

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

I.O. No. 08/2020  
Date of Institution 04.07.2019  
Date of Order 03.01.2020

**In the matter of:**

1. Sh. Parvez Khan, B2, 602, Prism Aundh, Pune-411007.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2<sup>nd</sup> Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

**Versus**

M/s Pearlite Real Properties Pvt. Ltd., Godrej Eternia C, 10th Floor Office, A 3, Old Mumbai Pune Highway, Wakdewadi, Shivaji Nagar, Pune-411005.

Respondent

**Quorum:-**

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



Present:-

1. Sh. Parvez Khan, Applicant No. 1 in person.
2. None for the DGAP.
3. Sh. Girish Goenka, Sh. Sharavanan Iyer, Sh. Manish Modi, Ms. Leena Nagpure, Sh. Kapil Sharma, Advocate, Tarun Rehan and Gagan Gugnani, Chartered Accountants, Authorised Representatives for the Respondent.

### ORDER

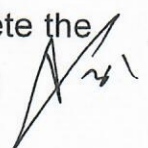
1. The present Report dated 26.06.2019, has been received on 04.07.2019 from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the present case are that an application dated 15.10.2018 was filed before the Standing Committee on Anti-profiteering, under Rule 128 (1) of the Central Goods and Services Tax (CGST) Rules, 2017 by the Applicant No. 1, alleging profiteering by the Respondent in respect of purchase of Flat No. F1-203 in the Respondent's project "Godrej-24", Hinjewadi, Pune, Maharashtra-411057. The Applicant No. 1 had alleged that the Respondent had not passed on the benefit of input tax credit (ITC) to him by way of commensurate reduction in price on implementation of GST w.e.f. 01.07.2017, in terms of Section 171 (1) of the CGST Act, 2017. The DGAP has reported that the aforesaid reference was examined by the Standing Committee on





Anti-profiteering, in its meeting held on 13.12.2018, whereby it was decided to forward the same to the DGAP to conduct a detailed investigation in the matter. On perusal of the said application, the DGAP has found that the Applicant No. 1 had booked a flat in the Respondent's project "Godrej-24", on 19.04.2017, i.e. in the pre-GST era. Further, the Applicant No. 1 had also submitted the copies of the cost sheets issued by the Respondent before and after implementation of the GST, booking form and statements of account along with his application.

2. The DGAP has intimated that a Notice under Rule 129 (3) of the above Rules was issued by him on 14.01.2019 on receipt of the said reference from the Standing Committee on Anti-profiteering, calling upon the Respondent to reply as to whether he admitted that the benefit of ITC has not been passed on by him to the Applicant No. 1 by way of commensurate reduction in price and if so, to suo moto determine the quantum thereof and indicate the same in his reply to the Notice as well as furnish all supporting documents. The Respondent vide the above Notice, was given an opportunity to inspect the non-confidential evidences/information submitted by the Applicant No. 1 on 24.01.2019 or 25.01.2019, which was availed by him on 18.01.2019. The Applicant No. 1 vide e-mail dated 10.06.2019 was also afforded an opportunity to inspect the non-confidential documents/reply furnished by the Respondent on 13.06.2019 or 14.06.2019, which the Applicant No. 1 had not availed of. The DGAP has also informed that the period covered by the current investigation was from 01.07.2017 to 31.12.2018 and the time limit to complete the





investigation was extended upto 06.07.2019 by this Authority, vide its Order dated 19.03.2019, in terms of Rule 129 (6) of the above Rules.

3. The DGAP in his Report has also stated that the Respondent in response to the Notice dated 14.01.2019 has submitted his replies vide letters/e-mails dated 23.01.2019, 06.02.2019, 20.05.2019, 23.05.2019, 24.05.2019, 29.05.2019, 31.05.2019 and 21.06.2019, wherein he has submitted the following documents/information:

- (a) Copies of GSTR-1 Returns for the period from July, 2017 to December, 2018.
- (b) Copies of GSTR-3B Returns for the period from July, 2017 to December, 2018.
- (c) Copy of TRAN-1 Statement.
- (d) Copies of VAT & ST-3 Returns for the period from April, 2016 to June, 2017.
- (e) Copies of all the demand letters, sale agreement/contract issued to the Applicant No. 1.
- (f) Tax rates - pre-GST and post-GST.
- (g) Copies of Balance Sheets for the FY 2016-17 & 2017-18.
- (h) Copy of the Electronic Credit Ledger for the period from 01.07.2017 to 31.12.2018.
- (i) CENVAT/ITC Register for the period from April, 2016 to December, 2018.
- (j) Details of turnover, output tax liability/GST payable and the ITC availed.
- (k) Copy of Project Report submitted to the RERA.
- (l) List of home buyers of the project "Godrej-24".

4. The Respondent has also submitted that he was developing the project in two phases – Phase-I, under the name of "Godrej-24" and Phase-II, by the name of "Godrej Elements". He has further submitted





that the "Godrej-24" project was being developed in a joint development agreement with M/s R. R. Megacity Builders as the landowner and as per the agreement, a portion of the proceeds realized from the sale of flats, would be shared with the landowner on a revenue sharing basis.

5. The DGAP has also examined the above application, the replies of the Respondent and the documents/evidences on record and has found that the Applicant No. 1 was to follow the payment plan in respect of Flat No. F1-203 which he has purchased from the Respondent the details of which are given in Table-A below:-

**Table-A**

Payment Plan			
S.No.	Milestone	% due	Amount (in Rs.)
1	Booking	-	1,02,633
2	30 days from the date of booking	-	1,60,652
3	60 days from the date of booking	5%	2,63,285
4	Allotment/Agreement	10% + Other Charges	8,80,247
5	Completion of Excavation	10%	5,26,570
6	Completion of Plinth	10%	5,26,570
7	Completion of 6 <sup>th</sup> slab	10%	5,26,570
8	Completion of 10 <sup>th</sup> slab	5%	2,63,285
9	Completion of 13 <sup>th</sup> slab	5%	2,63,285
10	Completion of 16 <sup>th</sup> slab	5%	2,63,285
11	Completion of top floor slab	5%	2,63,285
12	Completion of flooring	5%	2,63,285
13	Completion of external plumbing	5%	2,63,285
14	Sanitary fittings	5%	2,63,285
15	External work (Lifts, Water Pumps)	10%	5,26,570
16	On notice of possession	5% + Club House ad MSEB	6,63,285
17	<b>Total</b>	<b>100%</b>	<b>60,19,381</b>

*[Handwritten signature]*  
31.10.2020

6. The DGAP in his Report has also referred to the provisions of para 5 of Schedule-III, clause (b) of Schedule-II and Section 17 (2) and 17 (3) of the CGST Act, 2017 and submitted that the ITC pertaining to the unsold units was outside the scope of the investigation and the Respondent was required to recalibrate the selling prices of the units to be sold to the prospective buyers by considering the net benefit of additional ITC available to them post-GST.
7. The DGAP has also observed 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 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 were in force at the material time. Moreover, the Respondent was paying VAT @ 1% under the Maharashtra VAT laws and was not eligible to avail ITC of VAT paid on the inputs. Post-GST, the Respondent could avail the ITC of GST paid on all the inputs and the input services. From the information submitted by the Respondent for the period from April, 2017 to December, 2018, the details of the ITC availed by him, his turnover from the project "Godrej-24", the ratio of ITC to turnover, during the pre-GST (April, 2017 to June, 2017) and the post-GST (July, 2017 to December, 2018) periods, has been furnished in Table-B below by the DGAP:-





Table 'B'

S. No.	Particulars	Pre-GST	Post-GST
		April, 2017 to June, 2017	July, 2017 to December, 2018
1	CENVAT credit of Service Tax Paid on Input Services (A)	67,57,842	-
2	Credit of VAT Paid on Purchase of Inputs (B)	-	-
3	Total CENVAT/VAT/Credit Availed (C)= (A)+(B)	67,57,842	-
4	Input Tax Credit of GST Availed (D)	-	12,87,59,004
5	Turnover as per Home Buyers List (Flats sold upto 31.12.2018) (E)	26,93,29,710	1,70,96,06,801
6	Total Saleable Area (in sq. ft.) (F)	5,34,471	5,34,471
7	Area Sold relevant to Turnover (G)	3,60,157	5,02,388
8	CENVAT/INPUT TAX CREDIT reelevant to Area Sold (H = C or D * G/F)	45,53,819	12,10,29,913
9	Ratio of CENVAT/ Input Tax Credit to Turnover [(H)=H/E *100]	1.69%	7.08%

**N. B:** The pre-GST period of April, 2017 to June, 2017 has been taken into consideration as during the period April, 2016 to March, 2017, though the Respondent had availed ITC during the half year October, 2016 to March, 2017, there was no demand/turnover raised/received during the entire F.Y. 2016-17. Therefore, if only the ITC availed during 2016-17 was taken into account to determine the ratio of ITC to turnover for the entire period of April, 2016 to June, 2017, such ratio might not be accurate.

