Customs, Excise & Service Tax Appellate Tribunal,
West Zonal Bench : Ahmedabad

REGIONAL BENCH - COURT NO. 3

Customs Appeal No. 10749 of 2017

[Arising out of Order-in-Original No OIO-AHM-CUSTM-000-COM-009-16-17 dated 04.11.2016 passed by Principal Commissioner of Central Excise, Customs & ST, Ahmedabad]

M/s Mulchand M Zaveri **.... Appellant**
Koi Na Pada, Chawk, KHAMBHAT
GUJARAT -388620.

VERSUS

Commissioner of Customs, Ahmedabad **.... Respondent**
Custom House, Near All India Radio Navrangpura,
Ahmedabad, Gujarat

WITH

Customs Appeal No. 10750 of 2017

[Arising out of Order-in-Original No OIO-AHM-CUSTM-000-COM-009-16-17 dated 04.11.2016 passed by Principal Commissioner of Central Excise, Customs & ST, Ahmedabad]

Shri Sanjaykumar Mulchandbhai Patel **.... Appellant**
Koi Na Pada, Chawk, KHAMBHAT
GUJARAT -388620.

VERSUS

Commissioner of Customs, Ahmedabad **.... Respondent**
Custom House, Near All India Radio Navrangpura,
Ahmedabad, Gujarat

APPEARANCE :

Shri P.M. Dave, Advocate for the Appellant
Shri L. Patra, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO. A/12330-12331/2019

DATE OF HEARING : 03.10.2019
DATE OF DECISION : 05/12/2019

RAJU :

These appeals have been filed by M/s. Mulchand M. Zaveri (hereinafter referred to as M/s. MMZ) and it's partner Shri Sanjay kumar Mulchandbhai Patel (hereinafter referred to as Shri Sanjay Patel) against confirmation of demand of Customs duty, imposition of penalty and confiscation of goods.

2 The appellants had imported certain goods declaring the same as 'Natural Gold Ore Concentrate'. The appellants have been importing goods with the said description of 'natural gold ore concentrate' for some time. After fifteen consignments (one imported through Mumbai and not subject matter of this notice) of the said product having been cleared by Customs, the 16th consignment was stopped. The bill of entry No. 4434128 for the 16th consignment was submitted to Ahmedabad Customs for assessment. The goods were sought to be classified under Customs Tariff Heading 26169010 claiming basic Customs duty (BCD) at the rate 2.5% and nil CVD by virtue of Notification No. 12/2012-CE dated 17 March 2012 (Serial No. 56). All import documents like purchase orders, Dubai customs clearance declaration, packing list, testing report etc. were submitted with bill of entry. The said consignment was seized by Directorate of Revenue Intelligence (DRI) on the basis of intelligence to the effect that the appellants were importing by mis-declaring the goods as 'Natural Gold Ore Concentrate' and wrongly claiming the benefit of notification. The goods were examined under Panchanama. Thereafter, statements of Shri Rohit Harishrao Jadav, Senior Executive of M/s. C.N. Gandevia Clearing and Forwarding Agent was recorded. M/s. MMZ were declaring the imported goods as Gold Ore Concentrate since December, 2013. Shri Rohit Harishrao Jadav in his statement dated 24 January, 2014 stated that the imports made earlier were similar to the one imported vide bill of entry No. 4434128 dated 23 January, 2014 and examined under Panchanama dated 24 January, 2014. Regarding the physical appearance of the earlier consignments, he stated that the same were "reddish coloured lumps of mud containing yellow coloured metal

particles. During investigations certain Whatsapp messages were recovered from the mobile phone of Shri Sanjay Patel. Certain other incriminating documents were also recovered from the premises of appellant. Statement of Sh Sanjay Patel was also recorded. Statement of Shri Mohanlal S. Jadia, whose shop was used to process the material imported by the appellant, was also recorded. Based on these evidences a SCN was issued alleging that the appellants had not imported the 'Natural Gold Ore Concentrate' but had artificially mixed gold and various materials like mud, cement etc to artificially create something that could be camouflaged as 'Natural Gold Ore Concentrate'. The demand of duty, confiscation and penalties were confirmed against the appellants. Aggrieved by the said order the appellants are before the Tribunal.

2.1 Learned Counsel pointed out that during January 2014 to July 2014, statement of various persons including that of Shri Sanjay Mulchandbhai Patel was recorded by DRI authorities. A sample of the product was examined by a expert from IIT Mumbai. Learned counsel pointed out that a show cause notice was issued by ADG, DRI, Ahmedabad alleging that the goods covered under bill of entry 4434128 were not "Gold Ore/ Gold Ore Concentrate" classifiable under CTH 26169010 but the goods were "Gold" classifiable under CTH 71081300 and hence not eligible for exemption and also liable for confiscation. The same allegations were made in respect of imports made in the past, under different 14 consignments made during July 2013 to January 2014. Duty in respect of previous consignments imported through Ahmedabad Customs was also demanded. In the notice, Revenue also relied on the role of Shri Mohanlal S. Jadia whose shop was used to process the material imported by the appellant. Learned counsel pointed out that Shri Shailesh Kumar H Patel, Director of CHA firm and clarified that he had never seen the goods imported earlier. However, Shri Rohit Harishrao Jadav, Senior Executive of CHA, during cross-examination confirmed that he had seen the goods in the past; that Customs officers used to permit to opening of package for the purpose of control of samples for valuation by the government approved valuer. Shri Rohit Harishrao Jadav also stated that his observation that past imports were similar to the current import was based on physical appearance only and he cannot be 100 per cent certain in this regard.

2.2 Learned Counsel pointed that Revenue had relied on the report of Dr. George Mathew, Associate Professor at Indian Institute of Technology (IIT for short), Bombay. He pointed out that there were a lot of error in the report made by the Professor and for that purpose he relied on the record of the cross-examination of Dr. George Mathew. Learned Counsel pointed out that the demand, penalties and confiscation was upheld by the Commissioner despite the fact that they had pointed out various lacunas' in the report of the Professor of IIT, Mumbai. In this background of facts, learned Counsel argued that the report of Dr Mathew that the sample tested by them was 'not naturally occurring', is incorrect and cannot be relied on. He pointed out that while the report of IIT Professor stated that in native gold, the gold content should be 90 per cent and during cross-examination, he stated that gold content in the native gold varied from 70 per cent to 90 per cent. Learned Counsel pointed out that in the sample tested by IIT Bombay, the gold content found to 79 per cent which falls within the range of the native gold i.e. 70 per cent to 90 per cent. Learned Counsel pointed out that the report of IIT Bombay extracts the meaning of 'Natural Gold Nuggets' from Wikipedia. He argued that report of IIT Bombay does not rely on an authentic material or literature. Learned Counsel further pointed out that while the impugned order suggests that

(i) Natural Gold Nuggets had a wax like yellow colour,

(ii) that the sample of gold metal in question did not show pits or cavities/ craters and had smooth surface,

(iii) that trapped minerals and regular spiked features were usually absent in Natural Gold Nuggets,

but had failed to cite any authentic literature in support of this observation.

2.3 Learned Counsel further pointed out that Dr. Mathew had given his observation about the 'wax like yellow color' merely an eye examination observation. No equipment/ machinery was used to arrive at this observation regarding the testing of the samples.

2.4 He further pointed out that the report of IIT Bombay was inconclusive about presence of cement in the sample. The report stated that while presence of the cement was not detected, use of some form of cement was not ruled out. He pointed out that the nature of report creates doubt that when no cement was present still the Professor observed the use of cement cannot be ruled out.

2.4 Learned Counsel pointed that while Revenue has taken sample of the import made vide bill of entry No. 4434128, the same cannot be applied to past imports made by the appellant. Learned Counsel clarified the present demand relates to only 14 bills of entry as one import was made through Mumbai. Learned Counsel argued that Revenue had earlier taken samples in the past and therefore, it is not open to Revenue to rely on the report received on the basis of sample taken in the consignment which was seized.

He argued that the report of Professor IIT at best can be applied to bill of entry No. 4434128 only. He argued that in this background, attempt to re-classify the goods, covered in the past imports is illegal and without jurisdiction.

2.5 Learned Counsel pointed out that Revenue has heavily relied on WhatsApp messages recovered from the mobile phone of Shri Sanjay Patel. He argued that the said messages are not admissible as evidence and the messages do not establish that the partner of the appellant firm had instructed any person to prepare the goods for import in such a manner that they appeared like Natural Gold Ore Concentrates. Learned Counsel argued that there is no evidence showing that the instructions, advices appearing in the WhatsApp message were for the goods imported by the appellant and covered under bills of entry listed at Annexure-A to the show cause notice. He further argued that there is no evidence on record that advices and instructions allegedly given by Shri Sanjay Patel to Shri Sachin, the supplier abroad were actually carried out or implemented. He argued that mere presence of Whatsapp messages does not prove that supplier had actually carried out all the activities mentioned in the Whatsapp. Learned Counsel argued that while Whatsapp messages indicate that Shri Sachin was required to mix silver, zinc, cadmium, copper etc. but cadmium and zinc were not found in the metal portion of the sample tested by IIT, Bombay. He argued that alleged instructions were not followed.

