

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL Nos. E/1596,1597/2006

(Arising out of Order-in-Original No. 02/SK-02/2006/Thane-I dated
31.1.2006 passed by Commissioner of Central Excise, Thane-I)

**Oriental Veneer Products Ltd.
Vali N. Mithiborwala**

Appellant

Vs.

Commissioner of Central Excise, Thane-I

Respondent

Appearance:

Shri Vipin Kumar Jain, Advocate, with Shri Roshil Nichani,
Advocate, for appellant
Shri A.B. Kulgod, Assistant Commissioner (AR), for respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 05.12.2018

Date of Decision: 05.12.2018

ORDER No. A/**88310-88311/2018**

Per: Sanjiv Srivastava

These appeals are directed against Order in
Original No 02/SK-02/2006/Thane-1 dated 31.1.2006
of the Commissioner Central Excise Thane-1,
Navprabhahat Chambers Ranade Road Dadar (W)
Mumbai holding as follows:

*"(a) The goods valued at Rs.2,84,32,681/- which were
cleared by misdeclaration of value are liable for confiscation*

under Rule 173Q and/or Rule 209 and/or Rule 52A of Central Excise Rules, 1944 but are not available for confiscation.

(b) The demand of Central Excise duty amounting to Rs.39,93,852/- is confirmed under Rule 9(2) read with proviso to Sub section (1) to Section 11A of the Central Excise Act, 1944. This amount should be recovered from M/s. Oriental Veneer products Ltd.

(c) The amount of Rs.30 Lacs paid by M/s. Oriental Veneer products Ltd. should be appropriated towards the above demand.

(d) The goods valued at Rs.5.40 lakhs seized on 15.10.96 are liable for confiscation under Rule 173Q but, since it had been released provisionally on execution of Bond and Bank Guarantee, they are not available for confiscation and therefore I order an appropriation of an amount of Rs.1,25,000/- in terms of the Bond and Bank Guarantee.

(e) Interest at appropriate rate should be charged under Section 11AB of the Central Excise Act, 1944 on the above said confirmed duty amount.

(f) Penalty of Rs.39,93,852/- is imposed under Section 11AC ibid of the Act on M/s. Oriental Veneer products Ltd. However, as the penalty is imposed under Section 11AC no penalty is imposed under Rule 173Q or Rule 209 or Rule 226 of the Central Excise Rules, 1944.

(g) Penalty of Rs.15,00,000/- is imposed on Shri Vali N. Mithiborwala under Rule 209A of Central Excise Rules, 1944.

(h) As I am of the opinion that the penalties imposed meet the ends of justice, I do not propose to confiscate the land, building, plant and machineries etc. under Rule 173Q(2) of the erstwhile Central Excise Rules, 1944."

2.1 Acting on the intelligence that the Appellant Company (Appellant), is making supplies to plywood manufacturers by under invoicing the value of goods the

office premises of the appellant company and residential premises of its Director were searched on 15.10.1996.

2.2 During search certain finished goods which were not found accounted for in the RG-1 Register were seized under panchanama dated 15.10.1996 and subsequently released provisionally against B-11 Bond of Rs 5.40 Lakhs and Bank Guarantee of Rs 3.50 Lakhs.

2.3 During certain pay in slips of the saving account no 167423 with Development Credit Bank of the Managing Director Shri Vali N Mithiborwalla (Appellant 2) were also recovered. These pay in slips mentioned the name of various customers of the Appellant. Thus branches of the Development Credit Bank, holding the said account were visited and the bank statement in respect of the saving accounts (A/c No 167423 and 1875) of Appellant 2 were taken. Scrutiny of the said saving accounts statement revealed that prima facie deposit of around Rs 2 Crores during the period April 1994 to November 1996.

2.4 In his statement dated 15.10.1996, Managing Director of Appellant admitted that-

- though the actual price of the veneer ranges between Rs 5 to Rs 14 per sq mts, depending on the quality of log, the actual billing at time of

clearance was done at Rs 1 to Rs 2.50 per sq mts, differential being collected in cash;

- during the period from mid 1994 onwards he admitted to have collected Rs 1.5 Crores in cash over and above the billed amount, on which Central Excise duty to the tune of Rs 30 Lakhs was not paid. (This amount of Rs 30 Lakhs was paid through TR-6 challan No 36 on 16.10.1996)

2.5 Managing Director and Shri Srinivas Acharya, Manager of Appellant filed affidavits vide their letter dated 4.11.1996 retracting their statements and contending that they were obtained under threat and were false and involuntary.

2.6 On the basis of the statement of Managing director and the scrutiny of documents various customers who had received the goods were identified and their premises searched. In their statements various customers namely Shri Ashok Jethanand Gwalani, director M/s Mahalaxmi Plywood Ltd Ulhasnagar, Shri L Kankaria Proprietor M/s Arihant Plywoods Nasik, Shri Jayaprakash S Chandak Proprietor M/s Biz International Sangamner, Shri Nitin N Bangul Partner A N Industries Nasik, Shri Ashok S Vazirani Director Advance Particle Board Pvt Ltd Kadvali Village, Shri Kiran B Patel Partner M/s Wood and Paper Ind Baroda and Shri Haresh Patel Partner M/s Hans Enterprises

Rebale New Mumbai were recorded. In their statements they admitted having received the goods by under-invoicing and making the balance payments in cash.

2.7 On the basis of the investigations carried out as above a show cause notice 11th April 1997 issued to the Appellant show cause as to why:-

“(i) The value of goods declared in the invoice should not be enhanced from the declared value to Rs.9.50 per square meter for the goods cleared from April '94 to October '96 as per Annexure 'A' to this Office, under Section 4 of the Central Excise Act, 1944, as the assessee has actually sold the goods for a higher value and also collected the difference of value from the buyers cash/cheque/demand draft;

(ii) The goods valued at Rs.2,84,32,681/-, which were cleared by misdeclaration of value should not be held liable for confiscation under Rule 173Q and/or Rule 209 and/or Rule 9(2) and/or Rule 52A of the Central Excise Rules, 1944;

(iii) Central excise duty amounting to Rs.39,93,852/- (as shown in Annexure A) evaded on the value which was not declared to the Centre authorities should not be demanded and recovered from them under Section 9(2) read with proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944;

(iv) Rs.30 lacs paid by the assessee vide T.R. 6 Challan No. dated 18.10.96 voluntarily towards their duty liability on account of misdeclaration, suppression of facts and under valuation of goods should not be appropriated towards the evaded duty amount;

(v) Goods valued at Rs.5.40 lakhs seized on 15.10.96 should not be confiscated as per the provisions of Rule 173Q and or Rule 209, and or Rule 226 of Central Excise Rules, 1944;

(vi) *Penalty should not be imposed on them for suppressing the actual assessable value of their final products by reason of fraud, collusion, willful misstatement or suppression of facts from the Central Excise authorities and thereby evading Central Excise duty by undervaluing the goods, as per the provisions of Section 11AC of Central Excise Act, 1944 and or Rule 173Q and or Rule 209 and or Rule 226 and or Rule 9(2) and/or Rule 52A;*

(vii) *Interest should not be charged under Section 11AB of Central Excise Act, 1944 on the delayed payment of duty at the appropriate rate;*

(viii) *The land, building, plant and machinery, material conveyance or things used in connection with the manufacture, production, storage, removal or disposal of aforesaid goods and all other excisable goods such land or in such buildings or produced or manufactured with such plant materials or things should not be confiscated under Rule 173Q(2) of Central Excise Rules, 1944."*

2.8 Appellant 2 was also asked to show cause as to why penalty should not be imposed on him under section 209A of Central Excise Act, 1994 (as it existed then).

