BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	66/2019
Date of Institution	07.06.2019
Date of Order	06.12.2019

In the matter of:

1. Sh. Pawan Kumar, pawan_alloys@rediffmail.com.
2. Sh. D. Siva Krishna, eureka_vic@yahoo.co.in.
3. Sh. Karpura Panickar, karpuravp@gmail.com.
4. Sh. S. Surya Rao, uday4funny@gmail.com.
5. Sh. P Ravikanth, rkpttd@gmail.com
6. Smt. P. Damayanthi, dhanalakshmienterpris@gmail.com.
7. Sh. B.V. Ravisankar, ravisankarbattula.99@gmail.com.
8. Sh. V. V. Srivasarao, vvsr9760@gmail.com.
9. Sh. K. Pydi Raju, kpraju9999@gmail.com.
10. Capt. Dr. Satya Prasad, captdrsatyaprasad@gmail.com .
11. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Apex Meadows Pvt. Ltd., SNO 104/2, Opp. SBT Hotel, NH 5, Gajuwaka, Visakhapatnam, Andhra Pradesh-530026.

Respondent

Quorum:-

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

Present:-

1. Sh. Pawan Kumar Jaiswal, Applicant No. 1 in person.
2. Sh. D. Shiva Krishna, Applicant No. 2 in person.
3. Sh. Ashish K. Agarwal, Authorised Representative for all the Applicants.
4. Capt. Dr. Satya Prasad, the Applicant No. 10.
5. Sh. P.K. Tyagi, Superintendent and Sh. Shivendu Pandey, Superintendent for the Applicant No. 11.
6. Sh. Rajeev Dewan & Pratik Jain, CA, Authorised Representatives, Sh. Rohit Dave, Authorised Signatory, Sh. Manish Karsija, Director and Sh. Nitin Goyal, Employee, for the Respondent.

ORDER

1. The present Report dated 24.04.2019, has been received on 25.04.2019 from the Applicant No. 11, i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. Vide the above report, the DGAP has reported that the Andhra Pradesh State Screening Committee on Anti-profiteering had referred 09

applications to the Standing Committee on Anti-profiteering under Rule 128 of the CGST Rules, 2017, filed by the Applicants No. 1 to 9, alleging profiteering by the Respondent in respect of purchase of flats in the Respondent's project "The Celest" located in Vishakhapatnam. The Applicants No. 1 to 9 had alleged that the Respondent had not passed on the benefit of Input Tax Credit (ITC) to them by way of commensurate reduction in price after implementation of GST w.e.f. 01.07.2017 and had charged GST on the pre-GST full amount of instalments. The Applicant No. 2 had also submitted copies of demand letters issued by the Respondent during the post-GST period Along with the application.

2. The Andhra Pradesh State Screening Committee on Anti-profiteering had examined the said applications and based on the submissions made during the personal hearing granted to the Respondent, the above Screening Committee had opined that in all the nine cases, the calculations submitted by the builder were not in accordance with the provisions of law and lesser benefit of ITC was passed on to the above Applicants. The above State Screening Committee had forwarded the said 9 applications with its observations, to the Standing Committee on Anti-profiteering for further action, in terms of Rule 128 of the CGST Rules, 2017. The aforesaid reference was examined by the Standing Committee on Anti-profiteering in its meeting held on 08.10.2018, the minutes of which was received in the DGAP on 25.10.2018 whereby it was decided to forward the same to the DGAP to conduct a detailed investigation in the matter.

3. Further, the Applicants No. 1 to 9 had submitted the duly filled in APAF-1 along with their applications. On perusal of the documents provided by the Applicant No. 2, it was revealed that the Applicant No. 2 had booked a flat in the Respondent's project "The Celest", in the pre-GST era. Thereafter, the DGAP had issued a Notice to the Respondent under Rule 129 of the Rules on 13.11.2018, calling upon the Respondent to reply as to whether he had admitted that the benefit of ITC had not been passed on to the Applicants by way of commensurate reduction in price and if so, to suo moto determine the quantum thereof and indicate the same in his reply to the Notice as well as furnish all supporting documents. The period covered by the current investigation was from 01.07.2017 to 31.10.2018. Subsequently, the Respondent had submitted his replies vide letters/e-mails dated 22.11.2018, 05.12.2018, 11.12.2018, 13.12.2018, 19.12.2018, 14.01.2019, 17.01.2019, 15.04.2019, 16.04.2019 and 22.04.2019. The submissions of the Respondent have been summed up as follows:-

(i) The Respondent contended that although there was no specified guideline for determination and computation of the benefit required to be passed on under the GST law, he suo moto computed the benefit on a preliminary basis and had been passing on the same by way of reduction in demand notes. Also, as the project was still under construction, it was not possible for the Respondent to compute the exact benefit of ITC to be passed on to the recipients and he would be able to ascertain the exact ITC benefit to be passed on only at the time

of issuance of the completion certificate and further benefit (if any)/adjustment of the same would be made in his final demand note. On the basis of his preliminary calculation, the Respondent submitted that the preliminary benefit already passed on to the customers was likely to exceed the actual benefit that would be required to be passed on in accordance with Section 171 of the CGST Act, 2017.

(ii) The Respondent submitted that discount on account of GST benefit @3% had been offered to all the home buyers. The Respondent submitted that on all demands raised post-GST, discount @3% of the gross demand value had been given to his home buyers. To support his claim, the Respondent submitted all demand notes issued to the above Applicants wherein the discount had been passed on. The gross value reported in the home buyers list post-GST was inclusive of the 3% discount.

(iii) The Respondent, vide e-mail dated 19.12.2018, had provided the trail of e-mail communications with his various home buyers to substantiate his claim that 3% benefit on account of ITC had been passed on by him.

(iv) The Respondent submitted that as per Real Estate Regulatory Authority (RERA) specifications, the two phases of his project was identifiable as two distinct projects, for which all records was maintained separately. As the second phase was approved by Andhra Pradesh RERA on 08.12.2018, bookings were made in that phase after 08.12.2018. However, as the Respondent filed single GST return for both the phases, the gross figures in

his GST returns included the demands raised in both the phases and any other outward supplies, such as, scrap sale, details of which were submitted.

(v) The Respondent had further submitted that in his ST-3 returns for the pre-GST era, figures were for both the demands raised as well as advances received. However, some of the home buyers cancelled their bookings post-GST and the details of demands raised on such home buyers were not provided in the home buyers list. The Respondent had also submitted reconciliation of ST-3 return figures with the total demands raised and advances received from his existing home buyers vide e-mail, dated 22.04.2019.

4. The Respondent had also submitted vide the aforementioned letters/e-mails, the documents/information viz. copies of GSTR-1 Returns for the period July, 2017 to October, 2018, copies of GSTR-3B Returns for the period July, 2017 to October, 2018, copies of Tran-1 for the period July, 2017 to December, 2017, copies of VAT & ST-3 returns for the period April, 2016 to June, 2017, copies of all demand letters, sale agreement/contract was issued to all the Applicants, Tax rates - pre-GST and post-GST, copy of Balance Sheet for FY 2016-17 & FY 2017-18, copy of Electronic Credit Ledger for the period 01.07.2017 to 31.10.2018, CENVAT credit/ITC register for the period April, 2016 to October, 2018, details of turnover, output tax liability/GST payable and ITC availed, list of home buyers in the project "The Celest".

5. The Respondent, vide letter dated 11.12.2018, had also submitted copies of the demand letters issued to the above Applicants and copies of the sale agreements. The details of the demand raised by the Respondent on the Applicant No. 2, was furnished in table-'A' below:

Table 'A' (Amount in ₹)

S. No	Payment Stage	Due Date	BSP	Service Tax	GST Benefit	GST	Total Amount payable
1	Booking + 0 days	10.09.2015	2,00,000				
2	Payable at allotmemnt letter issuance -10%	10.09.2015	2,99,900				
3	For Excution of Agreement - 10%	01.11.2015	4,99,900	42,930			10,42,730
4	On completion of Foundation -15%	12.09.2016	7,49,849	33,181			7,83,030
5	On casting of 3rd floor slab -12.5%	15.04.2017	6,24,874	28,119			6,52,993
6	On casting of 7th floor slab -12.5% + 50000 towards amenities charges	14.08.2017	6,74,874			83,984	7,58,858
7	On casting of 11th floor slab -10%	05.12.2017	4,99,454			59,934	5,59,388
8	On casting of mp floor slab -12.5%	23.08.2018	6,24,874		53,989	66,506	6,39,391
9	on Completion of plastering - 12.5%		6,24,874				
10	On possession 5% + Remaining Amenities Charges		3,39,980				
Total			51,38,549	1,04,230	53,989	2,12,424	44,36,390

6. The DGAP in his Report has observed that the contention of the Respondent that on account of GST, he was already offering a discount @ 3% of the gross demand, which had been communicated to all his customers and hence, he had passed on the benefit that might accrue to him on account of GST and that such preliminary benefit already passed to his customers was likely to exceed the actual benefit that would be required to be passed in accordance with Section 171 of the CGST Act, 2017, might had merit but whether the reduction made or discount offered was commensurate with the increase in the benefit of ITC, had to be determined in terms of Rule 129 (6) of the CGST Rules, 2017. Therefore, the additional ITC available to the Respondent and the amounts received by him from

the above Applicants and other recipients, both pre and post implementation of the GST, had to be taken into account to determine the benefit of ITC that was required to be passed on.

7. After detailed investigation, the DGAP has, in his Report dated 24.04.2019, inter-alia reported that para 5 of Schedule-III of the CGST Act, 2017 (Activities or Transactions which shall be treated neither as a supply of goods nor a supply of services) reads as "Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building". Further, clause (b) of Paragraph 5 of Schedule II of the CGST Act, 2017 reads as"(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration had been received after was issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever was earlier". Thus, the ITC pertaining to the residential units which was under construction but not sold was provisional ITC which may be required to be reversed by the Respondent, if such units remain unsold at the time of issue of the Completion Certificate, in terms of Section 17(2) & Section 17(3) of the CGST Act, 2017, which read as under:

> Section 17 (2) "Where the goods or services or both was used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall

be restricted to so much of the input tax as was attributable to the said taxable supplies including zero-rated supplies".

Section 17 (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 was liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building".

Therefore, ITC pertaining to the unsold units might not fall within the ambit of this investigation and the Respondent was required to recalibrate the selling price of such units to be sold to the prospective buyers by considering the net benefit of additional ITC available to him post-GST.

8. The DGAP has further reported that Section 171 of CGST Act, 2017 which governs the anti-profiteering provisions under GST, reads as "Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices." Thus, the legal requirement was that in the event of benefit of ITC or reduction in rate of tax, there must be a commensurate reduction in prices of the goods or services. Moreover, the said Section 171 does not provide a supplier of goods or services any means of passing on the benefit of ITC or reduction in rate of tax to the consumers other than by way of reduced prices. The Respondent had submitted that the benefit of ITC was passed on by offering a discount @3% of the demand price, to all his existing customers, post introduction of GST.

9. The DGAP has also stated that prior to 01.07.2017, i.e., before GST was introduced, the Respondent was eligible to avail CENVAT credit of Service Tax paid on input services. However, CENVAT credit of the Central Excise duty paid on inputs was not admissible as per the CENVAT Credit Rules, 2004, which was in force at the material time. Moreover, during the pre-GST period, the Respondent neither discharged any output VAT liability, nor did he availed any ITC of VAT paid on the inputs. Further, post-GST, the Respondent could avail the ITC of GST paid on all the inputs and input services including the sub-contracts. From the information submitted by the Respondent for the period April, 2016 to October, 2018, the details of the ITC availed by him, his turnover from the above project and the ratio of ITC to turnover, during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to October, 2018) periods, has been furnished in Table-'B' below.

Table 'B'			(Amount in ₹)	
S. No.	Particulars		Total (Pre-GST)	Total (Post-GST)
1	2		3	4
1	CENVAT of Service Tax Paid on Input Services	(A)	2,17,84,314	-
2	Credit of VAT Paid on Purchase of Inputs	(B)	0	-
4	Input Tax Credit of GST Availed	(C)	-	5,89,10,304
5	Total CENVAT/VAT/Input Tax Credit Available	(D)= (A)+(B) or (C)	2,17,84,314	5,89,10,304
6	Total Turnover as per Home Buyers List (Sold Units as on 31.10.2018)	(E)	44,84,80,346	53,11,78,843
7	Total Saleable Area (in sq. ft.)	(F)	2,65,592	2,65,592
8	Area Sold relevant to Turnover as per Home buyers List (Flats sold upto 31.10.2018)	(G)	2,40,233	2,40,233
9	Relevant CENVAT/INPUT TAX CREDIT	(H)= ((G)*(D)/(F))	1,97,04,825	5,32,85,487
10	Ratio of CENVAT/ Input Tax Credit to Turnover	[(J)=(H/F*100)]	4.39%	10.42%

10. The DGAP has claimed from the above table-'B' that the ITC as a percentage of the total turnover that was available to the Respondent during the pre-GST period (April, 2016 to June, 2017) was 4.39% and

during the post-GST period (July, 2017 to October, 2018), it was 10.42% which confirmed that post-GST, the Respondent had benefited from additional ITC to the tune of 6.03% [10.42% (-) 4.39%] of the turnover.

