

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

Case No.	48/2019
Date of Institution	05.04.2019
Date of Order	03.10.2019

In the matter of:

1. Sh. Mohit Arora, 2C-144, Kalpataru Estate, JVLR Road, near Majaa Bus Depot, Andheri East, Mumbai-400083,
2. Director General of Anti-Profitteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sanhya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

1. M/s Lodha Developers Limited, Lodha Exosius, N. M. Joshi Marg, Mahalaxmi, Mumbai-400011,
2. M/s Lodha Impression Real Estate Private Limited, 412, Floor-4, 17G, Vardhaman Chamber, Cawasji Patel Road, Horniman Circle, Fort, Mumbai-400001.

Respondents

Quorum:-

1. Sh. B. N. Sharma, Chairman
2. Sh. J. C. Chauhan, Technical Member
3. Ms. R. Bhagyadevi, Technical Member
4. Sh. Arvind Shah, Technical Member

Present:-

1. None for the Applicant No. 1.
2. Sh. Rana Ashok Rajnish., Assistant Commissioner for the Applicant No. 2.
3. Sh. Mangal Prabhat Lodha, Authorised Representative, Sh. Rakesh Gupta, Sr. Vice President (Taxation), Sh. Timish Salot, Vice President (Taxation), Sh. Surendra S. Gupta, Consultant, Sh. Santosh Thapliyal, Authorised Representative and Sh. Archit Aggarwal, Chartered Accountant for the Respondents.

ORDER

1. This Report dated 28.11.2018 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (B) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that vide his application dated 30.05.2018 (Annexure-1 of the Report)

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submitted to the Maharashtra Screening Committee on Anti-profiteering under Rule 128 (2) of the CGST Rules, 2017, the Applicant No. 1 had alleged profiteering by the Respondents while he had purchased Flat No. 704, Building-2, Lodha Etemis, Andheri East, Mumbai, in "Lodha Etemis" project launched by the Respondents. The above Applicant had also alleged that the Respondents had not passed on the benefit of Input Tax Credit (ITC) although they had charged GST @ 12% w.e.f. 01.07.2017 from him. The Maharashtra State Screening Committee had examined the above application and after its prima facie satisfaction that the Respondents had violated the provisions of Section 171 of the CGST Act, 2017, had sent the same with its recommendations for necessary action to the Standing Committee on Anti-profiteering on 13.07.2018 as per the provisions of Rule 128 of the CGST Rules, 2017. This application was duly considered by the Standing Committee on Anti-profiteering in its meetings held on 07.08.2018 & 08.08.2018 and was referred to the DGAP for conducting detailed investigation on the allegations levelled by the Applicant No. 1.

2. The DGAP has stated in his Report that the above flat was booked by the Applicant No. 1 on 21.04.2015 before the GST had come in to force w.e.f. 01.07.2018 and the following demands had been raised on him by the Respondents as per the Table-A given below:-



Particulars	GST	Other Charges	Service Tax	GST	Total
Agreement Value (A)	2,62,90,127	0	1,28,758	0	2,76,32,958
Paid in Pre-GST era (B)	2,29,75,758	0	18,27,112	0	2,58,02,870
Balance to be paid Post GST (C) = (A-B)	12,86,378	12,71,629	33,884	0	26,59,601
Amount Demanded by Respondents during 01.07.2017 to 31.09.2018 (D)	12,86,378	0	0	1,17,675	14,14,053
Amount to be demanded by Respondent (E)	0	12,71,629	0	1,34,320	14,11,729
Final Amount demanded post GST (F) = (D)+(E)	12,86,378	12,71,629	0	2,52,001	28,10,008

3. The DGAP has also stated that the Applicant No. 1 had submitted the following documents along with his complaint:-

- Duly filled in Form APAF-1.
- Copy of Allotment letter from the Respondents.
- Copies of Payment Schedule Pre-GST & Post-GST.
- Copy of agreement dated 21.04.2015.
- Copies of e-mails requesting for passing on the benefit of ITC.
- Copy of final demand letter alongwith amount.
- ID proof (PAN Card).

4. The DGAP had issued Notice under Rule 129 of the CGST Rules, 2017 on 11.09.2018 (Annexure-3 of the Report) asking the Respondents to intimate whether they admitted that the benefit of ITC had not been passed on to the above Applicant through commensurate reduction in the price of the flat and if so, to suo moto determine the quantum of such benefit and communicate the same with necessary evidence. An opportunity to inspect the non-confidential evidence/information submitted by the Applicant No. 1 was

also afforded to the Respondents between 17.09.2018 and 19.09.2018 which they had utilised on 19.09.2018. In response to the Notice dated 11.09.2018, the Respondents, vide their reply dated 26.09.2018, submitted to the DGAP that the on-going operations of Lodha Eternis residential project were assigned to the Respondent No. 1 w.e.f. 20.02.2018, vide National Company Law Tribunal's order dated 20.02.2018. It was also stated that all the transactions, subsequent to the above assignment in respect of Lodha Eternis residential project, were to be maintained in the books of account of the Respondent No. 1 and therefore, he was also made a co-noticee vide Notice F.No.220111APl/80/2018 dated 24.10.2018 issued by the DGAP. The Applicant No. 1 was also afforded an opportunity of inspecting the evidence produced by the Respondents between 19.11.2018 to 20.11.2018 however, he had requested vide his email dated 14.11.2018 to send him the copies of the evidence by post which were accordingly sent to him by the DGAP. The DGAP has also submitted that the present investigation has been conducted from 01.07.2017 to 31.08.2018 and the period for completing the investigation was upto 29.11.2018 as per the provisions of Rule 129 (6) of the CGST Rules, 2017.

5. The DGAP has also intimated that the Respondent No. 2 had filed replies to the Notice vide their letters dated 18.09.2018, 26.09.2018, 12.10.2018, 22.10.2018, 23.10.2018, 24.10.2018, 01.11.2018, 06.11.2018 and 12.11.2018. The contents of the replies given by the above Respondent have been given in brief by the DGAP as under:

- I. That the Respondents had claimed that the allegation of the above Applicant was completely misplaced, unjustified & premature and all facts had not been placed on record by him.
- II. That the Respondents had also claimed that much before coming in to force of the GST they vide his email dated 17.06.2017 had intimated the above Applicant that the available GST benefits would be passed on to him
- III. That the Respondents vide their email dated 05.09.2017 had clearly informed the above Applicant that the benefit of ITC would be passed on at the time of possession,
- IV. That the possession of Flat no. 704 was yet to be handed over to the above Applicant by the Respondents.

6. The DGAP has further intimated that the Respondent No. 2 had also submitted the following documents:-

- (a) Copies of GSTR-1 returns for July, 2017 to August, 2018 in r/o the Respondent No. 2.
- (b) Copies of GSTR-3B returns for July, 2017 to August, 2018 in r/o the Respondent No. 2.
- (c) Copies of Tran-1 statements for the transitional credit availed by the Respondent No. 2.
- (d) Copies of VAT & ST-3 returns for April, 2016 to June, 2017 in r/o the Respondent No. 2.
- (e) Copy of Electronic Credit Ledger for the period July, 2017 to August, 2018 in r/o the Respondent No. 2.



- (f) Copies of all demand letters and sale agreement/contract and construction agreement dated 21.04.2015 in the name of the above Applicant Sh. Mohit Arora.
- (g) Tax rates Pre-GST and Post-GST in r/o the Respondent No. 2.
- (h) Computation of GST benefit to be passed on.
- (i) Copy of Balance Sheet for FY 2016-17 & 2017-18 in r/o the Respondent No. 2.
- (j) Details of taxable turnover and ITC for the project Lodha Eternis.
- (k) List of home buyers in the project Lodha Eternis along with the details of land owners.

7. The DGAP has also submitted that the Respondent No. 1 had also filed replies to the Notice vide his letters dated 12.10.2018, 22.10.2018, 23.10.2018, 24.10.2018, 01.11.2018, 06.11.2018, 12.11.2018, 15.11.2018, and 20.11.2018. He has also informed that the Respondent No. 1 had given similar replies which had also been given by the Respondent No. 2 and which had been mentioned in para 5 above and in addition he had given the following submissions:-

- I. That the Respondent No. 1 had intimated the quantum of GST benefit as Rs.196/- per sq. ft., vide his possession demand letter dated 18.08.2018 to the above Applicant.
- II. That the benefit of ITC due to reduction in the cost incurred post 01.07.2017 as a result of elimination of taxes like VAT/Excise Duty/CVD & SAD applicable on the materials on which the Respondent No. 1 was not entitled to take credit.

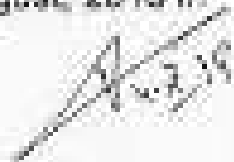
during the erstwhile regime, worked out as Rs.170/- per sq. ft. in building No. 2 and Rs. 196/- per sq. ft. in the "Locha Eternis" Project, whereas the Respondent No. 1 had already given the benefit to the applicant by way of reduction in price @ Rs.196/- per sq. ft. amounting to Rs.1,90,316 & Rs. 23,273/- on account of excess Maharashtra VAT (MVAT) paid @1% on total agreement value at the time of agreement registration.

III. That the above benefit of Rs. 170/- per sq. ft. & Rs. 196/- per sq. ft. had been calculated without considering the reversal of the credit on account of credit attributable to unsold units post receipt of occupancy certificate.

IV. That the GST benefit of Rs. 196/- per sq. ft. included transition credit of Rs. 49,74,677/- of which Rs. 36,70,830/- pertained to the goods lying in stock (work in progress-unsold flats as on 30.06.2017). It was also claimed that the Commissioner of State Taxes Maharashtra State had issued an Internal Circular No. 23A of 2018 dated 01.09.2018 wherein it was stated that the developer was not eligible for transitional credit.

8. The DGAP has intimated that the Respondent No. 1 had also submitted the following documents:-

- (a) Copies of GSTR-1 returns for March, 2018, to August, 2018 in r/o M/s Lodha Developers Ltd.
- (b) Copies of GSTR-3B returns for March, 2018, to August, 2018 in r/o M/s Lodha Developers Ltd.



- (c) Copy of Electronic Credit Ledger for the period from March, 2016 to August, 2018 in r/o M/s Lodha Developers Ltd.
- (d) Computation of GST benefit to be passed on.
- (e) Copy of Balance Sheet for FY 2016-17 & 2017-18 In r/o M/s Lodha Developers Ltd.
- (f) Details of taxable turnover and ITC for the project Lodha Eternia.

9. The DGAP after investigation has stated that the main issue for determination was whether there was benefits of reduction in the rate of tax or additional ITC on the supply of construction service provided by the Respondents after coming in to force of the GST w.e.f. 01.07.2017 and whether the Respondents had passed on the above benefits to the recipients in terms of Section 171 of the CGST Act, 2017 or not. The DGAP has also stated that the Applicant No. 1 had submitted correspondence dated 18.08.2018 received from the Respondents revising the payment schedule. The details of the amounts and taxes paid by the Applicant No. 1 to the Respondent No.1 were as under:-



Table "B"

(Amount in Rs.)

