

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

I.O. No. 26/2020
Date of Institution 15.04.2020
Date of Order 27.11.2020

In the matter of:

1. Sh. Ram Prakash Sharma, A-163, Sarita Vihar, New Delhi-110076.
2. Sh. Naresh Arora, House No. 4/162, Near Balaji Hanuman Mandir, Shivaji Nagar, Gurgaon, Haryana-122001.
3. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s BPTP Ltd., M-11, Middle Circle, New Delhi-110001.

Respondent

Quorum:-

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



Present:-

1. None for the Applicant No. 1
2. Sh. Naresh Arora Applicant No. 2 in person.
3. Sh. Ajay Bhagwani, Vice President (Taxation) and Sh. Kunal Kishore, Advocate for the Respondent.

ORDER

1. A Report dated 23.03.2020 has been received from the Applicant No. 3 i.e. the Director General of Anti-Profiteering (DGAP) on 15.04.2020 after detailed investigation under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the Report are that the Applicant No. 1 and 2 had filed applications before the Standing Committee on Anti-profiteering, under Rule 128 (1) of the CGST Rules, 2017 and submitted that they had purchased flats in the Respondent's Project "Discovery Park" but the Respondent had not passed on the benefit of Input Tax Credit (ITC) to them by way of commensurate reduction in prices of the flats, in terms of Section 171 (1) of the CGST Act, 2017. The Standing Committee on Anti-profiteering on prima facie having satisfied itself that the Respondent had not passed on the benefit of ITC had forwarded the applications of Applicant No. 1 and 2 with its recommendation to the DGAP for detailed investigation under Rule 129 (1).
2. The DGAP on receipt of the applications and supporting documents from the Standing Committee on Anti-profiteering had issued notice

under Rule 129 (3) of the CGST Rules, 2017 on 08.07.2019 calling upon the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the above Applicants by way of commensurate reduction in prices charged from them and if so, to suo moto determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all supporting documents. Vide the above mentioned notice dated 08.07.2019, the Respondent was also given opportunity to inspect the non-confidential evidence/information furnished by the above Applicants during the period from 15.07.2019 to 17.07.2019, which he had not availed. Vide e-mail dated 10.01.2020, the above Applicants were also given an opportunity to inspect the non-confidential documents/replies furnished by the Respondent on 15.01.2020 to 16.01.2020, which was not availed of by the Applicant No. 1 & 2.

3. The DGAP has reported that the time limit to complete the investigation was extended up to 27.03.2020 by this Authority, vide its order dated 24.12.2019 in terms of Rule 129 (6) of the CGST Rules, 2017 and the period of current investigation was from 01.04.2016 to 30.06.2019.
4. The DGAP has further reported that the Respondent had submitted his replies vide letters dated 19.07.2019, 26.07.2019, 22.08.2019, 14.10.2019, 01.11.2019, 07.11.2019, 18.12.2019, 07.01.2020, 20.01.2020, 28.02.2020, 11.03.2020, 17.03.2020, 18.03.2020, 19.03.2020, 20.03.2020 vide which he had stated:-

- a. That as per the CA's Certificate issued on computation of profiteering, the percentage of ITC benefit would be 0.78% on the

invoices raised till March 31, 2019 and that he had been passing on discounts to the customers of the Project duly considering the benefit of ITC.

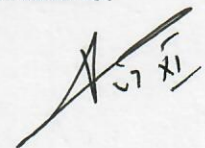
- b. That out of the total 622 customers under the Project, there was settlement arrived at with 332 customers relating to the amount charged for area escalation, cost escalation, difference of Service Tax and GST due to delay in possession and excess ITC to be passed on and various other issues. The settlement inter alia included settlement on account of passing on the benefit of excess ITC. The Respondent has also submitted copies of settlement deeds signed with the two customers wherein "Special Credit 2" was allowed towards excess GST ITC and other miscellaneous taxes. As the Respondent had already passed on the benefit to these 332 customers, no further benefit was to be passed on to them. The Respondent had submitted sample copies of settlement deeds entered into with the two customers.
- c. That he had received Occupation Certificate (OC) for 05 towers on 31.10.2018 and reversed ITC of Rs. 1,87,27,180/- on account of receipt of OC. Out of total 622 units, in 45 units either booking was cancelled or sale of units was after receipt of OC and no GST was charged. Accordingly, these 45 customers were not eligible for any benefit on account of ITC.
- d. That in approx. 115 cases, there was litigation by the customers, due to which either demand raised has not been fully paid or has been partly paid and due to the non-payment of the demand by these customers they were not entitled to the benefit of ITC.

- e. That the Respondent has passed on GST benefit of 3.56% on GST demands raised till June, 2019 through the entries made in the accounts of the customers.
- f. That as per the Notification for real estate issued in March, 2019, the Respondent was barred from taking benefit of ITC of GST in respect of old Project as on 31.03.2019 against any Project in future and such ITC would lapse. Further, the Respondent was still to incur lot of expenditure in respect of the Project 'Discovery Park' which would result in more ITC against which there would be hardly any further billing and thus ITC would lapse.
- g. That the Respondent has already passed on an amount of Rs. 3,41,44,848/- on account of profiteering.
- h. That the Respondent has not raised any demand in respect of the EWS flats and the commercial properties sold post-GST.
5. The DGAP has also stated that vide the aforementioned letters/e-mails, the Respondent has submitted the following documents/information:-
- (a) Copies of GSTR-1 Returns from July, 2017 to June, 2019.
- (b) Copies of GSTR-3B Returns from July, 2017 to June, 2019.
- (c) Copy of Tran-1 Statement.
- (d) Copies of VAT & ST-3 Returns from April, 2016 to June, 2017.
- (e) Electronic Credit ledger for the period from July, 2017 to June, 2019.
- (f) Copies of all demand letters and Flat buyer agreements in the name of the Applicants.
- (g) Details of applicable tax rates- pre-GST and post-GST.

- (h) Copies of Balance Sheets with Profit & Loss Accounts and other Annexures for FY 2016-17 and 2017-18.
- (i) Copy of Project Report submitted to the RERA including all periodic progress Reports.
- (j) Payment Schedule for the applicants.
- (k) Details of total units in Project "Discovery Park" and total units sold.
- (l) Details of taxable turnover and ITC for the Project "Discovery Park".
- (m) Project wise ITC availed by the Respondent.
- (n) Details/ List of home buyers of the Project "Discovery Park".
- (o) Ledger of 50 customers reflecting the benefit of ITC credited to their account.

6. The DGAP in his Report has also stated that the above applications, the various replies of the Respondent and the documents/evidence on record had been carefully examined. The main issues for investigation were:-

- i) Whether there was benefit of reduction in rate of tax or ITC on the supply of construction service by the Respondent after the introduction of GST w.e.f. 01.07.2017 and if so,
- ii) Whether such benefit was passed on to the recipients in terms of Section 171 of the CGST Tax Act, 2017 by the Respondent?



7. It has also been reported by the DGAP that vide letter dated 26.07.2019, the Respondent has submitted copies of the payment schedule for purchase of apartments by the above Applicants. The details of the amounts and taxes paid by the Applicant No. 1 to the Respondent have been furnished by the DGAP in Table-'A' below:-

Table-'A'

Amount in Rs.)									
S. No.	Payment Stages	Due Date	Base Price (%)	Base Price	Other Charges/IFMS	Service Tax including Cess	GST	GST benefit passed on	Total
1	At the time of Booking	29.12.2012	7.5%	3,21,720	-	9,941	-	-	3,31,661
2	Within 75 Days of Booking	14.03.2013	7.5%	3,21,720	-	9,941	-	-	3,31,661
3	Start of Construction	18.04.2013	30%	12,86,880	-	39,765	-	-	13,26,645
4	On completion of 5 th Floor Slab	16.10.2014	20%	8,57,920	-	26,510	-	-	8,84,430
5	On completion of top Floor Slab	02.03.2018	20%	8,57,920	-	1,02,950	-	-	9,60,870
6	Completion of Internal Plstr and Strt of Flooring		10%	4,28,960	-	-	51,475	-	4,80,435
7	On offer of possession		5%	2,14,480	-	-	25,738	-	2,40,218
Total			100%	42,89,600	-	1,89,107	77,213		45,55,920

8. The details of amounts and taxes paid by the Applicant No. 2 to the Respondent are furnished in Table-'B' below:-

Table-'B'

