

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

I.O. No. : 17/2022
Date of Institution : 31.03.2021
Date of Order : 27.09.2022

In the matter of:

1. M/s Damodar Ropeways & Infra Limited, located at Damodar House, I/A Vansittart Row, Kolkata-700001.
2. M/s Accurate Real Estates Private Limited, 45, Vivekanand Road, P.S. Girish Park, Kolkata-700007.
3. M/s Splash Properties Pvt. Ltd., 2, Rowland Road, P.S. Ballygunge, Kolkata-700020.
4. M/s Abundant Properties Pvt. Ltd., 6/2 Moira Street P.S. Shakespeare Sarani, Kolkata-700017.
5. M/s Seed Properties Private Limited, I/A Vansittart Row, P.S. Hare Street, Kolkata-700001.
6. M/s King Properties Pvt. Ltd., 6 A, Tiljala Road, P.S. Tiljala, Kolkata-700046.
7. M/s Mason Buildcon Pvt. Ltd., 19A, Sarat Bose Road, P.S. Bhowanipore, Kolkata-700020.
8. M/s Pansy Nirman Pvt. Ltd., 19A, Sarat Bose Road, P.S. Bhowanipore, Kolkata-700020.
9. M/s Techserve Tele Services Pvt. Ltd., 4, Kali Krishna Tagore Street, P.S. Jora Bagan, Kolkata-700007.
10. 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 Salarpuria Signum Complex LLP, having registered office
at 7, Chittaranjan Avenue , Kolkata – 700072.

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. Rohit Surana and Smt. Sunayna Banthia, Chartered Accountants and Sh. Kishor Dagar for the Applicant No. 1 to 9.
2. Sh. Raminder Singh, Assistant Commissioner for the DGAP.
3. Sh. Ashok Batra, Sh. Arun Kumar Agarwal, Chartered Accountants and Sh. Ankit Khemka, Manager (Indirect Taxes) for the Respondent.

ORDER

1. The present Report dated 31.03.2021 had been received in National Anti-Profiteering Authority (**NAA or Authority**) from the Applicant No. 2 i.e. 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 the Applicant No. 1 on his behalf and 8 other companies namely M/s Accurate Real Estates Private Limited, M/s Splash Properties Pvt. Ltd., M/s Abundant Properties Pvt. Ltd., M/s Seed Properties Pvt. Ltd., M/s King Properties Pvt. Ltd., M/s Mason Buildcon Pvt. Ltd., M/s Pansy Nirman Pvt. Ltd., and M/s Techserve Tele Services Pvt. Ltd., collectively referred to as '**land owners**' alleging profiteering by the Respondent in respect of the development agreement entered into with the Respondent on 26.12.2013 and also the allocation agreement dated 02.05.2017 thereto, in respect of the Respondent project "**Victoria Vista**", Kolkata. The above Applicants had alleged that the Respondent had not passed on commensurate benefit of ITC to him, on

implementation of GST w.e.f. 01.07.2017, in terms of Section 171 of the CGST Act, 2017.

2. The DGAP in his Report dated 31.03.2021, had *inter-alia*, stated that:-


- a) The aforesaid reference was examined and forwarded by the Standing Committee on Anti-profiteering and was received by the DGAP on 15.10.2020 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 to 9 in respect of construction service supplied by the Respondent.
- b) On receipt of the said reference from the Standing Committee on 15.10.2020, a Notice under Rule 129 of the CGST Rules, 2017 was issued by the DGAP on 13.11.2020, calling upon the Respondent to reply as to whether he admit that the benefit of ITC had not been passed on to the recipients by way of commensurate reduction in price and if so, to *suo moto* determine the quantum thereof and indicate the same in his reply to the Notice as well as furnish all supporting documents. Further, the Respondent was given an opportunity to inspect the non-confidential evidences/information submitted by the Applicant No. 1 during the period 26.11.2020 to 27.11.2020, which the Respondent did not avail.
- c) On verification of the documents / information submitted by the Respondent from time to time, it had been observed that the Respondent had availed additional benefit of ITC under the GST regime, the benefit of the same had to be passed on to the recipients u/s 171 of CGST Act.

- d) The period covered by the current investigation was from 01.07.2017 to 30.09.2020.
- e) The time limit to complete the investigation was 14.04.2021.
- f) In response to the DGAP's Notice dated 13.11.2020, the Respondent submitted his reply vide mail / letter dated 25.11.2020, 02.12.2020, 04.01.2021, 03.02.2021, 10.03.2021, 17.03.2021 and 25.03.2021. The Applicant No. 1 had also submitted home buyers list for the owners share of allotment vide his letter dated 08.03.2021 forwarded through email.
- g) Vide the aforementioned letters/e-mails, the Respondent and Applicant No. 1 submitted the following documents/information:
- i) Brief profile of the Respondent.
 - ii) Copies of GSTR-1 and GSTR-3B Returns for the period July, 2017 to September, 2020 and copy of GSTR-9 Returns for the FY 2017-18 & 2018-19.
 - iii) Copy of Tran-1 filed.
 - iv) Copy of Electronic Credit Ledger for the period 01.07.2017 to 31.08.2020.
 - v) Copies of ST-3 returns for the period April, 2016 to June, 2017.
 - vi) CENVAT/ITC register for the period April, 2016 to September, 2020.
 - vii) Details of applicable tax rates, pre-GST & post-GST.
 - viii) Balance Sheet for the FY 2016-17, 2017-18, 2018-19.
 - ix) Copy of RERA Registration bearing No. HIRA/P/KOL/2018/000025 for the project Victoria Vista

under West Bengal Housing Industry Regulatory Authority.

- x) Copy of Agreement/Registry between the land owners and the developer for the project "Victoria Vista".
 - xi) Copies of Declarations made in Annexure-IV to the Notification No. 03/2019 Central Tax (Rate) dated 29.03.2019.
 - xii) Status of the project "Victoria Vista" as on 30.09.2020 in terms of tower-wise sold and unsold units.
 - xiii) 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, 2020 for all the projects separately including the project "Victoria Vista".
 - xiv) List of home buyers in the project "Victoria Vista".
 - xv) Copy of tax invoices for the months of Feb'18, Mar'18, Sept' 18 to Mar'19, April'19, July'19, Aug'19, Nov'19 to March'20, June' 20 to Sept'20.
- h. In the Notice dated 13.11.2020, the Respondent was informed that if any information/documents was 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 mail dated 25.03.2021 requested to treat all the documents submitted by him as confidential. Accordingly, the documents had been treated as confidential under Rule 130 of the Rules.
- i. The subject Application and several replies submitted by the Respondent along with the documents had been carefully examined by the DGAP. The main issues for determination are:

- i) whether there was reduction in rate of tax or additional benefit of ITC availed 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, in terms of Section 171 of the CGST Act, 2017.
- j. The other aspect to be considered, while determining profiteering was that para 5 of Schedule-III of the CGST Act, 2017 (Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services) reads as "*Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building*". 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 his first occupation, whichever is earlier*". Thus, the ITC pertaining to the residential units which was under construction but not sold was provisional ITC which might 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 are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempted supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies".