S. No.	Payment Details	Date	CGP	Other Charges	Service Tax	IGST	ITC Benefit Availment	Total
1	Application money-1	15.04.2016	1,00,000	-	8,374	-	-	1,08,374
2	Application money-2	18.04.2016	23,00,213	-	86,968	-	-	24,30,211
3	Application money-3	01.05.2016	25,00,001	-	62,725	-	-	25,62,726
4	On initiation of RDC work for Poddar	14.03.2016	12,03,700	-	64,940	-	-	12,68,640
5	On initiation of RDC work for Section	01.06.2016	12,03,700	-	66,040	-	-	12,69,740
6	On initiation of RDC work for Level 1 & level 2	21.06.2016	25,20,210	-	1,10,800	-	-	26,31,010
7	On initiation of RDC work for level 2	27.08.2016	12,03,700	-	66,040	-	-	12,69,740
8	On initiation of RDC work for level 3	14.10.2016	12,03,700	-	66,040	-	-	12,69,740
9	On initiation of RDC work for level 4	26.10.2016	25,20,210	-	1,10,800	-	-	26,31,010
10	On initiation of RDC work for level 5	11.11.2016	18,04,800	-	85,200	-	-	18,90,000
11	On initiation of RDC work for level 6	24.11.2016	18,04,800	-	85,200	-	-	18,90,000
12	On initiation of RDC work for level 7	07.12.2016	18,04,800	-	85,200	-	-	18,90,000
13	On initiation of RDC work for level 8	19.12.2016	18,04,800	-	85,200	-	-	18,90,000
14	On initiation of facade work external	14.02.2017	12,00,100	-	68,800	-	-	12,68,900
15	Final Possession Dem and Letter	16.08.2018/ 13.09.2018	12,65,100	12,71,829	-	3,88,400	1,24,318	29,39,647
16	Amount not to be Deducted	-	23,200	-	-	8,000	-	28,200
Total			2,42,85,127	12,71,829	96,87,112	3,81,400	1,24,318	2,56,71,686

10. The DGAP has also submitted that the contention of the Respondent No. 1 that the accurate quantum of ITC would be finally determined and the benefit passed on to the recipients at the time of giving possession might be correct as the above Respondent had passed on benefit of Rs. 1,90,316/-, vide his possession demand letters dated 18.08.2018 & 13.09.2018 but the profiteering, if any, had to be established at a point of time in terms of Rule 129 (6) of the CGST Rules, 2017. Therefore, the ITC available to the Respondents and the taxable amount received by them from the above Applicant and other recipients till 31.08.2018 had to be taken into account for determining profiteering.

11. The DGAP has further submitted that the contention of the Respondents that all the units were not sold till the time of completion of this investigation and it was also not known if all the units would be sold before receiving the completion certificate from the competent authority therefore, in respect of any unsold units, corresponding ITC would have to be reversed once the completion certificate was obtained as ITC in respect of such units had been claimed in the relevant months when inward supplies were received by the Respondents. The DGAP has also contended that his above submission was supported by para 5 of Schedule-III of the CGST Act, 2017 and Clause (b) of Paragraph 5 of Schedule II of the CGST Act, 2017, therefore, the ITC pertaining to the units which were under construction but not sold was provisional ITC which might be required to be reversed by the Respondents in terms of Section 17 (2) & Section 17 (3) of the CGST Act, 2017. Therefore, the DGAP has claimed that the ITC pertaining to the unsold units was outside the scope of this investigation and the Respondents were required to recalibrate the selling price of such units to be sold to prospective buyers by considering net benefit of additional ITC available to them Post-GST.

12. The DGAP has also intimated that another claim made by the Respondents was that the above Applicant had withdrawn his complaint and hence, the investigation should be closed, however, he has submitted that although the proceedings must flow from an application but there was no legal provision under which it could be

withdrawn. He has further intimated that as per the provisions of Rule 129 of the CGST Rules, 2017, he was legally bound to complete the investigation in case of any reference having been received from the Standing Committee on Anti-profiteering and hence withdrawal of an application could legally not be a valid reason for closing the investigation.

13. The DGAP has also stated that the Respondents had submitted that the on-going business of Lodha Eternis residential project was demerged into M/s Lodha Developers Ltd. w.e.f. 20.02.2018 (Respondent No. 1), vide National Company Law Tribunal order dated 02.02.2018. It was also submitted that all the transactions, subsequent to demerger, in respect of Lodha Eternis residential project would be accounted for and recorded in the books of M/s Lodha Developers Ltd. and hence the Respondent No 1 had legal obligation to pass on any benefit in respect of the units sold by him to the buyers of the project Lodha Eternis. It was further submitted by the DGAP that prior to 01.07.2017 i.e. in the Pre-GST era, the Respondents were eligible to avail CENVAT credit of Service Tax paid on input services only and no credit was available in respect of the Central Excise Duty paid on the Inputs, of VAT paid on inputs and of VAT (WCT) paid to the sub-contractors. However, Post-GST, the Respondents were eligible to avail ITC of GST paid on Inputs and Input services including the sub-contractors. He has also submitted that from the data submitted by the Respondents which had been duly verified from the GSTR-1 and GSTR-3B Returns, the details of the ITC availed by the Respondents

and their taxable turnover for the project Lodhia Exerms during the said periods, the ratio of ITC to turnover during the Pre-GST and Post-GST period was as under:-

Table-^oC^o

(Amount in Rs.)

S. No.	Particulars	April, 2016 to March, 2017	April, 2017 to June, 2017	Total (Pre-GST)	July, 2017 to Feb, 2018	March, 2018 to August, 2018	Total (Post-GST)
(1)	(2)	(3)	(4)	(5)=(3)+(4)	(6)	(7)	(8)=(6)+(7)
1	CENVAT of Service Tax Paid on Input turnover as per GT (A)(4)	1,86,87,622	82,62,704	4,73,48,326	-	-	-
2	Input Tax Credit of VAT Paid on Purchase of Input as per VAT Returns (B)	-	-	-	-	-	-
3	Total CENVAT/ Input Tax Credit Available (C)=(A+B)	1,86,87,622	82,62,704	4,73,48,326	-	-	-
4	Input Tax Credit of GST Availed as per GSTR Return (D)	-	-	-	2,52,07,285	9,17,46,881	6,54,47,136
5	Total Taxable Turnover as per Returns (E)	1,32,02,63,634	84,51,63,627	1,86,54,26,434	28,47,04,878	21,24,28,288	59,71,33,166
6	Total Available ITC of Input in the period (G)=(C)+(D)	-	-	4,73,48,326	-	-	6,54,47,136
7	Ratio of ITC to Taxable Turnover as per Return (G)	-	-	1.57%	-	-	7.32%
8	Balance CENVAT/ Input Tax Credit (H)=(C)+(D)-(G)	-	-	1,86,54,26,434	-	-	6,54,47,136
9	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover [(I)=(H)/(E)]	-	-	1.57%	-	-	7.32%

14. On the basis of the above Table the DGAP has argued that the ITC as a percentage of the total turnover that was available to the Respondents during the Pre-GST period from April, 2016 to June, 2017 was 1.57% and during the Post-GST period from July, 2017 to August, 2018, was 7.32% which confirmed that Post-GST, the Respondents had benefited from the additional ITC to the tune of 5.75% (7.32%-1.57%) of the total turnover. Accordingly, the DGAP has assessed the amount of profiteering by comparing the applicable tax rates and the ITC available during the Pre-GST period (April, 2016 to June, 2017) when Service Tax @4.5% and VAT@1% was payable.

(total tax rate of 5.5%) with the Post-GST period (July, 2017 to August, 2018) when the effective GST rate was 12% (GST @18% alongwith 1/3rd abatement on value) on construction service, fixed vide Notification No.11/2017-Central Tax (Rate), dated 28.06.2017. On the basis of the figures contained in the above table, the comparative figures of ITC availed/available during the pre-GST period and post-GST period and the profiteered amount/excess collection have been furnished by the DGAP as under:-

Table-"D"

(Amount in Rs.)

S. No.	Particulars		Pre-GST April, 2016 to June, 2017	Post- GST July, 2017 to August, 2018
1	Particular	A		
2	Output tax rate (%)	B	5.50%	12.00%
3	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover as per Table - D above (%)	C	1.57%	7.32%
4	Increase in tax rate post-GST (%)	D= 12% less 4.75%	-	6.50%
5	Increase in input tax credit availed post-GST (%)	E= 7.32% less 1.57%	-	5.75%
6	<u>Analysis of increase in input tax credit:</u>			
7	Base Price collected during July, 2017 to August, 2018	F		84,78,43,554
8	Less: Units cancelled and amount refunded	G		
9	Net Base Price collected during July, 2017 to August, 2018	F+G		84,78,43,554
10	GST Collected @ 12% over Basic Price	H= F*12%		7,77,17,240
11	Total Demand collected	J+H		92,55,60,794
12	Revised Basic Price	K= (F+G) or 94.25% of F		81,01,85,559
13	GST @12%	L= K*12%		7,32,47,401
14	Commensurate demand price	M= K+L		88,34,32,960
15	Excess Collection of Demand or Profiteering Amount	N= J - M		4,17,18,532

15. The DGAP has also stated on the basis of the above table(s) that the additional ITC of 5.75% of the taxable turnover should have resulted in

commensurate reduction in the base price as well as cum-tax price, in terms of Section 171 of the CGST Act, 2017 and the benefit of the additional ITC was required to be passed on to the recipients. The DGAP has also contended that the Respondents had stated that any such benefit would eventually be passed on to the recipients at the time of giving possession of the flats, however, it was a fact that this had not been done so far. He has further contended that it was clear that the Respondents had retained the benefit which had accrued on account of the additional ITC by not reducing the Pre-GST base price of the flats by 5.75% and had charged GST at the increased rate of 12% on the pre-GST base price and hence they had contravened the provisions of Section 171 of the of the CGST Act, 2017.

10. The DGAP has also computed the extent of profiteering or the benefit not passed on by the Respondents, after taking into account the CENVAT/ITC availability Pre and Post-GST and the details of the amount collected from the home buyers during the period from 01.07.2017 to 31.08.2018 and claimed that the amount of benefit of ITC which had not been passed on or in other words, the profited amount came to Rs. 4,17,18,502/- which included 12% GST on the base profited amount of Rs. 3,72,48,602/-. He has also supplied the home buyer and unit no. wise break-up of this amount as per Annexure-19 of his Report. He has also claimed that as per Sr. No. 24 of Annexure-19, the total benefit to be passed on to the Applicant No. 1 amounted to Rs. 81,364/-, however, the Respondents had already passed on the benefit of Rs. 1,90,316/-, vide their possession demand

letters dated 18.08.2018 & 13.09.2018 to him but the excess amount passed on by the Respondents to the above Applicant could not be adjusted against the profited amount to be passed on to other customers. It was also submitted by the DGAP that the Respondent had supplied the construction services in the State of Maharashtra only.

17. The above Report was considered by the Authority in its sitting held on 11.12.2018 and it was decided that the Applicants and the Respondents be asked to appear on 26.12.2018. Since, the Respondents had asked for adjournment of the hearing scheduled on 26.12.2018, it was decided to grant next hearing on 10.01.2019. During the course of the hearing the Applicant No. 1 did not appear, the DGAP was represented by Sh. R. A. Rajneesh, Assistant Commissioner and the Respondents were represented by Sh. Mangal Prabhat Locha, Authorised Representative, Sh. Rakesh Gupta, Sr. Vice President (Taxation), Sh. Timish Salot, Vice President (Taxation), Sh. Surendra S Gupta, Consultant, Sh. Santosh Thapliyal, Authorized Representative and Sh. Archit Agarwal, Chartered Accountant.

18. The Respondents vide their reply dated 10.01.2019 have submitted that they had agreed to pass on the GST Anti-Profiteering benefit prior to the receipt of the notice of the complaint from the DGAP. They have also submitted that based on the taxes and the duties incurred on the total construction cost on the projects completed in the past it was assumed by them that savings between 4% to 5% would accrue to them hence, they had considered average rate of 4.5% as the GST

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benefit on the balance construction cost to be incurred, as on 30.06.2017. They have further submitted that they had agreed to pass on the above benefit to the customers of Eternis Project which could be evidenced from their letter dated 18.08.2018 sent to the above Applicant wherein it was communicated that an amount of Rs. 1,80,316/- (Rs. 198 per sq. ft. * 971 sq. ft.) had been given as discount on account of GST benefit. They have also stated that the above fact had also been recorded by the DGAP in Para 16 & 21 of his Report.