(Amount in Rs.)									
S. No.	Payment Stages	Due Date	Base Price (%)	Base Price	Other Charges/IFMS	Service Tax including Cess	GST	GST benefit passed on	Total
1	At the time of Booking	21.12.2012	7.5%	3,09,624	-	9,567	-	-	3,19,191
2	Within 75 Days of Booking	20.02.2013	7.5%	3,09,624	-	9,567	-	-	3,19,191
3	Start of Construction	11.04.2013	30%	12,38,496	-	38,270	-	-	12,76,766
4	On completion of 5 th Floor Slab	05.11.2014	20%	8,25,664	-	25,513	-	-	8,51,177
5	On completion of top Floor Slab	05.05.2016	20%	8,25,664	-	35,916	-	-	8,61,580
6	Completion of Internal Plstr and Strt of Flooring	06.04.2018	10%	4,12,832	-	-	49,540	-	4,62,372
7	On offer of possession	07.01.2019	5%	2,06,416	-	-	24,770	-	2,31,186
Total			100%	41,28,320	-	1,18,833	74,310	-	43,21,463

9. The DGAP had also claimed that para 5 of Schedule-III of the CGST Act, 2017 (Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services) reads as "Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of

building" and clause (b) of Paragraph 5 of Schedule II of the CGST Act, 2017 reads as "(b) construction of a complex building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration had been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever was earlier". Thus, the input tax credit pertaining to the residential units which were under construction but not sold was provisional input tax credit which would be required to be reversed by the Respondent, if such units remained unsold at the time of issue of the Completion Certificate (CC), in terms of Section 17(2) & Section 17(3) of the CGST Act, 2017. Therefore, the ITC pertaining to the unsold units after issuance of OC/CC might not fall within the ambit of the DGAP's investigation and the Respondent was required to recalibrate the selling prices of such units to be sold to the prospective buyers by considering the net benefit of additional input tax credit available to him post-GST.

10. The DGAP has further claimed that the Respondent has accepted that there was benefit of ITC which was required to be passed on and the same has been passed on to the home buyers as per the details mentioned in the homebuyer's list submitted by him. The Respondent has also submitted that he has executed settlement deeds with his 332 customers. According to the settlement deeds, "Special Credit 2" was mentioned as credit towards additional compensation and all the benefits relating to taxes as applicable stood settled by the home buyers with the Respondent. The

Respondent has also submitted the bifurcation of this Special Credit 2, as Anti-profiteering benefit and Credit for other miscellaneous reasons, in the home buyer's list. The Respondent has also submitted that GST benefit of 3.56% on GST demands raised till June, 2019 was passed on to all the customers. However, the DGAP has claimed that the correctness of the amount of benefit so passed on by the Respondent has to be determined in terms of Rule 129 (6) of the Rules. Therefore, the ITC available to the Respondent and the taxable amount received by him from the Applicants and other recipients post implementation of GST has to be taken into account for determining the benefit of ITC required to be passed on.

11. The DGAP has further reported that prior to 01.07.2017 i.e. before the GST was introduced, the Respondent was eligible to avail CENVAT Credit of Service Tax paid on input services and credit of the VAT amount paid on the purchase of inputs. However, the CENVAT Credit of the amount of Central Excise Duty paid on inputs was not admissible as per the CENVAT Credit Rules, 2004 which were in force at the material time. It was found that the Respondent had not been collecting VAT from his customers and there was no direct relation of turnover reported in the VAT Returns for the period from April, 2016 to June, 2017 filed by the Respondent with the amount so collected from the home buyers. Therefore, the credit of the VAT amount paid on the purchase of inputs and the VAT turnover was not required to be considered for computation of the ITC ratio to taxable turnover for the pre-GST period. Further post-GST, the Respondent could avail ITC of GST paid on inputs and input services including the sub-contracts.

From the information submitted by the Respondent, duly verified from the Service Tax Returns filed for the period from April, 2016 to June, 2017, the GSTR-1 and GSTR-3B Returns filed for the period from July, 2017 to June, 2018, the details of the CENVAT Credit and ITC availed by the Respondent and his taxable turnovers for the Project "Discovery Park" during the above said periods, the ratios of CENVAT Credit/ITC to turnovers have been furnished by the DGAP in the Table-C given below:-

Table-'C'

(Amount in Rs.)

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	Total (Post-GST)
(1)	(2)	(3)	(4)	(5)=(3)+(4)	(9)=(6)+(7)+(8)
1	CENVAT of Service Tax Paid on Input Services as per ST-3 (A)	88,50,141	77,32,908	1,65,83,049	-
2	ITC of VAT Paid on Purchase of Inputs as per VAT Returns (B)	-	-	-	-
3	Total CENVAT/ITC Available (C)= (A+B)	88,50,141	77,32,908	1,65,83,049	-
4	ITC of GST Availed as per GST Return (D)	-	-	-	14,08,46,857
5	Total Taxable Turnover as per homebuyer list(E)			27,81,20,828	84,86,84,210
6	Less Units Cancelled (F)			-	32,69,030
7	Net Taxable Demand (G)			27,81,20,828	84,54,15,180
8	Total Saleable Area in the Project (Square ft.) (H)			10,23,332.95	10,23,332.95
9	Area Sold relevant to Taxable turnover as per Returns (I)			7,41,656.95	8,86,773.63
10	Relevant CENVAT/ITC (J)= [(C)*(I)/(H)] or [(D)*(I)/(H)]			1,20,18,506	12,20,51,458
11	Ratio of CENVAT/ ITC to Taxable Turnover [(K)=(J)/(G)]			4.32%	14.38%

12. It has also been stated by the DGAP that as per the above Table-C, it was clear that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 4.32% and during the post-GST period (July, 2017 to June, 2019), it was 14.38%. This clearly confirmed that post-GST, the

Respondent has been benefited from additional ITC to the tune of 10.06% [14.38% (-) 4.32%] of the taxable turnover.

13. The DGAP has also stated that the issue of profiteering has been examined by comparing the applicable tax and the ITC available for the pre-GST period (April, 2016 to June, 2017) when Service Tax @4.5% was payable with the post-GST period (July, 2017 to June, 2019) when the effective GST rate was 12% (GST @18% along with 1/3rd abatement on value) on construction service, levied vide Notification No. 11/2017-Central Tax (Rate), dated 28.06.2017. On the basis of the figures contained in Table-‘C’ above, the comparative figures of ITC availed/available during pre-GST period and the post-GST period, the Excess Collection of Demand or the Profiteering Amount has been tabulated by the DGAP in the Table-‘D’ below:-

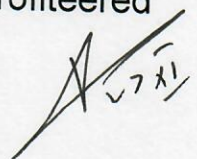
Table-‘D’

(Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April,2016 to June,2017	July, 2017 to June, 2019
2	Output tax rate (%)	B	4.5%	12.00%
3	Ratio of CENVAT/ ITC to Taxable Turnover as per Table - C above (%)	C	4.32%	14.38%
4	Increase in tax rate post-GST (%)	D= 12% less 4.5%	-	7.5%
5	Increase in ITC availed post-GST (%)	E= 14.38% less 4.32%	-	10.06%
6	Analysis of Increase in ITC:			
7	Base Price collected during July, 2017 to June, 2019	F		84,54,15,180
8	GST Collected @ 12% over Basic Price	G= F*12%		10,14,49,822
9	Total Demand collected	H=F+G		94,68,65,002
10	Recalibrated Basic Price	I= F*(1-E) or 89.94% of F		76,03,66,413
11	GST @12%	J= I*12%		9,12,43,970
12	Commensurate demand price	K= I+J		85,16,10,382
13	Excess Collection of Demand or Profiteering Amount	L= H-K		9,52,54,619

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14. The DGAP had further stated that from the Table-'D' above, it was quite clear that the ITC of 10.06% of the turnover should have resulted in commensurate reduction in the base prices of the flats. Therefore, in terms of Section 171 of the CGST Act, 2017, the benefit of the additional ITC that had accrued to the Respondent, was required to be passed on to the recipients. The Respondent had not contested that any such benefit would eventually have to be passed on to the recipients. In fact, the Respondent had submitted that he had passed on an amount of Rs. 32,927/- to the Applicant No. 1 and Rs. 72,396/- to the Applicant No. 2 which has been duly verified from the statements of account of the above Applicants submitted by the Respondent.
15. The DGAP has also submitted that after having established the fact of profiteering, the next step was to quantify the same. On the basis of the aforesaid CENVAT/ITC availability pre and post-GST and the details of the amount collected by the Respondent from the above Applicants and the other home buyers during the period from 01.07.2017 to 30.06.2019, the amount of benefit of ITC not passed on, or in other words, the profited amount came to Rs. 9,52,54,619/- which included 12% GST on the base profited amount of Rs. 8,50,45,767/-. The home buyer and unit no. wise break-up of this amount has been furnished by the DGAP in **Annexure-19** of his Report. This amount was inclusive of Rs. 1,17,883/- (including GST on the base amount of Rs. 1,05,252/-) and Rs. 2,56,899/- (including GST on the base amount of Rs. 2,29,374/-), which was the profited



amount in respect of the Applicant No. 1 and 2 respectively, mentioned at serial no. 15 and 183 of **Annexure-19**.

