CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

E/Cross/191,192,193,194/2009
in Appeals No. E/560,561,562,563/2009

E/465/2009-DB; E/466/2007; E/476/2008;

[Arising out of Order-in-Original No. 4/09 dated 12/02/2009 passed by the Commissioner of Central Excise, Customs and Service Tax, Calicut.]

PERFECT BOARDS & DOORS
PUTHIYAPARAMBA,
BALIAPTTAM,
KANNUR

T.P.HANEEFA
PARTNER,
M/S.PERFECT BOARDS & DOORS,
PUTHIYAPARAMBA,
BALIAPATTAM
KANNUR

Appellant(s)

G.SURYANARAYANAN
PROPRIETOR,
M/S.THE VENNERS,
NO.61, 9th CROSS,
DAIRY EMPLOYEES HOUSE BUILDING CO-OPERATIVE SOCIETY LAYOUT,
BANNERGHATTA ROAD,
BANGALORE.

Versus

Commissioner of Central Excise,
Customs and Service Tax
CENTRAL REVENUE BUILDING,
MANANCHIRA, CALICUT,
KOZHIKODE – 673 001
KERALA

Respondent(s)

Appeal(s) Involved:

E/562/2009

[Arising out of Order-in-Original No. 4/09 dated 12/02/2009 passed by the Commissioner of Central Excise, Customs and Service Tax, Calicut.]

Commissioner of Central Excise
and Service Tax
CENTRAL REVENUE BUILDING,
MANANCHIRA, CALICUT,

Appellant(s)

KOZHIKODE – 673 001
KERALA

Vs.

PERFECT BOARDS & DOORS
PUTHIYAPARAMBA,
BALIAPTTAM,
KANNUR

Respondent(s)

Appeal(s) Involved:

E/468/2009; E/469/2009; E/475/2009

[Arising out of Order-in-Original No. 3/09 dated 12/02/2009 passed by the Commissioner of Central Excise, Customs and Service Tax, Calicut.]

WOOD VENEERS
MILL ROAD,
BALIAPATTAM,
KANNUR

T.P.HANEEFA
PARTNER,
M/S.PERFECT BOARDS & DOORS,
PUTHIYAPARAMBA,
BALIAPATTAM
KANNUR

Appellants

G.SURYANARAYANAN
PROPRIETOR,
M/S.THE VENNERS,
NO.61, 9th CROSS,
DAIRY EMPLOYEES HOUSE BUILDING CO-OPERATIVE SOCIETY LAYOUT,
BANNERGHATTA ROAD,
BANGALORE.

Vs.

Commissioner of Central Excise,
Customs and Service Tax
CENTRAL REVENUE BUILDING,
MANANCHIRA, CALICUT,
KOZHIKODE – 673 001.
KERALA

Respondents

Appeal(s) Involved:

E/560/2009

[Arising out of Order-in-Original No. 3/09 dated 12/02/2009 passed by the Commissioner of Central Excise, Customs and Service Tax, Calicut.]

Commissioner of Central Excise,
Customs and Service Tax
CENTRAL REVENUE BUILDING,
MANANCHIRA, CALICUT,
KOZHIKODE - 673001

Appellants

KERALA

vs.

WOOD VENEERS
MILL ROAD,
BALIAPATTAM,
KANNUR

Respondents

Appeal(s) Involved:

E/470/2009; E/467/2009; E/473/2009

[Arising out of Order-in-Original No. 1/09 dated 11/02/2009 passed by the Commissioner of Central Excise, Customs and Service Tax, Calicut.]

WOOD BOARD
KEERIYAD,
VALAPATTANAM,
KANNUR.

T.P.HANEEFA
PARTNER,
M/S.PERFECT BOARDS & DOORS,
PUTHIYAPARAMBA,
BALIAPATTAM
KANNUR

Appellants

G.SURYANARAYANAN
PROPRIETOR,
M/S.THE VENNERS,
NO.61, 9th CROSS,
DAIRY EMPLOYEES HOUSE BUILDING CO-OPERATIVE SOCIETY LAYOUT,
BANNERGHATTA ROAD,
BANGALORE.

Vs.

C.C.,C.E.& S.T-CALICUT
CENTRAL REVENUE BUILDING,
MANANCHIRA, CALICUT,
KOZHIKODE - 673001
KERALA

Respondents

Appeal(s) Involved:

E/563/2009

[Arising out of Order-in-Original No. 1/09 dated 11/02/2009 passed by the Commissioner of Central Excise, Customs and Service Tax, Calicut.]

C.C.,C.E.& S.T-CALICUT
CENTRAL REVENUE BUILDING,
MANANCHIRA, CALICUT,
KOZHIKODE - 673001
KERALA

Appellants

Vs.

WOOD BOARD
KEERIYAD,
VALAPATTANAM,
KANNUR.

Respondents

Appeal(s) Involved:

E/471/2009; E/472/2009; E/474/2009

[Arising out of Order-in-Original No. 2/09 dated 12/02/2009 passed by the Commissioner of Central Excise, Customs and Service Tax, Calicut.]

PRIME VENEERS LTD.,
MILL ROAD , BALIAPATTAM, KANNUR

T.P.HANEEFA
PARTNER, M/S.PERFECT BOARDS & DOORS,

G.SURYANARAYANAN
PROPRIETOR, M/S.THE VENNERS

Appellants

Vs.

C.C.,C.E.& S.T-CALICUT
CENTRAL REVENUE BUILDING,
MANANCHIRA, CALICUT,
KOZHIKODE – 673001. KERALA

Respondents

Appeal(s) Involved:

E/561/2009

[Arising out of Order-in-Original No. 2/09 dated 12/02/2009 passed by the Commissioner of Central Excise, Customs and Service Tax, Calicut.]

C.C.,C.E.& S.T-CALICUT
CENTRAL REVENUE BUILDING,
MANANCHIRA, CALICUT,
KOZHIKODE - 673001
KERALA

Appellants

PRIME VENEERS LTD.,
MILL ROAD , BALIAPATTAM,
KANNUR

Respondents

Appearance:

Mr. B. Venugopal, Advocate
Swami Associates & Co.
G-8, FORTUNA ICON APARTMENTS,
JODIDHAR ASWATHAPPA FARM,
BEHIND NAGARJUNA NAGAR,
SAHKAR NAGAR,
BANGALORE – 560 092. KARNATAKA

For the Appellant

Mr. P. R. V. Ramanan,
Special Counsel For the Respondent

Date of Hearing: 23/07/2019
Date of Decision: 01/11/2019

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20953 – 20968 / 2019

Per : P. ANJANI KUMAR

Four companies and different personnel are involved in the appeals.

(i). M/s Prime Veneers Limited purchased the running business of M/s Prime Veneers and M/s Wood Industries (partnership firms of Shri T.P Mustafa and Shri C.P Marshab) during July 2002. Shri T.P Mustafa and Shri C.P Marshab became directors of M/s Prime Veneers Limited. Shri T.P Mustafa and Shri C.P Marshab died in an unfortunate accident on 13.11.2004. Shri T.P. Haneefa, the surviving director along with other directors was looking after the affairs of the company after the demise of Shri Mustafa and Shri Marshab.