19. The Respondents have further stated that they had passed on the ITC benefit of Rs. 3,89,90,084/- to their customers as against Rs. 3,72,48,662/- determined by the DGAP in his Report hence, they had not profiteered and resultantly not violated the provisions of Section 171 of the CGST Act, 2017. The Respondents have also submitted that no mechanism had been provided in the GST Act to quantify the amount of profiteering and hence, the methodologies of distribution of the benefit adopted by them and the DGAP were different which had led to the difference in the amount calculated by the Respondents and the DGAP. They have further submitted that the amount payable to/receivable from the different customers due to difference in the methodologies would be set off internally by the Respondents.

20. The Respondents have also pleaded that the method of calculation adopted by the DGAP in computing the profiteered amount in Table-C of his Report was incorrect as the DGAP had computed the profiteered amount by taking the ratio of CENVAT credit to the turnover which had

led to the wrong calculation of the amount of profiteering. To support their pleadings the Respondents have submitted:-

a) That in the construction industry, the credit might accrue in a particular period but the tax liability might not arise in the same period as the construction took place gradually. The builder could raise the demand only when milestone was achieved but ITC would accrue to him continuously. The Respondents have also added that the milestone-based payment schedule was the general policy adopted by them due to which the demand for recovery of the instalments based on the milestones could only be raised for premises which had been sold, although the expenses were incurred on the entire project. Therefore, if the proportion of the premises sold was lesser than the total area to be constructed, the utilization of the credit would be higher and distorted.

b) That there could be a number of other factors which affected the computation of the ITC benefit like the credit and the taxable value did not synchronize in the same month or same period, increase in the ITC due to increase in the rate of tax chargeable to the services, recovery of maintenance charges and increase in the credit on account of increase in the cost of construction due to increase in the tax rates imposed in the GST period which might lead to the distorted figures of additional ITC.

21. The Respondents have also claimed that the credit and the taxable value did not synchronize in the same month or the same period in the

instant case which was evident from the Table-C of the DGAP's Report as follows:-

Sr. No	Particulars	July 2017 to February 2018	March 2018 to August 2018	Total (Post GST)
1	Input tax credit of GST availed (A)	2,92,01,055	3,12,45,551	6,04,47,209
2	Total Taxable Turnover (B)	59,07,04,819	25,09,38,848	84,76,43,664
3	Total Saleable Area (C)	1,88,929	1,85,829	1,80,928
4	Area sold relevant to taxable turnover as per returns (D)	1,37,115	1,58,002	1,58,002
5	Relevant Credit (E) = (D)X(C)/(A)	2,01,27,708	2,45,03,056	4,74,03,270
6	Rate of Input Tax Credit Post GST (F=E/B1)	5.07%	9.76%	7.32%

The Respondents have therefore, submitted that as per the Table above, the ratio of availment of the ITC to the taxable turnover for the period from July-2017 to February-2018 was 5.07% and for the period from March-2018 to August-2018 was 9.76% whereas the DGAP had considered the average of both the periods as 7.32% and hence, the variation in the utilization of credit between the two periods (both falling under GST regime) itself substantiated their claim that there was no synchronization of accrual of credit with demand raised for recovery of amount from the customers.

22. The Respondents have also argued that the investigation period was upto August-2018 only and since the work of the building was still going on, demand could not be raised in August-2018 and therefore

the credit availed for achieving a milestone which had been achieved after August-2018 should not be considered for the calculation of the anti-profiteering benefit to the recipients. The Respondents have further furnished data in the tabular form to show the timelines of demands raised and the milestones to contend that the CENVAT credit considered by the DGAP in Table-C of his Report was accordingly required to be taken as Rs. 1,62,17,670/- for the Pre-GST period and Rs. 4,70,64,968/- for the Post-GST period.

23. The Respondents have also averred that under the Pre-GST regime, services were subject to tax at the rate of 15% but under the GST regime most of the services were taxable at 18% and therefore, there was an increase of 3% of the ITC available to them due to increase in the rate of tax which was more than the pre-GST regime and hence, impact of the additional ITC @3% for services should have been considered by the DGAP. The Respondents have further averred that due to the increase in the rate of tax on services the additional ITC available to him for the period from July-2017 to August-2018 was, as follows, which had not resulted in additional benefit to them as they were already getting it in the pre-GST period:-

Sr. No.	Particular		Amount (Rs.)
1	Taxable Value of Input Services (pure service contracts)	A	3,09,33,848
2	ITC availed on these services (18%)	B	71,88,071
3	Service Tax if available – 15%	C = A * 15%	59,80,077
4	Additional input tax credit	D = (B – C)	11,95,994

24. The Respondents have also submitted that the DGAP had ignored the increase in the cost of construction during the Post-GST period due to which the ITC had also increased whereas the sale price had not increased. The Respondents have submitted the following data to support their argument to claim that there has been increase in the ITC but no increase in the turnover and hence the calculation made by the DGAP in Table-D of his Report was incorrect:-

Sr. No.	Product Name	Pre-GST average rate	Post-GST average rate	% of Increase in cost
1	Ready Mix Concrete	4341	4,596	5.18%
2	Steel	31,278	38,052	21.80%
3	Granite & Marble	170	181	2.54%

25. The Respondents have relied upon the Order No. 3/2018 dated 04.05.2018 of this Authority passed in the case of Kumar Gandharv v. KRBL Ltd. and claimed that it was held in this case that the increase in the cost leading to increase in the ITC could not be considered as benefit received by the Respondent. The relevant extract of the said order is as follows:-

"7. It is also revealed from the perusal of the tax invoices submitted by the Respondent that there was an increase in the purchase price of paddy in the year 2017 as compared to its price during the year 2016 which constitutes major part of the cost of the above product. It is further revealed from the records that the respondent had increased the MRP of his product from Rs. 840/- to Rs. 885/- which constituted

increase of 8.55% keeping in view the increase in the purchase price. Therefore, due to the imposition of the GST on the above product as well as the increase in the purchase price of the paddy there does not appear to be denial of benefit of ITC as has been alleged by the applicant as there has been no net benefit of ITC available to the respondent which could be passed on to the consumer. Accordingly, there is no substance in the application filed by the above applicant as there is no violation of the provisions of section 171 of the CGST Act, 2017 and hence the same is dismissed "

26. The Respondents have also submitted that the ITC of Rs. 8,13,937/- had been availed by them due to increase in the cost of procurement of the materials and not on account of any additional benefit due to the advent of GST as has been shown in following table:-

Name of Material	Taxable Value of Procurements	Total ITC availed	Average Increase in Price	Increase in ITC due to Increase in Price
Gravite	41,68,094	8,44,507	2.54%	20,519
Marble	1,06,22,322	42,80,624	2.54%	1,06,035
RMC	2,72,11,845	48,08,133	6.18%	2,41,226
Steel	1,39,41,299	25,09,434	21.60%	4,45,755
Total	6,39,33,560	1,25,32,698		8,13,937

27. The Respondents have further submitted that despite increase in the cost of construction, they had reduced the price of flats as the average selling price per sq. ft. during the period from April 2016 to June 2017 was Rs. 23,485/- whereas during the period from July 2017 to August 2018 it was Rs. 23,286/-. The Respondents have also claimed that reduction in the price itself demonstrated that they had already passed

on the ITC benefit to all the new customers by commensurate reduction in the selling prices.

28. The Respondents have also stated that the turnover considered by the DGAP for the Post-GST era pertained only to the sale of flats made by the Respondents, however, the pre-GST turnover included income other than these sales also including the maintenance charges for which service had been provided in the earlier periods, cheque bounce charges and cancellation charges etc. The Respondents have further submitted that these incomes amounting to Rs. 21,02,761/- should not form part of the turnover considered for computing the profiteered amount.
29. The Respondents have also contended that the turnover considered by the DGAP in certain cases in the Pre-GST regime was more than the contract value including the land value shown in the agreements. The turnover was considered upto 130% (100% in case of VAT and 30% in case of Service Tax) instead of 100% as under the Pre-GST regime, the Respondents were liable to pay VAT at @1% of the total contract value and Service Tax at the rate of 15% only on 30% of the basic contract value. The Respondents have further contended that the DGAP had taken both the turnover values (VAT as well as Service Tax) which had distorted the turnover value. The Respondents have also submitted that the taxable turnover had been inflated by Rs. 25,90,50,575/- by the DGAP for the pre-GST period due to this error. Therefore, the said turnover in Table-C for the Pre-GST period should be re-calculated and ratio should be revised accordingly.

30. The Respondents have further submitted that the area sold relevant to taxable turnover mentioned in Table-C of the DGAP's Report was not correct as the DGAP had re-calibrated the CENVAT/ITC availed by the Respondents in proportion to the total area sold relevant to the taxable turnover in comparison to the total saleable area of the project. In the Pre-GST era, the Respondents had availed CENVAT credit of Rs. 4,72,55,526/- with a total saleable area of 1,98,929 sq. ft. However, the area sold relevant to the taxable turnover of that period was 1,19,364 sq. ft. Therefore, the DGAP had considered proportionate CENVAT credit of Rs. 2,83,54,883/- (Rs. 4,72,55,526 * 1,19,364 / 1,98,929). Similarly, for the Post-GST period, the DGAP had worked out the proportionate ITC as Rs. 4,74,03,270/- (8,04,47,206 * 1,56,002 / 1,98,929). They have claimed that the computation made in the Post-GST period by the DGAP was incorrect inasmuch as the area sold relevant to the taxable turnover of Rs. 64,76,43,854/- for the period from July-17 to Aug-18 was only 88,100 sq. ft. They have also claimed that the DGAP had considered the area pertaining to total sales even if no demand was raised for the same during July-17 to Aug-18. The Respondents have submitted the following details demonstrating the impact of change in sold area as follows:-

Particular	Pre-GST	Post-GST
Cenvat/ITC	3,10,37,869	1,13,24,054
Turnover	1,64,72,73,095	64,76,43,854
Total Saleable Area	1,98,929	1,98,929
Area Sold Relevant to Turnover	1,19,364	88,100
Relevant Cenvat/ITC	1,86,23,743	59,15,381
Ratio	1.20%	0.77%

31. The Respondents have further submitted that the amount collected as GST should not be considered as a benefit to the Respondents as the excess collection had duly been deposited with the Government and the Respondents had not retained the same. The Respondents have further added that the term 'profiteering' was described in various dictionaries as follows:-

- Black's Law Dictionary - Taking advantage of unusual or exceptional circumstances to make excessive profits
- Law Lexicon - To seek or obtain excessive profits, one who is given to making excessive profits
- Shorter Oxford English Dictionary - Make or seek to make an excessive profit
- Mount v. Welsh - Any conduct or practice involving the acquisition of excessive profit
- Islamic Academy of Education v. State of Karnataka - Profiteering would mean taking advantage of unusual or exceptional circumstances to make excessive profits

They have submitted from the above definitions that only those amounts which had been collected and kept by the Respondents could be termed as 'profiteering' and the amount of Rs. 7,77,17,240/- which had been collected as GST and had been paid to the Government or the amount of Rs. 3,89,90,084/- which had been paid to the customers as a part of the GST benefit could not be considered as 'profiteering'.



Therefore, they have claimed that Table-D of the DGAP's Report should be revised accordingly.