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

17. The DGAP has also reported that the Respondent has submitted that he has passed on benefit of Rs. 3,41,44,848/- to the home buyers. A summary of category-wise ITC benefit required to be passed on and the benefit claimed to have been passed on by the Respondent, has been furnished by the DGAP in Table-'E' below:-

Table-'E'

(Amount in Rs.)

Sr. No.	Category of Customers	No. of Units	Area (in Sq. ft.)	Demand Raised Post GST	Profiteering Amt. as per Annex-19	Benefit already Passed on by the Respondent	Difference	Remark
A	B	C	D	E	F	G	H=F-G	I
1	Applicant No. 1 (Residential)	1	1,248.65	10,46,250	1,17,883	32,927	84,956	Further Benefit to be passed on as per Annex-19
2	Applicant No. 2 (Residential)	1	1,259.09	22,80,058	2,56,899	72,396	1,83,963	Further Benefit to be passed on as per Annex-19
3	Other Buyers (Residential)	570	8,84,265.89	84,20,88,872	9,48,79,837	3,40,39,525	6,08,40,312	Excess Benefit passed on. List Attached as Annex-19
	Total	572	8,86,773.63	84,54,15,180	9,52,54,619	3,41,44,848	6,11,09,771	

18. The DGAP has also submitted that as per the Table-"E", the benefit already passed on by the Respondent was less than what he ought to have passed on in case of 572 residential flats by an amount of Rs. 6,11,09,771/- The details of this amount have been given in Annexure-19. For verification of the benefit already passed on by the Respondent, the statements of account of sample 50 home buyers have been called by the DGAP and the same have been duly verified with the details submitted by the Respondent.

19. The DGAP has concluded that the benefit of additional ITC of 10.06% of the taxable turnover has in fact accrued to the Respondent and the same was required to be passed on to the above Applicants and other recipients. Thus, the Respondent has contravened the provisions of Section 171 of the CGST Act, 2017 in as much as the additional benefit of ITC @10.06% of the base price received by the Respondent during the period from 01.07.2017 to 30.06.2019, has not been passed on to the above Applicants and other recipients. On this account, the Respondent has realized an additional amount to the tune of Rs. 1,17,883/- and Rs. 2,56,899/- from the Applicant No. 1 and 2 respectively which included both the profiteered amount @10.06% of the taxable amount (base price) and GST on the said profiteered amount. However, the Respondent has *suo moto* passed on an amount of Rs. 3,41,44,848/- to all the customers. This amount included Rs. 32,927/- and Rs. 72,396/- passed on to the above Applicants which has been duly verified by the DGAP. Therefore, the Respondent has in fact profiteered by an amount of Rs. 6,11,09,771/- (9,52,54,619 (-) 3,41,44,848/-) which included profiteered amount of Rs. 84,956/- (1,17,883/- (-) 32,927/-) and Rs. 1,83,963/- (2,56,899/- (-) 72,396/-) in respect of the Applicant No. 1 & 2 respectively. This amount (Rs. 6,11,09,771/-) included both the profiteered amount @10.06% of the taxable amount (base price) and GST on the said profiteered amount from other recipients as well who were not Applicants in the present proceedings. These recipients were identifiable as per the documents on record provided by the Respondent giving the names and addresses along with unit nos.

allotted to such recipients. Therefore, this additional amount of Rs. 6,11,09,771/- was required to be returned to such eligible recipients.

20. The DGAP has further reported that the present investigation covered the period from 01.07.2017 to 30.06.2019. Profiteering, if any, for the period post June, 2019, has not been examined as the exact quantum of ITC that would be available to the Respondent in future could not be determined at this stage, when the construction of the Project was yet to be completed.

21. The above Report was carefully considered by this Authority and it was decided to hear the above Applicants and the Respondent on 19.05.2020. A Notice dated 01.05.2020 was also issued to the Respondent to explain why the Report dated 23.03.2020 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. However, due to Covid-19 outbreak and subsequent lockdown in Delhi, the hearing could not be held. Sh. Ajay Bhagwani, Vice President (Taxation) and Sh. Kunal Kishore, Advocate appeared for the Respondent. The Respondent was directed to file written submissions which have been filed on 18.05.2020 in which the Respondent has submitted:-

a. That the Report of the DGAP was based on incomplete and incorrect facts as his submissions did not appear to have been considered and incorporated in the Report. The submissions made on the lapse of GST due to the amendments introduced with effect from 1st April, 2019 vide Notification No. 03/2019 dated 26.03.2019

were mentioned in the Report of the DGAP, however these submissions were neither dealt with nor rejected by giving any plausible justification. He had sent an e-mail on 23rd March, 2020 to extend the date of completion of investigation in view of the order dated 23rd March 2020 passed by the Hon'ble Supreme Court suo moto in Writ Petition (Civil) No. 03/2020 which allowed all the time barring proceedings to continue till further orders. However, the Report was filed on 23.03.2020 and no communication was sent to the Respondent till 01.05.2020 when the notice of hearing was received from this Authority along with the Report. The Government of India had also issued Notification No. 35/2020 dated 03.04.2020 extending the time limit for completion of all the proceedings falling in between the period from 20.03.2020 to 29.06.2020 up to 30.06.2020.

- b. That the Respondent had provided copies of statements of account of 52 customers including the two complainant customers showing entries of benefit of additional ITC amount in the accounts of the customers vide letter dated 18.03.2020 which was not considered by the DGAP. The DGAP has finalized the Report without giving any opportunity before drawing adverse inference.
- c. **Incorrect Saleable Area:-** The Respondent has also stated that the DGAP in his Report has adopted figure of 10,23,332.95 sq. ft. as the saleable area both pre and post GST. However, as per the submissions dated 17.03.2020, which were attached as Annexure-15 to the Report and reiterated on 20.03.2020 as Annexure-18 to the Report, the saleable area was 10,65,877 sq. ft. and no

explanation has been given by the DGAP to ignore the data given by the Respondent and adopting the data other than what was filed by the Respondent.

- d. **Incorrect Sold Area:-** He has further stated that the DGAP has adopted 7,41,657 sq. ft. as the area sold in the pre-GST period and 8,86,774 sq. ft. as the area sold in the post-GST period. However, as per his submissions dated 17.03.2020 attached as Annexure-15 with the Report and reiterated on 20.03.2020 as Annexure-18 with the DGAP's Report, the area sold in pre-GST period was 9,30,292 sq. ft. and in the post-GST period it was 9,35,691 sq. ft. However, the DGAP has not provided any explanation for considering the data other than what was filed by the Respondent.
- e. **Incorrect CENVAT of Service Tax Paid:-** The Respondent has claimed that he had categorically pointed out during the investigation vide his submissions dated 20.01.2020 that the input services received at the Corporate Office of the Respondent were apportioned across different Projects and thus, the proportionate CENVAT Credit of Service Tax in this regard of Rs. 66,68,035/- should be considered for the pre-GST period. Thus, instead of a total CENVAT Credit of Service Tax of Rs. 1,65,83,049/-, total amount of Rs. 2,32,51,084/- should have been considered in the Report in respect of the pre-GST period.
- f. **Incorrect Net Taxable Demand:-** The Respondent has further claimed that the DGAP in his Report has calculated pre-GST and post-GST Net Taxable Demand as Rs. 27,81,20,828/- and Rs. 84,54,15,180/- respectively. In this regard, the turnover representing

cancelled units during the pre- GST period amounting to Rs. 6,56,42,676/- had completely been ignored by the DGAP. Thus, on consideration of the same, the Net Taxable Demand for the pre-GST period would amount to Rs. 21,24,78,153/-.