11. The DGAP has also affirmed that the Central Government, on the recommendation of the GST Council, had levied 18% GST on construction service (after one third abatement towards cost of land, effective GST rate was 12% on the gross value), vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Accordingly, the profiteering had been examined by comparing the applicable tax and ITC available to the Respondent during for the pre-GST period (April, 2016 to June, 2017) when only Service Tax @ 4.5% was payable with the post-GST period (July, 2017 to October, 2018) when the GST rate was 12% on the gross value. On the basis of the figures contained in table-'B' above, the comparative figures of rate of tax, ITC availed/available as a percentage of the turnover in the pre and post-GST periods, as well as the turnover, the recalibrated base price and the excess realization (profiteering) during the post-GST period, has been tabulated in Table-'C' below:

Table 'C' (Amount in ₹)

S. No.	Particulars		Pre-GST	Post- GST
1	Period	A	April 2016 to June 2017	July 2017 to Oct 2018
2	Output tax rate (%)	B	4.50%	12.00%
3	Ratio of CENVAT credit / Input Tax Credit to Total Turnover as per Table - E above (%)	C	4.39%	10.42%
4	Increase in input tax credit availed post-GST (%)	D	-	6.03%
5	**Analysis of Increase in input tax credit:**			
6	Total Basic Demand during July, 2017 to October 2018	E		51,11,78,843
7	GST charged	F= E*12%		6,13,41,461
8	Total demand	G = E + F		57,25,20,304
9	Recalibrated Base Price	H =E*(1-D) or 93.97% of E		48,03,54,759
10	GST @12%	I = H * 12%		5,76,42,571
11	Commensurate demand price	J = I + H		53,79,97,330
12.	**Excess Collection of Demand or Profiteered Amount**	**K=G - J**		**3,45,22,974**

12. The DGAP has further claimed from Table-'C' above that the additional ITC of 6.03% of the turnover should have resulted in commensurate reduction in the base price as well as cum-tax price. Therefore, in terms of Section 171 of the CGST Act, 2017, the benefit of the additional ITC was required to be passed on to the recipients. In other words, by not reducing the pre-GST base price by 6.03% on account of additional benefit of ITC and charging GST @12% on such higher base price, the Respondent appeared to have contravened the provisions of Section 171 of the of the CGST Act, 2017.

13. The DGAP has also stated that on the basis of the aforesaid CENVAT/ITC availability in the pre and post-GST periods and the demands raised by the Respondent on the above Applicants and other home buyers on which the GST liability @12% was discharged by the Respondent during the period 01.07.2017 to 31.10.2018, the amount of benefit of ITC not passed on to the recipients or in other words, the profiteered amount came to Rs. 3,45,22,974/- which included GST @12% on the base profiteered amount of Rs.

3,08,24,084/-. The home buyers of flats sold upto 30.10.2018 and unit no. wise break-up of this amount was given in Annexure-15. This amount was inclusive of Rs. 1,30,577/- (including GST on the base amount of Rs. 1,16,586/-) which was the profiteered amount in respect of the Applicant No. 1, mentioned at serial no. 218 of Annexure-15; Rs. 1,21,541/- (including GST on the base amount of Rs. 1,08,519/-) which was the profiteered amount in respect of the Applicant No. 2, mentioned at serial no. 187 of Annexure-15; Rs. 1,58,824/- (including GST on the base amount of Rs. 1,41,807/-) which was the profiteered amount in respect of the Applicant No. 3, mentioned at serial no. 41 of Annexure-15; Rs. 92,611/- (including GST on the base amount of Rs. 82,689/-) which was the profiteered amount in respect of the Applicant No. 4, mentioned at serial no. 154 of Annexure-15; Rs. 1,31,729/- (including GST on the base amount of Rs. 1,17,615/-) which was the profiteered amount in respect of the Applicant No. 5, mentioned at serial no. 216 of Annexure-15; Rs. 97,148/- (including GST on the base amount of Rs. 86,740/-) which was the profiteered amount in respect of the Applicant No. 6, mentioned at serial no. 142 of Annexure-15; Rs. 1,42,691/- (including GST on the base amount of Rs. 1,27,402/-) which was the profiteered amount in respect of the Applicant No. 7, mentioned at serial no. 224 of Annexure-15; Rs. 1,11,160/- (including GST on the base amount of Rs. 99,250/-) which was the profiteered amount in respect of the Applicant No. 8, mentioned at serial no. 162 of Annexure-15 and Rs. 1,50,166/- (including GST on the base amount of Rs. 1,34,077/-) which was the profiteered amount in respect of the Applicant No. 9,

mentioned at serial no. 42 of Annexure-15. The DGAP has also stated that the said service has been supplied by the Respondent only in the State of Andhra Pradesh only.

14. The DGAP has also reported that the above computation of profiteering was with respect to 243 home buyers till 31.10.2016, whereas the Respondent was constructing a total of 267 flats. Out of 267 flats under construction, 24 units was either unsold or booked pre-GST but cancelled post-GST implementation (during the period under investigation). So, if the ITC in respect of these 24 units was taken into account to calculate profiteering in respect of 243 units where payments had been received post GST, the ITC as a percentage of taxable turnover would be distorted and erroneous. Therefore, the profiteering in respect of these 24 units should be calculated when the consideration thereof was received in the post-GST period, by taking into account the proportionate ITC in respect of such units. The DGAP has also clarified that the Respondent, vide his letter dated 22.04.2019, submitted that he had passed on the benefit of Rs. 1,53,35,365/- to the home buyers on account of ITC benefit. A summary of category-wise profiteering and the ITC benefit passed on, has been furnished in table-'D' below.

Table-'D' (Amount in Rs.)

Sl. No.	Category of Customers	No. of Units	Area (in Sq. Ft)	Amount Received Post GST	Profiteering Amt. as per Annex-27	Benefit claimed to have been Passed on by the Respondent	Difference	Remark
A	B	C	D	E	F	G	H=F-G	I
1	Applicant	1	1625	19,33,439	1,30,577	58,003	72,574	Further Benefit to be passed on as per Annex-15
2	Applicant	1	1380	17,99,648	1,21,541	53,989	67,552	Further Benefit to be passed on as

								per Annex-15
3	Applicant	1	1625	23,51,687	1,58,824	70,551	86,273	Further Benefit to be passed on as per Annex-15
4	Applicant	1	1380	13,71,289	92,611	41,139	51,473	Further Benefit to be passed on as per Annex-15
5	Applicant	1	1625	19,50,499	1,31,729	58,515	73,214	Further Benefit to be passed on as per Annex-15
6	Applicant	1	1625	14,36,468	97,149	43,154	53,994	Further Benefit to be passed on as per Annex-15
7	Applicant	1	1625	19,85,405	1,27,402	63,384	79,306	Further Benefit to be passed on as per Annex-15
8	Applicant	1	1625	16,45,940	1,11,180	49,378	61,782	Further Benefit to be passed on as per Annex-15
9	Applicant	1	1625	22,23,499	1,50,166	66,705	83,461	Further Benefit to be passed on as per Annex-15
10	Other Than Applicant	234	-	49,43,51,564	3,33,86,527	1,48,30,547	1,85,85,980	Further Benefit to be passed on as per Annex-15
	Total	243	-	51,11,78,843	3,45,22,974	1,53,35,365	1,91,87,609	-

15. The DGAP has further claimed from the Table 'D' above that the benefit claimed to have been passed on by the Respondent (Rs. 1,53,35,365/-) was less than what he should have passed on to the home buyers (Rs. 3,45,22,974/-) including the Applicants (Sr. No. 1 to 9 of table D), by an amount of Rs. 1,91,87,609/-. The details of these amounts was given in Annexure-15 to the DGAP's Report dated 24.04.2019.

16. In view of the foregoing paras, the DGAP has concluded that the additional ITC benefit of 6.03% of the turnover had accrued to the Respondent and the same was required to be passed on to the above Applicants and other recipients as per the provision of Section 171 of the CGST Act, 2017. On this account, the Respondent had realized an additional amount of Rs. 11,36,447/- (Sr. No. 1-9 of Table- 'D') from the Applicants No. 1 to 9, which included both the profiteered

amount @6.03% of the basic price and GST on the said profiteered amount. However, the Respondent had suo moto passed on an amount of Rs. 5,04,818/- to the above Applicants, duly verified from the demand letters issued to the Applicants No. 1 to 9. Therefore, the Respondent had profiteered by an amount of Rs. 6,31,629/- [Rs. 11,36,447/- (-) Rs. 5,04,818/-] in respect of the Applicants No. 1 to 9. The DGAP has also asserted that the Respondent had also realized an additional amount of Rs. 1,85,55,980/- (Sr. No. 10 of Table- 'D') which included both the profiteered amount @ 6.03% of the basic price and GST on the said profiteered amount, from 234 other recipients who were not the Applicants in the present proceedings. These recipients were identifiable as the Respondent has provided their names and addresses along with the unit no. allotted to them. Therefore, this additional amount of Rs. 1,85,55,980/- was required to be returned to such eligible recipients. Thus, the total profiteered amount (excluding the benefit already passed on) in respect of all 243 home-buyers (including Applicants No. 1 to 9) came to Rs. 1,91,87,609/-.

17. The above report was considered by the Authority in its meeting held on 25.04.2019 and it was decided to hear the above Applicants and the Respondent on 15.05.2019. Accordingly, notice was issued to him asking him to explain why the above Report should not be accepted and their liability for violation of the provisions of Section 171 of the CGST Act, 2017 should not be fixed. He was also asked to submit why penalty under Section 29, 122-127 of the above Act read with Rule 21 and 133 of the CGST Rules, 2017 should not be imposed on

them. During the course of these proceedings, the Applicant No. 1 was present on hearings dated 10.06.2019, 18.06.2019, 25.06.2019 and the Applicant No. 2 & 10 appeared on 10.06.2019 and the DGAP was represented by Sh. P.K. Tyagi and Sh. Shivendu Pandey, Superintendents while the Respondent appeared on hearings on 24.05.2019, 18.06.2019, 25.06.2019, 04.07.2019, 22.07.2019, 23.08.2019 and 30.09.2019. The Applicants No. 3 to 9 were not present during the hearings. The Respondent has filed his submissions dated 23.05.2019, 18.06.2019, 24.06.2019, 02.07.2019, 05.08.2019, 19.07.2019, 27.09.2019 & 11.10.2019.

18. The Respondent in his submissions dated 23.05.2019 has stated that the Respondent was engaged in the business of development of mixed used projects comprising of residential apartments and retail mall. The Respondent had started development of the Project in Vishakhapatnam, Andhra Pradesh in the year 2015. The development of residential apartments and retail mall was integrated, on the lower 4 floors of a Tower retail mall was being built and on the higher floors residential apartments were being built as details given below:

Particulars	Details	%age
Saleable Carpet Area		
Residential portion	2,65,592 Sq. feet	76%
Commercial portion	85,216 Sq. feet	24%
Total	3,50,808 Sq. feet	100%
Area Sold (up to 31st October 2018)		
Residential portion	2,40,233 Sq. feet	100%
Commercial portion	0 Sq. feet	0%
Total	2,40,233 Sq. feet	100%
Turnover details (excluding taxes)		
Turnover of sold portion (Upto 31 October 2018)	117.21 Crores	53%
Balance turnover of sold portion*	26.15 Crores	12%
Estimated sale value of unsold portion*	77.90 Crores	35%
Total	221.26 Crores	100%

*Without considering 3% interim benefit
^ Conservative estimate on the basis of last sale transaction

 # It was submitted that for the purpose of computation of profiteering, the DGAP has only considered the Residential portion of the project and not the total area.