32. The Respondents have also argued that the DGAP in para 19 and Table-D of the Report had considered Post-GST rate of tax as 12% and had taken the rate of tax in the Pre-GST regime as Service Tax and VAT to be 4.5% and 1% respectively. They have further argued that the DGAP had taken that this tax rate was applicable on the entire agreement value but as per Section 9 of the CGST Act, 2017 the tax was to be levied on supply of goods or services on the value to be determined under Section 15 of the Act and at such rates as might be notified by the Government, thus, the notified rate must be considered as 'tax rate'. Accordingly, they have claimed that the DGAP in Table-D of the Report had stated that the increase in the tax rate was only 6.5% [12% GST – (4.5% service tax + 1% VAT)], however, the DGAP had not given any findings on such increase in the rate of tax. The Respondents have further claimed that in the Post-GST period, the rate of tax on construction service was specified under Entry No. 3 of Notification No. 11/2017-CT (Rate) dated 28.06.2017 as 18%, but for determining the value, the said notification prescribed abatement of 1/3rd of the value of agreement towards land. Thus, if the agreement value was Rs. 100/-, 18% tax was payable on Rs. 67/-. They have also pleaded that as per the judgment passed in the case of Larsen & Toubro Ltd. v. State of Karnataka & others reported in 2014 (34) STR 401 (SC) service provided by the builder/developer had been classified as works contract, therefore, the value of land included in the

price was required to be excluded to arrive at the taxable value under Section 15 of CGST Act, 2017. They have further pleaded that the rate of tax was always applied on the taxable value which was also required to be declared in the ST-3 returns under the Service Tax regime and GSTR-3B returns under the GST regime. The Respondents have also stated that the rate of tax on sale of flats during the Post-GST period on 87% of the agreement value was 18% as per Sr. No. 3 of Notification No. 11/2017-CT (Rate) dated 28.06.2017. Therefore, in order to make the rates in the Pre and Post GST period comparable, the rate of tax in the Pre-GST period needed to be determined on the same basis i.e. after permitting abatement of 33% from the total value. The abatement of 70% from the total value was permitted under Notification No. 26/2012-ST dated 20.6.2012, thus, tax at the rate of 15% was payable on 30% of the total value and therefore, Service Tax of Rs. 4.5 (15% on Rs. 30) was payable on Rs. 100/- which included value of land. If the value of land was excluded the rate of Service Tax would be 6.72% $(4.5/67 \times 100)$. They have also stated that the rate of VAT was 1% in Maharashtra, therefore, to determine the rate of VAT after abatement of 33% (by reducing value of land) from the total value the VAT rate would be 1.49% $[1/67 \times 100]$. Thus, the total rate of tax on construction service in the pre-GST regime based on the principle laid in the GST regime was 8.21% $(6.72\% + 1.49\%)$ and hence, the increase in the rate of tax on comparing the same with the GST regime was 9.79% $(18 - 8.21)$.



33. The Respondents have also submitted that the increase in the rate of tax on the outward supply of the Respondent was more than the increase in the ITC available to the Respondent after the advent of GST by 9.8% and therefore, there was no profiteering on the part of the Respondents. It was further submitted by the Respondents that they had relied upon the Order No. 3/2018 dated 04.05.2018 passed by this Authority in the case of Kumar Gandharv v. KRBL Ltd. wherein it was held that if the increase in the tax rate was more than the increase in the credit amount, no benefit had accrued to the Respondents. The relevant extract of the same was quoted as follows:-

"6. We have carefully heard the respondent and also perused the material placed on the record and it is revealed that the 'India Gate Basmati Rice' sold by the respondent was not liable for tax before the implementation of the GST and after coming into force of the CGST Act 2017 it was levied GST @9% w.e.f. 22.09.2017. The Respondent was also made eligible to avail ITC w.e.f. the above date. However, ITC claimed by the respondent was not sufficient to meet his output tax liability and he had to pay the balance amount of tax in cash as is evident from the perusal of the table prepared by the DGSG. It is also apparent from the returns filed by the respondent for the months of September 2017 October 2017 and November, 2017 that the ITC available to him as a percentage of the total value of taxable supplies was between 2.69% to 3% whereas the GST on the outward supply of

his product was 8% which was not sufficient to discharge his tax liability. Moreover in this case the rate of tax has been increased from 0% to 5% instead of reduction in the same. Therefore, there appears to be no reason for treating the price fixed by the respondent as violation of the provisions of the Anti-Profiteering clause."

34. The Respondents have also contended that the DGAP in para 21 of the Report had computed that the total GST benefit which had to be passed on to the buyers of the flats was Rs. 4.17 Crores which included Rs. 81,364/- to be passed on to the Applicant No. 1. They have further contended that in Table-A of the Report the balance Service Tax to be collected was Rs. 99,684/- whereas the total GST payable was Rs. 2,88,401/-, thus, on the advent of GST, the excess tax to be borne by the above Applicant was Rs. 1,88,717/-, however, the DGAP had not correctly computed the same as he had not considered the VAT paid by the Respondents by charging the said amount to the above Applicant. The DGAP had also failed to mention the Service Tax amount to be borne by the above Applicant on the "Other Charges". They have also claimed that the amount of GST to be paid as had been mentioned by the DGAP in Table-A was also incorrect. The Respondents have submitted the revised Table-A as under:-



Particulars	IGP	Other Charges	Service Tax	VAT	GST	Total
Agreement Value (A)	2,52,05,127	12,71,529	12,58,343	2,53,159	-	2,80,47,158
Part of Pre-GST inv. (B)	2,30,74,756	-	11,57,113	2,43,184	-	2,52,75,053
Balance to be paid Post GST (C) = (A) - (B)	21,30,364	12,71,529	2,13,231	-	-	27,15,124
Amount Demanded by Respondents during 01.07.2017 to 31.03.2018 (D)	12,03,107	-	-	-	1,51,573	14,54,680
Amount to be demanded by Respondents (E) = (D-C)	28,283	12,71,529	-	-	1,80,298	14,89,110
Total Amount demanded by Respondents post GST (F) = (D+E)	12,31,390	12,71,529	-	-	3,11,871	28,14,790

The Respondents have also submitted from the revised Table that the balance Service Tax to be collected as specified in 3rd row was Rs. 2,13,231/- whereas the total GST payable was Rs. 3,11,661/- and thus, on coming in to force of the GST, it could be seen from the Table that excess tax to be borne by the above Applicant was only Rs. 98,430/- as compared to Rs. 1,88,717/- as claimed by the DGAP in his Report.

35. The Respondents have further submitted that the credit figures appearing in the Post-GST period in Table-D might be reduced once the Completion Certificate of the project would be received. The Respondents have also quoted Schedule-III "Sale of land and subject to clause (b) of para 5 of Schedule-II, sale of building" which is neither supply of goods nor supply of service. Para 5 (b) of Schedule-II reads as follows:

(b) "construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by

the competent authority or after its first occupation, whichever is earlier.

On the basis of the above provisions the Respondents have claimed that once the Completion Certificate was received, the sale of flats would not be subject to GST. They have also quoted the following provision of Section 17 (3) of the above Act as under:-

(3) "The value of exempt supply under sub-section (2) shall be such as may be prescribed and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building."

35. Therefore, the Respondents have claimed that they would be liable to reverse the proportionate ITC to the extent of flats sold after receipt of Completion Certificate, which would have considerable implication on the credit availed by the Respondents.

37. The Applicant No. 1 has also filed written submissions dated 10.01.2019 in which he has stated that thorough investigation of the ITC needed to be made in respect of the above project being executed by the Respondents.

38. The submissions dated 10.01.2019 filed by the Respondents were forwarded to the DGAP for his report. The DGAP has submitted revised investigation Report dated 22.01.2019, the brief facts of which are as follows:-

- a. **On the issue of incorrect method adopted to quantify the demand:** The DGAP has submitted that the Respondents had argued that the total area sold by them upto August, 2018 was 1,58,002 Sq. ft. but during the period from 01.07.2017 to 31.08.2018 (period under investigation Post-GST), they had raised demands only in respect of 88,100 Sq. ft. area (92 home buyers) and no demand letter was issued to the other buyers of area totalling 67,902 Sq. ft. (74 home buyers), which was also evident from the home buyer's list submitted by them.
- b. **On the issue of the turnover having no relevance to CENVAT Credit during the period should not be considered:** The DGAP has stated that the Respondents have submitted that other charges collected in the Pre-GST period towards cancellation of flat bookings and other miscellaneous services should not be considered during the computation of turnover for the Pre-GST period as it had no relevance with the ITC. The reconciliation of the same was submitted by the Respondents on 11.01.2019.
- c. **On the issue of the Turnover considered by DGAP in the Pre-GST regime is more than contract value:** The DGAP has submitted that the reconciliation of the turnover of VAT & Service Tax for the Pre-GST period was submitted by the Respondents on 11.01.2019 and on verification, it was observed that 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 collected from home buyers. This was because the Respondents were paying VAT @ 1% under Composition Scheme without any credit of VAT on inputs and were not collecting the same from the home buyers. The value shown in the VAT returns was the total agreement value of the flats booked in the return period and was not related to the actual amount collected from the home buyers. Therefore, the VAT turnover had not been considered for computation of the ITC ratio to taxable turnover for the Pre-GST period.

39. The DGAP after examination of the documents submitted by the Respondents during the hearing held on 10.01.2019 and to him, has claimed to have re-examined his Report dated 28.11.2018 and stated that after considering the revised details of the area sold relevant to the taxable turnover by the Respondent as per the home-buyers list and the details of other charges collected in the Pre-GST period, the taxable turnover of the Respondents during the period from April, 2016 to June, 2017 (i.e. Pre-GST) and during July, 2017 to August, 2018 (i.e. Post-GST), the ratios of CENVAT/ITC and the taxable turnover, Pre-GST & Post-GST, were as per the below Table:-

Table-E

(Amount in Rs.)

S. No.	Particulars	April, 2016 to June, 2017 Total (Pre-GST)	July, 2017 to February, 2018	March, 2018 to June, 2018	Total (Post-GST)
(1)	(2)	(3)	(4)	(5)	(6)=(3)+(4)+(5)
1	CENVAT of Service Tax Paid on Input Services (A)	4,72,05,523	-	-	-
2	Input Tax Credit of VAT Paid on Purchase of Inputs (B)	-	-	-	-
3	Total CENVAT/ Input Tax Credit Available (C) = (A+B)	4,72,05,523	-	-	-
4	Input Tax Credit of GST Available (D)	-	2,96,01,956	3,72,45,951	6,68,47,907
5	Total Taxable Turnover (E)	1,67,59,54,931	39,67,04,817	23,59,33,340	64,76,43,664
6	Total Taxable Area of Flats in the project (Square Mtr. (F))	1,40,929.10	-	-	1,40,929.30
7	Area Sold/availed to Taxable Turnover (G)	1,19,304.10	-	-	88,101.00
8	Relevant CENVAT/ Input Tax Credit (H) = (C)/(D) x 100 (I) = (D)/(E) x 100 (J)	2.93/44.980	-	-	2.62/33.340
9	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover (K) = (H)/(J)	1.51%	-	-	4.13%

40. The DGAP has also stated that the ITC as a percentage of the total turnover that was available to the Respondents during the Pre-GST period (April, 2016 to June, 2017) was 1.51% and during the Post-GST period (July, 2017 to August, 2018), it was 4.13% which clearly confirmed that Post-GST, the Respondents had benefited from additional ITC to the tune of 2.62% [4.13% (-) 1.51%] of the taxable turnover. On the basis of revised details of the comparative figures of ITC available/available during the Pre-GST period and the post-GST period, the DGAP has computed the excess collection or the profited amount as under:-

S. No.	Particulars		Pre-GST	Post-GST
1	Period	A	April, 2018 to June 2017	July, 2017 to August, 2018
2	Output tax rate (%)	B	5.50%	12.50%
3	Ratio of CENVAT/ Input Tax Credit to Taxable Turnover as per Table - A above (%)	C	1.51%	4.15%
4	Increase in tax rate post-GST (%)	D = 12% less 5.5%	-	6.50%
5	Increase in input tax credit availed post-GST (%)	E = 4.50% less 1.51%	-	2.99%
C. Analysis of Increase in Input tax credit				
7	Basic Price collected during July, 2017 to August, 2018	F		64,78,43,885
8	Less: Units cancelled and amount refunded	G		
9	Net Basic Price collected during July, 2017 to August, 2018	F-G		64,78,43,885
10	GST Collected @ 12% over Basic Price	H = 12%		7,77,41,262
11	Total Demand collected	J=H+G		72,55,85,147
12	Re-calibrated Basic Price	K= H/(1-2) or 97.39% of H		63,08,75,433
13	GST @12%	L= K*12%		7,59,81,846
14	Commensurate demand price	M= K+L		70,68,57,279
15	Excess Collection of Demand or Profiteering Amount	N= J - M		1,80,04,456

41. The DGAP has submitted from the above Table that the additional ITC of 2.62% of the taxable turnover should have resulted in commensurate reduction in the base price. Therefore, in terms of Section 171 of the CGST Tax Act, 2017, the benefit of the additional ITC that had accrued to the Respondents was required to be passed on to the recipients.

