

 <p style="text-align: center;">OFFICE OF THE PRINCIPAL COMMISSIONER CUSTOMS COMMISSIONERATE KUTCH CUSTOM HOUSE KANDLA NEAR BALAJI TEMPLE, NEW KANDLA</p> <p style="text-align: center;">Phone : 02836-271468/469 Fax: 02836-271467</p>		
A	File No.	S/10-27/ADJ/COMMR/AMIT/DE-NOVO/2017-18
B	Order-in-Original No.	KDL-CUSTM-000-COM-22-17-18
C	Passed by	Shri Sanjay Agarwal Commissioner, Custom House, Kandla.
D	Date of order	21.12.2017
E	Date of issue	21.12.2017
F	Show Cause Notices No. & Date	F. No. DRI/AZU/Misc-16/2011 dated. 05.03.2012 (Denovo Proceeding)
G	Noticee(s)/Co-Noticee(s)	1. M/s. Amit K. Dedhia, 3 rd Floor, Ratan Bhai Building, 19/21, J.B.Shah Marg, Chinchbunder, Mumbai- 400 009 2. Shri Dinesh Solanki, Plot No.-377, Survey No. 192, Bhagshree Society, Meghpur, Borechi, Adipur, Anjar, Kutchh, Gujarat.

1. This Order - in - Original is granted to the concerned free of charge.
2. Any person aggrieved by this Order - in - Original may file an appeal under Section 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

**Customs Excise & Service Tax Appellate Tribunal,
West Zonal Bench,**
2nd Floor, Bahumali Bhavan Asarwa,
Nr. Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad - 380004
3. Appeal shall be filed within three months from the date of communication of this order.
4. Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs.50 lakh (Rupees Fifty lakhs) and Rs. 10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.
5. The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paisa only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.
6. Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.
7. While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules 1982 should be adhered to in all respects.

BRIEF FACTS OF THE CASE:

1.1 Present proceedings have arisen out of CESTAT Order No. A/11407-11408/2017 dated 18.07.2017, whereby appeals filed by Customs Broker M/s. Amit K. Dedhia (*here-in-after referred to as noticee No. 1*) and their employee Shri Dinesh Solanki (*here-in-after referred to as noticee No. 2*) against the Order-in-Original No. KDL/COMMR/09/2012-13 dated 25.07.2013 have been allowed by way of remand for deciding afresh on merit. Both the noticees have been specifically directed to file reply to the Show Cause Notice within six weeks from the date of communication of the above mentioned order. It has also been directed to decide the matter within six weeks after receipt of reply to the Show Cause Notice from the noticees. Further, it has been directed to complete the proceedings, as far as practicable, within four months from the date of communication of the order.

1.2 The original proceeding was initiated against total six noticees. Out of those six noticees, the present matter has been remanded back by Hon'ble CESTAT in respect of the two noticees. Therefore, the Orders-in-Original passed in respect of remaining four noticees are not required to be interfered with and the present proceeding is limited to the above mentioned two noticees.

1.3 Facts of the case as per the Show Cause Notice F. No. DRI/AZU/MISC-16/2011 dated 05.03.2012, are that an exporter, M/s. Arihant Ceramic Industries filed Shipping Bills No. 2773536 dated 11.3.2011 and 2773612 dated 11.3.2011 at Custom House Kandla, through the noticee No. 1, declaring description of goods as "*Ceramic Sanitary Ware*". The export goods were stuffed under supervision of jurisdictional Central Excise Officers in container No. IALU 2203360 and IALU 2204812 at the premises of the exporter. The export goods were examined by the officers of Directorate of Revenue Intelligence (*here-in-after referred to as DRI*) at M/s. ABG Container Yard at Kandla Port under panchnama dated 16-17 March 2011. Both the containers were found fully stuffed with Red Sander Logs. Total 1107 Red Sander Logs, weighing 27.7 MTs, found from the two containers, were placed under seizure under panchnama dated 16-17 March 2011.

1.4 Officers of DRI called back three containers IALU 2253972, CLHU 3379219 and IALU 2251692, which were already exported by the same exporter under Shipping Bills No. 2699734 dated 04.3.2011, 2699205 dated 04.3.2011 and 2737867 dated 08.3.2011, respectively. These three Shipping Bills were also filed through the noticee No. 1, declaring the export goods as

Ceramic Sanitary Ware. On examination of the export goods covered under the said three containers under panchnama dated 30.3.2011, officers of DRI found that all the three containers were fully stuffed with Red Sander Logs. Total 1769 Red Sander Logs, weighing 40.53 MTs were found from the three containers and the same were placed under seizure.

1.5 Officers of DRI gathered that three trailers/ trucks used in transportation of the subject containers were lying in abandoned condition near a hotel on Chotila Highway. On verification, the trailers/ trucks having registration Nos. GJ-12-W-8969, GJ-12-W-5857 and GJ-12-Y-6674 were found lying there. The same were found loaded with three stuffed containers (*one container on each trailer/ truck*). The said trailers/ trucks, along with stuffed containers were brought to Kandla Port and on examination it was found that these containers were stuffed with Ceramic Sanitary Ware. The Ceramic Sanitary Ware as well as above three trailers/ trucks were placed under seizure under panchnama dated 20.4.2011.

1.6 The officers of DRI enquired from Regional Transport Office and it was gathered that trailers/ trucks No. GJ-12-W-5857 and GJ-12-Y-6674 were owned by Shri Rahul Rajesh Bhanushali and trailer/ truck No. GJ-12-W-8969 was owned by Shri Shantilal Champklal Aboti.

1.7 M/s. Arihant Ceramic Industries had procured Ceramic Sanitary Ware for export from M/s. Acme Cera Art, Thangadh. The officers of DRI conducted searches at the premises of both of them and resumed certain documents, pen drives and CPU under Panchnama dated 16.3.2011. During inquiry, officers of DRI gathered that one Shri Rahul Rajesh Bhanushali had arranged for transportation etc. of the containers stuffed with export goods. Residential premises of Shri Rahul Rajesh Bhanushali were also searched under panchnama dated 21.03.2011.