(ii). M/s. Wood Veneers is proprietorship concern of Smt. Nazreena w/o Sri T.P. Mustafa. She expired on13.11.2004 along with Sri T.P. Mustafa, and Sri C.P. Marshab died in an accident on 13.11.2004. Subsequent to their death, her legal heir C.P. Javed, Ms. Fatima and Sri Zubair Haji formed partnership firm and continued the operations in the name of M/s Wood Veneers.

(iii). M/s Perfect Boards & Doors have Shri T.P. Haneefa and Smt C.P. Jasleena as partners.

(iv). M/s Wood Boards is a proprietorship concern. Shri C.P. Marshab was the proprietor who expired on 13.11.2004. After his demise his younger brother C.P. Javid became the proprietor of the unit.

2. DGCEI conducted investigation against M/s Prime Veneer Limited, M/s Wood Veneers & Others, M/s Perfect Boards & Doors and M/s Wood Boards. On conclusion of the investigation DGCEI issued different SCN which were adjudicated by Commissioner. Revenue has based the allegations on certain records, recovered from one of the dealers in Bengaluru namely 'The Veneers' and 'Space System and Agencies', belonging to one person Shri G. Suryanarayana. Investigation claimed that Shri G. Suryanarayana admitted that the records were maintained by him and contain details of payments (additional consideration) made to the representatives of the group. During the investigation statements of some of the other dealers were also recorded who have been alleged to have admitted that they have been paying some part of value in cash. There are also many other dealers against whom the department did not conduct any investigation.

2.1. The investigation has considered the value shown in invoice by the Appellants to their Dealers and added the amount of cash alleged to have been paid by Shri G. Suryanarayana, and arrived at a percentage of undervaluation. For example in the case of Prime Veneer Limited, it is alleged that the invoice value represents 41.49% and undervaluation is alleged to be 59.51%. The investigation has considered that there is 59.51% undervaluation in all the cases, and accordingly revised the assessable value on all the clearances made during the impugned period and worked out differential duty on such revised assessable value. Each of the above parties are in Appeal contesting the confirming demands as indicated above and the Department is in appeal on the demands dropped. Details are as below.

Appellant	Impugned Order No /Date	Appeal No	Duty/penalty confirmed in OIOs (Rs.)	Revenue Appeal No (if any)
Perfect Boards	4/2009 12.02.2009	E/465/2009	9,66,391	E/562/2009
T.P. Haneefa	2/2009/ 12.02.2009	E/466/2009	10,000	---
T.P. Haneefa	01/2009 11.02.2009	E/467/2009	Do	----
Wood Veneers	3/2009 12.02.2009	E/468/2009	40,053	E/560/2009
T.P. Haneefa	3/2009 12.02.2009	E/469/2009	10,000	
Wood Boards	1/2009 12.02.2009	E/470/2009	5,01,726	E/563/2009
Prime Veneers	2/2009/ 12.02.2009	E/471/2009	22,96,581	E/561/2009

T.P. Haneefa	2/2009/ 12.02.2009	E/472/2009	10,000	----
G. Surya Narayana	01/2009 11.02.2009	E/473/2009	10,000	
G. Surya Narayana	02/2009 12.02.2009	E/474/2009	Do	
G. Surya Narayana	03/2009 12.02.2009	E/475/2009	Do	
G. Surya Narayana	04/2009 12.02.2009	E/476/2009	Do	

3. Shri Learned Counsel for the appellants, submits that there are no documentary evidences to support the charge of undervaluation; the Adjudicating Authority has confirmed the demand only on the basis of records recovered from the Dealers of the Appellant in Bangalore viz., 'The Veneers' and 'Space System & Agencies'. He has dropped the demands for a certain period in each of the cases but confirmed demands in subsequent period demand for a period on the basis of records recovered at Dealer in Bangalore holding that there was evidence for payment of additional consideration grounds.

(i). In respect of M/s Prime Veneer and Wood Industries a partnership firm, he dropped demand, for the period October 2001 to June 2002 as the units were acquired by Prime Veneer Limited in July 2002, on the ground that on the date of acquisition the said demand was not a liability in the books of Prime Veneer & Wood Industries; Section 11 provides only for the recovery of confirmed arrears or demand.

(ii). In respect of M/s Wood Boards, Commissioner dropped the demand prior to 13.11.2004, date on which Shri Mashab the proprietor expired and his younger brother C.P. Javid has become proprietor.

(iii). In respect of M/s Wood Veneers Commissioner has dropped the demand prior to 13.11.2004 when Smt Nazreena proprietor of the unit expired.

(iv). In respect of M/s Perfect Boards Commissioner confirmed the demand for the full period.

3.1. Learned Counsel for the appellants further submits that the allegation of undervaluation has been made mainly on certain records recovered by investigation from the premises of one of the dealer viz., M/s The Veneers and another firm (belonging to same business group), M/s Space Agency & Systems, Bangalore and the statement of Shri G. Suryanarayana; Shri G. Suryanarayana retracted the statement during cross examination; as the Commissioner has not re-examined him with any counter, the statement as well as the documentary evidences, lose their credibility; perusal of the documents indicates that the documents are not self-explanatory; investigation presumed that the manufacturer has collected additional consideration over and above the invoice value; the documents relied upon by the department on the individual invoices do not indicate the alleged undervaluation of 59.51%. Shri Suryanarayana has explained that the entries in exercise note book do not relate to the additional consideration paid in cash; he was maintaining the flat of Mustafa in Bangalore and taking care of his son's education expenses; the Mustafa Account in his note book relates to such expenses and has no relationship with sale proceeds of plywood; records of the Dealer allegedly indicate certain payments made to Shri T.P. Mustafa; Shri T.P. Mustafa is not alive and the investigation was not in a position to record any statement from him; it is be pertinent to note that the records indicate there are some entries where some payments have been shown to have been made to one Shri Thangal; investigation has not been in a position to identify the person or record the statement from him; investigation has questioned Shri T. P. Haneefa, partner of Perfect Boards, who is presently taking care of the affairs and. He has deposed that he is not in a position to offer any comments since details of payments if any could be known only to Mr Mustafa; Shri Haneefa has not admitted the statement of Shri G. Suryanarayana as correct; therefore, the entire allegation based on the record maintained by the third party, i.e. Shri G. Suryanarayana does not have any evidentiary value; no evidence that additional consideration paid was for the sale of plywood by the Appellants; moreover, the money was purported to have been paid to Late Shri Mustafa who was a director; it is settled legal position that the company and its directors are distinct legal persons. Hence the demand of the duty in the hands of the Appellant is not legally sustainable. Both the show cause notice and the impugned order attribute the monies paid by G Suryanarayana to Shri Late Mustafa as additional consideration for Ms/ Wood Boards and M/s Wood Veneers, when these firms are proprietary units and Shri Late Mustfa had role in the businesses of these firms; therefore, in the case of M/s Perfect Boards, wherein Shri Late Mustafa has no connection, the allegation cannot sustain at all.

