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

Appeal(s) Involved:

E/183/2008-DB; E/263/2008

[Arising out of Order-in-Original No. 17.2007 dated 31/12/2007 passed by the Commissioner of Central Excise, Mangalore.]

M/s. KAMMADI PLYWOOD & BLOCK BOARDS
SAMPYA ARYAPU,
PUTTUR -574 210

Appellant(s)

The Commissioner of Central Excise and Service Tax
7TH FLOOR, TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE – 575 003.
KARNATAKA

Versus

The Commissioner of Central Excise and Service Tax
7TH FLOOR, TRADE CENTRE,
BUNTS HOSTEL RD.,
MANGALORE – 575 003.
KARNATAKA

Respondent(s)

M/s. KAMMADI PLYWOOD & BLOCK BOARDS
SAMPYA ARYAPU,
PUTTUR -574 210

Appearance:

Mr. N. Anand, Advocate
K.S. RAVI SHANKAR Advocate
No. 152 (18), Race Course
Bangalore - 560001
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 Nos. 20986 -20987 / 2019

Per : P. ANJANI KUMAR

Briefly stated the facts of the case are that the Appellant, M/s Kammadi Plywoods and Block Boards, Puttur, is a partnership engaged in manufacture of different varieties, quality and grades of plywood, block boards, veneers and panels falling under Chapter 44 of the Central Excise Tariff Act, 1985. The Appellant was registered with the Department in 1996 and later surrendered registration but had been filing declarations annually. The Appellant had during the period in dispute, every year over 20 dealers spread across the country and also had individual customers to whom goods were sold. The goods are all liable to duty ad-valorem and assessable under section 4 on the basis of *transaction value.* DGCEI, Bangalore the Appellant and show cause notices dated 11.12.2006and 19.7.2007 were issued. The allegation was that the Appellant was indulging in undervaluation of goods; were showing a lesser price/value than the actual selling price of the final product and collecting the excess sale price in cash and were procuring raw materials and paid cash without accounting the same in their books of account and showing wrong description to suppress the value of such raw materials. Commissioner of central Excise, vide OIO No17/2007dated 7.12.2007, confirmed the demand of duty of Rs.66, 06,964/- with interest and imposed equal penalty on the Appellant. Hence, appeal No E/183/2008. Revenue has filed appeal No E/263/2008 pleading that Personal penalty on Shri Haji Ibrahim, Partner may be upheld.

2. The Learned counsel for the appellants reiterates the grounds of appeal and submits that the allegation was based on four slips of paper (Annexure-C.1.1 to C.1.4 to the notice at p.401-405 vol.2); Department obtained statement from 4 customers to allege undervaluation; the notice took figures of 2004-05 as the base year and concluded theta the appellants recorded only about 43.24% of the value and suppressed the balance of

56.76% and the average was adopted for the entire period in question, spanning 1749 days, in all both before and after the period 2004-05.

2.1. The Learned Counsel submits that the argument of the department is not tenable and wrong for the following reasons.

- Allegation of undervaluation was based on four slips of paper; undervaluation on the basis of four slips of paper for a total of 1749 days, when the said sheets of paper did not relate to the entire period, is not only unconscionable but preposterous; the demand is based on averages, built on conjectures and surmises, *would haves and could haves* and not the actual facts and without examining the contentions advanced in adjudication. Demands are entirely made on assumptions and presumptions which are sweeping, using a *thumb rule* formula.
- Transaction value under Section 4 deals with the actual sale price; there is nothing forthcoming in the order that the adjudicator took note of Section 4 and the Rules framed thereunder to assess the total demand of duty.
- The Appellant on an average had 20 dealers spread across the country besides selling goods to independent customers; investigation did nothing to ascertain the sale prices and mode of transacting business from other dealers and independent customers but generalized the issue. Investigation ignored the fact that the products were different, the descriptions, dimensions and grades were different and took the approach that the same *one shoe fits all* for a period of five years. The demand is not tenable.
- The Appellant produced before the Respondent certificates and declarations from its dealers and suppliers (24 dealers and suppliers in total at pp.306 – 329); majority of the dealers and suppliers have certified the fact that they purchase goods from/supplied goods to the Appellant and paid consideration only by cheque or DD and never paid any cash. This material fact has been ignored by the Respondent, who has applied averages as alleged in the notice and demanded duty wrongly.
- Investigation has taken a solitary instance of a purchase invoice of M/s. National Veneer Products, Kasargod to allege that the Appellant has been using the excess cash collected without recording such payments, relying on the ledger extracts of two suppliers namely INA India Limited, Bangalore and Rehmaniya Furniture, Kasargod (at Annexure C.1.5 & C.1.6 of the notice).

