to June, 2017) which was the most logical to work out profiteering.
- g) **Assuming methodology adopted by DGAP stands scrutiny of legislative requirements, there were multiple apparent errors in the computation done by DGAP:** - The Respondent has not pointed out any specific error in the Report. However, the Respondent has again raised issue of methodology i.e. what figures should be taken and how the computation should be done. In this regard, it was already submitted that The "Methodology and Procedure" has been prescribed under Section 171 (1) itself. The Authority has notified the same vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. Methodology prescribed by the Respondent was not in terms of this Authority.
- h) **No methodology or guidelines prescribed under GST laws to ascertain benefit to be passed:** - The methodology and guidelines have been prescribed by this Authority in terms of Rule 126 of the CGST Rules, 2017 in term of the statue. The main contours of the procedure and methodology in this regard (passing on of the two benefits) were enshrined in Section 171 itself. The Section said "any reduction" which means the reduction in the rate of tax on any good and/or service and not on any entity/group/company. This meant that every instance of profiteering was to be seen and checked SKU-wise



by considering each good/service, at the granularity of SKUs. Further, the Section said "any supply" i.e. each taxable supply made to each recipient thereby clearly indicating that setting off of benefits by any supplier was not allowed. Then the word "commensurate" gave the extent of benefit to be passed on by the way of reduction in price. The Authority therefore has to see that the benefit if at all passed to the recipient by the supplier was actually commensurate to the reduction of rate of tax or the additional ITC available. However, to give further clarification and to elaborate upon this legislative intent behind the law, this Authority has been empowered to determine/expand the scope, procedure and methodology in detail.

It was also 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. As the facts of each case were different in a real estate project like percentage of completion of project; different proportion ITC availed because of different purchase pattern of inputs like cement, steel, fittings, etc.; area sold; taxable turnover etc. before or after the GST implementation, for example, if a project was completed 10% before the implementation of the GST and 90% was completed after the GST came into force and there was another project which was completed 90% before the GST and 10% after the implementation of the GST, the above parameters would vary substantially in both of these cases. Different schemes of payment existed in real estate sector like construction-linked plan and subvention scheme hence payment schedule would be different in both of these schemes. There were different projects in real estate

sector like residential units or commercial units or combined. Government has also launched schemes like affordable housing which added further variations in facts of each case. The date of commencement and date of completion differed from one project to another. For example, a project was started in 2013 but got completed just 60% before the GST and another project which may have started in the same year but got completed just 30% during the same period. There would be huge variation in the above parameters of these projects. Similarly, the completion scenario differed in post-GST period. Before the issuance of Occupancy Certificate/ Completion Certificate, it was considered as a supply of service under the CGST Act but after the Occupancy Certificate/ Completion Certificate was issued it did not come under the purview of GST but under various States' Registration/Stamp Acts. N

In light of above facts, quantum of profiteering was determined by the DGAP by taking into account the particular facts of each case. Hence, there could not be one-size-fits-all mathematical methodology. Moreover, there was no need to define the word 'commensurate' as its literal meaning carried the essence of the law, as has been given in Section 171 of the CGST Act, 2017.

- i) **Factors affecting pricing in real estate industry:** - Not relevant with this case as anti-profiteering law did not interfere in pricing and market practices.
- j) **The DGAP has not commented on the compliance undertaken by the Respondent for Anti-profiteering:-** The Respondent had not submitted any proof of suo-moto steps taken to comply with the

requirement of Section 171 of the CGST act, 2017 upto the submission of the Report. However, if he has passed on benefit of ITC in terms of Section 171 of the CGST Act, he could place it before this Authority for consideration. The DGAP has data only upto date of submission of his Report and till then the Respondent has not submitted any such data or proof.

The DGAP has offered comments only on matter relevant to present case. If comments were not offered on an issue then it did not mean acceptance. Only Silver Oak project has been investigated and reported in terms of Section 171 of the CGST Act, 2017 as per all the data and submissions made by the Respondent mentioned in the Report. In his submissions dated 31.08.2020, the Respondent had suggested his own methodology and compared pricing of the project under investigation with another completed project. In this regard, it was submitted that the DGAP's Report was based on the methodology as per section 171 of the CGST Act, 2017 and profiteering could not be worked out comparing with the pricing of other project.

19. We have carefully considered the Reports of the DGAP, the submissions made by the Respondent and the material placed on record. On examining the various submissions we find that the following issues need to be addressed in the present case:-

- a. Whether the Respondent was required to pass on and has passed on the commensurate benefit of reduction in the rate of tax to his customers?



b. Whether there was any violation of the provisions of Section 171 (1) of the CGST Act, 2017 in this case?