g. **Reversal of ITC post-GST not considered:-** The Respondent has also contended that vide letter dated 17.03.2020, he had pointed out that the amount of reversal of ITC ought to be Rs. 70,38,671/-. Even though the DGAP has recorded that these ITC reversals were excluded from computation, however, the entire returned figure of ITC of Rs. 14,08,46,857/- had been considered. Giving effect to the said reversal, the amount of ITC would get reduced to Rs. 13,38,08,186/.

h. **Non-Consideration of ITC of VAT Paid:-** The Respondent has further contended that he had submitted details to the DGAP to show that an amount of Rs. 24,99,903/- was the ITC towards VAT paid on purchase of inputs during the pre-GST regime. In this regard, the Report of the DGAP has ignored the ITC on VAT by erroneously observing that the Respondent had not been collecting VAT from his customers and there was no direct relation of turnover reported in the VAT returns with the amount so collected from the home buyers. There was absolutely no basis for the observations made in this regard, in as much as:-

i. That the claim of the DGAP that VAT in the pre-GST period has not been levied on the demands raised by the Respondent on his customers was not correct. In fact he has raised demands on account of VAT @1.05% of the demands raised till 31.03.2014 and

after 31st March, 2014, the Respondent has taken Bank Guarantees/ FDRs with lien marked in his favour as demand of VAT would be raised as soon as the assessments are finalised. As VAT was merged with the GST and it was paid by the Respondent during the pre GST period as soon as the figures of VAT were provided, the same needed to be considered while working out the amount of profiteering.

22. That the issue of lapse of GST due to new provisions introduced in March, 2019 applicable to the Real Estate industry w.e.f. 1st April, 2019 was raised vide letter dated 28.02.2020 at S. No. 10 and vide letter dated 17.03.2020 at S. No. 6. This issue was mentioned in the Report of the DGAP however no reason was given for not-accepting plea of the Respondent that the amount of ITC which was likely to lapse could not be treated to be the profiteered amount.
23. The Respondent vide his submissions dated 08.06.2020 has reiterated his submissions made on 18.05.2020 and has further stated:-
- a. That in the cases where investigation reports have been prepared without granting sufficient opportunity have been set aside by the Hon'ble Courts by holding the same to be in violation of principles of natural justice viz. in the cases of ***Rajasthan Care Service v. Union of India 2018 (15) GSTL 317 (Bom.)*** and ***Jindal Saw Ltd. v. Ministry of Finance 2019 (369) ELT 507 (Guj.)***.
- b. That this Authority in the cases of ***M/s J. P. Sons, Case No. 16/2018, dated 6.12.2018 2019 (22) GSTL 473 (NAPA)*** and ***Pushpak Chauhan v. Harish Bakers & Confectionaries Ltd. 2019 (22) GSTL 463 (NAPA)*** has held that even in cases where notice

was issued, if the noticee had not furnished oral or written pleadings against the allegations, in the interest of natural justice, an opportunity could be granted.

- c. That the DGAP has arrived at completely erroneous ratios of CENVAT/ITC to the taxable turnovers. The Report has mentioned that while this ratio was 4.32% in the pre-GST regime, however, post-GST the ratio has increased to 14.38% leading to a benefit of 10.06% to the Respondent. However, the DGAP has incorrectly calculated the said ratios both pre and post-GST and thus, the said ratios needed to be rejected.
- d. That this Authority in the case of ***M/s Puri Constructions, Case No. 30/2019 vide Order dated 08.05.2019 2019-TIOL-30-NAA-GST*** and in several other cases has considered the credit of VAT paid on purchases of the inputs and credit of VAT (WCT) charged by the civil contractor on sub-contracts while calculating the ratio prior to GST.
- e. That this Authority in the case of ***M/s Pivotal Infrastructures Pvt. Ltd. IO No. 14/2020 dated 19.03.2020*** has directed the DGAP that the claim regarding VAT credit ought to be scrutinized. Thus, the same principles should be applied to the present case as well.
- f. That the above *ex facie* errors if corrected would lead to the correct computation of the ratio of ITC to taxable turnover. If the correct calculations were made, the impact of the same would be as follows:-



S. No.	Particulars	Report		Respondent	
		Pre GST	Post GST	Pre GST	Post GST
1	CENVAT of Service Tax Paid on Input as per ST-3 (A)	1,65,83,049		1,65,83,049	
2	Relevant allocation – ST- HEAD OFFICE (B)	-		66,68,035	
3	Input Tax credit as per VAT Return (C)	-		24,99,903	
4	Total Cenvat / Input available (D) = (A) + (B) + (C)	1,65,83,049	-	2,57,50,987	-
5	Total Input available as per GST Return (D)		14,08,46,857		14,08,46,857
6	ITC Reversal (E)				70,38,671
7	Net ITC available (F = D-E)		14,08,46,857		13,38,08,186
8	Total Taxable Turnover (G)	27,81,20,829	84,86,84,210	27,81,20,829	84,86,84,210
6	Less unit cancelled (H)	-	32,69,030	6,56,42,676	32,69,030
7	Net Taxable demand (I = G-H)	27,81,20,829	84,54,15,180	21,24,78,153	84,54,15,180
8	Total Saleable Area in Project (J)	10,23,332	10,23,333	10,65,877	10,65,877
9	Area Sold relevant to taxable turnover as per returns (K)	7,41,657	8,86,774	9,30,292	9,35,691
10	Relevant Cenvat / Input tax credit (L) = [(E) x (K) / (J)]	1,20,18,518	12,20,51,458.21	2,24,75,330	11,74,64,881
11	Ratio of Cenvat / Input tax credit to taxable turnover (M) = (L) / (I)	4.32%	14.38%	10.58%	13.89%
	Benefit to be passed		10.06%		3.31%

g. That the Report of the DGAP has completely ignored the fact that the rate of GST post 01.04.2019 has been fixed and specific provisions have been made in the Notification No. 03/2019 dated 26.03.2019 whereby, the Respondent was barred from taking credit with respect to the old Projects. After adjusting the output liability, the total excess ITC which was likely to lapse on account of the above Notification would be Rs. 3.34 Crore as on 30.06.2019 and Rs. 5.04 Crore as on

31.12.2019 and these figures were likely to increase substantially once whole Project got completed.

- h. That this Authority has also dealt with similar claims made in the cases of ***Shree Mahalakshmi Enterprises (Case No. 58/2019 dated: 20.11.2019 2019-TIOL-58-NAA-GST)*** as well as ***M/s Friends Land Developers (Case No. 62/2019 dated 27.11.2019, 2019-TIOL-62-GST-NAA)*** wherein, it was held that the Notification would apply prospectively. Thus, as the period involved for investigation in the present case is up to June, 2019, applying the observation of this Authority, the DGAP ought to have considered the submissions of the Respondent.
- i. That the Report of the DGAP did not consider the following relevant aspects:-
- i. The price at which a flat was sold by the Respondent was the negotiated price. There were numerous customers with whom settlement had been arrived at by the Respondent. The settlement amount already included the benefit of ITC commensurate to the settlement amount. No further amount was required to be passed on in such cases beyond what had been agreed in the settlement deed.
- ii. The benefit of Rs. 3,41,44,848/- to all the customers was the correct amount of commensurate benefit which had already been passed on by the Respondent.
- iii. The pending billing was very less and the expenses to be incurred in respect of the balance execution of the Project far exceeded the billing to be done. Further, the GST to be paid to

the Government on such billing was 18% or more while collection was likely to be much less @12% resulting into accumulation of more GST credit which would lapse.