42. The DGAP has also stated that on the basis of the aforesaid CENVAT/ITC availability Pre and Post-GST and the details of the amount collected by the Respondents from the above Applicant and the other home buyers during the period from 01.07.2017 to 31.08.2018, the amount of benefit of ITC which had not been passed on by the Respondents to the recipients or in other words, the profiteered amount came to Rs. 1,80,04,456/- which included GST (@ 12% on the base profiteered amount of Rs. 1,69,88,264/-). The DGAP

has also submitted the home buyer and unit no. wise break-up of this amount in Annex-19 (Revised). Further, the DGAP has further stated that the above amount was inclusive of Rs. 37,085/- (including GST on the base amount of Rs. 33,093/-) which was the profiteered amount in respect of the Applicant No.1, mentioned at Serial No.16 of Annex-19 (Revised).

43. The DGAP also mentioned that the above computation of profiteering was with respect to 92 home buyers whereas the Respondents had booked 166 flats till 31.08.2018. He has further mentioned that out of the 166 booked flats, 74 customers who had booked the flats till 31.08.2018 had not paid any consideration during the period from 01.07.2017 to 31.08.2018 (Post-GST period under investigation), therefore, if the ITC in respect of these 74 units was calculated in respect of the 92 units where payment had been received after GST, the ITC as a percentage of taxable turnover would be distorted and erroneous. Therefore, he has stated that the benefit of ITC in respect of these 74 units should be calculated when the consideration was received Post-GST by taking into account the proportionate taxable turnover in respect of these 74 Units.

44. The DGAP has further stated that on the basis of the details of outward supplies of the construction service submitted by the Respondents, it was clear that the service was supplied in the State of Maharashtra only. He has also added that the Respondents had submitted vide their letter dated 10.01.2019 that they had passed on the benefit of Rs. 3,08,25,327/- to 166 home buyers who had booked

their flats upto 31.08.2018, the details of which were enclosed as Annex-19 to the Report dated 28.11.2018. A summary of category-wise profiteering & the benefit passed on was furnished by the DGAP as follows:-

Table-G

(Amount in Rs.)

S. No.	Category of Customers	No. of Units	Area (In Sqft)	Amount Received Post GST	Profiteering Amt. as per Annex-19	Benefit claimed to have been Passed on by the Respondent	Difference	Remarks
A	B	C	D	E	F	G	(H-F-G)	I
1	Applicant	1	871	12,83,167	37,065	1,80,216	(1,53,251)	Excess Benefit passed on.
2	Other Than Applicant	31	28,768	54,85,27,201	1,50,38,797	80,01,180	1,00,18,637	Full or Benefit to be passed on as per Annex-20
3	Other Than Applicant	60	58,376	9,98,33,165	29,26,834	1,14,81,733	(87,06,380)	Excess Benefit passed on. List Attached as Annex-21
4	Other Than Applicant	74	87,902	-	0	1,29,33,148	(1,29,33,148)	No Consideration Paid Post-GST. However, Respondent passed on benefit 1 in Amount of Annex-22
5	Other Than Applicant	66	12,827	-	-	-	-	Unsold Units as on 31.08.2018
	Total	213	1,90,869	64,76,43,664	1,90,84,456	3,08,25,327	(1,17,74,122)	-

45. The DGAP has also submitted from the above Table that the benefit claimed to have been passed on by the Respondents was less than what they should have passed on in respect of 31 cases (Sr. 2 of the above Table) amounting to Rs. 1,00,18,637/-. The details of these amounts are given in Annex-20 (Revised DGAP Report). The benefit claimed to have been passed on by the Respondents was higher as compared to what they should have passed on in respect of 61 recipients of residential flats including the Applicant (Sr. 1 & 3 of above table) amounting to Rs. 88,59,611/- (Rs.1,53,251 + Rs. 87,06,360).

The details of this excess benefit claimed to have been passed on are given in Annex-21 of the Revised DGAP Report. Further, the Respondents have also claimed to have passed on benefit amounting to Rs. 1,29,33,148/- to 74 buyers of flats who had not paid any consideration Post-GST. The details of this excess benefit claimed to have been passed on are given in Annex-22 of the Revised DGAP Report. The DGAP has further added that these amounts of excess benefit, claimed to have been passed on as per Annex- 22, could not be set off against the additional benefit to be passed on to other recipients as per Annex-21 but may be adjusted against the further demands from such home buyers.

46. The DGAP has also submitted that the additional ITC of 2.62% of the taxable turnover had accrued to the Respondents which was required to be passed on to the above Applicant and the other recipients. He has further submitted that the provisions of Section 171 of the CGST Act, 2017 had been contravened by the Respondents as the additional benefit of ITC @2.62% of the base price received by the Respondents during the period from 01.07.2017 to 31.08.2018, had not been passed on to the above Applicant and other recipients and the Respondents had realized an additional amount to the tune of Rs. 37,065/-, from the above Applicant which included both the profited amount @2.62% of the taxable amount (base price) and GST on the said profited amount. The DGAP has also claimed that the Respondent had passed on Rs. 1,90,316/- to the above Applicant, therefore, the Respondents had passed on excess amount of Rs. 1,53,251/- (Rs. 1,90,316/- (-) Rs.

37,065/-) which may be adjusted against the further demands from the applicant. The DGAP has further claimed that the investigation revealed that the Respondents had realized an additional amount of Rs. 1,90,04,456/- as has been mentioned in Table- 'F' of his revised Report which included both the profiteered amount @2.62% of the taxable amount (base price) and GST on the said profiteered amount from 81 other recipients who were not Applicants in the present proceedings. These recipients were identifiable as per the documents on record and therefore, this additional amount of Rs. 1,90,04,456/- was required to be returned to such eligible recipients, he has contended.

47. The revised Report dated 22.01.2019 furnished by the DGAP was considered by the Authority and it was decided that the Applicants and the Respondents be asked to appear before the Authority on 06.02.2019 as substantial changes have been made by the DGAP while calculating the profiteered amount as compared to his earlier Report dated 08.11.2018. Since, the Respondents had asked for adjournment of the hearing scheduled on 06.02.2019, it was decided to accord next hearing on 11.02.2019. During the hearing, the Respondents have filed submissions dated 11.02.2019 on the DGAP's revised Investigation Report.

48. It is observed that most of the objections raised by the Respondents vide their submissions dated 11.02.2019 are those which have already been taken on record. However, in addition the Respondents have contended that they had not done profiteering as was evident from

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Table-C of para 9 of the revised DGAP Report which stated that the profited amount arrived at by the DGAP on overall basis was negative which implied that the Respondents had passed on more benefit to the customers than determined by the DGAP. They have further contended that they were required to pass on benefit of Rs. 1,69,68,284/- to 32 customers as per the DGAP, whereas they had already passed on overall benefit of Rs. 1,76,92,179 to 92 customers and Rs. 3,06,25,327/- to 166 customers. Therefore, it was submitted that the Respondents had not profited and violated the provisions of Section 171 of the CGST Act, 2017. It was also submitted that the profited amount should be considered in totality and not against each recipient as Section 171 used the word "recipient". They have also argued that as per Section 13 of the General Clauses Act, 1897 the word 'singular' should also be read as 'plural' thus, the word "recipient" in Section 171 should be read as "recipients" and as long as the Respondents had passed on more benefits to all the customers, they should not be asked to pay the amount to the customers on individual basis, to whom less benefit had been passed on. The Respondents have relied on the interpretation of the Hon'ble CESTAT given in the case of *M/s Schwing Stetter (India) Pvt. Ltd. v. 2016-TIOL-1895-CESTAT-MAD* on the provisions of the Finance Act, 1994 in the pre-GST regime in respect of Rule 5(4A) of the Service Tax Rules, 1994, vide which an assessee was allowed to adjust excess amount paid by him against his service tax liability for the succeeding "month" or "quarter". The Department had disputed that the

succeeding month or quarter meant immediately following the month or the quarter, however, the Appellate Tribunal based on the provisions of the General Clause Act, 1897 had interpreted that the term "month" has to be read as "months". The relevant extract of the said order has been quoted by the them as follows:-

"4. Heard both sides and perused the records. The short issue to be decided is whether the appellant has short paid the service tax during the month of July, 2011 by wrongly adjusting the service tax excess paid by them in the month of May, 2011 or otherwise. Both the authorities below have observed that as per Rule 6(4A) of STR, 1994, it is a wrong adjustment since Rule says that the assessee may adjust such excess amount paid by him against his service tax liability for the succeeding month or quarter and not in the subsequent months. The contention of the appellant is that the benefit of the same should be extended to the subsequent months after the succeeding month. It is a well-settled legal principle that the statute should be interpreted as it is even if the intention is imperfect, imprecise or there is an obvious omission. Even though the appellants have not specifically intimated the department in this regard, but adjustment was declared in their ST-3 returns, accordingly intimation of such adjustment stands made to the department. Even if it is not adhered to, at the most it is a procedural lapse and merely for this procedural lapse the excess amount paid could not be deviated and cannot be permitted to be retained by the Government. Section 13 of the General Clauses Act,

1897 provides that singular include the plural. Accordingly, month includes months. Further the case laws relied on by the appellants are squarely applicable to the facts of the present case. The issue stands settled against the Revenue and in favour of the appellant-assessee. In view of the above, I am of the considered view that the excess amount paid in the month of May, 2011 adjusted by the appellants in the subsequent months tax liability is absolutely in order. Therefore, invoking Section 73(1) for a non-existing 'short-payment' is not sustainable. Accordingly, the impugned order is set aside and the appeal is allowed with consequential relief, if any, in accordance with law."

The Respondents have also submitted that the above situation had arisen due to the fact that they had distributed the benefit based on the area whereas the DGAP had computed the benefit based on the value of demand raised Post-GST on the customers. The Respondents have further submitted that as per the provisions of Section 171 of the CGST Act, 2017, the benefit of ITC was required to be passed on to the recipients by way of "commensurate" reduction in prices which had been differently interpreted by them and the DGAP and thus, there was no profiteering and they should not be asked to pass on the benefit of Rs. 1,00,18,637/-.