20. In this connection perusal of Section 171 of the CGST Act shows that it provides as under:-

*“(1). Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.*

*(2). The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.”*

*(3). The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.*

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

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

*Explanation:- For the purpose of this section, the expression "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of ITC to the recipient by way of commensurate reduction in the price of the goods or services of both."*

21. It has been observed from the record that the Respondent was engaged in supply of construction service. He has developed the Project Prestige Residency, Ghodbunder Road, Thane (west) in three phases. The building Silver Oak formed a part of the project Prestige Residency among other buildings constructed on the plot of land. Silver Oak and Hill View were the last buildings to be constructed in the complex, which were completed in 2019 and 2017 respectively. Both these buildings, Hill view and Silver Oak, have been constructed on the same plot of land. Out of the 100 flats in Silver Oak, 7 flats were sold under the pre-GST regime i.e., prior to 1 July 2017 and the remaining 93 flats were sold in the GST regime.

22. The Respondent has contended that the DGAP's Report was based on incomplete facts and information as complete data/information could not be furnished by him to the DGAP on account of Covid-19 restrictions. However, it is evident from the submissions of the Respondent that at no stage he has produced the data before this Authority which he had allegedly not produced before the DGAP which falsifies his above claim. The DGAP's Reports show that enough opportunities were afforded to the Respondent to submit his complete documents, however, he had

failed to produce any further data. Therefore, the above contention of the Respondent cannot be accepted.

23. The Respondent has argued that the computation of benefit on the basis of the DGAP's methodology was not suitable for the real estate industry and it has already been stayed by the Hon'ble Delhi High Court. In this regard it is clear that the the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and ITC or for computation of the profiteered amount has been outlined in Section 171 (1) of the CGST Act, 2017 itself which provides 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 is apparent from the plain reading of the above provision that it mentions "reduction in the rate of tax or benefit of ITC" which means that if any reduction in the rate of tax is ordered by the Central and the State Governments or a registered supplier avails benefit of additional ITC post GST implementation, the same have to be passed on by him to his recipients since both the above benefits are being given by the above Governments out of their scarce and precious tax revenue. It also provides that the above benefits are to be passed on any supply i.e. on each product or unit of construction or service to every buyer and in case they are not passed on, the quantum of denial of these benefits or the profiteered amount has to be computed for which investigation has to be conducted in respect of all such products/units/services by the DGAP. What would be the 'profiteered amount' has been clearly defined in the explanation attached to Section 171. These benefits can also not be passed on at the entity /



organisation / branch/ invoice/ business vertical level as they have to be passed on to each and every buyer at each product/unit/service level by treating him equally. The above provision also mentions "any supply" which connotes each taxable supply made to each recipient thereby making it evident that a supplier cannot claim that he has passed on more benefit to one customer on a particular product therefore he would pass less benefit or no benefit to another customer than what is actually due to that customer, on another product. Each customer is entitled to receive the benefit of tax reduction or ITC on each product or unit or service purchased by him subject to his eligibility. The term "commensurate" mentioned in the above Sub-Section provides the extent of benefit to be passed on by way of reduction in the price which has to be computed in respect of each product or unit or service based on the price and the rate of tax reduction or the additional ITC which has become available to a registered person. The legislature has deliberately not used the word 'equal' or 'equivalent' in this Section and used the word 'Commensurate' as it had no intention that it should be used to denote proportionality and adequacy. The benefit of additional ITC would depend on the comparison of the ITC/CENVAT credit which was available to a builder in the pre-GST period with the ITC available to him in the post GST period w.e.f. 01.07.2017. Similarly, the benefit of tax reduction would depend upon the pre rate reduction price of the product and quantum of reduction in the rate of tax from the date of its notification. Computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from product to product or unit to unit or service to

service and hence no fixed mathematical methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a buyer. Similarly, computation of the profiteered amount is also a mathematical exercise which can be done by any person who has elementary knowledge of accounts and mathematics as per the Explanation attached to Section 171. However, to further explain the legislative intent behind the above provision, this Authority has been authorised to determine the 'Procedure and Methodology' which has been done by it vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, no fixed mathematical formula, in respect of all the Sectors or the products or the services, can be set for passing on the above benefits or for computation of the profiteered amount, as the facts of each case are different. In the case of one real estate project, date of start and completion of the project, price of the flat/shop, mode of payment of price or instalments, stage of completion of the project, rates of taxes pre and post GST implementation, amount of CENVAT credit and ITC available, total saleable area, area sold and the taxable turnover received before and after the GST implementation would always be different from 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 the other project. Therefore, no set procedure or mathematical methodology can be framed for determining the benefit of additional ITC which has to be passed on to the buyers of the units. Moreover, this Authority under Rule 126 has been empowered to 'determine' Methodology & Procedure and not to 'prescribe' it. Similarly, the facts of the cases relating to the sectors of Fast Moving Consumer



