BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

I.O No	:	19/2022
Date of Institution	:	27.11.2020
Date of Order	:	28.09.2022

In the matter of:

1. Sh. Sumit Mansingka, 404, Prangan Tower, Ramprastha Greens, Sector-9, Vaishali, Ghaziabad-201010.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s E-Homes Infrastructure Pvt. Ltd., Head Office: Dasnac Annexe-I, ECE House, 28A, Kasturba Gandhi Marg, New Delhi-110001.

Respondent

Quorum:-

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

Present:-

1. Sumit Mansingka Applicant No. 1 in person.
2. None for the DGAP.
3. Sh. Sandeep Chilana (Advocate), Sh. Priyojeet Chatterjee (Advocate), Sh. R K Tayal (Advocate) and Sh. Subodh Kumar Gupta, CA for the Respondent.

ORDER

1. The instant Report dated 27.11.2020 was furnished by the Director General of Anti-Profiteering (DGAP) under Rule 133 (4) of the Central Goods & Services Tax (CGST) Rules 2017. The said Report was furnished by the DGAP in response to this Authority's Interim Order 07/2020 dated 03.01.2020 deciding the first DGAP Report dated 01.07.2019. The brief facts of the case are that a complaint dated 18.12.2017 was filed before the Uttar Pradesh State level Screening Committee on Anti-Profiteering by Applicant No.1 alleging profiteering by the Respondent in respect of a flat purchased by him in the Respondent's project "The Jewel of Noida" situated at Plot No. 14, Eco City, Sector-75, Noida, Gautam Budh Nagar, Uttar Pradesh. To elaborate, Applicant No. 1, in his complaint (Application), had alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) to him in respect of the flat purchased by him in terms of Section 171 of the CGST Act, 2017. The Uttar Pradesh State Screening Committee examined the Application and opined that it did appear that the commensurate benefit of Input Tax Credit had not been passed on in this case and forwarded the Application to the Standing Committee on Anti-profiteering recommending further action in terms of Rule 128 of the Rules. Thereafter, the matter was examined by the Standing Committee on Anti-profiteering in its meeting held on 13.12.2018 which recommended a detailed investigation into the matter by the DGAP. The minutes of this meeting were received by the DGAP on 07.01.2019.

2. In his Report dated 01.07.2019, DGAP had reported that Applicant No. 1 had booked his flat in the Respondent's project "The Jewel of Noida" on 27.04.2016 and had later filed an Application with the Uttar Pradesh State

Screening Committee under Rule 128 of the CGST Rules 2017 alleging that no benefit of Input Tax Credit was passed on to him by the Respondent in terms of anti-profiteering provisions.

3. Accordingly, the DGAP issued a Notice under Rule 129 of the CGST Rules 2017 on 16.01.2019, calling upon the Respondent to reply as to whether he admitted that the benefit of Input Tax Credit had not been passed on to the 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.

4. The DGAP has reported that the period covered by the current investigation is from 01.07.2017 to 31.12.2018 and that the time limit to complete the investigation was extended, on his request, up to 06.07.2019 by this Authority on 10.04.2019 in terms of Rule 129(6) of the said Rules.

5. The DGAP further stated that the Respondent submitted his response along with relevant documents vide his letters/e-mails dated 30.01.2019, 19.02.2019, 12.04.2019, 20.05.2019, 31.05.2019, 03.06.2019, 07.06.2019, 17.06.2019 and 21.06.2019. Further, the Respondent submitted copies of the Allotment Letter and the Agreement, both dated 27.04.2016, in respect of the Applicant No. 1, showing the details of the payment plan to the DGAP which is as below:-

S. No.	Stage	Percentage of Basic Sale Price (BSP)
1	On Application	15% of BSP
2	Within 60 days of the Application	30% of BSP
3	At the time of Excavation	10% of BSP

4	At the time of 1st Floor Slab	5% of BSP + Car Parking
5	At the time of 4th Floor Slab	5% of BSP + Lawn/Green Charges
6	At the time of 8th Floor Slab	5% of BSP + Lease Rent & Services
7	At the time of 12th Floor Slab	5% of BSP + Club Membership
8	At the time of 16th Floor Slab	5% of BSP + Corner Charges
9	At the time of 20th Floor Slab	5% of BSP + Floor PLC
10	At the time of the top Floor Slab	5% of BSP + Electrification
11	At the time of External Plaster	5% of BSP + Power Backup Charges
12	At the time of the offer of Possession	5% of BSP + IFMS + Other Charges
	Total	**₹ 85,35,000**

6. In his report, while describing how the computation of the profiteered amount had been done, the DGAP interalia reported that -

   a. Since the Respondent had been discharging his output VAT liability under the Uttar Pradesh VAT Scheme by paying VAT on a deemed 10% value addition to the purchase value of the inputs and since he was not charging the amount of VAT from his home buyers, there appeared no direct relation between the turnover reported in his VAT returns for the pre-GST period, the ITC of VAT was not be considered for the computation of profiteering.

   b. Basis the information submitted by the Respondent, i.e. the details of the Input Tax Credit availed, his turnover from the

project "Jewel of Noida" and a comparison of the ratios of Input Tax Credit to the Turnover in the pre and post-GST periods, the ITC as a percentage of the turnover available to the Respondent during the pre-GST period (April 2016 to June 2017) was 1.38% while it worked out to 4.09% for the period from July 2017 to December 2018, which implied that the Respondent had benefited from ITC by 2.71% [4.09% (-) 1.38%] of his turnover.

c. In terms of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017, the above computed additional Input Tax Credit of 2.71% of the turnover (the aggregate of all the demands raised by the Respondent), profiteering was worked out to ₹3,93,85,763/- including 12% GST. Also that by not reducing the pre-GST price by 2.71%, the Respondent appeared to have contravened Section 171 of the CGST Act, 2017.

d. Since no demand had been raised on Applicant No. 1 in the post-GST period, the said Applicant was not amongst the 426 homebuyers found eligible to receive any benefit in the investigation that covered the period from 01.07.2017 to 31.12.2018.

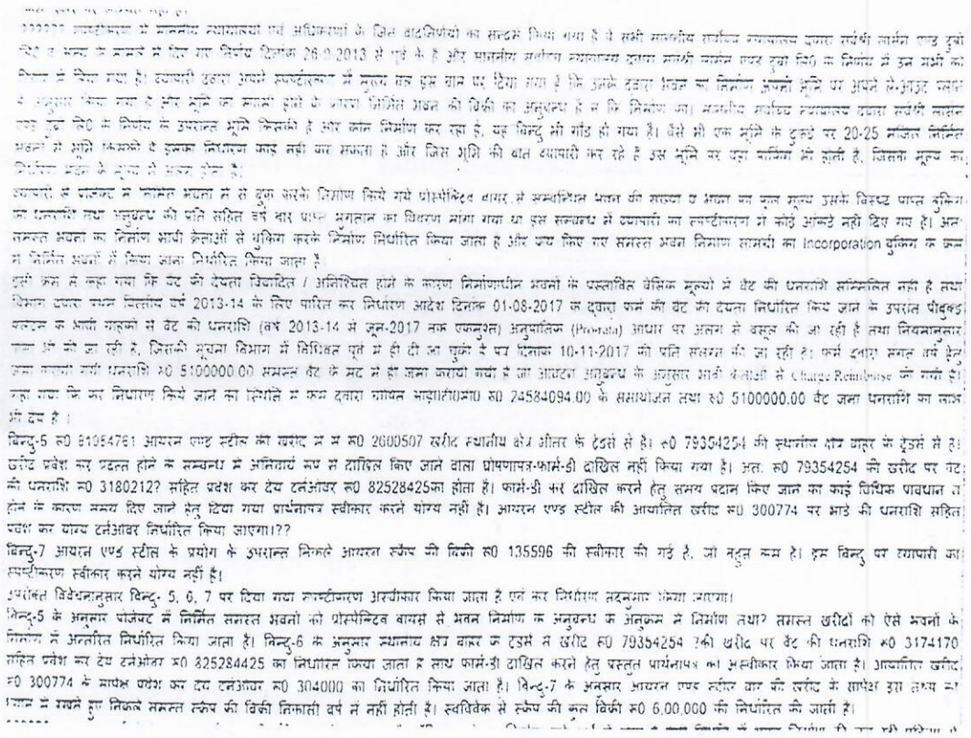
e. That the services were being supplied by the Respondent in the state of Uttar Pradesh only.