1.8 Summons were issued to Shri Shantilal Champklal Aboti, owner of trailer/ truck having registration No. GJ-12W-8969 but he did not appear before the officers of DRI for recording of his statement.

1.9 Statements of Shri Vinay Kant Amrutlal Gandhi *alias* Vinod Gandhi, partner in M/s. Arihant Ceramic Industries were recorded under Section 108 of the Customs Act, 1962, on 16.03.2011 and 11.07.2011 wherein he stated, inter alia that the said exports were affected through a mediator namely Shri Vishal Shah of Mumbai; that Shri Dinesh Solanki of M/s. D.S. Clearing was Clearing Agent; that Shri Vishal Shah recommended his name; that Shri

Dinesh Solanki of M/s. D.S. Clearing was working in the name of CHA "M/s. Amit K. Dedhia"; that around two years ago Shri Vishal Shah contacted him and enquired about rates of sanitary items for export; that around eight months ago he came personally and enquired about rates and other details of sanitary items for export; that orders were placed by Shri Vishal Shah either personally or telephonically; that Shri Vishal Shah never enquired about export of Red Sander Logs; that his employee put seals on both the containers in the presence of officers of Central Excise; that one Shri Rahul, nephew of Shri Vishal Shah, was looking after documentation job at Gandhidham with the help of an assistant Shri Ganesh; that the documents of export consignment were being collected either by Shri Rahul or Shri Ganesh from M/s. D.S. Clearing and were forwarded to Shri Vishal Shah at Mumbai; that transportation was arranged by Shri Vishal Shah; that ceramic items were purchased from M/s. Acme Cera Arts and stuffed in containers in his premises; that on the suggestion of Shri Vishal Shah he appointed M/s. D.S. Clearing as CHA for customs clearance of the goods exported and export by M/s. Arihant Ceramic Industries; that Shri Vishal Shah placed the export order and provided names and addresses of overseas buyers; that containers were booked by Shri Vishal Shah and transportation was also arranged by Shri Vishal Shah; that he did not know as to who stuffed Red Sander Logs in the containers and also did not know where the same were stuffed; that during stuffing of sanitary ware at the premises of M/s. Arihant Ceramic Industries, he was present and Central Excise officers were also present.

1.10 Statements of Central Excise officers posted at Assessment Range Limbdi were also recorded by the officers of DRI wherein they stated, inter alia, that the export goods were stuffed in containers in their presence as per the declarations and the containers were sealed with Central Excise one time bottle seals; that how and when Red Sanders Logs were replaced with the export goods was not known to them; that the one time bottle seals found affixed on containers, seized by DRI, were forge/ fake seals.

1.11 Statement of Shri Amit Chandru Ahuja, Manager of M/s. Kaveri Forwarders of Gandhidham was recorded under Section 108 of the Customs Act, 1962 on 11.8.2011 wherein he stated, inter alia, that they were in the business of freight forwarding and container booking; that Shri Dinesh Solanki - CHA of M/s. Arihant Ceramic Industries contacted him for booking of containers in name of M/s. Arihant Ceramic Industries; that the payments were received through Shri Dinesh Solanki of M/s. D.S. Clearing by cheques issued by M/s. D.S. Clearing; that as per the documents M/s. Arihant Ceramic Industries booked the containers for export of Sanitary ware.

1.12 Statement of Shri Haresh Dadlani, proprietor of M/s. Mohita Clearing Agency of Gandhidham was recorded by officers of DRI under Section 108 of the Customs Act, 1962 on 05.08.2011, wherein he stated, inter alia that he was in the business of customs clearing; that he had cleared two consignments for M/s. Arihant Ceramic Industries in the month of November, 2010; that he got the business through one Shri Rahul Bhanushali from M/s. Arihant Ceramic Industries; that he came in contact with Shri Rahul Bhanushali through a friend; that he did not know Shri Vishal Shah; that he was not engaged in business of transportation; that he had no idea about R.D. Logistics; that address of M/s. R.D. Logistics on the documents shown to him during statement was actually address of his firm M/s. Mohita Clearing Agency; that another shown transport document also contained same address for firm M/s. Odhavram Forwarders; that Shri Rahul Bhanushali misused his office address and illegally issued lorry receipts to M/s. Arihant Ceramic Industries in the name and style of M/s. RD Logistics and M/s. Odhavram Forwarders showing his (Dadlani's) office address.

1.13 Statement of Shri Gopalbhai Dhirubhai Sakariya one of the partner of M/s. Acme Cera Art of Thangadh was recorded under Section 108 of the Customs Act, 1962 on 16.03.2011 wherein he stated, inter alia, that he had sold two consignments of Wash Basins, each of 1400 pieces to Shri Vinay Kant Amrutlal Gandhi of M/s. Arihant Ceramic Industries.

1.14 Statement of Shri Afsar Ali Nurul Hak Sheikh of Dhobi Ghat, New Sunder Puri, Gandhidham was recorded under Section 108 of the Customs Act, 1962 on 14.07.2011 wherein he stated, inter alia, that he purchased vehicle GJ-12W 9787 from one Shri Kanwaljeet in the month of February 2010 and then he had sold that vehicle to Shri Rahul Bhanushali on 25.11.2010; that he did not know Shri Rahul directly but one of his (Afsar's) partner Prakash was working in Truck garage and Shri Rahul used to come there for repairing of vehicles.