Section 17 (3) "The value of exempted supply under subsection (2) shall be such as might be prescribed and shall

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

Therefore, ITC pertaining to the unsold units was outside the scope of this investigation and the Respondent was required to recalibrate the selling price of such units to be sold to the prospective buyers by considering the proportionate additional ITC available to him post-GST.

- k. In response to the Notice of Initiation of investigation dated 13.11.2020 and subsequent reminder dated 12.03.2021, the Respondent vide his submission dated 03.02.2021 provided the details of turnover and CENVAT credit /ITC availed for all the projects as mandated under erstwhile CENVAT Credit Rules 2004, present CGST Rules, 2017 & RERA regulations. From the Respondent's submission dated 17.03.2021, it was observed that the Respondent obtained the RERA Registration bearing No. HIRA/P/KOL/2018/000025 for the project “Victoria Vista” under West Bengal Housing Industry Regulatory Authority.
- l. From the above, it was clear that the credit on input services was admissible to the Respondent under Rule 2(1) of the Cenvat Credit Rules 2004, which was utilized to pay Service Tax. Further, as seen from the Respondent's submissions dated 17.03.2021 *“We were not registered under the State VAT laws in the state of West Bengal. We are engaged only in real estate development activity, on which VAT was not payable in the state. Hence no such return was required to be filed by us”*. Accordingly, no credit of VAT had been considered for computation of profiteering.
- m. It was observed that prior to 01.07.2017, i.e., before GST was introduced, the Respondent was eligible to avail CENVAT credit of Service Tax paid on the input services. However, CENVAT credit of Central Excise Duty paid on the inputs was not admissible

as per the CENVAT Credit Rules, 2004, which was in force at the material time. Further, post-GST, the Respondent could avail the ITC of GST paid on all the inputs and input services. From the information submitted by the Respondent for the period April, 2016 to September, 2020, the details of the ITC availed by him, his turnover from the project “Victoria Vista”, and the ratio of ITC to the turnover, during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to September, 2020) periods were calculated and has been furnished in table-‘A’ below:

<u>Table-‘A’</u>			
S. No.	Particulars	Total (Pre-GST) (April, 2016 - June, 2017)	Total (Post-GST) (July, 2017- September, 2020)
1	CENVAT of Service Tax Paid on Input Services used for flats (A)	12,09,387	-
2	ITC of VAT Paid on Purchase of Inputs (B)	-	-
3	ITC of GST Availed (C)		3,56,91,248
4	Total CENVAT/ITC Available (D)	12,09,387	3,56,91,248
5	Turnover for Flats as per Home Buyers List (E)	6,00,000	6,40,77,867
6	Total Saleable Area (in SQF) (F)	1,12,494	1,12,494
7	Total Sold Area (in SQF) relevant to turnover (G)	2,828	11,312
8	Relevant ITC [(H)=(A or C)*(G)/(F)]	30,403	35,88,986
9	Ratio of ITC Post-GST [(I)=(H)/(E)*100]	5.07%	5.60%

- n. The calculation above, was based on the home-buyers demand data submitted by the Respondent vide email dated 04.01.2021, the statutory Returns filed from time to time. The Respondent had submitted the option exercised under prescribed form as envisaged in Notification No. 3/2019, effective from 01/04/2019 for ongoing project wherein the Respondent opted to pay tax at the old rate availing the benefit of ITC as envisaged in the Notification and

hence the investigation had been carried out till September 2020 in as much as the Respondent was yet to receive the Occupancy Certificate. As seen from the Allocation Agreement dated 02.05.2017, it was noted that there were 44 units in all. Out of 44 units, 17 units were under the Respondent's (Developer) allocation and 27 units were under Applicant No. 1 to 9 (land owners) allocation. As per the home buyers list submitted by the Respondent, out of the 17 units allocated to the him only 4 units had been sold and the balance 13 units were unsold as on 30.09.2020. Similarly, as per the home buyers list submitted by the Applicant No. 1 vide his letter dated 08.03.2021 forwarded through email, it was noticed that out of the 27 units allocated to the Applicant No. 1 to 9, no unit was sold as on 30.09.2020. The 3 units that were sold by the Applicant No. 1 to 9 were sold after the investigation period. Accordingly, the 4 units that were sold by the Respondent had been considered for computation of profiteering. Further, the project wise bifurcation of Service Tax / ITC provided by the Respondent in respect of the project "Victoria Vista" had been considered for the computation of profiteering. Further, besides the project "Victoria Vista", the Respondent had been executing the project "Suncrest Estates".

- o. From the above table-'A', it was clear 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 5.07% and during the post-GST period (July, 2017 to April, 2020), it was 5.60%. This clearly confirmed that post-GST, the Respondent had benefited from additional ITC to the tune of 0.53% [5.60% (-) 5.07%] of the turnover for the project "Victoria Vista".
- p. It was also observed that the Central Government, on the recommendation of the GST Council, had levied 18% GST on Construction Service (after one third abatement towards value of land, effective GST rate was 12% on the gross value), vide

Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Accordingly, the profiteering had been examined by comparing the applicable tax rate and ITC available to the Respondent during for the pre-GST period (April, 2016 to June, 2017) when Service Tax @ 15% with the effective rate of 4.5% as the case might be and VAT@ 0.0% as per the Respondent submissions were leviable with the post-GST period (July, 2017 to September, 2020) when the effective GST rate was 12% on the gross value.