7. The above DGAP report dated 01.07.2019 was considered by the Authority in its meeting held on 09.07.2019 and after hearing the Applicant No. 1 and the Respondent over numerous hearings, this Authority referred the matter back to the DGAP vide its IO No. 07/2020 dated 03.01.2020 because:-

a) In response to the Respondent's submissions before this Authority regarding this being a case of two distinct and separate projects that had been erroneously taken up as a single project by the investigation, the DGAP had, in his Reports dated 01.07.2019, 17.09.2019, and 06.12.2019, reported that several documents (such as the bifurcation of CENVAT Credit Ledger/ITC, reconciliation of homebuyer data with his statutory Returns, the Formal approval of Layouts as well as Commencement Certificate for projects issued by NOIDA Authority, etc) had not made available to him for proper investigation under Section 171 of the CGST 2017. This apart, no details related to demands raised by the Respondent on Applicant No. 1 were found to be a part of the DGAP report, although the said Applicant had attached a copy of the demand letter dated 04.10.2017 issued to him by the Respondent in his Application, was also found relevant as one of the grounds for ordering reinvestigation. Therefore this Authority directed the Respondent to provide the DGAP with all the relevant data/information/documents and evidence related to the said projects as requisitioned by the DGAP. Based on the evidence and submissions made before it, the DGAP was directed to undertake the investigation afresh by treating the two projects separately. While ordering the reinvestigation, the DGAP had been directed to also incorporate the details of the reversal of ITC made by the Respondent in respect of those towers/units of the two projects, wherein the Completion/ Occupancy Certificate had been received.

b) The other issue related to the Respondent's averment that incorporation of the ITC of VAT was merited in the computation of profiteering since he fulfills the two conditions as mentioned in the

DGAP Report dated 01.07.2019 i.e. a) UPVAT liability had been paid by him in the pre-GST period on the deemed value addition as per UP VAT laws and the same could not be treated as a composition levy, and b) VAT had been recovered from the home buyers as evidenced by the case records including the invoice/ demand raised by him on the Applicant No.1 which was an enclosure to the Application itself. In addition, this Authority also considered the content of the Assessment Orders passed by the UPVAT Authorities for several financial years and the certificate issued by the Deputy Commissioner (VAT) certifying that the Respondent had not availed composition scheme in any financial year after 2012-13. Taking into cognizance the earlier UPVAT Assessment Orders as also that for the financial year 2016-17 dated 04.11.2019, the relevant para of which is reproduced below:-



It was clear that the Respondent had been collecting VAT from his customers from the year 2013-14 to Jun-2017 on a pro-rata basis and

was also depositing the same per the UP VAT laws. This documentary evidence being in the form of the VAT assessment order passed by the competent authority was found indisputable by this Authority and hence it was decided that this issue needs to be decided on the basis of the UPVAT Assessment Orders instead of merely following the manner in which this issue was handled previously since UPVAT Assessment Orders for the relevant period were now available. Given the above, the DGAP was directed to examine the said issue afresh.

c). DGAP was also directed to address, in the reinvestigation, the contentions of the Respondent (and the citation relied upon by him, i.e. the similarly placed case of M/s Paramount Propbuilt Pvt. Ltd,) that the calculation of profiteered amount was worked out based on the ITC to turnover ratio for the pre-GST period by taking data of only the truncated period of 15 months from 01.04.2016 till 30.06.2017, whereas ITC to turnover of the pre-GST period should have been calculated based on all credit legally available in the total period of construction in the pre-GST regime.

d). This apart, the said Order I.O. 07/2020 dated 03.01.2020 of the Authority also directed that the Applicant No. 1 was at liberty to approach the appropriate forum for redressal of his grievance that the allotment of his flat had been cancelled because he had filed the instant Application since the mandate of the Authority was limited to implementation of the provisions of Section 171 of the CGST 2017.

8. The DGAP reinvestigated the matter and submitted his Report dated 27.11.2020 under Rule 133(4) of CGST Rules, 2017. The Report which is like a para-wise reply to the directions contained in the Authority's Order 07/2020 dated 03.01.2020 also mentioned that another complaint dated 09.08.2018 had been filed by one Sh. Manish Kothary, G-1201, Royal

Classic CHS Ltd, New Andheri Link Road, Near Citi mall, Andheri West Mumbai-400053 to the Standing Committee on Anti-profiteering under Rule 128 of the Central Goods and Services Tax Rules, 2017 in the said matter.

9. Vide his Report dated 27.11.2020, the DGAP reported that he had issued a Notice dated 18.02.2020 to the Respondent in reply to which the Respondent made his submissions and submitted requisite documents. The submissions made by the Respondent before the DGAP are inter-alia summed up as follows:-

a) **Reversal of ITC:-** The reversal of ITC was made by him as per recommendations of his Chartered Accountant at the time of finalization of the annual return for the financial year 2017-18 and that proof of the reversal (Form DRC 03) was submitted on 09.03.2020. Further, as per Rules 142 of the CGST Rules, the verification of such payment along with the issuance of approval in Form DRC-04 vests with the jurisdictional officer who was in the process of reviewing the said information.

b) Project-1 'The Jewel of Noida Phase I" and Project-2 'The Jewel of Noida Phase I" are separate and distinct projects and the investigation should be limited to project-1 only since the complaint was only regarding that project.

c) Project 2 was approved by NOIDA (land development authority) only in the post-GST period. The building plan and layout of Project 2 were sanctioned only on 05.11.2018. Even the intended start date of the Project 2 is mentioned as 01.12.2017 in the documents available on the UP-RERA

website. The actual construction work for Project 2 only started after 15.02.2019 after its work order was awarded to the contractor and this is the reason why the ITC for the Project 2 is Nil for the pre-GST period.

d) ITC of VAT merits to be incorporated while computing the profiteered amount in respect of Project 1 as the same has been allowed by the UPVAT Authorities and since he fulfills all the conditions that permit this incorporation.

e) ITC to the Turnover ratio for the pre-GST period merits to be calculated for the entire construction period, i.e. from the very inception of the project.

f) Without prejudice to his other arguments, he wishes to submit that he had already passed on the benefit of ITC by way of additional discounts and commensurate reduction of price to his homebuyers by issuing credit notes and this includes the 9 customers of Project 2 who had paid advances before 01.07.2017 much before the Project 2 was sanctioned and much before its layout was approved since it was just a proposed/ future project and that he had submitted the said credit notes before the DGAP.

g) The flats sold after 01.07.2017 cannot be a subject matter of the calculation of profiteering but he had been extending appropriate discounts, as GST benefit, to his homebuyers who had bought flats after 01.07.2017.

10. DGAP has further reported that reinvestigation was carried out in terms of the directions of the Authority's IO No.07/2020 dated 03.01.2020 and on basis of data and submissions made by the Respondent and the following emerged:-

(i) Since the issue of whether two projects were separate or not had already been decided by the Authority, the investigation had been done accordingly.

(ii) On the issue of incorporation of ITC of VAT and submissions of the Respondent that the same is merited based on the impugned IO of the Authority and his following documents and submissions that Assessment Orders of UPVAT authorities for successive financial years have been submitted; certificate issued by the Deputy Commissioner (UPVAT) certifying that he had not availed composition scheme in any financial year after 2012-13 has been submitted, and his case fulfills the two conditions mentioned as requirements for such incorporation in the DGAP Report dated 01.07.2019 i.e. (a) VAT had been paid on deemed value addition: and (b) VAT had not been recovered from the home buyers.