1.15 Statement of Shri Dinesh Solanki (noticee No. 2), "H" Card Holder of CHA firm M/s. Amit K. Dedhia (noticee No. 1) was recorded under Section 108 of the Customs Act, 1962 on 16.06.2011 wherein he stated, inter alia that he was 'H' card holder of CHA firm M/s. Amit K. Dedia and was also running his own business in name of M/s. D.S. Clearing; that he was attending clearances at Kandla and Mundra ports; that he knew Shri Vinod Bhai Gandhi of M/s. Arihant Ceramic Industries as businessman of Sanitary Ware; that Shri Vinod Gandhi of M/s. Arihant Ceramic Industries contacted him for clearing of the

goods exported by his firm; that Shri Vinod Gandhi told him to contact Shri Vishal Shah of Mumbai and he provided Mobile No. of Shri Vishal, then he contacted Shri Vishal who provided the export work to his firm; that the authorisation was given by Shri Vinod Gandhi of M/s. Arihant Ceramic Industries; that for export related work he used to talk with Shri Vinod Gandhi on the instructions of Shri Vishal Shah; that Shri Vishal used to tell him for booking of containers on mobile phone and he used to book containers accordingly; that Shri Ganesh, a fellow of Shri Vishal, used to take delivery of containers from him; that export goods were stuffed in factory premises of M/s. Arihant Ceramic Industries; that the transportation from Thangadh to Kandla was arranged by Shri Vishal Shah; that he filed Shipping Bills for M/s. Arihant Ceramic Industries by declaring the goods as Sanitary Ware and Fire Bricks but actual goods was found to be Red Sanders Logs by DRI officers; that he filed Shipping Bills on the basis of documents provided by the exporter; that Export Invoices with Central Excise Annexure signed at the time of stuffing by Central Excise officers and Packing Lists were provided by the exporter; that all the documents were received by him through Shri Ganesh; that Shri Ganesh was a person of Shri Vishal Shah, who used to collect containers booked by him as per instructions of Shri Vishal Shah and the documents after completion of export proceedings; that he was not aware of address of Shri Ganesh; that he knew that Red Sander Logs were prohibited for export; that he did not know as to who stuffed Red sander Logs in containers; that gate-in of the containers were attended by Shri Ganesh and after completing the documentation formalities; that he used to give all the documents in his office for further customs formalities; that Shri Vishal Shah used to request him telephonically for booking of containers; that he used to contact M/s. Kaveri Forwarders who used to book containers from IAL container line and allot to M/s. Arihant Ceramic Industries; that he was communicating the booking of containers to Shri Vishal and Shri Ganesh telephonically; that Shri Ganesh used to collect containers from container yard directly; that all payments were made by Shri Ganesh directly to container line; that he received the payments from M/s. Arihant Ceramic Industries through Cheques; that he did not know Shri Rahul Bhanushali and he never met him; that he did not know M/s. R.D. Logistic; that he did not know address of Shri Vishal Shah; that he never met Shri Vishal Shah.

1.16 Further statement of the noticee No. 2 was recorded under Section 108 of the Customs Act, 1962 on 19.12.2011. He was shown statement dated 16.06.2011 wherein he had stated that all payments were made by Shri Ganesh directly to container line. On being asked specifically he stated that without understanding the question properly he had replied wrongly in

confusion and the fact is that payments for all containers booked for M/s. Arihant Ceramics Industries were made by him from M/s. D.S. Clearing, through Bank.

1.17 Shri Vishal Shah, Shri Rahul Bhanushali and Shri Ganesh could not be traced out.

1.18 On completion of investigation, DRI issued Show Cause Notice to total eight persons/ parties. Since the present matter relates of two noticees i.e., M/s. Amit K. Dedhia and Shri Dinesh Solanki only, allegations against persons other than these two noticees are not discussed here. In respect of the two noticees, the Show Cause Notice alleges that the noticee No. 2, "H" card holder of the noticee No. 1 received customs clearing work from M/s. Arihant Ceramic Industry. He acted on the directions of Shri Vishal Shah, a person no way related to M/s. Arihant Ceramic Industries. He did not know anything about Shri Vishal Shah and was not aware of his whereabouts. He never saw him. In spite of the fact that exporter was M/s. Arihant Ceramic Industry he chose to act on the directions of Shri Vishal Shah. By this unauthorized act on his part he abetted the smuggling of Red Sander Logs. He acted on the directions of Shri Vishal Shah. He failed to provide whereabouts of Shri Vishal Shah. His failure to observe due diligence as Custom House Agent and his highly negligent acts helped Shri Vishal Shah in executing his plan of smuggling and also in escaping the investigation. Shri Dinesh Solanki (noticee No. 2) booked containers for Shri Vishal on telephonic instructions. He did not care to know whereabouts of Shri Vishal shah and his business. He never obtained written request for booking of containers for him. He also handed over the containers to Shri Ganesh - a fellow of Shri Vishal Shah without knowing him or his address. The noticee No. 2 failed to present Shri Ganesh before the investigating officers during the investigation. He handed over export clearance documents to Shri Ganesh for onward submission to Shri Vishal Shah. In fact the exporter was M/s. Arihant Ceramic Industries but he handed over the documents to Shri Ganesh, a fellow of Shri Vishal Shah. During investigation he stated that he did not know whereabouts of either Shri Ganesh or Shri Vishal Shah.

1.19 In view of above investigation, a Show Causes Notice bearing F. No. DRI/AZU/Misc-16/2011 dated. 05.03.2012 was issued by the Additional Director General, DRI, Ahmedabad to M/s. Arihant Ceramic Industries, Shri Vinaykant Amrutlal Gandhi, Shri Vishal Shah of Mumbai, Shri Rahul Bhanushali, Shri Ganesh, Shri Shantilal Champklal Aboti and both the

present noticees. Vide the said Show Cause Notice penalty under Section 114 of the Customs Act, 1962 was proposed on both the present noticees.