8. The DGAP in his Report has also stated that the Respondent was engaged in developing two projects, namely, "Godrej-24" and "Godrej Elements" with the same GST registration. As the turnover and ITC figures pertaining to both the projects were being reflected in a single Return filed by the Respondent, the ITC for the project "Godrej-24" has been apportioned on the basis of the ratio of the carpet area of the two projects. The total demand raised as per the home-buyer's list submitted by the Respondent has been taken as the turnover of the Respondent from the project "Godrej-24". The DGAP has claimed from Table-B above, that the ITC as a percentage of the turnover that was available to the Respondent during the pre-GST period (April, 2017 to June, 2017) was 1.69% and during the post-GST period



(July, 2017 to December, 2018), it was 7.08% which indicated that post-GST, the Respondent has apparently benefited from additional ITC to the tune of 5.39% [7.08% (-) 1.69%] of the turnover.

9. The DGAP has also intimated that the Central Government, on the recommendation of the GST Council, has levied 18% GST on the 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 has been examined by the DGAP by comparing the applicable rate of tax and the ratio of ITC to turnover of the Respondent during for the pre-GST period (April, 2017 to June, 2017) when Service Tax @ 4.5% and VAT@ 1% were payable (total tax rate was 5.5%) with the post-GST period (July, 2017 to December, 2018) when the effective GST rate was 12% on the gross value. On the basis of the figures contained in Table-B above, the comparative figures of ITC availed/available as a percentage of the turnover in the pre-GST and the post-GST periods and the recalibrated basic price as well as the apparent excess collection (profiteering) during the post-GST period, has been tabulated by the DGAP in Table-C below:





Table 'C'

(Amount in Rs.)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April,2016 to June,2017	July,2017 to Dec. 2018
2	Output tax rate (%)	B	5.50%	12.00%
3	Ratio of CENVAT/ Input Tax Credit to Turnover as per Table - B above (%)	C	1.69%	7.08%
4	Increase in input tax credit availed post-GST (%)	D	-	5.39%
5	<b>Analysis of Increase in input tax credit:</b>			
6	Total Basic Demand raised during July, 2017 to December, 2018	E		1,70,96,06,801
7	GST @12%	F= E*12%		20,51,52,816
8	Total demand	G		1,91,47,59,617.12
9	Recalibrated Basic Price	H=E*(1-D) or 94.61% of E		1,61,74,58,994
10	GST @12%	I		19,40,95,079
11	Commensurate demand	J=H + I		1,81,15,54,074
12	Excess Collection or Profiteered Amount	K=G - J		10,32,05,543

10. The DGAP has also claimed from Table-C above that the additional ITC of 5.39% of the turnover should have resulted in commensurate reduction in the basic prices as well as cum-tax prices. Therefore, in terms of Section 171 of the Central Goods and Services Tax Act, 2017, the benefit of the additional ITC should have been passed on by the Respondent to the recipients. In other words, by not reducing the pre-GST basic price by 5.39% on account of additional benefit of ITC and charging GST @ 12% on such higher basic price, the Respondent appeared to have contravened the provisions of Section 171 of the of the Central Goods and Services Tax Act, 2017.

11. The DGAP in his Report has further quantified the amount of profiteering. On the basis of the aforesaid CENVAT/ITC availability in the pre-GST and post-GST periods and the demands raised by the Respondent on the Applicant No. 1 and other home buyers towards the value of construction service on which GST liability @ 12% was discharged by the Respondent during the period from 01.07.2017 to



31.12.2018, the amount of benefit of ITC not passed on by the Respondent to the recipients or in other words, the profiteered amount has been computed by the DGAP as Rs. 10,32,05,543/- which included GST @ 12% on the base profiteered amount of Rs. 9,21,47,806/-. The details of the home-buyers of flats who had purchased flats upto 31.12.2018 and the Unit No. wise break-up of this amount has been given by the DGAP in Annexure-15 of his Report dated 26.06.2019. The DGAP has also intimated that as no demand was raised on the Applicant No. 1 and no payment was made by him in the post-GST era, no benefit of additional ITC might be passed on to him. The DGAP has also observed that the Respondent has apparently supplied the construction service in the State of Maharashtra only.

12. The DGAP in his Report has also mentioned that the above computation of profiteering was with respect to 771 home buyers, whereas the Respondent has booked 892 residential units till 31.12.2018 out of which 121 buyers of residential units who had booked the flats and also paid the consideration in the pre-GST period, have not paid any consideration during the post-GST period from 01.07.2017 to 31.12.2018 (period covered by the investigation). Therefore, if the ITC in respect of these 121 units was considered for calculation of profiteering in respect of 771 units where payments have been received in the post-GST period, the ITC as a percentage of turnover might not be appropriate. Therefore, the benefit of ITC in respect of these 121 units should be calculated when the



consideration was received from such units by taking into account the proportionate ITC in respect of such units.

13. The DGAP has also submitted that the benefit of additional ITC of 5.39% of the turnover which has accrued to the Respondent was required to be passed on to the recipients. He has further submitted that the Respondent has contravened the provisions of Section 171 (1) of the Central Goods and Services Tax Act, 2017, in as much as the additional benefit of ITC has not been passed on to the recipients. As no demand was raised on the Applicant No. 1 and no payment was made by the Applicant No. 1 in the post-GST period, he was not eligible for the benefit of additional ITC, the DGAP has claimed. He has further claimed that the investigation revealed that the Respondent has realized an amount of Rs. 10,32,05,543/- which included both the profiteered amount @ 5.39% of the turnover and GST @ 12% on the said profiteered amount, from 771 other recipients other than the Applicant No. 1 in the present proceedings. These recipients were identifiable as per the documents provided by the Respondent, giving the names and addresses along with Unit Nos. allotted to such recipients. Therefore, the DGAP has contended that this amount of Rs. 10,32,05,543/- was required to be returned to such eligible recipients. The DGAP has also stated that the present investigation covered the period from 01.07.2017 to 31.12.2018 and profiteering, if any, for the period post December, 2018, has not been examined as the exact quantum of ITC that will 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.

14. The above Report was considered by this Authority in its meeting held on 09.07.2019 and accordingly the Applicants and the Respondent were asked to appear on 31.07.2019 for hearing. Four personal hearings were accorded to the interested parties on 31.07.2019, 21.08.2019, 06.09.2019 & 20.09.2019. Sh. Parvez Khan, Applicant No. 1 was present on 31.07.2019. The Respondent was represented by Sh. Girish Goenka, Sh. Sharavanan Iyer, Sh. Manish Modi, Ms. Leena Nagpure, Sh. Kapil Sharma, Advocates and Sh. Tarun Rehan and Sh. Gagan Gugnani, Chartered Accountants.
15. The Applicant No. 1 in his submissions dated 15.07.2019, 17.07.2019 and 06.08.2019 has contended that information furnished by the Respondent at page No. 44 of Annexure 7 attached to the DGAP's Report dated 26.06.2019 was incorrect as it clearly mentioned that "instalment paid before GST i.e. 30.06.2017 excluding taxes" was Rs. 2,47,464/- whereas he had paid Rs. 4,93,927/- and Service Tax of Rs. 22,405/-. All these transactions were done through NEFT but the Respondent had shown entries on 2<sup>nd</sup> & 3<sup>rd</sup> July, 2017. Since he had paid Service Tax on these transactions, it should have been considered under the pre-GST regime. He has also stated that the Godrej Elements project was launched in April/May 2018, whereas most of the bookings of the Godrej 24 project were made prior to the GST regime i.e. before 30.06.2017. He has also submitted that as per the booking agreement, "Registration/Agreement of sale" for the flat was supposed to be done within 90 days. However, the



Respondent did not get the Environmental Clearance (EC) from the Maharashtra Govt. within the stipulated period and hence agreement could not be executed as the EC was required to be obtained before executing the agreement. The Respondent had finally obtained the EC on 16.02.2018 and started executing the Registration/agreement of sale in April 2018 onwards without passing any ITC benefit. A copy of the agreement of sale was attached by the above Applicant, wherein the Respondent had not passed on the ITC benefit and had asked him to pay the GST on same basic price. He has further stated that total cost of flat had gone up by 9% with this change. The Respondent had informed his customers to cancel the booking and stated that all the amount paid so far would be forfeited.