19. The Respondent has also submitted that even though there were no specific guidelines/ methodology prescribed under the CGST Act, 2017 for passing on such benefit, the Respondent suo moto computed and decided to pass on preliminary benefit of 3% on the demands post implementation of the GST. In this regard, the Respondent has also sent out communications to his customers intimating that interim relief of 3% has been passed to customers by way of reduction in prices. He has also submitted that such communication was sent prior to receipt of any complaint from the customers which clearly indicated the law-abiding character and good intent of the Respondent. He has also submitted a copy of e-mail communication and sample invoice for passing on ITC benefit by him to customers. The total benefit amounted to Rs. 1, 53, 35,365/- (i.e. 3% of Rs. 51, 11, 78,843/-) till 31 October 2018. He has further submitted that the methodology for computing the interim GST benefit by the Respondent by estimating taxes which were a cost to him in the pre-GST regime as under:

S.no	Particulars	Amount (In Rs. Crores)
1	Excise duty paid on procurement of goods	1.65
2	CST paid on inter-State procurement of goods	0.34
3	VAT paid on local procurement of goods	0.43
4	SBC paid on input services	0.20
5	Transitional Credit	0.59
	Total	**3.21**

He has also stated that the total savings computed were allocable to the project as a whole. However, savings only with respect to area

sold prior to issuance of the completion certificate was required to be passed on to the customers. The same was computed as under:

S.no	Particulars	Area (In Sq. Feet)	Value (in Rs. Crores)
1	Residential area sold	2,40,235	143.36
2	Residential area unsold	25,357	17.65*
3	Commercial area	85,216	60.38*
	Total area of the project	**3,50,808**	**221.39**

**Estimated sale value of potion unsold had been computed basis the last sale prices of residential flats prevailing prior to October 2018*

20. The Respondent has further elaborated two scenarios below: -

Scenario 1 – Where value was taken as basis for allocating estimated input tax savings to be passed: -

Proportion of input tax savings to be passed on to the existing customers: = Total Savings of the Project * Value of residential Area sold/ Value of total area of the project

Input tax savings to be passed = Rs. 3.2 Crores X Rs. 143.36 Crores = Rs. 2.08 Crores
Rs. 221.39 Crores

Input tax savings to be passed on were allocated to the total sale price of the existing customers to compute the percentage benefit to be passed: Input tax savings to be passed/Sale value of portion sold under GST

% benefit to be passed = Rs. 2.08 Crores/ Rs. 77.2 Crores = 2.69%

Scenario 2 – Where area was taken as basis for allocating estimated input tax savings to be passed: -

Proportion of estimated input tax savings to be passed on to the existing customers: Total Savings of the Project * Residential Area sold/ Total area of the project

$$\text{Input tax savings to be passed} = \text{Rs. } \frac{2.2 \text{ Crores} \times 2,40,235 \text{ Sq. feet}}{3,50,808 \text{ Sq. feet}} = \text{Rs. } 2.19 \text{ Crores}$$

Estimated input tax savings to be passed on were allocated to the total sale price of the existing customers to compute the percentage benefit to be passed: Input tax savings to be passed/ Sale value of portion sold under GST

$$\text{\% benefit to be passed} = \text{Rs. } 2.19 \text{ Crores} / \text{Rs. } 77.2 \text{ Crores} = 2.85\%$$

The Respondent has also submitted that even though the amount allocable on the basis of above methodology was ranging between 2.69% to 2.85%, however, the final benefit arising on account of GST cannot be ascertained till completion of the project due to the following factors:

a. Any sale of property after receipt of completion certificate did not attract GST and thus, to this extent, proportionate ITC used for construction activity was liable to be reversed. Due to this, the ITC availed or to be availed by the Respondent was provisional in nature and the same got finalized only at the time of completion of project. Thus, determination of overall profiteering for a Respondent before completion of a project was not correct.

b. Inverted duty structure possible at the end of the project - Majority of procurements made by the Respondent were generally liable to GST @18% and output GST liability was payable @12%. This

difference in tax rates could result in accumulation of ITC which would eventually become a cost to the Respondent. Accordingly, the Respondent would be able to determine the actual benefit of ITC which had accrued to him only at the time of completion of project.

c. The total ITC benefit had been currently apportioned between residential portion sold, residential portion unsold and commercial portion basis carpet area instead of sale value. However, the Respondent would be required to reverse input tax proportionate to unsold area at the end of project on the basis of actual value and not carpet area. Thus, the allocation of ITC cannot be finalized till the time of completion of the project.

On the basis of the above, the Respondent has submitted that the benefit computed by the Respondent above would be further reduced to the extent of above-mentioned issues. However, on a conservative basis, the Respondent had suo moto decided to pass on a benefit of 3% to the customers which amounted to Rs. 15,335,365/- (i.e. 3% of Rs. 5, 11,178,843/-) till 31 October 2018. He has also submitted the details of customer-wise benefit passed on for all customers including the above Applicants.

21. The Respondent has further raised objections in the DGAP's Report and contended that the DGAP has considered incremental credit instead of blocked credit. The Respondent has submitted that the methodology adopted by the DGAP was not correct and has failed to consider the following aspects:

a. The DGAP has done the analysis on the basis of the incremental credits arising out of the implementation of the GST and thereafter applied a percentage on the said credits as an anti-profiteering measure.

b. The DGAP has merely done a comparison between the credits available in pre-GST with that was available post the implementation of the GST without analyzing the reasons. The actual reasons for the availability of such incremental credits were not looked into for arriving at the benefits to be passed on. He has further highlight that there were primarily 2 reasons for such incremental credits. Firstly, there was increase in tax rates i.e. tax on services increased from 15% to 18% and on goods from 22% to 28%. Secondly, the availability of blocked credits in post-GST period.

22. The Respondent has further stated that the rate of tax on services was 15% in pre-GST regime, which was subsequently increased to 18% in post-GST regime. The credit availability/eligibility was not changing as Service tax paid on execution of works contract was earlier available as CENVAT for utilization against the output tax liability; and the same continued to be available as credit under GST. The change on this account was the increase in tax rate from 15% to 18% for which additional working capital was applied. The Respondent has argued that the DGAP should take into consideration the said aspect as there was no change in the credit availability/eligibility and only an increase in tax rate was the reason for such incremental credit. The Respondent

has also asserted that in pre-GST regime the credit of excise duty/ VAT on inputs was not available as it was explicitly restricted. With the implementation of the GST, the said restricted credits were available for being availed and utilized, which needed to be passed on to the customers. He has tabulated below by way of an example the said factors for computation of the benefit: -

Particulars	Pre GST
Sale Price	200
Base Cost	100
Taxes	10
Eligibility	Non-Creditable
Credit as per return	0

Particulars	Post-GST
Sale Price	200
Base Cost	100
Taxes	18
Eligibility	Creditable
Credit as per return	30

The DGAP's Approach- Comparison of 0 with 18 for the purpose of incremental credit

The DGAP's Report- Comparison of Rs. 2.17 crores with Rs. 5.89 crores for the purpose of incremental credit

Profit & Loss a/c			
Cost	Amt.	Revenue	Amt.
Base cost	100	Sale price	200
Tax cost	10		
Profit	90		

Profit & Loss a/c			
Cost	Amt.	Revenue	Amt.
Base cost	100	Sale price	200
Tax cost	0		
Profit	100		

Balance Sheet			
Liability	Amt.	Asset	Amt.
		ITC	0

Balance Sheet			
Liability	Amt.	Asset	Amt.
		ITC	18

23. The Respondent has claimed on the basis of the above Tables that that the credit of Rs. 10 which was earlier not available, was available post implementation of the GST. Further, due to the increase in tax rates, the amount of tax had increased from Rs. 10 to Rs. 18. Only the aforesaid two reasons were resulting into incremental credits in the GST regime, and the same should be looked into by the DGAP for computation of the benefits to be passed on to the customers. The Respondent has also argued that that the approach should be passing on of benefits of blocked credits of Rs. 10. The Respondent has worked out blocked credit pertaining to residential portion sold and estimated it ranging between Rs. 2.08 crores to Rs. 2.19 crores from July 01, 2017 till the completion of the project. Therefore, GST input credit benefit to be passed on was calculated less than 3%. Going with conservative approach, the Respondent has decided to pass on GST input credit benefit @ 3% to his customers.

24. The Respondent has further averred that methodology adopted by the DGAP was not correct as per legislative requirements and there were multiple apparent errors in the computation done by the DGAP. The DGAP has considered incorrect details of total saleable area in his computation of profiteering. The Respondent has contended that in the computation of alleged profiteering, the DGAP has not considered the correct details of saleable area. The DGAP had considered total saleable area of 2, 65,592 Sq. ft. in Table 'B' of his Report instead of correct total saleable area of 3,50,808 Sq. ft. As a result, the alleged GST benefit pertaining to unsold portion has been inadvertently construed as benefit to be passed on to the existing customers. The

computations failed to protect the right of future customers who would either buy the property in future or have bought the apartments subsequent to period for which computation was being done by the DGAP which was tantamount to unjust enrichment of alleged GST benefits to existing customers. The Respondent has also submitted that where any portion remained unsold until completion, proportionate ITC pertaining to such portion of property would require to be reversed under the GST Law. Thus, apportionment of alleged GST benefits pertaining to unsold area to existing customer was incorrect. The Respondent has also submitted that he had provided the correct details of total saleable area through emails to the DGAP. However, the DGAP has failed to consider the correct total saleable area and thus, had committed error while computing the alleged profiteering by the Respondent. He has also submitted a copy of relevant emails sent to the DGAP. In this regard, he has referred orders passed by this Authority viz. M/s S3 Infra Reality Private Limited and M/s Puri Constructions Private Limited, wherein, the computations prepared for ascertaining profiteering duly considers the total saleable area being developed by the Respondent. Consideration of a similar aspect in one case and not in other has clearly established the error made by the DGAP in the computation, which was liable for revision.

25. The Respondent has further argued that the computation of alleged profiteering done by the DGAP considered additional GST of 12% on the amount of benefit that was required to be passed on in accordance with the method adopted by him. Even where the methodology adopted by the DGAP was considered, the quantum of benefit should have

been computed by comparing taxable value (i.e. turnover excluding GST) charged from customer instead of value including GST. The Respondent has also stated that GST amount collected on the differential base price cannot be construed as profiteering made by the Respondent as the same was duly deposited with the Government and not pocketed by the Respondent. However, the said Report deviated from the basic principal of unjust enrichment (as such tax was duly deposited to the Government) and have applied GST of 12% on the GST benefit amount required to be passed on to the customers.

26. The Respondent has also averred that the basis adopted by the DGAP for allocation of ITC between sold and unsold portion was incorrect. In absence of any prescribed methodology, the DGAP has considered project area as a basis to allocate ITC pertaining to sold and unsold portion of the project. The DGAP has computed "Relevant ITC" by drawing proportion of sold area vis-a-vis saleable area. This had been done for both pre-GST and post-GST regime. The Respondent has also submitted that area was not a correct basis to allocate credit pertaining to sold and unsold portions and "value" was more logical and correct base. Allocation of credit based on area did not concur with the provisions of GST law. Under GST law, value was the basis for determining output tax liability payable by any tax payer. Unless value of goods or services being supplied was not determined, the output tax liability cannot be computed. Area was not relevant for GST laws in any manner and their details were required to be submitted under different laws as applicable from time to time. Even calculation of benefit to be passed on to the customer has been made

based on sale value (i.e. demand price) by the DGAP. Thus, usage of two different basis (i.e. allocation of ITC basis area and distribution of alleged GST benefits basis value) in the same computation would give illogical and absurd results. The Respondent has also argued that Section 171 of the CGST Act, 2017 also specifies that benefit should be passed by way of commensurate reduction in "prices". Hence, it was evident that GST laws also considered the price as a relevant basis for anti-profiteering provisions. Therefore, the allocation should be made on the basis of value and present computation made by the DGAP on the basis of area was liable to be revised. He has also furnished the details of value that might be used for revision as below:

Sale value pertaining to area sold – Rs. 143.36 Cr*

Sale value pertaining to total saleable area – Rs. 221.39 Cr*

*This included actual sale value of portion sold and estimated sale value of portion unsold. Estimated sale value of potion unsold had been computed on the basis of the last sale prices of residential flats prevailing prior to October 2018.

27. The Respondent has also asserted that the DGAP has considered incomplete period in the computation resulting in incorrect comparison of pre and post-GST credit. In absence of any prescribed methodology, the DGAP has considered an arbitrary period under pre-GST regime for the computation of alleged profiteering. The DGAP has considered ITC and turnover for the period of April 2016 to June 2017 in pre-GST period and has ignored the period prior to that. The Respondent had made procurements prior to April 2016 for the relevant project and credit availed on the same had been used to pay output tax on demands raised. No logical explanation has been provided by the

DGAP in his Report for consideration of only a portion (i.e. April 2016 to June 2017) out of total project period. He has also stated that cenvat credit amounting to Rs. 1.55 Crores and Turnover amounting to Rs. 19.49 crores pertaining to period prior to April 2016 should have been considered while calculating the Pre-GST ITC ratio which has resulted into incorrect comparison of the credit.

28. The Respondent has also argued that cost incurred has no direct link with turnover and has stated that cost incurred on construction has no direct link with the turnover in case of Real Estate Industry. Typically, there was a wide gap between turnover (i.e. collection from customers) and construction cost at the beginning of the project and over the construction lifetime it narrowed which resulted in lower ITC to turnover percentage in the initial period and a higher ITC to turnover percentage in the later period. Thus, computation of benefit on the basis of percentage of ITC to Sales in the respective regime was not the correct methodology to compute the GST benefit.