The Department's case is disproved from Annexure C.1.5 & C.1.6 itself since it is clear from said Annexures that the Appellant had made payment to these two suppliers only by cheque, except for one transaction, in the case of INA India Limited, for which consideration was paid in cash.

2.2. The Learned Counsel submits that the impugned order is contrary to the decision of the Supreme Court in the case of Oudh Sugar Mills Limited v. UOI, 1978 (2) ELT 172 (SC). The demand being on averages and not on evidence is liable to be set aside. Respondent has ignored the record of cross-examination of the department's witness whose veracity has been questioned and impeached by the Appellant. Non-consideration of cross-examination record is as good as not granting cross-examination. Hence, the impugned order is therefore vitiated in law and liable to be annulled being violative of fair-play.

2.3. The Learned Counsel further submits that apart from making sweeping allegations of undervaluation on specious theory of averages, there is no corroborative evidence adduced by the department to demand duty for a period of 1749 days, and also for months after the date of search. Further, the investigating agency has not found any unrecorded cash or seized such cash from the Appellant during search to warrant adverse inferences. Further, the theory of the Department that the excess cash recovered from the customers/dealers have been used for paying purchases from various suppliers is disproved by the fact that a majority of the suppliers have given certificates/declarations that they have not received any cash and all their dealings with the Appellant was by way of cheque or DD. Further, the extract of ledger relied on by the Department at Annexure C.1.5 and C.1.6 clearly indicates that all the payments for purchase of raw materials from the two suppliers was through cheque only and not by cash. The impugned order is therefore opposed to the decisions of the Tribunal in the case of *CCE v. S.S.D. Spinning Mills Limited,* 2008 (222) ELT 392 (T-Che); *Woodmen Industries v. CCE,* 2004 (164) ELT 339 (T-Kol) maintained by the Supreme Court in 2004 (170) ELT A307 (SC); *Sharon Veneers v. CCE,* 2002 (146) ELT 655 (T-Che) and in *Truwoods Pvt Ltd v. CCE,* 2005 (186) ELT 583 (T-Del). Copies of the above decisions are enclosed to this synopsis.

2.4. The Learned Counsel also submits that the impugned order is contrary to the concept and definition of *transaction value* in Section 4 of the Act and none of the valuation rules have been cited or resorted to for demanding duty. Further, the Respondent has overlooked the provisions of Section 4 of the Act which provides for "transaction value" for each removal of excisable goods. Further, the excisable goods manufactured and cleared by the Appellant are of different types, grades, quality, dimensions, specifications, etc. There cannot be any question of applying averages while computing the "transaction value" ignoring the assessment of each removal of excisable goods as envisaged in section 4 read with Valuation Rules, 2000 and also Rule 5 of the CER, 2002.

2.5. The Learned Counsel further submits that the entire adjudication demand was barred by limitation as the Appellant was duly registered under the Central Excise law since 1996 but surrendered being well within the SSI exemption limit and annual declarations were filed. It is submitted that when the Appellant was registered and were regularly filing periodical returns, declarations under the CE Rules, and in the light of regular correspondence with the department, departmental visits, etc, the facts were within the knowledge of the department. The Appellant has been victimized merely because of an industry practice that was prevalent in resorting to undervaluation, which cannot be the basis for justifying invoking the extended period of limitation. The Learned Counsel further submits that the question of invoking extended period on a question such as valuation, which is subject matter of dispute, in the case of a registered assessee would not arise and there was no suppression of facts or other ingredient to invoke the extended period of limitation.

