

Sharon Veneers Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Aug-09-2002

Reported in : (2002)(84)ECC158

Judge : S Peeran, R K Jeet, N T C.N.B.

Appellant : Sharon Veneers

Respondent : Commissioner of Central Excise

Judgement :

1. By these appeals the appellants challenge the Order-in-Original No.35/95, dated 3-4-95 passed by the Collector of Central Excise, Madras by which he has confirmed a duty demand of Rs. 58,94,712.07 under Section 11A(2) read with proviso to Section 11(1) of the CE Act, 1944 besides imposing penalty of Rs. 6,00,000/- under Rule 173Q of the CE Rules, 1944 on the appellant-company. Other two appellants have been imposed penalty of Rs. 1,00,000/- and Rs. 10,000/- respectively under Rule 173Q of the CE Rules, 1944.

2. The brief facts of the case are that the appellants M/s. Sharon Veneers (P) Ltd. are engaged in the manufacture of Veneers (cone and face) falling under sub-heading 4404.00 and plywood falling under sub-heading 4408.90 of the CETA, 1985. Proceedings were initiated against the appellant-company by issue of show cause notice No. 6/93, dated 8-2-93 on allegation that they have contravened the provisions of Rules 173C, 173F, 173G and 226 of the CE Rules, 1944 for mis-declaration of the price, under-valuation, improper maintenance of accounts and

failure to fulfil the responsibility cast upon the manufacturer under the Self Removal Procedure scheme. The allegation is that the appellant-company has recovered extra value relating to plywood from their customers during the year 1989-90 and 1990-91 in the guise of sale proceeds of sawn timber (a non-excisable item) by floating a fictitious company in the name of M/s. TNTC with their accounts Manager/Commercial Manager PKV Menon as its proprietor.

Statements were recorded from various persons including PKV Menon who in his statement dated 6-5-91 stated about the nature of the transactions between the appellant-company and M/s. TNTC to whom most of the portion of the sawn timber was alleged to have been sold for further disposal to the customers. Reliance was also placed on the statement of four dealers of plywood to whom plywood was cleared from the premises of the appellant-company. Those dealers had deposed, inter alia, that they had paid for plywood amounts in excess of the billed price, in the form of cash. Reference was also drawn to the statements of 44 persons residing in an address mentioned certain bills of M/s.

TNTC for sale of sawn timber alleged to have been received from the appellant-company. Support was also drawn from the fact that the address of M/s. TNTC was actually the residential premises of PKV Menon and that the said M/s. TNTC had no godown or lorry of their own. It was also noticed that at the address noted in the bills only a hotel functioned and the residents in the hotel stated that they did not place any orders for goods from the appellant-company. Investigation also revealed that in many of the vehicle number given by the appellant-company for transport of the sawn timber, were actually of two wheelers, cars and even public transport like bus by which sawn timber could not have been transported. After considering the reply furnished by the appellants, the impugned order was passed demanding duty and imposing penalty as aforesaid.

3. Shri PS Raman, learned Counsel appearing for the appellants reiterated the grounds of appeal and also referred to the brief synopsis of the case submitted by them in the Court on 24-7-2001 together with a statement showing the names of dealers, buyers and consignment agents, value of the plywood purchased and the percentage of sales value. The statement also indicates the date of search by the

departmental officers. The learned Counsel submitted that there was no application of mind by the adjudicating authority as there was no evidence either in regard to flow back of cash or in regard to nature of transaction in sawn timber. He further submitted that statements of 15 persons (dealers/purchasers) who gave statements in favour of the appellants have not been taken into consideration while holding against the appellants. The learned Counsel also questioned the way in which the demand is quantified in that based on one solitary slip, on which the appellants had no opportunity to examine and confront the department and based on which the differential duty has been arrived at. He submitted that there was no seizure of the goods and hence uncorroborated and retracted statements cannot be relied upon. He submitted that the dealer viz. M/s. TNTC has been termed as a dummy unit of the appellants which is incorrect inasmuch as the unit has been registered under sales tax and they have their own premises and employees and were maintaining books of account for all transactions.

He has vehemently argued that out of 171 consignments transported in 71 vehicles, 125 consignments covering 70% of the sales are covered by valid transport documents and consignments transported by 46 vehicles were rejected on the ground that the same were found to be not lorries.

As regards invocation of extended period of limitation, he submitted that there was no charge of clandestine removal of the goods, the appellants have filed invoice under Rule 173C, declaration filed has been approved by the Assistant Commissioner, GP-I was scrutinized and RT 12 returns were assessed. Therefore, invoking the proviso to Section 11A(1) is not maintainable. He also cited the order of this Bench in the case of VG Plywood Ind. (P) Ltd. and three others v. CCE, Chennai reported in 2001 (5) ECL 160 wherein in an identical matter the Tribunal had set aside the duty demanded and the matter was remanded for de novo consideration for the limited purpose of deciding the charge of under-valuation and clandestine removal. He, therefore, prayed for setting aside the order and allowing the appeals.

4. Shri A Jayachandran, learned DR appearing for the department defended the impugned order. He also referred to the comments received from the

Commissioner on the written submissions of the assessee and submitted that the lower authority has passed a detailed considered order and there is no ground for interference. He also cited the judgment of the Tribunal in the case of Chowbey Sugandhit Tambaku Co. v CCE, Patna reported in 2001 (131) E.L.T. 222 wherein the Tribunal relying on the judgment of the Hon'ble Apex Court reported in 1983 (13) E.L.T. 1546 has held that the Revenue authorities are not required to prove by mathematical precision activities of clandestine removal which are in the personal knowledge of the assessee for which all precautions are taken to avoid detection. What is required is preponderance of probability which is the standard of proof required in a quasi-judicial proceedings and inasmuch as the impugned order has been passed after detailed investigation and examination of a number of witnesses, and documents, which supports the case of the department, the appeals should be dismissed by upholding the impugned order-in-original.

5. We have carefully considered the rival submissions, and perused the case records and synopsis submitted by the appellants, and the comments by the department. We find that the issue involved in this case is that the assessee has cleared sawn timber in the guise of plywood and realised extra consideration. The entire case has been made out on the [basis] of balance sheet entry for the sale of value of sawn timber.

The assessee submitted that there was no actual quantification correlated to the quantity of plywood manufactured and cleared by the appellant-company. We find that in this case the search of the premises of the appellants was conducted on 8-11-1991 and the show cause notice invoking the proviso to Section 11A(1) was issued on 8-2-1993. One of the allegations against the appellant-company is that the appellant-company had mis-declared the price of the plywood resulting in short-levy and that they had recovered extra value from their customers and the department wants to take support from the statement of PKV Menon, Proprietor of M/s. TNTC, that M/s. TNTC is actually the residential premises of the said Menon, who is also the Accountant/Commercial Manager of the appellant-company and that the said premises did not have any godown to deal with so much quantum of goods. We observe that this finding of the Commissioner cannot be countenanced for the reason that it is not always necessary for a dealer to have godown.