2.6 Learned Counsel further pointed out that demand of differential duty is barred by limitation. He argued that the past consignments were assessed as "Natural Gold Ore Concentrate" and concessional rate of Customs duty, by classifying under CTH 26169020 was allowed by proper officer. They had submitted all requisite documents like purchase invoices, packing lists/air way bills, certificate of country of origin etc. and the goods were available before the customs officers and they could have ascertain the composition of the goods. He argued that samples were also taken by the Customs Officers. Learned Counsel submitted that classification and admissibility of exemption are questions of law involving interpretation therefore, no malafide can be attributed to the assessee in such case.

2.7 Learned Counsel argued that earlier a similar issue was raised before the Customs and the Commissioner (Appeals) decided in appellant's favour in the said consignment, the goods were classified under CTH 26169010 and full exemption from CVD was granted by virtue of Serial No. 5 of Notification No. 4/2006-CE. He argued that the said order-in-appeal has bearing on issues like the bonafide nature of our imports, assessment of consignments of gold ore concentrate by proper Customs Officers upon proper scrutiny and verification, irrelevance of Whatsapp messages and thus, wrong invocation of longer period of limitation in these proceedings.

2.8 Learned Counsel pointed out that CTH 26129010 covers "Gold Ores and Concentrates". He pointed out that, for Ores of tariff heading 2601 to 2617 are eligible for the benefit of reduced rate of CVD by virtue of Notification No. 12/2012-CE. He pointed out that term "Ores" is statutorily defined under Note No.2 of Chapter 26 to mean – *"Minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of Heading 2844 or of the metals of Section XIV or XV, even if they are intended for non-metallurgical purposes."* He argued that this definition indicates that any mineralogical specie actually used for extraction of metals including gold, is "Ore" as defined by the Parliament even though such goods were intended for non-metallurgical purposes. He pointed out that the goods in question have been imported for extracting gold there from and therefore, they are 'Ore' as per Note 2 of Chapter 26 of the Customs Tariff.

2.9 He further pointed out that there is no violation of any nature committed by the appellant and there is no question of imposition of penalty. He also argued that penalty has been imposed on the firm as well as on the partner. He relied on the decision of Hon'ble Gujarat High Court in the case of ***Jaiprakash Motwani – 2010 (258) ELT 204 (Guj.)***. He further argued that no penalty can be imposed on the firm as there was no malafide. Learned Counsel further argued that the penalty imposed is very high. He also argued that redemption fine of Rs. 60 Lakh is too high as the duty involved is only Rs. 18 Lakhs.

3. Learned Authorised Representative for the Department relied upon the impugned order. He took us through the show cause notice where the product imported by the appellant and the evidence in support of revenue claim is described. He further relied on the statements of partner Shri Sanjay Patel. He pointed out that everything was admitted and the statement was never retracted. He further relied on the documents at page 31 and 33 of [relied upon document No.12] contained in the file seized from the appellant's premises under Panchanama dated 24 January 2014 which showed detailed calculation of the cost and material involved in production of goods in Dubai. Learned Authorised Representative also relied on the decision of Hon'ble Apex Court in the case of ***UOI vs. Jain Shudh Vanaspati Limited – 1996 (86) ELT 460 (SC)*** to assert that no re-assessment is needed to demand duty in respect of past clearances.

4. We have gone through the rival submissions. We find that the dispute essentially relates to admissibility of benefit of Notification No. 12/2012-CE dated 17 March 2012. The said notification exempts the excisable goods of the description specified in column (3) of the Table below read with relevant list appended hereto and falling within the Chapter heading or sub-heading or tariff item of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986). Serial No. 56 of the tariff, notification reads as follows:

Sl. No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
1	2	3	4	5
1 to 55 …… ……. …….				
56.	2601 to 2617	Ores	Nil	-

It is seen that the above notification exempts from Central Excise duty "Ores" falling under Chapter 2601 to 2617 from whole of excise duty.

4.1 **<u>Examination of Definition of Ore in HSN, chapter notes and other dictionaries</u>** Note 2 to Chapter 26 of the Tariff reads as follows:-

> "**2.** For the purposes of headings 2601 to 2617, the term "ores" means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of heading 2844 or of the metals of Section XIV or XV, even if they are intended for non-metallurgical purposes. Headings 2601 to 2617 do not, however, include minerals which have been submitted to processes not normal to the metallurgical industry."

From the above facts, it is seen that the appellants are claiming benefit of Notification No. 12/2012-CE and the notification exempts 'Ores' falling under heading 2601 to 2617 from Central Excise duty. Note-2 of the Chapter 26 defines the scope of the term 'ore' for the purpose of this chapter. This definition of 'ore' as applicable to Chapter heading 2601 to 2617 is elaborated in the HSN notes in following words:-

> "Headings 26.01 to 26.17 are **limited** to metallic ores and concentrates which:
>
> (A) Are of mineralogical species actually used in the metallurgical industry for the extraction of the metals of Section XIV or XV, of mercury or of the metals of heading 28.44, even if they are intended for non-metallurgical purposes, **and**

(B) **Have not been submitted to processes not normal to the metallurgical industry**.

The term "**ores**" applies to metalliferous minerals associated with the substances in which they occur and with which they are **extracted from the mine**; it also applies to **native metals in their gangue (e.g., metalliferous sands)**.

Ores are seldom marketed before "preparation "for subsequent metallurgical operations. The most important preparatory processes are those aimed at concentrating the ores.

For the purposes of headings 26.01 to 26.17, the term "**concentrate**s" applies to **ores which have had part or all of the foreign matter removed by special treatments**, either because such foreign matter might hamper subsequent metallurgical operations or with a view to economical transport.

Processes to which products of headings 26.01 to 26.17 may have been submitted include physical, physico-chemical or chemical operations, provided they are normal to the preparation of the ores for the extraction of metal. With the exception of changes resulting from calcination, roasting or firing (with or without agglomeration), such operations must not alter the chemical composition of the basic compound which furnishes the desired metal.

The physical or physico-chemical operations include crushing, grinding, magnetic separation, gravimetric separation, flotation, screening, grading, agglomeration of powders (e.g., by sintenng or pelleting) into grains, balls or briquettes (whether or not with the addition of small quantities of binders), drying, calcination, roasting to oxidise, reduce or magnetise the ore, etc. (but not roasting for purposes of sulphating, chloridating, etc.).

The chemical processes are aimed at eliminating the unwanted matter (e.g., dissolution).

Concentrates of ores obtained by treatments, other than calcining or roasting, which alter the chemical composition or crystallographic structure of the basic ore are **excluded** (generally **Chapter 28**). Also excluded are more or less pure products obtained by repeated physical changes (fractional crystallisation, sublimation, etc.), even if there has been no change in the chemical composition of the basic ore.**"**

4.1 From the above it is seen that as per HSN the term 'ore' applies only to 'metalliferous minerals' which are 'extracted from mines' or to 'native metals in their gangue (e.g. metalliferous sands)'. The website http://kolibri.teacherinabox.org.au/ describes 'native metal' as follows

"Any metal that is found in its metallic form, either pure or as an alloy, in nature."

Website https://www.azomining.com/ describes 'native metal' as

> **"Native metal is the uncombined form of metal that occurs in nature. It is the pure, metallic form that does not occur in combination with other elements. Native metals are either found as native deposits singly or as alloys."**

Dictionery.com defines 'Gangue' as

> **"rock or mineral matter of no value occurring with the metallic ore in a vein or deposit."**

Merriam Webster dictionary defines 'Gangue' as

> **"the worthless rock or vein matter in which valuable metals or minerals occur"**

As per the definition, to be an ore the material has to qualify to the description 'minerals of mineralogical species'. The term "mineral" has been defined in **Wikipedia** is

> **"A mineral is, broadly speaking, a solid chemical compound that occurs naturally in pure form."**

Then, the Encyclopedia Britanica defines 'mineral' as follow:-

> **1. Formed by a natural process (anthropogenic compounds are excluded).**
>
> **2. Stable or metastable at room temperature (25 °C). In the simplest sense, this means the mineral must be solid. Classical examples of exceptions to this rule include native mercury, which crystallizes at −39 °C, and water ice, which is solid only below 0 °C; because these two minerals were described before 1959, they were grandfathered by the International Mineralogical Association (IMA). Modern advances have included extensive study of liquid crystals, which also extensively involve mineralogy."**