2.9 After considering the submissions of Appellants, the show cause notice was adjudicated by the Commissioner vide his order in original No 202/97-Commr III dated 06.02.1998 holding as follows:

"17(a) The seized goods valued at Rs.5.4 lakhs are liable for confiscation. Since the goods have been released provisionally and the same is not presented for confiscation, I order payment of Rs.1,50,000/- (Rupees One Lakh Fifty Thousand only) which is otherwise leviable as fine in lieu of

confiscation and direct that this amount should be recovered from the Bond/Bank Guarantee executed.

17(b) The duty amount of Rs.4,88,584/- (Rupees Four Lakhs Eighty Eight Thousand Five Hundred Eighty Four only) is hereby confirmed under Section 11A(1) of the Central Excise Act, 1944.

17(c) I impose a penalty of Rs.3,00,000/- (Rupees Three Lakhs only) on the Managing Director, Shri Valibhai N. Mithiboriwalla, under Rule 209A of Central Excise Rules, 1944.

*17(d) Since the show cause notice issued was after the provisions under Section 11AB and Section 11AC of Central Excise Act, 1944 have come into effect, I hold that the assessee is liable to the mandatory penalty and interest under these two Sections. Accordingly, I impose penalty of Rs.4,88,584/- (Rupees Four Lakhs Eighty Eight Thousand Five Hundred Eighty Four only) on the assessee M/s. Oriental Veneer products Ltd., Shahapur, under Section 11AC. I also order that the interest at 20% under Section 11AB *ibid*.*

18. The duty confirmed and the penalty levied above shall be adjusted from the amount already paid by the party."

2.10 Against this order of Commissioner, Appellants filed appeal before tribunal. This order was also challenged by the department by way of appeal. Tribunal has by its Order No A/1074 & 1075/WZB/2004/C-I remanded the matter back for de-novo consideration. While remanding tribunal observed as follows:

"2. We have heard both sides. The basic grievance of the assessee is that of violation of the principles of natural justice. The appellants have not been supplied with copies of some of

the documents relied upon in the show cause notice in spite of repeated request for the same; the request for cross-examination of customers confirming receipt of goods without payment of duty has not been granted and no reasons for rejecting the request made has been recorded; no details are furnished as to who are the five customers who corroborated the payment to the Managing Director of the Company for receipt of veneers.

3. The Commissioner has also not given any detailed finding as to why he had held that only Rs. 24,42,919/- have been received by the company's Managing Director as payment for goods cleared clandestinely even though the deposits made by the Managing Director and supported by way of paying slips amounted to Rs. 1,98,52,332/-. The Commissioner's order rather cryptic. We therefore set aside the same for the above reasons and remand the case to the jurisdictional Commissioner for fresh decision in accordance with law after supply of relied upon documents requested by the assesseees in their reply to the show cause notice and after considering their request of cross-examination. Fresh order shall be passed after extending reasonable opportunity of hearing to the appellants, within a period of 3 months from the date of receipt of this order."

2.11 In the remand proceedings Commissioner has re-adjudicated the matter as per order referred in para 1, supra. Aggrieved by the order of Commissioner, appellants have filed these appeals.

3.1 In their appeal, Appellants have assailed the order of Commissioner on following grounds-

- i. Violation of Principles of Natural Justice.

- a. They were not supplied the copy of relied upon documents listed at S No 5,6 & 17 of Annexure C to the Show Cause Notice;
 - b. They were not allowed personal hearing after cross examination despite there being specific request from them.
- ii. Defiance of Order of Tribunal- Even when Tribunal has specifically directed the Commissioner to supply all the relied upon documents Commissioner proceeded to adjudicate the matter without supplying the documents again on the pretext that these documents were supplied earlier.
- iii. Appreciation of Evidence in form of Statements of Buyers- The entire case of revenue is based on the statements of the buyers, all the persons who were cross examined resiled from their statements and have unequivocally stated that their statements were neither true nor voluntary and the officers had used coercive methods and in certain case made the witnesses sign the statement without informing them contents of same. Respect of two Shri Ashok Wazirani and Shri Kiran Patel, cross examination was not allowed even after summoning them.

- iv. Bank Statement of Shri Vali Mithiborewala is the entire basis of the demand made even without stating the account of Shri Vali Mithiborewala is the account of appellant company or the money was being transferred from the account of that account to the account of company.
- v. In absence of pay in slips which as per the department bear the name of 11 customer and chits (as they have not been supplied along with relied upon documents), the demand made cannot be sustained.
- vi. Shri Mithiborewala has immediately retracted by him as being non voluntary
- vii. In absence of any findings in relation to fraud, suppression, mis-statement with intention to evade payment of duty, the show cause notice is barred by limitation.
- viii. Since the goods which have been confiscated and allowed to be redeemed on payment of redemption fine of Rs 1.25 lakhs, were at the time of search available in the factory premises and were not cleared without payment of duty order for confiscation is bad in law.

4.1 We have heard Shri Vipin Kumar Jain, Advocate along with Shri Roshil Nichaini, Advocate for the Appellants and Shri A B Kulgod, Assistant

Commissioner (Authorized Representative) for the revenue.

4.2 Arguing for the appellant learned counsel submitted that the case of revenue in the present case is based on certain documents which have never been supplied to them. He emphasized that even after the remand by the tribunal specifically for providing the said documents and thereafter adjudicating the matter Commissioner has not provided the said documents. He showed various correspondences undertaken by them with the Commissioner for supply of the said documents. Learned counsel submitted even after the matter being remanded by the tribunal specifically on this ground failure of Commissioner to provide the said relied upon documents is fatal to the case. He also submitted that the person who have been cross examined, in the remand proceedings have specifically retracted from their statements and have stated that their statements were neither correct nor voluntary. In such a situation, in absence of any evidence the order of Commissioner cannot be sustained.