16. The above Applicant has also intimated that as suggested by the Helpline provided by this Authority, he had shared the copy of this Authority's order passed in the case of M/s Pyramid Infratech Pvt. Ltd. to avoid litigation, but the Respondent was reluctant to pass on the ITC benefit. He had then filed a complaint with this Authority in October, 2018. Later in December, 2018 since the respondent had started sending legal notices for cancellation of the booking and due to the fear of losing the entire amount of Rs. 5.16 Lakh, he had agreed to accept his proposal of 3.8% ITC benefit in January, 2019 with an increased cost of Rs. 2 Lakh and had executed the agreement. He has also contended that execution of the agreement without the ITC benefit had increased other government levies like Stamp Duty which was additional burden on him. He has also claimed that he needed to be compensated for the delay and the additional



impact of Stamp Duty as it had increased by 1%. So far he had paid Rs. 36,57,576/- as per the demands which was 68% of the agreement value excluding Stamp Duty. This was as per the demands raised by the Respondent based on the progress of the work. He has also intimated that since the Registration process had got delayed because of delay on the part of the Respondent in obtaining EC and not passing on the ITC benefit, many customers got confused and registration got delayed further and a few buyers must have cancelled their bookings and lost the entire booking amount up to Rs 5.16 Lakh.

17. The Applicant No. 1 has further stated that in the absence of EC, the Respondent could not start the work at site till February, 2018; hence, no demand was raised by him during July, 2017 to March, 2018. The Registration process of Godrej 24 project had started from April, 2018 onwards and loan disbursement took another 2-3 months. The payments had started flowing from June/July, 2018 onward only. The GST Returns were filed after some time by the Respondent after receipt of the instalments. Till June, 2019 demands were raised equivalent to 68% of the sale consideration. He has further requested to extend the period of investigation up to 30.06.2019 i.e. from 01.07.2017 to 30.06.2019 which would give much better picture of the ITC benefit.

18. The Applicant No. 1 has also informed that he had paid Rs. 5,16,333/- during April, 2017 to June 2017 (pre-GST regime) and Rs. 31,41,241/- during January, 2019 to June, 2019, totalling to Rs.




36,56,576/- i.e. 68% of Sale consideration and balance payment would be made as per the demand. The Applicant No. 1 has also submitted copy of the EC Certificate issued by the Maharashtra Government to the Respondent, old draft agreement copy shared by the Respondent for registration with ITC benefit, payment particulars, statement of account dated 06.07.2019 and the last demand Invoice dated 11.06.2019.

19. The Respondent has filed his written submissions on 21.08.2019 in which he has raised objections on the DGAP's Report dated 26.06.2019. He has stated that the Respondent was real estate developer engaged primarily in the business of real estate construction, development and other related activities. One of the projects undertaken by him in the State of Maharashtra was 'Godrej 24'. He has also submitted that the Applicant No. 1 had sent an email dated 15.10.2018 to report to the Standing Committee on Anti-profiteering, with regard to the flat purchased by him in his 'Godrej 24' project situated in Pune. The above Applicant had alleged that the Respondent had been purposefully delaying the registration process. He has also submitted that as per the cost sheet shared by the Respondent on 10.09.2018 the GST benefit to the tune of only 3.88% of the turnover had been passed on by him to the above Applicant but the total cost had gone up from Rs. 60.29 Lakh (Rs. 49.79 Lakh + GST) to Rs. 62.29 Lakh (approx.), on the basis of which the above Applicant had alleged that the Respondent had resorted to profiteering and intended to ascertain, if any recourse was available



to him in accordance with the provisions of Section 171 of the CGST Act, 2017. The above application was examined by the Standing Committee on Anti-Profitteering in its meeting held on 07.01.2019 wherein it was decided to refer the matter to the DGAP in order to initiate investigation.

20. He has also stated that consequently, the investigation was conducted by the DGAP for the period from 01.07.2017 to 31.12.2018. Accordingly, a notice dated 14.01.2019 was sent to him by the DGAP for seeking information/documents relating to the allegation of contravention of the provisions of Section 171 of the above Act. The sought information/documents were duly submitted by the Respondent. The Respondent has further stated that he had submitted his response to the notice dated 14.01.2019 vide various letters/e-mails dated 23.01.2019, 06.02.2019, 20.05.2019, 23.05.2019, 24.05.2019, 29.05.2019, 31.05.2019 and 21.06.2019. The details of information/documents submitted by the Respondent vide these letters have been provided in the tabular form as is given below:-

Particulars	Data/Information submitted
<p>In response to letter dated 15.01.2019, the Respondent had <i>inter alia</i> submitted/shared the following –</p> <ul style="list-style-type: none"> <li>➤ Various Returns and forms such as GSTR-3B, GSTR-1;</li> <li>➤ Electronic Credit Ledger for the period Jul-17 to Aug-18;</li> <li>➤ For GST Tran-1;</li> <li>➤ ST-3 return for the period Apr-16 to June-17;</li> <li>➤ Financial Statements (Balance Sheets &amp; Profit &amp; Loss Accounts);</li> </ul>	<p>28.01.2019</p> 



<ul style="list-style-type: none"> <li>➤ Project report sought by The DGAP;</li> <li>➤ Allotment Letters;</li> </ul>	
<p>In response to letter dated 06.02.2019, the Respondent had <i>inter alia</i> submitted the following –</p> <ul style="list-style-type: none"> <li>• VAT Returns</li> <li>• ITC register from July 2017 to December 2018 with reconciliations;</li> <li>• List of home buyers;</li> </ul>	11.02.2019
<p>In response to letter dated 26.04.2019, the Respondent had submitted the list of home buyers in the desired format with 5 demand notes (on a sample basis) depicting the prices before and after considering GST benefit.</p>	20.05.2019
<p>In response to letter dated 21.05.2019, the Respondent had <i>inter alia</i> submitted the updated list of home buyers who had booked units up to 31st December 2017 along with the benefit passed onto such customer and details of credit reversal.</p>	23.05.2019
<p>The Respondent had also provided details of home buyers who had booked units during 01.01.2018 to 31.12.2018.</p>	25.05.2019
<p>In response to letter dated 10.06.2019, the Respondent had <i>inter alia</i> submitted the following –</p> <ul style="list-style-type: none"> <li>• Billing register for Pre-GST regime and GST regime which reconciles the turnover reported in the Returns;</li> <li>• Details of cenvat credit under pre-GST regime and ITC under GST Regime availed by the Respondent along with vendor wise details.</li> </ul>	12.06.2019
<p>The Respondent filed a letter before the DGAP and made following submissions:</p> <ul style="list-style-type: none"> <li>• That the Respondent had already passed on benefit of 3.88% to its customers;</li> <li>• That the complaint filed by the Applicant was not tenable under Section 171 of CGST Act;</li> <li>• That the comparison of ratio of ITC to turnover for pre-GST period and GST period was not the correct mechanism for calculation of profiteering amount;</li> <li>• That the amount of profiteering as per methodology of comparison of ratio of ITC to turnover for pre-GST period and GST period was less than that the amount of profiteering computed by The Respondent.</li> </ul>	

<ul style="list-style-type: none"> <li>• That in absence of specified procedure &amp; mechanism of calculation of profiteering, the proceedings was arbitrary;</li> <li>• That the investigation cannot go beyond the application submitted by the Applicant.</li> </ul>	
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21. The Respondent has also stated that the projects undertaken by the Respondent were 100% residential development projects. The Table given below summarised the saleable area and the number of units in the various projects undertaken by the Respondent:-

Project	Launch Period	Saleable Area (in sq. ft.)	Number of Units
Godrej 24	Pre-GST regime	9,48,024	816
Godrej Elements	GST regime	7,27,062	566

22. The Respondent has further stated that for undertaking the aforesaid projects, the Respondent had entered into a Development Agreement dated 30.03.2017 with M/s R R Megacity Builders Limited (RR Megacity). The terms agreed between the contracting parties were summarized as under:-