(iii) Further the Respondent had not provided any Invoice to prove that he had been charging VAT from his customers on actuals and that there was no proof to substantiate the claim that the VAT had not been paid on the deemed value addition and that this particular assessment order was different from the Assessment order of other Assesses of that State. The DGAP also reported that the argument that VAT was being paid, as provided, was not relevant, since he was not charging VAT from his customers. Further, regarding the observation of the Authority that the UPVAT Assessment Orders clearly stated that the Respondent had collected VAT from his customers for the years from 2013-14 to June 2017, DGAP has submitted that this was only a submission made by the Respondent before the VAT authority and was not an Order passed by VAT Authority. DGAP has added that

since there was no direct relation between the credit of VAT turnover shown in the VAT return of the Respondent during the period April 2016 and June 2017 with the amount collected from his home buyers, the said benefit will not be available to the Respondent as held by the Authority in its Order No. 38/2020 in respect of M/s Gaursons Realtech Pvt Ltd, Order No. 31/2020 in respect of M/s Radicon Infrastructure and Housing Pvt Ltd., Authority Order No. 08/2020 in respect of M/s Manas Vihar Sahikari Awas Samiti Ltd and Authority Order No. 75/2019 in respect of M/s Nirala Project Pvt Ltd. Therefore the credit of VAT of the pre-GST era was not incorporated in the computation of profiteered amount.

(iii) Regarding the Respondent's submission that the ITC to Turnover of the pre-GST period should have been calculated based on all credit legally available to him in the total period of construction in the pre-GST regime instead of a truncated period of 15 months from 01.04.2016 to 30.06.2017 as followed in the case of M/s Paramount Prop built Pvt. Ltd, the DGAP has replied that this contention of the Respondent is incorrect in as much as there is no comparison of periods for the calculation of profiteering. The whole purpose of taking the period of 15 months in the pre-GST period was to cover a reasonable period just before the rollout of GST so that a proper comparison of the percentage of Input tax credit available to the Respondent in the pre and post-GST periods could be worked out. Further, during this period there was no variation in the rate of tax on services whereas before that there were several changes in the rate of service tax which would have resulted in a distorted picture of CENVAT credit. Thus, this period was taken to find out the average ratio of input tax credit availability with the turnover. The ratio of ITC

and turnover in Pre-GST was compared with the ratio of ITC in the post-GST period. The period during the GST period may be one month or one year, depending upon the period of investigation. It did not mean that if the period was larger than the availability of ITC would increase or decrease but it only gives a ratio that represents the period for comparison. The DGAP also stated that it was a standard practice in DGAP to take the pre-GST period from 01.04.2016 to 30.06.2017 and the same has been followed in all similar cases and these cases have also been upheld by the Authority.

(iv) On the issue of cancellation of his allotment that was raised by Applicant No.1, the DGAP reported that the Authority had already addressed the issue and he had nothing more to add. As regards the issue related to profiteering concerning Applicant No.1, DGAP reported that his name did not figure in the Home-buyers list and accordingly the profiteering could not be computed in his case.

(v) The DGAP has further stated that, the issue relating to the reversal of credit concerning towers/units wherein the Completion Certificate had been received, had arisen when the Respondent claimed that their project was complete in the month of May 2017 and they had received the Occupancy certificate. The DGAP has added that this contention of the Respondent was not found in order as the Occupancy certificate was issued on 29.11.2017 for the project "the Jewel of Noida-1" (Project 1) and that there was no corroborative evidence that ITC had been reversed in terms of Section 17(2) & 17(3) of the CGST Act, 2017. The DGAP has further added that Para 5 of Schedule III of CGST Act, 2017 categorically mentions the words "after issuance of completion certificate or after its first Occupation, whichever was

earlier" and this fact had already been elaborated in Para 18 of the DGAP Report dated 01.07.2019 and was also mentioned in Para 9 of NAA's I.O 07/2020 dated 03.01.2020. Hence the period for Project 1 had been considered up to the time of issue of the Occupation Certificate i.e. 29.11.2017. It was also noteworthy that the Respondent had taken credit of Rs 2,71,85,969/- from July 2017 to December 2017, which shows that the construction activity was not completed by May 2017. As regards the reversal of unutilized credit, DGAP has opined that the reversal pertains to those flats which remain unsold and these units were never a part of the profiteering calculation. Hence, despite the submission of the Respondent vide his letter dated 09.03.2020 had reported that he had reversed several Rs. 72,68,049/- (IGST Rs. 22,14,393/- + CGST Rs. 25,26,828/- + SGST Rs. 25,26,828/-) on account of unsold units, he was asked to provide a copy of the details submitted to the Range Superintendent concerning the said reversal. The Respondent did not submit that copy. Since the profiteering computation was not dependent upon the amount of reversal and since the investigation was time bound, the Report was prepared and it does not impact the amount of profiteering.

11. The DGAP further stated that to verify the correctness of the statement concerning RERA Registration claimed by the Respondent, the official website of Uttar Pradesh Real Estate Regulatory Authority was visited and it was observed that there were only four registrations in the name and address of the Respondent. In this context, it was relevant to mention that RERA Registration had been made mandatory for all projects which were operational after 30.06.2017 hence all registration would normally be shown in the GST era. The details of the Respondent's project under RERA were as under: -

Sr.No	Project Name	Registration Number	Modified/Proposed Start Date
1	The Jewel of Noida (Phase-I)	UPRERAAPRJ4327	01/12/2013
2	The Jewel of Noida (Phase-II)	UPRERAAPRJ4350	01/12/2017
3	The Jewel of Noida (Phase-III)	UPRERAPR498423	05/11/2018
4	The Jewel of Noida (Phase-IV)	UPRERAAPRJ936659	05/11/2018

12. The DGAP further claimed that as per the direction issued by Authority vide Internal Order No. 07/2020 dated 03.01.2020 this investigation was done for two projects separately, namely "The Jewel of Noida (Phase-I)" and "The Jewel of Noida (Phase-II)". From the data submitted by the Respondent covering the period from April 2016 to December 2018, the ratio of input tax credit to turnover, during the pre-GST (April 2016 to June 2017) and post-GST (July 2017 to December 2018) periods, were furnished as Table 1 and Table-2 as below:-

TABLE-1(The Jewels of Noida-I)			
Sr.No	**Particulars**	**Total Pre-GST (April 2016 to June 2017)**	**Total Post-GST (June 2017 to December 2018)**
1	CENVAT of Service Tax Paid on Input Services used for flats (A)	2,41,87,067	-
2	Input Tax Credit of VAT Paid on Purchase of Inputs (B)	-	-
3	Total CENVAT/Input Tax Credit Available (C)= (A+B)	2,41,87,067	-
4	Input Tax Credit of GST Availed (D)	-	2,71,85,969
5	Turnover for Flats as per Home Buyers List (E)	59,57,07,980	32,51,14,336*
6	Total Saleable Area (in SQF) (F)	8,60,178	8,60,178
7	Total Sold Area (in SQF) relevant to turnover (G)	3,40,150	5,18,940*

8	Relevant ITC [(H)= (B)*(G)/(F)]	95,64,568	1,64,01,125
The ratio of Input Tax Credit Post-GST [(I)=(H)/(E)]		**1.61%**	**5.04%**

TABLE-2 (The Jewels of Noida-II)

Sr.No	Particulars	Total Pre-GST (April 2016 to June 2017)	Total Post-GST (June 2017 to Dec 2018)
1	CENVAT of Service Tax Paid on Input Services used for flats (A)	0	-
2	Input Tax Credit of VAT Paid on Purchase of Inputs (B)	-	-
3	Total CENVAT/Input Tax Credit Available (C)= (A+B)	0	-
4	Input Tax Credit of GST Availed (D)	-	4,21,72,340
5	Turnover for Flats as per Home Buyers List (E)	1,32,72,024	11,75,33,353
6	Total Saleable Area (in SQF) (F)	1,41,000	1,41,000
7	Total Sold Area (in SQF) relevant to turnover (G)	14,940	66,400
8	Relevant ITC [(H)= (B)*(G)/(F)]	0	1,98,59,882
The ratio of Input Tax Credit Post-GST [(I)=(H)/(E)]		**0.00%**	**16.90%**