Collins' Dictionary defines the 'mineral' as under:-

> **"A mineral is a substance such as tin, salt, or sulphur that is formed naturally in rocks and in the earth. Minerals are also found in small quantities in food and drink."**

In Cambridge Dictionary the term 'mineralogical' is defined as follows relating to mineralogy (= the scientific study of minerals):

From the above reading of definition of “Ores” appearing in Note-2 of Chapter 26 and definition of the term ‘minerals’ in various dictionaries appearing above, it is seen that only Naturally occurring substances are termed as ‘minerals’ and therefore “Ores”. Like HSN, Encyclopedia Britannica excludes ‘anthropogenic compounds’ from the term ‘Ore’. ‘Anthropogenic’ is defined as follows in Merriam Webster Dictionary

> ‘**:** of, relating to, or resulting from the influence of human beings on nature’

Cambridge Dictionary defines ‘***anthropogenic’*** as follows

> ‘caused by humans or their activities:’

4.2 Furthermore the HSN clarifies that the term ‘ore’ applies only to goods that are not subjected to processes which are ‘not normal to Metallurgical Industry’. Thus goods which are produced by subjecting pure gold, sand and other materials to various processes to appear like ore cannot by any stretch of imagination be called ore as these processes, of mixing gold with sand and other substances to create an ore like product, are not normal to Metallurgical Industry. Moreover it is not normal Metallurgical Industry Process to convert Pure metal (like Gold ornaments/biscuits) into Impure gold mixture with sand with some physical/chemical characteristics of ‘ore’.

4.3 Thus as per chapter notes and HSN only the naturally occurring material can qualify as ‘ore’. The artificially made substances cannot therefore be called as “Ore” in terms of the definition of the term ‘Ore’ appearing in the Chapter notes and explanations in HSN.

4.4 **Goods do not answer to the term Concentrate** The goods imported by the appellant were produced in a workshop by mixing sand and gold and various materials cannot be called concentrate. As per HSN explanatory notes the term 'concentrate' applies **only to 'ores which have had part or all of the foreign matter removed**……..'. Thus only goods derived from 'ores' can be called concentrate. It is seen that Revenue is seeking classification of the product under chapter 71 therefore is the correct classification of the product. In any case the goods do not fall under chapter heading 2601 to 2617 even under description of 'Concentrate'.

5 **Benefit of Notification.** The heading 26169010 covers both Gold Ore and Concentrates. Thus it is seen that the tariff distinguishes between Ores and Concentrates. While the notification grants exemption to 'Ores' falling under heading 2601 to 2617, it does not grant any exemption to 'Concentrates' falling in the same headings. Thus, to claim the benefit of exemption notification, the appellants are required to establish that the goods imported by the appellant are only 'Ores'. In the instant case, the appellants are claiming benefit of Notification No. 12/2012-CE and the notification exempts 'Ores' falling in the specified headings. Since appellants are claiming the benefit of the notification the onus to establish that they are entitled to the benefit of the notification is on the appellants. Revenue has placed on record sufficient evidence, discussed in following paras, to suggest that the goods are not of natural origin and therefore not 'Ores'.

5.1 The basic question that needs to be answered at the outset is if the benefit of exemption to 'ores' be extended to anything that has been artificially produced to resemble naturally occurring 'ores'. In other words, if it is established that the goods imported by the appellants were produced in by them in a workshop, and are not naturally occurring substances extracted from Mines or sand, can they be called 'ores' even if they resemble naturally occurring 'ores' in certain physical/chemical parameters? The answer is no.

Only the naturally occurring materials can qualify as ore and artificially produced material cannot qualify as ores even if they correspond to the the physical/chemical parameters of 'ores'.

5.2 The evidence with the revenue is in the shape of

(i) Test report of the professor at IIT Mumbai

(ii) Whatsapp messages recovered from the mobile phone of the Shri Sanjay Patel

(iii) Statements of other persons recorded during investigation

(iv) Documents recovered from the premises of appellant

5.3 Investigations have revealed that there were frequent exchange of messages between the appellant's partner Shri Sanjay Patel and foreign supplier Shri Sachin. The print-outs of WhatsApp messages were taken under Panchanama from the mobile phone recovered of Shri Sanjay Patel. During investigation, mobile phone of Shri Sanjay Patel was seized under Panchanama and the printout of WhatsApp messages exchanged between Shri Sanjay Patel and Shri Sachin, No. 971-52727299 of M/s. Gstar Jewellers, Dubai, UAE were taken. The said WhatsApp messages indicated that Shri Sanjay Patel was directing Shri Sachin to mix gold with various substances and create a product roughly answering to the physical/chemical description of "Ore". The messages exchanged during 13 November 2013 to 14 November 2014 shows that Shri Sanjay Patel giving minute by minute instructions to Shri Sachin to prepare fake gold ore concentrate. The messages and the implications of the Messages were specifically admitted by Shri Sanjay Patel. No cross examination of Shri Sanjay Patel was sought nor was his statement retracted. During this period the appellants approached Hon High Court for cross examination of a few witnesses. But the statement of Sanjay Patel was not retracted except in the reply filed after the cross examination of all witnesses. The WhatsApp messages were recovered under a Panchnama from a mobile recovered under a Panchnama. The recovery of phone or messages was not challenged as the Panchnama was not challenged. Furthermore the WhatsApp messages are corroborated by the recovery of cost sheet from appellants premises as well as the action/documentation (as detailed in following paras) pursuant to the said messages as detailed in OIO.

5.4 The Show Cause notice gives the summary of the messages in following words :

> **"38.2** The printouts of the Whatsapp messages relevant to the investigation, contained in the Mobile phone of Shri Sanjay Patel were taken under Panchnama. The messages exchanged between Shri Sanjay Patel and one Shri Sachin No. 971-527247299 of M/s. GStar Jewellers LLC, Dubai, UAE clearly bring out the modus operandi of melting the gold of 995 purity mixed with silver, cadmium, zinc, copper etc., preparing grains/flakes of the mixture of these metals, preparing a wet base of red soil, mixing the metal with the wet soil base and thereafter heating and drying of the composite mixture. The resultant preparation in the form of lumps of red soil containing grains/flakes of gold were imported into India by declaring the same as natural gold ore concentrate. The Whatsapp messages from PK No.6585 to 7264 clearly establish the above fact. These messages pertain to first consignment of gold imported by MIs. MMZ from M/s. Gstar Jewellers LLC, Dubai in the guise of fake gold ore concentrate. In these series of messages during 13/11/2013 to 14/11/2013 Shri Sanjay Patel is giving minute by minute instructions to Shri Sachin for preparing the fake gold ore concentrate. At PK No. 6586 and 6587 Shri Sanjay Patel is asking Shri Sachin whether he is preparing grains/flakes or preparing dough of Red Geru (red Indian soil). In response Shri Sachin at PK No. 6588 informs Shri Sanjay Patel that he is preparing grains/flake At PK No. 6593 Shri Sachin asks about the size of the grains/flakes and in response Shri Sanjay Patel informs at PK No.6596, 6598 and 6599 that it should be above 3mm but below 11mm and at the most it should not be more than 12-13mm. At PK No. 6611 and 6612 Shri Sachin informs that the metals are being melted and that he would send a photo after preparing grains/flakes. Shri Sanjay asks about the temperature at PK No. 6613 to which Shri Sachin informs that it is at 856 and at PK No. 6616 to 6618 he informs that he has added zinc and copper, he would add cadmium before 900, add silver at 900 and thereafter add gold at 1000.
>
> **38.3** In the messages at PK No. 6874 to 7002 Shri Sanjay Patel gives instructions for preparing the soil base. He asks Shri Sachin to use 50 gms liquid Sodium Silicate, 400gms of geru (red Indian soil) and half a litre of water, mix them and heat (stir) properly to make them smooth. He also instructs Shri Sachin simultaneously to boil 3.2 kgs of fine sand in 1 litre of water and add water as is needed. At PK No. 6892 Shri Sanjay Patel advices Shri Sachin to use 100gms Caustic Soda if Sodium Silicate is not available. At PK No. 6900 to 6903 Shri Sanjay informs that the preparation would be very good and a

Perfect Duplicate of the African original. At PK No.7006 to 7025 Shri Sanjay Patel instructs Shri Sachin to add slowly the grains/flakes and water (prepared as above at Para 39.2) to the wet soil base and keep stirring the same. At PK No.7230 Shri Sanjay informs the detailed break-up of the costing of the above preparation and its CIF value at Ahmedabad. As per this the above preparation containing 1 Kg gold of 995 purity has a CIF Ahmedabad value 26,98,317/-. Shri Sachin of M/s. Gstar Jewellers LLC, Dubai informs Shri Sanjay Patel at PK No. 7475 that Customs (Dubai) would apply only (HS) Code 71081100. The said consignment was imported by M/s. MMZ through ACC, Ahmedabad by filing bill of entry No.3820322 dated 16/11/2013 wherein the goods were declared to be Natural Gold Ore Concentrate and claiming classification under CTH 26169010. The import under the said bill of Entry No.3820322 dated 16/11/ 2013 is communicated by Shri Sanjay Patel to Shri Sachin at PK No.8139.