3.2. Learned Counsel further submits that the Investigation has also relied on the statement of some of the dealers namely (i) Gajanan Kallappa Kadolkar of M/s Gajan Glass and Plywoods (ii) Shri Pankaj Shah of M/s Pankaj Associates Secundarabad (iii) B. R. Ramamurthy of M/s Jyothi Glass & Plywood Bangalore (iv) N.Diwakar of M/s Wood ply (India) Pvt Ltd (v) Jeyakar of M/s Saraswathi Traders Madurai (vi) ShafI Ahmed of A. S. Trading Company Bangalore in support of the allegations of undervaluation. The said witnesses have deposed that they have paid additional consideration to the appellant manufacturers in this case. It is pertinent to note that the said statements are not corroborated with any independent evidences. Out of these dealers, Shri Pankaj Shah, Shri Diwakar, K. P. Aboobacker, Sri Shafeer, Shri Gajanan Kalappa Kadolkar have retracted their statements before the adjudicating authority during cross examination. It may be pertinent to note that the said statements are not corroborated by any evidences and the adjudicating authority has no basis or evidence to counter the retractions or support the contents of the statements as correct. The said statements therefore have no evidentiary value.

3.3. Learned Counsel further submits that as the demand of duty confirmed under the impugned orders is only based on records found and recovered from the third party premises (Dealer's premises) and no other evidence to corroborate the said records, the ratio of the decision of Hon'ble SC in the case of CBI v. *V.C. Shukla* - 1998 AIR SC 1406, is squarely applicable**.** He also relies on the decision of the Hon'ble High Court of Delhi in the case of *M/s. Vishnu & Co. Pvt. Ltd. & Others in CEAC 62/2014 with 73-90/2014* [2016 (332) E.L.T. 793 (Del.)], wherein it was held that the allegation of clandestine evidence cannot be sustained only on the basis of records recovered at third party. Therefore it is necessary that such evidences would be corroborated by independent evidences. It was also held that in the case of retraction subsequently during the course of cross examination it becomes necessary for the department to produce other evidence which is of independent nature which corroborates the retracted statements the above decision of Hon'ble High Court has been accepted by the CBEC as pert CBEC

Vide the Circular Circular No. 1063/2/2018-CX, dated 16-2-2018. The CBEC vide Circular 1053/2/2017 dated 10.03.2017 has also emphasised the said requirements in the process of adjudications; Tribunal in Final Order No. 20244-20248/2019 dated 08.03.2019, in the case of M/s Bhuwalka Casting and Forgings Pvt. Ltd, has considered the said Circular and held that the statements have to be supported with independent corroborative evidences.

3.4. Learned Counsel further submits that in the case of M/s Prime Veneers Limited, the Appellant has contested the demand of **Rs.2, 32,808;** the allegation was made on the basis of invoices of M/s Badariya Industries Mill Road, Kannur, recovered from the premises of M/s Prime Veneer Limited. Shri Pavithran, Accountant of the unit in his statement has deposed that the said invoices relates to removal of goods manufactured at M/s Prime Veneers Limited. It was also noticed that the said unit in Mill Road was not working during the period February 2005; the appellant contested that M/s Bhadriya Industries have another unit at Taliparamba and the invoices relates to clearances from the said unit and the said clearances were reflected in Sales Tax returns filed by the unit.

3.5. On the appeals filed by the Revenue, the learned counsel submitted that main ground of department is that the entire demand ought to have been confirmed by Commissioner. This is not sustainable for the following reasons:

(i). evidences recovered from M/s Veneers Bengaluru itself is not a valid evidence since it was recovered from third party and not supported by any evidence; the dealer has retracted the statement during cross examination.

(ii). the other evidences were only statements not corroborated by any evidences and dealers retracted the statements; CBEC circular 1053/2/2017 Cx dated 10.03.2017 relied, wherein it is reiterated that statements should be supported by evidences as held in the Final Order Nos. 20244-29248/2019 dated 8.3.2019 in the case of M/s Bhuwalka Castings;

(iii). no demand to be confirmed unless there are evidences transaction wise as decided in various matters involving plywood under valuation; cases of CERA Boards, Prestige Boards, and others are pending before SC.

(iv). dropping of demand in the case of Prime Veneer and Wood Industry in respect of the demand for period 2002 (prior to acquisition) of the firm by Prime Veneers Limited could not have been confirmed by the Commissioner, since the provisions of Section 11 provides for recovery of sums due to Government as on the date of acquisition by the successor. The same does not provide for issue of notice to the successor, to show cause in respect of lapses of predecessor.

(v). Commissioner has dropped the demand in respect of the period prior to 13.11.2004 in respect of Wood Veneer and Wood Board. In Wood Veneers Smt C.P. Nazreena W/O Shri Mustafa was the proprietor and in Wood Boards Shri Mashab was the proprietor up to 13.11.2004. Both these individuals expired in an accident on 13.11.2004 and the Commissioner has dropped the demand in respect of the proprietary units for the period up to 13.11.2004. He has followed the decision of Tribunal in the case of D. Matai V CCE reported in 2000 ELT (126) 1264 (Tri-Mum); he has also held that there was no provision to recover the demand from the legal heirs of deceased; in these two cases, the demand was not a confirmed in pursuance to an order of adjudication prior to change of ownership. Tribunal in the case of Sharada Industries reported in 2017 (347) E.L.T. 180 (Tri. - Bang.) followed the same and the decision is in conformity with the decision of Honourable SC in the case of Shabina Abraham Vs Commissioner of Central Excise and Customs reported in 2015 (322) E.L.T. 372 (S.C.).

4. Shri K. Veerabhadra Reddy, Additional Commissioner, AR Authorised Representative for the Revenue, reiterated the findings of grounds of appeal (in respect of Revenue Appeals) and Cross-Objections (in respect of other appeals). He submits that DGCEI ZU, BENGALURU conducted search at various premises on 30.03.2005; search operation resulted in seizure of incriminating records/documents indicating Under valuation of the products and statements of concerned were recorded; Evidences / documents gathered during investigation indicated (i) additional consideration was paid in cash by the dealers to the assessee in relation to the sale of goods over and above the invoice price and b) the actual price of the goods sold was worked out. He submitted that Adjudicating Authority confirmed demands partly without any reason on theoretical terms and not on evidence available. The impugned order is not proper, correct and legal for the following reasons.

(i). actual sale consideration received by different assessees is worked out based on percentage of invoiced price and percentage of additional consideration; worksheets for differential duty calculation calculated the actual sale value, for each month, on the basis of the general formula by multiplying the total amount in the invoices for the month with the said formula; the figure arrived at is cum duty value and accordingly, assessable value was derived from it.

(ii). incriminating documents recovered and other evidences gathered from one dealer namely M/s Veneers, Bangalore and its proprietor Shri G. Surya Narayanan indicate the actual sale price of different variety of goods which is higher than the invoice price under valuation of goods has been admitted by the other dealers also in respect of all the other clearances.

(iii). the statements given by the dealers have not been retracted by them; demand of differential duty on the entire clearance is worked out in the Show Cause Notice on the basis of the actual rate of goods provided by M/s Veneers and Shri G. Surya Narayanan.