That RR Megacity, being the owner of land measuring 1,20,596 sq. mtr. ('Entire Land') had agreed to enter into contract with the Respondent for Estimated Saleable Area (As per Annexure 2 of Agreement) of 16,77,000 sq. ft., wherein it had grant irrevocable, absolute and exclusive development rights in respect of the said land for construction and development of the projects ('Phase 2'), in consideration of the following:-



1) 4% of the Net Realizations (RR Megacity's share in Realizations);

2) Rs. 1,62,90,00,000/- (Total Monetary Consideration)

23. The Respondent has also submitted that the percentage of completion of the construction work of the above projects as on June, 2017, November, 2018 and December, 2018 was given below:-

S. No.	Period	Godrej 24 - Construction Completion %	Godrej Elements Construction Completion %
1	June'17	0%	N.A.
2	Nov'18	16.31%	14.21%
3	Dec'18	18.67%	-

24. The Respondent has further submitted the details of units booked under 'Godrej 24' project during different periods, along with the corresponding area, which is mentioned below:-

S. No.	Details for the project 'Godrej 24'	Units	Area
A.	Number of Units booked as on 30.06.2017	547	6,02,342
B.	Less: Number of Units cancelled in GST regime which were booked in earlier regime	113	1,27,469
C.	Net Units [(A)-(B)]	434	4,74,873
D.	Add: Units booked in GST regime till 31.12.2018	327	3,74,769*
E.	Less: Number of Units cancelled in GST regime which were booked in GST regime	24	
F.	Net units [(C) + (D) - (E)]	737	8,49,080
G.	Add: Un-booked Units as on 31.12.2018	79	
H.	Total Units [(F) + (G)]	816	

\*Note-Area mentioned here was for units booked in GST regime i.e. net of cancellation (327 units less 24 units)

25. The Respondent has also submitted that the present proceedings were in respect of the "Godrej 24" project and he was undertaking two projects viz. "Godrej 24" and "Godrej Elements" which were separately registered under the RERA, however, both the projects had same GSTIN. The project "Godrej 24" was launched in April, 2017 and the project "Godrej Elements" was launched in June, 2018. He has also summarised the details of the turnovers for the above projects as is given below:-

(In crores)

Project	Turnover	
	Pre-GST Regime	GST Regime
	Mar'17 to June'17	July'17 to Dec'18
Godrej 24	26.93	170.96
Godrej Elements	-	60.08
Total	26.93	231.04
As per ST-3/ GSTR-3B	26.93	231.04

26. The Respondent has further submitted the details of CENVAT credit/ITC pertaining to the above projects in the pre-GST and GST periods as is mentioned below:-

(In crores)

Project	CENVAT/ ITC	
	Pre-GST Regime	GST Regime
	Mar'17 to June'17	July'17 to Dec'18
Godrej 24*	1.33	12.88
Godrej Elements*	0.84	9.40
Total	2.17	22.28
As per ST-3/ GSTR-3B	2.17	22.28



*\*Notes: The amount of credit includes specific credit for the project and common credit. The common credit had been attributed to Godrej -24 in the ratio of saleable area of the project proportionate to total saleable area.*

27. The Respondent has further submitted that the Standing Committee had erred in referring the matter to the DGAP for further investigation. As per Rule 128 (1) of the CGST Rules, 2017, on receipt of an application, the Standing Committee should 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 an applicant 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. Rule 128 (1) of CGST Rules, as amended has been quoted by the Respondent as under:—

*'(1) 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 may be allowed by the Authority, in such form and manner as may 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 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.**

28. The Respondent has also claimed that the allegation of the above Applicant of not passing on the benefit of ITC was based on the cost sheet shared by the Respondent on 10.09.2018 in which GST benefit to the tune of only 3.88% of the turnover had been passed on by the Respondent to the above Applicant but the total cost of the flat had gone up from Rs. 60.29 Lakh to Rs. 62.29 Lakh. On the basis of this increase in the total cost, it was alleged by the above Applicant that the entire GST benefits was not passed on by the Respondent. It was further contended by the Respondent that the above fact could not be considered as a prima facie evidence to say that the Respondent had profiteered in the GST regime.

29. He has also argued that as per Section 171 of CGST Act, the benefit was required to be passed on in respect of any reduction in the rate of tax on any outward supply of goods or services or on the benefit of additional ITC. However, the Applicant No. 1 had nowhere explained in his application as to how the Respondent had indulged in profiteering. The above Applicant had admittedly pointed out that the Respondent had passed on GST benefit of 3.88% of the turnover. However, he had alleged profiteering only on the basis of the increase in the total cost without giving any reference to the change in the rate of tax. The Respondent has also submitted that without pointing out any inconsistency in the GST benefit calculation sheet of





3.88% and without suggesting any basis for the same, the above Applicant had arbitrarily alleged profiteering.

30. The Respondent has further argued that he had passed on the benefit of 3.88% of the turnover to the Applicant No. 1, which was duly reflected in the invoices issued to the above Applicant in the GST period. Copies of all such invoices raised in the GST regime were enclosed as evidence. He has also stated that the total cost had increased under the GST period as the output tax rate had been increased from 5.5% to 12% which had to be necessarily borne by the Applicant No. 1. He has further stated that the fact of increase in the rate of tax had been mentioned in para 15 of the Report dated 26.06.2019 as well. He has also contended that being an indirect tax, the burden of the same was to be borne by the recipient and thus, increase in the total cost could not be a ground to allege that the Respondent had indulged in profiteering. He has further contended that he had reduced his base price and the increase in the total cost was solely because of the increase in the rate of output tax. Therefore, the Standing Committee had erred in referring the matter to the DGAP in the absence of any accurate or adequate evidence.

31. The Respondent has also pleaded that the Report could not go beyond the application submitted by the Applicant No. 1 vide his letter dated 12.10.2018 and was liable to be rejected on this ground alone. He has also cited the provisions of Section 171 of the CGST Act, 2017 as under:-





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

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

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

32. He has also quoted the provisions of Chapter XV of the CGST Rules, 2017 and stated that Rule 128 of the above Rules contained the provisions regarding the examination of application by the Standing Committee and the Screening Committee. The extract of the above Rule, as amended, has been listed by him as under:-

***“128. Examination of application by the Standing Committee and Screening Committee-***

*(1) 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 may be allowed by the Authority, in such form and manner as may 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 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*

*(2) All applications from interested parties on issues of local nature or those forwarded by the Standing Committee shall first be examined by the State level Screening Committee and the Screening Committee shall, within two months from the date of 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 may be allowed by the Authority, upon being satisfied that the supplier had contravened the provisions of section 171, forward the application with its recommendations to the Standing Committee for further action."*

33. The Respondent has further added that an anti-profiteering investigation (prior to amendment made vide Notification No. 31/2019-Central Tax, dated 28.06.2019, since the Report was dated 26.06.2019), could be initiated only on the receipt of a written application from an interested party, commissioner or any other person. In the instant case, the proceedings were initiated on the basis of the application received from the Applicant No. 1. He has also mentioned that the said application was only in respect of one flat purchased by the above Applicant in the 'Godrej 24' project. Hence, the investigation could not go beyond the application and cover other customers also who had not questioned the benefit passed on to them.

34. In this regard, reliance was placed by the Respondent on the following orders of this Authority, wherein Investigation Report and the final order of this Authority was only on the product for which the complaint was filed:-

- i. **M/s U. P. Sales & Services v. M/s Vrandavaneshwree Automotive Private Limited 2018-VIL-01-NAA:** In this case, the Applicant had filed an application alleging that the supplier did not pass on the benefit of reduced rate of tax on Honda Car having Model No. WR-V 1.2 VX MT (i-VTEC) purchased by the Applicant. This Authority in this case while holding that the supplier had not

contravened the provisions of Section 171 of the CGST Act, 2017 had limited its enquiry and order only to the particular model of car.

ii. **Rishi Gupta v. M/s Flipkart Internet Pvt. Ltd. 2018 VIL-04-NAA:**

In this case, the Applicant had filed an application stating that he had paid extra amount for Godrej Interio Slimline Metal Almirah to the supplier and by not refunding the same, the supplier was resorting to profiteering in contravention of Section 171. This Authority while holding that the supplier had not contravened the provisions of Section 171 had limited its order only to the particular model of almirah.

iii. The Respondent has further relied on the decision given by this Authority in the cases of:-

- **Kerala State Screening Committee on Anti-Profiteering and another v. M/s Pulimootill Silks 2019 (2) TMI 296.**
- **Kerala State Screening Committee on Anti-Profiteering and another v. M/s Velbon Vitrified Tiles Pvt. Ltd. 2019 (3) TMI 370.**

35. The Respondent has also submitted that the application in an anti-profiteering case acted as the foundation and base of an investigation. In the present case, the application was received merely from one Applicant for the flat located in Godrej 24 project, Hinjewadi, Pune. Hence, the investigation could not go beyond the application and cover other customers also who had not questioned



the benefit passed on to them. The DGAP could not suo motu assume jurisdiction with regard to the other customers of the Respondent, on receipt of reference from the Standing Committee to conduct a detailed investigation in the matter of the Applicant No. 1. Hence, the DGAP could not exceed his jurisdiction by submitting his findings in respect of other unit buyers who had not filed any application.

