

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

Case No. 71/2019
Date of Institution 17.06.2019
Date of Order 13.12.2019

In the matter of:

1. Shri. Pradeep Kumar, Village Jainpur Sadhan (5), Indri, Karnal, Haryana-132041.
2. 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

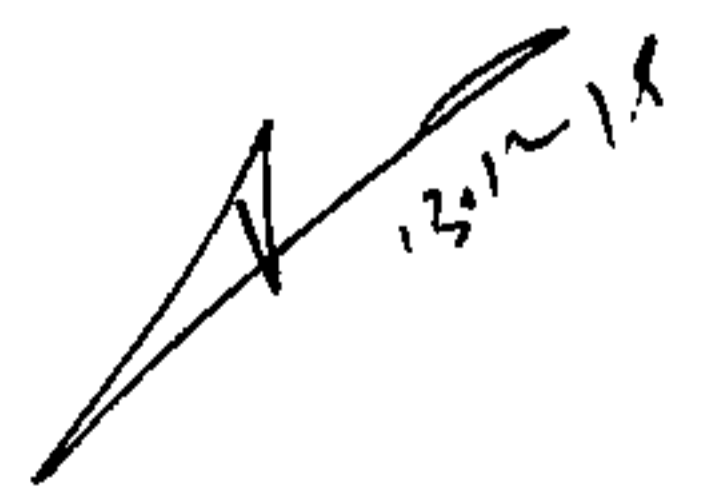
Versus

M/s Fusion Buildtech Pvt. Ltd., A-6 G.F., Master Somnath Marg, Yojana Vihar, Delhi-110092

Respondent

Quorum:-

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

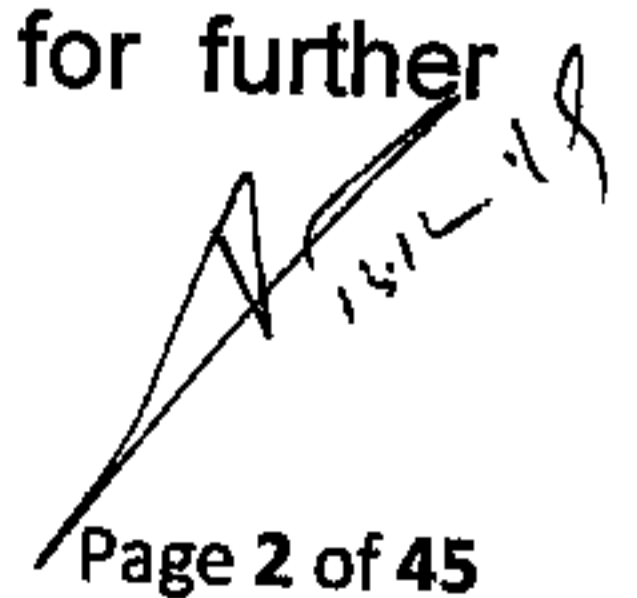


Present:-

1. Sh. Pradeep Kumar, the Applicant No. 1 in person.
2. Sh. P.K. Tyagi, Superintendent, for the Applicant No. 2.
3. Ms. Nidhi Gupta, Advocate, Sh. Bharat Bhushan, Advocate, Sh. Ashish Vaish, Advocate, Sh. Manish Gupta, Authorised Representative and Sh. Brijesh Kumar, Authorised Representative, for the Respondent.

ORDER

1. The present Report dated 02.04.2019 and subsequent Reports dated 30.05.2019 & 14.06.2019 have been received from the Applicant No. 2 i.e. The Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that the Applicant No. 1 had booked a flat in the Respondent's project "Fusion Homes" situated at off GH-05A, Greater Noida (West), Uttar Pradesh and he alleged that the Respondent had increased the price of the flat after introduction of GST w.e.f. 01.07.2017 and had not passed on the benefit of input tax credit by way of commensurate reduction in the price. The Uttar Pradesh State Screening Committee on Anti-profiteering on prima facie having satisfied itself that the Respondent had not passed on the appropriate benefit of input tax credit to the above Applicant as the input tax credit available to Respondent was to be apportioned against the instalments towards the price of the flat forwarded the said application with its recommendation, to the Standing Committee on Anti-profiteering on 06.08.2018 for further action, in terms of Rule 128 of the above Rules.

 15/12/18

2. The above reference was examined by the Standing Committee on Anti-profiteering and vide its minutes dated 06.09.2018 it had forwarded the same to the DGAP for detailed investigation. The application was forwarded to the DGAP along with the payment details as is given in the Table below:-

Table (Amount in Rs.)

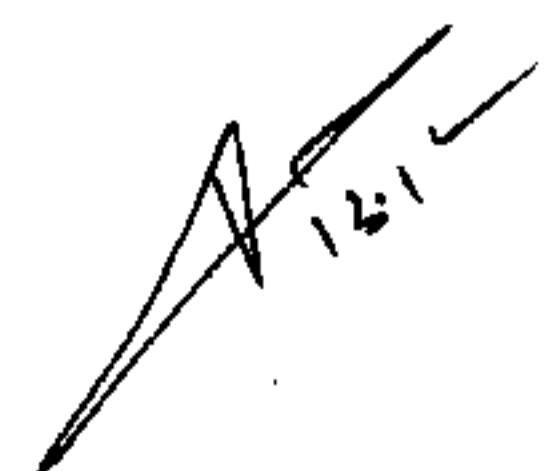
Particulars	Basic Sale Price	Service Tax	GST	Total
Agreement Value (A)	39,07,327	1,87,695	-	40,95,022
Paid in Pre-GST era (B)	21,88,103	1,05,114	-	22,93,217
Balance to be paid Post GST (C)= (A)-(B)	17,19,224	82,581	-	18,01,805
Demanded by the Respondent (D)	17,19,224	-	2,09,290	19,28,514
Excess Demand: (E)= (D)-(C)				1,26,709

3. The DGAP on receipt of the application issued notices dated 15.10.2018 and 05.11.2018 to the Respondent to reply as to whether he admitted that the benefit of ITC had not been passed on to the Applicant No. 1 by way of commensurate reduction in price and if so, to suo moto determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all the supporting documents. The Respondent was also given an opportunity to inspect the non-confidential evidences/information submitted by the above Applicant which was not availed by him. However, the Respondent did not avail of the said opportunity and vide his letter dated 02.11.2018, requested for extension of 30 days time to submit the documents.

4. Three summons dated 15.11.2018, 27.11.2018 and 04.12.2018 under Section 70 of the Central Goods and Services Tax Act, 2017 read

with Rule 132 of the Rules were also issued to the Respondent, to appear before the Superintendent, DGAP and produce the relevant documents. In response to the Summons, the Respondent submitted some documents, vide his letters dated 26.11.2018, 05.12.2018 and 10.12.2018. Upon scrutiny of the documents, the DGAP observed that the complete documents were not submitted by the Respondent. An e-mail dated 10.12.2018 was then sent to the Respondent to submit the requisite documents. The Respondent, vide his e-mail dated 13.12.2018 had then promised to submit the pending documents in December, 2018. The Respondent visited the DGAP on 26.12.2018 and vide his letter dated 26.12.2018, committed to submit the pending documents by 28.12.2018.

5. The Respondent submitted some more documents vide his letter dated 28.12.2018. The DGAP upon scrutinising, found that the details submitted by the Respondent were only in relation to part of the project and not for the entire project. The DGAP then issued fourth Summon to the Respondent on 05.02.2019, directing him to appear before the Superintendent, DGAP on 12.02.2019. The Respondent did not appear but submitted certain details, vide his letter dated 12.02.2019 and requested for 15 more days to submit the remaining details/documents. A letter dated 14.02.2019 was issued to the Respondent by the DGAP to submit the balance documents. The Respondent submitted few more documents, vide his letter dated 22.02.2019 but did not submit soft copies of the required documents, despite several requests and did not submit the data in the format as prescribed in the DGAP's Notice dated 15.10.2018.