** The turnover and total sold area considered for those flats which were sold before receiving the Occupation certificate. The Respondent received the Occupancy certificate in the month of 29.11.2017.*

13. The DGAP further reported that from the above Tables, it was clear that the input tax credit as a percentage of the turnover that was available to the Respondent during the pre-GST period (April 2016 to June 2017) was 1.61% and during the post-GST period (July 2017 to November 2019), it was 5.04% for the Project "**The Jewel of Noida (Phase-I)**" and from the above Table-'2', it is apparent that the input tax credit as a percentage of the turnover that was available to the Respondent during the pre-GST period (April 2016 to June 2017) was 0.00% and during the post-GST period (July 2017 to November 2019), it was 16.90% Project "**The Jewel of Noida (Phase-II)**". This implies that post-GST, the Respondent had benefited from additional input tax credit to the tune of 3.43% [5.04% (-) 1.61%] of the turnover for the project "**The Jewel of Noida (Phase-I)**" and the Respondent had benefited from additional input tax credit to the tune of 16.90% [16.90% (-) 0.00%] of the turnover for the project

"**The Jewel of Noida (Phase-II)**". Further, given Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017, the recalibrated base price and the excess realization (profiteering) during the post-GST period, were tabulated in Table-3 and Table- 4, as below:-

TABLE-3 (The Jewels of Noida-I)			
Sr. No.	**Particulars**		
1	**Period**	**A**	**July 2017 to December 2018**
2	Output GST rate (%)	B	12
3	The ratio of CENVAT credit/ Input Tax Credit to Total Turnover as per table - 'B' above (%)	C	5.04%/1.61%
4	Increase in input tax credit availed post-GST (%)	D= 5.04% *less* 1.61%	3.43%
5	**Analysis of Increase in input tax credit:**		
6	Base Price raised from July 2017 to December 2018 (Rs.)	E	32,51,14,336
7	GST raised over Base Price (Rs.)	F= E*B	3,90,13,720
8	Total Demand raised	G=E+F	36,41,28,056
9	Recalibrated Base Price	H= E*(1-D) or 96.57% of E	31,39,62,914
10	GST @12%	I = H* B	3,76,75,550
11	Commensurate demand price	J = H+I	35,16,38,464
12	**Excess Collection of Demand or Profiteering Amount**	**K= G–J**	**1,24,89,592**

Table 4 (The Jewels of Noida-II)			
Sr. No.	**Particulars**		
1	**Period**	**A**	**June 2017 to December 2018**
2	Output GST rate (%)	B	12
3	The ratio of CENVAT credit/ Input Tax Credit to Total Turnover as per table - 'B' above (%)	C	16.90%/0.00%
4	Increase in input tax credit availed post-GST (%)	D= 16.90% *less* 0.00%	16.90%
5	**Analysis of Increase in input tax credit:**		
6	Base Price raised from July 2017 to December 2018 (Rs.)	E	11,75,33,353
7	GST raised over Base Price (Rs.)	F= E*B	1,41,04,002
8	Total Demand raised	G=E+F	13,16,37,355
9	Recalibrated Base Price	H= E*(1-D) or 83.10% of E	9,76,70,216
10	GST @12%	I = H* B	1,17,20,426
11	Commensurate demand price	J = H+I	10,93,90,642
12	**Excess Collection of Demand or Profiteering Amount**	**K= G–J**	**2,22,46,713**

14. On the basis of Table- 3 and Table- 4 above, the DGAP reported that it was clear that the additional input tax credit of 3.43% for Project-1 and 16.90% for Project-II of the turnover should have resulted in the commensurate reduction in the base price as well as cum-tax price. Therefore, in terms of Section 171 of the Central Goods and Services Tax Act, 2017, the benefit of the additional input tax credit was required to be passed on to the recipients. The DGAP further stated that it was evident from the above Table- 3 and Table- 4 that the benefit of ITC that needed to be passed on by the Respondent to his homebuyers works out to Rs. 1,24,89,592/- inclusive of GST for the project "The Jewels of Noida-I" (Project 1) and Rs 2,22,46,713/- inclusive of GST for the project "The Jewels of Noida-II" (Project 2). The DGAP has annexed that homebuyer and unit no. wise break-up in Annex-16 of his Report.

15. The DGAP has also reported that the name of Sh. Manish Kothary, G-1201, Royal Classic CHS Ltd, New Andheri Link Road, Near Citi mall, and Andheri West Mumbai-400053 is not found in the list of homebuyers for the project "The Jewel of Noida-I" (Project- 1).

16. The DGAP further observed that the Respondent, vide his submission dated 09.03.2020, had submitted credits notes issued by him to 9 customers who had paid advances before 01.07.2017 and claimed that he had passed on the benefit of Rs 41,17,470/- to those 9 customers. It was observed from the Homebuyers' list for the project **"The Jewel of Noida-II" (Project- 2)** that the Respondent had shown 11 buyers had booked the flat in the Pre-GST regime and out of 11 buyers that had booked the flat in the pre-GST regime; the Respondent had received the advance from 9 buyers. As regards the verification of input tax credit benefit claimed to have been passed on to 9 homebuyers, by the Respondent, it was observed that the Respondent had provided the details of the benefit passed for the project **"The Jewel of Noida-II"** to 9 customers. This list was matched with the soft copies of credit notes (issued to homebuyers) submitted by the Respondent. On verification of the soft copies of credit notes, it was apparent that the Respondent had passed on the ITC benefit of Rs 41,17,470/- to 9 homebuyers. A summary of the benefit of the input tax credit required to be passed on and the input tax credit benefit claimed to have been passed on 9 home buyers, was furnished in Table- 5 below:-

Table 5 "The Jewel of Noida-II"

Sr. No.	Category of Customers	No. of Units	Area (in Sq.ft)	Amount Received Post GST	Profiteering Amt. as per Annex-16	Benefit claimed passed on by the Respondent
A	B	C	D	E	F	G
1	Pre-GST Booking buyers	8	13280	2,29,00,316	43,34,572	35,50,746
2	Pre-GST Booking buyers	2	3320	35,68,003	6,75,351	0
3	Pre-GST Booking buyers	1	1660	0	0	5,66,724
4	Other Buyers	30	49800	9,10,65,034	1,72,36,790	0
Total		**41**	**68060**	**11,75,33,353**	**2,22,46,713**	**41,17,470**

17. On the basis of the above Table- 5, DGAP stated that Respondent had not passed on the benefit amounting to Rs. 2,22,46,714/- to 40 home buyers (listed in Sr. 1, 2 & 4 of the above table). However, for want of verification, this benefit cannot be given to the Respondent without receiving requisite confirmation from these 9 customers.

18. The DGAP further stated that the contention of the Respondent that the flats sold after 01.07.2017 cannot be the subject matter of calculation of profiteering was also untenable. The DGAP stated that though the Respondent had given discounts to customers who purchased flats after 01.07.2017 to give effect to GST benefits in support of which the Respondent had furnished copies of the account confirmation had been submitted by the Respondent, the said documents only showed the total discount applied (including on account of ITC benefit) but it was not clear from the copies of the submitted account confirmations as to how much benefit passed on was on account of ITC benefit and hence the benefit was denied to the Respondent.