Goods (FMCG), restaurant service, construction service and cinema service are completely different from each other and therefore, the mathematical methodology adopted in the case of one sector cannot be applied to the other sector. Moreover, both the above benefits are being given by the Central as well as the State Governments as a special concession out of their tax revenue in the public interest and hence the suppliers are not required to pay even a single penny from their own pocket and therefore, they are bound to pass on the above benefits as per the provisions of Section 171 (1) which are abundantly clear, unambiguous, mandatory and legally enforceable. The above provisions also reflect that the true intent behind the above provisions, made by the Central and the State legislatures in their respective GST Acts, is to pass on the above benefits to the common buyers who bear the burden of tax and who are unorganised, voiceless and vulnerable. It is abundantly clear from the above narration of the facts and the law that no elaborate mathematical calculations are required to be prescribed separately for passing on the benefit of ITC and computation of the profiteered amount. This Authority is under no obligation to provide the same to the Respondent. The Respondent cannot deny the benefit of ITC to his customers on the above ground and enrich himself at the expense of his buyers as Section 171 provides clear cut methodology and procedure to compute the benefit of ITC and the profiteered amount and he is well aware of the benefit of additional ITC which he has obtained post-GST.

Further, there is no stay on methodology adopted by the DGAP while calculating profiteering amount. This observation of the Respondent is



unfounded as anti-profiteering matters are sub-judice in Hon'ble High Courts. Therefore, this Authority finds that the above plea of the Respondent cannot be accepted

24. The Respondent has alleged that Section 171 of the CGST Act, 2017 is ultra vires of the constitution and thus, investigation should be either dropped or kept in abeyance till the constitutional validity was being scrutinised by the Hon'ble High Court. In this connection it would be appropriate to mention that this Authority has not acted in any way as price controller or regulator as it doesn't have the mandate to regulate the same. The Respondent is absolutely free to exercise his right to practise any profession, or to carry on any occupation, trade or business, as per the provisions of Article 14 and 19 (1) (g) of the Constitution. He can also fix his prices and profit margins in respect of the supplies made by him. Under Section 171 this Authority has only been mandated to ensure that both the benefits of tax reduction and ITC which are the sacrifices of precious tax revenue made from the kitty of the Central and the State Governments are passed on to the end consumers who bear the burden of tax. The intent of this provision is the welfare of the consumers who are voiceless, unorganised and vulnerable. This Authority is charged with the responsibility of ensuring that the both the above benefits are passed on to the general public as per the provisions of Section 171 read with Rule 127 and 133 of the CGST Rules, 2017. Hence, the anti-profiteering related Rules and Section 171 of the Act have express approval of the Parliament, all the State Legislatures, the Central and all the State Governments and the GST Council and therefore, Section 171 and the Rules are constitutional

and are not violative of Article 14 and 19 (1) (g) of the Constitution. This Authority has nowhere interfered with the business decisions of the Respondent.

The contention of the Respondent made with respect to case of **Abbott Healthcare Private Limited & Anr Vs Union of India & Ors. [W.P. (C) No. 4213/2019 before Hon'ble Delhi High Court]** is not applicable in the present case as the Hon'ble Court has observed that there are other petitions pending in the Hon'ble Court which have raised similar challenge of the constitutional validity of the Section 171 of the CGST Act, 2017 and other provisions apart from challenging the orders of this Authority which included **WP (C) 378 of 2019 in case of Hindustan Unilever Ltd. v. Union of India** and **WP (C) 2347 of 2019 in case of Jubilant Foodworks Ltd. v. Union of India**. Therefore all the cases raising similar issues have been clubbed together and are being heard by the Hon'ble High Court of Delhi and no final judgment has been passed by the Court till date. Therefore, the above plea is not maintainable.