(iv). quantification of duty liability, arrived by Commissioner, did not appear to be correct; Commissioner failed to appreciate that the demand was based on the evidence seized from the premises of M/s The Veneers (a dealer) and on the statements of other dealers recorded under Section 14 of Central Excise Act, 1944; they all had confirmed that assessee had been collecting additional amount in cash, over and above the invoice amount for each transaction; evidentiary value of the statement could not be ignored.

(v). Section 11(A)(2) of Central Excise Act, 1944,inter-alia, mentions that the Central Excise Officer shall after considering the representation, if any made by the person on whom the notice is served under subsection (i), determine the amount of duty on goods due from the said person; the expression **'after considering the representation"** is very important; it casts the responsibility on the Adjudicating Authority to verify the correctness of the representation vis-à-vis the facts and figures mentioned in the show cause notice; the additional amount paid by the dealers to the manufacturer having been already established, it was the responsibility of the adjudicating authority to verify, whether the figures mentioned were correct in the light of submissions made by the dealers or the extent of discrepancy could have been pointed out based on evidence, adduced by the assessee, if any. In terms of Rule 11 of Central Excise (Valuation) Rules, 2000, the Commissioner could have determined value using reasonable means consistent with the principles and general provisions of Rules, Commissioner could have only determined the duty payable by the manufacturer after the verification and determination of value by inclusion of additional amount.

(vi). the assessee has taken over M/s PVWI with all its assets & liabilities on 01.07.2002. The demand made in the SCN was for the duty evasion committed by M/s PVWI during the period assessed prior to 01.07.2002 itself. Hence the view of the Adjudicating Authority that there was no liability at the time of the acquisition does not appear to be correct and legal. Hon'ble High Court of Karnataka observed (2012 (27) S.T.R (452), inter alia, that

> *If his family members were to take over the business after his death, continued to carry on the very same business, probably they would comply with the requirements of the statute. If they do not take over the business or comply with the provisions of the Act, they cannot be held liable of the dues of the deceased. That appears to be the principle underlining these two provisions.*

The above decision has been affirmed by the Honourable Apex Court in the case of M/s Sabrina Abraham as reported in 2017 (50) STR (241) SC. In the instant case, admittedly, the facts presented, points out to taking over of the business of the deceased proprietor by the successors and continued to carry on the very same business. Therefore, the liability on the successor is accordingly sustainable.

5. Heard both sides and perused records of the case. In the instance case all the appeals are of a group of companies i.e (i) M/s. Perfect Boards and Doors (ii) M/s. Wood Boards (iii) M/s. Prime Veneers Limited and (iv) M/s. Wood Veneers and various individuals involved in the case. The genesis of the case is in the investigation conducted by the officers of DGCEI against these companies subsequent to such searches conducted at various premises on 30/03/2005. The Department presents evidence in the form of diaries, registers, note books, private records/slips recovered from the premises of M/s. The Veneers Bangalore and M/s. Space Systems and Agencies both belonging to Shri G. Suryanarayana and the statement of several other persons recorded. On conclusion of the investigation, different

SCNs were issued to the four main appellants and others which were decided by the Commissioner vide OIO No. 01/2009 dated 11.02.2009; No. 02/03/04 all dated 12.02.2009. Different appeals, i.e. No. E/465/2009 by Perfect Boards and Doors, E/470/2009 by M/s Wood board; E/471/2009 by M/s Prime Veneers Ltd and E/468/2009 by M/s Wood Veneers, were filed. In respect of personal penalty, Sh. T.P. Haneefa filed E/466/2009, E/467/2009, E/472/2009, E/469/2009 and Sh. G.Suryanarayanan filed Appeals No E/473 to 476/2009. The Department filed Appeals No E/560 to 563/2009 against the partial dropping of the demands by Commissioner. As the evidence contained is the same set of documents and as learned Commissioner has dealt with all the cases in a similar manner, the cases were presented by counsel together and therefore, we propose to take up all the appeals together.

5.1. The main evidence put forth by the Department is in the form of:

(i) Exercise Notebooks recovered from M/s The Veneers and M/s Space Systems, Bangalore allegedly containing invoice wise details of actual amount, amounts shown in invoice and difference payable in cash.

(ii) Diaries bearing Serial Nos. 1,2,3,4.

(iii) Exercise Notebooks.

(iv) One Account called Mustafa Account alleged contained payments made to Sh. T.P. Mustafa or expenses incurred on his behalf by Sh. Suryanarayanan.

(v) Statements of various persons of the companies, of The Veneers and different dealers.

It is also alleged that Sh. G. Suryanarayanan and his Assistant, Sh. Narayanan have confessed to the maintenance of such records and recovery of the same from the office premises of M/s The Veneers or residence of Sh. G. Suryanarayanan.

5.2. Sh. Suryanarayanan during the course of recording of his statement is alleged to have prepared invoice wise amount and actual amount of invoice in respect of all the clearances of the four above said companies. On the basis of records recovered, prepared by Sh. Suryanarayanan, it was alleged that M/s Perfect Boards and Doors have received an amount of Rs.69,37,219/-; M/s Wood Veneers received an amount of Rs.51,93,514/-; M/s Prime Veneers received an amount of Rs.1,85,78,072/- and M/s Wood

Board received an amount of Rs.2,15,18,231/- over and above the price indicated in the invoices. Thus, it was alleged that these companies have indulged in under-valuation of the products sold by them to the tune of 38.31%, 36.7%, 58.51% and 67.56% respectively.

5.3. Learned Commissioner having gone through the various evidences put forth before him has come to the conclusion that the allegations raised in the SCNs were correct in view of the statements of Sh. G. Suryanarayanan on 30.03.2005, 31.03.2005, 11.09.2006 and 05.10.2006; statement of Sh. R. Narayanan dated 30.03.2005 and the statement of Sh. T.P. Haneefa, Director of Prime Veneers in respect of Prime Veneers. Commissioner finds that:

> *"43. I find that from the note books/ private records seized each invoice can be co-related to the actual purchase price. The diaries No.1, 2, 3 & 4 seized from the residence of Sh. G. Suryanarayanan clearly establish the payments made by him to M/s Prime through the representatives of the company. Therefore, from the above, I find that the statements of Sh. G. Suryanarayanan can be very well corroborated to the entries made in the private records as regard to actual clearance value of goods cleared by M/s Prime/PVWI. This has not been denied by the Director of M/s Prime. On the basis of the clearances made by M/s PVWI to M/s The Veneers it is seen that the actual price is Rs.233.567% of the invoice value. This M/s PVWI had suppressed their actual price in the invoice value. This M/s PVWI had suppressed their actual price in the above ratio. Similarly based on the clearances to M/s The Veneers it is calculated that the actual value of clearance made by M/s Prime is 241.03% of the invoiced price.*
>
> *44. In the above circumstances, I am convinced that M/s Prime as well as PVWI had suppressed the actual value/price of the goods cleared to M/s The Veneers, which has been evidenced by the statements of Sh. G. Suryanarayanan and Sh. T.P. Haneefa and have been corroborated by the private records viz. note books and diaries seized in investigation."*

5.4. As against the above findings by the Commissioner, the appellants based their defence on the following grounds:

(i). the entire case is made on the basis of third-Party records and payment of additional consideration was not corroborated by any independent witnesses. They wish to rely upon the decision of Hon'ble Delhi High Court in the case of Vishnu & Co. (Supra) which was accepted by the Department vide CBEC Circular No. 1063/2/2018-CE dated 16.02.2018.