38.4 For the subsequent consignments Shri Sanjay Patel advises use of Cement and Geru (red Indian soil). These communications are at PK No.7944 to 9007. Shri Sachin informs Shri Sanjay Patel at PK No. 9017 and 9018 that using geru would be expensive and for 2 kg geru of 400 Dirhams would be used. In response Shri Sanjay Patel informs him at PK No. 9019 to 9023 that he would send 100kg Geru. Shri Sanjay Patel subsequently informs him at PK No.9090 to 9099 that he is sending Geru and asks Shri Sachin for the name and address of the consignee. Shri Sachin at PK No.9106 and 9110 communicates the consignee name and address as :- No.+ 971 52247299, To- Jasmine Patel, Gallops Trading LLC, Khalid bin-al -walid Road, Opp. Askot Hotel, Bur Dubai, Dubai, UAE. At PK No.9213 and 9215 Shri Sanjay Patel informs Shri Sachin that they have to do another shipment of 2200gms immediately.

38.5 The conversations from PK No.11619 to 12491 between Shri Sanjay Patel and his Dubai based counterpart pertain to the preparation of the fake gold ore concentrate for importing 2.2 kgs of pure gold -995 purity, its cost in Dubai, the ingredients and the proportion in which they are to be used and preparation of the documents for export from Dubai to India. These communication messages clearly indicate that Shri Sanjay Patel is giving instructions to his Dubai based counterpart on every aspect from preparation of the fake gold ore concentrate as well as preparation of the documents for export from Dubai. The weight of the said consignment arrived was 6.2 kgs and the same was mentioned in the Invoice and Packing List and declared before Customs, Air Cargo Complex, Ahmedabad at the time import for which bill of entry No.3986187 dtd.04/12/2013 was filed by declaring the goods as Natural Gold Ore Concentrate.

38.6 The instances narrated above leading to the import of pure gold of 995 purity in the guise of the fake natural gold ore concentrate are pertaining to the first two consignments imported at ACC, Ahmedabad vide bill of entry No. 3820322 dated 16/11/2013 and 3986187 dated 04/12/2013. Similar modus was adopted for import of the other consignments of pure gold of 995 purity through ACC, Ahmedabad under bills of entry as detailed in Annexure-A to this notice.

38.7 That the declared country of origin is also fake is evidenced from the message of Shri Sanjay Patel at PK No, 10439 and 10440 wherein he informs his Dubai counterpart that editng of Ghana, West Africa is remaining in the documents and that they mention Ethiopia.**”**

5.5 After examining the messages the impugned order gives following findings on the issue of corroboration :-

20.3 From the Whatsapp messages exchanged between Sanjay Patel and Shri Sachin the following emerges:

i) In the messages exchanged on 09.11.13 (PK 5806 onwards) it appears that some proforma invoice was sent by Sachin to Sanjay Patel for his approval. Certain corrections were suggested by him such as writing some details in capital words and keep proper space above name for signature on the proforma invoice.

ii) It also appears that images of some material were forwarded by Sachin to Sanjay Patel and he in turn tells that the finish of the material was too smooth and it should be of natural form (matt finish).

iii) On 10.11.2013 the messages (PK 5816 to 6016) are relating to fixing the price of the gold Sanjay Patel asks about fixing of the gold price to which Sachin replies that it will cost 1300 with premium Sanjay Patel asks Sachin whether the rate is per ounce or what He then again asks about the price in grams Sachin replies that it will cost 1300 with premium He further tells that if it is fixed at 1300 them cost in USD will be 41.80 per gram.

iv) That proforma invoice as approved by Sachin and an amount of 80,000 AED was transferred by Sanjay Patel to Sachin for this purpose.

v) From one stage onwards the messages are relating to actual preparation of mixture by Sachin at Dubai under the guidance of Sanjay Patel from Ahmedabad. During the course of this exchange Sanjay Patel has asks Sachin whether he is ready to prepare the mixture and he replies that he is already on the point. Sanjay Patel has explained to Sachin various activities which are required to be done.

vi) WhatsApp message dated 13.11.2013 between Sanjay Patel and Sachin are relating to preparation of mixture containing gold and other metals, soil and chemicals. During the course of these messages method of preparation, the material to be used and the quantity used, temperature to be maintained, etc. have been explained. In addition, there is also an exchange regarding documents to be prepared and payment to be made etc. These are explained below separately.

Consignment No. 3 - B/E No. 3820322 dated 16.11.2013

21.1 This consignment is mentioned at Sl. No.3 of Annexure 'A' to the SCN. (hereinafter it is referred to as the 3rd consignment). The relevant messages are from PK 5806 onwards (dated 09.11.2013) exchanged between Sanjay and Sachin. The messages are with regard to:

21.2

i) Melting of gold of 995 purity with silver, cadmium, zinc, copper etc.
ii) Preparing grains/flakes of the mixture of these metals.
iii) Preparing of wet base of red soil.
iv) Mixing the metal with wet soil.
v) Heating and drying of the composite mixture.

21.3 In these messages, first they start with preparing the gold flakes (chilkas). Sachin informs that he has procured 1 kg of pure gold having size 11 to 12 mm. Sanjay Patel informs him that the size should be around 12 to
13 mm. Further he informs him to take various materials Zinc, Copper, Silver, Cadmium. He asks for the preparation of the mixture.

21.4 At one stage Sachin informs that the temperature is 856 and that he has already mixed Zinc and Copper with the gold (PK 6616) that he will mix cadmium before 900 and thereafter silver after 990 and at 1000 gold.

21.5 Sanjay Patel informs Sachin to keep the ko1ater ready and gives him directions regarding safety measure to be taken for pouring this mixture in the water. Sachin informs that the size of the final mixture is about the size of gram (chana). He sends image of the gold flakes. To get an idea of real size Sanjay asks Sachin to put a scale, pencil or pen and send image back to him, which he does.(PK 6709 to 6727) Further Sanjay informs that small and medium size flakes will be acceptable. The larger size being very small in quantity, they should be able to manage at this time. (PK 6736)

Preparation of soil mixture. (message No. PK 6802)

21.6 Sachin informs Sanjay Patel that the soil with him is little bit sandy and slips out of hand. Then he tells that he will use the finest sieve which will be as fine as to sieve Maida floor. Sachin asks him and say that the soil is very fine and it will automatically get sticky. He also advices him to mix Geru with it.

21.7 Sanjay Patel guides Sachin how to prepare soil mixture. He asks Sachin to get 50 grams of sodium silicate + 400 grams of Geroo + ½ liter of water, mix all these materials in ½ liter of water and stir it till it gets sticky. In addition, he asks to get 3.2 kg of fine sand + 1 liter of water and boil it. Meanwhile Sanjay asks about the availability of water glass (sodium silicate). He suggests that if the same is not readily available, caustic soda can also be used (PK 6874 to 6892).

Preparation of soil mixture with gold

21.8 At one stage, while sand. mixture is being prepared Sanjay Patel asks Sachin to keep gold flakes ready by the side. He inquires whether the color of sand mixture has changed from red to brown because of the effect of the caustic soda. At this stage, Sanjay Patel asks him to mix gold flakes in the sand mixture and put water in the same. He has also advised to lower the temperature. After seeing the image, Sanjay Patel comments that the sand is very sticky. During the course of preparation, Sachin informs that he has used 200 grams of caustic soda, to which Sanjay informs that the total weight of the mixture will be 5100 grams and asks him to remove 200 grams of mixture from this 200 grams of mixture was separated, gold flakes are again removed and mixed with the main mixture. At repeated intervals, he enquires about the color of the mixture and on number of occasions the photos are sent by Sachin to Sanjay Patel of various materials so that he can check as to whether the process is going in right direction. According to WhatsApp messages, the process is completed at 1.00 o'clock at night. (IST).

Money transactions:

21.9 During the course of this exchange of messages, Sanjay Patel informs Sachin about the transfers to the latter's account by Swift Transfer an amount of 21750 USD.(message no. PK 6231) Sanjay Patel also forwards to Sachin the message which he received from his bank "Your CD A/c*******23035 is debited by Rs. 13,88,231/- on 12.11.2013 by Transfer = US$21,750/-" (message no. PK 6450)

KALOTI (PK 6837 TO 6842):

21.10 During this period, there is also an exchange regarding sending the gold flakes for Kaloti certification. Sanjay Patel, on the basis of his own calculations informs Sachin that the purity of this gold flakes would be 74.5%.

Documentation.