25. The Respondent has contested the incremental credit considered instead of blocked credit by the DGAP in his Report dated 26.06.2020. In this regard, this Authority agrees with the DGAP 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 the input services (CENVAT credit of Central Excise Duty was not available) in respect of the flats for the project "Silver Oak" sold by him. The Respondent was not eligible to avail ITC of VAT paid on the inputs as he was availing Composition Scheme. Further, post-GST, the Respondent became



eligible to avail ITC of GST paid on all the input goods and services. The Respondent is deliberately trying to mislead by claiming that he has been compelled to pay more GST on services of 18% when Service Tax in the pre-GST period was 15% only, whereas not even a single rupee of tax was being paid in the pre-GST regime or in the post-GST regime by him as he was getting full CENVAT credit on the taxes paid by him in the pre-GST period and was adding those taxes on which ITC was not available like the Central Exise Duty in his cost of the flat and realizing it from his customers. He is also getting full ITC on all the taxes paid by him on his purchase of goods and services in the post GST period and is also charging GST from his buyers, hence there has been no adverse impact on this tax liability post-GST. Therefore, the above allegation of the Respondent is frivolous and is not maintainable. ✓

26. The Respondent has contended that the computation of benefit should majorly consider only ITC pertaining to goods. The plea taken by the Respondent on this ground is fallacious as Cenvat Credit of goods was not available to the Respondent in pre GST and he was eligible only to avail credit of Service Tax in pre GST. However, ITC of both goods and services has been allowed to him in the post-GST period which has resulted in the additional benefit of ITC to him due to implementation of GST. Therefore, the DGAP has correctly considered the ITC on services in his Report and accordingly, ITC benefit accrued to him pre GST and post GST has been compared for calculating profiteering.

27. The Respondent has also argued that approach adopted by the DGAP needs reconsideration and complete turnover approach should be considered, i.e. Billed as well unbilled amount of sale of flats and



Cost incurred has no direct link with turnover. This Authority finds that the DGAP has rightly considered the turnover related to flats from homebuyers' list submitted by the Respondent himself wherein the Respondent has billed the amount to buyers. Accordingly, the DGAP has correctly computed the profiteered amount by taking ITC to turnover ratios in the pre-GST & post-GST periods into account which is correct, reasonable and logical and in accordance with the mandate of Section 171 of the CGST Act, 2017. Since accrual of ITC may not be dependent on the amount collected from the buyers but avilment of ITC is certainly related to the turnover as he utilises ITC in discharging his final output liability and tax on which he recovers from buyers through invoices on monthly basis.


28. The Respondent has contested that the computation of profiteered amount has considered additional tax of 12% on alleged GST benefit. This Authority finds that the above contention raised by the Respondent is not correct as the Respondent has not only collected excess base prices from the customers which they were not required to pay due to the reduction in the rate of tax but he has also compelled them to pay additional GST on these excess base prices which they should not have paid. By doing so the Respondent has defeated the very objective of both the Central as well as the State Governments which aimed to provide the benefit of ITC to the general public. The Respondent was legally not required to collect the excess GST and therefore, he has not only violated the provisions of the CGST Act, 2017 but has also acted in contravention of the provisions of Section 171 (1) of the above Act as he has denied the benefit of ITC to his customers by charging excess GST.

Had the Respondent not charged the excess GST, the customers would have paid less price while purchasing the flats from the Respondent and hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit denied by the Respondent. Therefore, this Authority finds that the above contention of the Respondent is untenable and hence it cannot be accepted.

29. The Respondent has also contended that ITC reversal on account of sales effected post receipt of completion certificate (CC)/occupation certificate (OC) should be reduced from the total post GST ITC. In this regard, the Authority finds that the OC in the above project was issued to the Respondent in the month of May, 2020. However, the DGAP has conducted his investigation for the period from 01.07.2017 to 30.09.2019 during which no reversal of ITC has been made by the Respondent. The same would be considered at the time of calculation of the benefit after 30.09.2019 when the OC was received or ITC was claimed by him. Therefore, the DGAP has not factored into the ITC reversal on account of sales made post-issuance of OC while calculating the profiteering amount as no details of unsold flats can be submitted by the Respondent until the OC is received. In light of above facts, the above plea of the Respondent is not sustainable.

30. The Respondent has averred that while determining the projected cost of construction for Silver Oak, the Respondent had anticipated the benefit of ITC that would become available post introduction of GST and appropriately reduced the element of such ITC from the estimated cost. Accordingly, the offer price determined has factored the benefit of ITC available under GST. The average saleable price also included the



launch discount offered to the first 7 customers, and hence, was quoted lower than the standard price. It is apparent from the records that the 7 flats of the project 'Silver Oak' were sold by the Respondent in pre-GST regime. Therefore, the claim made by the Respondent that he had already factored in the benefit of ITC which would become available to him after implementation of GST Act, is completely wrong as the above decision of offering discount or passing ITC benefit to the first 7 flat buyers was taken when the GST Act was not even passed and also the estimated cost of construction was approved much before the implementation of the GST Act i.e. 01.07.2017. Hence, there arises no question of including the ITC benefit in sale of above 7 flats which were sold in pre-GST period when the Act itself was not into existence.  Therefore, there is no question of including the benefit of ITC in sale of flats of above project. Further, there is no ground to compare average sale prices of Silver Oak and Hill View projects as details of computation of the price have neither been given nor required to be taken into consideration by this Authority as it only concerns with the passing of benefit of ITC.