(ii). Sh. Suryanarayanan and others have categorically replied during the cross-examination that the figures in records do not represent actual purchase price of goods as alleged and that he has not recovered and paid any amount over and above the amounts shown in invoice.

(iii). The documents do not indicate anywhere categorically that the amounts shown therein pertain to a particular type of Veneer, Ply, Board, Door etc. sold to any particular person under a particular invoice. The entries in the said register, diaries and records are sketchy, vague and therefore cannot be primary evidence. Department covered up the deficiencies in the documents/records by way of oral statement of Sh. G. Suryanarayanan recorded under Section 14 of Central Excise Act, 1944. Such evidence is not acceptable in terms of Section 93 of the Indian Evidence Act, 1872. The so-called account of Mustafa contained various expenses incurred and payments made by Sh. G. Suryanarayanan on behalf of Sh. T.P. Mustafa who expired on 13.11.2004. It can be seen that many of the entries pertain to personal expenses of Sh. Mustafa, his son, Sh. Marshab and their apartment. The entries like driver's salary, apartment maintenance, electricity, telephone, car repair etc. in no way can be said to be the considerations collected over and above the invoice price from different dealers and customers. The contents of the registers cannot be linked to any company.

(iv). Learned Commissioner has erred factually in stating that Sh. T.P. Haneefa has accepted the findings of the investigation by way of statements of Sh. G. Suryanarayanan. In fact, on being shown all the figures, Sh. Haneefa, who was not aware of the authenticity of the figures and had no knowledge of facts and hence, offered no comments. This cannot be taken as failure to deny.

6. On going through the rival contentions, we find that the issue involved is that of under-valuation of Plywood, Veneer etc. manufacture and cleared by the appellants. The evidence made available by the Department in the form of record registers, diaries which are explained by the person from who possession the same have been recovered. Ongoing through the various records and the statements of the different persons, though retracted at a later stage, we find that the fact that there is under-valuation in the trade of the impugned products. We find that on the one hand, the Department tries to put down the pieces of evidence as an impregnable concrete defence to substantiate the allegation of under-valuation, defence attempts to wash it of saying it's a third-party evidence and as such, it cannot be relied upon and on the one hand, Sh. T.P. Haneefa, looking after the affairs of the company has denied any knowledge of payments over and above and on the other hand, the so-called confirmatory statements were retracted during the cross-examination. We find that DGCEI has made a series of cases against manufacturers of Veneers and Plywood across South India. Some cases have travelled up to the Tribunal on adjudication. CERA Boards and Doors 2010 (249) ELT 550 (Tri. Bang) was one such case. This Bench observed that:

> *"**11.5** As regards the allegation of under invoicing is concerned, we find that the investigation done is very extensive. They have confronted the officials of the assessee-company at their depot in Bangalore. They had also contacted certain dealers. They had collected a lot of incriminating documents. We do not want to list them again. They have elsewhere in this order, been enumerated. All these things have been discussed by the Commissioner in his order. Therefore, as far as the evidence for under-invoicing is concerned, we have to say that there is overwhelming evidence for under-invoicing. We cannot accept the learned Advocate's contention that there is no under invoicing or corroboration and the entire demand is made on presumptions and assumptions. The depot officials themselves have accepted that cash in excess of the invoice value is being separately collected. In fact, according to the Revenue, 30% of the actual value only is mentioned in the invoice and the remaining 70% is collected as cash. This is the main charge. We cannot say that this charge is baseless because the dealers from whom statements have been recorded have accepted that excess cash is being collected. Therefore, one thing is very clear that the price mentioned in the invoice is not the correct price. There is evidence that the appellants had been collecting cash over and above the invoice price.*

We find that as the issue involved in both the cases is about the undervaluation of Veneers and plywood, the ratio of the case is very much applicable as far as the appreciation of principle is concerned.

7. Understandably, we are dealing with a case of tax-evasion and not a criminal case wherein the degree and standard of evidence is much higher and more precise. As far as the tax-evasion cases are concerned, we find that the principle of pre-ponderance of probability has precedence over proof beyond doubt. It is widely accepted that 'Preponderance of probability' is met when a proposition is more likely to be understood by people of reasonable intelligence to be true than to be not true. Effectively, the standard is satisfied if at least there is 50% or more chance that the given proposition is believable by a reasonably prudent to be true. In this regard, Hon'ble Supreme Court in the case of Maharashtra State Board of Secondary and Higher Education v K. S. Gandhi & Others (1991) *2* SCC 716 1 held that

> "It is thus well settled law that strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. It is open to the authorities to receive and place on record all the necessary facts though not proved strictly in conformity with the Evidence Act. The evidence must be germane and relevant to the facts in issue. In grave cases like forgery, fraud, conspiracy, misappropriation, etc. seldom direct evidence would be available. Only the circumstantial evidence would furnish the proof. There must be evidence direct or circumstantial to deduce necessary inferences in proof of the facts in issue. There can be no inferences unless there are objective facts, direct or circumstantial from which to infer the other fact which it is sought to establish. The standard of proof is not proof beyond reasonable doubt 'but' the preponderance of probabilities tending to draw an inference that the fact must be more probable. Standard of proof cannot be put in a strait jacket formula. No mathematical formula could be laid on degree of proof. The probative value could be gauged from facts anti circumstances in a given case. The standard of proof is the same both in civil cases and domestic enquiries."

8. In view of this we do not find that the ratio of the cases of V.C. Shukla and Vishnu and Company (supra), relied upon by the appellants is of not much help. We find that the while case of VC Shukla was under Cr PC the case of Vishnu and Co pertains to clandestine removal. As the facts of the case are different, the ration cannot be applied.

8.1. It is now settled principle that cases of this nature need not be proved with mathematical precision. At the same time, a single piece of evidence cannot be accepted to encompass the whole gamut of transactions. A fine line of distinction requires to be drawn. Acceptance of the principle of preponderance cannot be a Licence to demand duty on the basis of assumptions/presumptions/ vague imputations. Therefore, while accepting the fact that there was under-valuation resorted to by these companies, we find that the methodology adopted to quantify the duty evaded should be sustainable on the evidence available and quantum thereof, needs to be arrived in a logical; rational and legally appropriate manner.