36. The Respondent has further submitted that an application, filed by a dissatisfied Applicant might be compared to a show cause notice in a tax proceeding wherein the Respondent was required to show cause as to why tax, interest and penalty, etc. should not be levied and collected from him. It was settled principle of law that an order adjudicating a show cause notice could not travel beyond the scope of a show cause notice. In this regard reliance was placed by the Respondent on the case of **Toyo Engineering India Limited v. CC, Mumbai, 2006 (201) E.L.T. 513 (SC)** wherein the Hon'ble Supreme Court has held that the department could not travel beyond the show cause notice. The extract of the relevant portion of the judgment has been provided below by the Respondent:-

*'16. Learned counsel for the Revenue tried to raise some of the submissions which were not allowed to be raised by the Tribunal before us, as well. We agree with the Tribunal that the revenue could not be allowed to raise these submissions for the first time in the second appeal before the Tribunal. Neither adjudicating authority nor the appellate authority had denied the facility of the project import to the respondent on any of these grounds. **These grounds did not find mention in the show cause notice as well. The Department cannot be travel***



*beyond the show cause notice. Even in the grounds of appeals these points had not been taken.'*

37. The Respondent has also averred that similarly, in the case of **Reckitt & Colman of India Ltd. v. CCE 1996 (88) E.L.T. 641 (SC)** it was held by the Hon'ble Supreme Court that the Revenue authorities could not make an order against an assessee that was based on the allegations and grounds that were not raised in the show cause notice. The relevant paragraph had been cited by the Respondent as under:-

*'3. It will be remembered that the case of the Revenue, which the appellant had been required to meet at every stage from the show cause notice onwards, was that the said product was a preparation based on starch. Having come to the conclusion that the said product was not a preparation based on starch, the Tribunal should have allowed the appeal. It was beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never canvassed and which the appellants had never been required to meet. It was upon this ground alone that the appeal must succeed.'*

On the basis of the aforementioned decisions, he has submitted that like an order could not travel beyond a show cause notice, the investigation Report of the DGAP, could not go beyond the application which acted as the basis of the investigation

38. The Respondent has further cited the case of **Fx Enterprise Solutions India Pvt. Ltd. and Ors. v. Hyundai Motor India Limited 2017 Comp 586 (CCI)** wherein the Competition Commission had asked the officer to conduct investigation regarding the contravention of Section 3 (4) read with Section 3 (1) of the Competition Act, 2002



However, the officer had also investigated whether the party had abused its dominant position in contravention of Section 4 of the Act. In this case, the Commission had held that the officer's investigation of contravention of Section 4 of the Act was de hors of the directions given and was ultra vires the scope of investigation. The extract of the relevant portion of the judgement has been given as follows:-

*'44...Thus, it was observed that the Commission had not directed the DG to investigate whether the OP had abused its dominant position in contravention of Section 4 of the Act. Further, both Information - 1 and Information - 2 filed by the Informants, only allege contravention of Section 3(4) read with Section 3(1) of the Act. **No allegations of abuse of dominance had been put forth by the Informants.***

*...45. Accordingly, the Commission was of the view that the DG's investigation of contravention of Section 4 of the Act by the OP, being de hors the directions given to the DG, was ultra vires the scope of investigation deserves to be disregarded.'*

39. The Respondent has further submitted that Rule 133 of the CGST Rules, 2017 was inter alia amended vide Notification No. 31/2019-Central Tax, dated 28.06.2019 by way of inserting sub-rule (5), which provides as under:-

*'(5) (a) Notwithstanding anything contained in sub-rule (4), where upon receipt of the report of the Director General of Anti-profiteering referred to in sub-rule (6) of rule 129, the Authority had reasons to believe that there had been contravention of the provisions of section 171 in respect of goods or services or both other than those covered in the said report, it may, for reasons to be recorded in writing, within the time limit specified in sub-rule (1), direct the Director General of Anti-profiteering to cause investigation or inquiry with regard to such other goods or*



*services or both, in accordance with the provisions of the Act and these rules.'*

The Respondent has stated that the aforesaid Rule provided that if this Authority had reasons to believe that there had been contravention of the provisions of Section 171 in respect of the goods or services or both other than those covered in the DGAP's Report, it may, for reasons to be recorded in writing, direct the DGAP to cause investigation or inquiry with regard to such other goods or services or both. In the instant case, no such reference had been made by this Authority to cause investigation in respect of profiteering vis-à-vis customers, other than the Applicant No. 1. Thus, in the light of the aforementioned facts, the Report should have been restricted to the Applicant No. 1 who had filed the application.

40. The Respondent has also contended that the CGST Act, 2017 read with the CGST Rules, 2017 did not provide the procedure and mechanism of determination and calculation of profiteering. In the absence of the same, the calculation and methodology used in the Report was arbitrary and was in violation of the principles of natural justice. He has also stated that the Central Government vide Notification No. 10/2017-Central Tax dated 28.06.2017 (amending Notification No. 3/2017-Central Tax) had notified the Anti-profiteering rules which provided for constitution of this Authority, Standing Committee and Steering Committees, power to determine the methodology and procedure, duties of this Authority, examination of application, order to be passed by this Authority and compliance by



the registered person etc. The Respondent has also asserted that Rule 126 of the CGST Rules, 2017 contained provisions regarding the power of this Authority to determine the methodology and procedure. The relevant portion of the Rule has been furnished by the Respondent below:-

***'Rule 126- power to determine the methodology and procedure: -***

*The Authority may determine the methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of ITC had been passed on by the registered person to the recipient by way of commensurate reduction in prices.'*

The Respondent has asserted that as per Rule 126 of the above Rules, this Authority had the power to determine the methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of ITC had been passed on by the registered person to the recipient by way of commensurate reduction in prices. He has further asserted that till date the CGST Rules, 2017 had not prescribed any procedure/ methodology/ formula/ modalities for determining/ calculating 'profiteering'. The Methodology and Procedures, 2018 issued on 19.07.2018 by this Authority only provided the procedure pertaining to the investigation and hearing. However, no method/formula had been notified/prescribed pertaining to the calculation of the profiteered amount.

41. The Respondent has also stated that Rule 127 of the CGST Rules, 2017 listed the duties to be performed by this Authority whereby it





could order reduction in prices, return to the recipient an amount equivalent to the amount not passed on as benefit, impose penalty and cancel registration under the CGST Act, 2017. The duties of this Authority as enumerated in Rule 127 included determination whether benefits consequent to reduction in the rate of tax or allowance of ITC were being passed on to the recipients and identification of the registered persons who had not passed on the benefits to the recipients and pass orders effecting reduction in prices. However, he has contended that under the CGST Act or the Rules made thereunder, there was no indication, let alone description as to how to conclude that there was profiteering due to change in the rate of tax. Whether such computation had to be done invoice-wise, product-wise, business vertical-wise or entity-wise etc. Thus, in the absence of the same, there was lack of transparency and the results could vary from case to case resulting in arbitrariness and violation of Article 14 of the Constitution of India. In other words, it would be impossible for the Respondent to defend his case and explain how the observations and findings of the DGAP were incorrect, thus, violating the principles of natural justice.

