

PUBLIC ACCOUNTS COMMITTEE
(1974-1975)

(FIFTH LOK SABHA)

HUNDRED AND SIXTY-SIXTH REPORT

**BAN ON TRADE WITH PORTUGAL
AND
B. O. A. C. GOLD SMUGGLING CASE**

[Paragraph No. 13 of the Report of the Comptroller & Auditor General of India for the year 1972-1973, Union Government (Civil), Revenue Receipts, Volume I, Indirect Taxes relating to Customs Receipts.]



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NEW DELHI**

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CONTENTS

	PAGE
COMPOSITION OF THE COMMITTEE	(iii)
INTRODUCTION	(v)
REPORT :	
(A) Imports from Portugal notwithstanding a ban on trade with that country	1
(B) B.O.A.C. Gold Smuggling case	16
APPENDICES	
I. Investigation in seizure of gold from B.O.A.C. Aircraft	60
II. Copy of order passed by Collector C.E. & C.	66
III. Appellate Order of the Board	80
IV. Opinion of Ministry of External Affairs	140
V. Record of discussion with Solicitor General of India	142
VI. Opinion of the Ministry of Law	146
VII. Affidavit filed by Director Revenue Intelligence	154
VIII. Writ Petition filed by Shri S.K. Srivastava Collector	166
VIII. (a) Extracts from Rejoinder affidavit filed by Shri S.K. Srivastava	175
IX. Summary of Conclusions/Recommendations	186
PART II — <i>ii</i>	
Minutes of the Sitzings of the Public Accounts Committee held on	
21-11-1974 (AN)	
10-12-1974 (AN)	
23-12-1974 (FN and AN)	
26-4-1974	

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PUBLIC ACCOUNTS COMMITTEE
(1974-75)

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SECRETARIAT

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Shri N. Sunder Rajan—Senior Financial Committee Officer

INTRODUCTION

1. The Chairman of the Public Accounts Committee, as authorised by the Committee, to present on their behalf this Hundred and Sixty-Sixth Report of the Public Accounts Committee on paragraph 13 (Imports from Portugal notwithstanding a ban on trade with that country) of the report of the Comptroller & Auditor General of India for the year 1972-73, Union Government (Civil), Revenue Receipts, Vol. I, Indirect Taxes, relating to Customs Receipts, and the BOAC Gold Smuggling Case, which the Committee examined as an off shoot of the Audit Paragraph.

2. The Report of the Comptroller and Auditor General of India for the year 1972-73—Union Government (Civil), Revenue Receipts, Vol. I Indirect Taxes was laid on the Table of the House on the 8th May, 1974. The Committee examined paragraph 13 of the Audit Report relating to Ban on trade with Portugal at their sittings held on the 10th December 1974 and the BOAC case on the 21st November (Afternoon) and 23rd December (Forenoon and Afternoon), 1974. This Report was considered and finalised by the Committee at their sitting held on the 26th April, 1975. Minutes of the sittings form Part *II of the Report.

3. A statement showing the summary of the main conclusions/recommendations of the Committee is appended to the Report (Appendix IX). For facility of reference these have been printed in thick type in the body of the Report.

4. The Committee place on record their appreciation of the assistance rendered to them in the examination of the Audit Report by the Comptroller & Auditor General of India.

5. The Committee would also like to express their thanks to the officers of the Ministries of Finance (Department of Revenue and Insurance) and Commerce (Chief Comptroller of Imports and Exports) and the Reserve Bank of India for the cooperation extended by them in giving information to the Committee.

NEW DELHI;

April, 26th, 1975.

Vaisakha 5, 1897 (S).

JYOTIRMOY BOSU,

Chairman,

Public Accounts Committee.

*Not printed (One cyclostyled copy laid on the Table of the House and five copies placed in the Parliament Library).

REPORT

Imports from Portugal Notwithstanding a Ban on trade with that country

Audit Paragraph

1.1. Government of India in a letter dated 6th December, 1966 addressed to all Collectors of Customs and Central Excise directed that pending issue of a formal notification under the Imports and Exports Control Act boycotting trade with Portugal, trade with Portugal should be stopped with immediate effect.