- q. On the basis of the figures contained in table- 'A' above, the comparative figures of ITC availed/available as a percentage of the turnover in the pre-GST and post-GST periods and the recalibrated basic price as well as the excess collection (profiteering) during the post-GST period, was tabulated in table- 'B' below:

Table-'B'			
S. No.	Particulars		Post-GST
1	Period	A	July, 2017 to September, 2020
2	Output GST rate (%)	B	12%
3	Ratio of CENVAT credit to Total Turnover in pre GST period as per Table - 'A' above (%)	C	5.07%
4	Ratio of ITC to Total Turnover in post GST period as per Table - 'A' above (%)	D	5.60%
5	Increase in ITC availed post-GST (%)	E= D-C	0.53%
6	Analysis of Increase in input tax credit:		
7	Base Price raised during July, 2017 to April, 2020 (Rs.)	F	6,40,77,867
8	GST raised over Base Price (Rs.)	G= F*B	76,89,344
9	Total Demand raised	H=F+G	7,17,67,211
10	Recalibrated Base Price	I= F*(1-E) or 99.47% of F	6,37,38,254
11	GST @12%	J = I* B	76,48,590
12	Commensurate demand price	K = I+J	7,13,86,844
13	Excess Collection of Demand or Profiteering Amount (in Rs.)	L= H-K	3,80,367

- r. From table- 'B' above, it was clear that the additional ITC of 0.53% of the turnover should had resulted in commensurate

reduction in the basic price as well as cum-tax price for the home-buyers of the project "Victoria Vista". Therefore, in terms of Section 171 of the CGST Act, 2017, the Respondent had not reduced the basic prices for the buyers of this project commensurate to the additional benefits accrued and this benefit of the additional ITC was required to be passed on by the Respondent to the recipients. In other words, by not reducing the pre-GST basic price on account of additional benefit of ITC and charging GST @12% on the pre-GST basic price, the Respondent appears to have contravened the provisions of Section 171 of the CGST Act, 2017.

- s. On the basis of the aforesaid CENVAT/ITC availability in the pre and post-GST periods and the demands raised by the Respondent on the Applicant No. 1 to 9 and other home buyers towards the value of construction on which GST liability @ 12% was discharged by the Respondent during the period 01.07.2017 to 30.09.2020, the amount of benefit of ITC not passed on to the recipients or in other words, the profiteered amount came to Rs. 3,80,367/- which included GST.
- t. As seen from the documents submitted by the Respondent, it was noted that the Respondent had been raising the bills on the Applicant No. 1 to 9 on monthly basis for the expenditure incurred during that month and had been collecting GST @18% in proportion to the share of each Applicant No. 1 to 9. In the said bills it was indicated that *"only tax amount to be recovered, basic value not to be paid"*.
- u. There were no units as allocated to the Applicant No. 1 to 9 who were otherwise the landowners had been supplied as on 30.09.2020 i.e. during the investigation period. Further, in view of Board's Circular No. 151/2/2012-ST dated 10.02.2012 regarding *"Service tax on construction services"* the relevant part of which was reproduced hereunder:

Clarification: Here two important transactions are identifiable: (a) sale of land by the landowner which is not a taxable service; and (b) construction service provided by the builder/developer. The builder/developer receives consideration for the construction service provided by him, from two categories of service receivers: (a) from landowner: in the form of land/development rights; and (b) from other buyers: normally in cash.

(B) Valuation:

(i) Value, in the case of flats given to first category of service receiver, is determinable in terms of section 67(1)(iii) read with rule 3(a) of Service Tax (Determination of Value) Rules, 2006, as the consideration for these flats i.e., value of land / development rights in the land might not be ascertainable ordinarily. Accordingly, the value of these flats would be equal to the value of similar flats charged by the builder/developer from the second category of service receivers. In case the prices of flats/houses undergo a change over the period of sale (from the first sale of flat/house in the residential complex to the last sale of the flat/house), the value of similar flats as are sold nearer to the date on which land is being made available for construction should be used for arriving at the value for the purpose of tax. Service tax is liable to be paid by the builder/developer on the 'construction service' involved in the flats to be given to the land owner, at the time when the possession or right in the property of the said flats are transferred to the land owner by entering into a conveyance deed or similar instrument (e.g. allotment letter).

(ii) Value, in the case of flats given to the second category of service receivers, shall be determined in terms of section 67 of the Finance Act, 1994.'

and also, in view of Notification No. 4/2018-Central Tax (Rate) dated 25.01.2018, wherein it had been envisaged that

“ In exercise of the powers conferred by section 148 of the CGST Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, hereby notifies the following classes of registered persons, namely :- (a) registered persons who supply development rights to a developer, builder, construction company or any other registered person against consideration, wholly or partly, in

the form of construction service of complex, building or civil structure; and (b) registered persons who supply construction service of complex, building or civil structure to supplier of development rights against consideration, wholly or partly, in the form of transfer of development rights, as the registered persons in whose case the liability to pay central tax on supply of the said services, on the consideration received in the form of construction service referred to in clause (a) above and in the form of development rights referred to in clause (b) above, shall arise at the time when the said developer, builder, construction company or any other registered person, as the case might be, transfers possession or the right in the constructed complex, building or civil structure, to the person supplying the development rights by entering into a conveyance deed or similar instrument (for example allotment letter) ”.

- v. The bills raised and the corresponding GST charged on the Applicant No. 1 to 9 by the Respondent had not been considered for the purpose of computation of profiteering in as much as the said charging of GST appeared to be not in consonance with the provisions of law. The matter was being referred to jurisdictional Commissionerate for further examination.
- w. Before concluding the investigation, it was pertinent to mention here that above computation of profiteering was with respect to 4 home buyers amongst all the customers as on 30.09.2020 in the project “Victoria Vista”.
- x. In respect of the units to be sold either by the Respondent or by the Applicant No. 1 to 9 subsequent to the investigation period and prior to the receipt of Occupancy Certificate, the Respondent might compute the profiteering in similar lines and pass on the benefit to the prospective buyers. The benefit in respect of the prospective buyers of the units allotted to the Applicant No. 1 to 9 might be passed on through them.

y. It appeared that post-GST, the benefit of additional ITC to the tune of 0.53% of the turnover, accrued to the Respondent and the same was required to be passed on by the Respondent to the Applicant No. 1 to 9 and also to the other eligible recipients. However, since no unit allotted to the Applicant No. 1 to 9 who was otherwise the land owners had been sold as on 30.09.2020 i.e. during the investigation period. Since the period of investigation was till 30.09.2020, as per the submissions made no unit pertaining to the Applicant No. 1 to 9's share had been sold during this period of investigation and hence kept out of the purview of this investigation. The profiteering had been computed in respect of the four units that had been sold by the Respondent during the period of investigation. The commensurate proportion of benefit of ITC was to be calculated as discussed *supra* and needed to be passed on to the Applicant No. 1 to 9 proportionate to their share at the time of supply envisaged in the Notification referred to above. Section 171 of the CGST Act, 2017 appeared to have been contravened by the Respondent, in as much as the benefit of additional ITC on the demand raised by the Respondent during the post-GST period from 01.07.2017 to 30.09.2020, had not been commensurately passed on to the eligible recipients. On this account, the Respondent had been found to have profited an amount of Rs. 3,80,367/- (Three Lakh Eighty-Three Thousand One Hundred only) which included GST to all the four customers as on 30.09.2020. All the recipients were identifiable as the Respondent had provided their names and addresses along with unit no. allotted to them. As aforementioned, the present investigation covers the period from 01.07.2017 to 30.09.2020.

z. In view of the aforementioned findings, it appeared that the provisions of Section 171(1) of the CGST Act, 2017, requiring that *"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”, had been contravened by the Respondent in the present case.