29. In light of above discussions, the Respondent has submitted that even if he assumed the methodology adopted by the DGAP was correct then the computation for alleged profiteering needed to be revised. Therefore, he has given his remarks highlighting the errors alongside the computation made by the DGAP in Tables below:

Scenario 1 – Where value was taken as basis for allocation of ITC

Particulars	Reference	As per DGAP's Report		Post errors rectification		Remarks
		Pre-GST	Post-GST	Pre-GST	Post-GST	
Cenvat of Service Tax paid on input services	A	21,784,314		37,284,314		Cenvat credit considered only for April 16-June 17. Cenvat credit upto March 16

						amounting to Rs. 1.55 Cr not considered
ITC of GST Availed	B		58,910,304		58,910,304	
Total Cenvat/ITC	C=A+B	21,784,314	58,910,304	37,284,314	58,910,304	
Total Turnover	D	448,480,346	511,178,843	643,380,346	511,178,843	Pre-GST Turnover Cenvat credit considered only for April 16+ June 17. Turnover up to March 16 amounting to Rs. 19.30 Cr not considered
Saleable area / Saleable value	E	265.592	265.592	2,212,563,814	2,212,563,814	ITC allocated basis area and not value was incorrect Sale Value (sold area) – Rs. 143.35 Cr Sale Value (saleable area) – Rs. 221.25
Sold area/ Sold value	F	240.233	240.233	1,433,563,814	1,433,563,814	
ITC relevant	G=C*E/F	19,704,325	53,285,487	24,157,244	38,169,150	
Ratio of ITC (Total Credit/ Total Turnover)	H=G/D	4.39%	10.42%	3.75%	7.47%	
Increase in ITC availed post GST	I=Post GST H - Pre GST H	-	6.03%	-	3.71%	Ratio was liable to be revised considering errors highlighted above
Total basic demand under GST	J		511,178,843		511,178,843	
GST Charged @ 12%	K=J*1.12		61,341,461			
Total demand under GST	L=J+K		572,520,304			
Recalibrated base price	M=J*(1-H)		480,354,759		492,203,117	
Add: GST @ 12%	N=M*1.12		57,642,571			
Commensurate demand price	O=M+N		537,997,330			

Profiteering amount as per DGAP	P=L-O		34,522,974			
Benefit amount (Recalibrated base price less revised base price)	Q=M*(1-H)				18,975,726	Profiteering should be computed in comparison with base price and not base price plus taxes
Less: Interim benefit already passed to customer	R		15,335,365		15,335,365	
Benefit to be passed on	S=Q-R		19,187,609		3,640,360	

Scenario 2 – Where area was taken as basis for allocation of ITC

Particulars	Reference	As per DGAP's Report		Post errors rectification		Remarks
		Pre-GST	Post-GST	Pre-GST	Post-GST	
Cenvat of Service Tax paid on input services	A	21,784,314		37,284,314		Cenvat credit considered only for April 16-June 17. Cenvat credit up to March 16 amounting to Rs. 1.55 Cr not considered
ITC of GST Availed	B		58,910,304		58,910,304	
Total Cenvat/ITC	C=A+B	21,784,314	58,910,304	37,284,314	58,910,304	
Total Turnover	D	448,480,346	511,178,843	643,380,346	511,178,843	Pre-GST Turnover Cenvat credit considered only for April 16-June 17. Turnover up to March 16 amounting to Rs. 19.49 Cr not considered
Saleable area	E	265,592	265,592	350,808	350,808	Saleable area as per RERA and information provided to DGAP was 350,808 Sq. Ft.
Sold area	F	240,233	240,233	240,235	240,235	
ITC relevant	G=C*E/F	19,704,325	53,285,487	25,532,477	40,342,059	
Ratio of ITC (Total Credit/ Total Turnover)	H=G/D	4.39%	10.42%	3.97%	7.89%	
Increase in ITC availed post GST	I=Post GST H - Pre GST H	-	6.03%	-	3.92%	Ratio was liable to be revised considering errors highlighted above
Total basic demand under GST	J		511,178,843		511,178,843	
GST Charged @ 12%	K=J*1.12		61,341,461			

Total demand under GST	L=J+K		572,520,304			
Recalibrated base price	M=J*(1-H)		480,354,759		491,122,860	
Add: GST @ 12%	N=M*1.12		57,642,571			
Commensurate demand price	O=M+N		537,997,330			
Profiteering amount as per DGAP	P=L-O		34,522,974			
Benefit amount (Recalibrated base price less revised base price)	Q=M*(1-H)				20,055,983	Profiteering should be computed in comparison with base price and not base price plus taxes
Less: Interim benefit already passed to customer	R		15,335,365		15,335,365	
Benefit to be passed on	S=Q-R		19,187,609		4,720,618	

30. The Respondent has claimed that the computation of benefit on the basis of above methodology has already been stayed by the Hon'ble Delhi High Court. The Respondent has also submitted that similar methodology adopted in the case of M/s Pyramid Infratech Pvt. Ltd. was presently under review by the Hon'ble Delhi High Court and interim relief has been provided by applying stay on the order in question. He has also stated that the case was still under the process of review by the Hon'ble High Court and was likely to be heard in July 2019.

31. The Respondent has also contended that methodology adopted in the case of M/s Pyramid Infratech Pvt. Ltd. was not applicable in the present case. He has also submitted that the facts of M/s Pyramid Infratech Pvt. Ltd. were not identical to the present case. There were differences in the facts of the present case for various reasons, for example intention of the Respondent. In the above-mentioned case, the intention of the Respondent had always been to sell the property. However, the Respondent was not intending to sell all the property which was being constructed in the project and thus, there could be

some portion of the property which would remain unsold even at the end of the project. He has also argued that with respect to orders passed by this Authority for other developers, sub-contractors were charging VAT under the respective State VAT law which was allowed as ITC to the developer. In the present case, sub-contractors were not charging VAT under Andhra Pradesh VAT law and thus, to this extent, the facts of instant case were distinguishable. This was for the reason that the methodology adopted by the DGAP took into consideration comparison of ITC pre and post-GST regime. While this percentage would be higher for the Respondents, wherein, the sub-contractors were charging input VAT, it was significantly lower in the present case. Therefore, given that the facts of the present case were not similar to M/s Pyramid Infratech Pvt. Ltd., he has submitted that the methodology adopted in the above case could not be squarely applied in the present case.

32. The Respondent has further made his legal submissions that the Section 171 of the CGST Act, 2017 was ultra vires the constitution and thus, investigation should be either dropped or kept in abeyance till the constitutional validity is being scrutinized by the Hon'ble High Court. He has also stated that Section 171 of the CGST Act, 2017 violates Article 19(1) (g) of the Constitution. Right to trade is a fundamental right guaranteed under Article 19(1) (g) of the Constitution of India and includes the right to determine prices, and such right cannot be taken away without any explicit authority under the law passed by the Parliament or State legislature under Entry 34 of the Concurrent List (List III) of the Seventh Schedule to the Constitution of India. Only in

exceptional cases, and in respect of a few specified goods, the Government has enacted laws to control prices. He has also submitted that the provisions of Section 171 of the CGST Act were not akin to the price control regulations enacted in terms of Entry 34 of the Concurrent List. Consequently, any such effort would be nothing but violation of the freedom of trade guaranteed under the Constitution of India. Therefore, the price control exercised by the DGAP was ultra vires the fundamental rights guaranteed under Article 19(1) (g) of the Constitution of India. In this regard, he has relied upon a recent decision in the case of Abbott Healthcare Pvt. Ltd. vs Union of India & others in W.P. (C) No. 4213/2019 wherein the issue was constitutional validity of the anti-profiteering provisions given in the GST law. He has also claimed that the Hon'ble Delhi High Court has observed that there were similar petitions pending with the Court in the case of Hindustan Unilever Ltd vs Union of India and Jubilant Foodworks Ltd. vs Union of India. Accordingly, the Hon'ble High Court stayed further proceedings against the supplier in the given case. The Respondent has also argued that the fundamental basis of the investigation was currently under scrutiny of the Hon'ble High Court. Accordingly, he has submitted that the present investigation against the Respondent should be either dropped or at least be kept in abeyance till the time constitutional validity of the Act is decided by the Hon'ble court.

33. The Respondent has further argued that no methodology or guidelines had been prescribed under GST laws to ascertain benefit to be passed. He has also stated that in terms of Section 171 of the CGST Act, 2017 any reduction in the rate of tax on supply of goods and/or services or

the benefit of enhanced ITC shall be passed on to the recipient by way of commensurate reduction in prices. The Authority has been constituted with specific powers granted to it under Chapter XV of the CGST Rules, 2017. Rule 126 of the above Rules empowers the Authority to determine the methodology and procedure to determine whether the tax payer has complied with the provisions of Section 171 of the CGST Act. The relevant extract of Rule 126 of the CGST Rules was reproduced hereunder:

> *"Rule 126. Power to determine the methodology and procedure: The authority may determine the methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of ITC had been passed on by the registered person to the recipient by way of commensurate reduction in prices."*

In view of the above, he has submitted that the CGST Act, 2017 and the CGST Rules, 2017 empowered this Authority to lay down the methodology for determining the manner in which the benefit of reduced GST rate or enhanced credit be passed on to the recipient. However, no precise computation methodology or principles has been laid down by the Authority. The methodology to be prescribed by this Authority must capture the basic principles that would be relevant to all industries keeping in view the common trade practices which would ensure that Section 171 of the CGST Act, 2017 was interpreted in a uniform manner across all tax payers. Such methodology was the crux of Section 171 of the CGST Act, 2017 because the same would ensure

equity, consistency and uniformity in defining the scope of Section 171 of the above Act.

34. The Respondent has also argued that no machinery provisions were available under the GST law and hence, charging provisions of anti-profiteering would fail in this case. Besides, this Authority had been constituted to curb unfair profit-making activities by the trading community so as to ensure that the traders did not profiteer on account of reduction in GST rate or enhanced GST credit under the GST regime. Further, the GST Flyer on Authority published by the Central Board of Indirect and Customs ("CBIC") provided an overview of the anti-profiteering provisions stipulating that this Authority had been constituted to examine whether the supplier of goods and/or services have passed on the benefit of reduced GST rate or enhanced ITC by way of commensurate reduction in the price of goods and/or services so as to ensure that the consumer was protected from arbitrary price increase in the name of GST. The Respondent has also stated that the methodology for determining whether the tax payer has passed on the benefit of reduced rate of GST or increased ITC by way of commensurate reduction in prices was one of the essential ingredients of Section 171 of the CGST Act, 2017. In the absence of the aforesaid methodology, the entire proceedings would be a futile exercise. In this regard, he has relied upon the Apex Court decision in the case of CIT vs. B. C. Srinivasa Shetty (***Commissioner of Income Tax v. B. C. Srinivasa Setty (1981) 128 ITR 294 (SC)***), wherein, the question of imposition of tax on capital gains on the goodwill of a newly

commenced business was involved. The Apex Court has held that the computation and charging provisions form the essence of any tax legislation and that the failure of the computation provision would automatically result in failure of the charging provisions. The relevant extract of the Apex Court decision was reproduced hereunder:

> *"Section 45 was a charging section. For the purpose of imposing the charge, Parliament had enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with him can be applied for determining the chargeable profits and gains. All transactions encompassed by Section 45 must fall under the governance of his computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by Section 45 to be the subject of the charge."*

In light of the plethora of judgments passed by the Hon'ble Supreme Court, it was a settled position that where there was no machinery for assessment, the law being vague, it would not be open to the authorities to arbitrarily assess to tax. In this regard, the Respondent has relied on the following decisions:

- K.T. Moopil Nair vs. State of Kerala [AIR 1961 SC 552];
- Rai Ramkrishna vs. State of Bihar [1963 AIR 1667, 1964 SCR (1) 897];
- State of A.P. vs. Nalla Raja Reddy [1967 AIR 1458, 1967 SCR (3) 28];

- Vishnu Dayal Mahendra Pal vs. State of U.P. [1974 AIR 1489, 1975 SCR (1) 376]; and
- D.G. Gose and Co. (Agents) (P) Ltd. vs. State of Kerala [(1980) 2 SCC 410].

The Respondent has further stated that the DGAP had initiated the anti-profiteering investigation with a pre-conceived notion that the Respondent had not passed on the benefit of the reduced GST rate to his customers. The DGAP's arbitrariness would render the entire investigation an otiose exercise resulting in grave injustice to the Respondent. In this regard, he has referred to the Apex Court decision in the case of Natural Resources Allocation (2012) 10 SCC 1 wherein it was held as under:

> *"Therefore, a State action had to be tested for constitutional infirmities qua Article 14 of the Constitution. The action had to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which were rational, informed with reasons and guided by public interest, etc. All these principles were inherent in the fundamental conception of Article 14. This was the mandate of Article 14 of the Constitution of India."*

35. The Respondent has further argued that penalty provisions under Section 29, 122, 123, 124, 125, 126 & 127 of the CGST Act, 2017 read with Rule 21 and Rule 133 of the CGST Rules, 2017 proposed to be evoked against the Respondent were liable to be dropped. He has also stated that he was a law-abiding taxpayer and has not violated any provision under the law. The Respondent in good intent has already

passed on the interim benefits to all customers to whom demand letters has been issued after the introduction of the GST. The Respondent was also committed to pass the same in all future demands to be issued. Further, the Respondent has also submitted that he would re-determine the benefit to be passed on at the time of completion of the project and accordingly, determine benefit to be passed on or adjust any benefit already passed on to the customers. He has also submitted that the Respondent had communicated his intent to pass on the interim benefit even prior to receipt of any complain from the customers. Thus, the Respondent has no malafide intent in the present case. Further, he has stated that mens-rea or malafide intent was an essential ingredient for imposition of penalty. In this regard, he has referred to the decision of the Hon'ble Supreme Court in case of **Hindustan Steel Limited vs State of Orrisa**. He has also stated that he has always acted in a bonafide manner and in absence of any guidelines on the manner of determining the benefit, he has exercised all necessary due diligence to suo-moto pass on the benefit to the customers. He has also submitted that the Notice merely mentioned imposition of penal provisions under Section 122, 123, 124, 125, 126 & 127 of the CGST Act and Rule 21 and 133 of the CGST Rules. However, the Notice did not specify the exact allegation made against the Respondent. He has also stated that he cannot be expected to make appropriate submission in his defence without knowing exact allegations under such Sections. Hon'ble Supreme Court in case of **Kaur & Singh vs CCE, New Delhi** has held that the party to whom a show cause notice was issued must be made aware of the allegations against it and it was a requirement of natural

justice. Thus, in absence of invocation of specific provision with respect to imposition of penalty, the penal provisions cannot be invoked. He has also asserted that there was no provision under the aforementioned sections which specifically contemplates levy of penalty in cases where the supplier had not passed on the benefit as required by Section 171 of the CGST Act, 2017. Thus, the aforementioned penal provisions were not applicable in the present case except to the extent of Section 125 of the CGST Act, 2017 which was general in nature. He has submitted that while Rule 133 of the CGST Rules, 2017 provides power to this Authority for imposing penalty, there was no corresponding provision in the said Act to impose penalty for contravention of Section 171 of the CGST Act, 2017. It was settled law that the Rules cannot prescribe penalty by travelling beyond the provision of the statue itself and exercise of such power amount to excessive delegation. In this regard, he has also referred to the judgement of Hon'ble Sikkim High Court in the case of **Shubh Enterprises vs Union of India** which was later affirmed by the Hon'ble Supreme Court. Therefore, he has submitted that invocation of penal provisions in the present case was incorrect to this extent.