4.3 Learned Authorized Representative, supported the order of the Commissioner. He also produced certain receipts and argued that all the relied upon and non relied upon documents recovered from the appellants during the course of search and investigation have been

given to the appellants at the time of issue of Show Cause Notice. He categorically stated the case is purely of the evasion of Central Excise duty by undervaluing the goods, and department has substantially established the financial flow back by way of the entries in pay in slips and the bank statement of the accounts in name of Managing Director of the Company. In his view burden cast on the revenue within the preponderance of probability to prove tax evasion as per the decision of Apex Court in case of D Bhoormall, has been discharged by the revenue. Accordingly he prayed for upholding the order of Commissioner.

5.1 We have considered the submissions made by the Appellants in their appeal and during the course of arguments and also the order of adjudicating Commissioner and the arguments advanced by learned Authorized Representative.

5.2 From the remand order as reproduced in para 2.10, supra, the matter was remanded by the tribunal to provided all the relied upon documents to the appellants and to re-adjudicate the matter. However the factum of non supply of all the relied upon documents has been stated by the Commissioner in his order himself in para 20 & 21. The said para's are reproduced below:

"20. Since the notice continues to make a grievance about non-supply of following documents, statement of accounts No.16423 with DC Bank Ltd., Dongri, and Account No.4875 of DC Bank, Santacruz Pay-in-slips for these accounts, File No.17 of panchanama dt. 16.10.96, fax message dt. 14.10.96 sent by M/s. OVPL to M/s. Hans Enterprises, and as some of these are not forthcoming on records, it would be appropriate to examine the position and the evidence in respect of their supply in some detail. The show cause notice has Annexures A,B & C with the list of relied upon documents being indicated in Annexure 'C'. In receipt dt. 12.4.97, Shri Vali M. Mithiborwala has acknowledged receipt of show cause notice along with legible copies of all the enclosures and on 29.4.97, he has acknowledged receipt back of all the documents recovered under panchnamas from office, factory and residential premises except for the documents listed out in Annexure 'C' of the show cause notice. It is beyond comprehension as to how a person of the level of Managing Director of OVPL could take back after 17 days documents not relied upon and mentioned in Annexure 'C' to the show cause notice without being aware of the contents of Annexure 'C'. It is totally unacceptable when viewed in the context of the fact that much before on 4.11.96 he had submitted affidavits retracting his statement recorded on 15.10.96 and had alleged coercion, threat and harassment in its recording and consequently there was every reason to expect him to properly verify and confirm the documents being returned to him before acknowledging its receipt on 12.4.97 and 29.4.97.

Subsequently letter dt 9.5.1997 received from OVPL stating that "we are going through the documents received from you, may we request you Sir, kindly grant us additional time till 30 June, 1997 to submit our cause". Thereafter by another letter dt. 26th June, 1997 signed by Director, it is stated "following documents have not been supplied along with SCN

a. List of documents relied upon on the notice

- b. Copy of the fax message dated 14.5.1996 allegedly sent to M/s. Hans Industries
- c. A true and complete copy of Bank statement and pay-in-slips of relied upon documents on the notice. These are required as several entries in abridged Bank statements furnished along with the notice are on the face of it erroneous
- d. All other statements recorded in the course of investigation, such as M/s. Konark Plywood Pvt. Ltd., M/s. Reliable Plywood Pvt. Ltd., M/s. Welcome Plywood Pvt. Ltd., M/s. Shree Laxmi Saw Mills, M/s. Wood and Paper Industries etc."

At the same time request was also made for return of all seized records as they are not relied upon, so that their return they could submit the reply. However, it was placed on record that they had denied all the allegations and reserved the right to cross examine the persons whose statements are relied upon. The letter is significant in that it indicates that the line of defence has been finalized and also indirectly admits the veracity of Receipt dt. 12.4.97 and 29.4.97. Perusal of Annexure 'C' shows that the documents listed therein includes panchanamas at the Factory, residence and office premises, statement of Vali S. Najmuddin dated 15.10.96 statements of Ashok Gwalani dt. 19.10.96, Abhay Kankaria dt. 13.1.97, Jayprakash Chandak dt. 14.1.97, Nitin Bagul dt. 13.1.97, Ashok Vazirani dt. 10.3.95, Shri Kiran Patel dt. 10.3.97, Hareesh Patel dt. 2.4.97 and Shrinivas Achayra dt. 15.10.96. Since copies of these were not called for, it appears that these crucial documents were admittedly supplied along with the SCN. Further, perusal of the show cause notice indicates no mention of M/s. Konark Plywood P. Ltd., M/s. Reliable Plywood P. Ltd., M/s. Welcome Plywood Pvt. Ltd., Shree Laxmi Mills, which goes to show that the statements of representative of other units mentioned in the show cause notice had been supplied. It is totally incredible that Annexure 'C' itself and copies of the relied upon documents had not been furnished to the notices – more so in view of the

fact that admittedly all documents not relied upon in the show cause notice had been returned to the notices on 29.4.97. I also observe that in response to A.C. (Adjn.)'s letter dated 4.7.97, Shri Vipin Kumar Jain on behalf of notices while reiterating the non supply of documents at sr. Nos. 4,5,6 and 7, stated that he himself had gone through the bunch of documents and had noticed that the documents requested was not included therein. In a subsequent letter dt. 4th Nov., 97 addressed to CCE, Shri Vipin Kumar Jain while reiterating the non supply of documents at Sr.No.4,5,6 and 7 of Annexure 'C' in his request to CCE for instructions to be given to the investigating officers slyly widens the scope of the request for supply of documents to furnish copies of Annex 'C' to the notice and all the copies of the relied upon documents in addition copies of documents mentioned in B,C & D in para 2 above may also be furnished...". He has also indicated a willingness of go ahead with a personal hearing on 7th November, 97. He submitted a written reply dt. 24.11.97 and attended the hearing on 28.11.97 without reiterating his demand for supply of the documents. However, in final para of reply, it has been mentioned that it is an interim reply to the Notice since the required documents have not been furnished to his clients so far.

In the remand proceeding M/s. OVPL through their letter 5.2.05 Shri Vipin Kumar Jain acknowledged receipt on 4.2.05 of copy of Annexure 'C' to the show cause notice and continued his grievance that documents at Sr. 4,5,6 and 7 of Annexure 'C' have not been furnished and also requested for copies of statements 8,13 and 15 which were said to be not legible. I observe that as a result of obtaining copy of Annexure 'C', the request for copy of fax message dt. 14.5.96 sent by M/s. OVPL to M/s. Hans Enterprises was changed to fax message sent by M/s. OVPL to M/s. Hares Enterprises. At the hearing on 9.2.05 when it was explained that the fax message is addressed to Hans Enterprises and not Hares Enterprises, which is a clerical error, it was readily acknowledged by the notices that copy of the fax message

had already been supplied and the same was acknowledged again. Perusal of the case records shows that all the documents were furnished along with the show cause notice and were acknowledged on 12.4.97, and in spite of M/s. OVPL and their Advocate requesting for copy thereof none was furnished till the first adjudication by the CCE and also during these remand proceedings when only copy of Annexure 'C' was furnished, vide note dt. 4.2.05 of Supdt. Adjudication. It is, therefore, clear that M/s. OVPL were making a charade of asking for a copy of the fax message when the message had been sent by them, copy had been available with them and had been supplied to them by the Dept. along with show cause notice vide receipt dt. 12.4.97. It is also significant that the notices did not ask for the copies of the statements relied upon in the show cause notice at any stage of the proceedings during the initial adjudication or on remand.