2.6. The Appellant submits that Respondent has under the facade of "best judgment assessment" resorted to estimates and guesstimates and proceeded to demand duty and impose penalty on a specious basis. The Appellant submits that in the light of the above, when there is no duty liability, the question of imposition of mandatory penalty under section 11AC would not arise in law, and interest being an accessory to duty, no liability for interest would arise as per the decision in the case of *Pratibha Processors vs. UOI*, 1996 (88) ELT 12 (SC).

2.7. The Appellant placed reliance on the following in support.

(a) Thumbay Holdings Pvt Ltd v. CCE, 2011 (272) ELT 225 (Tri-Bang.)
(b) Fathima Panels v. CCE, 2014 (313) ELT 641 (Tri-Bang.).
(c) Plama Boards Pvt Ltd v. CCE, 2010 (262) ELT 1058 (Tri-Bang.).
(d) Surya Boards Ltd v. CCE, 2014 (312) ELT 282 (Tri-Del.).
(e) Hi-Tech Pneumatics & Heat Treaters P Ltd v. CCE, 2010 (261) ELT 449 (Tri-Bang.)

3. Learned Special Counsel for the Department, Shri P.R.V. Ramanan, submits that the investigations conducted by the DGCEI revealed that the invoices issued by appellant reflected only part of the actual price, recovered from their customers, on which Central Excise duty was paid. The remaining part of the price (i.e. sales realization) was recovered in cash through their representatives; was not brought on statutory records as well as the Account books and was utilized for the purchase of raw materials, without proper accounting thereof. Thus, there was violation of Rule 4 of CER, 2002 read with Section 4 of CE Act, 1944; Rule 11 of CER, 2002 and Rules 6 and 8. Accordingly the two SCNs were issued and differential duty of Rs.62, 13, 963for the period from October 2001 to 14.1.2006 and Rs. 3, 93, 001 for the period from 15.1.2006 to 31.3.2006**,** was demanded and subsequently confirmed.

4. Learned special Counsel highlighted the findings in OIO, particularly in Paragraphs 51-64 and submitted that the evidence led by the Revenue and their probative value are discussed in detail. He enumerated the records recovered, mostly private as below (References are to pages in Volume-I).

(i). Shri Ramesh Shetty, Manager at Kanmadi's in his statement dated 16/1/06 accepted that 77 entries showing details of sales were actual realization of value from 2/4/2004 to 31/3/05; Managing Partner accepted that this statement was prepared by Shri Shetty.

(ii). Shri Hajee Ibrahim, Partner, confirmed the fact in his statement of 23/ 1/06 that Slip at page 17 of seized file No.22 (Page 405) refers to Bill of purchase of veneers from National Veneers, wherein the amount shown was Rs. 80,507, whereas the actual amount paid was Rs. 1, 92, 759; difference was paid in cash.

(iii). Purchase Ledgers revealed that payments in cash made in respect of 6 consignments, of wooden planks from M/s Safwan Wood products, were not accounted for by Kammadi.

(iv). Purchases Rs 1, 06, 596 from M/s INA India Ltd in 10 instances and of 18,736 from M/s Rehmania Furniture in 7 instances were not accounted for in the records of Kammadi. Verification from suppliers confirmed that the amounts were paid in cash.

(v). "Glue Register' showed that it was maintained in respect of purchases of raw materials for making UF and PF glue; however, while receipts of Phenol were found recorded therein, no purchase documents were found for Phenol.

(vi). purchases of Phenol (used for the manufacture of PF glue) from M/s Bhanu Enterprises was shown as 'Formaldehyde'. Excess over invoiced amounts for such purchases was made in cash.

(vii). Shri Hajee Ibrahim, Managing Partner of Kammadi, admitted that as existed in the plywood industry some amount was collected in cash from their dealers and this cash amount was paid to the suppliers of veneers, timbers etc; the products of their company were sold almost at the same price, irrespective of the quantity; this statement was never retracted.