- iv. The tax rate on major inputs and input services had also increased in the post-GST regime viz. the tax rate on Architect and Brokerage Services had increased from 15% pre-GST to 18% post-GST. Further, tax rate on Steel had increased from 5.25% to 18%.
- v. The Building Cost Inflation Index as per the data provided on the CPWD's website had increased at the rate of 8% from 2017 to 2019.
- vi. The minimum labour wages had also increased at the rate of 9% from 2017 to 2019.
- j. That this Authority has in several such cases required the DGAP to reconsider the Report and consider the submissions and factual errors pointed out by the Respondents in the cases of ***M/s Maheshwari Infratech Pvt. Ltd. IO No. 16/2020 dated 20.04.2020*** and ***Cloudbail India Pvt. Ltd. IO No. 15/2020 dated 20.04.2020***.
- k. That in the cases of ***Oryx fisheries Private Limited v. Union of India 2011 (266) ELT 422 (SC)*** and ***Siemens Ltd. v. State of Maharashtra 2007 (207) ELT 168 (SC)***, the Hon'ble Supreme Court has held that a quasi-judicial authority was obligated to act in an independent manner and any order which was passed with a premeditated mind was illegal and unsustainable. The DGAP having failed to consider documents

and submissions on record has acted in an unfair and unreasonable manner and therefore, the Report was liable to be rejected.

- I. That the Report of the DGAP has travelled far beyond the Applications filed before the Screening Committee and thus, the same was liable to be rejected on this ground alone. The original Applications were filed with respect to Flat Nos. A-1202 and F-1102. However, ignoring the same, the Report has been prepared for the entire Project which comprises of two phases and the second phase has not even been completed.
- m. That the FAQs on anti-profiteering provisions released by the CBIC clearly stated that for multiple goods, separate complaints with evidence were required to be filed and hence, the DGAP could not have *suo moto* assumed powers and broadened the scope of the investigation to flats other than those which had been referred to it by the Standing Committee.
- n. That in the case of ***M/s Northern Plastics Limited v. Hindustan Photo Films Mfg. Co. Ltd. 1997 (91) ELT 502 (SC)*** it was held that the authorities were creatures of the statute who derived their jurisdiction and powers from the statute and hence they could not venture into an exercise beyond the mandate of the statute.
- o. That the term 'commensurate' though not defined under the Act, was defined in Webster's dictionary to mean "*corresponding in size, extent, amount, or degree*" or "*equal in measure or extent*". Further, the Oxford dictionary defined the

term as "Having the same measure,' of equal extent, duration or magnitude". Thus, as long as corresponding benefit has been extended as benefit to the customers, the allegations of violation of Section 171 could not be sustained.

- p. That the 'Procedure and Methodology' issued on 19.07.2018 by this Authority provides the procedure pertaining to investigation and hearing but no method has been notified / prescribed pertaining to calculation of profiteered amount. Thus, in the absence of any legal and valid methodology and procedure in respect of the calculation of the profiteering amount, the proceedings itself were vitiated.
- q. That in absence of proper computation or machinery provisions, the entire scheme of the statute by which a charge was sought to be created would fail. In a catena of judicial precedents including in the cases of **CCE v. Larsen & Toubro Ltd. (2016) 1 SCC 170**, **CIT v. B. C. Srinivasa Setty (1981) 2 SCC 460** and **Suresh Kumar Bansal v. Union of India 2016-TIOL-1077-HC-DEL-ST**, it has been *inter-alia* held that statutory provisions levying the tax were not enforceable unless there existed the necessary machinery provisions for levying tax.
- r. That the provisions of Rule 126, 127 and Rule 133 of the CGST Rules, 2017 also could not be relied upon to support the Report, in as much as, the said Rules clearly appeared to be in excess of the Rule making power provided in Section 171 and / or Section 164 of the Act.



- s. That the DGAP in the present case has adopted a simplistic approach of arriving at the ratios of the ITC and the Taxable Turnovers for the purpose of calculating the ratios which should be applied by the Respondent for passing on the benefit. The said methodology did not have any statutory backing and completely ignored the business realities peculiar to the real-estate business. The Projects in the construction business were spread over a period of time and hence, there could not be a co-relation between the inward supplies and the input taxes. Further, after obtaining the OC any flat sold would not be liable to GST and hence he would have to reverse the ITC availed against such unsold flat.
- t. That the DGAP in his Report vide Table-D has acknowledged that the total GST collected by the Respondent was Rs. 9,12,43,970/- while profiteering amount to be passed on was Rs. 9,52,54,619/- which was in excess of the amount collected. Thus, it was clear that the methodology adopted by the DGAP was completely illegal, arbitrary and irrational.
24. Clarifications were sought from the DGAP on the Respondent's submissions dated 18.05.2020 and 08.06.2020. The DGAP vide his Report dated 08.07.2020 has stated:-
- a. **Report submitted in haste and without affording sufficient, proper and reasonable opportunity of hearing:** That the Respondent was asked for details by way of letters and e-mails only and he was required to submit the details vide e-mails/ post only. No communication on investigation Report was required to be given to

him. The submissions made by the Respondent during the investigation were duly considered and reported upon in the investigation Report dated 23.03.2020. As per Rule 129 of the CGST Rules, 2017, the DGAP was under statutory obligation to complete the investigation in the stipulated time period of 06 months, extendable by 03 months, with the permission of this Authority. The DGAP has granted total time period of approx. 08 months to the Respondent to submit the documents and submissions and has submitted his Report in the due course.

- b. Further, the Respondent has quoted the cases of ***Rajasthan Care Services*** and ***Jindal Saw Ltd. v. Ministry of Finance supra*** the facts of which were different from the present case.
- c. The contentions of the Respondent that this Authority in the cases of ***M/s J.P. & Sons*** and ***Pushpak Chauhan supra*** has held that in cases where notice was issued, if the Respondent has not furnished oral or written pleadings against the allegations, an opportunity could be granted, could not be accepted in the instant case, as the remarks were made for the penalty proceedings. This Authority has given ample opportunity to the Respondent during its proceedings to put forward his grievance, if any. Hence, the claim of the Respondent that the basic principles of natural Justice were not followed did not hold good.
- d. **Incorrect saleable area**: The total saleable area of 10,23,332.95 sq. ft. has been adopted from the Project Report submitted to RERA by the Respondent vide reply dated 26.07.2019 (Annexure-5 of the DGAP's Report dated 23.03.2020).



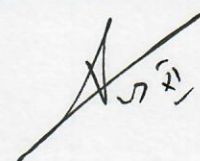
e. **Incorrect Sold area**: The area sold pre and post GST has been adopted from the list of home buyers, as submitted by the Respondent. The area sold pre-GST was the area relevant to the turnover for the period from April-2016 to June-2017. Therefore, the total area sold pre-GST (for the above mentioned period) was 7,41,656.95 sq. ft. For the post-GST period, the area sold was the total sold area after excluding cancelled units, which were sold post receiving OC and the units where no demand has been raised post-GST. The profiteering for such area would be computed at the time of sale of that particular area. Therefore, the total area sold post GST was 8,86,773.63 sq. ft.

f. **Incorrect CENVAT of Service Tax paid**: That this was a new fact submitted by the Respondent in front of this Authority and the same was not presented before the DGAP during the investigation. The Respondent has claimed that the input services received at the Corporate Office of the Respondent were apportioned across different Projects and thus, the proportionate CENVAT Credit in this regard of Rs. 66,68,035/- should be considered for the pre-GST period. However, the Respondent has not submitted any document supporting the claim. If the working regarding the apportionment of credit was provided and verified, the profiteering amount might change.

g. **Non-consideration of ITC of VAT paid as per Returns**: That this was also a new fact submitted by the Respondent. The Respondent has claimed that he has taken Bank Guarantees/ FDRs with lien marked in his favour, as the VAT assessments for the AY 2016-17

and April-2017 to June-2017 were in progress. Further, the Respondent has submitted that he would raise demands on account of VAT once assessments for pre-GST period were completed. However, the Respondent has not submitted any document supporting his claim. If the copies of Bank Guarantees and FDRs were provided and verified, the profiteering amount might change.