Of the documents claimed to have not been furnished to them, it is seen that i) Annex C has been supplied along with the SCN as evidenced by the receipt of the Noticee and the attendant circumstances of the case analysed above.

ii) Fax message sent by them to M/s. Hans Enterprises was admittedly supplied to them which has been acknowledged during personal hearing on 9.2.05.

iii) All other statements recorded in the course of investigation, such as M/s. Konark Plywood Pvt. Ltd., M/s. Reliable Plywood Pvt. Ltd., M/s. Welcome Plywood Pvt. Ltd., M/s. Shree Laxmi Saw Mills, M/s. Wood and Paper Industries etc. Use of the expression 'all other statements recorded...' clearly implies that some (i.e. relied upon statements as per Annexure C) have been received. Further statements of parties in sub para (d) of the request of the Noticees are not on record or relied upon. Copies of statements relied upon had been furnished along with the copy of the SCN as evidenced by the Noticees receipt dt. 12.4.97, fact that no request for any copy of statements relied upon was asked for at any stage and that none has been supplied during initial adjudication or

on remand thereafter, expose the hollowness of the claim made by the Noticee.

iv) Copies of the statement of accounts from the Bank. It is significant that the Noticee's letter dated 26th June, 1997, signed by Director, it is stated "following documents have not been supplied along with SCN

a)

b)

c) true and complete copy of Bank statement and pay-in-slips of relied upon documents on the notice. They are required as several entries in abridged Bank statements furnished along with the notice are on the face of it erroneous."

Since Annexure B is the list/statement of details of pay-in-slips in the Savings Bank Account and the only Bank statements on record and listed at sl no. 4 of Annexure C to the SCN are supplied to the Noticees along with the copy of the SCN and receipt thereof acknowledged on 12.4.97, it is abundantly clear that the reference to 'abridged Bank statements' is to nothing else than to the copy of Bank statements at sl no.4 of Annexure C to SCN and therefore an admission that it has been supplied and received along with copies of all other documents and statements relied upon in the SCN and listed in Annexure C thereof. However they have attempted to make a grievance out of this by confusing the issues and referring to the Bank's inability to furnish the records at this late stage. It is stressed that the account was that of Shri VN Mithiborwala and he could have obtained all necessary records from the Bank at the relevant time and even at the hearing on 9.2.05 the same had been reiterated to the Noticee and departmental officers asked to get the computer print out obtained by them authenticated and certified by the Bank. However it is reported that the Bank had furnished statements for part of the period and in respect of the remaining had stated that it is no longer available on the computer but they are making efforts to trace out the hard copies which will be submitted as soon as they are located.

Be that it may, the fact is that copies were furnished to the Noticees and this has been admitted by them in their letter dated 26/6/97.

21. I have, therefore, no hesitation in rejecting the claim of M/s. OVPL, Shri Vali M. Mithiborwala and Shri Vipin Jain that copies of documents at Sr.Nos. 4,5,6 and 7 of Annexure 'C' had not been given to them. Their claim in this regard is bogus and is only intended as a spurious defence to assail any adjudication order as passed in violation of the principles of natural justice."

5.3 In respect of the statements, cross-examination and other evidences Commissioner has in his order recorded the findings as follows:

"24. In defence the noticees have contended, inter alia, that (i) reliance cannot be placed on the statements recorded by the Excise officers from the following

Shri V.N. Mithiborwala, on 15.10.96,

Shrinivas Acharya on 15.10.96

as per the affidavits dated 17.10.96 and 19.10.96 respectively sworn to retract the statements recorded under pressure, coercion and harassment.

Jayaprakash Chandak proprietor Biz International, in his cross examination has stated that the statement was recorded under duress.

Haresh Patel in his cross examination stated that he signed the statement without knowing what was stated therein as the officers threatened him with arrest.

Shri Nitin Bagul, partner AN Industries in his cross examination has stated that he has paid only as per bill and the officers had brought the format of the statement.

Shri Kankaria proprietor of Arihant Plywood in his cross examination stated that he had signed the statement under

threat of otherwise being required to go to Bombay on summons.

Shri Ashok Gwalani, Director of Mahalaxmi Plywood P. Ltd. in his cross examination stated that he did not remember how he identified the representative of Oriental Veneer and the extent of cash paid or the price of their competitors.

(ii) that as the pay-in-slips, loose chits and bank statements of the accounts were not furnished and were not available no adverse inference can be drawn by the department.

(iii) that the deposits received in the personal savings account of Shri Vali Mithiborwala do not represent extra consideration received from the customers but the accounts are personal and duly declared to the competent Income Tax authorities and all withdrawal and deposits therein has been accounted therein and reflected in the income tax return. Further, no adverse inference can be drawn from the fact that in the absence of any pay-in-slip and complete bank account for the entire period, Mr. Mithiborwala is not in a position to give entry to entry wise explanation of the banking transaction.

(iv) the transaction in the personal account is explained by the fact that the raw material required for business being agricultural commodity, representatives have to be sent upcountry to far off villages to procure the said raw material and they are given cash to procure raw material at the cheapest rate possible, Shri Mithirborwala had given cash for this purpose from his personal account and whenever such cash remain unspent, the agent/employee used to send demand draft back in the name of Mr. Mithiborwala, or used to deposit the same back, to the extent purchases made in cash advance from his account, the company used to reimburse to Shri Vali Mithiborwala from time to time.

(v) As regards the seized goods, it was contended that the same were not yet finished and therefore were not required to be entered in the RG1 register and not liable for confiscation.

25. On preponderance of probability, I am unable to persuade myself to accept that all the statements recorded by the Department, including the collection of intelligence, during the period of Oct 96 to March 97 was done forcibly with intention to book the case against M/s. Oriental Veneer Products Ltd. It is surprising that the affidavit dated 17.10.96 of Shri V.N. Mithiborwala is sworn but not filed before any authority and despite it being claimed that he was in a very agitated and depressed state of mind also gives evidence of cool calculation. In any case, after filing the letter dtd. 4.11.96, the matter has not been pursued by him at all. Likewise, it is difficult to believe the affidavit 19.10.96, of Shri Shrinivas Acharya, an employee of M/s. Oriental Veneer Products Ltd., that he merely signed under threat of further interrogation, harassment and detention and was too scared to bring the truth stated in the affidavit to the notice of the Excise Officers as it may lead to further repercussion against him. It is also observed that in as much as the deponents have not been identified with an endorsement of identification by the Advocate on the N J Stamp paper, the affidavits are rendered defective. First on 17/19.10.96 to swear an affidavit to 'place correct facts on record' and fear of repercussions from Excise officers but not file it before any authority or CCE, then on 4.11.96 to file a complaint letter enclosing the affidavits to the CCE and then not to pursue the complaint and join the adjudication proceedings is totally incomprehensible action except on the premise that it was a part of defence strategy. On the other hand, both the statements had been recorded by the Gazetted officer under Section 14 of the Central Excise Act, 1944 and are in the handwriting of the deponents and explicitly state that the statement had been tendered voluntarily, no threat or pressure applied or any promise has been made. Significantly, Shri Mithiborwala, backed up his admission by submitting a cheque and TR6 challan for Rs.30 lakhs towards differential duty.