6. The DGAP vide his e-mail dated 13.03.2019, also gave the above Applicant an opportunity to inspect the non-confidential documents/reply furnished by the Respondent during the period 15.03.2019 to 18.03.2019. The Applicant visited the DGAP on 18.03.2019 and inspected the documents submitted by the Respondent.
7. The DGAP had sought extension of time for completing the investigation which was extended by this Authority vide its order dated 26.12.2018 in terms of Rule 129 (6) of the CGST Rules, 2017. The period of the investigation is from 01.07.2017 to 30.09.2018.
8. In response to the Notice dated 15.10.2018 issued by the DGAP, the Respondent vide his replies dated 02.11.2018, 13.11.2018, 26.11.2018, 05.12.2018, 10.12.2018, 13.12.2018, 26.12.2018, 28.12.2018, 12.02.2019, 22.02.2019 and 14.03.2019 submitted that before the introduction of GST, he had applied for completion certificates in respect of Towers A to F and all the expenses related to construction of these towers were incurred before the implementation of GST. Therefore, he had not received any benefit of input tax credit in respect of these towers and the benefit of input tax credit was not required to be passed on to the recipients under the GST regime. He further submitted that he had settled the case with the Applicant No. 1, vide final settlement letter dated 23.06.2018. The Applicant No. 1 had made the booking in the Respondent's project on 26.06.2017, at the agreed value of Rs. 39, 29,928/- (@ 3357.81 sq. ft. for 1130 sq. ft. plus IFMS (Interest Free Maintenance Security) charges @ Rs. 20 per sq. ft. plus PLC (Preferential location charges) @ Rs. 100 per sq. ft.) plus the applicable taxes and possession charges. He also

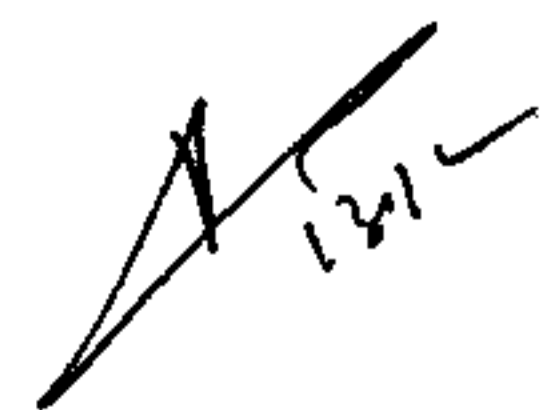
submitted that it was also agreed upon that in case of any delay in payment, interest @ 24% per annum, compounded quarterly, would be charged and the total interest came out to be Rs. 2,22,687/- plus GST. The Respondent also offered discount of Rs. 1,75,060/- plus GST to the Applicant No. 1 and the total amount payable by the Applicant No. 1 was Rs. 43,24,210/- for 1155 sq. ft. plus applicable taxes. However, the Applicant No. 1 had paid only Rs. 41,35,437/- excluding taxes.

9. The DGAP in his Report has also stated that the Respondent had furnished the following documents:-

- a) Copies of GSTR-1 Returns for the period July, 2017 to September, 2018.
- b) Copies of GSTR-3B Returns for the period July, 2017 to September, 2018.
- c) Copies of Tran-1 Return for the transitional credit availed.
- d) Copies of VAT & ST-3 Returns for the period April, 2016 to June, 2017.
- e) Copies of all demand letters, Sale Agreement/Contract issued to the Applicant.
- f) Tax rates - pre-GST and post-GST.
- g) Copy of Balance Sheet (including all annexures and profit/loss account) for FY 2016-17 & FY 2017-18.
- h) Copy of Electronic Credit Ledger for the period 01.07.2017 to 30.09.2018.
- i) Details of turnover, output tax liability, GST payable and input tax credit availed.
- j) List of home buyers in the project "Fusion Homes" (not in the prescribed format).
- k) Copy of Completion Certificate for the part project (A to F Towers).



10. Based on the above mentioned documents filed by the Respondent, the DGAP submitted that the main issues for determination were whether there was any benefit of reduction in rate of tax or input tax credit on the supply of construction service by the Respondent after implementation of GST w.e.f. 01.07.2017 and if so, whether such benefit was passed on to the Applicant No. 1, in terms of Section 171 of the CGST Act, 2017.
11. The DGAP also submitted that the Respondent claimed that out of total number of 12 towers in his present project, towers A to F were completed in the pre-GST era. The Respondent also claimed that the Applicant No. 1 had purchased a flat in Tower 'E' which was completed before the implementation of GST and thus, the buyers of flats in this tower had no claim to the benefit of input tax credit. However, when the DGAP scrutinised the Completion/Occupancy Certificates issued by the Greater Noida Authority and other documents submitted by the Respondent, he observed that the above contention of the Respondent had no merit on the following grounds:-
- (i) The Completion Certificate was issued by the Greater Noida Authority on 01.01.2018 and 19.01.2018 and not in the month of May, 2017 or June, 2017 as claimed by the Respondent.
- (ii) The letter dated 22.05.2017 of the Respondent, addressed to the Greater Noida Authority, for issuing the Completion Certificate clearly mentioned that the work was still under progress and would take another 45 days. Thus, the contention of the Respondent that



Applicant No. 1 had no claim to the benefit of input tax credit post-GST implementation was not acceptable.

(iii) No evidence to the effect that Towers A to F were completed before the implementation of GST, was submitted by the Respondent.

(iv) No evidence to prove that CENVAT credit of the pre-GST period, pertaining to unsold units in Towers A to F, was not carried forward to the post-GST period, was submitted by the Respondent.

(v) No evidence was submitted by the Respondent to prove that CENVAT credit that accrued in the pre-GST period in respect of the unsold units in Towers A to F, had been reversed.

(vi) The Respondent had charged GST even in respect of the flats which were booked after getting the Completion Certificates for Towers A to F.

12. The DGAP further furnished the details of amounts and taxes paid by the Applicant No. 1 to the Respondent, in the table given below:-

Table

(Amount in Rs.)

S. No.	Payment Stage	Basic Sale Price	Service Tax	GST	Total
1	Booking Amount	3,79,433	17,075	-	3,96,508
2	Within 60 days	3,79,433	17,075	-	3,96,508
3	On Casting of Foundation	4,55,319	20,490	-	4,91,403
4	On Casting of 1 st Floor Roof Slab	4,55,319	20,490	-	4,91,403
5	On Casting of 4 th Floor Roof Slab	4,55,319	20,490	-	4,91,403
6	On Casting of 7 th Floor Roof Slab	4,55,319	-	54,640	5,25,961
7	On Casting of 10 th Floor Roof Slab	4,55,319	-	54,640	5,25,961
8	On Casting of top Floor Roof Slab	1,89,716	-	22,766	2,19,150
9	On Completion of Masonry Work	1,89,716	-	22,766	2,19,150

	within apartment				
10	On Completion of masonry and plaster work within apartment	1,89,716	-	22,766	2,19,150
11	At the time of Offer of Possession	1,89,718	-	22,766	2,19,150
	Total	37,94,327	95,620	2,00,344	41,95,747

13. The DGAP also observed that prior to 01.07.2017, i.e., before GST was introduced, the Respondent was eligible to avail CENVAT credit of Service Tax paid on input services and the credit of the VAT paid on the purchase of inputs. However, CENVAT credit of the Central Excise Duty paid on the inputs was not admissible as per the CENVAT Credit Rules, 2004, which were in force at the material time. Post-GST, the Respondent was eligible to avail the input tax credit of GST paid on all the inputs and input services including the sub-contracts. The DGAP also asked the Respondent to provide sample copies of invoices raised by him in the pre-GST era, in support of the applicable tax rates for the services provided by him. The Respondent submitted that he had to pay Service Tax at the applicable rate (4.5% of the gross value) and VAT on the deemed sale value of the flats. The DGAP also analysed that from the VAT returns submitted by the Respondent, it could be seen that though the Respondent had claimed credit of VAT paid on the inputs, he had not discharged any output VAT liability. However, in the invoices raised by the Respondent on the Applicant No. 1 or other recipients, there was no demand of VAT. Further, the Respondent also submitted that VAT was not being charged/paid in the pre-GST period from the home-buyers. Therefore, for the purpose of the investigation, the DGAP had considered neither the credit of VAT paid on the inputs, nor the output VAT liability. It was also evident from the data

submitted by the Respondent that there was no VAT liability upon the Applicant No. 1 or any other recipient.