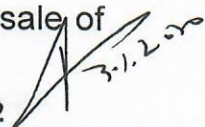
42. The Respondent has also made reference to other countries where GST was in place and stated that in order to control rise in inflation on account of implementation of GST, the Malaysian Government had introduced the 'Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High Profit) (Net Profit Margin) Regulations 2014, which provided mechanism to calculate whether any company had profiteered on account of GST or not. The anti-profiteering



measures in Australia revolved around the 'Net Dollar Margin Rule' serving as the fundamental principle for their guidance that was, if the new tax scheme - GST in this case - caused taxes and costs to fall by \$1, then prices should also fall by at least \$1. At the same time if the cost of the business rose by \$1 under the new tax scheme, then prices may rise by not more than \$1. These regulations had been set as barometers for calculating profiteering. He has also submitted that no such procedure for method for calculation of profiteering had been provided under the CGST Act and CGST Rules, 2017. Absence of the same violated the principle of natural justice and thus, the investigation was liable to be set aside.

43. The Respondent has also placed reliance on the case of **Eternit Everest Ltd. v. UOI, 1997 (89) E.L.T. 28 (Mad.)**, where the Hon'ble Madras High Court had held that in the absence of machinery provisions pertaining to determination and adjudication upon a claim or objection, the statutory provision would not be applicable.

44. He has also cited the case of **Commissioner of Income Tax Bangalore v. B. C. Srinivasa Setty (1981) 2 SCC 460** in which the Hon'ble Supreme Court had held that charging section was not attracted where corresponding computation provision was inapplicable. It was also submitted that relying on the case of B. C. Srinivas Shetty, the Hon'ble Allahabad High Court in the case of **Samsung (India) Electronics Pvt. Ltd. v. Commissioner of Commercial Taxes U.P. Lucknow 2018[11] G.S.T.L. 367** had observed that in the absence of any procedure or provision in the UP VAT Act, 2008 Act conferring such authority, in the case of a sale of

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composite packages bearing a singular MRP, the authorities under the Act could not possibly assess the components of such a composite package separately. Such an exercise, if undertaken, would also fall foul of the principles enunciated by the Hon'ble Supreme Court. In this regard, he has also quoted the case of **Union of India v. Suresh Kumar Bansal, 2017 (4) G.S.T.L. J128 (SC)** wherein it was confirmed by the Hon'ble Supreme Court that explanation added to Section 65 (105) (zzzh) of the Finance Act, 1994 vide the Finance Act, 2010, expanding the scope of taxability of construction of complex intended for sale by builders, was ultra vires as there was no statutory mechanism to ascertain value of service component of the subject levy.

45. The Respondent has also submitted that this Authority was itself using different methodologies to ascertain 'profiteering' in the cases decided by it. In some cases, this Authority had restricted itself to the goods mentioned in the application while in some other it had considered business as a whole which showed that there was no defined procedure being adopted by this Authority which was leading to arbitrariness. He has further submitted that in the absence of a well-defined procedure/methodology regarding calculation of profiteering, the DGAP was adopting an ad-hoc and arbitrary methodology and in the present case he had used the formula of calculating the difference between the ratio of credit available to the turnover in the pre and the post GST regimes to ascertain the alleged profiteering amount. He has also submitted that this approach was incorrect and would not provide the correct result in the construction



industry which had long gestation period. Therefore, it was essential to have a well-defined methodology for the construction industry. Therefore, he has submitted that in the absence of a prescribed method/formula for calculation of profiteering, following a method on case-to-case basis was arbitrary and thus, the Report was liable to be rejected.

46. The Respondent has also averred that the DGAP had arrived at the figures of alleged profiteering on the basis of the difference between the ratio of ITC to turnover during the pre-GST and the GST periods and computed the benefit of additional ITC which has accrued to the Respondent. The above methodology would never yield the correct quantum of profiteering, if any. He has also stated that the comparison of the above ratio was not correct for the reason that under the real estate sector, there was no correlation of turnover with the cost of construction or development of a project. The turnover reflected the amount collected as per the payment or booking plans issued by the developer which was dependent upon market driven strategy. On the contrary, the ITC accrued to a developer on the basis of the actual cost incurred by him while undertaking the development of a project. Thus, accrual of ITC was not dependent on the amount collected from the buyers. In this industry, advance was received by the suppliers/dealers even before the commencement of the projects. Likewise, units were sold after the completion of the project as well. Thus, receiving of inputs/input services and taking credit of the same did not have an immediate and direct relation with the turnover. Accordingly, calculating profiteering on the basis of



turnover could not reflect the correct outcome for the Respondent. He has also stated that in case a developer floated 25/75 scheme during the pre-GST regime, the buyers/ applicants were required to pay 25 per cent of the apartment's cost at the time of booking and the rest was to be paid after possession. The possession was to be provided in the GST regime. In such a case, the quantum of ITC would be proportionately higher in the initial period when the construction was in full swing, as compared to the turnover which would be limited to the 25% of the total price as per the scheme. Accordingly, the ratio of ITC to turnover would not reflect the correct position of benefit which has accrued to the developer, when calculated for a limited period of time, instead of the duration of the project.

47. In the light of the aforementioned he has submitted that in essence, the methodology of comparison of ratio of ITC to turnover for the pre-GST period and the GST period was incorrect because of the following reasons: -

- a) Project Life cycle effect had been totally ignored and it had been assumed that uniform expenses were incurred throughout the lifecycle of the project based on the formula adopted by the DGAP;
- b) The turnover would vary as per the market conditions and it was difficult to maintain the ratio of the same in proportion to procurement in a real estate sector e.g. turnover would be less in the lean period while credit would still be higher due to continuous use of inputs/input services for construction;



c) ITC was an absolute number which would vary as per the Govt. rate policies. A lot of goods had been moved from 28% to 18% slab which had not resulted into any benefit to the registered buyers as he was entitled to credit in both the scenarios. However, this would significantly vary the ratio as calculated by the DGAP to assess the anti-profiteering benefit;

d) Reversal of ITC in future due to receipt of Completion Certificate might also have a bearing on the ITC availed by the supplier/developer. Such a critical factor needed to be given appropriate weight while making the final computation. The calculation made under the aforesaid methodology proceeded on an assumption that all the expenses incurred in the GST period were towards the turnover, as all the credit had been attributed towards the same. No regard had been given to the fact that the ITC would also get accumulated on account of construction of unsold units.

48. Based on the above the Respondent has also submitted that the additional ITC in terms of Section 171 of the CGST Act, 2017 should reflect such ITC on goods or services which was not available to him earlier. However, the approach adopted by the DGAP for calculating the additional benefit which has accrued to the Respondent was based on the change in the rate of tax on input goods and services in the GST regime itself. The Respondent has also mentioned that credit with respect to such inputs/input services was available to him earlier as well before the change in the rate. Further, the DGAP had



not considered the tax cost which was earlier blocked. Hence, the above approach of comparison of ITC to turnover ratio for the pre-GST and the post-GST period for a limited period instead of project duration was not a correct approach and profiteering computation on basis of the same was liable to be set aside on this count itself.

49. The Respondent has also argued that the calculation made by the DGAP of the alleged profiteering was incorrect and on application of correct calculation, the alleged profiteering figures were less than the benefit which has already been passed on by the Respondent.
50. The Respondent has also submitted that the DGAP had not considered the submissions made by him and had arbitrarily finalized his Report, without giving any opportunity of rebuttal in violation of the principles of natural justice. He has further submitted that before arriving at the conclusion, The DGAP was required to first appreciate all the facts and submissions made by the Respondent.
51. The Respondent has further contended that the Report submitted by the DGAP was unreasoned and non-speaking and had been prepared without the appreciation of facts. In this regard he has relied on the decision given in the case of **International Panacea Ltd. v. CCE, Delhi-II 2012 (281) ELT 563 (Tri. Del)** wherein the precedent decisions of the Hon'ble Tribunal were strongly relied upon by the assessee in support of his case. However, the Adjudicating Authority therein had ignored them and decided the issue independently. The Hon'ble Tribunal in said case had held that the fair process required that the Adjudicating Authority dealt with each and every plea raised by the assessee and specifically the decisions which apparently



covered the issue. It was also held that the Adjudicating Authority was within its right to distinguish the relied upon decisions but it could not conveniently pass over or skip them. The essentiality of reasoned order had been emphasized by Hon'ble Supreme Court in its decision given in the case of **Kranti Associates Pvt. Ltd. and anr. v. Masood Ahmed Khan and ors. 2010 (9) SCC 496**. Accordingly, the above Report was liable to be set aside.