19. The above DGAP report was considered by the Authority in its meeting held on 04.12.2020. The Respondent filed his submissions vide his emails/ letters dated 05.02.2021, 16.03.2021, 22.03.2021, and 18.04.2022 while the DGAP tendered his clarification dated 19.02.2021. The Respondent's submissions made vide his numerous submissions are summarized below:-

a) That the DGAP's re-investigation report was wholly misconceived as the same was to be undertaken in terms of the directions of the Hon'ble Authority vide Order No. 07/2020 dated 03.01.2020 and the reinvestigation was to be limited only concerning Project 1 since the Authority had not passed any order under Rule 133(5) of the CGST Rules ordering extension of the investigation to Project 2. Despite the

Authority's Order holding that Project 1 and Project 2 were two separate projects, DGAP had gone beyond the scope of its mandate given by the Authority to extend the scope to Project 2, which was approved and sanctioned much after GST had been introduced. He cited the Order of Hon'ble Supreme Court in the case of Northern Plastics Limited v. Hindustan Photofilms Manufacturing Company Limited 1997 (91) E.L.T. 502 (S.C.) in support of this averment that this expansion of the scope of investigation by the DGAP is bad in law.

b) That while the project "Jewel of Noida Phase-1'(Project-1), comprising Tower Nos. A, C, D, E, and G, was approved in 2013 and its construction was completed in April 2017, i.e. before the introduction of GST, as is evidenced by the Completion Certificate dated 29.11.2017 issued by Noida Authority, which specifically recognizes the date of inspection in the said Completion Certificate as May 2017, i.e. before the introduction of GST and since the civil construction work of Project 1 was completed in April 2017 the question of profiteering does not arise at all in respect of Project 1.

c) He added that he launched his next project named Jewel of Noida Phase-2 (Project 2) comprising Tower F which is situated in a hitherto unbuilt area. The said land, on which Project 2 was conceived was not at all a part of the approved XA layout of Project 1 (as evidenced by the approval documents and NOIDA Authority's sanctioned building plan of Project 1 of the year 2013 that show this land as Future Project 2). The said Project 2 was launched on increased FAR after obtaining the sanction and approval dated 05.11.2018 of its building layout plan and drawings by the Noida Authority, i.e. much after the Introduction of GST.

d) That the UP-RERA registration dated 29.07.2017 in respect of the Project 2 mentions the Project- 2 starting date as 01.12.2017 which was five months after the rollout of GST. He further submitted that construction of the said Project 2 (Tower F) started only after its Work Order was placed with the contractor, M/s Mohan Construction Company on 15.02.2019 which is also clear from the fact that the pre-GST period ITC for this project is Nil. He added that as was evident from the UP-RERA registration of Project 2, it was a completely different product with a distinct cost and pricing structure as compared to Project 1 and this distinction is detailed below:-

Sr.No.	Points of Distinction	Project 1	Project 2
1	Project ID	UPRERAPRJ4327	UPRERAPRJ4350
2	RERA Registration Start Date	01.12.2013	01.12.2017
2A	Physical Start Date	01.12.2013	15.02.2019
3	Completion Date	April 2017 (actual completion date as certified by completion certificate)	01.12.2022 (project date as declared under RERA)
4	Saleable Area (approx.)	8.6 lac sq.ft	1.4 lac sq.ft
5	Status	Completed	Ongoing

e) That the said Project 2 is a distinct new 'product' that was launched only after the introduction of GST after its approval on 01.12.2017 and therefore the question of profiteering does not arise and the same is reflected in the fact that the DGAP has taken the ITC for the pre-GST

period as NIL which is absurd and it is reflected from the resultant profiteering of an unbelievable 16.90%.

f) That the ITC of VAT allowed by the UPVAT Authorities merits to be incorporated in the computation of profiteering in his case since all conditions for its incorporation that were specified by this Authority in its impugned Interim Order stood fulfilled in as much as he had purchased goods on payment of VAT; he was eligible for claiming credit of VAT under State VAT laws and had claimed the ITC of VAT which was allowed by the UPVAT Authorities which proves that he was not operating under any composition scheme, and he had charged VAT from his homebuyers. He further averred that during the course of proceedings before the Authority, evidence in the form of UPVAT Assessment Orders and certificates issued by the UPVAT Authority had been submitted and the same were also submitted before the DGAP but inexplicably not considered. He argued that since he was eligible to claim the benefit of ITC of VAT, to calculate the profiteered amount, the same should be considered.

g) That the DGAP finalized his reinvestigation report amid the Covid epidemic based on incorrect ITC and turnover figures for the post-GST period, despite the Respondent repeatedly requesting for time and informing that the said information was incorrect and that the correct audited information would be submitted as soon as offices reopen after Covid-19. However, the DGAP has concluded its investigation based on incorrect figures ignoring the fact that the amount of ITC availed in the post-GST period stood substantially reduced on account of the GST audit of the said period and this vitiated the DGAP report. The Respondent further submitted that the DGAP has reduced the turnover of the flats in the reinvestigation Report without any

justification. It was submitted that to justify the conclusions in its Original Investigation Report, DGAP without any merit or explanation, completely contradicted its previous Investigation Report in the case of the Company as well as all other investigation reports in the case of other real estate developers, had reduced the Total Turnover of the Company for Project 1 and 2 cumulatively, in both pre-GST and Post GST Periods just to arrive at the same ratios and defeat the whole purpose of the re-investigation. It was submitted that the total turnover of the Company (cumulatively for Project 1 and 2) in the post-GST period was Rs. 129.76 Crores whereas as per the Re-Investigation Report, the said turnover had been drastically reduced to Rs. 44.26 Crores (32.51 Cr+11.75 Cr) It was submitted that unlike any of its earlier investigation reports for the industry as a whole, solely to manipulate the ratio, DGAP in its Reinvestigation Report had placed an asterisk (*) after the turnover figure. He added that in the absence of proper methodology prescribed under the law, it was not open to the DGAP to change the methodology and basis of computation without any rationale and basis to suit its convenience. He also relied upon the fact that in the Hon'ble Delhi High Court Itself more than fifty (50) writ petitions were pending where the methodology of DGAP for calculation of profiteering was under challenge. In the instant case, the DGAP had itself digressed from its own methodology adopted during the original Investigation without any such direction from the Authority. Therefore, the manner in which the Re-investigation report was prepared depicts arbitrariness and was liable to be set aside. The Respondent also submitted that such unjustified changes in numbers, without a word of explanation by the DGAP in his re-investigation Report, were done only to ensure that the profiteering amount as

alleged in the Original Investigation Report stayed the same to justify the findings in his Original Report, presumably keeping in view the indirect repercussions of its fresh findings on the outcome of the complaint filed by the erstwhile CFO of the Respondent about the original investigation conducted by DGAP. It was submitted that the change in figures of verified turnover is completely unjustifiable and incorrect and the computation needed to be rectified.

h) The Respondent further submitted that while computing the ratio of ITC to turnover in Project 1 for the post-GST period, DGAP failed to consider the reversal ITC of GST that had been found ineligible and which amounted to Rs. 72,68,049.00 along with proof of such reversal in Form DRC -03. The said credit was reversed because it had been found ineligible by the jurisdictional GST authorities/ audit on various grounds including GST availed on invoices that did not have correct GSTIN, etc. It was submitted that even though DGAP had taken these documents on record, however while considering the ITC of GST it had still considered the total ITC amount of Rs. 2,71,85,969.00 in its entirety without giving effect to the reversal of GST ITC made by the Respondent, even when it had specifically excluded the turnover about the flats sold post receiving the occupation certificate. It was further submitted that during the GST audit for the financial year 2018-19, he (the Respondent) had further reversed ITC amounting to Rs. 4,82,313.00 for the period from July 2017 to December 2018 based on various audit objections, etc. till 31.12.2018. It was submitted that the retention of ITC of GST which had duly been reversed by the Respondent (and therefore which was not effectively claimed) for the purposes of calculation of profiteering was patently erroneous.

i) That the investigation period adopted by the DGAP in the case of Project 1 was highly skewed as only 15 months period before the GST rollout was taken whereas the investigation should have covered the entire period right from the inception of project 1.