1.20 The noticee No. 1 and the noticee No. 2 did not respond to the Show Cause Notice and therefore, the matter was adjudicated *ex-parte* by the Commissioner of Customs, Kandla vide OIO NO. KDL/Commr/09/12-13 dated 25.07.2012 wherein the adjudicating authority ordered imposition of penalty of Rs. 25,00,000/- under Section 114 of the Customs Act, 1962 on noticee No. 1 and penalty of Rs. 25,00,000/- under Section 114 of the Customs Act, 1962 on noticee No. 2.

1.21 Being aggrieved by the said order the noticee No. 1 and the noticee No. 2 preferred appeals before the Hon'ble CESTAT, Ahmedabad contending the penalty imposed on them under Section 114 of the Customs Act, 1962. The Tribunal vide its order No. A/11407-11408/2017 dated 18.07.2017 in appeals No. 10243/ 2013 and 10258/ 2013 has remanded the matter to the adjudicating authority.

DEFENCE & PERSONAL HEARING :-

2.1 As per directions of the Hon'ble CESTAT vide order A/11407-11408/2017 dated 18.07.2017, both the noticees were required to submit their defense submission within a period of six weeks. However, they did not submit their defense reply within stipulated period. Date of personal hearing in the matter was fixed for the noticee No. 1 as 16.11.2017, 23.11.2017 and 12.12.2017. The noticee No. 1 has submitted their defense reply vide letter dated 23.11.2017. Shri Sandip Batwal, advocate appeared on behalf of the noticee No. 1 for personal hearing on 12.12.2017 and reiterated the submission stated in written defense reply dated 23.11.2017.

2.2 In respect of the noticee No. 2, date of personal hearing in the matter was fixed as 16.11.2017 and 12.12.2017. The notices of personal hearing sent to the noticee No. 2 were received back undelivered. The received back undelivered covers contain remarks of postal authorities as "not known". Therefore, as provided under Section 153(b) of the Customs Act, 1962, letter dated 28.11.2017 intimating him date of personal hearing on 12.12.2017, was pasted on notice board of Custom House, Kandla. However, the noticee No. 2 has neither submitted his defense reply nor appeared for personal hearing.

2.3 In their defense reply dated 23.11.2017, the noticee No. 1 have submitted that they are Licensed Customs Broker for transacting business with customs for clearance of import/ export consignments. Shri Dinesh

Solanki (noticee No. 2), their employee and 'H' Card holder handled the work of customs clearance at Kandla. Duly authorized by the exporter M/s. Arihant Ceramic Industries, they filed five Shipping Bills in the month of March 2011 for export of goods declared as 'Ceramic Sanitary Ware'. For all the five consignments, the containers were stuffed in the exporter's warehouse under supervision of Central Excise officers. The officers of DRI intercepted two containers before export and called back three other consignments already exported. On examination, all the five containers were found to contain Red Sander Logs, instead of Ceramic Sanitary Ware declared in the Shipping Bills. Details of the same are as under;

Shipping Bill No. & date	Container No.	
2773536 (11/03/2011)	IALU 2203360	Intercepted before export; Found to contain 1107 logs of Red Sanders weighing 27.7 MT Seized under Panchnama dated 16/17 March 2011
2773612 (11/03/2011)	IALU 2204812	
2699734 (4/03/2011)	IALU 2253972	Recalled after export; Found to contain 1769 logs of Red Sanders weighing 40.53 MT Seized under Panchnama dated 30 March 2011
2699205 (4/03/2011)	CLHU 3379219	
2737867 (8/03/2011)	IALU 2251692	

2.4 Further, they have submitted that the container Nos. and seal Nos. matched with those specified in the Shipping Bills and examination (stuffing) reports given by the Central Excise officers. Show Cause Notice F. No. DRI/AZU/MISC-16/2011 dated 05.03.2012 was issued to the exporter M/s. Arihant Ceramic Industries and others, proposing confiscation of the seized Red Sanders Logs and also proposing to impose penalty. The SCN also proposed to impose penalty on them and their employee Shri Dinesh Solanki, under Section 114 of the Customs Act, 1962 for abetting the smuggling.

2.5 They further submitted that as per the SCN, the export goods stuffed at exporter's premises under Central Excise supervision were replaced with Red Sanders Logs in transit to Kandla Port and the Central Excise seals were replaced by fake seals; the exporter received export orders from Shri Vishal Shah who arranged transport of export goods up to Kandla Port through Shri Rahul Bhanushali; their employee Shri Dinesh Solanki acted on the directions of Shri Vishal Shah, a person no way related to the exporter; Shri Dinesh Solanki chose to act on the directions of Shri Vishal Shah, who was not the exporter; by failure to observe due diligence and by negligent acts he helped Shri Vishal Shah in executing his plans of smuggling and escaping the investigation; Shri Dinesh Solanki booked the containers for Shri Vishal Shah

on instruction over phone and without written requests for booking the containers; Shri Dinesh Solanki handed over the containers and export clearance documents to Shri Ganesh - a person of Shri Vishal, without knowing him or his address and failed to present him before investigating officers.

2.6 They have submitted that the SCN is not sustainable being based on erroneous appreciation of facts and the law. Therefore, no penalty should be imposed on them in the light of their submissions.

2.7 They have submitted that the SCN has proposed to impose penalty on them under Section 114 of the Customs Act, 1962 but as ingredients for imposing penalty under Section 114 of the Customs Act, 1962 are absent, penalty cannot be imposed on them. Under the provisions of Section 114, any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 113, or abets the doing or omission of such an act. It needs to be appreciated that they were not involved in the smuggling of Red Sander Logs in any manner and did not abet the smuggling in any manner. They only filed the Shipping Bills in *bona fide* manner as per the documents provided by the exporter who had duly authorised them. As such, penalty is not imposable on them under the provisions of Section 114 of the Customs Act, 1962.