21.11 Another set of message exchanged is regarding the origin to be mentioned on the invoice pertaining to the consignment to be imported. Sanjay Patel suggests that it should be either Ethiopian or African origin to which Sachin informs that he will write "Ethiopia". Yet another set of WhatsApp message reveal that Sanjay Patel directs Sachin to mention CTH 2616.90. Then he tells Sachin that duty under this heading is lower as compared to CTH 70 and 71081, which is 10%.(message no. P1K 6445 onwards) Besides, Shri Sanjay has also explained that the import under CTH 7108 was regulated by RBI and that they wanted to clear the goods @ 2.5% and the same *'can happen only if this one proves to be 26169010'. (PK 6562 to 6572)*

Calculation Sheet:

21.12 Sanjay Patel has also forwarded the calculation sheet of the total expense of preparing this mixture which includes elements towards expense on gold, forwarding through Trans Guard Express, insurance and Kaloti test report. (PK 7230). A similar calculation sheet appears to be made for consignment No. 5 which was recovered from his premises during the search and being relied upon in the SCN (para no. 13.4 of SCN). The material was sent via Emirates Airlines through Transguard Express. At this stage, Sachin again forwards images of the mixture, which is found satisfactory by Sanjay Patel. After inquiring the gross weight of the mixture, Sanjay prepares the commercial invoice and sends to Sachin. Sachin indicates the gross weight of the consignment and net weight.

21.13 In message nos. P1K 7313 to 7365 Sanjay Patel asks Sachin to check the invoice and further asks him to prepare covering letter, packing list, commercial invoice on his letterhead, stamp and sign it and after scanning it send all three documents to him.

21.14 According to WhatsApp messages, the consignment is submitted to the Dubai Customs. Next day on 15th evening, Sanjay Patel confirms arrival of consignment at Air Cargo, Ahmedabad. Next day on 16th Sanjay Patel informs that he has filed BE No. 3820322 dated 16.11.2013.

21.15 In messages exchanged on 22.11.2013, he informs Sachin that the goods have been cleared from the Customs and he is already in the process of cleaning the mixture of gold.

Relevance of WhatsApp message

21.16 From the above discussion, I find that the aforesaid exchange through WhatsApp messages corroborates with the import consignment mentioned at sl. no. 3 of Annexure 'A' to the SCN, i.e. B/E No. 3820322 dated 16.11.2013 filed by M/s MMZ owing to the following reasons:

i) Bill of Entry filed by M/s MM Zaveri and appearing at Sl.No.3 of the Annexure 'A' to the SCN is the same which was conveyed through WhatsApp messages PK 8139, 9119 & 9120;

ii) M/s GStar Jewellers LLC, Dubai had issued invoice dated 14.11.2013 for USD 42,300 towards supply of 5.00 kgs of Natural Gold Ore Concentrates unrefined

Gold, wherein advance payment $ 21,750/- is mentioned and balance amount of $ 20,550/- was to be paid within 7 working days (messages at PK 6231,6371,6450, 7230 & 11090 also indicate the same)

iii) the quantity mentioned in the aforesaid invoice of M/s GStar and in the B/E was 5 Kgs. which were also found in the messages more particularly at P1K 6949, 7068, 7076, 7083, 7089, 7101, 7230, etc.

iv) In the messages at PK 6857, 6860 it was insisted that country of origin to be written as 'Ethiopia'. In the invoice and aforesaid B/E the country of origin is also 'Ethiopia'

v) the goods were described as Natural Gold Ore ras under CTH 26159010 in the B/E. I find the same as very much in line with the messages at PK 6445, 6541, 6546, 6550, 6560, 6566, 6572,ec. whereby Shri Sanjay Patel had insisted to Shri Sachin to mention so;

vi) The purity of goods as per Kaloti report conveyed through the message PK 6823 and 6826 was 74.5% whereas in the packing list dated 14.11.2013 of M/s GStar and furnished alongwith the aforesaid BE the purity mentioned was 74.51% and subsequently Shri Kartikey Vasanthbhaj Soni in his report dated 20.11.2013 had also confirmed the purity as 17.9 Kt. (74.9%);

vii) the said consignment was shipped via Emirates Airlines through M/s Transguard and the same were mentioned in the messages at PK 6124, 6296, 6205,6497,6798, 7230, etc.

21.17 Therefore, it is clearly established that the aforesaid messages were exchanged between Shri Sanjay Patel and Shri Sachin of GStar, Dubai; that goods were prepared by him as per the instruction of Shri Sanjay Patel through these WhatsApp messages and imported by M/s MMZ vide B/E No. 3820322 and all these descriptions are matching with each other in messages as well as B/ E. It is also clearly established beyond doubt that the aforesaid consignment of fake 'gold ore concentrate' was sent by M/s Gstar, Dubai. The reasons for preparing the 'gold ore concentrate' was clarified by Shri Sanjay Patel vide PK 6541 to 6572 i.e. the misdeclaration was done with intent not only to circumvent the RBI regulations but also to evade payment of appropriate customs duty. Therefore, I find that there is no basis to 'disown' these messages and the same is overwhelmingly corroborated.

21.18 Therefore, I hold that the consignment no. 3 imported vide B/E No. 3820322 dated 16.11.2013 is not naturally occurring "Gold Ore Concentrate" but 'man made gold nuggets' mixed with other metals, soil, cement, etc. classifiable under CTH 7108.

Consignment No. 4- B/E No. 3986187 dated 04.12.2013

22.1 This Bill of Entry is mentioned at sl. No. 4 of Annexure-A to the SCN. (hereinafter referred to as consignment no. 4)

22.2 Relevant messages are from PK 7941 dated 16 11 2013 onwards Regarding an enquiry by Shri Sachin, Sanjay Patel informed that the same was discussed over phone earlier but again repeated the formula viz, 'Gem + Red Cement + water + gold = gold ore concentrates' and for drying the same very low heat is required. Shri Sanjay Patel vide subsequent messages advised Shri Sachin to meticulously follow his instructions regarding selection of ingredients, its ratio and asked for trial of very small quantities so as to avoid last moment nervousness that would end up in derailment of entire plan, which ultimately may invite doubts' in the minds of Customs. He further cautioned that if they leave any weak point, they might be caught at any moment and would lose two-three years to solve a problem with Customs and hence it was advised to make perfectly the same kind of material at all times. Shri Sachin had informed that his friend had gone for collecting red colour cement and if the same was received, he would prepare demo by next day (17.11.2013). I find that Shri Sanjay Patel had repeatedly reminded not to waste time that would delay next shipment and further instructed the method of mixing geru+cement+water and its ratio and also to ensure that the gold purity is fixed at 75% approximately, so that the gold value would also be fixed; that thereafter he could steadily increase the quantity and could solve the problems on his own without calling Shri Sanjay Patel again and again (PK 8385 to 8390).

22.3 While referring to messages dated 17.11.2013 onwards, I find that Shri Sachin had started the 'preparation' of goods for next consignment; that upon seeing the images, Shri Sanjay Patel asked him to pour 25 ml water more in the small vessel and prepare the paste and also advised him to follow the instructions strictly. In between they had exchanged certain images as well. For evaporation, he had given option of different method viz., focus bulb of 100-200V, fan, keeping outside if it is sunny day or use of vacuum. To a suggestion, Shri Sanjay Patel told that since the hair drier was instantly available, it could be tried and he appreciated7or giving such idea (PK 8926). Further, while observing the images, Shri Sanjay Patel had advised to observe the changes after giving mild heat through gas burner (PK 8998 to 9004). Since the aforesaid experiment appeared to be satisfactory, Shri Sachin informed that next day he would continue with the same test and for that purpose, he would gather all the required materials viz., night lamp, big hair dryer, 3-4 big steel bowl, steel bucket, geru, etc. (PK 9013 to 9016). Regarding proposal to obtain geru from Kerala (PK 9016), Shri Sanjay Patel replied that he would arrange the same and accordingly sent 100 kg. geru (PK 9110). Subsequently, on 19.11.2013 Shri Sachin had sent the images and informed that the goods were ready and its weighment was 500 gms.