(viii). S/ Shri Milap Chand Jain (Pages 378-380),Ashraf Khan (Pages 381/382), Vinod Kumar (Pages 383/384), Wahid Patel (Page 385),all dealers of the products of Kammadi, accounting for about 77%of the sales of Kammadi during 2002-2003 to 2005-2006, admitted that the actual sales price of the goods bought by them from Kammadi were much higher than the prices indicated in the invoices and that the difference was paid in cash. The aforesaid statements were retracted only at the time of Cross-examination i.e. after 18 months.

(ix). Ramesh Shetty,Manager Kammadi did not retract statement dated 16/1/06 (Pages 369- 372); he was shown several records seized from Kammadi and he did not disown them or profess any ignorance about them; he explained entries at pages 18 and 19 of File No.22 were explained by him as reflecting the actual sales value of the goods of Kammadi for the year 2004-2005.He retracted his second statement dated 26/9/2006by an affidavit, but no evidence of duress was produced. Shri Shetty was asked to appear before the investigating officers to substantiate the retraction but he did not respond.

5. Learned special Counsel dealt at length on the application of 'Preponderance of probability', and submitted that in civil law cases, the principle of 'preponderance of probability' has been widely followed. In the context of clandestine activity, such as 'smuggling' and 'clandestine removal of excisable goods without payment appropriate duty' time and again both Tribunals and Courts have adopted 'preponderance of probability' as the standard. Thus, the appropriate and correct application of the principle of 'preponderance of probability' has considerable significance for the present Appeals. It is widely accepted that 'Preponderance of probability' is met if the proposition is more likely to be true than not true. Effectively, the standard is satisfied if there is greater than 50% chance that the proposition is true. He submits that

5.1. Lord Denning in Miller Vs Minister of Pensions described it simply as "more probable than not".

5.2. P. Ramanatha Aiyar's "Advanced Law Lexicon", 3rd Edition, page **3688,** - *"By preponderance of evidence is not meant a preponderance in point of numbers of witnesses, but a preponderance of facts and circumstances that are convincing to the jury."*

5.3. 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."

5.4. Hon'ble Allahabad High Court in Rishi Kesh Singh v. The State (AIR 1970 All 51) observed at 90 that 'preponderance of probability' means "outweighing in the process of balancing however slight may be the tilt of the balance or the preponderance".

5.5. Supreme Court in D. Bhoormull's case observed that.

"30……El Dorado of absolute proof being unattainable, the law, accepts for it probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case.

5.6. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered.... Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden." In the case of Gulabchand Silk Mills Vs CCE, Hyderabad -II, Hon'ble Tribunal observed that clandestine activity can at best be established only by circumstantial evidence and it would be humanly impossible to establish every link in the chain of clandestine activity without any break.

5.6. He submitted that with reference to the present Appeals of Kanmadi and others, the evidence produced by the Revenue to establish undervaluation is similar to the evidence led in the following cases:

(i) CERA Boards and Doors 12010 (249) ELI' 550- I'- Bang]
(ii) Hero Plywood and Boards [2009 (248) ELI' (205) - I'- Bang]

(iii) Noble Plywood [2009 (248) ELT (440) - I'- Bang]
(iv) Prestige Boards Pvt. Ltd. [2009 (248) ELT (313) - T- Bang]
(v) Thumbay Holdings [2011(272) ELI' (225) - T- Bang]
(vi) National Boards and Others Final OrderNo670-687 dated 1/4/2010- T-Bang

5.7. He submitted that in all the above cases, the modus operandi followed by the assessees was absolutely identical. The Hon'ble Tribunal came to the conclusion in all the aforesaid cases that the allegation of undervaluation was established based on the principles of 'preponderance of probability'. However, on the issues of quantification of duty demand and penalties the cases were remanded to the original authority with directions to decide the 'normal price' in respect of each type of goods and compute the differential duty for the period before 1/7/2000 and to determine the value based on each transaction and confining the differential duty to the evidences on record for the period after 1/7/2000. Furthermore, in all the above cases, statements of only a few dealers were recorded. In the instant case, a significant factor is that the purchases of the 4 dealers together accounted for more than 77% of the total sales of Kanmadi during 2002-2003 to 2005-2006. The adjudicating authority has extensively dealt (Para 65) with this aspect. Four dealers (Milan Plywood, Vinod Plywood, Amar Glass and Plywood and National), accepted having paid more than the amount indicated in the invoices by cash, accounted for 73.58% in 2002-03, 89,96 % in 2003-04, 74.62% in 200405 and 73.06 % in 2005-06, of the total sales of Kanmadi. If the unit was selling products of identical specifications to several dealers located in the same place pricing practice could not have been different.