2.8 Further, they have submitted that no omission or commission by Shri Dinesh Solanki (their employee and noticee No. 2) can be construed as abetment. The SCN has not specified the omissions or commissions by them or by the noticee No. 2. The SCN does not point out any specific occasion where they, as an employer, failed to exercise necessary control on their employee. In any event, lack of supervision over employee cannot be construed as a ground for confiscation of the export goods or an act of abetment in smuggling by unscrupulous elements.

2.9 They have also submitted that without admitting but presuming for the sake of argument, if there was any negligence on their part, the same cannot be equated with abetment so as to impose penalty on them under Section 114 of the Customs Act, 1962. They cannot be penalized for booking containers for the exporter by its employee i.e. noticee No. 2. There is no doubt or dispute about the fact that the containers booked by the noticee No. 2, through his personal venture M/s. D.S. Clearing, for the exporter M/s. Arihant Ceramic Industries reached premises of the exporter and were stuffed with export goods under supervision of Central Excise officers.

2.10 It has also been contended that the exporter has not denied association with Shri Vishal Shah and so it is not relevant whether the messages for booking the containers for the exporter were received from Shri Vishal Shah or anybody else and whether the delivery of the containers were taken by Shri Ganesh or anybody else. Therefore, Shri Vishal Shah was the agent of the exporter and they and their employee cannot be faulted for coordination with Shri Vishal Shah as the agent of the exporter.

2.11 They have further contended that there is no allegation in the SCN that they were actively involved in the smuggling or had knowledge about such smuggling by unscrupulous elements under the cover of export by M/s. Arihant Ceramic Industries. Since the activity of stuffing goods into the containers was carried out at the factory premises of exporter under Central Excise supervision, they had no occasion to verify the goods and also no reason to doubt the correctness of goods stuffed in the containers. There is no practice of opening the containers sealed by the Central Excise officers unless the Customs Authorities find it necessary in view of any specific intelligence. The Customs officers also did not smell any foul play just like them. In their statements the Central Excise officers have categorically stated that the containers were stuffed with Sanitary Ware as per the export documents. They have also stated that Central Excise seals were affixed on the containers. The same container Nos. and seal Nos. are mentioned in the Shipping Bills and Central Excise Stuffing Reports. The Panchas have also tallied the same numbers and mentioned this fact in respective panchnamas for the examination of the containers. As such, they, like Central Excise officers supervising stuffing and the Customs officers giving Let Export Order, had no reason to suspect replacement of the goods and seals on way to the port.

2.12 They have also submitted that they have been sought to be penalized for abetting the fraudulent export. However, manner of aiding and abetting has not been specified in the Show Cause Notice. Only because they handled the export consignment, it does not mean that they aided the exporter or any other person in export of Red Sanders Logs. They cannot be faulted in any manner when they have placed the information available with them before the Customs authorities. It may be appreciated that their role is limited to facilitation for filing the documents as received from the exporter. In the circumstances, imposition of penalty on them is speculative of their role and therefore, is not sustainable. It is a settled principle of law that abetment presupposes knowledge of the proposed offence and also presupposes benefit to be derived by the abettors there-from. In absence of the essential

ingredients, they are not liable to penalty under Section 114 of the Customs Act, 1962. In this context they have placed reliance on the decision of the Tribunal in the case of CC, Mumbai Vs M. Vasi 2003 (151) ELT 312 (Tri. - Mumbai), in particular Para 20 thereof.

2.13 Further, they have contended that Customs examination of the consignments did not reveal any discrepancy. It was not appreciated during adjudication that just like them the assessing/ examining officers posted at CFS, also had inspected the consignments and checked the containers & seals before giving 'Let Export Order (LEO)'. Like the departmental officers they could not detect the fake seals. Further, it is not in dispute that they were duly authorized by the exporter to handle their customs clearance work. The identity of the exporter is also not in dispute. There is no case against them that they acted contrary to the instructions of the exporter or that they followed any illegitimate instructions of the exporter. It is therefore immaterial that the noticee No. 2 received instructions/ advice on behalf of the exporter from Shri Vishal Shah as per instructions from partner of the exporter. The SCN fails to specify the actions taken by them on the basis of directions from Shri Vishal Shah, which they should not have taken. The noticee No. 2 has stated in his statement dated 16.06.2011 that Shri Vinay Kant *alias* Vinod Gandhi provided him mobile number of Shri Vishal Shah. In the circumstances, the charge against them for failure to observe due diligence is not sustainable and as a corollary, penalty is not imposable on them.

2.14 They have also submitted that the SCN does not appreciate that the Shipping Bills were filed by them on the basis of the relevant documents and information furnished by the exporter. The description, quantity and value were declared in the Shipping Bills on the basis of commercial invoices/ packing lists given by the exporter with endorsement of the Central Excise officers. The exporter has not disowned the export invoices/ packing lists referred in the subject Shipping Bills or the fact that he had forwarded the export invoices/ packing lists along with other documents such as Central Excise Stuffing Reports. The SCN fails to appreciate that they were in no way concerned with the stuffing of the export goods and the transportation of the export goods from the exporter's premises to Kandla Port. The transportation of the export goods was handled by the exporter/ Mr. Vishal Shah without involvement of the noticees. As export goods were stuffed at the exporter's premises, their role commenced from the receipt of the export documents consisting of the export invoice/ packing list/ Annexure showing the particulars of stuffing under the supervision of Central Excise officers. They had no reason to know that the actual goods would not match with the

declared goods, when there was no discrepancy in the container No. and seal No. specified in respective export invoices and accompanying Central Excise Stuffing Reports. There is no allegation by the exporter or any of their employees about their involvement in replacement of goods stuffed at premises of the exporter by Red Sanders Logs, on way to the port. There is no case that they were aware about the replacement and that they encouraged any such replacement. It is also relevant that their statement was not recorded during investigations so as to penalize them. The replacement of Sanitary Ware by Red Sanders Logs was not in their knowledge till detection by the department. They have not been benefited in any manner on account of the smuggling. No motive has been alleged against them in the SCN and there was indeed no motive for abetting the exporter/ any other person in the matter.