4. The above Report was carefully considered by this Authority and a Notice dated 17.06.2021 was issued to the Respondent to explain why the Report dated 31.03.2021 furnished by the DGAP should not be accepted and his liability for profiteering in violation of the provisions of Section 171 should not be fixed. The Respondent was directed to file written submissions which had been filed on 07.07.2021 wherein the Respondent had submitted that the DGAP prepared his Report and concluded a profiteering on the part of the Respondent, without providing an opportunity of being heard and without listening to his point of view, merely on the basis of documents. No findings were given by the DGAP in respect of various submissions made by the Respondent on why ‘profiteering’ was not and could not be applicable in the instant case. The Respondent denied and disputed the charges framed, allegations made and action proposed by the Notice. Further, the Respondent vide his submissions dated 07.07.2021, 20.04.2022 and 08.06.2022 made following submissions in his defence:

- A. Applicability of Section 171:- In the instant matter neither there was any reduction in rate of tax nor there was any such ITC which was not available but subsequently became available. In this regard it was to be noted that the term ‘input tax credit’ had been defined in Section 2(63) to mean the credit of input tax. The term ‘input tax’ had been defined in Section 2(62) to *inter alia* mean the Central Tax, State Tax, Integrated Tax or Union Territory Tax charged on any supply of goods or services or both made to him.
- B. Comparison should not be made between ITC that was available in GST regime and Cenvat credit which was available to the taxpayers in Service Tax regime. The DGAP in his

Report had nowhere stated how an ITC which was not available as on 01.07.2017, become available thereafter.

- C. For arriving at the finding of profiteering, it was necessary to distinguish the increase in base price / non-reduction of base price on account of profiteering by wilful pocketing of tax concession meant for consumers from that due to purely commercial reasons. In this regard Hon'ble Supreme Court in the case of **Oudh Sugar Mills Limited, reported in 1962 (3) TMI 75**, had held that the findings based on presumptions and assumptions without any tangible evidence would be vitiated by an error of law.
- D. In the instant case, the Respondent sold 4 units in the following manner –

Date	Recipient	Net Rate
30.06.2017	Narendra Kr Bardia	9,600.00
18.04.2018	Harish Agarwal	13,150.00
01.04.2019	Swapan Ghosh	10,273.00
24.01.2020	Namita Ghosh	12,375.00

From the above chart it was clear that one unit was sold in service tax regime and 3 units was sold in GST regime. Section 171 could be applied in respect of those ITC, as per Section 171, which was not available to the Respondent in GST regime itself and subsequently become available. However, in the instant Report no such findings of the DGAP were noticed. Further, any benefit if at all was required to be passed then it should be only in respect of the unit which was sold before GST regime considering that the sale price of that particular unit did not contain the benefit of ITC available to the Respondent now on materials as well.

- E. Further, from the booking date and rate per sq. ft. of unit, it was understood that the unit rates were fluctuating. Sometime it was upward and sometime downward. In para 19 it had been observed by the DGAP that the pre-GST basic price had not been reduced on account of additional benefit of ITC. However, the DGAP had grossly failed to appreciate that sale price of units was solely not dependent on additional tax benefit.
- F. 'Profiteering' should mean to obtain benefits (of reduced tax rates or increased ITC) by a supplier which was meant for the recipients, in an unfair or illegal manner which was detrimental to the end consumers and/or had a negative impact on inflation. The profiteering must be a wilful act of the supplier to obtain benefits for himself without passing him on to the consumers. As a corollary, obtaining benefits without intention of pocketing the benefits does not constitute 'profiteering'.
- G. The service tax bills (debit notes) and the GST invoices raised by the Respondent on the Applicant No. 1 to 9 clearly indicate that the input taxes paid by the Respondent did not form part of selling price of Works Contract (Construction) Service supplied to the Applicant No. 1 to 9. The Service Tax invoices and GST invoices raised by the Respondent show that profit margin (of 10% on costs) was calculated on cost price not inclusive of tax amounts.
- H. Bills raised by the Respondent on the Applicant No. 1 to 9 were on cost + 10% mechanism. The same method was being followed by the Respondent in GST regime as well and the Respondent collected only tax portion from the Applicant No. 1 to 9 which was available as ITC to them. In this case, cost was always calculated excluding taxes and, the benefit of ITC was thus already passed on as the tax was being charged by the

Respondent on the net cost (net of ITC). In effect, the benefit of reduced cost stands passed on by the Respondent to the Applicant No. 1 to 9, irrespective of the applicability of Sec 171. Therefore, in the instant case the Respondent did not find any question of profiteering.

- I. Apart from above, due to delay in handing over the land to the Respondent for development of the project by the Applicant No. 1 to 9, the project got delayed which resulted in unwarranted escalation in the project cost. Such unwarranted cost escalation fuelled in the price escalation of the units.
- J. In the financial year 2019-20, the first year in which the Respondent recognized revenue in respect of the project 'Victoria Vista', the Respondent actually suffered a total loss of Rs. 1.76 crores against a turnover (revenue recognized on the basis of generally accepted accounting principles) of Rs. 9.43 crores, attributed to the project, far from any kind of profiteering.
- K. Assuming Section 171 was applicable:- Even if it was assumed that Section 171 was at all applicable then it should be restricted in respect of those units which were sold in Service Tax regime as while determining the sale price of the unit the tax component of Central Excise Duty and State VAT would have been considered as cost and embedded in the sale price. However, in respect of units sold in GST regime the same could not happen.
 - i. In fact, real estate development and sale in West Bengal was not liable to VAT. Thus, no ITC benefit was available to the Respondent either in respect of VAT or Central Excise. Rather the purchase of all inputs was inclusive of taxes, without any tax being separately charged, say at an inclusive price of Rs. 100/-. On introduction of GST, the

suppliers charged GST on the sale price of such materials (of Rs. 100/-) without any benefit of reduced prices being passed on. The entire GST amount (say Rs. 18/- @18% on an average) charged to the Respondent was debited to the “ITC account” and net of tax cost was debited to the cost of construction. Thus, the benefit of ITC of GST stands fully passed on. This can be demonstrated with some hypothetical data by way of a table furnished below:-