Business can also be done or arranged to be done by use of the modern communication facilities, for example diverting a load of goods to various dealers without being unloaded in the premises of the dealer, in this case the premises of M/s. TNTC. Further even if M/s. TNTC was found to be the residential premises of PKV Menon, its Proprietor, that by itself, cannot lead to a conclusion that no business transaction was carried on in that premises and the transactions carried on there are bogus. The learned Commissioner has questioned the transaction of the appellant-company with M/s. TNTC for the reason that the firm was the residential premises of PKV Menon who is the Commercial Manager of the appellant-company and that M/s. TNTC did not have godown to facilitate dealing in the sawn timber etc. This finding cannot be countenanced for the reason that doing such business, godown is a necessity. Moreover during the cross-examination, Shri PKV Menon categorically stated that the goods coming to the premises of M/s. TNTC were diverted to other dealers without being unloaded. Though the assertions by PKV Menon is not free from suspicion, in the absence of clear cut evidence that that M/s. TNTC has dealt with business in large quantum of sawn timber without the facility of godown and lorry of their own, suspicion however strong cannot take the place of proof and hence we are inclined to give benefit of doubt to the appellants in regard to the true nature of the transactions being conducted from M/s.

TNTC.5. Now we proceed to give our finding in regard to various other allegations levelled against the appellants.

Under-valuation. We find that the appellants have argued that out of 40 dealers, statements were taken from 18 dealers which represented 63.15% of the total sales during the relevant period and merely 3 dealers representing 7.91% of the sales alleged to have given extra payment to the appellant-company and two dealers out of these three representing 7.46% of the sales retracted their statement within a reasonable time.

The department sought to place reliance on the statement of one Mr.

Parthasarathy of Shankar Mercantile Corporation and during the cross-examination, he has denied having paid any extra consideration to the appellant-

company. This position is not controverted by the Revenue. We find that it is for the Revenue to establish with credible evidence the aspect pertaining to under-valuation. The charge that extra payment has been made and extra consideration received, has to be established by the department. We note that the Department in their comments have stated that when forty dealers of the appellant were spread all over South India, it would be difficult to conduct investigation in respect of all. It is for the department to establish the charge of under-valuation by bringing in acceptable evidence though not with mathematical precision. We find that the appellants have clearly stated that statements have been recorded under threat and coercion while the department in their comments sought to challenge this assertion by the appellants that the appellants have not brought any documentary evidence in this regard. We find that PKV Menon, Commercial Manager of the appellant-company, during the cross-examination on 25-7-1994 has clearly stated that the statement was recorded against his will and it was given under pressure and coercion made by the officers. He has also stated that the whole night he was beaten up and was harassed and he was forced to give a statement implicating himself and the first petitioner and he was allowed to go only after giving the statement as per direction of the Central Excise Officers at about 3 AM on 7-5-94 and the statement was taken between 1 AM and 3 AM. We find that the Commissioner has given a finding in para 20.3 that statements have been recorded from 7 (not 6 as mentioned) more dealers and the appellants have contended that their statement supports the case of the appellants. Other witnesses such as N. Ashok Kumar, A.V. Sekhar, P. Ravindran, and N. Nagendran have also stated during cross-examination that the statements were recorded from them as dictated by the Central Excise Officers and the statements were not voluntary. We find that while the department chose to rely on the statements which are in favour of the department, the statements though recorded from these seven dealers which are in favour of the appellants have not been relied upon by the Revenue. This approach of the Revenue is against the principles of natural justice, more particularly when the finding is given against the appellants. Further the Commissioner has noted that out of the seven dealers whose statements are stated to be in favour of the assessee, the statements of four persons do not specifically indicate that they did not pay any extra

consideration.

Conversely the statements of these persons also do not indicate that they have paid any extra consideration to the appellant-company. The Revenue having obtained statements from 18 persons and relying upon only those statements which are in favour of the Revenue is a one sided approach. Shri Parthasarathy in his statement dated 24-4-91 stated that he was responsible to Shri R.K. Agarwal, Director of Shankar Mercantile Corporation and nowhere in the statement he has stated that he has received any extra consideration from the dealers for the appellant-company. Shri Nagendran of M/s. Shree Sakthi Agencies, during cross-examination clearly stated that he has not paid anything over and above the billed amount to Shri Parthasarathy, who was the employee of M/s. Shankar Mercantile Corporation.

Quantification of demand. We find that the appellants have stated that the figures of sawn timber sales were taken from the balance sheet for the year 1989-90 and 1990-91 and by multiplying the rate of excise duty of plywood on the said balance sheet figures, raised an inflated demand, without any investigation conducted in this regard. We find that this stand taken by the appellants have not been controverted by the department and hence quantification is to be redone where the demand is sustainable.

Higher selling price of plywood. While quantifying the demand, the department has sought to rely upon the statement of one dealer and ignored the fact that selling price has to necessarily include sales tax, freight and insurance, etc. We also find that there is no correlation between raw material, finished product, power consumption done by the department that plywood has been cleared in the guise of sawn timber.

Price slip. As regards the slip recovered from M/s. Sakthi Agencies, the plea of the appellant was that the same has not been enclosed with the show cause notice and hence cannot be relied upon against the appellants. We find that the Commissioner has dealt with this plea in paras 20.2 to 21 wherein he has held that there was recovery of price slip from one of the dealers viz. M/s. Shree Sakthi Agencies and the said price slip indicated certain jottings in pencil and there was a

wide variation between the billed price and the selling price. The appellants contended that they had requested for copies of the said slip but their request in this regard has not been granted. We, however, find that the Commissioner has noted in para 20.6 that during the personal hearing the party was offered the facility of pursuing the price slip, but they declined to avail of the same pleading that it would not effect their client and therefore, they cannot now plead that it was neither relied upon, nor supplied to them to their disadvantage.

We observe that the appellant-company in their reply to the show cause notice dated 9-6-1993 had expressed their ignorance of the said slip and requested for supply of copies of the same. Just showing the slip at the time of personal hearing, in our view, cannot be taken to be affording effective opportunity to the party. The appellant is entitled to know who the writer of the slip is, and confront him if necessary.