1.2. During the course of audit of Ship's files it was noticed that the vessel 'Tabor' arrived at a port in December 1966. The bills of entry in respect of import of goods valued at Rs. 78,146 shipped at Lisbon (Portugal) in November 1966, were filed with the Custom House and the goods were cleared on 21st and 23rd December, 1966.

1.3. The irregular clearance of goods notwithstanding a ban imposed by the Government of India was objected in audit. The Custom House, however, held that the executive instructions issued by the Government of India could not be regarded as a ban promulgated by the Government and since the order prohibiting the trade with Portugal was issued only in August, 1967 by the issue of Import Trade Control Order 9/67 (Public Notice 135/67), the clearance allowed in these cases was in order. The Custom House further contended that since valid licences were issued, action had to be taken by the Reserve Bank of India prohibiting remittance to Portugal and the question of Custom House informing the Reserve Bank would not arise. The Ministry in its reply stated that the Customs authorities had no jurisdiction for not allowing clearance and that responsibility for not allowing imports was with the Reserve Bank of India and not with the Custom House.

[Paragraph 13 of the Report of the Comptroller and Auditor General of India for the year 1972-73, Union Government (Civil).—Revenue Receipts—Volume I—Indirect Taxes]

1.4. The Committee desired to know the purpose for which instructions had been issued, in the letter dated 6th December 1966, to the Collectors of Customs and Central Excise to stop trade with Portugal with immediate effect. The Finance Secretary informed

the Committee during evidence that this was in connection with the resolution passed by the United Nations for boycotting trade with Portugal. The Committee enquired when the resolution was passed by the United Nations and the reasons for the delay, if any, in issuing instructions thereunder. The Chief Controller of Imports & Exports stated in a written note:

"The Resolution was passed by the United Nations in December 1965 boycotting the trade with Portugal. The decision to ban trade with Portugal by issue of executive instructions was taken, in consultation with the Ministry of External Affairs in November 1966. The Ministry of Commerce wrote a letter dated 24-11-1966 to the Ministry of Finance (Department of Revenue and Insurance) for issue of executive instructions to the Collector of Customs. That Department accordingly issued instructions to the Collector of Customs on 6-12-1966. The time-lag between the U. N. Resolution and the ultimate issue of executive instructions was mainly due to the fact that various aspects had to be taken into consideration by the Government before coming to the decision."

1.5. Since diplomatic relations between Portugal and India had been broken in 1961 and India had also had no direct relations with Portugal from 1955 onwards, the Committee desired to know why it had taken till 1966 to ban trade with Portugal. The Chairman, Central Board of Excise and Customs stated during evidence:

"Banning imports into this country and exports from this country is not one of the functions which falls within the purview of the Board of Revenue. That would be the function of the Ministry of Commerce in consultation with the Ministry of External Affairs. So far as the Customs Department is concerned, so long as a proper, valid import trade control licence is available to an importer to bring in goods and those goods are validly covered by it, the customs authorities will allow such imports. If such a licence does not exist or the licence by way of phraseology and other things does not quite correctly cover the goods, then, of course, the Collector will deal with the matter."

1.6. When asked whether any intimation had been sent by the Board to the Reserve Bank when the circular of December 1966 was issued, the witness replied that this was done by the Commerce

Ministry. To another question whether these instructions had been issued as a result of a Government decision, he replied:

"So far as the Customs Department is concerned, the order which really bans imports was dated 1st August 1967 and from that date it was automatically applied. Till then, the order that was issued was dated 6th December, 1966. I suppose copies of these orders are available with the Committee, but I shall read the relevant portion. It reads:

'In the context of the Resolution passed by the U.N. in January 1966, on boycotting trade with Portugal. . . . In the meantime, it has been decided to stop with immediate effect trade with Portugal by the issue of executive instructions'.