	Labour	Material	Total Cost	Tax	Tax Amt	ITC claimed	Net Cost	Profit	Sale Price	Tax	Tax Amt	Total Sale Price
Pre-GST	40	60	100	Ser Tax @ 15% on Labour	6	6	100	60	160	Ser Tax @ 4.5%	7.2	167.2
Post-GST	40	60	100	GST @ 18%	18	18	100	60	160	GST @ 12%	19.2	179.2

ii. From the table as above, it transpired that although the profit margin and the sale price remained same, profiteering could be determined when computed based on the ITC / Turnover ratio as contemplated by the DGAP in his Report. This would effectively reduce the profit margin rather than passing on any amount of profiteering.

L. Timing of calculation of profiteered amount:- The DGAP had computed profiteered amount as on 30.09.2020. However it needed to be examined whether it was logically correct to compute purported profiteered amount at the mid of the project. In the conclusion para the DGAP had stated that the commensurate proportion of benefit of ITC was to be calculated as discussed therein and needed to be passed on to the Applicant No. 1 to 9 proportionate to their share at the time of supply as envisaged in Notification No. 04/2018.

M. In Para 25 it was stated that the benefit in respect of the prospective buyers of the land-owners might be passed on

through the land-owners. On a conjoint reading of both the paras, it was understood that the DGAP was of the view that the proportionate benefit of the land-owners was to be passed on at the time of CC and the land-owners in turn would pass on the same to his customers. Hence if any amount on account of additional ITC was to be passed on then it should be on CC date. If this analogy was adopted, then the amount, as quantified, was not required to be passed on right now as CC was not yet received and hence no question of profiteering could arise.

- N. Submissions of penalty:- As there was no case of profiteering at all, the question of imposition of penalty did not arise at all. Assuming that at all there was profiteering, as submitted above, no time limit was prescribed to pass on benefit, if any, under Section 171. The Respondent had not yet handed over the units either to the Applicant No. 1 to 9 or to the customers. Construction Service, being a continuous supply of service, would get completed upon handing over the units to the customers. Hence it would be too early to conclude that the Respondent had profiteered any amount as concluded by the DGAP in his report. Accordingly, no question could ever arise for imposition of penalty as proposed in the DGAP's Notice.
- O. Eligibility of Application dated 30.01.2020:- As understood the Application filed by the Applicant No. 1 to 9 dated 30.01.2020 which was rejected by the Standing Committee due to there being *prima facie* lack in the claim of the Applicant No. 1 to 9. Now surprisingly the DGAP issued a Notice to the Respondent dated 13.11.2020 on the basis of the same Application dated 30.01.2020 which was rejected by the Standing Committee, which was not tenable on this ground alone.
- P. As per Rule 128, the Standing Committee shall examine the accuracy and adequacy of the evidence provided in the

Application to determine whether there was *prima-facie* evidence to support the claim of the Applicant No. 1 that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of ITC had not been passed on to the recipient by way of commensurate reduction in prices. The Standing Committee conducted said examination and rejected the Application and as per Rule 129 any matter could be referred to the DGAP only if Standing Committee was satisfied that there was a *prima facie* evidence to show that the benefit of ITC to the recipient by way of commensurate reduction in prices. While an Application had been rejected by the Standing Committee, the impugned Notice being issued based on such Application was liable to be dropped without any further process.

- Q. The transaction between the Respondent and the Applicant No. 1 to 9 was merely a sale of undivided share of land, in lieu of consideration in kind, which was outside the scope of GST in terms of para 5 of Schedule III to the CGST Act. Hence, once the transaction itself was outside the ambit of GST, the provisions of CGST Act on such transaction were not applicable.
- R. Construction services for 27 flats rendered by the Respondent to the Applicant No. 1 to 9 in lieu of consideration in kind i.e., share in undivided portion of land appurtenant to 17 residential units/flats and there was no monetary consideration involved.
- S. The transaction between the Respondent and the Applicant No. 1 to 9 was 'B2B' transaction (Supply in consideration) and not 'B2C' transaction.
- T. The Respondent relied upon this Authority's decisions where it was held that Section 171 was not applicable in cases where units was sold after implementation of GST i.e., 01.07.2017:-

a. Ashish Jain, Ritika Barua, DGAP vs M/s. GLS Infraprojects Pvt Ltd dated 09.05.2022 cited as 2022-VIL-09-NAA.

b. DGAP Vs. Lodha Developers Ltd. reported in 2022(4) TMI 629 .

c. DGAP Vs. M/S. Conscient Infrastructure Pvt Ltd. cited as 2019 (5) TMI 1395.

U. In the absence of any reasoning and the uniqueness in the manner of charging consideration from the Applicant No. 1 to 9 in the instant case (i.e., in kind and not monetary), the standard practice u/s 171 by way of commensurate reduction in price cannot be applied. This methodology could be applied where transaction was between builder and intending buyer.

V. The concept applied by the DGAP for calculation of profiteering was not founded on sound logical understanding of law, more particularly to the nature of transaction under consideration, hence not acceptable to the Respondent.

W. The benefit of ITC should be computed at the completion of construction of residential units and the same needed to be passed on to the ultimate buyers at that point of time.

5. The Applicant No. 1 had also filed his written submissions dated 20.07.2021, 30.04.2022 and 20.06.2022 wherein he had *inter-alia* stated that:-

a) Accrual of Profiteering Benefit to be passed on to the Applicant No. 1 to 9:-

i. The Respondent must have benefitted from availment of ITC on account of Material purchases post introduction of GST as per Section 171 of the CGST Act, 2017. In the instant case, substantial construction had incurred in the

GST regime, hence, the profiteering amount was palpable.