22.4 Shri Sanjay Patel on 20.11.2013 had asked Shri Sachin to immediately make another shipment of 2200 gms. (PK 9213 onwards) Subsequently, they had shared the information/documents required for submission in Bank for preparations of advance payment towards next consignment. On 26.11.2013, Shri Sachin asked to check the mail as he had already sent the proforma in letterpad and after making certain modifications Shri Sanjay Patel sent it back and further asked him to write Ethiopia as country of origin instead of Ghana, West Africa. On 29.11.2013, it was informed that an amount of Rs. 29,17,593 i.e. USD 46,500/- had been debited from the account. On 30.11.2013 Shri Sachin had sent an image and subsequently mentioned the ratio of different ingredients viz., Zinc 100gm, Copper 200gm, cadmium 5 gm, silver 30 gm. per kg. gold, for which Shri Sanjay Patel suggested to reduce the silver 1mg and instead advised to put palladium 1mg. I find he has repeated the final ratio once again; that for 2.2 kgs it was advised to calculate the ratio accordingly. Subsequently, certain images/messages were exchanged and advised to reduce copper, to which Shri Sachin replied in positive. On 01.12.2013, Shri Sanjay Patel suggested to add 'gold Ore Concentrate Grains' and in the bottom 'Alloy' in the Kaloti Certificate. In between they had again exchanged images of 'grains' and in order to gauge the size, he was asked to keep a pen beside to it and click the photo. Subsequently, after seeing the photo, Shri Sanjay Patel opined that it would have been better if little bigger size is available, however advised him to act fast and start working. It was further reminded that the goods required to be prepared were of 2200 gms and not of 2 kgs. and the bill should be prepared as per the material content, otherwise difficulties would arise at Customs. It was further informed that they should keep the total weight at 6200gms. instead of 6.250 kgs. but purity would remain 75.94% i.e. 18.23 Kt. Subsequently, they had exchanged the images of packing list, export covering letter, commercial invoice, etc. Shri Sachin had further informed that total metal weight was 2620 gms. Therefore, upon calculating the same, Shri Sanjay Patel informed that total purity would become 7.68kt. On 03.12.2013, Shri Sanjay Patel informed that he had mailed the documents and the import file was getting ready at. CHA's Office and was waiting for airw' bill. In the midnight of 03/04.12.2013, it was confirmed that the goods have been cleared by Dubai Customs and the Transguard would deliver Airway Bill in the morning. On 06.12.2013 it was informed that the goods have been released and the same reached Indore.

Corroboration of consignment No.4 with above WhatsApp messages:

22.5 At this juncture, I would like to refer the Bill of Entry No 3986187 dated 04.12.2013 appearing at Sl. No 4 of Annexure to the SCN and find that the description mentioned therein is matching witho4escription. For brevity, the same are discussed hereinbelow:

i) the quantity mentioned in the aforesaid Bill of Entry is the same which was conveyed through WhatsApp messages PK 9213 & 9215 whereby it was informed that he should prepare goods weighing 2200mg;

ii) In the invoice dated 02.12.2013 country of origin is mentioned as Ethiopia and advance payment received as US$ 46,500 and balance US $ 35030 to be paid within 7 working days which is matching with the messages Vide PK 11251 whereby it was informed that an amount of Rs. 29,17,593 i.e. USD 46,500/- was debited. Further vide PK 15168, it was confirmed that balance amount of US$35030 received.

iii) The total weight mentioned in the invoice was 6200gms. which is matching with the message at PK 12334 to 12337

iv) Similarly, purity was mentioned in the Kaloti report 75.94% i.e. 18.23 Kt. which is matching with the messages at PK 12340, 12342

v) BE was filed on 04.12.20 13 which is matching with messages at PK 12504, 12561, etc.

vi) The said goods were sent via Emirates Airline, through Transguard which is matching with many messages at PK 12606, 12617, 12655, 12701, 12763

22.6 In view thereof, it is established by way of corroborative evidences like in the case of consignment No. 3 that the goods prepared by M/s GStar as per the instruction of Shri Sanjay Patel through these WhatsApp messages and imported by M/s MM Zaveri vide B/E No. 3986187 dated 04.12.20 13 were the same and all these descriptions are perfectly matching to each other.

22.7 I, therefore, hold that the goods in question are man made gold nuggets and not the gold ore concentrates as declared by the importer.

<u>Consignment No. 1 & 2 - B/E No. 2723043 dated 16.07.2013 and B/E No. 3330689 and 20.09.2013.</u>

23.1 These Bills of Entry are mentioned at si. No. 1 and 2 of Annexure-A to the SCN. (hereinafter referred to as consignment nos. 1 & 2).

23.2 Further, I find that at WhatsApp messages PK 6539 & 6540 dated 12.11.2013 Shri Sanjay Patel had mentioned that he had cleared last three shipments in the same manner and a total 14 consignments during 2008 to 2013. More particularly, at message PK 6544 he has informed that the last consignment of 2500 gms. was cleared by him declaring it under 0TH 26169010. While referring to the Annexure A Sl.No.2 of SCN, I find that M/s MMZ had cleared a consignment of 2500 gms. of 'Gold Ore Concentrate' vide Bill of Entry No.3330689 dated 20.09.20 13 through Air Cargo Complex, Ahmedabad. The same was corroborated with the admission of different witnesses in their respective statements. It is pertinent to mention here that none of them retracted their statements and therefore, the same can be corroborated with each other and accordingly substantiate the allegations made in the SCN. Therefore, it is established beyond doubt that M/s MMZ had misdeclared the aforesaid consignment of 2500 gms gold appearing at sl. No. 2 of the Annexure to the SCN and evaded payment of higher rate of duty and also violated the RBI regulations. Similar i the case of consignment appearing at sl. No. 1 covered under Bill of Entry No. 2723043 dated 16.07.20 13. Besides, Shri Sanjay Patel in his statement dated 28/29.01.2014 had also specifically stated the import of two consignments in the months of July, 2013 and September, 2013 from Shri Hardik Patel of M/s. Shreeman Diamond and Jewellery PiE at Dubai by declaring it as Gold ore concentrate. Therefore, it is clearly established that these two consignments were pred' by M/s Shreeman Diamond and Jewellery FZE Dubai and exported to M/s. MMZ.

23.3 Therefore, I hold that the goods imported vide B/E No. 2723043 dated 16.07.2013 and B/E No. 3330689 and 20.09.2013 were also man-made gold nuggets mixed with other metals and soil, cement, etc. and not the gold ore concentrates.

<u>Other consignments</u>

24.1 The noticees have argued that the WhatsApp messages pertaining to consignment no. 3 and 4 even if considered true, cannot be made applicable to consignment at sl. no. 5 to 15.

24.2 The WhatsApp messages pertaining to consignment no. 3 and 4, as discussed above, clearly indicate that the goods imported were not gold ore concentrate but an artificial mixture of gold with other metals in soil, sand etc. The process of preparing such artificial mixture has already been elaborated and discussed in above paras. The subsequent WhatsApp messages therefore, do not cover the process of manufacture elaborately again and again. However, in the subsequent messages there are clear indications that the same process has been used to prepare subsequent consignments. I may mention that next 11 consignments have been imported into India during a short span of roughly about 40 days (from 14.12.13 to 23.01.14). Some of relevant messages are mentioned below:

Consignment No. 5 - B/E No. 4080363 dated 14.12.2013

24.3 The messages exchanged from 4.12.2013 onwards indicate that draft purchase order and draft proforma invoice is sent by Sanjay Patel to Sachin. <u>On 7.12.13 Sachin informs that he has 2500 grns. of pure gold of 82.5 touch and Sanjay Patel advices him to prepare gold mixture of 75% purity</u>. (PK 13429 to 13433) After exchanging further messages, on 12.12.13 Sanjay Patel informs Sachin that he has sent some money through Swift on 12.12.2013. These details match with the consignment no. 5 covered by BE No.4080363 dated 14.12.2013. The corresponding invoice dated 10.12.2013 indicates an advance remittance of USD 75,000. This matches with the message dated 10.12.13, where there is mention about some amount being sent through Swift as advance. The fact that it was clearly mentioned that the goods of 75% purity are to be prepared and that some quantity of gold was available with Sachin, clearly indicates that this consignment was also prepared in similar fashion as consignment no. 3 and 4.

Consignment no. 6 - B/E No. 4137896 dated 20. 12.2013

24.4 In messages dated 15.12.2013, it is mentioned that for getting 4 kgs. of pure gold, the consignment should be of about 11 to 12 kgs.(PK 14299 to 14302). Further an amount of USD 75,000 was transferred to Sachin on 16.12.13, which is duly acknowledged by him. Sanjay Patel also asks Sachin to confirm to the bank that he was to get USD161144 towards the export business and show the swift copy so that bank would release the payment. Certain documents are approved by Sanjay Patel after making changes on 18.12.13. On 18.12.13, In WhatsApp message PK 14776, Sachin informs Sanjay Patel that process on material is still going on. These details match with consignment no. 6, covered by B/E No. 4137896 dated 20.12.2013. This B/E has been filed on 20.12.13 and quantity declared is 11.875 kgs., which is between 11 to 12 kgs. as mentioned in the messages. Further, corresponding invoice no. MMZ/GSJ/CI-04 dated 18.12.2013 clearly indicates receipt of an advance payment of USD 75,000 against the total amount of USD 161144 for a quantity of 11.875 kgs.