Therefore, we are of the view that the appellant has to be provided with copies of the slip on which reliance is placed by the Revenue, to rebut the claim of the department. Further, we find that the Commissioner has held that the price slip recovered from one dealer, viz M/s. Shree Sakthi Agencies, is admissible in evidence even in the case of other dealers also. We are unable to accept this finding of the Commissioner that the price slip recovered from just one dealer viz M/s. Shree Sakthi Agencies, can be relied upon for the purpose of finding out the price at which the goods have been sold to other dealers also. The price slip recovered from M/s. Shree Sakthi Agencies in the facts and circumstances of this case, could have been relied upon in relation to the sales made to that Agency only and not to others. As noted above, there are 40 dealers and the department could rely upon only one price slip pertaining to M/s. Shree Sakthi Agencies, in support of their claim. The claim of the department therefore for demanding differential duty from other dealers based on the solitary slip recovered from one dealer i.e. M/s. Shree Sakthi Agencies cannot be agreed to, more particularly because the department has not shown that each of these transactions was colourable and in each case there was flow of extra consideration. On the contrary there was no recovery of any price slip from any other dealers. Therefore the price slip recovered can at best be taken to be relatable to the sales made to M/s. Shree

Sakthi Agencies only. We further find that the Commissioner has admitted the fact that there is no dispute with regard to the quantity of plywood manufactured and cleared. The dispute centers around only on the extra consideration alleged to have flown to the appellant-company for clearance of plywood in the guise of sawn timber.

We, therefore, hold that so far as the clearances made to M/s. Shree Shakti Agencies from whom the price slip is recovered is concerned, the appellant has to be given effective opportunity to rebut the claim of the department. So far as the clearances made to the remaining dealers are concerned, we have given our serious consideration to this aspect of the matter. We find that in the comments forwarded by the department vide C.No. V/44/22/199/2001-R&T dated 21-8-2001, the department has stated as under: "When the forty dealers of the appellants spread all over South India and it would be difficult to conduct investigation in respect of all. Further among the dealers investigated, only some of them would have admitted the excess payment for business reasons. If a retraction is acceptable to the noticee for his convenience, the department is at liberty to place reliance upon the materials, which point out to the fact that the appellant had under-valued the goods.

More over there may be instances where the evidence gathered may not be clinching or does not fully support the case of the department..." We would have remanded those cases for re-consideration, but as already noted above, inasmuch as the department has categorically stated that it would be difficult to conduct investigations in respect of all the 40 cases spread over South India, we are left with no other option except to allow the plea of the appellants that there was no undervaluation in the case of the other 39 dealers as there are not sufficient corroborative material evidence to establish such a degree of probability that a reasonable person would have accepted that extra consideration has flown to the appellant-company.

Longer Period of Limitation, As regards invocation of the longer period of limitation we find that the appellants have stated that all the statutory records were strictly maintained including RG-I, RG 23(1), PLA, RT-12 returns were filed including

delivery challans and invoice and that the classification lists were regularly filed which were scrutinised and approved by the department and audit parties have also been regularly conducting audit of the appellant-company and therefore, the longer period of limitation cannot be invoked. We find that the Commissioner in para 25.0 has dealt with the plea of limitation raised by the appellant-company wherein he has noted that the fact regarding extra consideration received, has not been accounted for and hence longer period is invocable. We find that in this case the assessee has maintained all the statutory records and their unit have been visited by audit parties regularly. However, we find that, the appellants themselves have admitted that out of 171 consignments of sawn timber transported in 71 vehicles, 125 consignments covering 70% of the sales, were covered by valid documents. This indicates that in 46 consignments, there was no valid transport documents. The appellants have also admitted the fact regarding wrongly mentioning the vehicle numbers, though they have submitted that this was due to inadvertence.

Further as mentioned above, the price slip recovered from M/s. Shree Sakthi Agencies also indicates that there was extra payment. Therefore, it cannot be said that the appellant-company has come out clean before the authorities. Therefore, we are inclined to think that there was suppression of material fact and hence longer period of limitation is invocable in the facts and circumstances of this case.

7. We are not able to agree with the finding of the Commissioner in para 29.0, Shri Vishnu Khemani, Managing Director of the appellant-company who was managing the affairs of the Company and as in charge of the company in its day to day affairs, he should have been fully aware of the under invoicing and that bank introduction for opening account has been signed by Shri Khemani and hence he was instrumental in floating of the front company M/s. TNTC. We do not find any evidence on record to support the view taken by the learned Commissioner so far as floating of M/s. TNTC is concerned. However, since he was managing the affairs of the company and since there is admission by the appellant-company that in 46 consignments there were invalid transport documents, it cannot be said that he was not involved or was not concerned with under invoicing and therefore, he cannot escape from penal liability, however the quantum has to be reduced

considerably in view of our finding in regard the validity of the slip for the clearances made to other dealers are concerned. We have already held that so far as the existence of M/s. TNTC is concerned, they are entitled to the benefit of doubt in the facts and circumstances of this case. We, therefore, do not find sufficient evidence to hold that Shri PKV Menon was concerned with fictitious sale of sawn timber and flow of cash to Vishnu Khemani for the reason that he has used his residential premises. Therefore, we set aside the penalty imposed on Shri PKV Menon.

8. We also observe that more or less a similar case came up for consideration before the Tribunal in the case of M/s. E.G. Plywoods (P) Ltd. and 3 others reported in 2001 (5) ECL 160 (Tribunal) wherein the Tribunal after detailed hearing and appreciation of the facts has held as under in para 29 to 31 which are extracted herein below : "29. We have carefully considered the entire allegation, replies, evidence in the form of statements, result of cross-examinations, arguments and citations produced before. After the closure of the case the Counsel and the appellant's representative were asked to produce copy of the annexure to the show cause notice which gives details of 241 invoices. The annexure gives entry of invoice value, the enhanced value and the short-levy. Appellants have not produced the same nor the Revenue produced the same despite being called upon to do so except only their reply which is extracted. We are required to examine all the three allegations in the case.

30. The first allegation pertains to under-invoicing and undervaluation of clearances made by M/s. BGP to their dealers. The officers carried out search and seizure of the premises of M/s. BGP, M/s. BGS and its sister concern and about 18 dealers whose names have been indicated in the SCNs. Investigations were carried out with transporters and also with the bankers. The scrutiny of evidence led to visit of investigating officers to the premises of Shri Venkataraman who was canvassing the business on behalf of the appellant. Revenue has termed him as liaison officer while appellants claim that even as per his own evidence in the form of statement recorded that he was only a commission agent receiving 1% of billed amount of appellants. He had stated that statements given by him was not true, as recorded in the statement itself. They denied that he Was representing various