- ii. There was no denial of the fact that the Respondent must have enjoyed additional ITC benefit after introduction of GST regime.
- iii. Construction Service invoices raised by the Respondent to the Applicant No. 1 to 9 to collect the GST component also indicated that the Applicant No. 1 to 9 were the recipient of the services provided by the Respondent. Further, the Respondent relied upon the case law of Sattva Developers Pvt. Ltd. vs DGAP dated 14/06/2019.

b) Allocation of Flats to the Applicant No. 1 to 9 had already been made and hence his share of flats must also form a part of the profiteering computation: -

- a. As and when the property was constructed, the Applicant No. 1 to 9 develops the right over these flats to further sell him to other customers or retain him for personal use, as the case might be.
- b. The DGAP's contention that no flats were allocated to the Applicant No. 1 to 9 as on 30.09.2020 and therefore kept outside the purview of investigation, was not sustainable.

c) Time of supply of passing of Benefit amount to the Applicant No. 1 to 9:-

- i. The Construction Service invoices raised by the Respondent to the Applicant No. 1 to 9 read with time of supply provisions envisaged in the Notification No. 4/2018-Central tax dated 25.01.2018, also emphasises the fact that a pursuant to Allocation Agreement, right in the constructed property gets transferred to the Applicant No.

1 to 9 as and when the construction milestones were executed and not only when the construction was completed and possession was handed over.

- ii. The Report must be revised to include the profiteering benefit accrued for the Applicant No. 1 to 9's share of units along with changes in the time of supply of passing of the benefit amount. In fact going by the Time of supply provisions specified in Notf. No. of 4/2018-CT as referred by the DGAP, the benefit amount had already accrued to the Applicant No. 1 to 9 for his share of flats and hence the Respondent must pass on the benefit amount immediately.

d) The method adopted using comparison of Pre & post-GST ITC to Turnover ratio was faulty and untenable:

- a. The comparison of above ratio was not appropriate for the reason that under the real estate sector there was no correlation of turnover with the cost of construction or development of a project.
- b. ITC was higher in the initial stages of Development.
- c. Turnover was mostly linked with market.
- d. Profiteering should reflect the Benefit amount accrued to the the Applicant No. 1 to 9.
- e. Profiteering must be computed on the basis of total cost of the project.

e) Computation of Anti-Profiteering Benefit:-

- i. The construction expense incurred upto March' 2019 as per the details in the invoice raised by the Respondent had been considered as basis to compute the Total projected cost of the Project. The detail of percentage

completion last known to us was 35% on March'19, hence the same had been used to work out the total budgeted cost of the project.

Sr. No.	Cost Break-up	Cost incurred upto March'19	Total projected Cost	Cost/sq. ft.
A.	Architectural & Consultancy fees	63,70,350.00	1,82,01,000.00	161.80
B.	Civil	9,55,89,269.84	27,31,12,199.54	2,427.79
C.	Electrical Works	24,24,169.61	1,29,36,810.00	115.00
D.	Initial Site Development	18,98,519.01	18,98,519.01	16.88
E.	Phe work - Victoria Vistas	3,12,455.40	8,92,729.71	7.94
F.	Pre-Execution Cost	1,83,000.00	5,22,857.14	4.65
G.	Project Administration Expenses	2,58,56,526.69	7,38,75,790.54	656.71
H.	Statutory Fees	1,18,29,226.00	1,40,61,750.00	125.00
I.	Land Cost	48,51,909.66	80,00,000.00	71.11
J.	Finishes	2,51,465.00	7,18,471.43	6.39
Add:	Fittings Cost not considered in the bill upto 31-03-2019			
K.	Sanitary Fittings		61,87,170.00	55.00
L.	Kitchen fittings		25,87,362.00	23.00
M.	Air Conditioners		2,92,48,440.00	260.00
N.	Total	14,95,66,891.21	44,22,43,099.38	3,931.26

**The amount reflected in the bill was Rs. 14,93,15,426.21/- which was due to a calculation error in the invoice. The amount as per the detailed sheet of the invoice was considered for the purpose of calculation.*

***Completion Percentage as on March'2019 had been assumed on the basis of various discussions held with the Respondent in the due course. It was to mention herewith that the Applicant No. 1 to 9 had been following up with the Respondent for the latest percentage completion details, but the same was in vain. Hence, the workings*

had been made on the basis of data available as on 31st March '2019.

- ii. The nature of expenses incurred by the Respondent during the course of construction, largely being material, labour and works contract *inter alia* other expenses. Out of these expenses, the Respondent was allowed to avail Cenvat Credit of only services in the earlier tax regime. A comparison chart of nature of expenses and cenvatable and non-cenvatable ITC therein was laid down below:

Nature of Expense	Tax Component	Pre-GST regime	Post GST regime
Material	Excise Duty (ED) or/and VAT	No credit available	ITC on all goods or services was available subject to provisions of Sec 16 & 17 of the CGST Act, 2017
Labour	Service Tax	Credit available	
Works Contract	Material portion: ED or /and VAT Service portion: Service Tax	Credit was available only on Service Portion	

- iii. Therefore, the excess ITC enjoyed by the Respondent in the GST regime should be equal to the benefit of such non-cenvatable inputs now eligible to be availed, which as per his calculations came to Rs. 4,16,68,302.67/- for the entire project i.e. Rs. 370.42 per square feet.
- iv. To re-evaluate the profiteering accrued by the Respondent in lieu of ITC benefit availed for the project in the GST regime.

6. Supplementary Report under Rule 133(2A) of the CGST Rules, 2017 was sought from the DGAP on the submissions of the Respondent and the Applicant No. 1 to 9. In response, the DGAP vide his Report dated 31.03.2021 and 24.05.2022 had *inter-alia* furnished the following clarifications:-

Clarifications on the Respondent's submissions:-

- a. Applicability of Section 171: The contention of the Respondent in these paras was incorrect and hence denied as discussed hereunder:-
- i. Section 171(1) of the CGST Act, 2017 provides that 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.
 - ii. The instant case was clearly covered under the provisions of Section 171(1) of the CGST Act, 2017 as there was benefit of ITC consequent to introduction of GST.
 - iii. Prior to 01.07.2017 i.e. before the introduction of GST, the Respondent was eligible to avail CENVAT credit of Service Tax paid on input services as envisaged under sub-rule (1) of Rule 2 of CENVAT Credit Rules, 2004 and also the ITC of VAT paid on inputs provided the Respondent had not availed the Composition Scheme under VAT. However, the Respondent was ineligible to avail credit of CENVAT paid on inputs under CENVAT Credit Rules, 2004. Whereas on introduction of GST from 01.07.2017 the Respondent could avail the ITC of GST paid on all inputs and input services in pursuance to the seamless credit facility allowed under Section 16 of the CGST Act, 2017 read with the rules prescribed there under.
 - iv. Further, CBIC vide press release dated 15.06.2017 clarifies that *"Under GST, full input credit would be available for offsetting the headline rate of 12%. As a result, the input taxes embedded in the flat will not (& should not) form a part of the cost of the flat. The*

input credits should take care of the headline rate of 12% and it is for this reason that refund of overflow of input credits to the builder has been disallowed” and expected the builders to pass on the benefits of lower tax burden under the GST regime to the buyers of property by way of reduced prices / instalments.