36. The Respondent in his submissions dated 18.06.2019 in the response to the DGAP's supplementary Report dated 07.06.2019 and submissions dated 09.06.2019 & 10.06.2019 of the Applicants, has stated that unutilized CENVAT credit balance transitioned into GST credit had been appropriately considered as pre-GST credits. The Applicant has alleged that transitional credit of Rs. 72,59,350/- should

not be considered as pre-GST credits. Accordingly, as per the Applicants, pre-GST credits should have been Rs. 1,45,24,964/- only (i.e. difference between Rs. 2,17,84314/- less Rs. 72,59,350/-). In this regard, the Respondent has submitted that the aforementioned transitional credit of Rs. 72,59,350/- related to Service tax balance which could not be utilized till 30.06.2017. However, the said amount was allowed to be carried forward as ITC on introduction of the GST. He has also submitted that this was a mere procedural requirement and it did not result in any change in the underlying fact that such amount of Rs. 72,59,350/- was benefit available under pre-GST regime and accordingly, should be treated as pre-GST credits. Further, he has also submitted that there was mandatory requirement to pass on benefit of transitional credit claimed under TRAN-2 (i.e. situations where no invoice was available to substantiate amount of duty paid) to the customers. However, there was no such requirement to pass on aforementioned transitional credit claimed under TRAN-1 filed under Section 140 of the CGST Act, 2017. He has also stated that transitional credit of Rs. 1,31,25,206/- has appropriately been not considered in post-GST credits. Further, the Applicants, have alleged that transitional credit of Rs. 1,31,25,206/- has not been included in the post-GST credits. Accordingly, the same should be included in the post-GST credits for computing benefit to be passed on to customers. In this regard, the Respondent has submitted that out of the total transitional credit of Rs. 1,31,25,206/-, Rs. 72,59,350/-related to Service tax balance which could not be utilized till 30 June 2017. With respect to balance transitional credit of Rs. 58,65,856/-, the same related to

Excise duty/VAT/Entry tax benefit on procurements made by the Respondent under pre-GST regime. The Respondent has submitted that it was not a benefit under GST regime and thus, should not be considered for the calculation of credit benefits to be passed on to the customers. He has also submitted that there was mandatory requirement to pass on benefit of transitional credit claimed under TRAN-2 (i.e. situations where no invoice was available to substantiate amount of duty paid) to the customers. However, there was no such requirement to pass on aforementioned transitional credit claimed under TRAN-1 filed under Section 140 of the CGST Act, 2017.

37. The Respondent in his submissions dated 24.06.2019 in response to the revised submissions of the Applicants dated 15.06.2019 & the DGAP's supplementary Report dated 07.06.2019 has stated that the Respondent has suo moto passed on the preliminary benefit of 3% on all demand letters issued by him post-GST. The Applicants have alleged that the Respondent had come forward to give benefit of GST after filing of complaints to the GST Commissioner of Visakhapatnam and the Screening Committee on Anti-profiteering, Andhra Pradesh, with first complaint being filed on 5 January 2018. The Respondent has also submitted that he had suo-moto computed and decided to pass on preliminary benefit of 3% on the demands post implementation of the GST. In this regard, the Respondent has also sent out communications to his customers highlighting that interim relief of 3% had been passed to customers by way of reduction in prices. He has also submitted that such communication was sent in last week of December 2017 i.e. prior

to the date of receipt of any complaint from the customers, which clearly indicated the law-abiding character and good intent of the Respondent. He has also submitted a copy of the email and communication. Even in the case of the above Applicants, the communication was sent by the Respondent on 22 December 2017 i.e. on the same day when the first complaint was filed. Also, it was submitted that the Respondent had no prior knowledge of the fact that the above Applicants would be filing a complaint before the State GST authorities. On the basis of the above, the Respondent has submitted that the allegation made by the Applicants that he (the Respondent) had come forward with his offer to pass on the benefit to them only after submission of various complaints was baseless. The Respondent submitted that he had no malafide intention of not passing on the GST benefit.

38. The Respondent has stated that the Applicants have further alleged that transitional credit of Rs. 1,31,25,206/- claimed under Form TRAN-1 had not been included in the post-GST credits. In this regard, the Respondent has contended that this was not a benefit of "ITC" under GST as explained below: -

Section 171 of the CGST Act mandates for passing on the benefit of "ITC" to the recipient by way of commensurate reduction in prices. The term "input tax" and "ITC" had been defined under Section 2(62) and Section 2(63) of the CGST Act respectively. Relevant extracts of said sections have been reproduced below for reference:

Section 2(63) of the CGST Act – Definition of ITC

"2(63) ITC means the credit of input tax;"

Section 2(62) of the CGST Act – Definition of input tax

"input tax in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes—

(a) the integrated goods and services tax charged on import of goods;

(b) the tax payable under the provisions of sub-sections (3) and (4) of section 9;

(c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;

(d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or

(e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act,

but did not include the tax paid under the composition levy."

In view of the above, he has made the following submissions:

- Section 171 of the above Act mandates passing on the benefit of "ITC" only and the definition of ITC given under the CGST Act covered CGST, SGST, UTGST or IGST. It did not specifically include any of the previous taxes applicable under the Erstwhile tax laws such as Chapter V of the Finance Act, 1994, Central Excise Act, 1944, etc.
- Further, ITC has been defined to mean specified taxes charged on supply of goods or services or both. Thus, transitional credit would not get covered under the ambit of "ITC" since it relates to sale, entry or manufacture of goods and not supply per se.

On the basis of the above submissions, the Respondent has submitted that transitional credit cannot be said to be benefit of ITC under the above Act and thus, was not liable to be included as post-GST credit for the computations, unless specifically provided in the CGST Act, 2017. He has also submitted that proviso to Section 140(3) mandatorily

required passing on benefit of transitional credit claimed under Form TRAN-2 (i.e. situations where no invoice was available to substantiate amount of duty paid) to the customers. However, there was no such requirement specifically provided in the CGST Act, 2017 for transitional credit claimed under Form TRAN-1. Thus, intention of the lawmakers was clear that there was no need for passing on benefit of transitional credit claimed under Form TRAN-1 to the customers.

39. The Respondent has also argued that the Applicants have considered incorrect amount of ITC of GST availed under post-GST regime in their submissions. The Applicants have considered Rs. 7,95,69,826/- as post-GST credit instead of correct amount of Rs. 5,89,10,304/-. The breakup of said amount of Rs. 7,95,69,826/- has been provided below along with his remarks:-

S.no	Particular	Amount	Remarks
1	ITC of GST availed in post-GST regime	5,89,10,304	Correct amount to be considered for computation (basis methodology adopted)
Other items wrongly included by Applicants			
2	Service tax credit carried forward under GST	72,59,350	As explained above
3	Transitional credit of Excise/ VAT/ Entry Tax	58,65,856	As explained above
4	Remaining amount	75,34,316	ITC pertaining to phase 2 of the project
Total		**7,95,69,826**	

He has also submitted that the Applicants have extracted the incorrect figures from the information submitted to the DGAP by the Respondent. In light of above discussions, the computation made by the Applicants on the basis of the incorrect figures was improper to this extent and was liable to be ignored.

40. The Respondent in his submissions dated 02.07.2019 in response to the DGAP's supplementary Report dated 07.06.2019 and the revised submissions dated 25.06.2019 of the Applicants has further stated that unutilized CENVAT credit balance transitioned into GST credit has been appropriately considered as pre-GST credit (Amount involved – Rs. 72,59,350/-). The Applicants have alleged that transitional credit of Rs. 72,59,350 should not be considered as pre-GST credit and accordingly, pre-GST credit should have been Rs. 3,00,24,964/- only (i.e. difference between Rs. 3,72,84,314/- less Rs. 72,59,350/-). The Respondent has contended that the aforementioned transitional credit of Rs. 72,59,350/- related to Service tax balance which could not be utilized till 30 June 2017. However, the said amount was allowed to be carried forward as ITC on introduction of GST regime. He has also submitted that this was a mere procedural requirement and it did not result in any change in the underlying fact that such amount of Rs. 72,59,350/- was benefit available under pre-GST regime and accordingly, should be treated as pre-GST credit.

41. The Respondent has also argued that the Applicants have been continuously revising the figures of post-GST credit on the basis of assumptions which were arbitrary in nature. Even in the revised submissions filed by the Applicants, they have considered incorrect amount of ITC of GST availed in post-GST regime, i.e. Rs. 7,87,87,676/- instead of correct figure of Rs. 5,89,10,304/-. The Respondent further averred that the breakup of the said amount of Rs. 7,87,87,676 has been provided below:

Particular	Amount as per Respondent	Amount as per Applicants
Total ITC of GST availed in post-GST regime	6,80,60,410	6,80,60,410
Add: Service tax credit carried forward under GST	-	72,59,350
Add: Transitional credit of Excise/ VAT/ Entry Tax	-	58,65,856
Less: Credit pertaining to Phase-II	91,50,106	23,97,940
Net amount	**5,89,10,304**	**7,87,87,676**

42. The Respondent has again reiterated his earlier stand and further stated on the issue of the transitional credit by referring to the relevant provisions allowing credit to be carried forward under GST and the same was reproduced below:-

Rule (117) of the Central Goods & Services Tax Rules, 2017 ('the CGST Rules') – Credit carried forward under GST

"(1) Every registered person entitled to take credit of input tax under section 140 shall, within ninety days of the appointed day, submit a declaration electronically in FORM GST TRAN-1, duly signed, on the common portal specifying therein, separately, the amount of ITC of eligible duties and taxes, as defined in Explanation 2 to section 140, to which he was entitled under the provisions of the said section"

Section 140(3) of the CGST Act – Credit carried forward under GST

"(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012—Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered

importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:–"

43. In view of the above, the Respondent has made the following submissions on the issue of transitional credit:-

- Section 171 mandates passing on the benefit of "ITC" only and the definition of ITC given under the CGST Act covers CGST, SGST, UTGST or IGST. It did not specifically include any of the previous taxes applicable under the Erstwhile tax laws such as Chapter V of the Finance Act, 1994, Central Excise Act, 1944, etc.
- Further, ITC has been defined to mean specified taxes charged on supply of goods or services or both. Thus, transitional credit would not get covered under the ambit of "ITC" since it relates to sale, entry or manufacture of goods and not supply per se.
- Rule 117 of the Central Goods & Services Tax Rules, 2017 provides that credit of "eligible duties and taxes" (as defined in Explanation 2 to Section 140(3) of the CGST Act) transitioned under GST law should be construed as "ITC". However, the provisions were silent with respect to the credit of "eligible duties" transitioned under GST law, which has been separately defined in Explanation 1 to Section 140 of the CGST Act.

On the basis of the above discussion, he has further elaborated that transitional credit of "eligible duties" availed by the Respondent cannot

be said to be the benefit of ITC under the CGST Act, 2017 and thus, was not liable to be included as post-GST credit for the computations.

44. The Respondent has also contended that credit pertaining to Phase-II allowed as deduction from credit appearing in electronic credit ledger should have been Rs. 91,50,106/-. The Applicants have alleged that the Respondent had commenced Phase-II of the project from 1 May 2018 and it was not possible to incur any cost prior to commencement of the phase. The Applicants have also stated that only 50% of the ITC availed by the Respondent relating to Phase-II should be allowed as deduction from the total ITC appearing in the electronic credit ledger (i.e. having combined ITC of Phase-I and Phase-II) i.e. 50% of Rs. 47,95,880/- = Rs. 23,97,940/-. In this regard, he has also submitted that the aforementioned allegation put forth by the Applicants was baseless. It was a well-known fact that there were various costs which were generally incurred prior to commencement of any phase of a project viz. excavation, designing, consultancy, approvals, etc. Thus, ignoring the actual ITC and putting an arbitrary percentage on the actual figures was grossly incorrect. He has also submitted that ITC pertaining to Phase-II was duly verified by the DGAP at the time of investigation and appropriately excluded by the DGAP in his Report. Accordingly, to this extent, the Report issued by the DGAP did not warrant any change.

44. The Respondent has further elaborated that the benefit of VAT 250 scheme and output VAT not recovered from the customer should be given to the Respondent. He has further submitted that as per the arrangement with the customers, the price of the flats (say Rs. 100) was inclusive of Service tax @ 4.5%. However, VAT @1.25% was to be

recovered in addition to such price. Thus, the final price payable by the end customer was Rs. 101.25 (i.e. base price of Rs. 100 plus output VAT of Rs. 1.25). The Respondent has also submitted that output VAT of 1.25% was initially a cost to the end customer and would no longer be recovered under GST regime. However, while computing the benefit to be passed on to the customer, DGAP has erroneously not factored the same. Accordingly, the aforesaid savings in cost of output VAT of 1.25% to the end customer should be adjusted from the total benefit to be passed on to customers.