2.15 They have placed reliance on various judicial pronouncements in support of their submissions. They have submitted that in the case of CC, Mumbai Vs M. Vasi 2003 (151) ELT 312 (Tri. - Mumbai) the Hon'ble CESTAT has held that abetment presupposes knowledge of the proposed offence and also presupposes benefit to be derived by the abettors there-from. In the present case, there is no evidence that they were aware about the smuggling of Red Sanders Logs and there is no allegation that they get any benefit in any manner. Further they have submitted that in the case of Deepankar Sen Vs CC, Kolkata 2003 (159) ELT 260 (Tri. Kolkata), it has been held that merely acting as a Customs House Agent for the exporters, does not, ipso facto, lead to an inevitable conclusion that he was in hand in glove with the exporters in absence of any record to that effect and thus personal penalty was not imposable under Section 114 of Customs Act, 1962. They have also relied on order of Hon'ble CESTAT in the matter of Saffire Lithographers Vs Commissioner of Customs, Tuticorin, reported at 2007 (215) E.L.T.210 (Tri.-Chennai) wherein it was held that Customs Broker cannot be penalized on the basis of speculation; that the noticee No. 1 had no reason to suspect the substitution of the export goods. Further, in the matter of CC, Tuticorin Vs Moriks Shipping and Trading Pvt. Ltd., reported at 2008 (227) E.L.T. 577 (Tri. - Chennai), Hon'ble CESTAT set aside penalty imposed on Customs Broker holding that the Customs House Agent was not required to go into the authenticity of declarations made by exporter in export documents; the job of Customs Broker is confined to submission of documents given by the exporter as also to identify the exporter to the Customs Authorities; the appellant has no case that the respondents did not discharge these obligations. Similar view has been taken in the case of Akanksha Enterprises Vs CC, Mumbai-I [2006 (203) ELT 125 (Tri. Delhi)] following the decision of the tribunal in the case of Vetri Impex Vs CC, Tuticorin [(2004 (172) ELT 347 (Tri. Chennai)] holding that

duty of Customs Broker is limited to facilitate filing of documents as received from exporter and not required to go into authenticity of value of goods; Customs Broker acted in a responsible way by producing exporter who had filed documents for export of goods; penalty under section 114 of Customs Act, 1962 was not imposable as motive cannot be attributed to them. In the matter of G.M. Enterprises Vs CC (Export), Nhava Sheva, reported 2010 (262) E.L.T. 796 (Tri. - Mumbai), Hon'ble Tribunal has held that penalty on Customs Broker was not leviable when he acted in bona fide belief of documents supplied to him for preparing Shipping Bills and there is no statement of exporter that he was having any knowledge about mis-declaration of goods. The decision follows the Tribunal's order in the case of V. Isakia Pillai Vs CC, Chennai [2001 (138) ELT 802 (Tri. Chennai)]. The notice No. 1 has also cited order issued by Hon'ble CESTAT in the matter of Prime Forwarders Vs CC, Kandla, reported at 2008 (222) E.L.T. 137 (Tri. - Ahmd.), wherein it was held that in absence of any evidence proving involvement or knowledge about misdeclaration on the part of the Customs Broker, penalty was not imposable on them. The decision has been followed in the case of Sai Shipping Services Vs CC, New Delhi [2009 (239) E.L.T. 104 (Tri. - Del.)]. Further, in the matter of Success Engineering Vs CC, Kandla, reported at 2007 (215) E.L.T. 220 (Tri. - Ahmd.), it has been held that in absence of any evidence showing knowledge/intention on the part of in mis-declaration with a view to wrongly avail benefit, imposition of penalty under Section 112 of Customs Act, 1962 was not justified.

2.16 They have submitted that in the circumstances, the charge against them about abetting the export of Red Sanders Logs and failure to observe due diligence is not sustainable so as to attract penalty under Section 114 of the Customs Act, 1962 and they have requested to drop the proceedings initiated by the SCN under reference against them.

Discussion and Findings

3.1 I have carefully gone through the Show Cause Notice, Relied Upon Documents, submissions made by the noticee No. 1, directions given by the Hon'ble CESTAT vide order No. A/11407-11408/2017 dated 18.07.2017 and other materials available on record.

3.2 Present proceedings have arisen out of CESTAT Order No. A/11407-11408/2017 dated 18.07.2017, whereby appeals filed by both the present noticees have been allowed by way of remand. In the present proceeding, the noticee No. 1 has appeared for personal hearing and has also submitted written defense reply. However, despite specific directions of the

Hon'ble Tribunal, the noticee No. 2 has neither submitted written reply in defense nor appeared for personal hearing. As two letter dated 26.10.2017 and 27.11.2017 sent to him intimating date of personal hearing have been received back undelivered with remarks of postal authorities as "not known". Therefore, a letter dated 28.11.2017 intimating him date of personal hearing was served by way of affixing the same on notice board of this office, as provided under Section 153 of the Customs Act, 1962. However, the noticee No. 2 has not appeared for personal hearing. I am of the view that sufficient opportunities have been granted to the noticee No. 2 in respect of principles of natural justice, therefore, I proceed to adjudicate the case *ex-parte* in respect of noticee No. 2, based on the material available on record.