In paras 2 and 3, it gives the machinery, how this will be brought about. Para 2 says:

'It is felt that there should be no difficulty in disallowing the exports. . . '

—because, as you know, so far as export is concerned, unless on the shipping the exporter has the clearance and stamp from the Export Control Department, the customs would not pass it for export. So, it got effectively banned.

Para 3 gives the machinery for imports. It says:

'As regards imports, even though the licences might continue to be issued without specific endorsement to the effect that it is not valid for imports from Portugal, the Commerce Ministry have intimated that no imports will actually take place as the Reserve Bank has been advised to issue instructions to the authorised dealers in foreign exchange prohibiting remittances to Portugal.'

As a result of identical information received by us from the Commerce Ministry, the Ministry of Commerce also wrote to the Reserve Bank or the Economic Affairs Ministry. Para 3 very clearly lays down how this is to be done. That is to say, they have intimated that no imports will normally take place as the Reserve Bank is being advised to issue instructions to the authorised dealers in foreign exchange prohibiting remittances to Portugal, so that there was no question of our coming into the picture as such. As I explained, so long as an importer came forward

with a valid import trade control licence issued under the authority of the Government of India in the Ministry of Commerce, there was no possibility of anybody disallowing that import."

1.7. The Committee asked whether similar instructions had been simultaneously sent by the Ministry of Commerce to the other Departments including the Reserve Bank. The Chief Controller of Imports & Exports stated during evidence that the Ministry of Commerce had written to the Department of Economic Affairs as well as the Ministry of External Affairs on 24th November 1966. He added that the Department of Economic Affairs had been requested to issue instructions to the Reserve Bank.

1.8. The Controller of Exchange, Reserve Bank of India stated in this connection:

"The Economic Affairs Department consulted us in December 1966 saying that they wanted to bring about prohibition of imports from Portugal and that Government had already issued standing instructions to Collectors of Custom for disallowing imports from Portugal. This question was examined in the Reserve Bank and it was felt that so long as import licences continued to be issued and remained in circulation and these licences were valid for imports from the General Currency Area, which obviously included Portugal, the prohibition of remittances could not be brought about until a valid notification was issued under the Import and Export Trade Control Act. Our commercial banks have standing instructions from the Reserve Bank to strictly follow the terms stated in the import licences and so long as these licences were issued and were valid for imports from the General Currency Area, we could not disallow remittances for imports from Portugal. So, accordingly we advised Government to have a notification issued. Alternatively we suggested to the Economic Affairs Department issuing a direction to the Reserve Bank under section 25 of the Foreign Exchange Regulation Act, 1947."

He added:

"Then we received the notification only in August 1967. Thereafter, we issued the instructions to the Banks."

1.9. A written note furnished to the Committee by the Chief Controller of Imports and Exports, indicating the circumstances leading to the ban on trade with Portugal and the chronological sequence of events leading to the issue of the final notification in August, 1967 is reproduced below:

"In November, 1966, in the context of the Resolution passed by the United Nations in (December, 1965) (Resolution 2107 (xx) adopted on 21-12-1965), on boycotting trade with Portugal, the question whether the imposition of the ban on trade with Portugal should be by a formal notification under the Imports and Exports (Control) Act, 1947, or by the issue of executive instruction, was under consideration in the Ministry of Commerce, in consultation with the Ministry of External Affairs. Since the Government's intention was not to stop trade with Mozambique which was a Portuguese possession, it was decided to stop trade with Portugal by the issue of executive instructions. Accordingly, the Ministry of Commerce addressed the Central Board of Revenue, requesting them to suitably advise the Collectors of Customs to disallow export of uncontrolled commodities in Portugal. In respect of export of controlled commodities, suitable instructions were issued to licensing authorities not to allow such exports. Similarly, the Ministry of Finance (Department of Economic Affairs) was addressed by the Ministry of Commerce, requesting them to ask the Reserve Bank of India to issue a circular to the authorised dealers in foreign exchange, prohibiting remittance to Portugal, for import of any goods. Thus, by executive instructions, export to and import from Portugal was sought to be banned.