45. The Respondent in his submissions dated 19.07.2019 has also stated that the jurisdictional authorities during the verification of TRAN-1 have issued a Notice dated 05 November 2018 to him (the Respondent) seeking to reverse the ITC of Rs. 58,65,856/- availed in TRAN-1 on the ground that no input was lying in the stock or work-in-progress of the Respondent as on 30 June 2017 and the Respondent has decided, on a conservative basis, to reverse such credit. A copy of the Notice and GSTR 3B for the month of June 2019 was enclosed by him as evidence. In light of above facts, he assumed that the methodology adopted by the DGAP was correct, he has mentioned his remarks highlighting the abovementioned errors alongside the computation made by the DGAP in Table given below:-

Particulars	Reference	As per DGAP's Report		Post errors rectification		Remarks
		Pre-GST	Post-GST	Pre-GST	Post-GST	
Cenvat of Service Tax paid on input services	A	2,17,84,314		3,72,84,314		Cenvat credit considered only for April 16-June 17. Cenvat credit up to March 16 amounting to

						Rs. 1.55 Cr not considered
ITC of GST Availed	B		5,89,10,304		5,89,10,304	
Total Cenvat ITC	C=A+B	2,17,84,314	5,89,10,304	3,72,84,314	5,89,10,304	
Total Turnover	D	44,84,80,346	51,11,78,843	64,33,80,346	51,11,78,843	Pre-GST Turnover considered only for April 16-June 17 Turnover up to March 16 amounting to Rs. 19.49 Cr not considered
Saleable Area	E	2,65,592	2,65,592	3,50,808	3,50,808	Sale Value (sold area) – Rs. 143.35 Cr Sale Value (saleable area) – Rs. 221.25
Sold Area	F	2,40,233	2,40,233	2,40,233	2,40,233	
ITC relevant	G=C*E/F	1,97,04,325	5,32,85,487	2,55,32,477	4,03,42,059	
Ratio of ITC (Total Credit/ Total Turnover)	H=G/D	4.39%	10.42%	3.75%	7.89%	
Increase in ITC availed post GST	I=Post GST H - Pre GST H	-	6.03%	-	3.92%	Ratio was liable to be revised considering errors highlighted above
Total basic demand under GST	J		51,11,78,843		51,11,78,843	
GST Charged @ 12%	K=J*1.12		6,13,41,461		6,13,41,461	
Total demand under GST	L=J+K		57,25,20,304		57,25,20,304	
Recalibrated base price	M=J*(1-H)		48,03,54,759		49,11,22,860	
Add GST @ 12%	N=M*1.12		5,76,42,571		5,89,34,743	
Commensurate demand price	O=M+N		53,79,97,330		55,00,57,603	
Profiteering amount as per DGAP	P=L-O		3,45,22,974		2,24,62,701	
Less: Interim benefit already passed to	R		1,53,35,365		1,53,35,365	

customer						
Benefit to be passed on	S=Q-R		1,91,87,609		71,27,336	

46. The Respondent in his submissions dated 27.09.2019 in response to the DGAP's Report dated 22.08.2019 has stated that incorrect period has been considered in the computation resulting in incorrect comparison of pre and post-GST credit (Amount of pre-GST credit currently considered was Rs. 2,17,84,314/- instead of Rs. 34,518,675/-). He has contended that the DGAP has acknowledged that he has only considered pre-GST ITC only from April 2016 to June 2017 and ignored all prior ITC. The DGAP has clarified that this was a uniform practice followed by him and the Respondent has also argued that this was completely arbitrary practice followed by the DGAP and not in consonance with Section 171 of CGST Act, 2017. This approach led in completely ignoring pre-GST ITC earned prior to April 2016 and would lead to absurd results. The Respondent has also submitted that the subject project was initiated prior to April 2016 and the Respondent had also incurred expenditures during such period and earned ITC. Accordingly, pre-GST period should have been taken from beginning of project to June 2017. The same was also accepted by the Applicants present at the time of hearing.

47. The Respondent has also contended that incorrect details of total saleable area considered in the computation by the DGAP (total saleable area currently considered was 2,65,592 Sq. ft. instead of 3,50,808 Sq. ft.). The DGAP has acknowledged that it was aware that the project comprised of residential and commercial development. The

DGAP has clarified that the only reason because of which he has not considered the commercial area was because no commercial area has been sold till date. In this regard, the Respondent has submitted that the reasoning provided by DGAP was completely irrational and inconsistent since the DGAP itself has considered unsold residential portion in his computation but failed to consider the unsold commercial portion. Further, since the development of residential units and commercial units was integrated therefore there was a single GST registration/ ITC pool. It was submitted that exclusion of commercial portion would result in passing of GST benefit accruing to buyers of commercial units to residential units, which was grossly incorrect. Even at the time of hearing, the Applicants have accepted that total saleable area should include commercial portion and at least to this extent the computation should be revised.

48. The Respondent has further contended that even if it was assumed that the methodology adopted by the DGAP was correct, there were apparent errors in the computation as the DGAP has considered incorrect figures for his calculation. The Respondent has stated that the below mentioned figures should be taken into consideration in the computation done by the DGAP:-

Particulars	Refrrence	As per DGAP's Report		Post Correction	
		Pre-GST	Post-GST	Pre-GST	Post-GST
Cenvat of Service Tax paid on input services	A	21,784,314		34,518,675	
ITC of GST Availed	B		58,910,304		58,910,304
Total Cenvat/ITC	C=A+B	21,784,314	58,910,304	34,518,675	58,910,304
Total Turnover	D	448,480,346	511,178,843	660,921,865	511,178,843

Saleable area	E	265,592	265,592	350,808	350,808
Sold area	F	240,233	240,233	240,233	240,233
ITC relevant	G=C*F/E	19,704,325	53,285,487	23,638,357	40,341,723
Ratio of ITC (Total Credit/ Total Turnover)	H=G/D	4.39%	10.42%	3.58%	7.89%
Increase in ITC availed post GST	I=Post GST H - Pre GST H	-	6.03%	-	4.32%
Total basic demand under GST	J		511,178,843		511,178,843
GST Charged @ 12%	K=J*1.12		61,341,461		61,341,461
Total demand under GST	L=J+K		572,520,304		572,520,304
Recalibrated base price	M=J*(1-H)		480,352,387		489,119,808
Add: GST @ 12%	N=M*1.12		57,642,286		58,694,377
Commensurate demand price	O=M+N		537,994,674		547,814,185
Profiteering amount as per DGAP	P=L-O		34,525,630		24,706,119
Benefit amount (Recalibrated base price less revised base price)	Q=M*(1-H)				
Less: Interim benefit already passed to customer	R		15,335,365		15,335,365
Benefit to be passed on	S=Q-R		19,190,265		9,370,754

49. The Respondent in his submissions dated 11.10.2019 has provided the revised computation with revised figures assuming that the methodology adopted by the DGAP was correct under various scenarios in Tables below:

Scenario A - Where correct total saleable area, pre-GST ITC and pre-GST turnover from Apr 14 to Jun 17 (instead of Apr 16 to Jun 17) was considered

Particulars	Reference	As per DGAP's Report		Post Correction	
		Pre-GST (Apr 16 to Jun 17)	Post-GST (Jul 17 to Oct 18)	Pre-GST (Apr 14 to Jun 17)	Post-GST (Jul 17 to Oct 18)
Cenvat of Service Tax paid on input services	A	21,784,314		34,518,675[1]	
ITC of GST Availed	B		58,910,304		58,910,304
Total Cenvat/ITC	C=A+B	21,784,314	58,910,304	34,518,675	58,910,304

Total Turnover	D	448,480,346	511,178,843	660,921,865*	511,178,843
Saleable area	E	265,592	265,592	350,808	350,808
Sold area	F	240,233	240,233	240,233	240,233
ITC relevant	G=C*F/E	19,704,325	53,285,487	23,638,357	40,341,723
Ratio of ITC (Total Credit/ Total Turnover)	H=G/D	4.39%	10.42%	3.58%	7.89%
Increase in ITC availed post GST	I=Post GST H - Pre GST H	-	6.03%	-	4.32%
Total basic demand under GST	J		511,178,843		511,178,843
GST Charged @ 12%	K=J*1.12		61,341,461		61,341,461
Total demand under GST	L=J+K		572,520,304		572,520,304
Recalibrated base price	M=J*(1-H)		480,352,387		489,119,808
Add: GST @ 12%	N=M*1.12		57,642,286		58,694,377
Commensurate demand price	O=M+N		537,994,674		547,814,185
Profiteering amount as per DGAP	P=L-O		34,525,630		24,706,119
Less: Interim benefit already passed to customer	Q		15,335,365		15,335,365
Benefit to be passed on	R=P-Q		19,190,265		9,370,754

Scenario B – Where only saleable area was corrected, period was taken from Apr. 2016 to June. 2017.

Particulars	Reference	As per DGAP's Report		Post Correction	
		Pre-GST (Apr 16 to Jun 17)	Post-GST (Jul 17 to Oct 18)	Pre-GST (Apr 16 to Jun 17)	Post-GST (Jul 17 to Oct 18)
Cenvat of Service Tax paid on input services	A	21,784,314		21,784,314	
ITC of GST Availed	B		58,910,304		58,910,304
Total Cenvat/ITC	C=A+B	21,784,314	58,910,304	21,784,314	58,910,304
Total Turnover	D	448,480,346	511,178,843	448,480,346	511,178,843
Saleable area	E	265,592	265,592	350,808	350,808
Sold area	F	240,233	240,233	240,233	240,233
ITC relevant	G=C*F/E	19,704,325	53,285,487	14,917,878	40,341,723
Ratio of ITC (Total Credit/ Total Turnover)	H=G/D	4.39%	10.42%	3.33%	7.89%
Increase in ITC availed post GST	I=Post GST H - Pre GST H	-	6.03%	-	4.57%
Total basic demand under GST	J		511,178,843		511,178,843
GST Charged @ 12%	K=J*1.12		61,341,461		61,341,461
Total demand under GST	L=J+K		572,520,304		572,520,304

Recalibrated base price	M=J*(1-H)		480,352,387		487,840,550
Add: GST @ 12%	N=M*1.12		57,642,286		58,540,866
Commensurate demand price	O=M+N		537,994,674		546,381,416
Profiteering amount as per DGAP	P=L-O		34,525,630		26,138,889
Less: Interim benefit already passed to customer	Q		15,335,365		15,335,365
Benefit to be passed on	R=P-Q		19,190,265		10,803,523

50. The Respondent has also contended that the above computation was based on the methodology used by the DGAP in his Report dated 24.04.2019 and also sought by the Authority. However, he has in his previous submissions already highlighted that this methodology didn't reflect correct saving on GST Input Tax Benefit.

51. The Applicants in their submissions dated 09.06.2019 have referred to Table 'B' in the DGAP's Report dated 24.04.2019 and raised following issues: -

a. The Respondent has availed CENVAT of Service Tax of Rs. 2,17,84,314/- but the entire amount was not utilized and an amount of Rs. 72,59,350/- was left balance and which formed part of GST Credit as transitional credit and hence the credit availed pre-GST should be considered after deducting the balance of CENVAT transferred to GST. The actual amount under S. No. 5 for item No. D under pre-GST should be Rs. 1,45,24,964/- only (Rs. 2,17,84,314 – Rs. 72,59,350/-).

b. The Respondent has actually availed total GST Credit of Rs. 7,95,69,826/- against reported figure of Rs. 5,89,10,304/- inclusive of transitional Credit of Rs. 1,31,25,206/-.

c. Based on above submissions the revised Table – 'B' was given as follows:

Sino	Particulars		Total (Pre-GST)	Total (Post-GST)
1	2		3	4
1	CENVAT of Service Tax paid on Input Services	(A)	1,45,24,964	-
2	Credit of VAT paid on Purchases of Inputs	(B)	-	-
4	Input Tax Credit of GST Availed	(C)	-	7,95,69,826
5	Total CENVAT/VAT/Input Tax Credit Available	(D) = A+B or C	1,45,24,964	7,95,69,826
6	Total Turnover as per Home Buyers List	(E)	44,84,80,346	51,11,78,843
7	Total Saleable Area (in Sq. Fts)	(F)	2,65,592	2,65,592
8	Area Sold relevant to Turnover as per Home buyers List	(G)	2,40,233	2,40,233
9	Relevant CENVAT / Input Tax Credit	(H) = G*D/F	1,31,38,105	7,19,72,416
10	% of CENVAT / ITC to Turnover	(J) = H/E*100	2.93	14.08

d. From the above re-worked figures the Respondent has not passed on ITC to the tune of 11.15% (14.08-2.93) as per observations in para 18 of the said Report dated 24.04.2019. Based on the above reworked figures, the Table – 'C' of the said Report was reworked as follows:

Sino	Particulars		Total (Pre-GST)	Total (Post-GST)
1	2		3	4
1	Output Tax Rate	(A)	4.50%	12.00%
2	Ration of CENVAT / ITC as per Table - B	(B)	2.93%	14.08%
3	Increase in Input Tax Credit post GST	(C)	-	11.15%
4	Total Basic Demand during July to October 2017	(D)	-	51,11,78,843
5	GST Charged	(E)	-	6,13,41,461
6	Total Demand	(F) = D+E	-	57,25,20,304
7	Recalibrated Base Price	(G) = D*(1-C)	-	45,41,82,402
8	GST @ 12%	(H) = G * 12%	-	5,45,01,888
9	Commensurate Demand Price	(I) = G+H	0	50,86,84,290

10	Excess Collection of Demand or Profiteered Amount	(J) = F-I	0	6,38,36,014

e. The Applicants have also clarified the figures in above Tables in revised submissions dated 10.06.2019 and stated that-

i) **Table 'B' of the DGAP's Report**

Serial No. 1 - CENVAT of service tax paid on input services.