As regards the statements recorded under Section 14 ibid, from the buyers/customers, it is incredible that all these persons had signed without knowing the contents or had acted under threats and yet none of them (including two others) had taken any action to retract the statements so recorded, nor did the Noticees at any time take up the matter with any authority to lodge their protest or disclose the fact in their reply to the SCN. It is observed that the statements had been recorded over a period of time, by different Supdts of C. Ex., some of them from other Commissionerate for example statements of Shri Bagul and of Shri Kankaria were recorded by Supdt, C. Ex., Sinnar Range, Nashik Commissionerate, of Shri J.S. Chandak, proprietor Biz International by Supdt. C. Ex. Sangamner Range. At the time of cross examination Shri Chandak, Harish Patel, Nitin Bagul, Ashok Gwalani, A.L. Kankaria, all identified their statements and their signatures as genuine. The authenticity of statement recorded under Section 14 is thus established and these are to be taken as admissible evidence in the proceedings.

On perusal of record of cross examination it is seen that the first cross examination was of Shri Ashok Gwalani who identified the statements and signatures as his and in his handwriting. He has categorically stated that there was a trade practice of low billing and he had paid in cash to the representative of Oriental Veneer Pvt. Ltd. His response to the Advocate's query as to how the cash was generated by him outside the books was plain - that he was having cash sales and there was a trade practice of low billing. Taking together his statement and cross examination I find that he has justified and confirmed that additional amount over and above the bill amount was paid in cash to the representative of Orient Veneer, who would be identified by him on personal recognition or was carrying duplicate bill etc.

In respect of cross examination of Shri Kankaria, Shri Kankaria, owned up the signature on the statement as his own, but stated that the statement was not in his handwriting and he does not remember the contents. On being examined

as to what part has been prepared by him and what part by officers, he stated that except his answers to question 7 and 12 the rest of the particulars in the statement are incorrect and do not pertain to him. But on questioning he admitted that the answer to question no.9 was correct and was given by him and he had made payments from his saving bank account no. 14369. He also could not explain how officers obtained detail about his transaction with Oriental Veneer, payment particulars, bank account no and personal details without putting any questions to him. Clearly, the statement has been recorded after his interrogation and Shri Kankaria, appeared to have been influenced and was not stating the whole truth in his cross examination.

Next, Shri Jayprakash Chandak, of Biz International identified his signature but stated that was not in his handwriting and the statement contains some portion which he has disclosed and some which he has not. On the cross examination of Advocate he owned the answer to question nos. 1,2,6,8 and 9 but in response to further questions by the Commissioner drawing to the questions no.3 and 4 of the statement, he accepted that the answer at sr.no.4 intimating that the bill was raised for Rs.2.50 or Rs.10/- per sq. mtr. With latest consignment of A grade in November being Rs.4.50 per sq. mtr. As also given by him and is correct. Further answer to question no.7, he admitted that the indication of total quantity purchased and the rates but the third column showing the differential in rates had been got written from him and he had signed the statement. He also admitted that he did not complain about the alleged forceful manner of recording statement. I observe Shri Chandak showed the sign of being influenced but the testimony given by him in the statement recorded on 14.1.97 under Section 14 ibid has not been shown to be incorrect or untrue. Reliance is therefore placed on his statement.

As regards, the cross examination of Shri Bagul of A.N. Enterprises, stated that the officers had brought the format of the statement and some figures were filled in the statement.

However, it is seen that the question records question and answers and it is not feasible for the officers to have prepared the format of the statement without knowing the length of the answers to the queries, particularly to questions no. 1,2,3,8,10,11,13,14,15,17 which were admittedly his answers. On being asked by the Advocate he attempted to disown certain answers in respect of question put to him. However, when asked by the Commissioner to explain his disowning of his answer to question no.12 apart from the denial that he had made any payment he stated he does not have any records with him here and he does not remember. He agreed that he had not made any complaint about the manner of recording of statement and there was no enmity between him and the officers recording statement. Thus, the statement recorded under Section 14 ibid is voluntary and based on the questions put to him. Shri Bagul appeared to be influenced at the time of his cross examination and had not been able to explain and substantiate his statement during the cross examination that the officers had brought the format and filled in some figures.

The cross examination of Shri Patel of Hans Enterprise, he identified the signatures on the statement but stated that he just signed without knowing the contents. He also has not complained about the manner of forceful recording of his statement and his admission during cross examination that he could not be arrested as he has not done anything wrong belies the claim of fear of arrest by officers. He accepted also that officers did not bear any enmity towards him. In the circumstances there is nothing in the cross examination which could cast any reflection on the statement recorded by Supdt. C. Ex. under Section 14 of the Central Excise Act, 1944.

Thus, I hold that there is nothing in the cross examination of these persons, which could cast any reflection on the statement recorded by Supdt. C. Ex. under Section 14 ibid and these statements are relevant pieces of evidence which can be relied upon.

26. *It is observed that M/s. OVPL have not questioned the authenticity of the document viz. fax dated 14.5.96 sent by them (Oriental Veneer Products Ltd.) to M/s. Hans Enterprises. The Fax gives particulars about the invoice number and the amount billed for the supplies made along with the grade of material supplied, the rates thereof, the total sale price. It also indicate the amount due, the amount received and the balance. This has also been confirmed by Haresh Patel of M/s. Hans Enterprises. This clearly shows underbilling and recovery of additional amount over and above the bill by M/s. OVPL. The three chits recovered also indicated the underbilling, in supplies made but while copies thereof were furnished along with SCN, they are not presently available. But, Department's case of evasion of duty is not affected by the absence of these chit since, the fact of over billing is adequately proved by other evidence for example fax message, statement dated 15.10.96 Shri Mithiborwala, the statements of various customers. However, it is also observed that there was no uniform rate at which material was billed or sold. The department has therefore not gone into the question of the grade of veneer supplied, individual invoices etc. but has attempted to ascertain the total quantum of additional consideration received for computing the duty evasion."*

5.4 When the matter was earlier listed for hearing before the tribunal on 30.05.2017, The bench of tribunal vide its order M/87929-87930/17/EB passed the order as follows:

"Both sides are in rivalry submission on the supply of documents. Appellant says it was deprived of the opportunity of defence in absence of copy of the documents supplied to it as requested vide letter dated 17.4.2017 addressed to the learned DR. But, Revenue on the other hand, says that all relied upon documents were supplied and nothing is pending to be supplied. Revenue referred to the letter dated 29.4.1997

of the Director of the appellant company exhibiting his acknowledgment in token of receipt of all documents from investigating agency stating that there is nothing to be received by the appellant from the department.