5.8. Learned special counsel further submitted that

(i). Apex Court in the case of CIT vs H.M. Esuf All &H.M. Abdullah, 90 ITR 271 SC, approved projection of turnover for 355 days by the CTO on the basis of private records pertaining to 19 days.

(ii). This Bench in the case of Gulabchand Silk Mills vs. CCE, Hyderabad-11 12005 (184)ELT 263 (Tri-Bang), after weighing the evidence and upheld the extension of the charge of duty evasion to all the clandestine clearances on the basis of the circumstantial evidence. This Bench, also in the case of Rajkamal Plasmolds (p) Ltd 2006 (200) ELT 571, confirmed the demand, from 1/2/2002 to 30/1/2003, on the basis of the Partner's statement corroborated by a single dealer's admission.

(iii). Central Excise and Customs officers are not police officers and the statements recorded by them are valid as evidence, even if confessional in nature, as held in are admissible as evidence as held in Surjeet Singh Chabbra Vs. UOI 1997 t89) ZLT 646 (SC). Tribunal observed similarly in the case of Rishab Velveleen (P) Ltd vs. CCE, Meerut 12006 (201) ELT 437 (T-Del).

5.9. On the issue of valuation issue, learned special Counsel submitted that in the present case the duty demand is in respect of clearances after 1/7/2000. As per Section 4 (1) (a) as at present, "the value for the purpose of assessment on each removal of the goods shall in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer are not related, and the price is the sole consideration for the sale, be the transaction value;" By definition, a necessary concomitant of the transaction value is that the price should be the sole consideration for the sale. Thus, where additional consideration by way of cash flowed from the buyer to the assessee and the same was required to be paid by the buyer to the assessee, over and above the price shown on the invoice at the time of removal from the factory, one of the necessary conditions for the existence of a 'transaction value' at the factory gate is not satisfied. Further, the price indicated on the invoice is not the price actually paid for each transaction, as established by the evidence lent by Revenue. In the light of decision of Supreme Court in the case of CCE, Mumbai vs. Fiat India Pvt. Ltd. [2012 283) ELT 0161 (SC) and directions of the Hon'ble Tribunal in the six cases cited above, requires reconsideration. The formula adopted in the 0I0, applying the provisions of Rule 11 of the Central Excise Valuation Rules,2000, is in the facts and circumstances of the case, legal and proper and hence, merits approval. The re-determination of the actual sales values for the period from October, 2001 to 31/3/2006 has been done by applying this percentage. The details are set out in Annexure 'D' appended to the SCN.

5.10. Learned special Counsel submitted, with reference to revenue appeal against the impugned OIO, that the adjudicating authority has erred in refraining from imposing a penalty on the partner of the Appellant firm, when it has been clearly established that the partner was not only actively involved in under invoicing the goods, but he was also the master mind behind the entire operation. The adjudicating authority's decision is contrary to the Apex Court judgment in the case of Prakash Metal works vs CCE, Ahmedabad 2007 (216) ELT 6601 and the orders of the CESTAT in respect of Alpesh Patel 12007 (215) ELT 2341, Vikas Shipping 2005 (185) ELT 95 and VishanShamlalMilwani2006 (202) ELT 90.