14. The DGAP also submitted that the Respondent was also asked to provide the break-up of the gross agreement value being charged upon from his home-buyers into different components, such as, basic sale price, PLC, Parking charges, etc, as the sample invoices submitted by the Applicant No. 1 with his application, showed this break-up.
15. The Respondent however didn't provide the complete project details and even after issue of four summonses, the Respondent didn't provide reconciled data of GSTR returns and home-buyer's list. Since the DGAP required these details for investigation, a letter dated 13.03.2019, was issued to the Respondent to provide the break-up of home-buyer's list price into basic sale price & PLC and also to provide the total number of flats and total area being developed, as per the plan submitted to the RERA. The Respondent, vide letter dated 14.03.2019, submitted that there were 1528 flats in the project "Fusion Homes" and the total area being developed was 21,20,603 Sq. ft. and requested for 7 days' time to submit the break-up of home-buyers list price into basic sale price and PLC & its reconciliation with the GST returns. The DGAP, vide his letter dated 14.03.2019 also directed the Respondent to submit the remaining details on or before 22.03.2019 but the Respondent failed to do so.
16. The DGAP also observed that para 5 of Schedule-III of the Central Goods and Services Tax Act, 2017 states as under:-
(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 Central Goods and Services Tax Act, 2017 reads "*(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier*". Thus, the ITC pertaining to the residential units which were under construction but not sold was provisional input tax credit which may be required to be reversed by the Respondent if such units remained unsold at the time of issue of completion certificate, in terms of Section 17(2) & Section 17(3) of the CGST Act, 2017, which reads as under:

Section 17 (2) "Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies".

Section 17 (3) "The value of exempt supply under sub-section (2) shall be such as may be prescribed and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building".



The DGAP thus mentioned that the ITC pertaining to the unsold units was outside the scope of 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 input tax credit available to him post-GST.

17. The DGAP also submitted that from the information submitted by the Respondent, covering the period July, 2017 to September, 2018, the details of the input tax credit availed by him, his turnover from the present project that the ratio of input tax credit to turnover, during the pre-GST (April, 2016 to June, 2017) and post-GST (July, 2017 to September, 2018) periods, the ratios of CENVAT/ Input Tax Credit to Total Turnover were furnished in Table given below:-

S. No.	Particulars	Total (Pre-GST) 01.04.2016 to 30.06.2017	Total (Post-GST) 01.07.2017 to 30.09.2018	
(1)	(2)	(3)	(4)	
1	CENVAT of Service Tax Paid on Input Services (A)	3,05,51,024	-	
2	Input Tax Credit of GST (B)	-	14,34,21,257	
3	Total CENVAT/Input Tax Credit Availed (C)	3,05,51,024	14,34,21,257	
4	Total Turnover as per list of home buyers (D)	64,15,97,757	84,86,45,518	
5	Total Saleable Area (in Square Ft.) (E)	21,20,603		21,20,603
6	Total Sold Area (in Square Ft.) relevant to turnover (F)	5,36,794		7,84,163
7	Input Tax Credit relevant to Area Sold (G)= [(C)*(F)/(E)]	77,33,464		5,30,34,747
8	Ratio of CENVAT/ Input Tax Credit to Total Turnover [(H)=(G)/(D)]	1.21%		6.25%

Thus, from the above table, it was clear that the input tax credit as a percentage of the total turnover that was available to the Respondent

during the pre-GST period (April, 2016 to June, 2017) was 1.21% and during the post-GST period (July, 2017 to September, 2018), it was 6.25% and it clearly confirmed that post-GST, the Respondent has benefited from additional input tax credit to the tune of 5.04% [6.25% (-) 1.21%] of the turnover.

18. The DGAP also observed that the Central Government, on the recommendation of the GST Council, had levied 18% GST (effective rate was 12% in view of 1/3rd abatement on value) on construction service, vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 (Annex-21). Accordingly, the profiteering had been examined by comparing the applicable tax and input tax credit available for the pre-GST period (April, 2016 to June, 2017) when effective Service Tax @ 4.5% was payable on construction service with the post-GST period (July, 2017 to September, 2018) when the effective GST rate was 12% on construction service. On the basis of the figures contained in Table above, the comparative figures of input tax credit availed/available during pre-GST period and post-GST periods, the recalibrated basic price and the excess collection/profiteering were tabulated by the DGAP in the Table below:-

S. No.	Particulars	Pre-GST	Post- GST
1	Period	A	B
		April, 2016 to June, 2017	July, 2017 to September, 2018
2	Output tax rate (%)	B	C
		4.50	12
3	Ratio of CENVAT/ Input Tax Credit to Total Turnover as per Table - C above (%)	C	D
		1.21%	6.25%

4	Increase in input tax credit availed post-GST (%)	D		5.04
<u>Analysis of Increase in input tax credit:</u>				
5	Basic Price raised/collected post GST as per list of home buyers (Excluding Land)	E		84,86,45,518
6	GST @ 12%	$F = E * 12\%$		10,18,37,462
7	Total Demand raised	$G = E + F$		95,04,82,980
8	Recalibrated Basic Price	$H = E * (100 - D) / 100$ or 94.96% of E		80,58,73,784
9	GST @ 12% on recalibrated basic price	$I = H * 12\%$		9,67,04,854
10	Commensurate demand	$J = H + I$		90,25,78,638
11	Excess Collection (Profiteering)	$K = G - J$		4,79,04,342

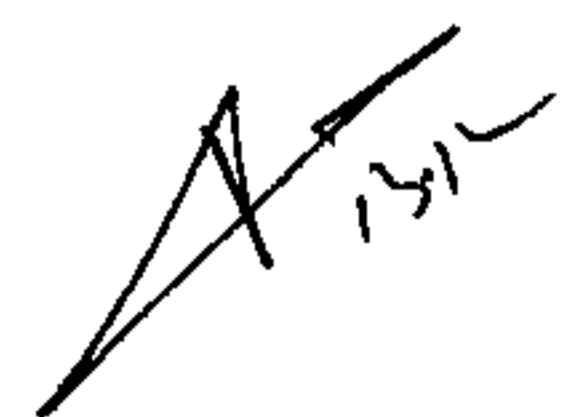
Thus, from the above table, it was clear that the additional input tax credit of 5.04% of the turnover should have resulted in commensurate reduction in the basic price as well as cum-tax price. Therefore, in terms of Section 171 of the Central Goods and Services Tax Act, 2017, the said benefit of the additional input tax credit was required to be passed on to the recipients. In other words, by not reducing the pre-GST basic price by 5.04%, on account of the benefit of additional input tax credit and charging GST at the rate of 12% on the pre-GST basic price, the Respondent appeared to have contravened the provisions of Section 171 of the of the Central Goods and Services Tax Act, 2017.

19. The DGAP further submitted that on the basis of the aforesaid CENVAT/Input Tax Credit availability in the pre and post-GST periods and the details of the turnover or the amounts collected by the Respondent from the Applicant No. 1 and other home buyers during the period 01.07.2017 to 30.09.2018, the amount of benefit of input tax credit not passed on, i.e. the profiteered amount came out to Rs.

4,79,04,342/- which included GST on the base profiteered amount of Rs. 4,27,71,733/-. This amount was inclusive of Rs. 2,36,428/- (including GST on the base amount of Rs. 2,11,096/-) which was the profiteered amount in respect of the Applicant No. 1. The DGAP also observed that the Respondent has supplied the construction services in the State of Uttar Pradesh only.

20. The DGAP thus concluded that the benefit of additional input tax credit of 5.04% of the turnover had, in fact, accrued to the Respondent and the same was required to be passed on to the Applicant No. 1 and other recipients. The investigation apparently revealed that the Respondent has realized an additional amount of Rs. 2,36,428/- from Applicant No. 1 and Rs. 4,76,67,914/- (Rs. 4,79,04,342 – Rs. 2,36,428) from the other home buyers in the present project which included both the profiteered amount @5.04% of the basic sale price and GST on the said profiteered amount. The recipients other than the Applicant No. 1, were identifiable as per the documents provided by the Respondent. Therefore, this additional amount of Rs. 4,76,67,914/- might be returned to such eligible recipients who were not Applicants in the DGAP Report.