31. The Respondent has argued that various factors like Market dynamics with respect to unsold inventory and changing demand and supply; Payment plan taken from customer e.g. Construction linked payment, 20:80 payment scheme, 10:90 payment scheme etc.; Operational schemes/discounts- Festival offers on Akshay Tritiya, Gudi Parva, free stamp duty/registration etc.; Stage of construction for e.g. booking in pre-launch of project vs booking at considerable completion of project; Prices of competitor in near vicinity, location preference of customer



affect pricing in real estate industry are considered while fixing price. However, this contention is baseless as these are promotional schemes launched by the Respondent to increase his sales and have nothing to do with ITC benefit. Therefore, irrespective of above parameters, he cannot deny ITC benefit to the eligible buyers as per Section 171.

32. The Respondent has averred that he has suo motu passed on the ITC benefit appropriately to the eligible customers which was higher than the quantum of additional ITC. From the available records, this Authority finds that the Respondent has failed to submit any documentary evidence which confirms that he has passed on benefit of ITC in terms of Section 171 of the CGST Act, 2017. The DGAP's Reports also states that the Respondent has not submitted any data or proof which validates his above claim. Therefore, his plea is untenable and hence cannot be accepted.

33. The Respondent has contended that the benefit was required to be passed on to the customers, then the benefit would also be adjusted in the future receivables due from the customers for which sales have already been made. The said quantum of receivables due from the customers should also be taken into consideration for arriving at the actual percentage of benefits to be passed. This Authority finds that the Respondent is eligible to avail additional ITC benefit in monthly GST Returns; therefore, he has to pass on the same to the eligible customers every month. Hence, the profiteering amount has to be computed as per consideration received by him and reflected in his monthly GST Returns not on the basis of future receivables. Hence, above plea is not maintainable.

34. The Respondent has argued that computation of benefit on the basis of percentage of ITC to Sales in the respective regime was not the correct methodology to compute the GST benefit, since there was no synchronisation between the accrual of credit and the value of taxable service during a certain period. This Authority observes that accrual of ITC may not be dependent on the amount collected from the buyers but availment of ITC is certainly related to the turnover as he utilises ITC in discharging his final output liability and tax on which he recovers from buyers through invoices on monthly basis. Therefore, the DGAP has correctly computed the profiteered amount by taking ITC to turnover (Sales) ratios in the pre-GST & post-GST periods into account which is correct, reasonable and logical and in accordance with the mandate of Section 171 of the CGST Act, 2017. 

35. The Respondent has averred that the real estate industry followed Accounting Standard-7 for recognition of revenue and costs for the purpose of accounting in the books. Similarly, provisions for recognition of 'taxable income' have been issued by the Government of India in exercise of the powers conferred under section 145(2) of the Income Tax Act, 1961. This Authority finds that the DGAP has computed the profiteered amount by taking ITC to turnover ratios in the pre-GST & post-GST periods into account in accordance with Section 171 of the Act, 2017. Further, there is no principle of accounting which forbids computation of profiteered amount as has been done in his Report. Therefore, the above claim of the Respondent is not defensible.

36. The Respondent has contested that the area was not a correct basis to allocate credit pertaining to sold and unsold portions and "value" was

more logical and correct base. Allocation of credit based on area does not concur with the provisions of GST law. This Authority concurs with the DGAP that area sold has been considered by the DGAP wherein the payment has been received by the Respondent from the buyers while computing ITC to turnover ratios which gives relevant ITC. Hence, it is logical and apt method to arrive at profiteering amount in terms of Section 171 of the Act, 2017.