other manufacturers. Revenue has relied on certain slips seized from his premises which showed the thickness of plywood, bill rate, the rate he was asked to 90 sell and from his statement it was alleged that there was huge difference between the bill price and the price at which it was sold to Sundaram Industries and TANSI and that amounts so taken by cash was passed on to the Directors and appellants. Appellants seriously challenged the slips recovered on the ground that these slips were never made available to them. The Commissioner has noted that during the hearing appellants were given an opportunity to take xerox copies and make their submissions. Appellants' main ground is that when the department is solely proceeding on the basis of statement of Shri Venkatraman to prove the under-valuation, then his presence for cross-examination was paramount and was fundamental to prove the under-valuation of principles, of natural justice. Appellants claim that there was a serious violation in this respect. The Commissioner has noted that Shri Venkatraman and Ramachandran did not turn up and appellants had agreed to file their written submissions. The Commissioner in his order proceeded to hold that even if they had a right to cross-examine him, even then his statement can be taken as corroborative and establishing the facts of under-valuation. We have considered this plea of the appellant. We are not in a position to accept the Commissioner's finding in the light of his own recording in para 57.3 that Shri Ramachandran and Venkatraman did not turn up for cross-examination. It can be gathered from this paragraph that appellants had agreed to file their written submissions which, according to the appellant, was to mean that they did not give up the right to cross-examine on witnesses not turning up. The Commissioner had asked them to proceed with the next stage which he was entitled to do so. We are inclined to accept this plea of appellant, because the claim being very enormous and huge, it cannot be said that appellants would have given up their valuable right to cross-examine Mr. Venkatraman, who is the fulcrum of the entire case. The entire slips were recovered from him and slips have been relied as a basis to prove the under-valuation. It has been brought to our notice that appellants had, during 1989, 25 dealers and the dealers increased to 43 during 1991. The department had only conducted and taken statement of 19 persons and relied on 18 dealers. The cross-examination was sought for 21 and only 10 of them turned up and in which only two i.e. Ganesh Timber Trading Co.

and Vaitheshwaran Timber Trading Co. relied on their earlier statements.

The Commissioner has relied on these two pieces of evidence to uphold the charge of under-valuation. We have noticed that in the cross-examination both the dealers did not produce any evidence of extra payment made or entries made in their registers for making payment in respect of each bill number. There is no discussion by the Commissioner with regard to 241 invoices relied and as to how in respect of each invoices there was extra payment. The question is whether the slip of Venkataraman who has not been cross-examined and the veracity of the slip not having been put to test can be taken as gospel truth to apply for all the transactions with respect to 241 invoices of 42 dealers. The appellant's case is also that they had made 26% of transaction to one particular dealer whose statement has not been recorded and there is no allegation pertaining to this 26% of sales in the SCN for under-valuation. For the purpose of proving under-valuation, the burden is on the Revenue to show that in each of the transaction, there was extra payment made. There is no doubt that deposits had been made in the Vijaya Bank, but this has been explained to be not connected with each of the invoices or each transaction. The correlation between the transaction and invoices and extra payment is most important criteria for arriving at the figure of the exact amount of under-valuation. Such an exercise has not been done in the present case. The annexure to the show cause notice which was shown in the Court merely indicated a general figure. The corroborative evidence in respect of each of the invoice is required to be proved. What can be gathered from the entire order is that slips had been seized from Shri Venkataraman's residence.

This alone cannot be the sole criteria for, confirming, the demands.

Neither the answers given by witnesses from Ganesh Timber Trading Co., ACS Guruswamy Nadar and Slips seized from Vaitheeswaran Timber Trading Co can be considered to be corroborative for transaction with regard to other dealers. The reason being that the department has accepted the appellant's prayer for clearance of goods on invoice price under Rule 173C(11) of CE. Rules and evidence to this effect has been produced and there is no serious challenge by Revenue that assessee was operating under the provisions of Rule 173C(11) of

C.E. Rules, 1944. The Tribunal in its Larger Bench judgment rendered in the case of CCE, Chandigarh v. Taparia Tools Ltd and Ors. (supra) have held that value of excisable goods is determined with reference to the normal price at which such goods are sold. Where the goods are not sold at the factory gate to any particular class of wholesale buyers, duty on the value of the goods sold to that class cannot be determined on the price at which the sale was effected to another class of buyers. When the price of the goods sold to such class is not ascertainable under Section 4(1)(a), then provision contained in Section (4)(b) have to be invoked. It has been held that as per that class, nearest ascertainable, equivalent price has to be ascertained by complying with the rules framed in that behalf. The result of that provision can be had only when normal price is incapable of being ascertained. In the light of the finding on the transaction value given in the Larger Bench Judgment of several Apex Court judgment, we have to clearly hold that department having permitted the appellants to follow the procedure as per provision of Rule 173C (11) of C.E. Rules, therefore each of the invoice price has to be taken as independent for the purpose of assessment. In that view of the matter, the evidence of the slip recovered from Venkataraman, who has not been cross examined and there being no corroborative independent evidence in respect of the dealers of separate payments made, therefore, it is difficult to hold that department has established the case of undervaluation solely on the basis of two statements of admission given by Ganesh Timber Trading and Vaitheeswaran Timber Trading. The question now is as to whether the matter has to be allowed in party's favour or matter is required to be remitted back for re-determination.

31. We have carefully examined this aspect of the matter and given our serious consideration. The law as it stands on this aspect of the matter has been examined by us. We note that it is for the Revenue to establish the aspect pertaining to under-invoicing and under-valuation. The criteria to be followed is that extra payment had been made and extra consideration received has been established.

The department having relied on Venkataraman's statement ought to have produced him for cross-examination. Even if his statement is disregarded, then also Revenue can proceed on the basis of corroborative evidence, if available, to

show that the appellants have indulged in under-valuation. In the written submissions filed by the Dy. Commissioner before us to the queries raised by the Tribunal, the Revenue in this case have clearly admitted that out of 21 witnesses sought to be cross-examined, only 10 were produced. The Commissioner states that officers were not cross-examined. Hence, the statements are deemed to be proved. We are not in a position to accept this finding as appellants plea for cross-examination of officers continued till the case was closed and the Commissioner ought to have produced all the officers including the Venaktaraman and Ramachandran for the purpose of cross-examination. The failure to produce these persons for cross-examination has resulted in failure of principles of natural justice as noted in large number of judgments. We have noticed that even the Hon'ble Apex Court has remanded the matters in similar cases to give opportunity to either side to establish their case. It will be, in our humble opinion, unfair on the part of Revenue in not giving opportunity to establish their case merely because the Commissioner was in a hurry to close the case. We note that the Commissioner has proceeded on general premise and on assumptions and presumptions to establish under-valuation. The relevant findings have been recorded. These findings do not show that each of the 241 invoices have been examined and corroboration with regard to under-valuation in respect of each of the transaction has been noted and findings recorded.

Appellants' having permitted to function under Rule 173C(11) of C.E. Rules, therefore the department and the Commissioner should show that each of the transaction was colourable and in each of the transaction there was extra consideration received except Venkataraman's statement and two witnesses. There is presently nothing on record to come to that finding. Even the admission of two dealers cannot be generalised as being the case of under-valuation in respect of other dealers were independent. Appellants have established that they have in all 41 dealers and 26% of transaction are to a single dealer, who has 'not been examined in the matter.