6. Heard both sides and perused the records of the case. The case under discussion is about undervaluation of veneers/block board/plywood manufactured and cleared by M/s. Kammadi Plywoods and Block Boards ie. the appellants. The evidence put forth by the Department is in the form of paper slip recovered under Mahazar on 16.11.2006 during the course of search at the factory premises of M/s. Kammadi; statements of Shri. Ramesh Shetty from whose possession the said slip was recovered; statement of Shri Haji Ibrahim, Managing Partner of the appellants; statements of various dealers, of the appellant, like Shri Milap Chand Jain of M/s. Milan Plywood Suppliers, Shri. Ashraf Khan of Amal Glass and Plywoods, Shri. Vinod Kumar of M/s. Vinod Plywood Suppliers, Shri. Vahid Gaffar Patel of National Plywood; statement of Shri. Ashok Kumar Jain of M/s. Bhanu Enterprises and documents allegedly indicating purchase of raw-material utilizing the cash generated and statements of raw-material suppliers such as M/s. INA Ltd. Bangalore and M/s. Rehmaniya Furniture, Kasargod etc. On the basis of the evidences collected and analysed Department alleges that the appellants was involved have only shown 43.24% of the actual value in their invoices and suppressed the balance percentage and have recovered cash over and above the invoiced amount; they have also purchased raw-materials by paying in cash and by describing their raw-materials in different names. The Department came to the conclusion that the appellants have made clearances worth Rs. 2,15,35,646/- during the year 2004-05 whereas they have only shown the value of clearances in the invoices for Rs. 93,12,383/-.

7. Per contra, the appellant submit that the allegation made by the Department is based on 4 slips of paper; on the basis of this, the Department has quantified the undervaluation supposed to have been made by the appellants for a total of 1749 days; moreover the said sheets of paper did not relate to the entire period; the demand is on averages built on conjectures and surmises, would haves and could haves and not the actual facts; the adjudication order did not take note of Section 4 and Rules framed thereunder; the appellants had 20 dealers spread across the country and are also selling goods to independent customers; the investigation did not ascertain the sale prices from other dealers and independent customers; the adjudicating authority confirmed the demand entirely on assumptions and presumption which are sweeping using a thumb rule formula; though the appellant produced before the adjudicating authority certificate of 24 dealers who categorically stated that they have paid the consideration only in cheque and cash and that no consideration over and above the invoice amount was paid in cash.

8. Countering this learned special counsel for the Department submits that it is not just a matter of 4 slips and 4 dealers; the 4 dealers i.e. Milan Plywood Suppliers, Vinod Plywood Suppliers, Aman Glass and Plywoods and National who are examined accounted for 73.58% of the total sales in 2002-03, 89.96% in 2003-04, 74.62% in 2004-05 and 73.06% in 2005-06. The learned Special Counsel submits that the dealers questioned cover majority of the transactions of the appellants and therefore, it cannot be said that the Department has examined just 4 dealers and concluded in respect of all the dealers and independent buyers. The learned Special Counsel for the Department, whose submissions have been mentioned above, in elaborate manner, relied mainly on a principle of preponderance of probability. He submits that in relation to the cases of evasion of tax, evasion cannot be proved in a mathematical precision. Citing various case-laws learned Special Counsel submits that there are circumstantial evidences which go to prove that the appellants were involving themselves in undervaluation of the goods; they cannot be expected to keep the accounts in a proper manner. He submits that the Department was correct in arriving at the duty evasion on the basis of a certain formula arrived.

9. We have gone through the rival submissions and enormous case records that were presented. We find that the investigation could lay their hands upon certain slips from the possession of Shri. Ramesh Shetty, Manager of the appellants. Shri. Ramesh Shetty in his statement dated 16.11.2006 accepted that the said slip contained the actual sale value for the year 2004-05. We also find that the 4 dealers who accounted for a major portion of the sales of the appellants confirmed that the prices indicated in the invoices of the appellants are not correct prices at which they received the goods; that a part of actual sale consideration is paid by them in cash to Shri. Hajee Ibrahim through his representatives and the amount shown in the invoice was paid by cheque or DD as per instructions given by either Shri. Ramesh Shetty, the Manager or Shri. Hajee Ibrahim, the Managing Partner. We also find that the suppliers of raw-material to the appellants also accepted purchases in cash in addition to the fact that the item procures from them was variously describes as "formaldehyde", "Urea", "Caustic Soda", "Formic Acid", "Phenol", "MUF Glue" and "PF Blue". We find that Department alleges that purchase of phenol is not found mentioned under Glue register. We also find that Shri Ramesh Shetty vide affidavit dated 27.09.2006 has retracted his statement dated 26.09.2006. However, he did not choose to appear before the Deputy Director of DGCEI to put forth evidence in support of his claim. We also find that Shri Hajee Ibrahim, who has accepted the statement of Shri. Ramesh Shetty and also the fact of existence of undervaluation in the trade of plywood and veneers, has not retracted his statement. The records maintained by Shri Ramesh Shetty in the factory of the appellants cannot be brushed aside as nobody would note down such entries just for fun. Ongoing through the entirety of the circumstances of the case, we find that the Department has undertaken a wide investigation and has established the fact that the appellants were indulging in undervaluation. We find that as this is a case of tax evasion and not a criminal offence to be proved beyond reasonable doubt. We hold that the investigation could establish to set the principles of preponderance of probability in motion for a proper appreciation of the case.