2. *We are very clear that the document dated 29.4.1997 is sufficient to hold against the appellant that all documents have been supplied to it by the Department and that is acknowledged by the Director. Looking to the manner the appellant has followed dilatory tactics and caused prejudice to the interest of Revenue, Appellant is directed to produce its cash-book, journal, ledger and other subsidiary records for the financial year 1994-95 to 1996-97 before learned adjudicating authority to examine entire cash deposits made in its Bank account and sources thereof mentioned in such record for the said years. The cash-book so produced before the Commissioner to examine each and every transactions as appearing at page 66 of adjudication order, should reflect the cash deposits. The Commissioner shall also examine the cheque transactions, if such transactions were used in adjudication. This is only the working modality possible to serve the interest of justice against the submission of the appellant that copy of Pay-in-Slips are required to be produced by department against bank statements appearing in adjudication order.*

3. *In so far as bank account is concerned, the evidence of the Bank extracted from its books of account and statement thereof issued is the appropriate evidence, which cannot be disputed in law and such statements should also be examined with reference to cash book, journal and ledger of the appellant that shall be produced before Id. Adjudicating authority.*

4. *Appellant says that there were certain statements recorded from Mr Shrinivas Acharya, Konark Plywood Pvt. Ltd., Reliable Plywood Pvt. Ltd., Welcome Plywood Industries Pvt. Ltd., Shree Laxmi Saw Mills and Wood and Paper Industries. Revenue is required to produce copy of those*

statements before the Tribunal on the next date fixed for examination.

5. *In order to facilitate the examination of the cash-book entries on cash deposit and bank deposit, the appellant shall make an application as expeditiously as possible before the Adjudicating Commissioner to fix the date and on that date appellant shall produce those records for aforesaid years for his examination. On production of such records and examination thereof, Id. Commissioner shall send his report to Tribunal along with his adjudication record on 31.7.2017.*

7. *The appellant lastly says that a file was recovered from the appellant containing loose papers therein. Revenue is directed to produce such file before the appellant on the date of examination of aforesaid accounting records as stated above and also before the Tribunal."*

5.5 When matter was listed for reporting compliance on 31.07.2017, bench passed order No M/88780-88781/17/EB stating as follows:

"Appellant says that it has not made application to the learned adjudicating Commissioner to fix a date for production of records before him for his examination as was directed by order dated 30th May 2017. That has obstructed the process of justice and handicapped the authority to send his report today.

2. *In view of the above defiance of order of Tribunal by the appellant who has obstructed the process of justice, notice is hereby issued to it to show cause on 10.8.2017 as to the reason why the interim order passed on 7.7.2006 staying realization of demand to the extent stated in the order shall not be vacated and its appeals dismissed on that day. So also appellant is directed to explain the reason why contempt shall not be drawn against it for obstruction to the process of*

justice and such explanation with the order of Tribunal forwarded to the Hon'ble High Court of Bombay for appropriate order.

3. Appellant is also directed to file an affidavit by 10th August 2017 stating the reason why it has not made application to the adjudicating Commissioner for fixation of date of hearing and examination of its records as stated in the order of Tribunal passed on 30.5.2017. Copy of such affidavit be also served on Revenue by 8th August 2017."

5.6 Appellants against this order filed a writ petition before High Court (Writ Petition No 2528 of 2017). High Court vide its order dated 23.08.2018 allowed the writ petition as per order as follows:

"5. After hearing both sides at some length, we find that the Tribunal in the peculiar facts and circumstances would have been well advised to dispose of the appeal on merits and finally. With great difficulties and obstacles parties get an opportunity to argue old appeals and the Tribunal therefore should not pass any orders which would delay the proceedings further. Public interest suffers adversely if any tentative and prima-facie view is expressed, like in the present manner, and it delays the final hearing of the appeal and thereafter the passing of the orders. The available material should have been taken into account to dispose of the appeal.

6. We, therefore, direct the Tribunal to pass final order in the appeal by reserving the right of both sides to raise appropriate contentions with regard to the interim directions and in the event they are aggrieved and dissatisfied with the final orders in the appeal. All contentions of both the sides in relation to interim directions are kept open along with that of merits."

5.7 In response to the order of the tribunal seeking the documents learned Commissioner has vide his letter dated 28.07.2017 informed as follows:

OFFICE OF THE PRINCIPAL COMMISSIONER (A.R.) CUSTOMS, EXCISE & SERVICE TAX APPELLATE
 TRIBUNAL 1ST FLOOR, JAI CENTRE, 37 P.D' MELLOW ROAD,
 POONA STREET, MASJID (E), MUMBAI – 400009

F.No. E/1596-1597/06-Mum
 Mumbai, the 2nd, August 2017

To,
 Deputy Registrar, Cestat Mumbai,
 Jai Centre, 37 P.D' Mellow Road,
 Poona Street, Masjid (E),
 Mumbai – 400009

Sir,

Sub: - Appeal No. E/1596-1597/filed by M/s. Oriental Veneer Products Ltd. & Mr Vali. N.Mithiborwalla-Reg

Kindly refer to Order No **M/ 87929-87930/17/EB/dated 30-5-2017** wherein Revenue were directed vide to comply with Para 2,4,5&7 of the said order

2. Commissioner Central GST, Thane Rural vide letter dated 28-07-2017 (copy enclosed) has reported that :-

(a) it is to inform that consequent to the re-organisation of the erstwhile Central Excise Commissionerate with the onset of GST regime, the subject Review Cell File was received from the erstwhile Thane-I Commissionerate on **10-07-2017**.

(b) it was seen from the file that direction was issued to the investigating unit (Preventive Unit) by the Commissioner (Thane-I) to carry out the instruction as contained in Para-4, Para-5 and Para-7 of the order dated 30.05.2017.

(c) On receipt of the said file, immediate efforts were made through the Anti-evasion Unit of the Thane Rural CGST Commissionerate to locate the statements as referred in the Para-4 of the subject order by deputing the officers to erstwhile Central Excise Thane-I Commissionerate.

(d) The statements given by Mr.Shriniwas Acharya, Konark Plywood Pvt. Ltd. Shree Laxmi Saw Mills and Wood and Paper Industries are received from the Anti-Evasion Section & same are enclosed herewith for examination the Hon'ble CESTAT. It is reported that the

Statement given by Reliable Plywood Pvt. Ltd. and Welcome Plywood Industries Pvt. Ltd. were not available in the records available erstwhile Central Excise Thane-I Commissionerate.