21. The DGAP further mentioned that the present investigation covered the period from 01.07.2017 to 30.09.2018 and profiteering, if any, for the period post September 2018, had not been examined as the exact quantum of input tax credit that would be available to the Respondent in future could not be determined at that stage, when the construction of the project was yet to be completed.



22. The above Report was considered by the Authority in its meeting held on 09.04.2019 and it was decided to hear the Applicants and the Respondent on 25.04.2019.
23. Six personal hearings were accorded to the parties on 25.04.2019, 09.05.2019, 24.05.2019, 03.06.2019, 12.06.2019 and 17.06.2019, out of which 3 hearings were attended by the Respondent and 2 hearings were attended by the Applicant No. 1. During the course of the hearings, Sh. Pradeep Kumar, the Applicant No. 1 appeared in person, the Applicant No. 2 was represented by Sh. P.K. Tyagi, Superintendent, and the Respondent was represented by Ms. Nidhi Gupta, Advocate, Sh. Bharat Bhushan, Advocate, Sh. Ashish Vaish, Advocate, Sh. Manish Gupta, Authorised Representative and Sh. Brijesh Kumar, Authorised Representative.
24. The Applicant No. 1 filed his written submissions dated 09.05.2019 and vide email dated 15.05.2019 stating that the statements made by the Respondent were contradictory in nature. On the one hand, he claimed that the benefit of ITC was not available as all works related to Phase-1 were completed in pre-GST era, whereas on the other hand, he claimed that he had provided discount due to GST. The Applicant No. 1 also stated that the Respondent's claim that all the works of all the flats were completed before GST era was false and lot of work had been done by him in the GST regime. He had further submitted that the flat was handed over by the Respondent to him on 16.09.2019 and at that time, lot of work was incomplete viz. wooden texture flooring which was done two weeks post-handing over of the flat, laying of electrical wiring, all painting work, charging of fire line, installation of CCTVs in lobbies and

common areas and lifts, non implementation of solar heating on terrace, non functioning of fire alarm panel and Public Address system, external services like park, pathways, street lighting and greenery, club house, swimming pool (except children play area which was handed over in November 2018 and sofa set for entrance Area of each tower which was provided in December 2018). He also stated that all the material that the Respondent had used for development of common areas was paid by current residents as well. Thus, he must get the benefit of ITC from the Respondent. The Applicant No. 1 also questioned the tiles laid in his bathroom and lobby and also claimed usage of poor quality material/man power resulting in cracks in walls.

25. The Applicant No. 1 further submitted that as per the agreement signed in August 2017, it was confirmed by the Respondent and Investors Clinic that maintenance charges would be Rs. 1.25 per sq. ft. as he was using LED lights and renewable energy resources. But, while raising demand, the Respondent increased maintenance charges to Rs. 1.80 per sq. ft. for less than half developed society which were very high. The Applicant No. 1 also submitted that the Respondent offered him letter of possession in January 2018 i.e. 16 months ago. The Applicant No. 1 further submitted that the Respondent had used Indian Green Building Council (IGBC) Platinum Pre-Certification as his key feature to sell his property/flats. But he had not implemented many works as per the Platinum certification. He further claimed that while offering possession, the Respondent demanded electricity connection charges at Rs. 5000/- per KVA which were very high. He also claimed that similar societies were

charging Rs. 2000/3000/- per KVA and since this was govt. fee it should have been reasonable. The Applicant No. 1 also enclosed some photographs of his flat to show his flat's condition.

26. The Respondent filed his first written submissions on 09.05.2019 vide which he submitted that in the pre- GST regime, the Respondent used to charge Service Tax on 'construction services' provided by him to the customers. While in the post- GST regime, the Respondent was duly charging GST from his buyers and paying taxes to the Central Government. He also submitted that the provisions of Anti-profiteering as contained in Section 171 of the CGST Act, 2017 itself were challenged before the Hon'ble Delhi High Court and the Hon'ble Court had granted stay. He further mentioned that as per DGAP Report, there was no allegation that rate of tax on the supplies being made by the Respondent had reduced. The only allegation was that the Respondent had got additional benefit of ITC to the extent of 5.04% which should have been passed onto the customers. Thus, in view of above, the Respondent submitted the following:-

(i) That the DGAP Report had exceeded his jurisdiction in calculating profiteering in respect of the customers other than the Applicant No. 1 in the matter and in terms of the provisions of Anti profiteering as contained under CGST Act 2017, the DGAP could not go beyond the complaint of the Applicant No. 1.

(ii) That para 25 of the DGAP Report mentioned that for the purposes of this investigation the credit of VAT paid on inputs

has not been considered. The Respondent claimed that the Report had failed to consider that as per the decision by Hon'ble Supreme Court in the case of **Raheja Builders and Larsen & Toubro**, the activity of a builder was like sale of material during construction and was liable for payment of VAT under VAT laws. Therefore, while discharging liability under VAT laws, the Respondent was eligible to avail ITC of VAT paid on purchase of inputs/capital goods. He also submitted that during the period 01.04.2016 to 30.06.2017, the Respondent had availed ITC of Rs. 1,98,04,225/- under VAT and the said amount of ITC availed should have been included while computing the percentage (%) of Cenvat Credit/ITC availed and the percentage (%) of credit availed during 01.04.2016 to 30.06.2017 was thus likely to get increased by more than 1%. He also enclosed the copy of assessment order and VAT paid to the department.

(iii) The provisions of Section 171 of the Central Goods & Services Tax Act, 2017 were applicable to the long term/continuous contracts. They could not be said to be applicable to the fresh contracts entered after 01.07.2017. The price offered after 01.07.2017 was after considering the cost of inputs in the post-GST era. The applicable taxes and prices prevailed in the open market for the similar product. Thus, the allegation of profiteering on 51105 sq. ft. of area for which agreement to sell had been entered after 01.07.2017 was incorrect.



(iv) Even otherwise, he had already offered more than 10% discount in basic prices to all the customers who have booked flats post-GST.

(v) In view of the change in economic scenario particularly increase in availability of ITC on account of higher rate of GST, the basic price of the flats had been reduced by more than 5% in as much as in the cases where pre-GST rate was Rs. 3,865 per sq. ft. it had been reduced to Rs. 3,400 per sq. ft. post GST. As the discount had been given mainly on account of availability of ITC, thus the allegation that the Respondent had failed to give the necessary discount and had profiteered is absolutely incorrect.

(vi) While computing the ITC availed during the period 01.07.2017 to 30.09.2018, the DGAP Report included the amount of credit of Rs. 3,49,08,227/- taken from GST Tran- 1 statement. The said amount of credit included Rs. 69,68,288/- taken under section 140 (1) of the CGST Act, 2017 which was the balance carried forward as per last return (ST- 3). The Respondent further submitted that the said credit which had been taken prior to 30.06.2017 could not be considered for the period 01.07.2017 to 30.09.2018.

(vii) Similarly, credit under Tran- 1 included credit of Rs. 2,79,39,939/- which had been taken under Section 142 (11) (c) of the Uttar Pradesh GST Act, 2017 and under Section 140 (3) of the CGST Act, 2017 pertained to the period 01.04.2016 to

30.06.2017. This also couldnot be considered to be relatable to the period 01.07.2017 to 30.09.2018.

(viii) Out of 12 towers in the present project, the Respondent had completed construction of 6 towers in the month of May, 2017 itself i.e. prior to implementation of GST. He also claimed that he had been regularly requesting the local authorities to grant completion certificates so that possession could be given and the apartments could be registered in the name of customers and balance payments could be obtained. He further submitted that even though the completion certificates had been issued subsequently, the Respondent had hardly incurred any amount on construction of these towers. Thus, the ITC availed after 01.07.2017 did not include any ITC pertaining to construction of these towers. On this basis, the total turnover for the period 01.07.2017 to 30.09.2018 should also have not included the amount billed/ received relating to flats sold in Tower A, B, C, D, E, and F. He also submitted that during the period 01.07.2017 to 30.09.2018, the Respondent received Rs. 63,69,91,887/- from the customers who had purchased apartments in Tower A, B, C, D, E and F. He also claimed that the para 31 of the DGAP Report computed that there was an increase in availability of ITC by 5.04%. Assuming that the said ratio of 5.04% was correct (without admitting), the demand of about Rs. 3.17 crores was liable to be reduced.