3.3 It emerges from the Show Cause Notice dated 05.03.2012 that 'Ceramic Sanitary Ware' were stuffed in the factory premises of the exporter under supervision of Central Excise officers but the same were replaced with Red Sander Logs on the way from premises of the exporter to Kandla port by certain persons. The noticee No. 1 is a Customs Broker (*By that time known as Customs House Agent and in short CHA*). The noticee No. 2 was an employee of the noticee No. 1 and was having Customs 'H' card. In the instant case, the exporter and one Shri Vishal Shah had approached the noticee No. 2 for attending export clearances. The noticee No. 2 received export documents showing description of export goods as "Ceramic Sanitary Ware' and accordingly he filed subject five Shipping Bills. On examination of the export goods, officers of DRI found prohibited Red Sander Logs from these five consignments. Apart from other persons/ parties, the Show Cause Notice was issued to both the present noticees proposing penalty under Section 114 of the Custom Act, 1962 for abetment and not exercising due diligence. During adjudication proceedings, both the noticees did not avail opportunity of defense and the matter was adjudicated *ex-parte* in respect of these two noticees vide Order-in-Original No. KDL/COMMR/09/12-13 dated 25.07.2012. As penalties were imposed on both the present noticees, they preferred appeals before Hon'ble CESTAT and the matter has been remanded for *de-novo* adjudication in respect of present two noticees.

3.4 The present matter is limited to the issue as to whether in the facts and circumstances of the case, penalty under Section 114 of the Customs Act, 1962 is imposable on the noticees or not. The Section 114 of the Customs Act, 1962 reads:

SECTION 114. Penalty for attempt to export goods improperly, etc. - Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act, shall be liable, -

(i) *in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act], whichever is the greater;*

(ii)

(iii)

3.5 The noticee No. 1 have contended that they did not have knowledge of smuggling and they were not involved in the smuggling in any manner; that they filed Shipping Bills on the basis of documents provided by the exporter who had duly authorized them for the same; that authenticity of the export documents is not under dispute. I have gone through copies of export documents and the Shipping Bills relied upon in the Show Cause Notice. I find that the Shipping Bills were filed by the noticees in accordance with the export documents provided to them. Further, I find that there is no allegation that the noticees were having knowledge or direct involvement in respect of the subject smuggling. In view of these documentary evidences, this contention of the noticee No. 1 is correct.

3.6 They have also contended that as container numbers and seal numbers matched hence they had no reason to suspect replacement of the goods and seals on the way to port; that they were not responsible for stuffing or transportation; that there is no allegation in respect of their motive for abetment. I find from the details discussed in the impugned Show Cause Notice and the relied upon documents that the containers were stuffed with declared goods at the factory premises of the exporter under supervision of Central Excise officers but the goods were subsequently replaced on the way to Kandla port and the container seals were also changed with fake seals. It has been mentioned in the examination panchnamas that the officers of DRI verified the seal numbers and found the numbers matching with the declared seal numbers. Only after investigation it could be ascertained that the original seals were replaced with fake seals containing same numbers. As there is no allegation of any role of the noticees in transportation of the goods, I find force in the contention of the noticee No.1 that they had no reason to suspect replacement of the goods and seals.

3.7 It has been contended that statement of the noticee No. 1 was not recorded during the investigation. However, I find that statement of the noticee No. 2 was recorded by the officers of DRI as an employee of the noticee No. 1. In the capacity of 'H' card holder and an employee of the noticee No. 1, the noticee No. 2 had attended the subject exports for and on behalf of noticee No. 1. Therefore, in the facts and circumstances, I do not find it obligatory for the investigating officers to record statement of noticee No. 1 also.

3.8 The notice No. 1 have also contended that the noticee No. 2 has followed instructions of Shri Vishal Shah treating him an agent of the exporter. I have gone through statements of noticee No. 2 recorded on 16.06.2011 and 19.12.2011. In those statements he has stated that the exporter contacted him for clearance of export goods by his firm and also told him to contact to Shri Vishal Shah. He booked containers on the instructions of Shri Vishal Shah. In respect of stuffing of Red Sander Logs he has stated that he came to know about it only after detection of the case by officers of DRI. In respect of KYC norms he stated that he followed the KYC norms and made enquiry about M/s. Arihant Ceramic Industries and Shri Vinod Gandhi. Further, in his statements dated 16.03.2011 and 11.07.2011, Shri Vinay Kant Amrutlal Gandhi has stated that Shri Vishal Shah gathered his details through *tradeindia.com* and contacted him for export. He recommended name of noticee No. 2 as clearing agent and accordingly he appointed M/s. D.S. Clearing as CHA. Shri Vishal Shah used to deal with the noticee No. 2. It emerges from these statements that the exporter was well aware of the fact that Shri Vishal Shah was dealing with the noticees for and on their behalf of them. There is nothing on record to show that the exporter had ever objected the same. In view of these facts I find force in the contention of the noticee No. 1 that the noticee No. 2 has entertained instruction of Shri Vishal Shah treating him as an agent of the exporter. Thus, noticees cannot be faulted for coordination with Shri Vishal Shah as the agent of the exporter. Further, merely the fact that the noticees followed instruction of a person on behalf of exporter, itself does not constitute an act attracting penalty under Section 114 of the Customs Act, 1962.

3.9 In order to ascertain as to whether the noticees have discharged their obligations as CHA, I have gone through the relied upon Shipping Bills and related export documents. I find that the Shipping Bills in question were filed on the basis of the documents received by the noticees from the exporter. The noticee No. 2 stated in his statements that they were authorized to attend their export as Customs Broker by Shri Vinod Gandhi of M/s. Arihant Ceramic Industries. Shri Vinod Gandhi also confirmed this fact in his statements. Further, as discussed above, the noticees received instructions from Shri Vishal Shah. Though Shri Vishal Shah was not partner or employee of the exporter firm but the statements recorded during investigation show that with the knowledge of the exporter he was dealing with the noticees. Further, it also emerges from the statements that transportation of the subject containers were arranged by Shri Vishal Shah and there is nothing on record to show that the noticees were in any manner involved in the transportation.

As appointed Customs House Agent (Now Customs Broker) they had filed Shipping Bills on the basis of export documents provided to them. In view of these facts, I find force in the contention of the noticee No. 1 that they had discharged their obligations as CHA.