9. We find that Learned Commissioner accepted the fact of under-valuation and has been categorical in finding that the method of approximation cannot be applied. We find that the Commissioner has found as below:

> "54. The calculation of actual sale value on the basis of average formula will never reflect the correct and actual value. For example, in respect of Invoice No. 205/ dated 5.10.04 (clearance by M/s Prime) to M/s The Veneers the invoice value is Rs.87,069/- and actual sale value proved by investigation is Rs.2,52,585/-. The actual sale value by formula is Rs.2,09,862/-. Similarly, in respect of invoice No.41/dated 11.05.04 the invoice value is Rs.62,965/- and actual value by investigation is Rs.1,93,448/-. But actual value on the basis of formula is Rs.1,51,764/-. Again, in respect of invoice no.249/dated 09.11.2001 (clearance by PVWI) the invoice price is Rs.52,780/- and actual sale value on investigation is Rs.1,34,366/-. But the actual sale value on the strength of the formula is Rs.1,23,277/-. Again, in respect of invoice no.34 dated 20.04.02 (clearance made by PVWI) the invoice value is Rs.1,27,034/- whereas actual sale value by investigation is Rs.3,23,213/-. The actual sale value by formula is Rs.2,96,710/-. The above examples clearly illustrate that application of formula for calculating the actual sale value is not at all correct and dependable. Each invoice value and corresponding actual value vary in accordance with the type and quality of goods billed. I find that investigation has not been made any attempt to find out the differential amount collected by the assessee over and above the billed amount in respect of all dealers instead they had gone after the formula based on evidence from one dealer. It is to be noted that on the left-hand side wrapper of the note book 1-3/27 Sh. G. Suryanarayanan has indicated actual sale price of the different goods manufactured and cleared by M/s Prime. Therefore, if investigation would have conducted to find out the actual value in respect of each variety of goods cleared, they would have been in a position to calculate the actual value by multiplying the actual value of the particular type with total clearance quantity of that grade. The investigation has not made any attempt in this direction to find out the actual sale value on realistic terms. In this circumstance, I am unable to accept the actual sale value worked out by the investigation on a generalized formula. Even though investigation has taken statements of some of the dealers admitting that they are also getting goods under valued from the assessee in the same pattern of sale but no evidences were brought out as

regards the actual amount of cash flow from the buyer to the seller. In the light of the above discussion, we are of the view that the differential duty worked out in annexure D to the SCN is purely on theoretical terms and not on realistic terms.

10. The appellants have also submitted that post 1.7.2000, where assessable value is transaction value, each transaction needs to be analyzed independently and no extrapolation/ generalisation can be permitted. In this regard, we find that this Tribunal has already laid down the principles of valuation with regard to the case of under-valuation as the present one. We find that the Tribunal in the case of CERA Boards (supra) has observed that:

> *"**11.12** As regards the period after 1-7-2000 for valuation, the concept of 'transaction value' has been introduced. In the concept of transaction value, each transaction is important. Therefore, the transaction value is to be determined for the clearances after 1-7-2000. As far as the period after 1-7-2000 is concerned, the value for assessable purpose is the transaction value. The transaction value is the value for each transaction. The concept of transaction value is entirely different from the concept of normal value. While the normal value can be notional, the transaction value is the actual amount transacted in respect of the goods. Of course, under certain circumstances, the transaction value has to be determined in accordance with the Rules. Anyhow, we would not go into that. Suffice it to say that for all the clearances after 1-7-2000, the value has to be determined based on each-transaction. Therefore, the differential duty should be confined only to the evidences available on record. These are our two observations. Therefore, the Revenue's contention that uniformly for all the clearances, 70% should be added to the invoice value is not accepted. We reiterate our finding to say that for the period prior to 1-7-2000, the Commissioner has to decide' the normal price for each variety of goods and he can adopt the same for all the clearances. It does not mean that the invoice value has to be accepted. The normal price has to be determined based on the evidence available.*
>
> ***11.13** As regards the period after 1-7-2000, the Commissioner has to go strictly by the transaction value and decide the short levy. After deciding the differential duty leviable on the basis of the above principles, the Commissioner can determine the quantum of penalty, etc.*

We find that there are no reasons as to why we should differ from the observations of the Tribunal as above. Therefore, we hold that the quantification of the duty liability requires to be arrived strictly on transaction to transaction basis on the above terms as was observed by this bench in CERA Boards.

11. The show cause notice proposes to recover additional duties on the basis of a percentage of under valuation arrived at. Learned Commissioner has correctly denied an approach of quantifying the duty liability on an approximation basis as is proposed in annexure-D to the SCN in respect of Prime Veneers and Others. However, the Commissioner has taken recourse to the annexures C 1-16, C 1-13 etc. It is seen that in these annexures' amounts shown and amounts collected invoice wise are mentioned, giving reference to the seized records. The entries thereof have been accepted by Shri G. Suryanarayanan, the person who maintained the records. Therefore, such records cannot be brushed aside as imagination. Understandably, no person would keep such records just for the sake of fun. These are not lines of poetic thoughts jotted down from time to time. They are dated, named and numbered. They tell a story as to how the accounts were maintained in the course of business. It is for the investigation to unfold the story and bring them to understandable, legally sustainable facts and figures to establish duty evasion. Appellants, however submit that the person who recorded the same has retracted during cross examination. We too find that the records recovered from Shri G. Suryanarayanan contain some unexplained anomalies. They refer to some amounts, names and dates. In some cases, Demand drafts are mentioned. It is not coming forth whether these drafts pertain to accounted value of sale or towards additional consideration. In some places, though small amounts are mentioned, words "L' are found so as to infer that the transactions were in lakhs. However, in some cases such notations are not there. In the annexures refer to, by Commissioner, as C-1-16, C1-13, C-1-20 etc., We find that though entries are listed invoice wise and a reference is given to the seized documents, the names of dealers/traders/customers are not mentioned. Commissioner has also not recorded any findings on the same. We find that the quantification of the duty requires to be arrived on the basis of evidence available.

12. Moreover, the appellants submit that whereas the Show Cause Notice Proposed valuation under Rule 6 of the Valuation Rules, Learned Commissioner has confirmed the duty after arriving at the value under Rule 11 of Central Excise Valuation Rules.; thus, the commissioner has traversed beyond the scope of Show Cause Notice and is against the principles of Natural Justice.

13. We find, in view of the discussion above, that the Learned Commissioner has rejected the method of quantification arrived at in the annexure-D in respective to SCNs saying that the duty cannot be arrived on an assumption and presumption basis, by multiplying the average percentage of duty evasion quantified to all the clearances. Commissioner has placed reliance on the annexures of the C series. However, he has not elaborated on the reasons as to why he was following the same except stating that the record has invoice wise clearances and the amounts actually paid. We find that in the said annexures, the names of the recipients are not mentioned. In view of the decision of the Tribunal in the case of CERA Boards (supra) the quantification of duty evaded is to be done on the basis of transaction value. However, in the absence of details like names of the consignees, this bench cannot come to a conclusion, on the basis of the available records, that all the entries mentioned in the C series annexures relied upon by the Commissioner, relate to that the actual transactions that have taken place. As discussed above, these annexures were prepared by Sh. G. Suryanarayanan during the course of recording of his statement. The said annexures do not indicate if they are corroborated by entries, if any, found in the records recovered from the premises of the appellants and others. This assumes significance due to the fact that Sh. Suryanarayanan during the course of cross-examination has denied his statement recorded. Moreover, duty evaded post 01.07.2000, requires to be arrived at on the basis of transaction value in terms of the findings of this Bench in CERA Boards (Supra). Under such circumstances, the issue needs to go back to the Adjudicating Authority, who shall re-quantify the duty confirmed by him after going through the records seized from the Veneers; space systems, the premises of the appellants and others to arrive at the value in respect of each of the transactions after giving an opportunity to the appellants of being heard.