52. The Respondent has also contested the calculations made by the DGAP of the alleged profiteering on the ground that the period considered by the DGAP for the pre-GST period should have been from March, 2017 to June, 2017 instead of April, 2017 to June, 2017. He has also claimed that the total saleable area as also the saleable area relevant to the turnover considered by the DGAP for the computation were both incorrect. In this regard, he has referred to the calculations made by the DGAP of the alleged profiteering percentage as under:-

(Amount in INR)

S. No.	Particulars	Mar'17 to June'17	July'17 to Dec'18
1	Credit of Service Tax Paid on Input Services (A)	67,57,842	-
2	ITC of GST Availed (B)	-	12,87,59,004
3	Turnover from List of Home buyers (net of cancellation) (C)	26,93,29,710	1,70,96,06,801
4	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	5,34,471	5,34,471
5	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to turnover (E)	3,60,157	5,02,388



6	ITC relevant to Area Sold (F) [(F) = (A)*(E)/(D) or (B)* (E)/(D)]	45,53,819	12,10,29,913
	Ratio of ITC to Turnover [(G) = (F)/(C)* 100]	1.69%	7.08%
	Profiteering %	5.39%	
	Profiteering Amount	Rs. 10,32,05,543	

53. The Respondent has stated that the DGAP has ignored the CENVAT credit availed for the period of March, 2017 for computing the profiteering on the premise that there was no consideration received during March, 2017. The DGAP has also observed that the pre-GST period should be considered from April, 2017 to June, 2017 as only during this period, both the indicators (ITC as well as the turnover) existed.

54. The Respondent has also contended that mere absence of turnover, could not be a reason for disregarding the period of March, 2017 in the computation of profiteering in terms of the methodology adopted by the DGAP. The Respondent has also argued that the comparison of ratio of ITC to turnover for the pre-GST period with the GST period was not the correct methodology for computing profiteering under Section 171 of CGST Act, 2017 as it suffered from various inconsistencies and assumptions. He has also asserted that this methodology assumed that uniform expenses were incurred on periodical basis throughout the project lifecycle and that taxable turnover would also be uniform, which practically varied a lot given the market conditions and was objectively, an incorrect assumption to make and presuming the same to be true and applying the same to



the present case, the assumption of uniformity of expenses should be seen qua the pre-GST period and the GST period of investigation, as a whole. He has also contested that the objective behind considering the entire period of the project (pre-GST or GST period) was that, the ITC and its co-relation with taxable turnover should be assessed at the broader periodic level rather than linking it with a particular period of the project. He has also submitted that no period of a project should be excluded for purpose of computing the profiteering as doing the same would lead to incorrect results. However, in case if the entire period was not being considered then the period from the commencement of the project in the pre-GST regime till the period of investigation in the GST period should be considered.

55. The Respondent has also cited Rule 5 of the CENVAT Credit Rules, 2004 in his support wherein refund was allowed in the ratio of export turnover to the total turnover for that particular relevant period. In this regard, it was held in a catena of case laws that the 'CENVAT credit' meant credit which was lying unutilized at the end of relevant period and not just pertaining to the relevant period. Thus, even if the turnover considered was for a particular month, the CEVAT credit considered for computing refund was the balance lying at the end of the said particular relevant period. Applying the said ratio to the present facts, he has submitted that it was immaterial whether during a specific period, the turnover was nil, the said period shall be considered for computing profiteering. The Respondent has also submitted that the impugned methodology was based on assumption of uniformity of ITC as also the taxable turnover during a particular



period, which in the instant case was pre-GST period and GST period. If the DGAP itself was of the opinion that the said uniformity did not hold good as he had excluded the period of March, 2017 from the computations by observing that during that period, the Respondent had nil turnover with certain CENVAT credit, his own assumption stood defeated, in which case, the impugned methodology was inappropriate for computation of profiteering in the present proceedings.

56. The Respondent has also contended that the saleable area as also the saleable area relevant to turnover considered by the DGAP in his calculations was incorrect. The figures claimed by him to be correct are given below:-

S. No.	Particulars	Mar'17 to June'17	July'17 to Dec'18
1	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	9,48,024	9,48,024
2	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to turnover (E)	6,04,965	8,77,742

57. The Respondent has also furnished the profiteering calculation based on the methodology adopted by the DGAP after considering the entire pre-GST period, in the light of above submissions as is given below:-

(Amount in INR)

S. No.	Particulars	Mar'17 to June'17	July'17 to Dec'18
1	Credit of Service Tax Paid on Input Services (A)	1,33,30,931	



2	ITC of GST Availed (B)		12,87,58,949
3	Turnover from List of Home buyers (net of cancellation) (C)	26,93,29,710	1,70,96,06,801
4	Total Saleable Carpet Area (Excluding Balcony Area) (in SQF) (D)	9,48,024	9,48,024
5	Total Sold Carpet Area (Excluding Balcony Area) (in SQF) relevant to turnover (E)	6,04,965	8,77,742
6	ITC relevant to Area Sold (F) [(F) = (A)*(E)/(D) or (B)* (E)/(D)]	85,06,901	11,92,13,372
Ratio of ITC to Turnover [(G) = (F)/(C)* 100]		3.16%	6.97%
Profiteering %		3.81%	

On the basis of the aforementioned calculation after applying the methodology adopted by the DGAP and by including the period of March, 2017, the Respondent has claimed that he was liable to pass on benefit of 3.81% to his customers.

58. The Respondent has also submitted that he has already passed on the benefit of 3.88% to the eligible customers of the project 'Godrej 24', by way of commensurate reduction in the prices due to additional ITC which was to accrue to him under the GST regime which has also been admitted by the Applicant No. 1. The details of the actual benefit claimed to have been passed on to the different categories of the customers are as follows:-

Category	Number of Units	Mechanism of ITC benefit passed on to customers
Customers who had booked units in earlier regime.	As on 30.06.2017 = 584  Less: Units cancelled in GST regime = 37  Net Units = 547	3.88% had been passed to the customers of 434 units on the amount of billing done in GST regime through credit note or adjustment in the tax invoice itself.



	Less: Units booked in Pre-GST cancelled in GST regime = 113 Remaining units = 434	
Customers who booked units from 01.07.2017 to 30.06.2018	235	3.88% had been passed on the agreement value. <ul style="list-style-type: none"> <li>• 2.25% had been passed on through reduction in the price which was reflected in the cost sheet.</li> <li>• Remaining 1.63% had been passed on the amount of billing done in GST regime through credit note or adjustment in the tax invoice itself</li> </ul>
Customers who booked units after 30.06.2018 till 31.12.2018	68	GST benefit was factored in the price at which units were booked.
Unsold Units as on 31.12.2018	79	
<b>Total Units</b>	<b>816</b>	

59. The Respondent has also submitted that the Applicant No. 1 belonged to Category A i.e. he had booked the unit in earlier regime. He has also stated that proof of passing on of the benefit to different categories of customers, as explained above, on a sample basis, was enclosed as evidence. Thus, the Respondent has claimed that he had already passed on the benefit of 3.88% which was more than the profiteering computed by the DGAP.

60. The Respondent has also averred that in para 18 of the DGAP's Report it has been observed that computation of profiteering has been made in respect of 771 home buyers, whereas 892 units had been booked in the present project till 31.12.2018 out of which 121 customers who had booked the flats and also paid the booking



amounts in the pre-GST period, had not paid any consideration during the post-GST period from 01.07.2017 to 31.12.2018 (period under investigation) and therefore, if the ITC in respect of these 121 units was considered to calculate profiteering in respect of 771 units where payments had been received after GST, the ITC as a percentage of turnover may not be appropriate. He has also submitted that the DGAP had arbitrarily considered the figure of 892 home buyers since in project 'Godrej 24', it was a fact that there were only 816 flats available, out of which 79 flats were not booked till 31.12.2018 (i.e. till the end of period of investigation). He has also added that reference to 121 home buyers and 771 home buyers seemed out of place and factually incorrect in the light of facts of the present case. He has also alleged that this showed non-application of mind on the part of the DGAP and his findings deserved to be set aside on this ground itself.