37. The Respondent has also mentioned the judgement passed in the case of Commissioner of Income Tax v. B. C. Srinivasa Setty in support of his argument. When this judgement was studied it was found that it is related to valuation of the goodwill for computation of income tax which is not the matter in the present case. Hence, it is submitted that the above case is not relevant in case of the Respondent. ✓

38. The Respondent has also mentioned that there was no machinery for assessment; therefore, it was open to the authorities to arbitrarily assess the tax. In this regard, he has relied upon the following decisions:-

- **K.T. Moopil Nair vs. State of Kerala;**
- **Rai Ramkrishna vs. State of Bihar;**
- **State of A.P. vs. Nalla Raja Reddy;**
- **Vishnu Dayal Mahendra Pal vs. State of U.P.; and**
- **D.G. Gose and Co. (Agents) (P) Ltd. vs. State of Kerala**

However, these cases cannot be followed in the present case as no 'assessment' is done in the Anti-profiteering cases as is done in the tax cases hence no machinery is required as there is no levy of tax. Therefore, the cases cited by the Respondent are not relevant in the present case.



39. The Respondent has also quoted the decision passed by the Apex Court in the case of Natural Resources Allocation in his defence and has stated that this Authority might issue suitable guidelines for computation of the extent of profiteering and direct the DGAP to submit the revised Report in accordance with such guidelines. It is pertinent to mention here that the Methodology and Procedure had 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 in this regard are enshrined in Section 171 itself and has been discussed in detail in para supra. The DGAP has submitted his Report accordance with the provisions of Section 171 and hence no separate guidelines are required to be issued. Therefore, the above claim of the Respondent is not tenable. ✓

40. It is clear from the plain reading of Section 171 (1) mentioned above that it deals with two situations; one relating to the passing on the benefit of reduction in the rate of tax and the second pertaining to the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from the DGAP's Report that there has been no reduction in the rate of tax in the post GST period; hence the only issue to be examined is as to whether there was any net benefit of ITC with the introduction of GST. On this issue it has been revealed from the DGAP's Report that the ITC as a percentage of the turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 1.43% and during the post-GST period (July, 2017 to September, 2019), it was 5.69% in Project "Silver Oak". This clearly confirms that post-GST, the Respondent has benefited from additional input tax credit

to the tune of 4.26% [5.69% (-) 1.43%] of the turnover and the same was required to be passed on to the customers/flat buyers/recipients. The DGAP has calculated the amount of ITC benefit to be passed on to all the flat buyers as Rs. 3,45,28,279/- for the project 'Silver Oak' which was availed by the Respondent the details of which are mentioned in Table- C supra.

41. The Authority finds no reason to differ from the above-detailed computation of profiteering in the DGAP's Report or the methodology adopted and hence, this Authority determines the profited amount for the period from 01.07.2017 to 30.09.2019, in the instant case, as Rs. 3,45,28,279/- for the project 'Silver Oak'. This Authority under Rule 133 (3) (a) of the CGST Rules, 2017 orders that the Respondent shall reduce the prices to be realized from the buyers of the flats/shops commensurate with the benefit of ITC received by him as has been detailed above. ✓
42. The Respondent is also liable to pay interest as applicable on the entire amount profited, i.e. Rs. 3,45,28,279/- for the project 'Silver Oak'. Hence the Respondent is directed to also pass on interest @18% to the customers/ flat buyers/ recipients on the entire amount profited, starting from the date from which the above amount was profited till the date of passing on/ payment, as per provisions of Rule 133 (3) (b) of the CGST Rules 2017.
43. A complete list of homebuyers has been attached with this Order, with the details of amount of benefit of ITC to be passed along with interest @ 18% in respect of the project 'Silver Oak' of the Respondent as per **Annexure-A**.



44. We also order that the profiteering amount of Rs. Rs. 3,45,28,279/- for the project 'Silver Oak' along with the interest @ 18% from the date of receiving of advance from the homebuyer till the date of passing the benefit of ITC shall be paid/passed on by the Respondent within a period of 3 months from the date of passing of this order failing which it shall be recovered as per the provisions of the CGST Act, 2017.

45. 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 project 'Silver Oak' 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. However, perusal of the provisions of Section 171 (3A) under which penalty has been prescribed for the above violation shows that it has been inserted in the CGST Act, 2017 w.e.f. 01.01.2020 vide Section 112 of the Finance Act, 2019 and it was not in operation during the period from 01.07.2017 to 30.09.2019 when the Respondent had committed the above violation and hence, the penalty prescribed under Section 171 (3A) cannot be imposed on the Respondent retrospectively. Accordingly, notice for imposition of penalty is not required to be issued to the Respondent.