10. 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."*

11. Having upheld the fact of undervaluation resorted to by the appellants we do not find that the ratio of the cases, which were under CrPC or cases pertaining to clandestine removal, relied upon by the appellants cannot be applied. Now we turn our discussion to the quantification of the duty evasion. 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. Acceptance of the principle of preponderance cannot be a License to demand duty on the basis of assumptions/presumptions/ vague imputations. Inability to investigate and establish evasion cannot be covered up by mere citing of the principle. A fine line of distinction requires to be drawn. 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, need to be arrived in a logical, rational and legally appropriate manner. We find that in the instant case the Department has some sort of corroborative evidence in the form of slips recovered from Shri. Ramesh Shetty, Manager, which is supported by the statements of Shri Ramesh Shetty and Shri Hajee Ibrahim. We find that the show-cause notice discusses this evidence at para 20, as reproduced as below:

> *"20. It is seen from the page No. 18 & 19 of file 22 seized vide mahazar dated 16.12006 drawn at the factory of M/s. Kammadi that the actual sale value in respect of the year 2004-05 have been recorded therein, which has been confirmed by Shri. Ramesh Shetty, Manager, M/s. Kammadi in his statements dated 16.012006 and 26.09.2006. As per the said document the total sale value for the year 2004-05 is Rs. 2,26,84,036/-, whereas the value of clearance for the year 2004-05 as recorded by M/s. Kammadi in their invoices is Rs. 93,12,383/-. From this, it appears that they have recorded only a portion of the value in their books of account. From the Sales Register for the year 2004-05 submitted by M/s. Kammadi it is seen that during the said year the total sales tax collected is Rs. 11,48,390/-. Excluding this amount from the actual sale value recorded in page No. 18 & 19 above, the actual value of goods manufactured and cleared by Kammadi during the year 2004-05 works out to Rs. 2,15,35,646/-. Hence it appears that M/s. Kammadi have shown only 43.24% of the actual value in their invoices and have arrived at the aggregate value."*

12. Having shown the value of actual clearances for the year 2004-05, the show-cause suddenly states that hence it appears that M/s. Kammadi have shown only 43.24% of the actual value in their invoices and have arrived at the aggregate value. The show-cause notice concludes by saying that M/s. Kammadi are liable to pay central excise duty of Rs. 62, 13,963/- as per Annexure-D. The said Annexure-D covers the period 2001-02 to 2005-06 (up to 14.01.2006). We find that no corroborative evidence has been put forth to show the actual figures arrived for different years. Understandably, the same has been arrived on the basis of the percentage of undervaluation calculated by them as per the figures available for the period 2004-05. We find that there are no corroborative evidences to arrive at the figures for different periods. It is an accepted fact that the goods sold by the appellants are of different varieties and sizes. Shri Milap Chand Jain has furnished the actual and invoice price goods sold by M/s. Kammadi for different descriptions of goods such as plywood 6mm, plywood 8/9mm, plywood 12mm, plywood 18mm, block board 19mm and block board 25mm. on going through the prices, it is seen that the undervaluation varies from product to product. Moreover, in a typical business atmosphere it cannot be said that all the goods are sold at a uniformly undervalued price. It is also possible that at times the prices indicated may be actual and at times the goods may be sold at a loss.