When this be the case, the burden was heavy on the Revenue to establish as to how under-valuation has taken place and in the present case, we notice that such a conclusion is not forthcoming from the finding of the Commissioner, although

show cause notice and allegation is enormous and weighty. We are of the considered opinion that the matter has to go back for de novo consideration. Shri Venkataraman has not been produced by Revenue for cross-examination to establish Revenue's case. However, in the interest of justice, we direct the Revenue to summon him for cross-examination. In case, if he fails to turn up, then his evidence as has been noted in cited judgment cannot be relied upon except wherever corroboratory evidence is available; which can be culled out and shown that it is material evidence to establish the case of under-valuation.

Therefore, the findings on undervaluation, in the impugned order is set aside and matter remanded for de novo consideration." We find that in the above case, the allegations pertained to mis-declaration and under-valuation, clubbing of clearances, misclassification of Plywood and clandestine removal of plywood and the Tribunal after careful consideration of the matter, duty demanded on account of mis-declaration and clearance of goods as marine plywood, set aside and the aspect pertaining to undervaluation and clandestine removal was remanded back to the Commissioner for de novo consideration. The Tribunal while disposing of the matter, extensively dealt with the aspect pertaining to admissibility of price slip recovered from one dealer and whether such price slip/chit can be made relatable to the other dealers also when there was no recovery of price slip from them as could be seen from the finding portion extracted above. The Tribunal has held that "Even the admission of two dealers cannot be generalised as being the case of under-valuation in respect of all other dealers who were independent". In the case before us, the charge against the appellant-company was that they have cleared plywood in the guise of sawn timber by manipulation of records and by creating dummy unit. In view of our discussion above, we hold that while the aspect pertaining to demand of duty based on the slip recovered from M/s. Shree Sakthi Agencies remanded for de novo consideration, the same in respect of other dealers from whom no such slip was recovered, cannot be sustained in the facts and circumstances of this case. The Revenue has pressed into service the decision of the Hon'ble Supreme Court in the case of D. Bhoormull [1983 (13) E.L.T. 1546] and the decision of the Tribunal in the case of Chowbey Sugandhit Tambaku v.CCE, Patna reported in [2001 (131) E.L.T. 222] wherein it was held that the Revenue authorities are not required to prove by mathematical precision

activities of clandestine removal which are in the personal knowledge of the manufacturer. In the case before us we find that the preponderance of probability has not been arrived. In view of our discussion above, we pass the following order:

(a) The aspect pertaining to demand of duty from the appellant-company for the clearances made to M/s. Shree Sakthi Agencies based on the slip/chit recovered is remanded for de novo consideration by providing with copies of such slips/chits and invoice/delivery challan, by affording effective opportunity of hearing to the appellants including cross-examination of the initiator of the slip/chit, and the investigating officers, if desired by the appellants, in accordance with law.

(b) Duty demanded for the alleged clearances made to other dealers from whom no such slip was recovered, is unsustainable and is set aside.

(c) The penalty imposed on the appellant-company and the other two appellants viz. Vishnu Khemani, Managing Director of the Company and PKV Menon is set aside. However, the quantum of penalty on the appellant-company and Shri Vishnu Khemani is to be re-fixed based on the outcome of the remand proceedings.

Thus the appeal of appellant PKV Menon is allowed while the appeals of appellant-company and its Managing Director Shri Vishnu Khemani are disposed of in the above terms. Ordered accordingly.

9. I have considered the various pleas raised by the appellant in this case and noted that the appellant have strongly denied the allegation of under-valuation, clandestine manufacture and removal of the goods.

The appellant are engaged in manufacture of commercial plywood bonded with UF/PF resin of various sizes and thickness falling under Tariff sub-heading 4408.90 attracting 30% of Basic Excise Duty and 5% thereupon as Special Excise Duty during the relevant period. They were also manufacturing veneers both core and face, falling under tariff sub-heading 4404.00 attracting 12% of Basic and 5% thereupon Special Excise Duty, during relevant period. Apart from the said plywood and veneers, the company as by-product manufactures sawn timber falling under subheading 4403.00 attracting "NIL" rate of duty vide Notification

48/87, dated 1-3-87 (as amended) has also been cleared.

They filed classification list bearing No. 1/88-89 under Rule 173B on 8-12-88 indicating the various subheading in which said products of articles of wood, proposed to be manufactured by them was fully described for the years 1989-90 and 1990-91 as well as for all subsequent years, necessary classification lists with modification and amendments whenever necessary was been filed by them. They were getting timber logs for manufacturing the product by importing it from Malaysia and other countries. The purchases were also made by entering into High Sea Sale Agreements.

10. The process of manufacture has been described by them in para 4 of the appeal memo which is extracted: "Timber logs are brought from the Log Yard and after cross-cutting, the timbers are identified in two separate categories, the round cylindrical logs which have no cracks and knots are selected for peeling. The peelable logs are taken in stages to peeling, clipping, drying, hot pressing, DD saw cutting and finishing stages of plywood. Other logs with defects like deep cracks, end-to-end cracks or rotten ends, cross-fibre, logs with twists and bends, dry logs, heavy knots, etc. are basically unpeelable timbers and therefore since rotary cut is not possible, they are taken for sawing in the saw mill resulting into production of Sawn Timber, while plywood unit's objective is to get maximum peelable logs, nevertheless all plywood factories necessarily have Saw Mills attached to them so that unpeelable logs can be Sawn and sold as Sawn Timber, so that some value is derived".

11. In short, after the search on 23-4-1991 the office of the appellant and also the premises a show cause notice was issued raising demands for Rs. 58,94,712.07 as differential duty for the periods 1989-90 and 1990-91 by invoking the provisions of Sub-section (1) of Section 11A of the Central Excises and Salt Act, 1944 alleging that they have violated various provisions of CE Act and Rules and hence they are liable to pay differential duty. Department claimed that: (ii) Appellant-company has under-valued plywoods cleared from its factory for the relevant financial years.

(iii) Statutory accounts and returns maintained by the appellant company do not show actual values of the goods cleared from the factory.

(iv) Appellant-company has not adopted the correct assessable value under Section 4 while clearing plywood manufactured by its factory.

(b) Appellant-company has floated a bogus company in the name and style of Tamil Nadu Timber Corporation (in short TNTC) and except for two sales of sawn timber, all the others sales were made only to TNTC. (c) Appellant-company has shown fictitious transactions of Sawn Timber through TNTC to plough back the money received, over and above the invoice value of plywood.

(d) The invoices are under-valued to show the sale price of plywood and collected excess amount as flow back.

(e) The statements of various dealers and consignment agents substantiate the fact that excess amount was collected by one Mr.

Parthasarathy and on instruction of one Mr. R.K. Agarwal, in cash.

(f) The statements of truck owners/drivers as also the purchasers indicate that Sawn Timber was neither transported nor sold by the appellant-company.