- v. Accordingly, the DGAP following the standard procedure / methodology had compared the ITC to turnover ratio in pre & post GST periods in the present case which was rational, logical & appropriate in terms of Section 171 and that had been approved by this Authority in similarly placed cases.
 - vi. On applying the above methodology, it had been observed that the Respondent was benefitted by the accumulation of credit which was to be passed on to the homebuyers in whose demands had been raised or advances had been received in the post GST period. Whereas the Respondent had not passed on such benefit and hence contravened the provisions of Section 171 of the CGST Act, 2017.
- b. The contention of the Respondent that the benefit should only be passed on to the homebuyers who had purchased the units before GST regime was not tenable as the Respondent had not submitted any documentary evidence to the effect that price had been negotiated and the benefit of ITC available consequent to introduction of GST had been passed on for verifying the methodology and the quantum of such benefit adjusted in the agreement and also for confirmation of the same from the homebuyers who booked his flats post GST.

- c. The documents submitted by the Respondent, indicate that he had been raising the bills on the Applicant No. 1 to 9 on monthly basis for the expenditure incurred during that month and had been collecting GST @18% in proportion to the share of each Applicant No. 1 to 9. In the said bills it was indicated that *"only tax amount to be recovered, basic value not to be paid"*.
- d. There were no units as allocated to the Applicant No. 1 to 9 who were otherwise the landowners had been supplied as on 30.09.2020 i.e. during the investigation period.
- e. The bills raised and the corresponding GST charged on the Applicant No. 1 to 9 by the Respondent had not been considered for the purpose of computation of profiteering in as much as the said charging of GST appeared to be not in consonance with the provisions of law.
- f. Accordingly, the DGAP following the standard procedure / methodology had compared the ITC to turnover ratio in pre & post GST periods in the present case which was rational, logical & appropriate in terms of Section 171 and that had been approved by this Authority in similarly placed cases and arrived at the profited amount in respect of the units booked / sold till the investigation period and suggested the Respondent to pass on the benefit on the same lines to the prospective buyers of his own and also to the prospective buyers of the Applicant No. 1 to 9 through themselves.
- g. Assuming Section 171 was applicable:-
- i. Prior to 01.07.2017 i.e. before the introduction of GST, the Respondent was eligible to avail CENVAT credit of Service Tax paid on input services as envisaged under sub-rule (1) of Rule 2 of CENVAT Credit Rules, 2004 and also the ITC of VAT paid on

inputs provided the Respondent had not availed the Composition Scheme under VAT. In the instant case, as submitted by the Respondent, in West Bengal the Real Estate Development was not liable to VAT. However, the Respondent was ineligible to avail credit of CENVAT paid on inputs under CENVAT Credit Rules, 2004. Whereas on introduction of GST from 01.07.2017, the Respondent could avail the ITC of GST paid on all inputs and input services in pursuance to the seamless credit facility allowed under Section 16 of the CGST Act, 2017 read with the rules prescribed there under.

- ii. Accordingly, the DGAP following the standard procedure / methodology had compared the ITC to turnover ratio in pre & post GST periods in the present case which was rational, logical & appropriate in terms of Section 171 and that had been approved by this Authority in similarly placed cases.

h. Timing of calculation of profiteered amount:- The contention of the Respondent in this paras was incorrect and hence denied as discussed hereunder:

- i. The Respondent had availed ITC every month by filing GSTR-3B Returns despite a long gestation period in a housing project.
- ii. The Respondent could not enrich himself at the expense of the flat buyers by denying him the benefit of ITC till completion of the project while he used the same in his business for discharging his output tax liability every month.

iii. The Respondent could always make adjustments in case more or less benefit was passed on at the final computation and payment of the benefit.

iv. Accordingly, the Respondent had to make periodical assessment of the ITC benefit and pass it on to the eligible flat buyers on each and every demand raised by him.

v. Further, it had been the standard practice to call for the data / information up to the month preceding the month in which the Application / complaint received from the Standing Committee on Anti-profiteering and the element of profiteered amount was being calculated based on the data submitted for such period as was done in similar cases and upheld by this Authority. Section 171(1) of CGST Act, 2017 mandates passing on of the benefit of additional ITC which had accrued to the Respondent during the life of the project subsequent to introduction of GST till the Occupancy Certificate was issued.

i. Eligibility of Application dated 30.01.2020:-

i. The Standing Committee on Anti-profiteering in the meeting held on 19.08.2020 after detailed discussions decided to forward the case to DG Anti-profiteering for further investigation with the observation that *"From the documents submitted, it appears that a benefit of reduction in ITC has not been passed, hence case is being forwarded to the DGAP"*.

- ii. Under sub-rule 1 of Rule 128 of CGST Rules, 2017, the Standing Committee shall, within a period of two months from the date of the receipt of a written Application or within such extended period not exceeding a further period of one month for reasons to be recorded in writing as might be allowed by this Authority, in such form and manner as might be specified by it, from an interested party or from a Commissioner or any other person, examine the accuracy and adequacy of the evidence provided in the Application to determine whether there was *prima-facie* evidence to support the claim of the Applicant No. 1 that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of ITC had not been passed on to the recipient by way of commensurate reduction in prices.
- iii. Under sub-rule 1 of Rule 129 of CGST Rules, 2017, where the Standing Committee was satisfied that there was a *prima-facie* evidence to show that the supplier had not passed on the benefit of reduction in the rate of tax on the supply of goods or services or the benefit of ITC to the recipient by way of commensurate reduction in prices, it shall refer the matter to the DGAP for a detailed investigation.
- iv. Under sub-rule 2 of Rule 129 of CGST Rules, 2017, the DGAP shall conduct investigation and collect evidence necessary to determine whether the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of ITC

had been passed on to the recipient by way of commensurate reduction in prices.

- v. Accordingly, the DGAP had called for all the relevant documents / information and worked out the profiteered amount following the standard procedure upheld by this Authority in all such similar cases.

Clarifications on the Applicant No. 1's submissions:-

- j. The Applicant No. 1 in his written submissions had contested neither the findings of the DGAP in its report nor the observations of the DGAP in the clarifications filed under Rule 133(2A) in respect of Respondent's submissions made before this Authority.