- h. **Reversal of ITC post-GST not considered:** That the reversal of credit was on account of the units where the OC has been received. The area of such units has not been considered for calculating the ITC to turnover ratio relevant to the area sold. Therefore, the reversals have not been considered.
- i. **Incorrect Net Taxable Demand:** That this was a new fact submitted by the Respondent in front of this Authority and the same was not presented before the DGAP during the investigation. The Respondent has submitted that the turnover representing cancelled units for the pre-GST period was Rs. 6,56,42,676/- and the same should be considered. However, the Respondent has not submitted any document supporting the claim. If the details/ documents supporting the claim were provided and verified, the profiteering amount might change.
- j. **Alleged Profiteering amount was unexplainably and irrationally exorbitant:** The contention of Respondent was not sustainable as the total profiteering amount so arrived vide Table-D of the Report included the excess GST amount collected by the Respondent from the home buyers, which needed to be returned.



k. That the submissions of the Respondent that the rate of GST post 01.04.2019 has been fixed and specific provisions have been made in the Notification No. 03/2019 dated 26.03.2019 whereby, the Respondent was barred from taking any excess credit with respect to the old Projects and that after adjusting the output liability, the total excess ITC which was likely to lapse on account of the above Notification was Rs. 3.34 Crore as on 30.06.2019 and Rs. 5.04 Crore as on 31.12.2019, were not tenable. As per Notification No. 03/2019, construction of residential apartments other than affordable residential apartments by a builder/ promoter in a Project which commenced on or after 1st April, 2019 or in an ongoing Project in respect of which the builder has not exercised the option to pay central tax on construction of apartments at the rates as specified for items mentioned in the said Notification, has to reverse the excess ITC on proportionate basis, as per the formula mentioned in the Annexure-I of the Notification. Thus, this Notification has no direct relation with the profiteering amount so determined in the DGAP's Report dated 23.03.2020.

l. Report and Investigation conducted in a pre-meditated manner:

The contention of the Respondent that a huge amount of credit was likely to lapse in view of Notification No. 03/2019 dated 26.03.2019 and cost incurred was likely to be much in excess of the billing to be done, did not hold merit, as discussed above. As per Section 171 any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices. Thus, the increase in cost, on

account of factors, other than the tax rate or input tax credit could not be offset against the benefit to be passed on due to increased availability of ITC.

m. That the Respondent has cited the cases of ***Oryx Fisheries Pvt. Ltd.*** and ***Siemens Ltd. supra*** and claimed that in the above cases, any order which was passed with a premeditated mind was illegal and unsustainable. However, the merits of these cases were not applicable in the instant case, as the DGAP has submitted his Report after due consideration of the replies submitted by the Respondent.

n. **Report has travelled beyond the application filed by the Applicant:** That Section 171 did not mention about any particular recipient, this means that all supplies of the registered person needed to be examined from a profiteering angle. Such expanded investigation was the only obvious method to compute the profiteering because there was a single GST return for the supply of all the SKUs put together, supplied by a particular registered person and also a single credit entry in the ITC ledger of the registered person for the particular month. It was not feasible to earmark a portion of the total ITC to a particular product /SKU being supplied by him as there were a lot of common inputs for the products being supplied.

o. **No violation of Section 171 of the Act:** That under the provisions of Section 171 of the CGST Act, 2017 read with Rule 129 of the CGST Rules, 2017, the legal requirement was abundantly clear that in the event of a benefit of ITC or reduction in rate of tax, there must

be a commensurate reduction in prices of the goods or services. Such reduction could obviously be in terms of money only, so that the final price payable by a consumer got reduced. Thus, under the provisions of Section 171 of the CGST Act, 2017, every recipient of goods or services was entitled to get his/her due share of benefit. The contention of the Respondent that he has provided corresponding benefit to the customers and that there was no statutory mandate or prescription to determine profiteering, was not sustainable.

p. **Methodology adopted for investigations was completely illegal:**

That the Methodology and Procedure has been notified by this Authority vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. The facts of each case were different in a real estate Project like percentage of completion of Project, different proportion of ITC availed because of different purchase pattern of inputs like cement, steel, fittings etc.; area sold; taxable turnover, payment of price etc. before or after the GST implementation. Government has also launched schemes like affordable housing which added further variation in the facts of each case. Before the issuance of OC /CC, it was considered as a supply of service under the CGST Act but after these certificates were issued it did not come under the purview of GST but under various States Registration / Stamp Acts. Further, the facts of the cases related to FMCG companies, restaurants, construction and cinema sectors were completely different and at times mutually exclusive to each other.

Applying the same mathematical methodology of FMCG sector to a

supplier of a cinema sector would in fact lead to erosion of justice in the name of uniformity. In light of the above facts, quantum of profiteering was computed by the DGAP by taking into account the particular facts of each case. Moreover, there was no need to define the word 'commensurate' as its literal meaning carried the essence of the law, as has been given in Section 171 of the CGST Act, 2017.

q. **The Anti-profiteering Measure interferes with the Right to carry**

business: That the Respondent was absolutely free to exercise his right to practice and carry on trade or business, as Article 19 (1) (g) of the Constitution protects it. The Respondent could fix any price / margin he wants but in the event of invocation of Section 171, it was to be ensured that the benefit (which was a sacrifice of precious revenue from the kitty of Central and State Governments in a welfare state) of the reduction in the rate of tax and ITC was passed on to the recipients and if tracked down the entire value chain, to the end consumers. The soul of this provision was the welfare of the consumers who were voiceless, unorganized and scattered. The DGAP has nowhere interfered in the business decisions of the Petitioner.

25. Further, the Respondent has filed his submissions dated 14.08.2020 against the supplementary Report of the DGAP dated 08.07.2020 in which he has reiterated his earlier submissions and in addition has advanced the following arguments:-

a. That the DGAP has himself agreed to the fact that the calculation errors pointed out by the Respondent particularly pertaining to a) CENVAT Credit of Service Tax paid in respect of Corporate Office,

(b) Value Added Tax paid (c) Turnover representing cancelled units, if verified, would change the profiteering amount. Therefore, the investigation was defective and therefore, the Report dated 23.03.2020 was liable to be rejected.

b. **Incorrect Saleable Area**: As per the Report of the DGAP, 10,23,332.95 sq. ft. was the saleable area both pre and post GST. However, as per the Respondent's submissions dated 17.03.2020 and 20.03.2020 the correct saleable area was 10,65,877 sq. ft. The DGAP's Clarifications state that the area has been adopted from the RERA Report submitted by the Respondent on 26.07.2019 (Annexure-5 of the Report). However, a perusal of the said RERA Report showed that there was no mention of the area as 10,23,332.95 sq. ft.

c. **Incorrect Sold Area**: The DGAP in his Report has adopted 7,41,657 sq. ft. as the area sold pre-GST and 8,86,774 sq. ft. post-GST. However, as per the submissions dated 14.10.2019, 17.03.2020 and reiterated on 20.03.2020 the area sold in the pre-GST period was 9,30,292 sq. ft. and in the post-GST period it was 9,35,691 sq. ft. The DGAP's Clarifications stated that this area was taken from the list of home buyers, as submitted by the Respondent. Adopting of the said area from the home buyer's list was completely erroneous as the DGAP has not considered the entire area sold and has restricted the period for adopting the area sold to April, 2016 to June, 2017. In the home buyers' list submitted by the Respondent, the area of 1,88,635 sq. ft. and 2577 sq. ft. related to the cancelled units which were also the area sold with respect to the same Project

and therefore, should have been considered to calculate the area sold. Similarly, in the post-GST period, the homebuyer's list provided for a total sold area of 9,35,691 sq. ft. Assuming that the area sold post OC was to be excluded, the area of 11534 sq. ft. could be excluded resulting in area of 9,24,157 sq. ft. Thus, the figure adopted in the Report of the DGAP was incorrect,

d. **Incorrect CENVAT of Service Tax Paid:** The DGAP in his Report has considered a total CENVAT Credit of Rs.1,65,83,049/- instead of a total of Rs. 2,32,51,084/- by ignoring the CENVAT amount of Rs. 66,68,305/- related to the Corporate Office of the Respondent. The DGAP in his Clarifications has stated that this was a new fact which was not submitted during the investigation. However, from the letter dated 17.03.2020 and reiterated on 20.03.2020, it was clear that this fact was available on record. Thus, the Credit should have been considered even on the basis of admitted position in the Clarifications.

e. **Non-Consideration of ITC of VAT Paid as per Returns:** As per the submissions made vide letters dated 18.12.2019, 20.01.2020, 28.02.2020, 17.03.2020 and 20.03.2020 an amount of Rs. 24,99,903/- was the ITC towards VAT paid on purchase of inputs during the pre-GST regime which was not considered in the Report. The DGAP in his Clarifications has stated that this was a new fact which was not submitted during the investigations. Thus, the ITC on VAT paid should have been considered even on the basis of admitted position in the Clarifications. Further, insofar as the copies of Bank Guarantees and FDRs were concerned, the same were