13. Clandestine Removal: In respect of Prime Veneers Ltd., it was alleged that during the course of search of office premises of Prime, one invoice book of M/s Bhadriya Industries was found. On the basis of the statements of Sh. C.A. Pavitran, Accountant of M/s Prime and Sh. K.P. Aboobacker, Partner of M/s Bhadriya Industries, it was alleged that M/s Prime Veneers have cleared the goods manufactured by them under the invoices of M/s Bhadriya Industries. On account of this, a duty of Rs.2, 37,464/- was confirmed by the Commissioner. Commissioner finds that Sh. Pavitran, Sh. Aboobacker and Sh. T.P. Haneefa have accepted the same. However, ongoing through the statement of Sh. T.P. Haneefa record on 17.08.2006, it is seen that he only stated that he was not sure whether all the goods covered under the said invoices (23 invoices numbering 22-44) were cleared from M/s Prime Veneers Ltd; if the same was cleared from M/s Prime Veneers Ltd. under the invoices of M/s Bhadriya Industries, appropriate duty on the same would be paid. We find that this is a partly committal statement. It is not coming forth whether any further evidence has been adduced to establish the clandestine removal. The charge of clandestine removal is a serious charge and is required to be proved along with use of raw material, electricity, labour, manufacture of the material, transportation and receipt of money for the same. Going by the records of the case, no effort in that direction appears to have made except noting that M/s Bhadriya Industries was closed during that time and depending on the statements of different persons. The appellants submitted that M/s Bhadriya Industries have Sales Tax Returns and declared the same in their Returns. The impugned order silent in this regard. Under these circumstances, we find that enough evidence has not been put forth before us to come to a definitive conclusion. Therefore, we find it necessary to remand the matter back to the Commissioner to analyze the evidence available, and submissions made by the appellants and the money trail in this regard to arrive at the conclusion regarding the clandestine removal alleged to have been committed by M/s Prime Veneers Ltd.

14. Penalties: Sh. T.P. Haneefa has filed Appeals No. E/466, 467, 469, 472/2009 and Sh. Suryanarayanan Appeals No E/473,474,475,476/2009. Ongoing through the OIOs, we find that Commissioner has been very lenient in imposing the penalties and has imposed nominal penalties of Rs.10,000/-

in each case. It is not the case of the appellants that the said persons have no role in the dealings of the companies. Therefore, we do not find any reason to interfere with the same looking into the role played by the respective individuals. However, as regards the penalty imposed on various companies under Section 11AC of CEA, 1944 as discussed above, the appeals are being remanded for re-calculating in the duty confirmed, it is directed that the penalties shall be equivalent to the re-confirmed duties. We find that as penalty under Section 11AC is to be imposed, penalty under Rule 25/26 is not warranted and hence liable to be set aside.

Department's Appeals

15. Revenue is in appeal against the above cited OIOs passed by the Commissioner mainly on the following grounds.

(i). Commissioner has not accepted duty worked out in the Annexure D to Show cause Notice giving reason that calculation of differential duty is purely on theoretical terms and not on realistic terms. Adjudicating authority has confirmed duties as under

Party	Appeal No	OIO	Amount demanded	Amount confirmed
Wood Boards	E/563/2009	1/2009 12.02.2009	1,09,47,398	5,01,726
Wood Veneers	E/560/2009	3/2009 12.02.2009	1,55,52,989	40,053
Prime Veneers	E/561/2009	2/2009/ 12.02.2009	1,51,50,674	22,96,581
Perfect Boards	E/562/2009	4/2009 12.02.2009	81,50,051	9,66,391

(ii). the actual sale consideration received by the assessee as worked out to a percentage was arrived at by multiplying the total amount in the invoices for the month with the said formula. The under valuation of goods by the assessees, in respect of all the other clearances, (apart from which mentioned in Annexure C) has been admitted by the other dealers and the statements have not been retracted.

(iii). The evidence gathered from the dealers under summons proceedings did not specify the amount / additional consideration paid by them, but stated that they had paid additional amount over and above the invoice price. Dealers have confirmed that assessee had been collecting additional amount in cash, over and above the invoice amount for each transaction. Hence the fact regarding the payment of additional amount stands established / substantiated.

(iv). In terms of Section 11(A)(2), the adjudicating authority needs to verify the correctness of the representation vis-à-vis the facts and figures mentioned in the show cause notice. The additional amount paid by the dealers to the manufacturer having been already established and it was the responsibility of the adjudicating authority to verify, whether the figures mentioned in the Annexure-D were correct. If it was found incorrect, he could have arrived at the value in the light of submissions made by the dealers under the provisions of Rule 11 of Central Excise (Valuation) Rules, 2000 using reasonable means consistent with the principles and general provisions.

(v). the assessee has taken over M/s PVWI with all its assets & liabilities on 01.07.2002. The demand made in the SCN was for the duty evasion committed by M/s PVWI during the period assessed prior to 01.07.2002 itself. Hence the view of the Adjudicating Authority that there was no liability at the time of the acquisition does not appear to be correct and legal.

On the portion of the duty demand dropped by Commissioner

16. We find that the Department is aggrieved by the fact that the Commissioner has not confirmed the demands as proposed in the SCNs. However, the same Commissioner has taken recourse to the annexures C 1-16 in the case of Prime Veneers and similar annexures in other cases. We find that the Department is aggrieved by the fact that the Commissioner has not accepted the calculation arrived at on the basis of a generalized percentage of evasion. As per our discussion above, we find that the Commissioner has rightly done so. Allegation of evasion of duty is a serious charge and the same has to be corroborated with evidences. In the instant case, the Department is heavily dependent on the records seized from the premises of office of the Veneers, Bangalore; Space Systems and Agencies, Bangalore and from the residence of Sh. G. Suryanarayanan and statements of several persons recorded in this regard. Department's contention is that in addition to the records recovered from Sh. Suryanarayanan, the