46. The concerned jurisdictional CGST/SGST Commissioner is directed to ensure compliance of this Order. It may be ensured that the benefit of ITC is passed on to each homebuyer as per Annexure- A attached with this Order along with interest @18%. In this regard an advertisement of appropriate size to be visible to the public may also be published in minimum of two local Newspapers/vernacular press in



Hindi/English/local language with the details i.e. Name of builder (Respondent) – M/s Prescon Realtors and Infrastructure Pvt. Ltd., Project- 'Silver Oak' Location- Maharashtra and amount of profiteering so that the concerned homebuyers can claim the benefit of ITC if not passed on. Homebuyers may also be informed that the detailed NAA Order is available on Authority's website [www.naa.gov.in](http://www.naa.gov.in). Contact details of concerned Jurisdictional CGST/SGST Commissioner may also be advertised through the said advertisement.

47. The concerned jurisdictional CGST/SGST Commissioner shall also submit a Report regarding compliance of this order to this Authority and the DGAP within a period of 4 months from the date of passing of this order.

48. Further, the Hon'ble Supreme Court, vide its Order dated 23.03.2020 in Suo Moto Writ Petition (C) no. 3/2020, while taking suo-moto cognizance of the situation arising on account of Covid-19 pandemic, has extended the period of limitations prescribed under general law of limitation or any other specified laws (both Central and State) including those prescribed under Rule 133(1) of the CGST Rules, 2017, as is clear from the said Order which states as follows:-

*"A period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings."*

Further, the Hon'ble Supreme Court, vide its subsequent Order dated 10.01.2022 has extended the period(s) of limitation till 28.02.2022 and the relevant portion of the said Order is as follows:-

*"The Order dated 23.03.2020 is restored and in continuation of the subsequent Orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings."*

Accordingly this Order having been passed today falls within the limitation prescribed under Rule 133(1) of the CGST Rules, 2017.

49. A copy each of this order be supplied to the DGAP, the Respondent, the Applicant No. 1, the concerned Commissioners CGST /SGST and the Director, Town Planning and Valuation Department, Maharashtra State for necessary action. File be consigned after completion.

**Annexed:** Annexure A in Pages 1 to 6


Sd/-  
(Amand Shah)  
Technical Member &  
Chairman

Sd/-  
(Pramod Kumar Singh)  
Technical Member

Sd/-  
(Hitesh Shah)  
Technical Member



Certified Copy

  
(Dinesh Meena)  
Secretary, NAA

F. No. 22011/NAA/169/Prescon/2020/7640-7646 Date: 22.07.2022  
Copy To:

1. M/s. Prescon Realtors and Infrastructure Pvt. Ltd., 20, Prestige Precinct, 2nd Floor, Almeida Road, Panchpakhadi, Thane (W)- 400 601.
2. Shri Arnav Datta, 801, Silver Oak, Prestige Residency, Ghodbunder Road, Thane- 400 615.
3. Directorate General of Anti-Profitteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
4. The Chief Commissioner, Mumbai Zone, CGST & C.Ex., 115, GST Bhavan, M. K. Road, Churchgate, Mumbai-400 020.
5. The Commissioner of State Tax, Maharashtra State. GST Bhavan, Mazgaon, Mumbai-400010.
6. The Director, Town Planning, Maharashtra, Pune Central office, Old Building, Pune-411001.
7. Guard File.

**ANNEXURE-A**

**LIST OF HOMEBUYERS OF THE PROJECT "SILVER OAK"**

<b>Sr. No.</b>	<b>Name of Customer</b>	<b>Unit No.</b>	<b>Amount of ITC benefit to be passed on (Amount in Rs.)</b>
<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>
1	Mr. Rajmohan Lakshmikumar R.	303	4,15,957
2	Mrs. Reshma Satyajeeet Shinde	403	4,15,957
3	Mr. Hemant Madhavrao Patwardhan	501	1,95,619
4	Mr. Devendra Maharshi	502	4,771
5	Dr. Ramesh Vittal Saliyan	503	4,11,947
6	Mr. Prasad V. Sahastrabuddhe	601	4,99,472
7	Mr. Abhijeet Mahashabde	602	5,48,200
8	Mr. Saurabh Shantwan	603	1,49,849
9	Mr. Amod Avinash Kulkarni	604	4,15,957
10	Mr. Hitesh M. Jagtap	701	5,54,850
11	Mrs. Vaishali Parag Adarkar	702	1,37,572
12	Mr. Sachin Mahipat Jadhav	703	10,735