61. The Respondent has further argued that even if it was assumed that the calculation of profiteering of 5.39% made by the DGAP was correct, in such a scenario, the computation of quantum of benefit to be passed was incorrect. He has also given the analysis of increase in the ITC as under:-

Analysis of Increase in ITC:		
Base Price raised during July'17 to December'18 (Rs.)	E	1,70,96,06,801
GST raised over Base Price @12% (Rs.)	F = E*B	20,51,52,816
Total Demand raised	G=E+F	1,91,47,59,617



Recalibrated Base Price	$H = E*(1-D)$ or 94.61% of E	1,61,74,58,994
GST @ 12%	$I = H*B$	19,40,95,079
Commensurate demand price	$J = H + I$	1,81,15,54,074
Excess Collection of Demand or Profiteered Amount	$K = G - J$	10,32,05,543

62. The Respondent has also submitted that for computing the profiteered amount, the difference should be calculated between the base price during the relevant period vis-à-vis the recalibrated base price, excluding the GST amount. Further, the recalibrated base price should be computed as inclusive of profiteered amount instead of computation as has been given in the Table given above. He has claimed that the correct computation of quantum of profiteering was as under:-

Analysis of Increase in ITC:		
Base Price raised during July, 2017 to December, 2018 (Rs.)	A	1,70,96,06,801
Recalibrated Base Price	$B = A/105.39\%$	1,62,21,71,744
Excess Collection of Demand or Profiteered Amount	$C = A - B$	<b>8,74,35,057/-</b>

63. The Respondent has also submitted that he has already passed on benefit of 3.88% to his customers which should be adjusted against the remaining demands, if any and to that extent, the proceedings were liable to be set aside. The Respondent has also enclosed the following documents as evidence:-





- i. Development Agreement dated 30.03.2017 between The Respondent and M/s RR Megacity Builders Limited.
- ii. Architect's certificates for Project 'Godrej 24'.
- iii. Architect's certificates for Project 'Godrej Elements'.
- iv. List of homebuyers for the project 'Godrej 24'.
- v. Summary of CENVAT credit for the period from March, 2017 to June, 2017 as also ITC for the period from July, 2017 to December, 2018, attributable to 'Godrej 24' project.
- vi. Copies of all the invoices raised to the Applicant No. 1
- vii. Proof of passing on of the benefit to the customers, on a sample basis.

64. The Respondent in his submission dated 06.09.2019 has stated that the DGAP has considered carpet area instead of saleable area for computing profiteering percentage. However, the nomenclature used is saleable area. However, even if carpet area was considered, the carpet area relevant to turnover considered by the DGAP was incorrect. The correct figures of carpet area relevant to turnover was as follows:-

<b>Carpet Area relevant to turnover</b>	<b>Pre-GST (Apr-17 to Jun-17) or (Mar-17 to Jun-17)</b>	<b>GST regime (July-17 to Dec-18)</b>
Correct Figures	3,40,898 sq. ft.	4,95,058 sq. ft.
Figures considered by The DGAP	3,60,157 sq. ft.	5,02,388 sq. ft.





65. The Respondent has also submitted that while computing the profiteering percentage and amount, the DGAP has considered the figure of turnover which was net of benefit passed on to customers. However, profiteering percentage could be correctly computed only when benefit amount passed on by the Respondent was added in the turnover for the GST period. The gross turnover should be considered for computing the profiteering percentage and profiteering amount.

66. The Respondent has further submitted that the projects undertaken by him were 100% residential projects. The below Table summarised the saleable area and number of units in the various projects undertaken by him:-

Project	Godrej 24	Godrej
	Elements	
<b>Launch Period</b>	Pre-GST regime	GST regime
Date of first booking	28-04-2017	22-06-2018
Date of first receipt from customer	30-04-2017	25-05-2018
<b>Saleable Area (in sq. ft.)</b>	9,48,024	7,27,062
<b>Total Number of Units</b>	816	575
RERA ID	P52100001005	P52100016626

67. The Respondent has also submitted that none of the projects mentioned above has been completed till now. He has enclosed the copy of RERA registration certificate for both the projects as evidence.

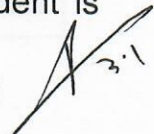


68. The Respondent has further furnished projects wise details like number of flats constructed, built, sold, unsold area wise as below:-

Project	Godrej 24	Godrej
		Elements
Sold/Booked units	737	309
Unsold/Un-booked units	79	266
<b>Total Number of Units</b>	<b>816</b>	<b>575</b>

69. The Respondent in his submission dated 20.09.2019 has contended that the service for which the credit was denied by the DGAP in his Report pertained to the month of March 2017 and it related to the development management fee charged by the development manager in accordance with the development management agreement. He has also attached copies of the invoice of development management fee and the development agreement as evidence. The Respondent has also submitted that the scope of development management services included pre-construction development fee such as designs and approvals etc. as agreed by the parties in the agreement. There were various services which needed to be availed before launch for getting approvals which were mandatory for the launch to happen. Such services were received prior to launch of the project and there was no reason why such credit should not be considered for the purpose of overall benefit.

70. We have carefully considered the Report filed by the DGAP, submissions of the Respondent, the Applicant No. 1 and the other material placed on record and it is revealed that the Respondent is

 3.1



executing "Godrej-24" project at Hinjewadi, Pune, Maharashtra-411005. It is also revealed that the Applicant No. 1 had booked a Flat in the above project on 19.04.2017 and had complained to the Standing Committee on Anti-Profiteering on 15.10.2018 that the above Respondent was not passing on the benefit of ITC to him on Flat No. F1-203, which he had purchased from him. The above complaint was examined by the Standing Committee in its meeting held on 13.12.2018 and was forwarded to the DGAP for detailed investigation as per the provisions of Rule 129 (1) of the CGST Rules, 2017. The DGAP has conducted investigation in the above allegations levelled by the Applicant No. 1 and vide his Report dated 26.06.2019 has stated that the Respondent has violated the provisions of Section 171 of the above Act by resorting to profiteering of an amount of Rs. 10,32,05,543/-.

71. It is further revealed from the record that the Respondent has claimed that the carpet area relevant to turnover considered by the DGAP was incorrect. He has also supplied both the figures which have been claimed to be correct by him as well as those which have been considered by the DGAP in Table B of his Report dated 26.06.2019 as under:-

<b>Carpet Area relevant to turnover</b>	<b>Pre-GST Apr-17 to Jun-17) or (Mar-17 to Jun-17)</b>	<b>Post-GST (July-17 to Dec-18)</b>
Correct Figures	3,40,898 sq. ft.	4,95,058 sq. ft.
Figures considered by The DGAP	3,60,157 sq. ft.	5,02,388 sq. ft.



72. Since, there is difference in the both the above figures therefore verification of the correct figures is required to be made.
73. It is also apparent from the record that the DGAP has taken total saleable area as 5,34,471 sq. ft. in Table B of his Report while computing ratio of ITC to turnover for the pre and post GST periods whereas the Respondent has claimed that this area was 9,48,024 sq. ft. The above contention of the Respondent also needs to be investigated and correct figure is required to be ascertained.
74. It is further apparent from the perusal of para 18 of the Report dated 26.06.2019 furnished by the DGAP that the Respondent had booked 892 units. Whereas the Respondent has vehemently claimed in his submissions that the total number of the units in his "Godrej 24" project was 816. Since, there is vast difference in the number of units claimed by both the parties the same is required to be reconciled.
75. The Respondent has also contended that the DGAP has considered the area of cancelled flats while computing the profiteered amount in his Report which has resulted in incorrect profiteering. The above claim of the Respondent is also required to be investigated.
76. The Respondent has also claimed to have passed on the ITC benefit of 3.88% to his buyers which also needs to be verified.
77. Based upon the above facts the present Report filed by the DGAP cannot be accepted and hence the present case is remanded to him for further investigation as per the provisions of Rule 133 (4) of the above Rules on the issues mentioned in paras supra.
78. Accordingly, the DGAP is directed to cause further investigation in the present case and submit detailed reasoned Report as per the



provisions of Rule 129 (6) of the CGST Rules, 2017. The above Respondent is directed to extend full co-operation to the DGAP during the course of the investigation.

79. A copy of this order be sent to both the Applicants and the Respondent free of cost. File of the case be consigned after completion.

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

Sd/-  
(B. N. Sharma)  
Chairman



Sd/-  
(Amand Shah)  
Technical Member

Certified Copy

  
3.1.2020

(A.K. Goel)  
Secretary, NAA

File No. 22011/NAA/58/Pearlite/2019/112

Dated: 03.01.2020

Copy To:

1. Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai ViR Singh Marg, New Delhi-110001,
2. M/s Pearlite Real Properties Pvt. Ltd., Godrej Eternia C, 10th Floor Office, A 3, Old Mumbai Pune Highway, Wakdewadi, Shivaji Nagar, Pune-411005.
3. Sh. Parvez Khan, B2, 602, Prism Aundh, Pune – 411007.
4. Guard File