j) That he reiterates his prayer that no profiteering can be said to exist in the case of project 2 as it was approved by the NOIDA Authority only on 05.11.2018, registered with RERA as a new project on 01.12.2017 much after the rollout of GST and the commencement of construction work was on 15.02.2019, i.e. the date of signing of his contract with M/s Modern Construction Company for construction work. Further, Modern Construction Company took an Insurance policy for construction works to be undertaken in Phase 2 on 09.05.2019 clearly establishing Project 2 started much after the introduction of GST on 01.07.2017 which is also supported by the statutory returns that show pre-GST ITC of this project as NIL. Therefore, this project can't be a subject matter for anti-profiteering provisions.

k) That any complaint filed by Mr. Manish Kothary was not legally maintainable as already accepted by the DGAP in the reinvestigation report.

l) That in addition and without prejudice to his above submissions, he submits that he had duly passed on the benefit of ITC on Tower F (Project 2) to the customers by way of additional discount and commensurate reduction in price by Issuing credit notes to his few customers who had paid token amounts before 01.07.2017 at the pre-launch stage with which additional coverage was purchased much before the project sanction and approval of layout plans. Further, for the customers to whom flats were sold after 01.07.2017, he had

extended appropriate discounts to give effect to the passage of GST benefit.

m) That without prejudice of the above, he submits that the DGAP had incorrectly included GST already paid to the Government in the profiteering amount which is incorrect and should be redressed.

n) That the reversal of ITC in the post-GST period from July 2017 to December 2018 duly affected by him has been inappropriately denied and not incorporated/adjusted in the computation of profiteered amount by the DGAP although the said reversal of ITC of GST was akin to its non-availment. He added that the statement of the DGAP that the reversed ITC pertained to the unsold units was factually incorrect as the said reversal of GST had been made on account of incorrect GSTIN details and was not related to the unsold flats. The details of the reversed ITC amounts were submitted by him on 09.03.2020 (resubmitted before the Authority on 05.02.2021) along with supporting documents including the DRC Forms Challans.

o) That the provisions of the CGST Act and the CGST Rules on anti-profiteering were violative of Article 19(1)(g) of the Constitution of India. Further, Rules 126, 127, and 133 of CGST Rules suffer from the vice of excessive delegation.

p) That in the absence of a judicial member, the very constitution of the Authority was Improper because any order by Authority has to be passed in compliance with the observation of Hon'ble Bombay High Court in the case of Hardcastle Restaurants Pvt. Ltd. & Anr. Vs Union of India & Ors. W.P. No. 3492 of 2018 with respect to the presence of members in all the hearings who were passing the order.

q) Without prejudice, even if it was assumed for the sake of argument that the Respondent was guilty of profiteering, then he wishes to

submit that penalty cannot be imposed on the Respondent as no penal provisions were in existence during the period of investigation i.e. 01.07.2017 till 31.12.2018 as the penalty prescribed under Section 171(3A) had been inserted with prospective and not retrospective effect.

r) It was also submitted that the same matter was already sub judice before various High Courts including the High Court of Delhi. Further, the Hon'ble Supreme Court in the case of Collector of Central Excise, Kerala v. Larsen & Turbo (2016) 1 SCC 170 and Commissioner of Income Tax v. B.C. Srinivasa Shetty (1981) 2 SCC 460, observed that the charging section and the computation provision constitute the code of a transaction, in absence of computation provision levy fails. Given the above, Respondents adopts the submission made in the reply to the notice dated 04.12.2020.

20. The DGAP was directed by the Authority to furnish his clarifications on the successive submissions made by the Respondent from time to time. The clarifications of the DGAP on various submissions of the Respondent are inter-alia summed up as below:-

a) That the reinvestigation was carried out in line with the directions contained in the Interim Order dated 03.01.2020 of the Authority.

b) That in his first Report dated 01.07.2019, the total turnover (cumulatively for projects 1 and 2 taken together) for the post-GST period was Rs. 129.76 crores because the period of investigation was taken up to December 2018 since the Respondent had not submitted any proof of receipt of the Occupancy Certificate. However, in the Report furnished under Rule 133(4) dated 27.11.2020, the turnover of project 1 had been considered only up to the date of receipt of the

Occupancy Certificate i.e. 29.11.2017, which was Rs. 32.51 crores. DGAP has added that vide Table-A of Para 15 of his Report dated 27.11.2020, it was mentioned that the turnover and the total sold area were only considered for those flats which had been sold before receiving the Occupation Certificate on 29.11.2017 and therefore there was no change in the formula to inflate the profiteering amount to bring it close to the amount of profiteering computed in its original Investigation Report.

c) That the cases of the real estate sector have normally been investigated only up to the date of the Occupancy Certificate as per settled policy.

d) That the computation proposed by the Respondent in his submissions was based on his own methodology which was not the methodology upheld by the Authority.

e) That the Parliament as well as all the State Legislature had delegated the task of framing the Rules under the CGST Act, 2017 to the Central Government as per the provisions of Section 164 of the above Act. Accordingly, the Central Government, in terms of Section 171 (3) of the CGST Act, 2017 read with Section 2 (87) of the Act, had prescribed the powers and functions of the Authority, on the recommendation of the GST Council, which was a Constitutional federal body created under the 101st Amendment of the Constitution, as per Rule 127 and 133 of the CGST Rules, 2017.

f) That the power to determine its own Methodology & Procedure had been delegated to the Authority under Rule 126 of the above Rules as per the provisions of Section 164 of the above Act as such power was generally and widely available to all the judicial, quasi-judicial, and statutory authorities to carry out their functions and duties. The above

delegation had been granted to the Authority after careful consideration at several levels.

g) Since the functions and powers to be exercised by the DGAP had been approved by the Authority, the same were legal and binding on the Respondent. The sale of Housing units before the issuance of the Occupancy Certificate/ Completion Certificate was considered a supply of service under the CGST Act, 2017 but after the Occupancy Certificate/ Completion Certificate was issued, the sale of housing units was not covered under the purview of GST but under various States' Registration/Stamp Acts. Therefore, it was evident that the DGAP had followed the methodology prescribed by the Authority and submitted its investigation Report accordingly.

h) That Section 171 (2) of the CGST Act, 2017 states that "The Central Government may, on recommendations of the Council, by notification, constitute an Authority, to examine whether input tax credits availed by any registered person or the reduction in the tax rate had actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him." The above Section had vested powers to the Authority to expand the scope of the investigation to all the supplies made by a registered person. This Section empowers the Authority to examine if the commensurate benefit of the input tax credit reduced tax rates had been passed by him or not. Since the Section does not refer to any particular recipient, it implies that all the supplies made by a registered person to all his recipients need to be examined from the perspective of passing on the benefit to each buyer. Therefore, all the supplies made by the Respondent were required to be investigated.

i) That it was a standard practice in DGAP to take the pre-GST period from 01.04.2016 to 30.06.2017 in all cases of profiteering and that the said practice had been upheld by NAA in all cases. It was also a standard practice in all real estate cases and had been adopted by the DGAP as a part of the methodology to maintain uniformity. Therefore, not considering ITC details before 1 April 2016, as submitted by the Respondent, was appropriate and thus the methodology proposed by the Respondent for the calculation of profiteered amount was incorrect.

j) That though the Respondent has submitted that his Project 2 was launched post introduction of the GST regime, a perusal of the homebuyers' list and transaction dates for the said project reveals that the actual booking in Project 2 was initiated before 01.07.2017. Therefore, profiteering had been worked out in respect of the said project 2 in the Report dated 27.11.2020.

k) That the Respondent vide his letter dated 09.03.2020 had reported that he had reversed an amount of Rs. 72,68,049/ (IGST Rs. 22,14,393/- + CGST Rs. 25,26,828/- + SGST Rs. 25,26,828/-) in respect of which he was asked to furnish the details submitted to the Range Superintendent concerning said reversal to check whether the reversal pertained to ITC found ineligible on account of factors such as Audit, incorrect GSTIN details, etc. The Respondent did not submit that copy. The DGAP, in his report dated 19.02.2021 has further reported that since the investigation was time bound, the Report had been prepared without having received the response from the Respondent and that in any case, the said issue would not alter the quantum of profiteering as it was only affecting the ratio.