Commissioner should have taken into account the statements of the various dealers as per whom payments over and above invoiced prices were being collected from them. However, we find that these statements of the dealers are not corroborated by any records recovered either from the dealers themselves or from the premises of the appellants. Commissioner has placed reliance on annexures marked as C 1-16, C 1-13 etc. It is seen that these annexures appear to contain invoice wise amount shown and amounts collected giving reference to the seized records. The entries thereof have been accepted by Shri G. Suryanarayanan, the person who maintained the records. Therefore, such records cannot be brushed aside as imagination. Understandably, no person would keep such records just for the sake of fun. Appellants, however submit that the person who recorded the same has retracted during cross examination. Under such circumstances, we find that the Commissioner has rightly did not rely upon the quantification of duty on a theoretical and hypothetical basis and relied upon evidence which is apparently cogent. We find that this case stands slightly on a different footing on factual matrix than the other cases detected by DGCEI during the relevant period. In this case the evidence is in the form of records and diaries maintained by one dealer, M/s Veneers Ltd Bangalore and the statement of its proprietor, Shri G. Suryanarayanan. The facts are not corroborated at the end of the appellant and no such records were available. Shri T.P. Mustafa who was proprietor/looking after the affairs of group companies expired and his brother T.P. Haneefa had taken over. Records seized contain a record called "Mustafa Account". As Shri Mustafa is no more his statement was not recorded. There are references to one Mr Thangal who was supposed to be middle man between Shri Suryanarayanan and Shri Mustafa. Revenue could not trace the said Shri Tangal and record his statement. Shri T.P. Haneefa who later took charge of the Group could not/did not confirm the entries in the books/accounts maintained by Shri Suryanarayanan or his statement. However, as the issue relates to undervaluation and the preponderance of probability suggested the existence of the same and could not be brushed aside. There should be a reasonable way to quantify the duty evasion. There were certain records available with Shri G. Suryanarayanan and his committal statement was there. Under the circumstances we find that the Commissioner has correctly relied upon the records maintained by Sh. G. Suryanarayanan as they are at least corroborated by his own statement. In this case, at least, a semblance of evidence in the form of diaries, registers etc., is available as corroboration. That is not the case in respect of the statements of the dealers which the Department would like to rely upon. Moreover, we find that the records registered discussed in the SCN as well as the OIO, there are certain anomalies. It indicates certain payments with dates. In some cases, Demand drafts are also mentioned. It is not coming forth whether these drafts pertain to accounted value of sale or towards additional consideration. In some places, though small amounts are mentioned, words "L' are found so as to infer that the transactions were in lakhs. However, in some cases such notations are not there. In the absence of committal statement by the proprietor/director/partner, conclusion cannot be inferred only on the basis of the statements of dealers. Therefore, we find that Commissioner has rightly restricted the demand to that portion where invoice wise records were available and were supported by statements albeit which were denied during the cross-examination. However, the portion of the duty confirmed by the Commissioner requires to be re-worked in view of our discussion in the previous Paras. Therefore, on this count, we find that Department's grounds for confirming the entire duty proposed in the SCN does not merit consideration and to that extent, Commissioner's order is not required to be interfered with.

On the Liability of the successor:

17. The Department is in appeal against the Learned Commissioner's finding that duty recoverable from erstwhile companies cannot be recovered from the present companies. Commissioner finds that:

> *"I find from the records that M/s PVWI was a partnership firm till July, 2002. The present assessee took over the said firm w.e.f. 01.07.02 based on a sale agreement dated 01.06.02 accordingly; all the assets and liabilities of the partnership firm have been the part of the newly formed company, Prime. The new assessee is responsible for all liabilities. But at the time of acquiring/purchase, the former firm had no liability under Central Excise Law. If there was a confirmed demand as on 01.06.02/01.07.02 it would be the responsibility of the new assessee to settle the liability. In the present case the SCN is issued on 18.10.06. No fresh demand can be enforced/recovered*

> *from the assessee. There is no allegation that the successor company had committed the offence/evaded duty during the period prior to 01.07.02. Also, no notice is issued to the partners of the erstwhile PVWI. Generally when a manufacturing firm is bought by another party, the duty on pre-takeover manufacture cannot be recovered by the department from the buyer of the firm even though under purchase agreement buyer is liable to pay such liabilities because department can initiate proceedings for recovery of duty only against a person who is liable to pay under the Excise Law. The buyer firm is not responsible for the duty liability or irregularities committed by the firm and is partners as per the ruling of the Hon'ble Tribunal in the case of Makers Development Services Vs Collector [1989 ELT 126 (T)].*

They submitted that the amount was not a confirmed demand as on the date of transfer of the unit. The appellants further submitted that Section 11 of CEA, 1944 was amended in 2004. A provision has been made in the CEA to enable recovery of revenue arrears including the interest from the person, to whom another person liable to pay duty and interest in pursuance of a confirmed demand has transferred his business or property.

14. For a proper appreciation, it is necessary to go to the provisions of Section 11 of CEA, 1944. Proviso to Section 11 is reproduced as below:

> *"Provided that where the person (hereinafter referred to as predecessor) from whom the duty or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining written approval from the [Principal Commissioner of Central Excise or Commissioner of Central Excise], for the purposes of recovering such duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change]*

15. Ongoing through the provisions of Section 11, it is seen that it caters to the situation where there are confirmed arrears i.e. amounts recoverable from the original owner are outstanding as on the date of transfer. By no reasoning, it gives understandings that a Show Cause Notice can be issued and confirmed against the successor or Successor Company. It is not the case of the department that there were confirmed arrears against the erstwhile companies as on the date of transfer/acquisition. It is further seen that the new companies have been given with new registration. Therefore, commissioner has correctly held that Prime Veneers and M/s Wood Board, Learned Commissioner has found that duty recoverable from erstwhile companies cannot be recovered from the present companies. The case laws submitted by the Department are not applicable in view of the above provisions. We find that though the Rules provide for recovery of existing confirmed dues from the transferee, there are no provisions to enable to issue Show Cause Notice to successor/Transferee for recovery of duty on account of commissions and omissions of the predecessor/Transferor. We find that there are no reasons to interfere with the order of the commissioner in this regard.

16. Dropping of Demand due to the death of proprietor: Learned Commissioner has also dropped the demand relating to M/s Wood Boards and Wood Veneers where respective proprietors expired in an accident. We find that as contended by the appellants, the decision is in conformity with the ratio of the decision of the Tribunal cited by the Commissioner and was also relied upon in the case of Sharda Industries, 2017 (347) ELT 180 (Tri. Bang). Hon'ble Apex Court decision in the case of Sabina Abraham, 2015 (322) ELT 372 (SC) supports the same view. Therefore, in this regard also, we find that the Department's contentions are not acceptable and the Commissioner's order need not be interfered with in respect of the demands dropped by him for the period up to 13.11.2004 in the case of Wood Boards and Wood Veneers.

In view of the above, we find that the Departmental appeals do not survive and hence are liable for rejection.

17. (i). In respect of the main appellants, the appeals are disposed of as follows:

Sl. No.	Appeal No	Appellant	Manner of Disposal
1.	E/465/2009	Perfect Boards	Allowed by way of remand for re-quantification of the Duty confirmed in view of discussion above. Penalty under Section 11AC to be equal to such re-quantified duty.
2.	E/468/2009	Wood Veneers	do
3.	E/470/2009	Wood Boards	do
4.	E/471/2009	Prime Veneers	Allowed by way of remand for re-quantification of the Duty confirmed in view of discussion above. Penalty under Section 11AC to be equal to such re-quantified duty. Demand confirmed of on alleged clandestine removal also to be considered afresh.

(ii) Appeals No. E/466/2009, E/467/2009, E/469/2009 & E/472/2009 filed by Sh. T.P. Haneefa are rejected.

(iii) Appeals No. E/473/2009, E/474/2009, E/475/2009 &E/476/2009 filed by Sh. G. Suryanarayanan are rejected.

(iv). Revenue Appeals No. E/560, 561, 562, 563/2009 are rejected.

E/Cross/191,192,193,194/2009 are also disposed of accordingly.

(Order was pronounced in Open Court on **01/11/2019.)**

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

Pak/PK