49. During the hearing held on 11.02.2019, the Respondents were directed to submit the list of all the flat buyers to whom ITC benefit was passed on by the Respondents and copies of the credit notes and customer ledger accounts of some flat buyers on sample basis to

prove their argument. The Respondents vide their submissions dated 20.02.2019 have submitted the details of the 82 buyers on whom demands were raised during the period between 01.07.2017 to 31.08.2018 as per Annexure-A and list of 74 customers on whom no demand was raised during the above period as per Annexure-B. During the hearing held on 25.02.2019, the Respondents have filed written submissions dated 25.02.2019 and also filed further written submissions on 18.03.2019,

50. The Respondents have submitted in their above submissions that the DGAP had not filed reply on the following objections raised by them:-

- i. The increase in credit due to increase in rates of GST.
- ii. The increase in credit due to increase in cost of input material.
- iii. In the calculation, non-construction related turnover was also considered, which should be excluded.

51. The Respondents have further submitted a list of 17 (Seventeen) other projects in which they have claimed that they had themselves passed on the ITC benefit to the flat buyers. The list of the Projects is as under:-

Sr. No.	PROJECT NAME	TOTAL AREA (SFT)	AREA SOLD - GST BENEFIT (SFT)	GST BENEFIT AMOUNT PASSED (RS.)
1	ALLURA	5,47,688	6,30,623	10,40,11,177
2	ALTA MOUNT	1,27,430	51,170	1,13,75,857
3	ARVINDA	25,22,622	20,96,427	23,51,62,303
4	ADURIO	2,64,228	68,913	2,93,06,300
5	BEJWINDO	1,18,387	2,43,377	62,45,252
	CENTRAL PARK/GOVINDA/N/COODENAME ETC			
6		39,85,390	22,94,421	13,19,12,003
7	COODENAME FINALE	2,42,592	1,75,334	2,93,99,928
8	COODENAME TRINITY	1,29,679	1,96,494	4,93,86,315
9	SIARA	4,71,563	1,78,701	3,65,90,188
10	LAKESHORE GREENS	35,23,694	24,69,204	10,51,77,787
11	MARQUEE	5,67,897	4,62,917	11,74,57,901
12	NEW CURR PARADE	23,17,658	13,93,851	17,35,66,134
13	PARKSIDE	5,30,482	4,88,802	3,53,12,760
14	TRUMP TOWER	5,95,193	3,98,824	3,74,90,040
15	UPPER THANE	12,46,824	8,32,828	11,11,95,353
16	VENUDA	2,31,754	2,20,662	4,36,31,104
17	WORLD ONE	6,85,104	4,81,756	14,22,86,885
	TOTAL	1,92,78,588	1,23,26,674	1,39,30,61,689

52. The submissions of the Respondents were forwarded to the DGAP on 22.02.2019 & 26.03.2019 and the DGAP vide his Reports dated 01.03.2019 & 05.04.2019 has submitted that:-

- i. On the issue of the details of the ITC benefit passed on in other projects:- The DGAP has stated that the project covered in the DGAP's investigation was "Lodha Eternis". The details submitted by the Respondents pertained to other projects which were not part of the investigation.
- ii. On the issue of increase in ITC due to increase in rate of GST and cost of input material:- The DGAP has stated that the increase in the ITC as a percentage of total turnover availed by the Respondents Post-GST, had been mentioned earlier in his Reports. He has also stated that there should be no extra liability.

on the Respondents on account of GST charged by the suppliers as the said suppliers were also enjoying the benefit of ITC on the purchases made by them, which they would have passed on to the Respondents by way of reduction in the prices of the materials.

ii. On the issue of Consideration of Non-construction related turnover in the Pre-GST period:- The DGAP has stated that the turnover taken for computation of ITC percentage in the Pre-GST period had excluded non-construction related turnover.

iv. On the issue of Increase in ITC due to increase in rate of GST chargeable on services:- The DGAP has stated that in the Report dated 28.11.2018, the ITC availed by the Respondents as a percentage of the Respondents total turnover, both in the Pre-GST and Post-GST periods, had been quantified and compared to determine whether there was any benefit of ITC. The Input or Input service wise availability of ITC, either prior or post implementation of GST, had not been examined by the DGAP.

53. The Respondents vide their submissions dated 09.04.2019 have stated that they had already supplied the required information and explanation regarding the Pre-GST and the Post-GST data/figures from time to time and the matter may be decided in view of their previous submissions.

54. We have carefully considered all the Reports filed by the DGAP, the submissions made by the Respondents and the other material placed on record and find that the Applicant No. 1 had booked Flat No. 704 on 21.04.2015 with the Respondents in their Lodha Eternia project.

located in Andheri East, Mumbai for total consideration of Rs. 2,52,62,127/- as per the details furnished by the DGAP in Table-A of his Report. It is also revealed from the record that the above Applicant vide his complaint dated 30.05.2018 had alleged that the Respondents were not passing on the benefit of ITC to him in spite of the fact that they were availing ITC on the purchase of inputs at higher rates of GST which had resulted in benefit of additional ITC to them and were also charging GST from him @12%. The above complaint was examined by the Standing Committee in its meetings held on 07.06.2018 & 08.08.2018 and was forwarded to the DGAP for investigation who vide his Report dated 28.11.2018 has found that the ITC as a percentage of the total turnover which was available to the Respondents during the Pre-GST period was 1.57% and during the Post-GST period this ratio was 7.32% as per the Table-G mentioned above and therefore, the Respondents had benefited from the additional ITC to the tune of 5.75% (7.32%-1.57%) of the total turnover which they were required to pass on to the flat buyers of this project. He has also claimed that the Respondents had not reduced the basic prices of their flats by 5.75% due to additional benefit of ITC and by charging GST at the increased rate of 12% on the Pre-GST basic prices, they had contravened the provisions of Section 171 of the of the CGST Act, 2017. The DGAP vide his Report dated 28.11.2018 has further submitted that the amount of benefit of ITC which had not been passed on by the Respondents or the profited amount came to Rs. 4,17,18,502/- which included 12% GST on the basic profited

amount of Rs. 3,72,48,562/-. The DGAP has also intimated that the above amount was inclusive of Rs. 81,384/- (including GST) which the Respondents had profited from the Applicant No. 1. He has also supplied the details of all the buyers who had purchased flats from the Respondents along with their unit numbers vide Annexure-19 attached with the Report in which the profited amount of Rs. 4,17,18,502/- has been computed.

55. The Respondents were issued notice dated 26.12.2018 to explain why the above Report of the DGAP should not be accepted and their liability for violating the provisions of Section 171 of the CGST Act, 2017 should not be fixed along with imposition of penalty as per Sections 122-127 of the above Act read with Rule 133 of the CGST Rules, 2017 and their registration under the above Act should also not be cancelled.

56. It is also apparent from the record that the DGAP has submitted revised Investigation Report dated 22.01.2019 in which he has stated that after taking in to account the revised details of the area sold by the Respondents, the ITC availed and the Respondents taxable turnover during the period from April, 2016 to June, 2017 (i.e. Pre-GST) and during the period from July, 2017 to August, 2018 (i.e. Post-GST), the ratio of CENVAT/ITC to the taxable turnover, Pre-GST was 1.51% and during the Post-GST period, it was 4.13% which showed that Post-GST, the Respondents have benefited from the additional ITC to the tune of 2.62% [4.13% (-) 1.51%] of the taxable turnover which was required to be passed on to the buyers by the Respondents. The

revised ratio calculated by the DGAP has not been challenged by the Respondents, moreover the same is based on the information supplied by the Respondents which has been duly verified by the DGAP and therefore, the same is being treated to be correct.

57. The DGAP has also re-computed the profiteered amount after taking in to account the CENVAT/ITC availability Pre and Post-GST and the details of the instalments received by the Respondents from the Applicant No. 1 and the other home buyers during the period from 01.07.2017 to 31.08.2018 and stated that the amount of benefit of ITC which has not been passed on by the Respondents to their customers or the profiteered amount came to Rs. 1,80,04,456/- which included GST (@ 12% or 18%) on the base profiteered amount of Rs. 1,69,68,264/- and which also included an amount of Rs. 37,065/- (including GST on the base amount of Rs. 33,093/-) which was profiteered by the Respondents from the above Applicant. No objection has been raised by the Respondents against the above amounts. On the basis of the aforesaid facts the amount of benefit of ITC which has not been passed on by the Respondents to the recipients or in other words, the profiteered amount as per the provisions of Rule 133 (1) of the CGST Rules, 2017 is determined as Rs. 1,80,04,456/- which includes GST (@ 12% or 18%) on the base profiteered amount of Rs. 1,69,68,264/-. This amount is also inclusive of Rs. 37,065/- (including GST on the base amount of Rs. 33,093/-) which is the profiteered amount in respect of the Applicant No. 1

58. The DGAP has also mentioned that the above computation of the proffered amount was in respect of the 92 flat buyers whereas, the Respondents had booked 166 flats till 30.06.2018, out of which 74 buyers had booked them in the Pre-GST period and also paid the booking amount in this period but they had not paid any consideration during the period between 01.07.2017 to 30.06.2018 Post-GST. He has further mentioned that if the ITC in respect of these 74 units was calculated with reference to the 92 units where payments had been received after GST had come in to force, the ITC as a percentage of taxable turnover would be distorted and erroneous and hence, the benefit of ITC in respect of these 74 units should be calculated when the consideration would be received Post-GST by taking into account the proportionate taxable turnover in respect of these 74 Units. It is observed from the documents placed on record as well as the above submissions of the DGAP that there are total 212 flats out of which 46 flats have remained unsold and 166 flats have been sold by the Respondents. Out of the above 166 flat buyers the Respondents have received consideration Post-GST, only from 92 flat buyers. Therefore, the ITC benefit is required to be passed on to the 92 buyers only at this stage and benefit should be passed on to the other buyers at a later stage when payments are received from them..

59. The DGAP has further mentioned that the Respondents had passed on the benefit of Rs. 3,08,25,327/- to the 166 flat buyers (Table G supra). The DGAP has also stated that the benefit claimed to have been passed on by the Respondents was less than what they should

have been passed on in respect of 31 cases (Sr. 2 of the Table G mentioned supra) amounting to Rs. 1,00,18,637/- (Annexure-20 of the revised Report) and the benefit claimed to have been passed on by the Respondents was higher (Annexure-21 of the revised Report) as compared to what they should have passed on in respect of the 60 recipients of the flats (Sr. 3 of Table G mentioned above) amounting to Rs. 87,06,360/-. He has further contended that the Respondents have also stated to have passed on the benefit amounting to Rs. 1,29,33,148/- in respect of 74 buyers of the flats who had not paid any consideration Post-GST. The above claims made by the DGAP do not appear to be correct as he has taken in to account the amount of discounts which the Respondents have paid to the buyers. By no stretch of imagination the discounts given by the Respondents out of their own profit margins can be construed to have been given as the benefit of additional ITC. Therefore, the amount of discount cannot be adjusted against the ITC benefit. Accordingly, the findings recorded by the DGAP vide Table-G cannot be accepted and it is held that the Respondents have not passed any excess benefit to the above house buyers.

80. The DGAP has also found that the additional ITC benefit of 2.62% of the taxable turnover which has accrued to the Respondents was required to be passed on to the Applicant No. 1 and the other recipients and therefore, the provisions of Section 171 of the CGST Act, 2017 have been violated by the Respondents as the additional benefit of ITC @2.62% of the base prices received by the

Respondents during the period from 01.07.2017 to 31.08.2018 had not been passed on to the Applicant No. 1 and the other buyers and the Respondents have realized an additional amount of Rs. 37,065/- from the Applicant No. 1 which includes both the profiteered amount @2.62% of the taxable amount (base price) and the GST on the said profiteered amount however, the Respondents have passed an amount of Rs. 1,50,316/- as benefit of ITC to him and hence an excess benefit of Rs. 1,53,251/- had been passed on to him. However, perusal of the credit note issued in favour of the above Applicant on 28.08.2018 shows that this amount has been paid as a discount which cannot be taken to be the benefit of ITC and hence no excess benefit of ITC has been passed on to him by the Respondents. Accordingly, the above Applicant is held entitled to an amount of Rs. 37,065/- including the GST as benefit of ITC along with interest @18% from the date from which the above amount was realised by the Respondents from him.