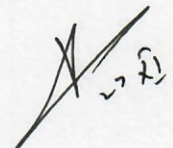
never called upon from the Respondent. Sample copies of the FDRs and BGs in this regard were annexed as Annexure-WS-1 by the Respondent.

f. **Reversal of ITC post-GST not considered:** The DGAP in his Report has considered Rs. 14,08,46,857/- towards ITC availed post-GST without considering that Rs. 70,38,671/- related to ITC reversed by the Respondent towards units in respect of which OC was received by the Respondent. The Respondent has filed complete details of area of units sold pre-GST and post-GST and area of units unsold before issue of OC and after issue of OC vide letter dated 20.03.2020. Although it was stated by the DGAP that area of such units has not been considered, however, it was not clear from DGAP's Report. The DGAP in his Clarifications has also stated that these reversals related to units where OC has been received and since the area was not considered for calculating ITC, hence the reversals were also not considered.

g. **Incorrect Net Taxable Demand:** The pre-GST Net Taxable Demand was considered as Rs. 27,81,20,828/- without considering that turnover of Rs. 6,56,42,676/- related to cancelled units and thus, the amount should have been Rs. 21,24,78,153/-. The DGAP in his Clarifications has stated that this was a new fact which was not submitted during the investigations. However, from the perusal of the letters dated 17.03.2020 (Annexure-15 of Report) and 20.03.2020 (Annexure-18 of the Report), it was clear that this fact was available on record and the pre-GST turnover was Rs. 21,24,78,153/- while the DGAP has considered pre-GST turnover as

Rs. 27,81,20,628/-. Thus, the Net Taxable Demand should have been considered as Rs. 21,24,78,153/- even on the basis of admitted position in the Clarifications. The details in this regard were annexed as Annexure-WS2 by the Respondent.

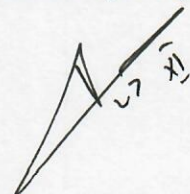
- h. **Lapse of ITC on account of Notification No. 3/2019 dated 26.03.2019 not considered**: The Respondent has pointed out that the period of investigation in the present case was from April, 2016 to June, 2019. Thus, the period overlapped with the period of investigation after the Notification No. 3/2019 dated 26.03.2019 was brought into force. The total excess ITC which was likely to lapse on account of the Notification should have been considered. The DGAP in his Clarifications has agreed that the Notification required reversal of excess ITC on proportionate basis and that the Notification has no direct relation with the profiteering amount. Since, the ITC was going to lapse it should be considered while computing the ITC available post-GST.
- i. **Comparison with pre-GST ITC was erroneous and contrary to Section 171 of the CGST Act**: In terms of Section 171, a registered person was required to pass on the benefit on account of 'input tax credit', which comprised of CGST, SGST, and IGST etc. The said input tax credit did not comprise of the VAT paid under the pre-GST regime. Thus, the whole basis of drawing a comparison with the VAT paid on inputs and comparing the same to ITC post GST to arrive at the ratio for computing profiteering was beyond the provisions of Section 171 of the CGST Act, 2017.



- j. The DGAP in his Clarifications has admitted that in the real-estate sector, there were various market driven parameters which impacted pricing and thus, the methodology adopted by the Respondent ought to have been considered as having extended 'commensurate' benefit. The methodology adopted in the Report would never result in the correct profiteering amount, in as much as (i) The turnover in Real-estate sector was not correlated to the cost of construction. The turnover of the registered person reflected the amount collected from the customers as per payment plans which was market driven. However, the ITC accrued as per the actual cost incurred; (ii) the amounts received sometimes also included the advances received for various units. However, there were various situations where the units were sold only at the end of the completion of the Project. During this entire time, the ITC kept getting added on with the receipt of inputs/input services; (iii) The various inputs received by the Respondent prior to GST had now a higher rate of tax. Thus, when the same inputs were received prior to GST, the ITC would be lower whereas, post-GST, the ITC would be higher.
26. During the hearing through video conferencing on 26.10.2020, the Respondent had requested to allow him to submit his legal submissions in respect of the Report of the DGAP. Therefore, the Respondent was allowed to submit his legal submissions. The Respondent vide his submissions dated 02.11.2020 has reiterated his earlier submissions dated 08.06.2020 and has further stated:-



- a. That perusal of the submissions dated 18.07.2020 made by the DGAP established that the investigation in the present case was not carried out properly and various facts and calculations submitted by the Respondent were not considered. Further, the DGAP has himself admitted the calculation errors pointed out by the Respondent particularly pertaining to the CENVAT Credit of Service Tax relating to the Corporate Office, VAT paid as per the details provided during the investigation and turnover representing the cancelled units. Thus, the Report of the DGAP dated 23.03.2020 ought to be rejected.
- b. That any sale of property after the receipt of CC did not attract GST and thus proportionate ITC availed or to be availed by the Respondent was provisional in nature and the same would get finalized only at the time of the completion of the Project. Therefore, it was very difficult to ascertain the exact amount of benefit on account of ITC before the issuance of CC. Thus, the Respondent has correctly computed the GST benefit to be passed on to the customers by adopting the methodology considering the taxes which were earlier a cost and were now available as credit.
- c. The Respondent has also furnished details of the Projects vide Annexure-1 of his submissions dated 03.11.2020, which he has executed or was executing in the State of Haryana under single GSTIN 06AACCB2442A1ZH, perusal of which shows that the following Projects are still under construction or were partly completed:-



S.No.	Project	Status
1	PARK SENTOSA	UNDER CONSTRUCTION
2	THE DECK	UNDER CONSTRUCTION
3	PARK ARENA	UNDER CONSTRUCTION
4	DISCOVERY PARK	PART COMPLETED
5	PARK ELITE FLOORS	PART COMPLETED
6	Park-81	PART COMPLETED
7	NEW ELITE FLOORS	PART COMPLETED
8	PARK CENTRAL	UNDER CONSTRUCTION
9	PARK SPACIO	PARK COMPLETED
10	TERRA	UNDER CONSTRUCTION
11	PEDESTAL@70 A	PART COMPLETED
12	VISIONNAIRE	PART COMPLETED
13	PARK STREET @ FARIDABAD	PART COMPLETED
14	AMSTORIA FLOORS	PART COMPLETED

27. During the hearing held on 26.10.2020, the Applicant No. 2 had also stated that the Respondent has not passed on the benefit of additional ITC to all the flat buyers and had requested to allow him to submit the proof of the same. The request of the Applicant was accepted and he was allowed to submit the proof of non-passing on of the ITC benefit to the home buyers by the Respondent. The Applicant No. 2 vide his e-mail dated 03.11.2020 has enclosed copies of e-mails from S/Sh. Surinder Singh, buyer of Unit No. F-G05, Deepak Sharma, buyer of Unit No. G-406, Ashok Arora, buyer of Unit No. K-404, Amit Kumar Gupta, buyer of Unit No. A-705 and Surjeet Kumar, buyer of Unit No. H-101 who have purchased flats in Project 'Discovery Park' of the Respondent claiming that they have not received any benefit of ITC from the Respondent. The above Applicant has also claimed that several other buyers had also not got the benefit. He has further claimed that the Respondent has

given benefit of 3% only whereas he himself has got much more benefit.