(ix) The computation of percentage of ITC during 01.04.2016 to 30.06.2017 as well as 01.07.2017 to 30.09.2018 did not consider the percentage of completion of each tower. Unless

the said exercise was done, it could not be worked out as to whether the credit taken was more in terms of percentage. This applied with greater force when the plan for billing the amount to customer was different than percentage of completion in as much as the initial bill raised to the customers were more relatable to the sale of land and the subsequent bills were more relatable to construction activity.

(x) On account of increase in GST rate on outward supply as well as inputs, the ITC in his Electronic Credit Ledger was continuously increasing which would be evident by the following details –

Quarter	Closing balance of ITC in Electronic Credit Ledger
September, 2017	Rs. 66,75,612/-
December, 2017	Rs. 6,97,93,367/-
March, 2018	Rs. 3,55,34,257/-
June, 2018	Rs. 5,03,51,304/-
September, 2018	Rs. 6,92,39,947/-

Thus, he requested that the authorities may take necessary actions for refund of the said excess ITC so that the funds so received may be ploughed back in the business and the projects may be completed expeditiously.

27. The Respondent further submitted that the calculations of Profiteering done by DGAP were erroneous and conceptually flawed.

He also submitted that on receiving the application of the Applicant

No. 1, the necessary discount/benefit of additional ITC had duly been given by him and the DGAP could not ignore the discounts already given to the Applicant No. 1. The Respondent also furnished a copy of assessment order and VAT paid to the department, copy of discount pamphlet and sample bookings, copy of ST-3 Return for the period Apr-June 2017 and Trans-1 Statement, copies of correspondence with the Greater Noida Industrial Development Authority and Architect's certificate, Copy of the letter of confirmation of receiving of discount by the Applicant No. 1.

28. The Respondent filed his next submissions on 03.06.2019 vide which he submitted that the Credit of VAT had not been considered in the Pre-GST regime by the DGAP in his Report dated 02.04.2019. He further submitted that the Respondent was liable to pay VAT in the earlier regime on deemed sales basis i.e VAT was paid on total purchases plus 20% deemed profit after considering ITC of the VAT paid on purchases. Thus, ITC of VAT was available in the pre-GST regime. He further submitted that the credit availed in Trans-1 statement should have been considered in Pre-GST regime for the purposes of calculation, as it pertained to the same period. He also enclosed the calculation sheet showing impact on profiteering. He also mentioned that the ITC availed in Post GST regime was also not correct in DGAP Report. It had wrongly been calculated from ledgers. Actual ITC availed and utilized had been shown in GSTR 3B Returns. He also enclosed the summary sheet of ITC availed & utilized as per GSTR 3B Returns. He also mentioned that ITC utilized should have been considered in post GST regime, as it was the maximum credit that could be used for payment of Tax. He also stated that the 'total

area sold' in sq. ft. in pre-GST regime and post GST regime was not correct and as per the DGAP annexures it should be Rs. 8.51 lakhs for pre-GST regime & Rs. 9.54 lakhs for post-GST regime. He further submitted that the Respondent has already extended discount on post GST sale of flats approx. to the tune of Rs. 600 per sq. ft. The average sale price during the period Apr – June 2017, was 4400 /sq. ft. whereas the average sale price post GST was Rs. 3800/sq. ft. Thus, there was a discount of approx. 13.6% in post GST regime. He further enclosed following documents in support of his submission:

- (a) VAT Returns (2015-16 to 2017-18).
- (b) Assessment order 2015-16.
- (c) Trans – 1 Credit Sheet.
- (d) Electronic Credit Ledger (July 2017 to Sep 2018).
- (e) Summary of ITC availed in GSTR 3B (July 2017 to Sep 2018).
- (f) Customers Sheet with Booking date & Carpet Area (Annexure 22 of DGAP Report).
- (g) Brochure – Post GST Prices & Payment Plans.

The Respondent also enclosed the 5 calculation sheets in respect of 5 issues prepared by him against the DGAP's Report dated 02.04.2019 which are furnished below:-

Calculation Sheet - 1

Issue - VAT ITC to be taken in Pre-GST

	Pre GST 01- 04-2016 to 30- 06-2017	Post GST 01- 07-2017 to 30- 09-2018
Cenvat of ST	30551024	
VAT	19804225	

ITC		143421257
Total Credit	50355249	143421257
Gross Taxable Turnover	641597757	848645518
Total Saleable Area	2120603	2120603
Total Sold Area relevant to Turnover	536794	784163
ITC Relevant to Sold Area	12746561	53034747
Ratio	1.986690396	6.249340351
Difference	4.26	
Turnover plus GST	950482980.16	
Recalibrated	812493218.93	
Recalibrated plus GST	909992405.21	
Difference - Profiteering	40490574.95	

Calculation Sheet - 2

Issue- Trans 1 ITC in Pre-GST Regime

	Pre GST 01-04-2016 to 30-06-2017	Post GST 01-07-2017 to 30-09-2018
Cenvat of ST	30551024	
VAT	19804225	
ITC		143421257
Trans-1	27281055	
Total Credit	77636304	143421257
Gross Taxable Turnover	641597757	848645518
Total Saleable Area	2120603	2120603
Total Sold Area relevant to Turnover	536794	784163

ITC Relevant to Sold Area	19652289	53034747
Ratio	3.063023271	6.249340351
Difference	3.19	
Turnover plus GST	950482980	
Recalibrated	821573726	
Recalibrated plus GST	920162573	
Difference - Profiteering	30320407	

Calculation Sheet - 3

Issue: Post GST ITC should be as per utilisation declared in GSTR

3B

	Pre GST 01-04-2016 to 30-06-2017	Post GST 01-07-2017 to 30-09-2018
Cenvat of ST	30551024	
VAT	19804225	
ITC		90347860
Trans-1	27281055	
Total Credit	77636304	90347860
Gross Taxable Turnover	641597757	848645518
Total Saleable Area	2120603	2120603
Total Sold Area relevant to Turnover	536794	784163
ITC Relevant to Sold Area	19652289	33409105
Ratio	3.063023271	3.936756231
Difference	0.87	
Turnover plus GST	950482980	
Recalibrated	841262302	
Recalibrated plus GST	942213778	

Difference - Profiteering	8269202
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Calculation Sheet - 4

Issue - Total Area Sold

	Pre GST 01-04- 2016 to 30-06- 2017	Post GST 01-07- 2017 to 30-09- 2018
Cenvat of ST	30551024	
VAT	19804225	
ITC		90347860
Trans-1	27281055	
Total Credit	77636304	90347860
Gross Taxable Turnover	641597757	848645518
Total Saleable Area	2120603	2120603
Total Sold Area relevant to Turnover	851555	954820
ITC Relevant to Sold Area	31175841	40679912
Ratio	4.859094516	4.793510513
Difference	-0.07	
Turnover plus GST	950482980	
Recalibrated	849239570	
Recalibrated plus GST	951148318	
Difference - Profiteering	-665338	

Calculation Sheet - 5

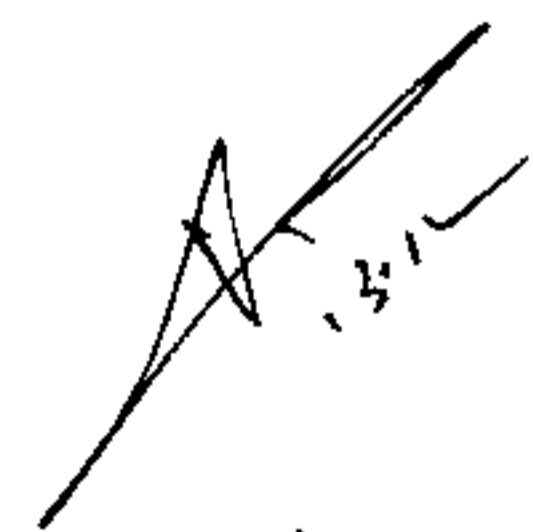
Issue - Discount Already Extended



Avg. Sale price Pre GST (A)	4463.6875
Avg. Sale Price Post GST (B)	3865.475
Discount (C) = (A-B)	598.2125
Percentage (D) = (C/B * 100)	15.47578241
Total Amount Due Post GST	227885980
(As per Annexure 22 of DGAP Report)	
Discount Percentage Approx	15.00
Discount Already Offered in Rs	34182897

29. The Respondent filed his final submissions on 17.06.2019 vide which he had submitted that he had paid VAT of approx. Rs. 6.77 lakhs during 2016-17 and Rs 7.28 lakhs during 2017-18 in cash, and made balance payment with ITC. He also submitted that the total area sold during the post-GST period was 9,54,820 sq. ft.