We agree with the above arguments specifically corroborating the WhatsApp messages with these imports. The impugned order corroborates the said messages with other evidence and documents. The grounds of appeal do not challenge the detailed, almost message wise, corroboration reached by the impugned order. The challenge is very general. The appeal memorandum claimed that there were no such messages or there is no evidence that the said messages were acted upon. We find that the appellants have not challenged the recovery of cell phone under a panchnama and the recovery of messages under panchnama. Even otherwise the statement of Sanjay Patel also supports it. The appellants have not sough cross examination of Sanjay Patel. Cross examination of all persons whom they wanted to cross examine was granted under directions of Hon High Court. We find that the whatsApp messages are sufficiently corroborated and therefore relevant and admissible. The analysis of the messages shows that the messages were not only exchanged but the instructions were also executed.

5.6 The messages are further corroborated by the recovery of a cost sheet during search of the appellant's premises. The said cost sheet contains details as follows:

Sr. No.	Detail	Amount $
1	**Pure gold Bar (995) 1237 $ = $ 126619/FOR 0.995 KG 3.200 PURE GOLD**	**126619**
2	**Transguard $ 430 (5KGS) + 1 (over weight 5kg) $490**	**490**
3	**Kaloti Test Report $18**	**18**
4	**Silver Metal (for mixing) = $28**	**28**
5	**Melting charges & other metals used like zinc cadmium and copper = $ 140**	**140**
6	**Packing material = $15**	**15**
7.	**Cement + color = $ 2**	**2**
8	**RedSoil=$28**	**28**
9	**Total of Above=$ 126616 Gross**	**127340**
10	**Exporters Commission (0.5% of above) $ 633**	**637**
11	**Total = = $ 1272249**	**127977**
12	**Insurance (Door to Airport) = $ 19**	**19**
13	**Grand Total = 127268 $**	**127996**
14	**Rounded to = $ 127270 / 9,555 gms Ores & Concentrates**	**128000**

The said cost sheet shows the various materials that go into preparation of the fake gold ore. It was recovered from the appellants premises. This sheet clearly shows that fake gold ore was being manufactured. Thus the said cost sheet also corroborates the facts detailed in the WhatsApp messages.

5.7 Even before the Hon'ble High Court the appellants did not seek cross examination of Shri Sanjay Patel. After the directions of Hon High Court to cross examine the persons they wanted to cross examine, Shri Sanjay Patel denied the statement and the messages. No argument or evidence or reason was given in support of denial of statement or WhatsApp messages. It is not denied that the mobile phone and the whatsApp messages were recovered under a Panchnama. The appellants have not challenged the Panchnama at any stage nor have sought any cross examination of Panch witnesses. In these circumstances their challenge to the recovery of mobile phone and the WhatsApp messages is dismissed.

6. Revenue has placed reliance on the report of the Professor of IIT, Bombay. The appellants have sought to discredit the said report during cross examination of the author of the report. **We find that the comparison of the parameters of the imported material with the parameters of 'ores' do not influence the outcome of the case in any significant manner. Even if the goods imported by appellants answer to all physical/chemical parameters of 'ore' can they still be called 'Ore'. From the discussion above it is apparent that if the goods are not extracted from mines but are produced artificially the same cannot be classified or described as 'ores'.**

6.1 The Principal Commissioner has relied on the test report. **It needs to be noted that even if the test report showed that the samples answered to all the physical and chemical parameters of the 'ore', the sample cannot be called 'Ore' if it is not of natural origin.** The report reads as follows:-

(I) Chemical Analysis of Gold Metal

(a) A real gold nugget has a wax like yellow color, however, the present samples do not show waxy luster and show brighter yellow with pale pinkish shade.
(b) Real gold nugget usually posses pitted surface and signs of abrasive polishing. If the nugget is man-made from melted scrap gold pits and larger craters are usually, not seen and the surface would appear smooth with no pits/crater. The present sample of gold metal do not show pits or cavities/craters and have smooth surface.

(c) Natural gold nuggets posses a regular shape rather than highly irregular or varied shapes ranging from pear, round, elongated, flat and dendritic etc. Careful observation of the plate-1 of the present sample reveal that gold metals are mostly bulbed, tear drop or highly irregular very sharp edged, or elongated needle shaped features. The tear and bulbed shaped nuggets clearly show sharp pointed features indicating extracting out from melted concentrate, as high specific gravity of gold develops into tear drop with sharp pointed end on opposite side. Sharp pointed features are never observed in Natural Gold Nuggets.

(II) Soil Analysis

(A) The soil along with gold metals seems to be bind together using some cement. The type of cement used is not very clear at present.

(B) The chemical analysis and X-ray diffraction do not show presence of sulphide or arsenic minerals or oxide of these elements as they are commonly associated with gold.

(C) Surprising the present soil sample show absence of any clay minerals less that A d-spacing. **The soil seemed to have been partially heated or baked**.

During the cross-examination of Shri George Mathew, certain facts emerged. Learned Counsel for the appellant particularly relied on the question Nos. -5, 12, 21, 24, 29, 30, 33 and 34 of the cross-examination, as follows:-

"q.5. Are you doing research in regard to gold, or about other metals and minerals?
Ans. I do research on minerals, but not on gold.

q.12. Did you conduct all required tests and analysis personally, or any other persons were also involved in this work?
Ans. The chemical analysis and X-ray diffraction is done by the technical superintendent. The interpretation is done by me.

q.21 In this para-1 on page 1, you have reported that native gold usually contains more than 90% Au. But in the book titled "The Chemistry of gold extraction" by John O. Marsden and C. lain House and also in a paper published by SGS Minerals, it is reported that Au in native gold is more than 75%. So, therefore, is it correct to state that native gold must contain more than 90% Au.
Ans. The Au in native gold varies from 70% to 90%.

q.24. You have referred to LOI values and error percentage in "Chemical Analysis". Are these standards specified in any literature?
Ans. No LOl value is detected, and the error associated with trace elements is plus or minus 5%, and 2% in the case major elements.

q.29. All the five metal elements are usually found in naturally occurring gold ore or gold concentrate?
Ans. Not always all these elements may or may not be present.
q.30. In "soil sample" various chemicals and compounds have been mentioned. Are these chemicals/compounds found in the soil associated with the gold ore/ concentrate?
Ans. The chemicals /compounds found in a soil depend upon the source from where the soil is derived.
q.33 In this case, Au is reported as 79.73. If we apply the above formula then it would be 19.135 carat. Is this right?
Ans. Yes.

> **q.34** On page-5 of your report in para-2 contain observations about colour of gold nugget are recorded. Did you conduct any test like Spectrophotometer, and did you use an equipment like spectrometer for colour?
> **Ans**. No. It is only physical observation."

6.2 Learned Counsel argued that the report of Shri George Mathew cannot be relied on as Shri Mathew is not expert of gold. He relied on question No. 5 of the cross-examination which indicates that Shri Mathew has research in minerals and not in gold. We do not find any merit in the argument of the learned counsel as the term 'Mineral' covers gold ores also. Gold is a metal and gold ore is a mineral.

6.3 Learned Counsel also seeks to draw support from the fact that chemical examination was not done personally by the Professor but by the technical Superintendent. It is not necessary for the Professor to do the actual lab work by himself. He is only required to interpret the result of the tests done in the labs. Thus, we do not find merit in the argument of the learned Counsel to do lab test personally and discredit the report in any manner.

6.4 Learned counsel has produced evidence before the Professor which indicate that gold content in native gold is 70% to 90% to which the professor has agreed. This would indicate that the report of the Professor that "Native gold usually contains more than 90% Au" is discredited. In the cross-examination he has agreed that Au content in the native gold varies from 70% to 90%. The chemical analysis of the sample showed gold content 79.93% thus, it falls within the range in which the gold ore also falls. However, just because the sample contains gold in 70% to 90% it does not become "ore". If the same is produced in a workshop the same cannot be called an 'Ore' in terms of the HSN. Learned Counsel also relied on to the question Nos. 24, 29 and 30 to the cross-examination but they are not of much significance.

6.5 From the above, it is apparent that there is no minimum or maximum percentage specified for gold content in gold ore. Different literature may suggest different values, however, this fact has no significance in the present proceedings as term 'Ore' is defined in the tariff itself. The said definition does not contain any maximum or minimum value of metal or non-metal. Learned Counsel further raised the issue regarding use of word 'usually' at various places in the report of Professor at IIT, Bombay. It needs to be appreciated that 'Ore' is naturally occurring substance and therefore cannot be any specific parameter for 'Ore'. The composition of ore and contents of various materials in gold ore may vary from place to place and content to content. Therefore, the term 'usually' appearing in the report of the Professor of IIT is not incorrect and we need to appreciate that variation in the proportions of contents is noticed in naturally occurring minerals from place to place. The quality of composition of Ores cannot be standardized as they are naturally occurring substances. Moreover the tariff/HSN does not prescribe any minimum or maximum limit in the definition of 'Ore'.