13. Therefore, extrapolating the figure arrived for one year to all the years in dispute is stretching things too far. As we have observed above, the principle of preponderance of probability can at best be a confirmation of a fact but at the same time it may not be used to confirm a figure. We find that the principle cannot be used for quantification of evasion of duty over a period of time particularly in the absence of corroborative evidence. We find that the principle of preponderance of probability should not be misused to make sweeping allegations and arriving at imaginary figures. Therefore, we find that the allegation of duty evasion can be held to be sustainable only where corroborative evidence other than the statements recorded. In the instant case, the statements are retracted though in a belated manner. Only statements which are supported by corroborative evidence are not vitiated by retractions. Therefore, we find that in the instant case the allegation of duty evasion is sustainable only for the year 2004-05, as discussed in the show-cause notice at Para No. 20.

14. Learned Counsel also submitted that the impugned order is contrary to the concept and definition of *transaction value* in Section 4 of the Act and none of the valuation rules have been cited or resorted to for demanding duty. Further, the Respondent has overlooked the provisions of Section 4 of the Act which provides for "transaction value" for each removal of excisable goods. Further, the excisable goods manufactured and cleared by the Appellant are of different types, grades, quality, dimensions, specifications, etc. There cannot be any question of applying averages while computing the "transaction value" ignoring the assessment of each removal of excisable goods as envisaged in Section 4 read with Valuation Rules, 2000 and also Rule 5 of the CER, 2002. On the other hand, Shri. P.R.V. Ramanan, learned Special Counsel submits that by definition, a necessary concomitant of the transaction value is that the price should be the sole consideration for the sale. Thus, where additional consideration by way of cash flowed from the buyer to the assessee and the same was required to be paid by the buyer to the assessee, over and above the price shown on the invoice at the time of removal from the factory, one of the necessary conditions for the existence of a 'transaction value' at the factory gate is not satisfied. Further, the price indicated on the invoice is not the price actually paid for each transaction, as established by the evidence lent by Revenue. In the light of decision of Supreme Court in the case of CCE, Mumbai vs. Fiat India Pvt. Ltd. [2012 283) ELT 0161 (SC) and directions of the Hon'ble Tribunal in the six cases cited above, requires reconsideration. The formula adopted in the 0I0, applying the provisions of Rule 11 of the Central Excise Valuation Rules,2000, is in the facts and circumstances of the case, legal and proper and hence, merits approval. However, we find that the show-cause notice has not invoked Rule 11 of Central Excise (Valuation) Rules, 2000. Commissioner in the impugned order simply mentions the Valuation Rules, but does not discuss the applicability of Rule 11. Therefore, we are not inclined to accept the submissions of the Special Counsel. We also find that the facts of the case cited by Special Counsel are different.

15. 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.*

16. We find that CESTAT has been consistent in taking the above view. 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. Therefore, duty evaded post 01.07.2000, requires to be arrived at on the basis of transaction value, in each case, terms of the findings of this Bench in CERA Boards (Supra). Under the circumstances, the issue needs to go back to the Adjudicating Authority, who shall re-quantify the duty evaded, in view of our findings above, after going through the available records to arrive at the value in respect of each of the transactions after giving an opportunity to the appellants of being heard. We also hold that penalty imposable under Section 11AC of the Central Excise Act shall be equal to such duty re-quantified.

17. We find that the Revenue has filed the appeal E/263/2008 on the grounds that the Commissioner has not imposed any penalty under the provisions of Rule 26 of Central Excise Rules, 2002 on the Managing Partner. We find that the Commissioner has given reasoning for such a conclusion. Therefore, we find that Commissioner's order does not require any intervention to that extent. We find that the Department's appeal is not maintainable.

18. In the result, we passed a following order:

(i) Appeal No. E/ 183/2008 filed by the appellants i.e. M/s. Kammadi Plywood is allowed by way of remand for re-quantification of the Duty confirmed in view of discussion above.

(ii) Appeal No. E/263/2008 filed by the Revenue is rejected.

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

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
JUDICIAL MEMBER

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