(e) As regards to Para-2 & 5 of the Hon'ble CESTAT order dated 30.05.17 it is submitted that the matter is being persuaded with the erstwhile Central Excise Thane-I Commissionerate to know whether directions of the Hon'ble Tribunal have been complied with by the appellant. However it is also to be mentioned that so far the appellant has not approached the new formation with the documents in terms of directions of Hon'ble Tribunal.

(f) it is also reported that the related case records pertaining to Anti-Evasion/Adjudication Unit have not been received so far by this Commissionerate.

3. The above facts may be taken on record

Yours faithfully,

Arsad 2/8/2017
(Ashok B Kulgod)
Assistant Commissioner (AR)
Cestat Mumbai
Mobile No. 9322826968

Encl:- (a) Letter dated 28-07-2017 of Commissioner CGST Thane Rural &
(b) Statements mentioned in Para 2(d) for Tribunal examination..

Copy to :- Commissioner CGST Thane Rural, 4th Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector-E, Bandra-Kurla Complex, Bandra (East), Mumbai – 400 051 with direction to provide :-

- (i) the Statement given by Reliable Plywood Pvt. Ltd. and Welcome Plywood Industries Pvt. Ltd &;
- (ii) to produce file mentioned in Para 7 of Order No M/ 87929-87930/17/EB/dated 30-5-2017 to the appellant on date of examination of accounting records mentioned in Para 2 of the said Tribunal order & also before Tribunal.

Arsad 2/8/2017
Ashok B Kulgod
Assistant Commissioner (AR)
Cestat Mumbai

OFFICE OF THE COMMISSIONER CGST THANE RURAL 4TH FLOOR UTPAD SHULK BHAVAN, PLOT NO. C-24, SECTOR-E, BANDRA – KURLA COMPLEX, BANDRA (EAST), MUMBAI - 400 051

F.No. V/Trb.04/CESTAT-15/Oriental Veneer/K-II/Th-I/17-18
Mumbai, the July 2017

To,
The Commissioner (AR)
CEASTAT, WZB,
Mumbai



Sir,

Sub:- Appeal No. E/1596-1597/ filed by M/s. Oriental Veneer Products Ltd. & Mr Vali Mithi Borwalla -Reg)

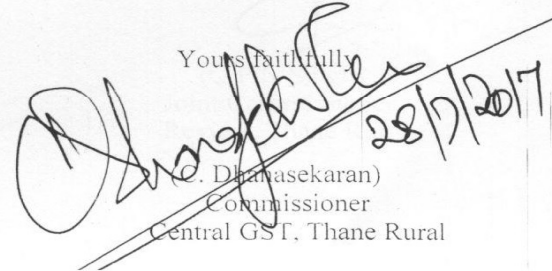
With reference to the above it is to inform that consequent to the re-organisation of the erstwhile Central Excise Commissionerate with the onset of GST regime, the subject Review Cell File was received from the erstwhile Thane-I Commissionerate on 10-07-2017. It was seen from the file that direction was issued to the investigating unit (Preventive Unit) by the Commissioner (Thane-I) to carry out the instruction as contained in Para-4, Para-5 and Para-7 of the order dated 30.05.2017. On receipt of the said file, immediate efforts were made through the Anti-evasion Unit of the Thane Rural CGST Commissionerate to locate the statements as referred in the Para-4 of the subject order by deputing the officers to erstwhile Central Excise Thane-I Commissionerate. The statements given by Mr Shrinivas Acharya, Konark Plywood Pvt. Ltd., Shree Laxmi Saw Mills and Wood and Paper Industries are received from the Anti-Evasion Section. These copies of the statement are forwarded herewith in duplicate for producing before the Hon'ble CESTAT. **The statement given by Reliable Plywood Pvt. Ltd. and Welcome Plywood Industries Pvt. Ltd. were not available in their available records.** Further, the related case records pertaining to Anti-evasion/Adjudication Unit have not been received so far by this Commissionerate.

As regards to Para-2 & 5 of the Hon'ble CESTAT order dated 30.5.2017 it is submitted that the matter is being persuaded with the erstwhile C.Ex.Thane-I Commissionerate to know whether directions of the Hon'ble Tribunal have been complied with by the appellant. However it is also to be mentioned that so far the appellant has not approached the new formation with the documents in terms of directions of Hon'ble Tribunal.

As the complete records of the case are yet to be received from erstwhile Commissionerate, the fact may be brought to the notice of Hon'ble Tribunal for kind consideration and seeking extension of **04 months time for compliance of directions of Hon'ble CESTAT.**

Encl: - letter dt 12-7-17

Yours faithfully


C. Dhavasekaran)
Commissioner
Central GST, Thane Rural

OFFICE OF THE COMMISSIONER CGST THANE RURAL 4TH FLOOR UTPAD
SHULK BHAVAN, PLOT NO. C-24, SECTOR-E, BANDRA - KURLA COMPLEX,
BANDRA (EAST), MUMBAI - 400 051

F.No. V/Trb.04/CESTAT-15/Oriental Veneer/K-II/Th-I/17-18
Mumbai, the 12th July 2017

MOST URGENT/COURT MATTER

To,
The Joint Commissioner
(Legacy cell)
Central Excise, Thane-I

Sir,

Sub:- CESTAT order No. M/87929-87930/17/EB dated 30.5.2017 in r/o
Appeal No. E/1596-1597/ filed by M/s. Oriental Veneer Products Ltd. &
Mr Vali Mithi Borwalla -Reg)

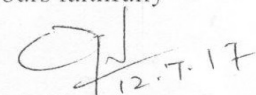
Please find enclosed herewith CESTAT order No. M/87929-87930/17/EB dated 30.5.2017. It was seen from the above order that direction was issued to the investigating unit (Preventive Unit) by the Commissioner (Thane-I) to carry out the instructions of the CESTAT as contained in Para-4, Para-5 and Para-7 of the order dated 30.05.2017. On receiving of the file in this Commissionerate, efforts were made through the Anti-evasion Unit of the Thane Rural CGST Commissionerate to locate the statements as referred to in the Para-4 of the subject order. The statement given by Reliable Plywood Pvt. Ltd. and Welcome Plywood Industries Pvt. Ltd. are not yet received from the legacy cell of erstwhile Thane-I Commissionerate.

As regards to orders received at Para-2 regarding the verification of deposits made during the period 94-95 to 97-98, it is not evidenced whether the Appellant has produce its cash-book, journal, ledger and other subsidiary records for the financial year 1994-95 to 1996-67 before the adjudicating authority to examine entire cash deposits made in its Bank account and sources thereof mentioned in such record for the said years.

As per Para-5 of the order the appellant was to make an application expeditiously before the Adjudicating Commissioner to fix the date and on that date appellant shall produce those records for aforesaid years for his examination. On production of such records and examination thereof, the Commissioner shall send his report to Tribunal along with his adjudication record on 31-7-2017. It is also not evidenced whether directions at Para-5 of the Hon'ble Tribunal is complied.