13. The appellant contend that the allegations are totally misleading and without any basis. They contended that all the excise records were strictly maintained by them including RG-I, RG-23(1), PLA, GP-I, RT-12, Delivery Challan Invoices, etc., in addition to registers showing "production, sale and stocks" of each and every item, datewise, were also being maintained. Classification list and price list were regularly filed, which were duly scrutinised and approved/endorsed by the Department. Audit parties have been frequently visiting the company's unit and had been examining/scrutinising all the invoices and sale bills. The production and sales of sawn timber was in specific knowledge of the department as borne out by the said records.

Therefore, they cannot allege suppression of facts and extend larger period under proviso to Section 11A (1) of the Act. They also relied on several voluminous

documents to show that the charges brought out in the show cause notice were without any supporting evidence or without application of mind. They showed through the evidence that TNTC was a proprietary firm with its own bank accounts and sales tax and it had no nexus whatsoever with the company. Moreover, the figures would reveal that sawn timbers were sold by the appellant-company to a very large number of buyers and it was absolutely incorrect on the part of the Department to contend that TNTC was the only buyer, through whom the sawn timber used to be sold. They relied on the assessment made to the Sales Tax Authorities for the relevant period and to prove the factual transaction of sawn timber. They also pointed out that transactions between TNTC and appellant-company were all through cheques and there was no monetary transaction in cash whatsoever. They contend that factual fact has been overlooked and therefore the finding that TNTC had been floating as a dummy unit is totally a perverse finding arrived at by the adjudicating authority. They contend that sawn timber is a necessary by-product of plywood/veneer unit and the quantum and production of sawn timber depends on the quality of timber logs. They made purchases on high seas basis. The quality of timber could not be inspected resulting in import of poor quality of logs with cracks and crevices. Therefore, they contend that out of 40 dealers/buyers/consignment agent of the company, department had recorded the statements of 18 buyers/dealers/consignment agents. The statements of the dealers constituted less than 8% of the total value of sale of plywood of appellant. They retracted and had no consequence or bearing on the facts of the case. The statements were made by one Mr. Parthasarathy who was doing business for several other persons and had maintained his books and accounts which cannot be relied and had no bearing on the case. They also challenged the quantification of demand as the Department had picked up the figures of sawn timber sales, shown in the balance sheet in 1989-90 and 1990-91 as sold to TNTC (except 2 bills) and by multiplying the rate of excise duty of the plywood and the said balance sheet figures raised the inflated figures. They also questioned the veracity and correctness of the vehicles numbers and challenged in this numbers in which the said numbers had been noted. It is said that many of the trucks were repeatedly used for carrying sawn timber as well as plywood and that they were erroneously written in the invoices also for which the appellant cannot be attributed

motives and demands raised. They pointed out that there was an independent sales other than to TNTC to a extent of Rs. 38,37,772.12 which was more than 60% of the total sales of sawn timber of the appellant-company. The sales were made at factory gate against cash memos. They also produced "production, sales and stock registers" of sawn timber for the relevant period which has not been looked into by the adjudicating authority.

They contend that the Department has relied on solitary statement of one dealer to enhance the higher selling price of the plywood which cannot be accepted. They have also relied on the various statement given by the witnesses which were in their favour and which was not been taken into consideration by the adjudicating authority. It stated that the Collector has considered the error in holding TNTC to be a fictitious company while at the same time holding in para 15 to have an independent existence. It is stated that the Department has wrongly assumed the rate of excise duty on plywood at 21% and on Veneer is 5.25%. They contend that the accurate rate was 31.5% on plywood 12.6% on Veneers, while the rate of sales tax along with surcharge is 8,8%.

Therefore they challenge the correctness of the Commissioner's order.

They contend that the dealers are independently receiving the goods and in such circumstance department cannot proceed to rely on the statement of the 3 dealers who have also retracted the statements. They contend that there is no evidence to hold the charge of under-valuation solely on the basis of slips recovered which have no evidential value. He also pointed out that Mr. P. Ravindran in his cross-examination had rebutted the said slip and the said slips do not have any conclusive evidence to show under-valuation. It is also contended that the show cause notice was issued on 8-2-1993 for a search conducted on 23-4-1991 and therefore on this ground alone the demands are required to be strucked down as time-barred.

14. The case was argued by Shri P.S. Raman who pointed out to the entire evidence on records and written submission that there is no undervaluation in the case or that there was manufacture and removal without accounting. The statement of few dealers cannot be relied to uphold the charges. He also pointed

out that Mr. Parthasarathy was not their employee and he was dealing with several other companies and his jobs had no evidential value. He also pointed out that reliance on Bhoormull is totally irrelevant for charge on under-valuation as Bhoormull's case dealt with the case of smuggling and not with regard to manufacture and clearance of goods or pertaining to charge of under-valuation. He submitted that for the purpose of proving the charges of clandestine manufacture and removal the Department has to place cogent and reliable evidence. He pointed out that no such evidence is available on the record and the department relied solely on the Bhoormull's case. He also relied on the judgment rendered in the case of B.C. Plywoods Ind. (P) Ltd. & Ors. v. CCE, Chennai as reported in 2001 (5) ECL 160 (T) which has clearly laid down that there has to be co-relation between transaction and invoices and extra payment said to have been made. He submitted that no such co-relation has been done and there is no evidence of receiving of extra consideration. He also pointed out that there were 40 dealers who were not examined and without their statements and sale made to them, the evidence of 3 dealers cannot be relied to uphold the charge of under-valuation. Ld.

Counsel also pointed out that M/s. TNTC were not a dummy unit but were in existence in all transactions was through cheques and they had maintained separate registration under sales tax with separate premises and employees. He also pointed out that there was enormous sales and very high percentage to other dealers and no extra consideration was received from TNTC and there is no evidence on record to this extent.

15. Ld. DR reiterated the Departmental contention. Ld. DR read out the order of the Commissioner and relied on his findings.

16. On a careful consideration I notice that for the purpose of proving that TNTC was a dummy unit the Department had to produce evidence in this regard and no such evidence is available in this regard to uphold that TNTC is a dummy unit. On the other hand the appellant have produced enormous evidence to show that TNTC is in existence in all transaction with them was through cheques and TNTC was having independent transaction and independent dealings. Therefore, the

finding arrived at by the Commissioner that TNTC is a dummy unit is factually incorrect finding and requires to be set aside.