30. The Respondent also submitted that the Authority had notified the methodology and procedure, on its website and it was an admitted position that the said procedure contained the procedure to be followed but did not contain any methodology to arrive at the quantum of alleged profiteering. He further explained that the Authority in its earlier orders had observed that no single methodology can be adopted for all the cases. He also cited the case of **Kiran Chimirala Vs. M/s Jubilant Food Works Pvt. Ltd.**, in Case No. 04/2019 decided on 31/01/2019 by the Authority according to which the Authority had ordered as under:-



"47. The Respondent has alleged that no methodology has been prescribed for determination and calculation of profiteering. In this connection it would be relevant to point out that this Authority has already notified the 'Procedure and the Methodology' vide its Notification dated 28.03 2018 under the provisions of Rule 126 of the CGST Rules, 2017 which is available on its website. As far as the method of calculation of profiteered amount is concerned no fixed method can be prescribed as the various parameters which are required to be taken in to account while making such computation vary from industry to industry and from one product to another. The factors which need to be considered while determining profiteering in the case of a real estate builder cannot be applied in the case of a consumer goods industry and hence the computation varies from sector to sector and from product to product. Within various products also the products which are sold on MRP and the products which are sold under the cost of production methodology the method of calculation of the profiteered amount will vary. Similarly -in the case of services and within services also in the case of construction services it may differ depending upon the land cost from the other services, therefore the commensurate reduction in prices as stipulated in Section 171 will vary not only between the goods and the services but also within the various types of goods and services hence, no fixed methodology can be 'prescribed' and it can only be 'determined' in each case. The provisions of Section 171 are further very explicit which state that the recipient has to be given the benefits of tax reduction and the ITC on every supply

commensurate with such reduction or the ITC. Hence, it was duty of the Respondent to ascertain on which of his products the rate of tax had been reduced and after taking in to account the impact of denial of ITC to what extent the prices should have been increased. The whole exercise needed no directions from this Authority as it involves simple mathematical calculation which the Respondent has been carrying on repeatedly at the time of fixing his prices. Hence, the contention of the Respondent made on this ground is unreasonable and hence it cannot be considered."

The Respondent, from the above contention said that it was clear that, there could not be a single methodology to determine the quantum of profiteering in all cases. The parent statutes and the rules made thereunder had conferred the powers to prescribe or adopt a methodology for this purpose on the Authority and which cannot be further re-delegated. Thus, the Authority alone could determine as to which methodology was to be applied in a particular case to determine the quantum of profiteering, if any. The Authorities like State Level Screening Committee, Standing Committee on Anti-Profitteering or the DGAP did not possess any power to apply a particular methodology.

31. The Respondent further claimed that, the DGAP had concluded in his Report that post-GST, the Respondent had been benefitted from additional input tax credit to the tune of 5.04% of the turnover and these figures had been arrived at by comparing the ratio of ITC availed with turnover in the pre-GST and post-GST period. He also mentioned that the DGAP divided the ITC availed during the period 01.04.2016 to 30.06.2017 by the turnover during the said period

which resulted in a ratio of 1.21%. Similar exercise was done for the period 01.07.2017 to 30.09.2018 and which resulted in the ratio of 6.25%. The difference of the said ratios had been held as additional input tax credit. He also submitted that the real estate projects were long drawn processes taking five years or more, which involved various stages like obtaining permission from various Statutory Authorities, land formation, foundation work, civil construction, services like plumbing, lighting, lift etc, and finishing work like flooring, roofing etc. In each stage/process consumption of material, its value and tax component were different and also the billing was done as per the terms of agreement. Thus, no direct nexus, could be found between revenue and ITC availed. He had also claimed that even the Government itself had admitted that there was no correlation between the revenue and ITC availed in real estate sector and the Government had notified new GST rates for residential projects w.e.f. 01.04.2019 and had prescribed GST Rates @ 5% / 1% with no ITC. He also submitted that the Government was conscious of the fact that availment of ITC has no nexus with the revenue booked and therefore, it linked the ITC with percentage of work done in the project which was also not a correct method but much better than one adopted in this case by the DGAP. He had also claimed that in the Notification No. 03/2019- C.T. (Rate), dated 29-03-2019, the detailed procedure was prescribed to adjust the ITC availed with the percentage of work done.

32. The Respondent further submitted that if there was any substance in the methodology adopted by taking ratio of ITC over revenue booked then it should show a broad similar trend across the

industry. The Authority had passed many orders adopting the same methodology. He also furnished the comparative chart of the ratios so arrived in the said orders which are mentioned below:-

ORDER NO.	APPLICANT Vs. RESPONDENT	PRE-GST PERIOD		POST-GST PERIOD	
		PERIOD	RATIO	PERIOD	RATIO
12/2019	Ashok Khatri Vs. S3 Infra Reality	April'16 to June'17	3.8%	July'17 to August'18	6.49%
21/2019	Vivek Gupta Vs. Gurukripa Developers	April'16 to June'17	0.27%	July'17 to August'18	3.31%
30/2019	Ms. Pallavi & Sh. Abhimanyu Gulati Vs. Puri Constructions	April'16 to June'17	6.91%	July'17 to June'18	13.70%
32/2019	Rahul Aggrawal Vs. Shrivision Homes	April'16 to June'17	7.56%	July'17 to August'18	7.09%
34/2019	Varun Goyal Vs. Eldeco Infra	April'16 to June'17	0.61%	July'17 to August'18	3.45%
35/2019	Sunil Mehta Vs. Salarpuria Real Estate	April'16 to June'17	3.06%	July'17 to June'18	4.51%

In the above chart, ratio in pre-GST ranges from 0.27% to 7.56% and in post-GST, it ranges from 3.31% to 13.70% which clearly showed that the benefit of additional ITC could not be computed by this methodology.

33. The Respondent also questioned the DGAP's investigation and findings in his report and submitted that:-

- a) The Respondent had intimated the Authorities about completion of the said towers much prior to 1st July, 2017. The delay in issuance of completion certificate was beyond the control of Respondent. And also, there was no evidence that the Municipal Authorities on inspection had found that project was not complete.
- b) The Respondent had given details of stages of all the work, wherein it was clearly stated that the work relating to internal and external plasters, flooring, tile work, doors and windows, lobby tiling and finishing, lift, fire-fighting, paint, sanitary ware, basement parking, water tank, were all complete. A detail of pending/partly completed services was also given, wherein work relating to electric wiring, final paint coat, external development, sewerage, water treatment plant, sewerage treatment plant, Main Gate and common area development were stated to be in progress. He also contended that it was also specifically stated that the said work will be completed in next 30-40 days, which ended before 30th June, 2017 and even if it was assumed that any minor work stretched beyond 30th June, 2017 then also it could not be alleged that any major procurement of material was left to be made.
- c) The DGAP had mentioned that the Respondent adduced no evidence to the effect that tower A to F were complete before implementation of GST. The Respondent said that the letter dated 22.05.2017, addressed to Greater Noida Authority and RERA Declarations were sufficient enough to shift the onus, if any, on the Department to prove otherwise.

- d) The DGAP had mentioned that the Respondent had not adduced any evidence to show that it had not carried forward CENVAT Credit of pre-GST period in respect of unsold units in towers A to F. The Respondent said that the if he had carried forward any excess Credit, then it was a case of tax evasion and not of profiteering.
- e) The DGAP had incorrectly mentioned that he had charged GST even in respect of the flats which were booked after getting completion certificate.