Under the circumstances explained above, you are requested to take personal efforts and send the complete case file to this office on extreme urgent basis

Yours faithfully


(O.P.N. Singh)
Joint Commissioner
Review, Thane Rural

5.9 From the facts as available it is quite evident that certain relied upon documents which formed the basis of the show cause notice, have not been served upon the appellants and are also not available with the revenue now. Even at the time of adjudication in the remand proceedings these documents were not made available to the appellants. Since the starting point of investigation is the pay-in slips recovered from the premises of appellant during search conducted, it cannot be said that in absence of the said documents department has proved the case within pre-ponderance of probability. Annexure C to the Show Cause Notice lists following documents as relied upon documents-

"List of documents relied upon:

1. *Panchanamas dated 15.10.96 drawn at the Factory and office of M/s. Oriental Veneer Products Ltd.*
2. *Panchanamas dated 15.10.96 drawn at the residence of Shri S. Najmuddin – Director.*
3. *Statement dated 15.10.96 of Shri Vali N. Najmuddin.*
4. *Statement of Accounts of Shri Vali Najmuddin of S.B. A/c No. 16423 at DCBL – Dongri and S.B. A/c No.4875 at DCBL – Santacruz.*
5. *Pay-in-slips of A/c No.16423 of DCBL, Dongri and A/c No.4875 at DCBL – Santacruz.*
6. *File No.17 containing loose papers with drawn from the office premises vide Panchanama dated 15.10.96.*
7. *Fax message dated 14.5.96 sent by M/s. OVPL to M/s. Hares Enterprises.*
8. *Statement dated 19.10.96 of Shri Ashok. J. Gwalani.*

9. Statement dated 13.01.97 of Shri Abhay L. Kankaria.
10. Statement dated 14.01.97 of Shri Jayprakash S. Chandak.
11. Statement dated 13.01.97 of Shri Nitin N. Bagul.
12. Statement dated 10.03.97 of Shri Ashok S. Vazirani.
13. Statement dated 31.01.97 of Shri Kiran B. Patel.
14. Statement dated 02.04.97 of Shri Haresh Patel.
15. Statement dated 15.10.96 of Shri Shrinivas Acharya."

5.10 Documents which are not produced have been relied in the show cause notice stating as follows:

"The scrutiny of documents recovered under Panchanama dated 15.10.96 from the premises of the said assessee's office revealed that

- a) *Chit paged at Sr.No.91 of document No.17 shows that the said assessee had supplied 2431.56 sq mts of face veneers to M/s. Bent Ply Products vide invoice No.338 dtd 29.09.96 sqr. mtr. at the rate of Rs.8 per sqr.mtr., thereby suppressing sale value of face veneer to the extent of Rs.16,534/- for that invoice.*
- b) *Chit paged at Sr.No.97 of documents No.17 shows that the said assessee has supplied 2073 sqr mtr of face veneers @ Rs.10.50 per sqr.mtr. and 1382 sqr.mtr. of face veneers @ Rs.12.50 per sqr.mtr. to M/s. Advance Particle Board Pvt. Ltd. vide invoice No.171 dtd 5.3.95 but had billed both for Re.1/- p.s.m. only thereby suppressing the value of face veneer to the extent of Rs.35,068.50 to evade central excise duty.*
- c) *Chit given at Sr.No.99 to document No.17 shows that the said assessee had supplied 19,670 sqr.mtr. of face veneers @ Rs.17/- per sqr.mtr. and 9887.50 sqr.mtr. of face veneers @ Rs.13.50 per sqr.mtr. to M/s. Star Plywoods Pvt. Ltd. but had billed the same for Re.1/- and thereby*

suppressed the value of face veneer to the extent of Rs.4,38,313.50 to evade central excise duty.

d) From the fax message sent by the said assessee from phone number 3851245 installed in the office of the said assessee to M/s. Hans Enterprises, it is seen that 673.72 sqr.mtr. of face veneers was cleared @ Rs.19.50 per sq.mtr. and 2266.97 sqr.mtr. was cleared @ 14.75 per sqr.mtr. vide invoice number 486 dtd 2.1.96, available in document No.06, but the billing was done @ Rs.2.50 per sqr.mtr. In invoice No.524 dated 19.1.96 of document No.07, 1312.50 sqr.mtr. of face veneer was cleared @ Rs.19.50 per sqr. Mtr. but billing was done for Rs.2.50 per sqr.mtr. In invoice No.589 dtd 9.2.96 of document No.08, 2319.91 sqr.mtr. was cleared @ Rs.19.50 p.s.m. and 407.50 sqr.mtr. was cleared @ Rs.16.00 p.s.m. however the billing was done for Rs.2.50 only. For invoice No.11 dtd 22.5.96 of document No.10, 1101.40 sqr.mtr. of face veneer was cleared @ Rs.19.50 p.s.m. but the bill was raised for only Rs.2.50 per sqr.mtr. Thus for the above mentioned invoices the assessable value was suppressed to the extent of Rs.1,21,705 to evade central excise duty. The above facts were confirmed by Shri Haresh Patel partner of M/s. Hans Entp. that they had received the fax message and the rates mentioned above for the said invoice was the actual rate paid by them and not the rates quoted in the central excise invoice of the said assessee.

a) The bank pay-in-slips of Development Corporation Bank Dongri and Santacruz reveals that the assessee is holding a Savings account Nos. 16423 and 1875 respectively, wherein he is depositing all such extra considerations, received from his various customers in the form of cash/cheque/demand drafts. So far the assessee has deposited Rs.2 crores in this account. These amounts have come from his customer is evident from the fact that most of the pay in slips bear the name of the customers from whom the amount were received. Besides M/s. Mahalaxmi Plywood Pvt Ltd, M/s. Arihant Particle Board Pvt Ltd, M/s. Wood and Paper Ind., M/s. Hans Enterprises have also admitted the fact of payment of such

differential amounts to the said assessee for supply of face veneers from time to time."

In absence of the said documents either in original or in form of any certified copy these paras cannot be said to be based on the available evidence for scrutiny.

5.11 Apart from the above discussions show cause notice is only narration of search operations and evidences recorded in form of statements of various person. Commissioner has in his order recorded that the persons making the statement have not testified their statements as correct and voluntary. Thus these statements in absence of other evidences cannot be called as reliable evidence in proceedings relating to evasion of duty.

5.12 Further another fact that needs consideration is that the amount which have been said to be received clandestinely against the duty evaded by way of undervaluation of goods is determined by way of deposits made in the bank accounts of the managing Director. How a person receiving the money in cash against such undervalued goods leave a trail by depositing the said amounts in his accounts has not been considered and answered by the revenue in these proceedings.

6.1 The Appeals filed by Appellant and Appellant 2 are allowed and the order of Commissioner set aside.

(Pronounced in court)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

tvu