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13	Mr. Santanu Mallik Thakur	704	4,15,957
14	Mr. Arnav Kumar Datta	801	2,31,580
15	Mr. Manish S. Shinde	802	4,39,058
16	Mr. Vyas Mohan	803	4,11,947
17	Mrs. Anushree Puthran	804	50,365
18	Mr. Kunjur Ramachandra Shetty	901	5,34,633
19	Mr. Nilesh Dashrath Jangam	902	2,32,481
20	Mrs. Premila Ishwaralal Raghuvanshi	903	4,23,975
21	Mr. Ameya Suresh Mainkar	904	4,15,957
22	Mr. Panchal Ramesh Narayandas	1001	5,24,053
23	Ms. Saumya Varghese	1002	5,10,509
24	Mrs. Sanjivani M. Tendulkar	1003	3,87,133
25	Mr. Girish Ramanathan	1004	4,19,482
26	Mr. Narendra Ganpatrao Tiple	1101	2,06,803
27	Mrs. Dipika Sushil Patil	1102	4,86,386

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28	Mr. Ashutosh Khetan	1103	4,19,482
29	Mr. Prasad Jakhadi	1104	4,15,370
30	Mr. Saikat Saha	1201	2,32,653
31	Mrs. Deepali Nitin Kakade	1202	5,54,850
32	Ms. Janhavi Bajirao Sathe	1203	4,31,612
33	Mr. Jai Narain Rastogi	1204	4,05,230
34	Mr. Mukesh Pukhraj Rawal	1301	5,38,380
35	Mr. Shesh Narayan Pandey	1302	4,30,640
36	Mr. Shubham Chandraprakash Singh	1303	4,27,568
37	Mr. Parag Malaviya	1304	3,83,801
38	Mr. Tushar Chhagan Satdeve	1401	5,26,851
39	Mr. Abhijit Madhav Gokhale	1402	5,39,631
40	Mr. Sameer Suhas Sanaye	1403	3,88,531
41	Mr. Deepak Chauhan	1404	4,06,586
42	Mr. Prabhat Dayanand Rai	1501	5,19,393

43	Mr. Deep Haripatram Narayan	1502	5,04,556
44	Mr. Pawan Thakur	1503	4,31,612
45	Mr. Hemant R. Yadav	1504	4,23,525
46	Mr. Alap Prakash Deshpande	1601	5,37,284
47	Ms. Milred Saini	1602	5,37,954
48	Mr. Sudhir Kumar Jerath	1603	4,06,190
49	Mr. Sirin Islam Shaikh	1604	4,31,612
50	Mrs. Naziya Javed Qureshi	1701	5,36,390
51	Mr. Mohan Amin	1702	5,46,474
52	Mr. Kartik Neelakantan	1703	4,35,655
53	Mr. Santosh Martand Gandhe	1704	4,33,633
54	Mr. Sanjay Ramniklal Chhatbar	1801	5,54,850
55	Mr. Amol Madhukar Ridhore	1802	4,37,030
56	Mr. Yashpal Jasubhai Wala	1803	3,83,900
57	Mr. Vinay Shankar Munukuntla	1804	59,841



58	Mr. Michael M. D'silva	1901	5,04,556
59	Mr. Satish Vitthal Patil	1902	4,88,368
60	Mr. Shanmukhkumar B. Chetti	1903	3,85,921
61	Mr. Sachin Keshav Salián	1904	4,31,994
62	Mrs. Anagha Arvind Bavchikar	2001	5,83,154
63	Dr. Ganeshchandra S. Sonavane	2002	5,46,474
64	Mrs. Smita Abhay Mestry	2003	4,07,938
65	Mrs. Neha Nandkishore Jaokar	2004	4,46,027
66	Mr. Rahul Jaiswal	2101	5,37,501
67	Mr. Vikram I. Singh	2102	5,77,129
68	Mr. Uday Unnikrishnan Nair	2103	4,45,764
69	Mrs. Shivika Sanghi	2104	4,36,004
70	Mr. Yogesh Kshirsagar	2201	5,33,909
71	Mrs. Papiya Sinha	2202	5,36,665
72	Mrs. Seema Sandip Sawant	2203	4,48,032

73	Mrs. Snehal Bibish Pillai	2204	4,771
74	Mr. Tharayail Bristain Joseph	2301	5,46,221
75	Mrs. Moushumi Upadhyay	2302	4,42,255
76	Mrs. Sunita Milind Kharpate	2304	4,44,022
77	Mr. Nandkishore K. Mishra	2401	5,38,169
78	Mr. Sachin Saxena	2402	5,38,169
79	Ms. Shanti Srinivasan	2403	4,49,807
80	Mrs. Mayura Kolape	2501	5,50,155
81	Mr. Ram Pandey	2502	5,24,955
82	Mr. Rahul Ashok Pashan	2503	4,48,032
<b>Total amount of ITC to be passed on (Amount in Rs.)</b>			<b>3,45,28,279</b> 