34. The Respondent also submitted that the Authority had time and again found that commensurate benefit of reduction in price should go only to that customer who was entitled for it and it was not a defence that the benefit had been extended to some other customer group or to some other product line. Thus, the benefit of additional ITC which was meant for the buyers of flats in towers other than in Towers A to F, could not be shared. He again cited the case of **Kiran Chimirala Vs. M/s Jubilant Food Works Pvt. Ltd.**, in Case No. 04/2019 decided on 31/01/2019 by the Authority as under:-

"55. The Respondent has also claimed that the profiteered amount should be calculated by considering him as an entity and not on each SKU. However, this contention of the Respondent is irrational and against the basic provisions of Section 171 which require him to pass on the benefit of rate reduction to every recipient on every supply. In case this computation is made as has been suggested by the Respondent it would not be possible to ensure that the benefit has been passed on to each customer as the calculation would have to be made for all the SKUs together irrespective of the fact whether the base price of a product has been reduced or increased. The

Respondent is under legal obligation to pass on both the above benefits to each customer and he cannot deny benefit to one customer on the ground that he has as an entity passed on the benefits to entire group of customers. Similarly benefit due to a customer cannot be denied to him on the claim that the same has been passed on to another customer on another product. There is no justification in the claim of the Respondent that the DGAP should also have taken in to account those SKUs in the case of which the price increase was within the permissible limit of 5.59%, since there was no profiteering in their case they were not required to be considered. Even if each restaurant owned by the Respondent was assessed separately for profiteering the conclusion would have been the same as the Respondent was charging the same prices in each of his outlets and was also centrally fixing the prices and hence he has been rightly assessed for profiteering collectively. There is also no justification for 'netting off' the increases and the decreases in the prices of the various products as the benefit is required to be passed on each SKU and profiteering is required to be computed only in respect of those SKUs where prices have been increased more than 5.59%."

35. The Respondent also mentioned that Section 171 could not be invoked to compare pre-GST and post GST taxes and these provisions were applicable only when there was a reduction in rate of tax. Since, the GST was levied from 1st July 2017 and thus, it could not be stated that there was any reduction in rate of tax. He further claimed that in the DGAP report, it was found that he had been benefited from additional input tax credit to the tune of 5.04% of the turnover. He added that even if it was admitted that the said

additional credit was available to him (the Respondent) by virtue of introduction of GST, this could not be termed as benefit to him, unless there was likelihood of encashment of such credit. He further furnished a chart given below and stated that the chart revealed that the balance in Electronic Credit ledger of the Respondent was increasing rapidly and there was no scope of its liquidation. Merely balance in Electronic Credit ledger could not be termed as benefit to the Respondent, unless there was scope of encashment of such credit:-

<u>Month Ending</u>	<u>ITC taken</u>	<u>Utilized</u>	<u>Balance</u>
30-09-2017	2,84,98,133	83,11,514	2,01,86,619
31-12-2017	6,72,31,810	94,86,450	7,79,31,979
31-03-2018	3,35,61,052	6,60,02,788	4,54,90,243
30-06-2018	1,87,08,212	65,47,108	5,76,51,347
30-09-2018	1,94,13,397	0	7,70,64,744
31-12-2018	1,15,98,393	83,06,540	8,03,56,597
31-03-2019	89,13,134	1,00,61,138	7,92,08,593
30-04-2019	15,23,395	22,41,816	7,84,90,172

36. Clarification was also sought from the DGAP on the Respondent's above submissions. The DGAP vide his Reports dated 30.05.2019 and 14.06.2019 has submitted that the present project was started in the pre-GST era and continued in the post-GST era. He further submitted that he has calculated the profiteering as per the records/documents submitted by the Respondent during the investigation. He also claimed that the allegation of the Respondent that Tran-1 credit has been considered for computation of profiteering in the post-GST period was incorrect since Tran-1 credit had not been

considered by the DGAP while computing the amount of profiteering. He also submitted that all other facts/ queries raised by the Respondent had been explained in his report dated 02.04.2019.

37. We have carefully considered all the Reports filed by the DGAP, submissions of the Respondent and the Applicant No. 1 and other material placed on record and find that there are certain issues raised by the Respondent vide which he has raised objections against the DGAP's Report dated 02.04.2019.

38. We observe that the first objection of the Respondent is that the DGAP had exceeded his jurisdiction in calculating profiteering in respect of the customers other than the Applicant No. 1 in the matter. This claim is incorrect since the ITC was collected by the Respondent over the complete project and hence the benefit is required to be passed to all the eligible flat buyers. Thus, the Authority is of the opinion that in order to compute the ITC benefit to be passed on to the buyers, it was necessary to computer the same for the whole project and for every buyer. Further, in the interest of justice, the benefit of input tax credit should be passed on to every buyer in the present project.

39. We also note that one of his prime contentions against the DGAP's report is that the credit of VAT paid on inputs has not been considered. We find that this claim of the Respondent is incorrect since though the Respondent had claimed credit of VAT paid on the inputs, but he had not discharged any output VAT liability. Further,

Respondent also did not charge VAT in the pre-GST period from the home-buyers. Thus, for determining the profiteering amount, neither the credit of VAT paid on the inputs, nor the output VAT liability had been taken into consideration by the DGAP and thus, DGAP has rightly computed the profiteering in this aspect.

40. We find that the Respondent further raised the issue of Tran-1 Credit and stated that while computing the ITC availed during the period 01.07.2017 to 30.09.2018, the DGAP had included the credit amount of Rs. 3,49,08,227/- taken from GST Tran- 1 statement which also included Rs. 69,68,288/- which was the balance carried forward as per last return (ST- 3) and since the same had been taken prior to 30.06.2017, thus, it could not be considered for the period 01.07.2017 to 30.09.2018. However, this contention of the Respondent appears frivolous since the DGAP has not considered the Tran-1 credit while computing the profiteered amount in his Report dated 02.04.2019. Thus, to say that the credit amount from the Tran-1 statement could not be considered does not appear to be correct as the DGAP has already not considered it and thus, the DGAP has correctly calculated the ITC pre-GST and post-GST.

41. We find that the Respondent had claimed that the credit under Tran- 1 statement of Rs. 2,79,39,939/- pertained to the period 01.04.2016 to 30.06.2017 and it could not be considered to be relatable to the period 01.07.2017 to 30.09.2018. On perusal of the DGAP's Report dated 02.04.2019, we find that the said amount has not been added in the post-GST computations and hence, this

contention of the Respondent is unfounded as that is what the DGAP has done.

42. We also observe that the Respondent has also raised questions on the methodology of computation of profiteering and has stated that if there was any substance in the methodology adopted by taking ratio of ITC over the revenue booked, then it should have shown a similar broad trend across the industry. He has also furnished the comparative chart of the ratios arrived in the different orders of the Authority as mentioned in para 32 of this Order and has contended that these ratios ranged from 0.27% to 7.56% in the pre-GST period while in the post-GST period, these ranged from 3.31% to 13.70%, which shows that the benefit of additional ITC cannot be computed by this methodology. After going through the orders mentioned by the Respondent, we find that this contention is not tenable since the mathematical computation pertaining to benefit of additional ITC is case specific and it depends on various factors specific to each case. These factors include the stages viz. completion of the project pre-GST and post-GST; the payment schedule; the number of units in the project; the total area sold and unsold in pre-GST and post-GST periods, the ITC availed in the two periods; and the turnover i.e. (aggregate amounts billed to the home-consumers) recalibrated in the two periods.