61. The DGAP has also claimed that the investigation had revealed that the Respondents had profiteered an amount of Rs. 1,60,38,767/- (Table G supra) which included both the profiteered amount @2.62% of the taxable amount (base price) and the GST on the said profiteered amount from 31 other recipients who were not Applicants in the present proceedings and since they were identifiable as per the documents furnished by them therefore, an amount of Rs. 1,00,18,637/- was required to be returned to such eligible buyers after deducting an amount of Rs. 60,20,130/- which had been paid by the

above Respondents as discount to them. As already mentioned supra discount cannot be considered as the benefit of ITC and hence the above amount of Rs. 1,60,28,787/- is ordered to be returned to the above buyers with interest. Similarly an amount of Rs. 29,28,624/- (Table G) profited by the Respondents from 60 house buyers is also required to be returned to them without deducting the amount which has been passed as discount. An amount of Rs. 1,29,33,148/- (Table G) which has been claimed to have been passed on as benefit of ITC to 74 house buyers and which has been mentioned as discount by the Respondents in their submissions and the credit notes shall also not be considered as such benefit as it has been given by the above Respondents from their own profit margins and shall not be adjusted against the benefit of ITC which may accrue to them in future.

82. The Respondents have also contended that they were not in agreement with the computation of the profited amount made by the DGAP as it included the GST which had been deposited by them in the Govt. account. The plea taken by the Respondents on this ground is fallacious as by forcing the flat buyers to pay more price by not releasing the benefit of additional ITC and by collecting tax @12% on this additional realisation they had denied the benefit of additional ITC to them by not reducing the prices of the flats commensurately. Had they not collected the additional GST the buyers would have paid less price and by doing so they have denied them the benefit of additional ITC which amounts to violation of Section 171 of the above Act. Both the Central as well as the State Government had no intention

of collecting the additional GST as they had sacrificed their revenue in favour of the flat buyers to provide them accommodation at affordable prices and by compelling the buyers to pay the additional GST the Respondents have not only defeated the intention of the above Governments but have also acted against the interests of the house buyers hence the contention of the Respondents is not justifiable and therefore, the GST collected by them on the additional realisation has rightly been included in the profiteered amount by the DGAP.

63. The Respondents have also raised objection on the methodology followed by the DGAP while calculating the profiteered amount however, it is not maintainable as profiteering in each case has to be determined on the basis of the facts of each case and no straight jacket formula can be fixed for calculating the same as the facts of each case differ. The methodology applied in the case where the rate of tax has been reduced and ITC disallowed cannot be applied in the case where the rate of tax has been increased and ITC allowed. Similarly the methodology applied in the case of Fast Moving Consumer Goods (FMCGs) cannot be applied in the case of construction services. Even the methodology applied in two cases of construction service may vary on account of the period taken for execution of the project, the area sold and the turnover realised. The Respondents have themselves admitted that the same methodology could not be applied in each case and hence they should have no objection on the methodology which had been adopted in their case based on the ITC availed, area sold and the instalments received after

01.07.2017. Further the Authority under Rule 128 of the CGST Rules, 2017 has already notified the 'Procedure & Methodology' for determination of the profiteered amount vide its Notification dated 26.03.2018 however, as has been stated above the same has to be applied on case to case basis. It would also be appropriate to mention here that this Authority has power to 'determine' the methodology and not to 'prescribe' it as per the provisions of the above Rule and therefore, no set prescription can be laid while computing profiteering. Accordingly, the claims made by the Respondents that the profiteered amount could not be computed by applying ratio of ITC to turnover as both could not be matched as they accrued at different periods of time is incorrect. Hence the objection raised by the Respondent on this ground is frivolous and without legal force.

64. The Respondents have also submitted copies of the credit notes and the ledger account of the above Applicant and other house buyers vide their submissions dated 20.02.2019 to whom they have claimed to have passed on the additional benefit of ITC. The details of these house buyers are as under:-

Sr. No.	Name - Mr./Mrs.	Details of Credit Note 1			Details of Credit Note 2			Total Amount (INR)
		Entry	Date	Amount (INR)	Entry	Date	Amount (INR)	
1	Yash Arora Applicant No. 1	Discount	28-08-2018	1,90,516	SGST & CGST Credit	28-08-2018	35,896	2,26,412
2	Sandeep Sawhney	Discount	05-10-2018	2,68,956	SGST & CGST Credit	28-08-2018	32,276	3,01,232
3	Asha Chugh	Discount	05-10-2018	2,47,384	SGST & CGST Credit	28-08-2018	28,510	2,75,894
4	Sabir K. George	Discount	05-10-2018	2,27,395	SGST & CGST Credit	28-08-2018	28,510	2,55,905
5	Ashwini Kumar	Discount	05-10-2018	1,82,503	SGST & CGST Credit	28-08-2018	28,509	2,11,012
6	Rajdeep Saha	Discount	05-10-2018	1,95,316	SGST & CGST Credit	28-08-2018	32,878	2,28,194
7	Shresh Sharma	Discount	05-10-2018	1,82,503	SGST & CGST Credit	28-08-2018	28,509	2,11,012
8	Pravin D.	Discount	05-10-2018	1,90,316	SGST & CGST Credit	28-08-2018	32,838	2,23,154
9	Raja Minerva	Discount	05-10-2018	1,88,364	SGST & CGST Credit	28-08-2018	32,234	2,20,598
10	K. Kishorevan	Discount	05-10-2018	1,91,316	SGST & CGST Credit	28-08-2018	32,838	2,24,154

65. It is clear from the above Table that the Respondents vide their first credit notes dated 05.10.2018 had released discount to the above Applicant as well as to the other house buyers which cannot be considered as passing on of the benefit of additional ITC as the above discount has been given by the Respondents from their own profit margins and not on account of the benefit of ITC. The entry of "discount" made in the credit notes itself proves that this amount has not been paid on account of the ITC benefit. Accordingly, the discount of Re. 1,93,315/- paid to the above Applicant can also not be considered as the benefit of ITC. Therefore, the finding of the DGAP that the Respondents had passed on the additional benefit of ITC as discount as has been mentioned in the revised Report dated 22.01.2019 is not correct and it cannot be accepted. The Respondents vide their subsequent credit notes dated 29.01.2019 have claimed that they have passed on the above benefit as SGST & CGST credit. This credit can also not be taken to be the passing on of the benefit of ITC as there is no evidence to support the same nor it has been verified by the DGAP. The Respondents have also not furnished the details of the computations of the above amount nor explained the methodology adopted by them while calculating the above amount. The entry in these credit notes also does not state that the above amount has been passed on account of the benefit of additional ITC and hence, the claims made by the Respondents in this behalf cannot be accepted.

66. The Respondents have also cited the order passed by this Authority in the case of M/s KRBL supra and claimed that increase in the cost

leading to additional ITC could not be considered as additional benefit. In this connection it would be pertinent to note that the above case pertained to the sale of Basmati Rice on which there was no tax and after coming in to force of the GST, 5% tax was imposed on it. Therefore, it was not a case of reduction in the rate of tax and hence it did not fall in the ambit of Section 171 of the above Act, whereas in the present case additional benefit of ITC has accrued to the Respondents and hence they are liable to pass on the benefit of additional ITC to the house buyers. Increase in the cost of inputs has no connection with passing on of the above benefit as it is the benefit of additional ITC only which has been given to the Respondents by the Central as well as the State Govt. out of their own revenue which is required to be paid to the house buyers. Moreover, the Respondents have also been given the benefit of lower prices while making purchases by their suppliers who have availed the benefit of ITC themselves. The Respondents have failed to establish that their ITC had increased due to increase in the cost and hence the claim made by them cannot be relied upon. Accordingly, the above order does not help the Respondents.

87. The claim of adjustment of the excess amount paid by the Respondents as ITC benefit against the profiteered amount as per the order passed in the case of M/s Schwing Stetter (India) Pvt. Ltd. supra can also not come to the aid of the Respondents as facts of both the cases are different as in the above case the Appellants were requesting for adjustment of the extra tax paid by them whereas the

present case pertains to the profiteered amount and not the tax. Accordingly, the excess amount which the Respondents have claimed to have paid as ITC benefit to the house buyers cannot be adjusted against the benefit due to either other house buyers or against their future entitlement or against the total profiteered amount computed by the DGAP as the same is required to be passed on to each such recipient as per the provisions of Section 171 (1) of the above Act. Similarly the case of Larsen & Toubro supra also does not support the case of the Respondents as the DGAP has not included the value of land while calculating the Pre and Post-GST rates of tax levied on them. The DGAP has taken Service Tax @4.5% , VAT @1% (Total 5.5%) during the Pre-GST period and GST @12% during the Post-GST period and correctly arrived at the figure of 6.5% as the increase in the rate of tax vide Table-B of his revised Report dated 22.01.2019. Accordingly, the claim of the Respondents that there was increase of 9.79% in the rate of tax Post-GST cannot be accepted.

68. The Respondents have also claimed that the DGAP had included that income also in the Pre-GST taxable turnover like maintenance charges for which service had been provided previously, cheque bounce charges and cancellation charges which should not have been included. Perusal of Table-A of the revised Report dated 22.01.2019 shows that the DGAP has changed the figures of Total Taxable Turnover in Col.No. 5 from Rs. 180,84,28,434/- to Rs. 187,59,54,901/- for the Pre-GST period and hence the objection of the Respondents has been resolved.

69. The Respondents have also contended that the DGAP had wrongly taken in to account the turnover in respect of the house buyers which was more than the contract value and had also wrongly calculated VAT and Service Tax on such turnover. The DGAP in his revised Report dated 22.01.2019 has stated that there was no direct relation of turnover reported during the Pre-GST period with the amount collected from the house buyers as the Respondents were paying VAT @1% without ITC on inputs and were not collecting it from the house buyers and hence the value shown in the returns was the total agreement value and was not related to the actual amount collected, therefore, the VAT turnover has not been considered while computing the ratio of ITC to turnover. The explanation given by the DGAP appears to be correct and therefore, this contention of the Respondents cannot be given credence.

70. The computation of benefit made by the DGAP vide Table-G of his revised Report dated 22.01.2019 has been carefully considered by us and we find that by no stretch of imagination the amount passed as discount can be considered as the benefit of additional ITC and hence the same cannot be adjusted against the profiteered amount/benefit. Similarly the amount passed as credit of SGST & CGST also cannot be taken as the benefit of ITC. It is revealed from the perusal of Column L of Annexure-18 of the revised Report dated 22.01.2019 that the profiteered amount has been computed by applying the additional benefit @2.56% whereas it should have been calculated by applying factor of 2.82% as has been stated by the DGAP in his Report.

Accordingly, an amount of Rs. 1,90,04,456/- computed by applying the additional benefit @2.82% is determined as the profiteered amount including the GST as per the provisions of Rule 133 (1) of the above Rules. The Applicant No. 1 shall be entitled to the ITC benefit of Rs. 37,065/- including the GST and rest of the house buyers would be eligible to get ITC benefit of Rs. 1,89,87,391/- including the GST along with the interest to be calculated @18% from the date of realization of the above amount till it is paid. The Respondents shall not adjust the amount of discount or the SGST & CGST credit offered by them out of their own profit margins on account of the reduction in the cost or due to slow down in the market against the ITC benefit to be paid to the house buyers. The DGAP shall accordingly, re-compute the amount to be passed on to all the eligible house buyers and convey the same to the Respondents and the Commissioners SGST and CGST as well as this Authority.