17. With regard to the charge of under-valuation the Revenue is seeking to rely on 3 witnesses. On the other hand the appellant have shown that they had clearances with 49 dealers and the Department had not examined any of these dealers to show that the price sold to few of them was the only price and the sales. The department ought to have examined all the dealers to show that the sales made to one or two dealers was not proper sales and it was under-valued. There is no conclusive finding on this aspect of the matter which has been brought to the notice and shown that the statement of Mr. Parthasarathy cannot be relied as he was not an employee of the appellant. He was working for several other persons and his statements are not corroborative to any other statement or evidence which is having evidential value. Therefore to solely to rely on the statement of Mr. Parthasarathy to hold that there was extra payment through cash is totally unsustainable. I also notice that Parthasarathy during his cross-examination has denied having paid any extra consideration to the appellant company. This is a clinging evidence in favour of the party and which cannot be brushed aside. I also notice that the Department have clearly admitted that they have not examined all the 40 dealers of the appellant. Therefore in a circumstance like this it is not proper to accept the evidence of 3 dealers who have also rebutted in the cross-examination the earlier statement is not conclusive to prove the charge of under-valuation in the absence of examining 40 dealers by the Revenue. The Revenue ought to have examined all the dealers and collected sufficient documentary evidence in the form of evidence and other documents to prove the case of under-valuation but merely to hold that it is not possible to prove the case in the light of Bhoormull's case will be violative against principles of natural justice and miscarriage of justice. Department has to prove the charge of under-valuation with a conclusive evidence and no such evidence is available on record.

18. Likewise with regard to the charge of sale of plywood on higher price, department has not produced any conclusive evidence. There is no co-relation between the raw material, financial flow back and power consumption to show that there was higher production and higher sale and plywood at higher price and also

there is no evidence to show that plywood had been in the guise of sawn timber. Therefore this charge also falls down.

19. As regards the price slip recovered from the M/s. Sakthi Agencies the same is not reliable evidence at all. As the price slip recovered from one dealer which is jittered in pencil cannot be considered as a conclusive evidence for the purpose of adopting the price. The slip maintained by Sakthi Agencies in their own hand writing cannot be said to be the price at which the appellant have sold the goods and that would be the price on which it has been sold to other dealers. In the absence of any evidence recovered from other dealers, therefore the price slip recovered from the Sakthi Agencies cannot be a ground to confirm prices at which the goods were sold to larger number of dealers. In that view of the matter the appellant succeeds on merits in view of lack of cogent, reliable and dependable evidence with regard to the parties under-valuation, sale of the goods on higher prices.

20. Department has not proved any invoicing of excisable goods realising the extra cash over the valued amount by fictitious sale of non-excisable item and retracted extra consideration (cash) realised for the excisable goods as the sale proceeded of a non-excisable product as held by the Commissioner in para 31 of his order.

(a) TNTC was an independent unit having its own existence and the sales were made to them on principal to principal basis by cheques and therefore the charge that clearances were made to a dummy unit is set aside.

(b) That there was no abnormal of sawn timber and firewood during the periods 1989-90 and 1990-91 and that there was no under-valuation of sales and the basis of the charge is not sustainable in the absence of examining 40 dealers in the case and without proper cogent evidence of Parthasarathy of Shankar Mercantile Corporation with regard to extra consideration paid to company is not sustainable and requires to set aside.

(c) Likewise the statement of N. Ashok Kumar, AV Sekhar, P. Ravindran and N. Nagendran are also not sustainable and no support of documentary evidence for proving the charge of undervaluation.

(d) Likewise, there is no sale of the goods over and above invoice price and the department has not proved the charge of undervaluation.

(e) The department has also not proved that excess amount was collected by Parthasarathy and on instruction of one R.K. Agarwal and there is no evidence of the said collection was made and it was paid on to the appellant.

22. The statement of truck drivers and purchaser that sawn timber was neither transported nor sold by the appellant-company. Therefore the charges made in the show cause notice are not a conclusive evidence and requires to be set aside.

23. In this circumstance I order for allowing the appeals with consequential relief if any.

In view of the difference opinion between the Members the matter is placed for consideration before the 3rd Member.

(a) Whether the appeals are required to be remanded for de novo consideration with regard to allegation pertaining to demand of duty from the appellant-company for the clearance made to M/s. Shree Sakthi Agencies based on the slip/chit recovered from them as recorded by Hon'ble Member (Technical) in his order and whether the quantum of penalty on the appellant-company and Shri Vishnu has to be re-fixed based on the outcome of the remand proceedings as held by Shri Jeet Ram Kait, Hon'ble Member (Technical) in his order Whether the appeals are required to be allowed in terms of the order, for lack of evidence produced by the Revenue, as held by Shri S.L. Peeran, Hon'le Member (J) in his order.

Sd/- Sd/-Jeet Ram Kait) (S.L. Peeran) Member (T) Member (J) 24. I have perused the records and orders proposed by both my Id.Brothers. I have also heard both sides.

25. The proceedings in the present appeals are in respect of duty demand on Veneers manufactured by the appellant-assessee M/s. Sharon Veneers (P) Ltd., during the financial years 1989-90 and 1990-91. A duty demand of about Rs. 59 lakhs had been confirmed in the impugned order upon a finding that the appellant invoiced the goods sold by them at a price lower than the sale price and realised

the un-billed portion of the value in the guise of sale proceeds of sawn timber. Both the Members are in agreement that most of the duty demand is not sustainable inasmuch as they have not found Revenue's allegation of realising part of the value as sale proceeds of sawn timbers sustainable. They have also agreed that the demand in respect of the sales other than to one dealer M/s. Shree Sakthi Agencies is required to be dropped.

26. During the hearing of the case, Id. Counsel of the appellants submitted that out of the duty demand of about Rs. 59 lakhs, only a small amount of Rs. 6/- to Rs. 7/- lakhs would relate to the goods sold to M/s. Shree Sakthi Agencies. The difference of opinion is with regard to this portion of the demand only. The Id. Member (T) has taken the view that this portion of the demand is required to be re-adjudicated in view of the recovery of the slip/chit from M/s. Shree Sakthi Agencies during the search operations, while, Id. Member (Judicial) is of the view that there is lack of evidence in regard to the goods sold to M/s. Shree Sakthi Agencies also.

27. During the hearing of the case today, the Counsel for the appellant took me through the allegations in the show cause notice and findings in the adjudication order on the question of slip/chit recovered from M/s. Shree Sakthi Agencies. He pointed out that M/s. Shree Sakthi Agencies is the appellant's dealer in Salem and during the search operations, the authorities had seized certain papers from M/s. Shree Sakthi Agencies. The notice stated as under in page 9 of the show cause notice about the seized papers: "that rate quoted in the page No. 39 para 2 to Mahazar dated 23-4-91 represents the selling price of plywoods in terms of Sq.ft.; that the rate in page No, 52 of the above file represents the landed cost and selling price of Sharon Plywoods that the pencil noting in page No. 57 of the above file represents the landed cost of Sharon Plywoods in terms of sq.ft. and that it was his own handwriting; that notings in page No. 60 of the above file represents the rates of supply of Sharon thermply as ascertained by him over phone from M/s. SVPL; that as they are small traders and plywood business is such that, that kind of making extra payment over and above the billed amount is unavoidable so as to remain in the business".