l) That in respect of Project 1, since the Occupancy Certificate was issued on 29.11.2017, the period of investigation had been considered only till

that date. In the period from July to December 2017, the total ITC worked out to Rs 2,71,85,969/-. Regarding the reversal of credit, no corroborative evidence to ascertain its eligibility was received till the Report was prepared and hence not considered.

m) Regarding the matter of incorporation of ITC of VAT in the computation of profiteering, the contents of Para 13 (ii) of the DGAP Report dated 27.11.2020 may be referred and that the same was not considered because the Respondent had not provided any Invoice raised by him on his homebuyers to prove that he had been charging VAT from their customers on actuals as a practice. Since no invoice had been furnished in this regard, there was no proof to substantiate the claim of the Respondent that the VAT had not been paid on the deemed value addition and that this particular assessment order was different from the Assessment Orders of other taxpayers of the State. Respondent's argument that he was filing Returns and paying VAT was not relevant, as he was not charging VAT from his homebuyers.

n) Regarding the observation of the Authority that the Assessment Order clearly stated that the Respondent had been collecting VAT from the customers for the year 2013-14 to June 2017, it was submitted that this was only submission of the Respondent before the VAT Authority and was not an Order passed by VAT Authority and hence not considered.

o) That since there was no direct relation between the credit of VAT turnover shown in the VAT Returns of the Respondent during the period April 2016 and June 2017 and the amount actually collected from the home buyers. That the ITC of VAT was not incorporated in the computation of profiteering.

p) That the Respondent had not only collected excess base price from his customers which they were not required to pay due to the reduction in

the rate of tax but he had also compelled customers to pay additional GST on this excess base price which the customers were not required to pay. By doing so the Respondent had defeated the very objective of both the Central and the State Governments which aimed to provide the benefit of input tax credit to the general public. The Respondent was legally not required to collect the excess GST and therefore, he had not only violated the provisions of the CGST Act, 2017 but had also acted in contravention of the provisions of Section 171 (1) of the Act supra, as he had denied the benefit of tax reduction to his customers by charging excess GST. Had he not charged the excess GST the customers would have paid less price while purchasing flats from the Respondent and hence above amount had rightly been included in the profiteering amount.

21. The proceedings in the matter could not be completed by this Authority earlier due to lack of required quorum of Members in the Authority during the period 29.04.2021 till 23.02.2022 and that the minimum quorum was restored only w.e.f. 23.02.2022 and hence the matter was taken up for proceedings vide Order dated 24.02.2022 and the Respondent, as well as Applicant No. 1, were allowed to be heard in person. The personal hearing was held on 12.04.2022 and was attended by Sh. Sandeep Chilana (Advocate), Sh. Priyojeet Chatterjee (Advocate), Sh. R K Tayal (Advocate) and Sh. Subodh Kumar Gupta, CA for the Respondent. The Respondent and Applicant No. 1 reiterated their respective submissions made from time to time. Thereafter the case was reserved for orders on 10.05.2022.

22. We have carefully considered the Report furnished by the DGAP and the clarifications filed by him and the records of the case and the Authority finds

that the following issues are required to be settled in the present proceedings:-

I. Whether there is benefit of additional ITC available to the Respondent which is not passed on by him to the Applicants?

II. Whether there is any violation of the provisions of Section 171 (1) of the CGST Act, 2017 by the Respondent?

III. Whether various issues raised by the Respondent relating to absence of proper methodology; violation of Article 19 (1) (g); Rules 126, 127, 139 of CGST Rules,2017 suffering from vice of excessive delegation; absence of judicial member in the Authority, etc are tenable in the given facts and circumstances.

The Authority finds that, the instant Report dated 27.11.2020 had been furnished by the DGAP under Rule 133 (4) of the Central Goods & Services Tax (CGST) Rules, 2017 in response to the Authority IO No. 07/2020 dated 03.01.2020 which was issued to refer back the DGAP Report dated 01.07.2019. The Respondent is in the business of the supply of Construction services and he has executed projects by the name of Jewel of Noida Phase I and Jewels of Noida Phase 2. Section- 171 of the CGST Act, 2017 reads as under:-

> *"(1) 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 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.

23. The Respondent has submitted that in absence of proper methodology prescribed under the law, it was open to DGAP to change the methodology and basis of computation without any rationale and basis to suit its convenience. He also relied upon the fact that the Delhi High Court Itself had more than fifty (50) writ petitions pending where the methodology for calculation of profiteering was under challenge. In this regard, this Authority finds that, the main contours of the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and the benefit of ITC are enshrined in Section 171 (1) of the CGST Act, 2017 itself which states 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 clear from the perusal of the above provision that it mentions "reduction in the rate of tax on any supply of goods or services" which does not mean that the reduction in the rate of tax is to be taken at the level of an entity/group/company for the entire supplies made by it. However, one formula which fits all cannot be set while determining such a "Methodology and Procedure" as the facts of each case are different. In one real estate project, the date of start and completion of the project, price of the house/commercial unit, mode of payment of the price, stage of completion of the project, the timing of the purchase of inputs, rates of taxes, amount of ITC availed, total saleable area, area sold and the taxable turnover realized 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 another project. Issuance of Occupancy Certificate/

Completion Certificate would also affect the amount of benefit of ITC as no such benefit would be available once the above certificates are issued. Therefore, no set parameters can be fixed for determining the methodology to compute the benefit of additional ITC which would be required to be passed on to the buyers of such units. Hence, we find that this contention of the Respondent is not tenable.

24. The Respondent submitted that the provisions of the CGST Act, 2017 and Rules made thereunder on anti-profiteering were violative of Article 19(1)(g) of the Constitution of India and Rule 126, 127, and 133 of CGST Rules suffer from the vice of excessive delegation. We find that, such contentions made are not correct as the Authority does not act in any way as a price controller or regulator as it doesn't have the mandate to regulate the same. The Respondent is 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 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 the tax. This Authority has nowhere interfered with the business decisions of the Petitioner and therefore, there is no violation of Article 19 (1) (g) of the Constitution. Regarding excessive delegation, it is noted that the Parliament as well as all the State Legislature have delegated the task of framing the Rules under the CGST Act, 2017 to the Central Government as per the provisions of Section 164 of the above Act. Accordingly, the Central Government in terms of Section 171 (3) of the CGST Act, 2017 read with Section 2 (87) of the Act, has prescribed the

powers and functions of the Authority, on the recommendation of the GST Council, which is a Constitutional federal body created under the 101st Amendment of the Constitution, as per Rule 127 and 133 of the CGST Rules, 2017. Since the functions and powers to be exercised under Rule 126, 127, and 133 of CGST Rules, 2017 have been approved by competent bodies, the same is legal and binding.

25. The Respondent has also made detailed submissions regarding the absence of a judicial member in the Authority in this regard it is noted that this Authority has been constituted under Section 171(2) of the CGST Act, 2017. We find that, the Parliament, the State Legislatures, the Central and the State Governments, and the GST Council in their wisdom have not thought it fit to provide for a judicial member in this Authority. Such a member has also not been provided in other such Authorities like the TRAI or the Authorities on Advance Rulings on the Income Tax, Authorities on Advance Rulings on the Central Excise, and the Goods and Services Tax. Further, the Respondent has quoted the case of Hardcastle concerning the presence of all members in all the hearings who were passing the order however, this case is of no help for the Respondent as all the members of the Authority passing this order have duly heard the Respondent at the detail. Hence, this contention of the Respondent is not tenable.

26. The Respondent also submitted that the DGAP had incorrectly included GST already paid by the Respondent to the Government in the value of the profiteered amount. In this regard, we find that, the Respondent had not only collected excess base prices from his customers which they were not required to pay due to the reduction in the rate of tax but the Respondent had also compelled customers to pay additional GST on this excess base price which the customers were not required to pay. By

doing so the Respondent had defeated the very objective of both the Central and the State Governments which aimed to provide the benefit of input tax credit to the general public. The Respondent was legally not required to collect the excess GST and therefore, he had not only violated the provisions of the CGST Act, 2017 but had also acted in contravention of the provisions of Section 171 (1) of the Act supra, as he had denied the benefit of tax reduction to his customers by charging excess GST. Hence, this Authority finds that, the GST amount had rightly been included in the profiteering amount.