71. The Respondents have also claimed that the DGAP had wrongly taken area sold in the Post-GST period as 1,56,002.00 sq. ft. in Table-C of his Report dated 28.11.2018 whereas actually an area of 88,100.00 sq. ft. had been sold during the above period and in case this area was considered the relevant ITC figures would also change which would result in lowering the ratio of ITC to total turnover. In this connection it is apparent from the revised Report dated 22.01.2019 that the above area has been revised to 88,100.00 sq. ft. and the ratio of ITC to turnover has also been re-computed. Hence, the contention of the Respondents appears to be correct.

72. The Respondent has also cited the definitions of Profiteering given in the dictionaries to claim that he had not taken advantage of unusual or exceptional circumstances to make excessive profit and hence he had not profited. In this connection it would be pertinent to quote the explanation attached to Section 171 (3A) of the above Act which states as under:-

"For the purposes of this section, the expression "profited" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both."

It is clear from perusal of the above provisions as well as the facts of the present case that the Respondents have not passed on the benefit of additional ITC to the house buyers by commensurate reduction in the prices and hence it is established that they had resorted to profiteering.

73. The Respondents have also claimed that the DGAP had wrongly taken increase in the rate of tax from 5.5% (Service Tax 4.5% +VAT 1%) in the Pre-GST period to 12% GST in the Post-GST period and hence total increase of 6.5% was considered by him in the tax rate whereas it should have been calculated on the rate of tax applied as per Section 9 of the Act. Perusal of the tax rates shows that the additional value of tax calculated by the DGAP is correct as per the relevant Notifications issued by the Central as well as the State Govt. and hence the claim

made by the Respondents is not relevant. The rates of tax prevalent during the Pre and the Post-GST period can also not be made comparable as both are different and hence the increase in the tax rate cannot be taken as 9.79% as has been argued by the Respondents. As discussed supra the order passed in the case of KRBL is based on entirely different set of facts and hence the same cannot support the case of the Respondents as there is additional benefit of ITC of 2.62% Post-GST to the Respondents which is required to be passed on by them.

74. The Respondents have also submitted that the computation of the Service Tax and the GST to be paid by the Applicant No. 1 in Table-A of the Report dated 28.11.2018 was wrong. Since, the DGAP has revised the profiteered amount to be paid to the above Applicant therefore, the above claim of the Respondents is irrelevant.

75. The Respondents have also submitted that they would have to reverse the ITC after issuance of the Completion Certificate as per Schedule-III subject to clause (b) of para 5 of Schedule-II as well as Section 17(3) of the above Act. As the Completion Certificate has not been obtained by the Respondents therefore, the above provisions are not applicable in their case.

76. It is established from the perusal of the above facts of the case that the provisions of Section 171 of the CGST Act, 2017 have been contravened by the Respondents as they have profiteered an amount of Rs. 1,90,04,456/- inclusive of GST @ 12% on the base profiteered amount of Rs. 1,69,69,264/-. The Respondents have also realized an

additional amount to the tune of Rs. 37,065/- from the Applicant No. 1 which includes both the profiteered amount @2.52% of the taxable amount (base price) and the GST on the said profiteered amount. Accordingly, the above amounts shall be paid to the above Applicant and the other eligible house buyers by the Respondents along with interest @18% from the date from which these amounts were realised from them till they are paid as per the provisions of Rule 133 (3) (b) of the CGST Rules, 2017.

77. In view of the above facts the Authority under Rule 133 (3) (a) of the CGST Rules, 2017 orders that the Respondents shall reduce the prices to be realized from the buyers of the flats commensurate with the benefit of ITC received by them as has been detailed above. Since the present investigation is only up to 31.03.2018 any benefit of ITC which accrues subsequently shall also be passed on to the buyers by the Respondents. In case this benefit is not passed on the Applicant No. 1 or any other buyer shall be at liberty to approach the State Screening Committee Maharashtra for initiating fresh proceedings under Section 171 of the above Act against the Respondents. The concerned CGST or SGST Commissioner shall take necessary action to ensure that the benefit of additional ITC is passed on to the eligible house buyers in future.

78. It is also evident from the above narration of facts that the Respondents have denied benefit of ITC to the buyers of the flats being constructed by them in their Lodha Eternis Project in contravention of the provisions of Section 171 (1) of the CGST Act.

2017 and have thus resorted to profiteering. Hence, they have committed an offence under section 171 (3A) of the CGST Act, 2017 and therefore, they are apparently liable for imposition of penalty under the provisions of the above Section. Accordingly, a Show Cause Notice be issued to them directing them to explain why the penalty prescribed under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on them.

79. The Respondents have themselves admitted that they have passed on the additional ITC benefit of Rs. 139,30,61,699/- in respect of 17 other projects being executed by the Respondents. They have also admitted the same before the DGAP vide Annexure-12 attached with the Report dated 08.11.2018. The details of all these projects and respective ITC benefit claimed to have been passed on by the Respondents are as under:-

Sr. No.	PROJECT NAME TOTAL	TOTAL AREA(SFT)	AREA SOLD - GST BENEFIT (SFT)	GST BENEFIT AMOUNT PASSED (RS.)
1	ALLURA	5,47,608	4,31,633	10,40,11,177
2	ALTAQUANT	1,77,800	51,129	1,11,73,867
3	ANIFA	25,22,222	20,56,427	25,94,62,109
4	AGURO	2,64,228	60,913	2,95,05,210
5	BELMONDO	8,18,387	2,43,207	62,43,252
6	CENTRAL PARK/DOWNTOWN/CODENAME EPIC	20,65,290	22,50,421	13,65,12,000
7	CODENAME FINALE	2,43,583	5,73,634	2,88,93,928
8	CODENAME TRINITY	6,15,878	1,96,398	4,85,88,519
9	IGRA	4,71,553	1,79,701	2,66,50,189
10	LAKESHORE GREENS	35,23,054	24,89,899	10,51,77,787
11	MARQUEE	5,63,440	4,82,817	11,74,53,401
12	NEW CLIFF PARADE	23,17,658	15,52,895	17,35,65,114
13	PARKSIDE	5,20,482	4,68,802	3,53,12,760
14	TRUMP TOWER	5,50,183	1,59,824	1,74,90,040
15	UPPER THANE	12,76,826	8,33,828	11,11,83,353
16	VENICE	2,23,754	2,20,652	4,56,33,104
17	WORLD ONE	5,08,104	4,84,756	14,22,88,885
	TOTAL	1,92,78,588	1,23,26,674	139,30,61,699

Keeping in view the self-admission of the Respondents in which they have admitted that they are liable to pass on the benefit of additional ITC as per the provisions of Section 171 of the above Act, the above admission of the Respondent is required to be investigated as there are sufficient reasons to believe that the Respondents are required to pass on the benefit of additional ITC to the eligible house buyers, accordingly, the DGAP is directed to investigate the issue of passing on the benefit of additional ITC in respect of the above seventeen projects and submit his Report in terms of Rule 133 (5) of the CGST Rules, 2017 which reads 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 has reasons to believe that there has 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,

(b) The investigation or enquiry under clause (a) shall be deemed to be a new investigation or enquiry and all the provisions of rule 129 shall mutatis mutandis apply to such investigation or enquiry."

80. The Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Maharashtra to monitor this order under the supervision of the DGAP by ensuring that the amount profited by the Respondents as ordered by the Authority is passed on to all the eligible buyers. A report in compliance of this order shall be submitted to this Authority by the Commissioners CGST /SGST within a period of 4 months through the DGAP from the date of receipt of this order.

81. It is also revealed from the Report dated 28.11.2018 that the DGAP vide Col. No. 5 of Table-C had taken the "Total Taxable Turnover as per returns (E)" for the Pre-GST period from 01.04.2017 to 30.06.017 as Rs. 180,84,6,434/-, vide Col. No. 7 "Area sold relevant to Taxable Turnover as per returns (G)" as 1,56,002.00 sq. ft. for the Post-GST period w.e.f. 01.07.2017 to 31.08.018, vide Col. No. 8 the "Relevant CENVAT/ITC (H)=[(C)*(G)/(F) or (D)*(G)/(F)]" was taken as Rs. 4,74,03,270/- and vide Col. No. 9 the "Ratio of CENVAT/ITC to Taxable Turnover [(I)=(H)/(E)]" was calculated as 1.57% for the Pre-GST Period and ratio of 7.3% was calculated for the Post-GST period thereby stating that the Respondents had got additional benefit of . ITC of 5.75% (7.32%-1.57%) of the total turnover which they were required to pass on to the house buyers. Accordingly, the DGAP had intimated that the Respondents had profited an amount of Rs. 4,17,18,502/- . Whereas in the revised Report dated 22.01.019 the figures in Col. No. 5 of Table-A have been taken as Rs. 187,59,54,901/- for the Total Taxable Turnover, in Col. No. 7 the figures taken are 88,100 sq. ft. for

the area sold. In Col. No. 9 the ratio has been calculated as 1.51% for the Pre-GST period and 4.13% for the Post-GST period resulting in additional benefit of ITC of 2.62%. The profiteered amount has also been revised to Rs. 1,90,04,456/-. Perusal of para 3 of the revised Report shows that the above figures have been changed on the basis of the claims made by the Respondents in their submissions made before this Authority as well as the DGAP on 10.01.2019 after considering the revised details of the area sold relevant to the taxable turnover as per the home buyers list and the details of the other charges collected during the Pre-GST period. The above contention of the DGAP shows that the team of his office which had investigated the present case had been careless and negligent while examining the returns and the list of the house buyers and had failed to verify and collect correct figures from the Respondents. It is also revealed from the perusal of Column L of Annexure-19 of the revised Report dated 22.01.2019 that the profiteered amount has been computed by applying the additional benefit of ITC @2.56% whereas it should have been calculated by applying benefit @2.62% which again shows carelessness and negligence on the part of the above team. Therefore, it is apparent that the team has not carried out its duties diligently and faithfully while investigating the above case which has resulted in submitting revised Report in which the profiteered amount was drastically changed and wrongly calculated. Accordingly, the DGAP is advised to look in to it administratively and take necessary action.



82. A copy each of this order be supplied to both the Applicants, the Respondents, Commissioners CGST/SGST as well as the Principal Secretary (Town & Planning), Government of Maharashtra for necessary action. File be consigned after completion.



Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(R. Bhagyadevi)
Technical Member

Sd/-
(Aman Shah)
Technical Member

Certified Copy
X
+ 4 8 19
(A. K. Goyal)
Secretary, NAA

F. No. 22011/NAA/116/Lodha/2018 / 5539 - 5344

Date: 04.10.2018

Copy To -

1. M/s Lodha Developers Limited, Lodha Excelus, N. M. Joshi Marg, Mahalaxmi, Mumbai-400011.
2. M/s Lodha Impression Real Estate Private Limited, 412, Floor-4, 17G, Yashwantrao Chavan Chamber, Cawasji Patel Road, Horniman Circle, Fort, Mumbai -400001.
3. Sh. Mohit Arora, 2C-144, Kalpataru Estate, JVLR Road, near Majas Bus Depot, Andheri East, Mumbai-400093.
4. Director General, Directorate General of Anti-Profitteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
5. Chief Commissioner, CGST, Mumbai Zone, GST Building, 115 M.K. Road, OPP, Churchgate Station, Mumbai-400020.
6. Commissioner, Commercial Taxes, Office of the Commissioner of State Taxes, 8th floor, Goods and Services Tax (GST) Bhavan, Mazgaon, Mumbai - 400010.
7. Principal Secretary, Urban Development Department, 4th Floor, Main Building, Mantralay, Hutatma Rajguru Chowk, Mumbai.
8. Guard File/NAA Website.