28. The Id. Counsel for the appellants pointed out that it would appear from the narration in the show cause notice, that there is no specific mention of any additional payment in the seized papers. It only seems to indicate the landed cost and selling price for the goods. No separate chit/slip is also mentioned. The learned Counsel submitted that this evidence is of no consequence to the issue relating to valuation of the goods, reason being that M/s. Shree Sakthi Agencies being only a small dealer of the appellant's manufactured goods, transaction with them would not be of much relevance in determining the assessable value of the goods. The learned Counsel's submission is that if the sale price of the rest of the goods to other dealers were found to be normal and acceptable as assessable value, the transactions between the appellant and M/s. Shree Sakthi Agencies could also be assessed at the assessable value applied to sales to other dealers, particularly since the appellant's sale price was same to all the dealers including M/s. Shree Sakthi Agencies.

29. The learned Counsel also pointed out that even apart from the above legal position, the evidence collected in respect of sales to M/s.

Shree Sakthi Agencies was not at all confirmatory of the allegation that the goods sold are under valued. He pointed out that a mere perusal of the statement dated 25-4-91 of Shri P. Ravindran, Partner of M/s. Shree Sakthi Agencies, Salem would show that the statement is too vague to be relied upon as evidence in regard to under-valuation of the goods. He pointed out that according to the SCN, Shri P. Ravindran stated that in respect of 15 mm thickness plywood the sale price was lower than the purchase price inasmuch as he had indicated Rs. 155-160 as the purchase price exclusive of sales tax and he has mentioned Rs. 151-155 as the sale price. The learned Counsel pointed out that such a state of affairs is quite unlikely. This shows that the statement did not indicate the correct factual position. The learned Counsel further pointed out that Shri Ravindran retracted his statement on the very next day in his letter addressed to the Asstt. Collector of Central, Excise. He had also moved the Madras High Court alleging that the statement had been obtained through coercion. The learned Counsel also pointed out that Shri P. Ravindran, was cross-examined before the adjudicating authority and he had stated that: "the statement about the extra amount contained in my

statement on 25-4-91 is not correct. But it was written as dictated by the officers much against my will. I confirm once again that I have not paid at any time anything extra than the billing amount." 30. The learned Counsel also contended that even the original statement of Shri P. Ravindran did not prove the charge of under-valuation in as much as it had only stated additional payments were made to Shri Parthasarathy who is the employee of M/s. Shankar Mercantile Corporation who is the agent of the appellant-company. The learned Counsel pointed out that it is significant that Shri P. Ravindran, did not state that he has paid any amount to the appellant-company towards the price of the goods purchased. It was also pointed out that Shri Parthasarathy had denied the allegation of Shri Ravindran. Thus, there is no link between the sale of the goods and the payments, if at all.

The learned Counsel also pointed out that even though the recovery of the slip/chit is mentioned in the SCN, a copy of the same was never made available to the appellant. Therefore, they had no opportunity to make their submissions on it.

31. As against the submissions on behalf of the appellant's, the submission of the learned DR is that the case is required to be pursued in respect of valuation of the goods sold to M/s. Shree Sakthi Agencies inasmuch as evidence (slip/chit) is available regarding under invoicing of the sales. The learned DR submitted that the absence of conclusive evidence in respect of sale prices to other dealers was no ground for dropping the proceedings in respect of sales, which are proved to be under-valued.

32. The issue involved is the correct valuation of the Veneers manufactured by the appellant's company. During the relevant period, valuation was to be undertaken in terms of Section 4 of the Central Excise Act. That section contemplated the assessment of the goods at the normal value at which such goods are sold in the ordinary course of trade. The impugned order had held that the sale of the goods to the dealers of the appellant's was not at normal value and that part of the price was being collected in cash over and above the invoice price. The Division Bench has not accepted the finding regarding collection of part of the price in the guise of sale value of sawn timber. They have set aside the duty demand in respect of the goods sold to all but one dealer, accepting the sale price to those dealers the

assessable value of the goods. Thus, the price to all the dealers other than M/s. Shree Sakthi Agencies has been accepted as normal sale price. In the normal course, since the sale price to M/s. Shree Sakthi Agencies was the same as to others, the sale to M/s. Shree Sakthi Agencies should also be treated as at normal price. The difficulty in accepting the sale price to Shree Sakthi Agencies as normal value is the presence of the slip/chit recovered from them during search operations and the statement made by Shri P. Ravindran. Learned Member (Technical) is of the opinion that the matter is required to be considered afresh by the Commissioner While, learned Member (J) feels that the case is lacking in evidence, the 'slip/chit' notwithstanding. The position with regard to this piece of evidence, it would appear, is that M/s. Shree Sakthi Agencies were entering their landed purchase price and sale price in their records. The adjudicating authority has held that the landed purchase price is not the normal price taking the evidence relating to realization of part of the price in the guise of sale value of sawn timber. Thus, the 'slip/chit' evidence was seen as confirmed by the evidence in regard to receipt of price for sawn timber sale. This corroborative material evidence now remains rejected by the Division Bench. Therefore, the slip/chit stands all by itself. The contention of the learned Counsel for the appellant is that this evidence could not be the basis for confirmation of demand. This contention is put forth on the ground that the statement dated 25-4-91 of Shri P. Ravindran was vague and unreliable and that it had been retracted the very next day.

He retracted the statement alleging that the statement had been extracted from him through coercion. He also moved the High Court with the same allegation. Further during corss-examination, he categorically stated that there was no additional payment. Shri Parthasarathy who was stated to be the recipient of the payment has also contradicted Shri Ravindran and there is no proof of the amount being paid to the appellant-assessee.

33. I am of the view that the slip/chit by itself cannot be considered adequate evidence to hold that the sales to M/s. Shree Sakthi Agencies had been under-valued. Shri Ravindran, had explained on 25-4-91 that the chit was indicative of his purchase and sale prices. He has stated that in regard to certain varieties, the sale price was less than the purchase price. This seriously affects the credibility of

his statement made on 25-4-91. Again Shri Rav-indran's retraction of his statement dated 25-4-91 came promptly on the next day. He even moved the H.C. so as to obtain acceptance of his denial of that statement. In the cross-examination also he categorically maintained that there was no additional payment for the veneers purchased from the appellants. Thus, the evidence is too slender and compromised. Continuation of the proceedings through remand would be futile.

34. In view of the above, I am of the view that the appeals may be allowed as proposed by the learned Member (Judicial).

In terms of the majority order, the impugned order is set aside and appeals are allowed with consequential relief, if any.

Sd/- Sd/-(Jeet Ram Kait) (S.L.Peeran) Member (T) Member (J)

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