- 7. Copy of the above clarifications/supplementary report of the DGAP dated 30.03.2022 and 24.05.2022 was supplied to the Respondent and to the Applicant No. 1 to 9 to file their rejoinder/submissions respectively. The Respondent had filed his rejoinder/ submissions dated 20.04.2022 vide which he had reiterated and relied upon his submissions made earlier. The Applicant No. 1 had also filed his submissions dated 20.06.2022 on the DGAP's clarifications dated 24.05.2022 vide which he had also reiterated and relied upon his submissions made earlier. The Respondent requested for personal hearing in the matter.
- 8. The proceedings in the matter could not be completed by the Authority 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 further proceedings vide Order dated 10.03.2022.


9. Therefore, hearing in the matter was held on 08.06.2022. It was attended by Sh. Rohit Surana, Smt. Sunayna Banthia, Chartered Accountants and Sh. Kishor Dagar for the Applicant No. 1 to 9, Sh. Raminder Singh, Assistant Commissioner for the DGAP, Sh. Ashok Batra, Sh. Arun Kumar Agarwal, Chartered Accountants and Sh. Ankit Khemka, Manager (Indirect Taxes) for the Respondent. During the personal hearing, the Respondent has re-iterated his arguments based on his written submissions dated 07.07.2021, 20.04.2022 and 08.06.2022 and also informed that a consolidated written submissions would be filed. The Applicant No. 1 has also reiterated his written submissions dated 20.07.2021, 30.04.2022 and 20.06.2022.

10. The Respondent vide his email dated 09.08.2022 has filed his written submissions wherein he has reiterated his earlier written submissions and submitted the documents mentioned below: -

- a. Development agreement dated 27.12.2013 between the Applicant No. 1 to 9 and the Respondent.
- b. Statement showing Service Tax/GST bills raised on the Applicant No. 1.
- c. Tax invoices for the 'Works Contract Services' raised by the Respondent on the Applicant No. 1 to 9.

11. The Authority has carefully considered the Reports filed by the DGAP, all the submissions and the documents placed on record, and the arguments advanced by the Respondent during the hearing and the submissions made by the Applicant No. 1. It is clear from the plain reading of Section 171(1) 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. It is observed 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 5.07%, whereas, during the post-GST period (July-2017 to September, 2020), it was 5.60% for the project 'Victoria Vista'. The DGAP has found that, post-GST, the Respondent has been benefited from additional ITC to the tune of 0.53% (5.60% - 5.07%) of his turnover for the project 'Victoria Vista' 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. 3,80,367/- for the project 'Victoria Vista', which was availed by the Respondent. The profiteering amount determined by the DGAP during the period 01.07.2017 to 30.09.2020 is in respect of the units in respect of units which belong to Sh. Narendra Kumar Bardia (unit no. 8B) Rs. 11,872/- (including GST), Sh. Swapan Ghosh (unit no. 9B) Rs. 1,60,626/- (including GST), Sh. Harish Agarwal (unit no. 18B) Rs. 2,01,339/- (including GST) and Sh. Firoz Bei (unit no. 19B) Rs 6,530/- (including GST). Further, it also appears from the report of the DGAP that the commensurate proportion of benefit of ITC is to be calculated as discussed *supra* and needs to be passed on to the eligible recipients proportionate to their share at the time of supply (sale of their share of flats) as envisaged in the Notification No. 4/2018-(Central Tax).

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12. However, the Authority finds that the profiteering amount of Rs. 3,80,367/- (including GST) has been determined by the DGAP in respect of the four units (out of Respondent's 17 units) sold by the Respondent from his share of flats till the period of

investigation i.e. upto 30.09.2020. It was reported by the DGAP that no unit from the Applicant No. 1 to 9's share of flats (27 units) were sold till the investigation period. Therefore, only 4 units were considered for the calculation of profiteered amount by the DGAP during the investigation period 01.07.2017 to 30.09.2020.

13. Further, the Authority finds that as per the Applicant No. 1's submissions dated 20.06.2022, the Respondent has received the Completion Certificate on 18.05.2022. Further, the Respondent during the Personal hearing held on 08.06.2022 has also stated that the Occupancy Certificate has been received by him for the said project in May, 2022. Therefore, in the given facts and circumstances, the Authority finds that this is a fit case to direct the DGAP to conduct the investigation upto the date of Completion Certificate so that the commensurate benefit of ITC in respect of all units are calculated.
14. Therefore, without going into the merits and the other submissions made by the Respondent and the Applicant No. 1 to 9 at this stage, the Authority finds that this case needs to be reinvestigated by the DGAP based on the above findings in the para 11 to 13 supra of this Authority. Thus the Authority directs the DGAP to reinvestigate the matter as per the provisions of Rule 133(4) of the CGST Rules 2017 for the period 01.07.2017 to 18.05.2022 i.e. till the date of Completion Certificate of the Project.
15. 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."

16. A copy of this order be sent to the Applicants and the Respondent free of cost for necessary action.


S/d
(Amand Shah)
Technical Member &
Chairman



S/d
(Pramod Kumar Singh)
Technical Member

Certified copy

S/d
(Hitesh Shah)
Technical Member


(Rajarshi Kumar)
NAA, Secretary

File No. 22011/NAA/11/Salarpuria/2021-22

Date:-30.09.2022

Copy To:-

1. M/s M/s Salarpuria Signum Complex LLP, 7, Chittaranjan Avenue, Kolkata-700072.
2. M/s Damodar Ropeways & Infra Ltd., Damodar House, I/A Vansittart Row, Kolkata-700001.
3. M/s Accurate Real Estates Private Limited, 45, Vivekanand Road, P.S. Girish Park, Kolkata-700007.
4. M/s Splash Properties Pvt. Ltd., 2, Rowland Road, P.S. Ballygunge, Kolkata-700020.
5. M/s Abundant Properties Pvt. Ltd., 6/2 Moira Street P.S. Shakespeare Sarani, Kolkata-700017.
6. M/s Seed Properties Private Limited, I/A Vansittart Row, P.S. Hare Street, Kolkata-700001.

7. M/s King Properties Pvt. Ltd., 6 A, Tiljala Road, P.S. Tiljala, Kolkata-700046.
8. M/s Mason Buildcon Pvt. Ltd., 19A, Sarat Bose Road, P.S. Bhowanipore, Kolkata-700020.
9. M/s Pansy Nirman Pvt. Ltd., 19A, Sarat Bose Road, P.S. Bhowanipore, Kolkata-700020.
10. M/s Techserve Tele Services Pvt. Ltd., 4, Kali Krishna Tagore Street, P.S. Jora Bagan, Kolkata-700007.
11. Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
12. Guard File.