3.10 It has been contended that the exporter did not disown the export invoices/ packing lists referred in the subject Shipping Bills or the fact that he had forwarded the export invoices/ packing lists along with other documents such as Central Excise Stuffing Report etc. I do not find anything adverse to this contention in the available material. Thus, the contention is factually correct.

3.11 The noticee No. 1 has also contended that the export goods stuffed in exporter's premises under Central Excise supervision were replaced with Red Sanders Logs in transit to Kandla Port and the Central Excise seals were replaced by fake seals and like the departmental officers, they could not detect the fake seal. It is on record that the containers were sealed in presence of the Central Excise officers. From the case records, I find that the attempt to illegally export Red Sander Logs was done by way of changing the original export goods on the way to Kandla port. As per the relied upon panchnamas of examination of the export goods, the container Nos. and seal Nos. matched with those mentioned in the Shipping Bills and examination (stuffing) reports of the Central Excise officers. These facts show that fake seals showing the same numbers must have been affixed on respective containers while replacing the export goods with Red Sander Logs. This fact could be detected only due to specific intelligence gathered by DRI. If this fact could not be detected by the noticees, it cannot be equated with negligence on their part. In view of these facts, I find force in this contention of the noticee No. 1.

3.12 I have gone through the citations quoted by the noticee No. 1. Gist of the cited orders can be summarized as follows:

- In the absence of evidence to prove knowledge of fraudulent activities, penalty is not warranted.
- When Customs Broker acts on basis of the documents given to them and there is nothing to show that he was aware of containers being stuffed with goods other than declared there is no justification for imposition of penalty.
- When CHA acts in bona fide belief of documents supplied to him for preparing Shipping Bills and there is no statement of exporter that CHA was having any knowledge about misdeclaration of goods, penalty cannot be imposed on CHA.
- Role of CHA is limited to facilitate the proper filing of the documents as received from the exporter. He is not required to go in to the authenticity of the value of goods etc. His job is confined to the submissions of the

papers as given by the exporter and to identify the exporter to the authorities.

- Abetment presupposes knowledge of the proposed offence and also presupposes benefit to be derived by the abettors there-from.

3.13 In the instant case, I find that there is no allegation that the noticees were having knowledge of the subject smuggling. They merely acted as Customs Broker which does not, ipso facto, lead to an inevitable conclusion of their involvement. As Customs Brokers they were not required to go into the authenticity of declarations made by exporter in export documents. Otherwise also as the factory stuffed containers were received at Port, their job was confined to submission of documents given by the exporter and to identify the exporter to the Customs authorities. Therefore, in the facts and circumstances, the orders/ judgments cited by the noticee No. 1 are squarely applicable in the instant case and the above discussed proposition laid down vide the cited judicial pronouncements are applicable. Therefore, in the absence of any evidence showing knowledge/ intention, it cannot be said that they have abetted the smuggling activities.

3.14 I find that sole basis of proposing penalty under Section 114 of the Customs Act, 1962 on the noticees is allegation of failure to observe due diligence and by negligent acts which helped Mr. Vishal Shah in executing his plans of smuggling and escaping the investigation. There is no allegation that the noticees had knowledge of illegal exports. The Sections 114 of the Customs Act, 1962 provides for imposition of penalty on the persons who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or abets the doing or omission of such an act. The Section 113 of the Customs Act, 1962 provides various situations wherein export goods are liable to confiscation. These situations include the export goods attempted to be exported contrary to any prohibition (*clause d*), the goods which do not correspond in respect of value or in any material particular with the entry made under this Act (*clause i*) and goods cleared for exportation which are not loaded for exportation on account of any willful act, negligence or default of the exporter, his agent or employee, or which after having been loaded for exportation (*clause k*). I find that in the facts and circumstances of this case, the allegations against the noticees relates to the act of following directions of Shri Vishal Shah and failure to provide whereabouts of Shri Vishal Shah which itself does not amount to abetment in smuggling activities. In view of the provisions of Section 113, the said act on their part does not amount to an act attracting confiscation of subject goods under Section 113 of the Customs Act, 1962. Therefore, penalty under Section 114 of the Customs Act, 1962 is not leviable on them.

3.15 Though the noticee No. 2 has neither submitted his defense reply nor appeared for personal hearing but he was an employee of the noticee No. 1 and he has acted in the capacity of 'H' card holder of the noticee No. 1. There are same allegations for same acts on the parts of both the noticees. Therefore, case of both the noticees is on the same footing. The facts emerging from the submissions of the noticee No. 1 also clarify stand of the noticee No. 2 in this case.

4. In view of the above, I pass the following order:

ORDER

I hereby drop the proceeding initiated vide Show Cause Notice F. No. DRI/AZU/MISC-16/2011 dated 05.03.2012 in respect of M/s. Amit K. Dedhia and Shri Dinesh Solanki.


(SANJAY AGARWAL)
COMMISSIONER

BY RPAD/SPEED POST

TO:

1. M/s. Amit K Dedhia
3rd Floor, Ratan Bhai Building,
19/21, J.B. Shah Marg,
Chinchbunder,
Mumbai- 400 009
2. Shri Dinesh Solanki
Plot No.-377, Survey No. 192,
Bhagshree Society,
Meghpur, Borechi, Adipur,
Anjar, Kutch, Gujarat.

COPY TO:

1. The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad.
2. The Additional Director General, Directorate of Revenue Intelligence, Ahmedabad Zonal Unit, Unit No. 15, Magnet Corporate Park, 100 Feet, Thaltej - Hebatpur Road, Near Sola Over Bridge, Off. S.G. Highway, Thaltej, Ahmedabad - 380 054.
3. The Assistant/Deputy Commissioner (Recovery), CH, Kandla.
4. The Assistant/ Deputy Commissioner (Prosecution), CH, Kandla.
5. Guard file.