43. We also find it pertinent to mention that Section 171 (1) of the CGST Act, 2017 clearly states that "Any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in

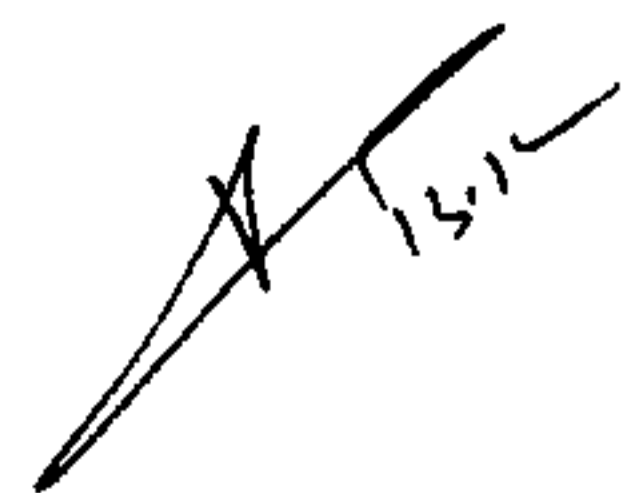
prices". Therefore, the intention of the legislature is amply clear from the above provision which requires that the benefit of tax reduction or ITC is required to be passed on to the customers by commensurate reduction in prices and the same cannot be retained by a supplier. In furtherance of the same, this Authority has in exercise of the powers conferred on it under Rule 126 of the CGST Rules, 2017, notified the 'Procedure & Methodology' for determination of the profiteered amount vide its Notification dated 28.03.2018. However, the mathematical methodology for determination of the profiteered amount is case specific since it depends on the facts of each case and thus, no fixed formula can be set for calculating the amount profiteered in different cases. In fact, the mathematical computation depends on various factors such as those detailed in the preceding paragraph. It is also pertinent to elaborate that the mathematical methodology applied in cases where the rate of tax has been reduced and ITC disallowed cannot be applied to cases where the rate of tax has been reduced and ITC allowed.

44. We also find that the Respondent has contested that the computation of percentage of ITC made for the periods from 01.04.2016 to 30.06.2017 and from 01.07.2017 to 30.09.2018 by the DGAP has not factored the percentage of completion of each tower and unless the said exercise was done, it could not be worked out as to whether the credit taken was more in terms of percentage. However, the above mentioned contentions of the Respondent appears to be baseless since all the towers are the part of the present project and a project as a whole is taken for calculation of the ITC to turnover ratio for the pre-GST and post-GST period and the same has

already been considered by the DGAP in his calculation of percentage of ITC. It is thus unnecessary to consider the percentage of completion of each tower. It is also imperative to submit that the determination of percentage of completion of each tower is not feasible in the absence of any statutory mechanism. Thus, the DGAP has correctly computed the profiteered amount as per the documents submitted by the Respondent himself and also the area sold pre-GST and post-GST is also correctly mentioned by the DGAP in his report dated 02.04.2019.

45. We further observe that the Respondent claimed that the provisions of Section 171 of the CGST Act, 2017 were applicable to the long term/continuous contracts and they could not said to be applicable to the fresh contracts entered after 01.07.2017. This contention of the Respondent is irrelevant since the present project was started in the pre-GST era and continued in the post-GST era and the Applicant had also made the booking in the on 26.06.2017, at the agreed value of Rs. 39,29,928/- (@ 3357.81 for 1130 sq. ft. plus IFMS @ Rs. 20 per sq. ft. plus PLC @ Rs. 100 per sq. ft.) plus the applicable taxes and possession charges. Further, Section 171 of the CGST Act, 2017 states that:-

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



Nowhere does the above provision of law mentions that the above provisions would not be applicable to the fresh contracts entered after 01.07.2017.

46. The Respondent's further contention that he had already offered more than 10% discount in basic prices to all the customers who have booked flats Post GST and the discount had been given mainly on account of availability of ITC, thus the allegation that he had failed to give the necessary discount was absolutely incorrect. However the discount offered by the Respondent to the customers cannot be considered as passing on of the benefit of additional ITC as the above discount has been given by the Respondents to set off the prices which he had increased and not on account of the benefit of ITC. It would also be relevant to refer Section (15) (1) of the CGST Act, 2017 which reads as under:-

"The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply."

We therefore observe that Section 15 (3) (a) provides that the value of the supply shall not include any discount which is given before or at the time of the supply, even if such discount has been duly recorded in the invoice issued in respect of such supply. Thus, GST is chargeable on actual transaction value after excluding any discount (conditional as well as unconditional) and therefore, for the purpose of computation of profiteering actual transaction value has to be considered for

computation of profiteering amount. Further, the discount which was to be given to the customers by the Respondent is purely his business call. Accordingly, the discount of more than 10% in basic prices claimed to have been paid to the house buyers by the Respondent cannot be held as the benefit of ITC and hence, the claims made by the Respondents in this behalf cannot be accepted.

47. It is established from the perusal of the above facts that the provisions of Section 171 of the CGST Act, 2017 have been contravened by the Respondent as he has profiteered an amount of Rs. 4,79,04,342/- which includes GST on the base profiteering amount of Rs. 4,27,71,733/- from all the flat buyers. This amount is inclusive of Rs. 2,36,428/- (including GST on the base amount of Rs. 2,11,096/-) which is the profiteered amount in respect of the Applicant No. 1. All these buyers are identifiable as per the documents placed on record and therefore, the Respondent is directed to pass on this amount of Rs. 4,79,04,342/- along with interest @18% per annum to these flat buyers from the dates from which the above amount was collected by him from these buyers till the payment is made, within a period of 3 months from the date of passing of this order.

48. In view of the above facts, this Authority under Rule 133 (3) (a) of the CGST Rules, 2017 orders that the Respondent shall reduce the prices to be realized from the buyers of the flats commensurate with the benefit of ITC received by him as has been detailed above. Since the present investigation is only up to 30.09.2018 any benefit of ITC which accrues subsequently shall also be passed on to the buyers by the Respondent.

49. It is also evident from the above narration of facts that the Respondent has denied benefit of ITC to the buyers of the flats and the shops being constructed by him in his Project 'Fusion Homes' 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 09.04.2019 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.
50. The Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Uttar 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 is passed on to all the eligible buyers. A report in compliance of this order shall be submitted to this Authority by the Commissioners CGST/SGST Uttar Pradesh through the DGAP within a period of 4 months from the date of receipt of this order.
51. A copy each of this order be supplied to the Applicants, the Respondent, Commissioners CGST/SGST Uttar Pradesh as well as

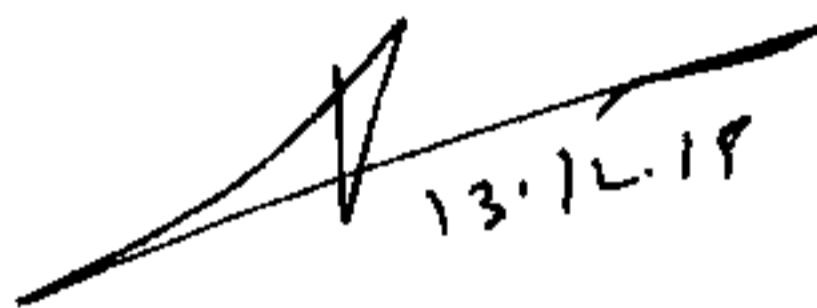
the Principal Secretary (Town & Planning), Government of Uttar Pradesh for necessary action. File be consigned after completion.

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Technical Member

Certified copy



(A. K. Goel)
Secretary, NAA



File No. 22011/NAA/26/Fusion/2019

Dated: 13.12.2019

Copy To:-

1. M/s Fusion Buildtech Pvt. Ltd., A-6 G.F., Master Somnath Marg, Yojana Vihar, Delhi-110092.
2. Shri Pradeep Kumar, S/o Shri Roshan Lal, Village Jainpur Sadhan (5), Indri, Karnal, Haryana-132041.
3. Commissioner of Commercial Taxes, Office of the Commissioner, Commercial Tax, U.P. Commercial Tax Head Office Vibhuti Khand, Gomti Nagar, Lucknow, Uttar Pradesh- 226010.
4. Chief Commissioner of Central Goods & Services Tax, Meerut Zone Opp. CCS University, Mangal Pandey Nagar, Meerut, Uttar Pradesh- 250004.
5. Principal Secretary (Town & Planning), Government of Uttar Pradesh, TCG / 1-A-V/5, Vibhuti Khand, Gomti Nagar, Lucknow-226010.
6. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
7. NAA Website/Guard File.