As per the DGAP's Report- Rs. 2,17,84,314/-

As per his submission- Rs. 1,45,24,964/-

Difference – Rs. 72,59,350/-

They have stated that the difference figure they have taken from Service Tax value in TRAN-1 Return and also contented that Rs. 72,59,350/- was the unutilised part of total figure taken by the DGAP in Table 'B' of his Report. Hence their submission figure of Rs. 1,45,24,964/- might be considered for calculation of Serial No. 2 of Table 'B' of DGAP's Report for the pre-GST period.

ii) **Table 'B' of the DGAP's Report**

Serial No. 4. Clarification

Amount as per their submission for post-GST period– Rs. 7,95,69,826/-

ITC claimed by the Respondent from July 17 to March 18- Rs. 3,92,46,760/-

ITC claimed by the Respondent from April 18 to Sep 18 – Rs. 2,71,97,860/-

Transactional input claimed by the Respondent (this might also be considered as it was also part of ITC utilised by the Respondent post-GST) - Rs.1, 31, 25,206/-

Total ITC in post-GST period- Rs. 7,95,69,826/-

They have also enclosed a copy of electronic ledger of the Respondent as evidence. They have also stated that the figures related to total turnover, total saleable area remained the same as in the Table 'B' of DGAP's Report

iii) **Table 'B' of the DGAP's Report**

Serial No. 09 Clarification

The methodology of calculation

Serial No. 9 - Relevant CENVAT/ITC and

Serial No. 10 - Percentage of CENVAT/ITC was same as adopted by DGAP in his Report.

iv) **Table 'C' of the DGAP's Report**

Methodology of calculations in Table 'C' of their submission was same as per Table 'C' of the DGAP's Report.

52. The Applicants have filed further submissions dated 15.06.2019 which were here under:

a. The Respondent had never come forward to give any ITC benefit of GST as claimed by him in his letter dated 24.05.2019. After a complaint was filed before GST Commissioner of Andhra Pradesh, the Respondent had come forward with the offer of 3% ITC benefit to be passed.

b. that even the Respondent in his letter dated 24.05.2019, while questioning the methodology adopted by the DGAP in his Report, accepted the fact that the credit under Andhra Pradesh VAT Act and CENVAT Credit of Inputs was not available and that was one of the major reasons for difference in credits pre-GST and post-GST.

c. The Respondent had claimed input credit by way of "Transitional arrangements for inputs" in terms of Sub Section 6 of Section 140 of CGST Act, 2017 read with similar provision under APSGST Act, 2017 and the same was credited to his electronic credit ledger.

d. The Respondent had availed the AP VAT and CENVAT credit of goods which were procured prior to GST and used by the Respondent for making taxable supplies post GST. Further, the Respondent had claimed the said credit as per Section 140 of CGST Act, 2017 because the inputs were used for supplies post GST and on such supplies the Respondent had collected GST at applicable rate from the Applicants.

e. Since the supply was made post-GST for which Transitional credit was availed as input under GST as Transitional credit of APVAT and CENVAT of Central Excise and the Applicants paid the GST on such supplies post GST, the said credit should also be included in ITC for purpose of calculation of benefit availed by the Respondent to be passed on to the Applicants.

f. It was also submitted that if the supply was made prior to GST the same would be subjected to AP VAT @ 1.25% and the

Respondent should not have availed any CENVAT credit benefit under APVAT Act, 2005 and Central Excise Provisions. Since the supply took place post-GST, the Applicants had paid GST @12% (as demanded by the Respondent) and against the same the Respondent had claimed transitional credit. Collecting full tax on such supplies without passing on transitional credit should also be considered as profiteering by the Respondent.

g. It was further submitted that the Respondent had claimed CENVAT Credit as per ST-3 in their transitional credit as submitted earlier which was also claimed as transitional credit.

h. Since the said credit was not actually availed under Service Tax Provisions and now under GST as transitional credit resulting in higher payment of GST @12% by the Applicants against 4.5% Service Tax earlier, the said CENVAT under Service Tax should be reduced and the same should be added to GST ITC in terms of Section 140 of CGST Act.

i. The Applicants have also referred to Press Release dated 15th June 2017 by CBEC, where at para 5, it was mentioned that full input credit should be passed on. The ITC under present circumstances should also include transitional credit.

53. The Applicants in their submissions dated 25.06.2019 in response to the Respondent's submissions dated 24.05.2019 have contended that:-

a. The Respondent had never come forward to pass on the benefit of GST and only on submission of various complaints; finally

approaching the State Taxes Office came forward with proposal to pass some benefit of GST.

b. The Respondent in his letter dated 24.05.2019 was not correct that he had came forward suo-moto to pass on the ITC benefit. It was only due to proactive intervention of the Applicant No. 1 and some other home buyers that the Respondent was forced to pass on some benefit after writing to State Tax Commissioner. On 18.08.2017 letter to Mr. Mansh Karserija was sent by registered post. Again on 12.12.2017 letter to Mr. Mansh Karserija was given by hand and the complaint was filed before State GST Commissioner and Jt. Commissioner on 22.12.2017 and before State Screening Committee on 25.12.2017. Only after filing complaint to GST State Commissioner and Jt. Commissioner of State Tax, Visakhapatnam, the Respondent has sent us email on 22.12.2017 with proposal to pass on ITC Benefit. They also stated that as evident from Table A of Report of the DGAP, the said benefit was passed on after December 2017, which clearly showed that the Respondent has neither came with clean hands before the Anti Profiteering Authority nor before the Committee and was trying to camouflage the facts to suit their requirements as being done with applicants.

c. The ITC shown in post-GST period in Table 'B' of the Report of the DGAP was not in agreement with Returns filed by the Respondent and require certain adjustments. Considering the entire information made available to Applicants and as per

submissions made by the Respondent by his letter dated 24th May 2019, the correct credit availed by him was summarized as follows:-

Total GST Regular credit availed as per electronic credit ledger- Rs. 6,80,60,410/-

Add: Transitional Credit availed by Form GST TRAN-1- Rs. 1,31,25,206/-

Less: Credit in relation Phase – II (as per explanation below)- Rs. 23,97,940/-

Total GST Credit availed by Respondent in relation to Phase – I Rs.7,87,87,676/-

d. It was also submitted that the Respondent has claimed credit in relation to Phase–II for Rs. 91,49,504/- in the information submitted to the DGAP as follows:-

Between July 2017 to March 2018-Rs. 43,53,624/-

Between April 2018 to October 2018-Rs. 47,95,880/-

Total-Rs. 91,49,504/-.

e. The Applicant No. 1 has further stated that as per information available on AP RERA portal, the Phase II has commenced from 01.05.2018 and the Respondent has submitted that ITC in relation to phase II in period July 2017 to March 2018. He has argued that it was not possible for a unit to use ITC prior to commencement of the project and hence the claim of ITC used for period July 2017 to March 2018 should not be apportioned to Phase II. He has also submitted that in the light of

questionable act of the Respondent, the Applicants left with no option so he has considered 50% of input claimed by the Respondent for period April 2018 to October 2018 as ITC for Phase II., i.e., 50% of Rs. 47,95,880/- = Rs. 23,97,940/-.

f. The Applicants has further submitted that in relation to Andhra Pradesh VAT and Central Excise credit, the same was not available in pre-GST regime and hence the credit of the same was claimed by the Respondent as transitional credit should be considered as GST Credit for purpose of arriving to correct GST credit availed by the Respondent. Therefore, total ITC under GST should be considered at Rs. 78,87,87,676/- as submitted by Applicants above.

g. The Applicants have again submitted the revised figures by revising the ITC figures and total saleable area and claimed that total pre-GST CENVAT Credit should be Rs. 3,00,24,964/- (i.e., Rs. 3,72,84,314/- (actual CENVAT Credit) – Rs. 72,59,350/- (which was transferred to GST)) and reproduced the Table 'B' & 'C' of DGAP's Report below for reconsideration:-

Table 'B'

(amount in Rs.)

Sino	Particulars		Total (Pre-GST)	Total (Post-GST)
1	2		3	4
1	CENVAT of Service Tax paid on Input Services	(A)	3,00,24,964	-
2	Credit of VAT paid on Purchases of Inputs	(B)	-	-
4	Input Tax Credit of GST Availed	(C)	-	7,87,87,676
5	Total CENVAT/VAT/Input Tax Credit Available	(D) = A+B or C	3,00,24,964	7,87,87,676
6	Total Turnover as per Home Buyers List	(E)	64,33,80,346	51,11,78,843
7	Total Saleable Area (in Sq. Fts)	(F)	3,50,808	3,50,808
8	Area Sold relevant to Turnover as per Home buyers	(G)		

	List		2,40,233	2,40,233
9	Relevant CENVAT / Input Tax Credit	(H) = G*D/F	2,05,61,068	5,39,53,729
10	% of CENVAT / ITC to Turnover	(J) = H/E*100	3.2	10.55

Table 'C'

(amount in Rs.)

Sino	Particulars		Total (Pre-GST)	Total (Post-GST)
1	2		3	4
1	Output Tax Rate	(A)	4.50%	12.00%
2	Ration of CENVAT / ITC as per Table - B	(B)	3.20%	10.55%
3	Increase in Input Tax Credit post GST	(C)	-	7.35%
4	Total Basic Demand during July to October 2017	(D)	-	51,11,78,843
5	GST Charged	(E)	-	6,13,41,461
6	Total Demand	(F) = D+E	-	57,25,20,304
7	Recalibrated Base Price	(G) = D*(1-C)	-	47,36,07,198
8	GST @ 12%	(H) = G * 12%	-	5,68,32,864
9	Commensurate Demand Price	(I) = G+H	0	53,04,40,062
10	Excess Collection of Demand or Profiteered Amount	(J) = F-I	0	4,20,80,242

54. The Applicants have further in their email submissions dated 19.07.2019 in response to the Respondent's submissions dated 02.07.2019 have averred that pre-GST Period should have been taken from the Inception of the project till June 2017. Secondly, the DGAP has taken residential area as total saleable area and ignored commercial area resulting in incorrect calculations. In this regard, the Applicants have clarified that they were not in agreement with the Respondent on the above said issues. In their submissions dated 25.06.2019 during the hearing they have mentioned, even if, the claim of the Respondent was accepted for time being and calculations were made with the said consideration still the ITC to turnover ratio would be 7.35%, which was higher than what the Respondent has offered.

Hence, it was evident that the Respondent was involved in profiteering. Further, they asserted that the DGAP was correct in considering the period from April, 2016 rather than the commencement of the project, since the GST provisions have restricted the eligibility of input under Section 140 of CGST Act, 2017 for one year. Their claim of ITC to turnover ratio remained at 11.5% as submitted in their submission dated 09.06.2019.

55. The DGAP in his supplementary Report dated 07.06.2019 has observed that the Respondent has calculated the profiteered amount by adopting his own methodology, by varying various parameters considered during the investigation by the DGAP. The period covered by the investigation of the DGAP for arriving at the ITC availability during the pre-GST period, was from 01.04.2016 to 30.06.2017, whereas the Respondent has considered the pre-GST period since the initiation of the project till 30.06.2017. Further, the Respondent has taken saleable value for apportioning the ITC and the amount of taxes has been excluded from the profiteered amount, contrary to the method adopted by the DGAP.

56. The DGAP in his supplementary Report dated 22.08.2019 and 04.09.2019 has stated that pre-GST period should have been taken from May, 2015 to June, 2017, whereas the DGAP has taken the period from April, 2016 to June, 2017. The DGAP has also contended that he has considered a uniform pre-GST period from April, 2016 to June, 2017 across all the investigations relating to the Real Estate sector. The DGAP has also stated that he has taken the residential area as the total saleable area and not considered the commercial

area. The factual information submitted by the Respondent was as follows:-

Total residential area: 2, 65,592 sq. ft.

Total commercial area (as claimed by the Respondent): 85,216 sq. ft.

Total area (as claimed by the Respondent): 3,50,808 sq. ft.

57. The DGAP has also submitted that as per the details of the buyers submitted by the Respondent, he has sold only the residential portion of the project and no commercial unit has been sold by the Respondent during or before the period of investigation considered by the DGAP. Apparently, there was no turnover from the commercial area of the project, the area sold relevant to turnover as per Column 'G' of Table 'B' of the DGAP's Report dated 24.04.2019 consisted of only the residential portion and hence, the total saleable area pertaining to the residential portion only, has been considered by the DGAP in Column 'F' of Table 'B' of the Report dated 24.04.2019. The DGAP has further argued that the Applicant No. 1 has submitted that the unutilized CENVAT credit balance of Rs. 1,31,25,206/- which has transitioned into the GST credit should be considered as post-GST credit. In this regard the DGAP has stated the transitional credit related to the ITC of Excise Duty/Service Tax/VAT which was available to the Respondent during the pre-GST period and the same was carried forward as transitional credit in form TRAN-1 in post-GST period and was not a new credit availed. The same has been considered in the DGAP's Report dated 24.04.2019.

58. We have carefully considered the Report of the DGAP, submissions made by the Respondent & the Applicants and based on the record it was revealed that the Respondent is in the Real Estate business and the DGAP's Report was with regard to one of his projects namely "The Celest" located in Vishakhapatnam, Andhra Pradesh. On examining the various submissions we find that the following issues need to be addressed:-

a. Whether there was any net additional benefit of ITC to the Respondent?

b. Whether there was any violation of the provisions of Section 171 of the CGST Act, 2017, by not passing on the benefit ITC by the Respondent?