27. The Respondent has made his detailed submissions regarding the fact that the credit of VAT for pre-GST era has been denied to him. He has also submitted copies of VAT returns and the UPVAT assessment orders for the relevant period in this regard. The perusal of the UP VAT assessment orders appears to indicate that the credit of the VAT for the relevant period has been allowed by the assessing authority in terms of state laws, prevalent at the time. It is claimed by the Respondent that assessment orders indicate that the Respondent had been collecting the VAT from his customers for the year 2013-14 to June 2017 on pro-rata basis and was also depositing the same in accordance with the extant rules. We find that, this documentary evidence in the form of VAT assessment orders passed by the competent authority needs to be carefully considered. Having gone through the clarifications of the DGAP, we find that they have not looked into the evidence on record inasmuch as the invoices submitted by the applicant along with the application itself appear to indicate that the VAT amount has been separately demanded by the Respondent in the pre-GST invoices. It would appear from such invoices that the Respondent had been charging VAT amounts from his homebuyers/recepients in the pre-GST period. We also find that certain

orders of this authority have been cited by the DGAP in support of his finding that the credit of ITC paid on the purchase of inputs merits to be excluded from the computation of the profiteered amount. These orders are Order Number 38/2020, 31/2020, 8/2020 and 75/2019. We find that while it may be true that in these cases the Authority has held that the benefit of credit of VAT shall not be available to the respondents in those cases. However, the facts of the individual case has to be looked into while deciding the matter. We find that the Assessment Orders of UPVAT for the period from April 2016 to June 2017 issued by the statutory VAT Authorities in respect of the Respondent have either never been placed before the DGAP during the course of the investigation or no evidence was provided by the Respondent to suggest that VAT has been charged from their customers and hence the same has not been incorporated in the computation of profiteered amount. The Authority further finds that the ITC of VAT, as much as is allowed vide the said VAT Assessment Orders for the period from April 2016 to June 2017 (copies enclosed as Annexure I and II) shall be incorporated into the computation of profiteered amount by the DGAP subject to verification of the authenticity of the same. The Authority therefore directs the DGAP to ascertain the authenticity of the VAT Assessment Orders submitted by the Respondent for the period from April 2016 to June 2017 and if verified from the State GST Commissioner/Uttar Pradesh VAT Department, the DGAP shall incorporate the amounts, as allowed by the concerned statutory Authority on assessment, in the computation of profiteered amount by including the same as ITC in the pre GST period and recalculate the profiteered amount and submit his Report to this Authority.

28. The Respondent has also submitted that while computing the ratio of ITC to turnover for Project- 1 i.e. Phase I, for the post-GST period, DGAP had failed to consider the reversal ITC of GST amounting to Rs. 72,68,049.00 although the supporting challans and Form DRC -03 had been submitted. In this regard, we observe that the DGAP has also reported in its Report dated 19.02.2021 that the supporting documents that were needed to ascertain the nature of the reversal (whether it was the ineligible credit that was reversed or the credit that pertained to unsold flats) submitted by the Respondent was received only after the reinvestigation Report had already been finalized due to the time-bound nature of the same. We also observe that the Respondent has stated that although the reversals were made duly and promptly, the delay in submission of the same before the DGAP was due to the epidemic that had forced the closure of his office. Given the above, in the interest of justice, we observe that the documents submitted by the Respondent detailing the nature of the GST ITC that was reversed ought to be examined on merits and profiteering, if any, may be recalculated, if necessary, so that any reversal made on account of ineligibile ITC on account of incorrect GSTIN details as stated by the Respondent can be verified from the DRC 3 challans and their supporting documents which are already on record and available with the DGAP may be factored into the computation of profiteered amount in accordance with law and decisions of this Authority in similar cases, if any.

29. In the view of the above discussion and findings, this Authority directs the DGAP to recalculate the profiteered amount, in respect of Project-1 i.e Phase I, in line with paragraphs 27 and 28 of this Order under Rule 133(2A) of the CGST Act, 2017, and submit its report within four weeks of this Order.

30. We note also that Respondent has submitted that Project-2 i.e. Phase II was launched by them on 1-12-2017 i.e. after the introduction of the GST and that the final layout drawings for the said Project 2 i.e. Phase II were approved by the Noida Authority on 5-11-2018 and also that the contract with M/s Modern Construction Company for construction of the said Project-2 i.e. Phase II was entered on 15-2-2019. In view of the above said facts, the Respondent has claimed that provisions of Section 171 of the CGST Act, 2017 do not get attracted in respect of Project-2 i.e. Phase II. However, Respondent has also submitted that benefit of ITC has been passed on to 9 customers, who have booked flats on the basis of EOI/advances as well as other homebuyers in form of discounts. These two submissions of the Respondent, i.e. that Project-2/Phase II has started after 1-12-2017 and that the ITC benefit has been passed down to 9 customers who have booked the flats in pre-GST era, contradict each other. The Authority also finds from the Annexure-11 of the DGAP Report wherein the Respondent in his own submissions dated 08.10.2020 has admitted that some customers have booked flats in pre GST period and those customers had also been allotted flats numbers viz. Bharat Chugh Flat no. F-602 alloted on 12.02.2017 and Sandhya Jain Flat No. F-802 alloted on 04.06.2017. It is not understood as to how the booking of flats could have been made before the launch of Project on 1-12-2017, that too in pre-GST era. These evidences submitted by the Respondent himself appear to indicate that the plan for construction and sale of units in the said Project-2/Phase II was in public domain during the pre-GST era and the prospective buyers have made bookings of the flat. The contention of the Respondent that the above said bookings were in response to EOI/Advance is not supported by any evidence/document and the said contention of the Respondent, prima-

facie does not appear to be sustainable. It also appears that, the Respondent has paid Service Tax on the payments received, whether it be known as advance/EOI or by any other name, from such persons who have booked units in the said Project II/Phase II prior to 1.07.2017. This Authority finds that, the above contradictory submissions made by the Respondent vis a vis the facts on record require proper scrutiny so as to determine the true and correct nature of transactions relating to the said Project 2/Phase II. In the given facts and circumstances, the DGAP is directed to reinvestigate the said Project-2/Phase II as per the above said findings of the Authority after making appropriate enquiries, as deemed fit, relating to the units booked/transactions made in the pre GST and GST periods and submit a fresh report for the said Project 2/ Phase II in terms of Rule 133(4) of the CGST Rules, 2017 separately.

31. Further, the Hon'ble High Court of Delhi, vide its Order dated 10.02.2020 in the case of Nestle India Ltd. & Anr. Vs. Union of India has held that:-

> *"We also observe that prima facie, it appears to us that the limitation of period of six months provided in Rule 133 of the CGST Rules, 2017 within which the authority should make its order from the date of receipt of the report of the Directorate General of Anti Profiteering, appears to be directory in as much as no consequence of non-adherence of the said period of six months is prescribed either in the CGST Act or the rules framed thereunder."*

32. A Copy of this order may be provided to the Applicants as well as the Respondent free of cost.

Sd/-
(Amand Shah)
Technical Member &
Chairman

Sd/-
(Pramod Kumar Singh)
Technical Member

Sd/-
(Hitesh Shah)
Technical Member

Certified Copy

30.9.22

(Rajarshi Kumar)
Secretary, NAA

F. No. 22011/NAA/234/E-Homes Pt./2020

Date:

Copy To:-

1. M/s E-Homes Infrastructure Pvt. Ltd., Head Office: Dasnac Annexe-I, ECE House, 28A, Kasturba Gandhi Marg, New Delhi-110001.
2. Sh. Sumit Mansingka, 404, Prangan Tower, Ramprastha Greens, Sector-9, Vaishali, Ghaziabad-201010.
3. Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
4. Guard File.