28. This Authority has carefully considered all the Reports filed by the DGAP, submissions of the Respondent and the Applicant No. 2 and all other material placed on record. On examining the record, it is revealed that the Respondent vide his above mentioned submissions has alleged that the DGAP has not considered his submissions during the investigation. He has further alleged that there were following factual errors in the Report of the DGAP:-

a. **Incorrect Saleable Area:-** The Respondent has contended that the DGAP in his Report has adopted figure of 10,23,332.95 sq. ft. as the saleable area both in the pre and the post-GST periods. However, as per his submissions the correct saleable area was 10,65,877 sq. ft. The DGAP vide his Clarifications dated 08.07.2020 has claimed that the total saleable area of 10,23,332.95 sq. ft. has been adopted from the Project Report submitted to RERA, a copy of which has been supplied by the Respondent to the DGAP, vide his submissions dated 26.07.2019 (Annexure-5 of the DGAP's Report dated 23.03.2020). It is clear from the counter claims made by the Respondent and the DGAP that there is serious difference on the figures of the saleable area. Accordingly, the above issue is required to be further investigated to arrive at the correct figure of saleable area.

b. **Incorrect Sold Area:-** The DGAP has taken 7,41,656.95 sq. ft. as the area sold in the pre-GST period and 8,86,773.63 sq. ft. as the sold area in the post-GST period on the basis of the home buyers

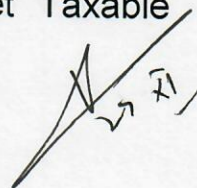
list submitted by the Respondent. However, the Respondent has claimed that the area sold in pre-GST period was 9,30,292 sq. ft. and in the post-GST period it was 9,35,691 sq. ft. It is apparent from the above that there is dispute over the sold area during the pre and the post GST periods which needs to be further investigated and correct figures submitted to this Authority.

c. **Incorrect CENVAT of Service Tax paid:-** The Respondent has also contended that the input services received at the Corporate Office of the Respondent were apportioned across different Projects and thus, the proportionate CENVAT Credit in this regard of Rs. 66,68,035/- should be considered during the pre-GST period. Therefore, instead of a total CENVAT Credit of Rs. 1,65,83,049/-, a total of Rs. 2,32,51.084/- should have been considered in the Report of the DGAP as the above credit. The DGAP has stated in his Clarifications dated 08.07.2020 that this was a new fact submitted by the Respondent before this Authority and the same was not presented before him during the investigation nor documents supporting the above claim were supplied by the Respondent. The DGAP has also stated that if the details regarding the apportionment of credit were provided and verified, the profiteering amount might change. Therefore, there is need to verify the above claim of the Respondent to arrive at the correct findings on the above issue. Accordingly, the DGAP is directed to further investigate it and submit Report on the same.

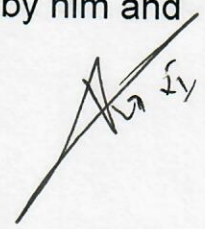
d. **Non Consideration of ITC of VAT paid as per Returns:-** The Respondent has also contended that as per his VAT Returns placed

on record an amount of Rs. 24,99,903/- was the ITC towards the VAT paid on the purchase of inputs during the pre-GST regime which has not been taken in to consideration by the DGAP while computing the pre-GST ratio of ITC to turnover. The DGAP in his Clarifications dated 08.07.2020 has claimed that this was also a new fact submitted by the Respondent. However, the Respondent has not submitted any document supporting the claim. If the copies of Bank Guarantees and FDRs were provided and verified, the profiteering amount might change. Accordingly, the above claim of the Respondent is also required to be further investigated and findings submitted to this Authority.

- e. **Incorrect Net Taxable Demand**:- The Respondent has also contended that the DGAP has calculated the Respondent's pre-GST and post-GST Net Taxable Demands as Rs. 27,81,20,828/- and Rs. 84,54,15,180/-. In this regard, the turnover representing cancelled units for the pre-GST period amounting to Rs. 6,56,42,676/- has completely been ignored. Thus, on consideration of the same, the net taxable demand for the pre-GST period would amount to Rs. 21,24,78,153/-. The DGAP in his Clarifications dated 08.07.2020 has stated that it was a new fact submitted by the Respondent before this Authority and the same was not presented before him during the investigation. He has also stated that if the details/ documents supporting the claim were provided and verified, the profiteering amount might change. Accordingly, this issue is also required to be investigated and correct figures of Net Taxable Demand furnished to this Authority.

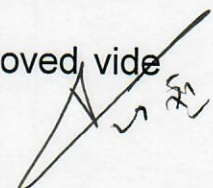


29. The Applicant No. 2 vide his e-mail dated 03.11.2020 has also alleged that the Respondent has not passed on benefit of additional ITC to the home buyers and has submitted copies of e-mails from S/Sh. Surinder Singh, buyer of Unit No. F-G05, Deepak Sharma, buyer of Unit No. G-406, Ashok Arora, buyer of Unit No. K-404, Amit Kumar Gupta, buyer of Unit No. A-705, and Surjeet Kumar, buyer of Unit No. H-101, who have purchased flats in Project 'Discovery Park' of the Respondent, in which they have claimed that they have not received any benefit of ITC from the Respondent. The above Applicant has also claimed that several other buyers have also not got the benefit. He has further claimed that the Respondent has given benefit of 3% only whereas he has got much more benefit. The Respondent has contended that he has passed on the benefit amounting to Rs. 3,41,44,848/-. The DGAP vide Para 19 of his Report dated 23.03.2020 has also claimed that the Respondent has passed on the above amount to the Applicant No. 1 & 2 and other 570 home buyers and hence, he is required to pass on the balance amount of Rs. 6,11,09,771/-, out of the total profited amount of Rs. 9,52,54,619/-, to the home buyers. The DGAP has also claimed that he has verified passing on of the benefit in respect of 50 home buyers and found it to be correct. However, it is clear from the e-mails of the above 5 home buyers that the claim of the Respondent is wrong and hence, the DGAP is directed to verify the passing on of the benefit to all the eligible home buyers as has been claimed by the Respondent during the investigation to be carried out by him and submit his findings to this Authority.



30. Based on the above reasons and without going into the merits of the other submissions filed by the Applicants and the Respondent at this stage, we find this to be a fit case for further investigation as per the provisions of Rule 133(4) of the CGST Rules 2017. Accordingly, this Authority directs the DGAP to reinvestigate the above issues and furnish his Report under Rule 129 (6) of the CGST Rules, 2017. The investigation shall be carried out w.e.f. 01.07.2017 to 31.11.2020 or till the date OC has been received by the Respondent in respect of the above Project.
31. The Respondent has also submitted list of the Projects which are being executed by him in the State of Haryana under the single GST registration vide Annexure-1 of his submissions dated 03.11.2020 as has been mentioned in para supra. Perusal of the list shows that 14 Projects are under construction or have been partly completed. Therefore, there are sufficient grounds to believe that the Respondent is liable to pass on the benefit of ITC to the home buyers of these Projects in terms of Section 171(1) as he has himself admitted that he is liable to pass on the benefit in respect of the present under construction Project. Under the provisions of Section 171 (2) of the above Act, this Authority is competent to suo moto examine all such cases where the benefit of additional ITC is required to be passed on and then determine the benefit. Since, the Respondent is availing the benefit of ITC post-GST under one registration, hence, all the above Projects are required to be investigated so that the exact quantum of benefit can be determined.

The action of taking suo moto cognizance has been approved, vide

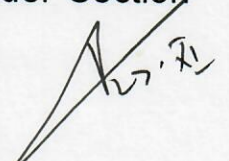


order dated 10.02.2020 passed by the Hon'ble High Court of Delhi in W.P.(C) 969/2020, in the case of **M/s Nestle India Ltd. & another v. Union of India & others** in which the Hon'ble Court has observed that:-

“We, however, make it clear that this interim order shall not come in the way of the National Anti Profiteering Authority in cases where it has suo moto taken action.” (Emphasis supplied)

Accordingly, the DGAP is directed to investigate all the 14 Projects of the Respondent mentioned above and submit his report under Rule 129 (6) so that the benefit of ITC to be passed on to the home buyers of these Projects could be determined.

32. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was required to be passed within a period of 6 months from the date of receipt of the Report from the DGAP under Rule 129 (6) of the above Rules. Since, the present Report has been received by this Authority on 15.04.2020 the order was to be passed on or before 14.10.2020. However, due to prevalent pandemic of COVID-19 in the Country this order could not be passed on or before the above date due to *force majeure*. Accordingly, this order is being passed today in terms of the Notification No. 65/2020-Central Tax dated 01.09.2020, issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes & Customs, under Section 168 A of the CGST Act, 2017.



33. A copy each of this order be supplied to the Applicants and the Respondent free of cost. File be consigned after completion.


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



Sd/-
(Amand Shah)
Member (Technical)

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

Certified Copy


(A.K Goel)
NAA, Secretary

File No. 22011/NAA/147/BPTP/2020 /6200-6204 Date:- 27.11.2020

Copy To:-

1. M/s BPTP Ltd., M-11, Middle Circle, New Delhi-110001.
2. Sh Ram Prakash Sharma, A-163, Sarita Vihar, New Delhi-110076.
3. Sh. Naresh Arora, House No. 4/162, Near Balaji Hanuman Mandir, Shivaji Nagar, Gurgaon, Haryana-122001.
4. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 12th Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
5. Guard File.


27.11

A. K. GOEL
SECRETARY, NAA