59. The Respondent has himself agreed to the profiteering and claimed to have passed on a preliminary benefit of 3% suo moto on the demands post implementation of the GST of the additional ITC which amounted to Rs. 1,53, 35,365/- (i.e. 3% of Rs. 51, 11, 78,843/-) till 31 October 2018 received by him on the project to his customers vide his submissions dated 23.05.2019. While considering the various contentions made by the Respondent on the report of the DGAP, our findings was as under:-

A. The Respondent has computed the interim GST benefit by estimating taxes which were a cost to him in the pre-GST regime. We find that it is a methodology based on estimated or assumed figures which is not accurate and we agree with

the methodology adopted by the DGAP while determining profiteering.

B. We find that the Respondent has contended that the Authority has not prescribed methodology for calculation of profiteering and consequently the DGAP has followed a methodology that was questionable and erroneous. In this regard, we observe that the profiteering has to be determined on cases to case basis, by adopting the most appropriate and accurate method based on the facts and circumstances of each case as well as the nature of the goods and services supplied. We reiterate that there cannot be any fixed mathematical formulations/methodology for determination of the quantum of benefit to be passed on which could cover different sectors of the economy and that each case has to be decided based on its specific facts. In this case, for calculation of profiteering, the increase in the ITC as a percentage of total taxable turnover has been taken by the DGAP and we do not find anything incorrect therein.

C. The Respondent has also argued that pre-GST period should have been taken from May, 2015 to June, 2017, whereas the DGAP has taken the period from April, 2016 to June, 2017. The DGAP has contended that he has considered a uniform pre-GST period from April, 2016 to June, 2017 across all the investigations relating to the Real Estate sector and we find this argument of the DGAP

appropriate as principle of parity and uniformity in respect of period before the implementation of the GST, followed by him in real estate cases to arrive at profiteering amount.

D. The Respondent has also contended that the DGAP has taken the residential area as the total saleable area and not considered the commercial area. In this regard, the DGAP has stated that the Respondent has sold only the residential portion of the project and no commercial unit has been sold by him during or before the period of investigation considered by the DGAP. Apparently, there was no turnover from the commercial area of the project, the area sold relevant to turnover as per Column 'G' of Table 'B' of the DGAP's Report dated 24.04.2019 consisted of only the residential portion and hence, the total saleable area pertaining to the residential portion only, has been considered by the DGAP in Column 'F' of Table 'B' of the Report dated 24.04.2019. We find that the DGAP has rightly observed that the Respondent has sold only the residential portion of the project and no commercial unit has been sold by him so no turnover is attributable to the commercial area. Hence, this plea of him cannot be accepted.

E. The Respondent has also argued that he would be able to pass on the actual ITC benefit only after the receipt of completion certificate (CC) of the subject project as the ITC in respect of unsold units has to be reversed after the receipt of CC. We find this argument incorrect as any benefit

accrued on account of additional ITC has to be passed on to the customers by the Respondent in terms of Rule 129 (6) of the CGST Rules, 2017 as soon as it is availed by the supplier.

F. The Respondent has also submitted that the tax on the input services has been increased from 15% to 18% and hence he has not got additional benefit of ITC which he was required to pass on. In this connection it would be pertinent to mention that the Respondent has got benefit of ITC on goods as well and it is only the additional benefit of ITC, from his own supplies in the value chain, which he has availed post-GST which he is required to pass on. It is established from the returns filed by the Respondent that he has availed relevant ITC of Rs. 1,97,04,325/- during the pre-GST period and Rs. 5,32,85,487/- during the post-GST period @4.32% and 10.42% of the turnover respectively during the above periods which has resulted in additional ITC benefit of 6.03% of the turnover to him which he is bound to pass on.

G. The Respondent has also contended that he was not in agreement with the computation of the profiteered amount made by the DGAP as it included the GST which had been deposited by him in the Govt. account. The plea taken by the Respondent 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 he has denied the benefit of additional ITC to them by not reducing the prices of the flats commensurately. Had he not collected additional GST the buyers would have paid less price and by doing so he has 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 forfeited their revenue in favour of the flat buyers to provide them accommodation at affordable prices and by compelling the buyers to pay the same the Respondent has not only defeated the intention of the above Governments but has also acted against the interests of the house buyers hence the contention of the Respondent is not justified and therefore, the GST collected by him on the additional realisation has rightly been included in the profiteered amount by the DGAP and there is no question of reducing an amount of GST paid to the Government from the profiteered amount which has been forcibly collected by him from the flat buyers.

H. The Respondent has also averred that the basis adopted by DGAP for allocation of ITC between sold and unsold portion was incorrect as the DGAP has considered project area as the basis to allocate ITC pertaining to sold and unsold portion of the project and computed "Relevant ITC" by drawing proportion of sold area vis-a-vis saleable area which has been done for both pre-GST and post-GST

regime. The Respondent has also submitted that area was not a correct basis to allocate credit pertaining to sold and unsold portions and "value" was more logical and correct base. The Respondent has also submitted his computations on the basis of value. The DGAP has already considered value as turnover in his computations and he has arrived at relevant ITC only after considering the area sold and turnover. Therefore, we find no reason to deviate from the approach of the area taken to find the relevant ITC by the DGAP and therefore, the above argument of the Respondent cannot be considered.

I. The Respondent has also argued that similar methodology adopted in the case of M/s Pyramid Infratech has already been stayed by the Hon'ble Delhi High Court. In this context, we find that the argument of the Respondent is not entirely correct as the Hon'ble High Court has only granted a conditional stay on recovery subject to the Respondent depositing an amount of Rs. 5,11,60,450/- which he had admitted before the Authority.

J. The Respondent has also argued that Section 171 of the CGST Act, 2017 violates Article 19 (1) (g) of the Constitution which is Right to trade, as it tries to fix prices. He has also cited cases like Abbott Healthcare Pvt. Ltd. Hindustan Unilever Ltd. and Jubilant Food works Ltd. to support his argument. We find this argument of the Respondent incorrect as Section 171 was inserted in the Act to ensure

that benefit of GST rate reduction or ITC benefit is passed on to the eligible customers on account of GST implementation. It has nowhere acted as price regulator but has worked in interest of consumers. Further, the cases cited by the Respondent in support are still under review in the High Court so his argument is untenable.

K. The Respondent has further argued that no methodology or guidelines have been prescribed under GST laws to ascertain benefit to be passed. In the absence of the aforesaid methodology, the entire proceedings would be a futile exercise and there was no machinery for assessment of tax. In this regard, he has relied upon the Apex Court's decision in the case of **CIT vs. B. C. Srinivasa Shetty** and he has also cited other cases viz. **K.T. Moopil Nair vs. State of Kerala; Rai Ramkrishna vs. State of Bihar; State of A.P. vs. Nalla Raja Reddy; Vishnu Dayal Mahendra Pal vs. State of U.P.; and D.G. Gose and Co. (Agents) (P) Ltd. vs. State of Kerala** in his defence. We find the contention of the Respondent wrong and incorrect as the Authority has notified the Methodology and Procedure vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017 which was also made available on its website for ready reference for the trade. As the facts of each case are different so no fixed mathematical methodology can be prescribed for each case separately. Therefore, the cases cited above have no relevance here.

The overarching principle of the existent law is to ensure that the supplier has not pocketed the ITC benefit accrued to him on account of implementation of GST and has passed it on.

60. The Applicants have also contended that the unutilized CENVAT credit balance of Rs. 1,31,25,206/- which has transitioned into the GST credit should be considered as post-GST credit and accordingly they have submitted their computation of profiteering. In this connection, the DGAP has stated that the transitional credit related to the ITC of Excise Duty/Service Tax/VAT which was available to the Respondent during the pre-GST period and the same was carried forward as transitional credit in form TRAN-1 in post-GST period and was not a new credit availed. We find this argument of the DGAP as correct and in line with the existent law so this contention of the Applicants is not sustainable.

61. The DGAP after taking into account the benefit of credit available during pre-GST (April 2016 to June 2017) period to the taxable turnover received during the said period and comparing the same with the post-GST period (01.07.2017 to 31.10.2018) has arrived at the percentage of ITC. Based on the above analysis the DGAP has as has been shown in the Table-B above correctly estimated the net benefit of ITC as 6.03%. However, the DGAP in his Report dated 24.04.2019 has mentioned that he has duly verified the Respondent's claim of having suo moto passed on an amount of Rs. 5,04,818/- to the above Applicants from the demand letters issued to the Applicants No. 1 to 9. Therefore, the

Respondent had profiteered by an amount of Rs. 6,31,629/- [Rs. 11,36,447/- (-) Rs. 5,04,818/-] in respect of the Applicants No. 1 to 9. The DGAP has also asserted that the Respondent had also realized an additional amount of Rs. 1,85,55,980/- (Sr. No. 10 of Table- 'D') which included both the profiteered amount @ 6.03% of the basic price and GST on the said profiteered amount, from 234 other recipients. Therefore, this additional amount of Rs. 1,85,55,980/- was required to be returned to such eligible recipients. Thus, the total profiteered amount (excluding the benefit already passed on) in respect of all 243 home-buyers (including Applicants No. 1 to 9) came to Rs. 1,91,87,609/-. However, this claim of the DGAP cannot be considered as the Respondent's claim of passing of the ITC benefit suo moto has to be verified from the Applicants and not from the demand letters which he had submitted to the DGAP during the time of investigation. Therefore, the DGAP is directed to verify the above claims of the Respondents with conclusive evidence like affidavit from the Applicants or credit notes issued to the recipients. However, this Authority is in agreement with the DGAP's calculations as mentioned in Annexure 15 of his Report. Thus, based on the above facts this Authority determines the profiteered amount as Rs. 3,45,22,974/- which includes GST @12% on the base profiteered amount of Rs. 3,08,24,084/- realized from 243 out of total 267 residential units for the period w.e.f. 01.07.2017 to 31.10.2018 as per the Annexure- 15 of the Report., including the above Applicants.

62. It was established from the perusal of the above facts of the case that the provisions of Section 171 of the CGST Act, 2017 had been contravened by the Respondent as he had profiteered an amount of

Rs. 3,45,22,974/- which includes GST @12% as applicable on the base profiteered amount of Rs. 3,08,24,084/- from the 243 residential units for the period w.e.f. 01.07.2017 to 31.10.2018 as per Annexure- 15 of the Report. Accordingly, the above amounts shall be paid to the above Applicants and the other eligible house buyers by the Respondent along with interest @18% from the date from which these amounts were realised from him till he was paid as per the provisions of Rule 133 (3) (b) of the CGST Rules, 2017, failing which shall be recovered by the concerned Commissioner CGST / SGST and paid to the eligible house buyers.

63. From the above discussions it is clear that the Respondent has profiteered by an amount of Rs. 3,45,22,974/- during the period of investigation. Therefore, in view of the above facts, the Authority under Rule 133 (3) (a) of the CGST Rules, 2017, orders that the Respondent shall reduce/refund the price to be realized from the buyers of the flats commensurate with the benefit of ITC received by him as has been detailed above. As far as the final computation of the additional ITC that will be available to the Respondent is concerned, the same cannot be determined at this stage, as the construction of the project is yet to be completed. Hence, the DGAP is directed to carry out a comprehensive investigation post the issuance of occupancy certificate in respect of the said project. Further, we observe that in any case, the unsold area, in its entirety, has not been considered for computation of the profiteering amount in as much as the present investigation has been conducted only up to 31.10.2018. Therefore, we order that any additional benefit of ITC, which may accrue to the Respondent

subsequently, shall also be passed on by him to all eligible buyers. In case this additional benefit is not passed on to the Applicant No. 1 to 10 or other eligible buyers, they shall be at liberty to approach the Andhra Pradesh State Level Screening Committee for initiating fresh proceedings under the provisions of Section 171 of the above Act against the Respondent. The concerned jurisdictional CGST or SGST Commissioner shall take necessary action to ensure that the benefit of additional ITC was passed on to the eligible house buyers in future.

64. It is also evident from the above narration of facts that the Respondent has denied benefit of ITC to the buyers of the flats being constructed by him in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has committed an offence under Section 171 (3A) of the above Act and therefore, he is liable for imposition of penalty under the provisions of the above Section. Accordingly, a Show Cause Notice be issued to him directing him to explain as to 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 him. Accordingly, the notice dated 26.04.2019 vide which it was proposed to impose penalty under Section 29, 122-127 of the above Act read with Rule 21 and 133 of the CGST Rules, 2017 is withdrawn to that extent.

65. Further the Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Andhra Pradesh to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by the Authority was passed on to all the

buyers. A report in compliance of this order shall be submitted to this Authority by the DGAP within a period of 3 months from the date of receipt of this order.

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

Sd/-
(B. N. Sharma)
Chairman

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

Certified copy

(A.K. Goel)
Secretary, NAA

Sd/-
(Amand Shah)
Technical Member

F. No. 22011/NAA/38/ApexMeadows/2019 Date: 06.12.2019

Copy To:-

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14. Office of the Chief Commissioner of Customs & Central Tax, Visakhapatnam Zone, GST Bhavan, Port Area, Visakhapatnam, Andhra Pradesh- 530035,
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(A.K. Goel)
Secretary, NAA