6.6 Learned Counsel has also relied on the fact that observations regarding general appearance of colour of the sample was not made on the basis of any equipment but just by physical observation. Learned Counsel has sought to discredit the observations on that basis. It needs to be appreciated that Professor at IIT is the export in minerals and can be expected to know the characteristics by which the minerals are generally described.

6.7 The impugned order relies on the observations regarding the absence of pits or cavities/craters and have smooth surface of the gold metal found in the sample. It is seen that in the cross-examination the said observations regarding presence or absence of cavities/pits and regarding the smoothness of surface has not been challenged. Learned Counsel has pointed out the use of word usually in the report and it would indicate that such smoothness of surface can be found in the naturally obtained substance also. The report/result of report is as follows:-

1. ***Chemical Analysis of Gold Metal:***

The chemical analysis as shown in the table indicates that the gold metal contains 79 % Au, 17% CU and 0.11% Ag. This composition of the gold alloy indicates it to be 18 carat gold variety. About -1.6 wt% are non-soluble residues.

2. ***Gold metal morphology***

- A real gold nugget has a wax-like yellow color, however, the present samples do not show waixy luster and show brighter yellow with pale pinkish shade (plate I) .

- Natural gold nuggets typically contain plenty of quartz and other mineral and dirt trapped within. Real gold nugget usually posses pitted surface and signs of abrasive polishing. If the nugget is man-made from melted scrap gold pits and larger craters are usually not seen and the surface would appear smooth with no pits/craters. The present sample of gold metal do not show pits or cavities/craters and have a smooth surface. Since it does not have pits and cavities that usually natural gold nuggets posses, also do not contain other minerals trapped in it. SEM image at high resolution (plate 3) indicates absence of trapped minerals and show regular spiked (plate 4) features that are usually absent natural gold nuggets, as abrasion removes it.

Natural gold nuggets posses a regular shape rather than highly irregular or varied shapes ranging from pear, round, elongated, flat and dendritic etc. As the highly malleable gold in the nature during the process of erosion after removal from the host rock gets tumbled along with hard minerals. This makes the surface pitted and looses all its shape angularity. Careful observation of the Plate-I of the present sample reveal that gold metals are mostly bulbed, tear drop or highly irregular very sharp edged, or elongated needle shaped features. The tear and bulbed shaped nuggets clearly show sharp pointed loam arcs indicating extracted out from melted concentrate, as high specific gravity of gold develops into tear drop with sharp pointed end on opposite side. **Sharp pointed features are never observed in Natural Gold Nuggets.**

4. ***Soil Analysis***

> Chemical analysis of the soil as shown in the above table indicates that the soil is dominantly quartz bearing. The colour of the soil is largely due to iron. The soil is a silty (0.05—0.002 mm) variety of equal grain, size and less clayey. Seem to have been derived due to weathering of old crystalline rocks in the areas of low rainfall. The soil along with gold metals seems to be bind together using some cement. The type of cement used is not very clear at present.
>
> The chemical analysis and X-ray diffraction do not show presence of sulphide or arsenic minerals or oxide of these elements as they are commonly associated with gold. Erosion of the gold source area usually brings these minerals and elements enriched in the soil too.
>
> The powder X-ray diffraction indicates the soil contain kaolinite clay together with quartz and dolomite (MgCO3). Minor amount of hematite is also observed. Surprising the present soil sample show absence of any clay minerals less than 10 A d-spacing. The soil seemed to have been partially heated or baked,
>
> ***Based on above results and observation the sample given for analysis is not NATURALLY OCCURING. It contains man-made 18 carat GOLD NUGGETS mixed in red soil in the form of lumps.***
>
> ***Presence of the cement variety is not detected. However, the use of some form of cement is not ruled out.***
>
> ***The soil is reddish brown coloured soil, however, it cannot be concluded whether it is the Red-Indian soil (GERU).***
>
> ***Natural native gold nuggets usually have > 90 wt% Au. Presence of ~18% Cu in the sample seems to have been added or 18 carat gold or gold jewellery has been melted produce gold nuggets to show it as gold ore placer deposits.***

It is seen that in the above report of IIT Professor clearly states that Sharp pointed features are never observed in Natural Gold Nuggets. He has also pointed out that gold metal are bulbed, tear drop or highly irregular very sharp edged, or elongated needle shaped features. He also observed that the tear and bulbed shaped nuggets clearly shows sharp pointed features indicating extracted out from melted concentrate as high specific gravity of gold develops into tear drop with sharp pointed end on opposite side. This observation of the IIT Professor has not been challenged in the cross-examination by any question. It is seen that there is no use of word usually in the said observation and the word used is 'never'. This in fact corroborates the allegation that the goods were not of natural origin.

6.8 **<u>Moreover even if the goods imported correspond to all the defined physical/chemical parameters of 'Ores', the same cannot be called 'ore' if they are not naturally occurring material but are produced in a workshop.</u>**

7 The next issue relates to the Confiscation and imposition of Redemption fine. The confiscation has been ordered under section 111(d) and (m) of the Customs Act 1962. We uphold the confiscation. We find that Redemption fine of Rs 60 lakhs has been imposed on the goods of declared value of Rs 1.32 Crores. Considering the facts and circumstances of the case and the fact that duty evaded in this consignment is approximately 18 lakhs, we reduce the said fine to Rs 15 lakhs. The penalty of Rs 10 lakhs, imposed under 112(a) in respect of the confiscated consignment is also upheld

8 It has been argued that demand of differential duty is barred by limitation. He argued that the past consignments were assessed as "Natural Gold Ore Concentrate" and concessional rate of Customs duty, by classifying under CTH 26169020 was allowed by proper officer. They had submitted all requisite documents like purchase invoices, packing lists/air way bills, certificate of country of origin etc. and the goods were available before the customs officers and they could have ascertain the composition of the goods. He argued that samples were also taken by the Customs Officers. Learned Counsel submitted that classification and admissibility of exemption are questions of law involving interpretation therefore, no malafide can be attributed to the assessee in such case. It was also argued that earlier a similar issue was raised before the Customs and the Commissioner (Appeals) decided in appellant's favour in the said consignment, the goods were classified under CTH 26169010 and full exemption from CVD was granted by

virtue of Serial No. 5 of Notification No. 4/2006-CE. He argued that the said order-in-appeal has bearing on issues like the bonafide nature of our imports, assessment of consignments of gold ore concentrate by proper Customs Officers upon proper scrutiny and verification, irrelevance of WhatsApp messages and thus, wrong invocation of longer period of limitation in these proceedings.

8.1 We find that the WhatsApp messages clearly show that the previous consignments were produced in the workshop. It has been corroborated by the detailed analysis in the impugned order. It has also been corroborated by the recovery of document from appellants premises and also from the sample tested. The appellants had contended that the assessment of previous consignments was done after drawl of sample and therefore the assessment cannot be reopened by issue of this notice. While there is no clear evidence of drawl of samples in earlier consignments, we find that the same will not have any impact on the present proceedings. Samples may be drawn for testing or valuation. The actual composition of the sample has no relevance to the facts of the present case. **Even if the samples answered to all physical and chemical parameter of 'Ore', the same does not qualify to be 'ore' for the purpose of the Tariff or the notification.** As provided in HSN/Chapter notes and as discussed in Para 5 above, unless the material is of natural origin, and not subjected to any processes not normal to metallurgical industry the same cannot be called 'ore'. Taking of samples of previous consignment, if any, for chemical/physical testing or valuation purposes, does not help the case of the appellant, if the fact that the said goods were produced in a workshop by mixing gold, sand and other materials is suppressed. Thus the fact that samples were taken of earlier consignments or not, does not affect the outcome of this case. Even if those samples were taken and tested it might not have been possible to detect that the same were produced in a workshop and were not of natural origin. In view of the fact that an elaborate mechanism for hoodwinking Customs was devised by the appellant the intention to evade the customs duty cannot be doubted. Moreover we find that the issue in the said order of Commissioner (Appeals) referred in Para 8 above is very different and only technical in nature. It has no bearing on this case. This is a case involving fraudulent intentions and actions. In view of above the demand of duty and interest on past consignments is also upheld. The penalty under section 114A, of the Customs Act 1962, in respect of past consignments is also upheld.

9 A separate penalty of Rs 50 lakhs under section 114A, of the Customs Act 1962, has been imposed on Shri Sanjay Patel. Hon'ble High Court of Gujarat, in the case of *Jai Prakash Motwani - 2010(258) ELT 204 (Guj),* has held that when penalty has been imposed on the firm, separate penalty on partner cannot be imposed. Respectfully following the decision of Hon'ble High Court, the appeal of Shri Sanjay Patel is allowed.

10 The appeal of M/s Mulchand M Zaveri is partly allowed. The appeal of Sanjay Patel is allowed.

(Pronounced in the court on 05/12/2019)

(JUSTICE DILIP GUPTA)
PRESIDENT

(RAJU)
MEMBER (TECHNICAL)

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