The above communications were addressed by the Ministry of Commerce on 24-11-1966. The Ministry of Finance (Department of Revenue and Insurance) issued executive instructions to all the Collectors of Customs on the 6th December, 1966, banning trade with Portugal, on the lines indicated above. On 24-12-1966, the Ministry of Finance (Department of Economic Affairs) wrote to the Ministry of Commerce that issue of a circular notification by the Reserve Bank of India to various dealers in foreign exchange stopping remittance to Portugal, might result in publicity and in view of this, they desired that the Ministry of External Affairs should be consulted, before the instructions were issued by the Reserve Bank of India, to the authorised dealers in foreign exchange. On 13-1-1967, the Ministry of Commerce addressed a letter to

the Ministry of External Affairs asking for clarification on the points raised by the Ministry of Finance (Department of Economic Affairs). An interim reply dated 9-2-1967 was received from the Ministry of External Affairs stating that the points raised by the Ministry of Finance (Department of Economic Affairs) were being examined. Another interim reply dated 18-2-1967 was also received from the Ministry of External Affairs.

On 14-3-1967, the Ministry of Finance (Department of Economic Affairs) wrote a letter to the Ministry of Commerce enclosing a copy of letter dated 24-2-1967 from the Reserve Bank of India wherein the Reserve Bank of India had explained their difficulties in issuing any secret instructions to various dealers in foreign exchange and their inability to issue instructions in the absence of a Government Notification banning trade with Portugal.

On 15-3-1967, a letter was addressed by the Chief Controller of Imports & Exports, to the Ministry of Finance (Department of Economic Affairs) stating that the matter had been carefully considered in consultation with the Ministry of External Affairs and the Ministry of Commerce and it had been decided that necessary instructions to various dealers in foreign exchange should be issued by the Reserve Bank of India, even though there might be some publicity as a result of issue of such instructions.

The Chief Controller of Imports & Exports wrote another letter on 15-3-1967 to the Ministry of Finance (Department of Revenue and Insurance) stating that the entire matter had been carefully considered, in consultation with the Ministry of External Affairs and the Ministry of Commerce and it had been decided that, in order to avoid any unnecessary publicity, the ban on exports to Portugal should not be enforced by issue of formal Import Trade Control Order, but should be done only through executive instructions. It was also made clear that the ban should apply only to Portugal and not to the Portuguese colonies.

On 1-4-1967, a letter was received by the Ministry of Commerce from the Ministry of Finance (Department of Revenue and Insurance) stating that there were certain inherent difficulties in enforcing ban on trade with Portugal by

executive instructions and they desired that the matter should be considered at a meeting of the Inter-Departmental Committee, to evolve some legal basis to enforce the ban on trade with Portugal. Accordingly, it was decided to convene an Inter-Departmental meeting to discuss the entire issue to come to a final decision.

In pursuance of the decision taken at the Inter-Departmental meeting, an Import Trade Control Order was issued on 1-8-1967, prohibiting import and export of all goods from or to any place in Portugal."

1.10. The Committee desired to know the relative functions of the Customs authorities, Chief Controller of Imports & Exports and the Reserve Bank of India on the imposition of a ban on imports. In a note furnished to the Committee, the Ministry of Finance (Department of Revenue & Insurance) stated:

"Imports into the country and exports from the country are controlled under the Imports and Exports (Control) Act, 1947 (as amended from time to time). This Act is administered by the Ministry of Commerce. Whenever the Government decides to prohibit import/export of any goods or class of goods, an order is issued in exercise of the powers conferred by the said Act. Thus the Ministry of Commerce have issued the Imports (Control) Order, 1955 and the Exports (Control) Order, 1968 (both as amended from time to time) by virtue of which, save as otherwise provided in the Order, no person shall import/export any goods of the description specified in the Schedule thereto, except under, and in accordance with a licence or a customs clearance permit granted by the Central Government or by an officer so authorised. The orders issued by the Ministry of Commerce, Office of the Chief Controller of Imports and Exports are published in the Gazette of India. There are also circulated to all their lower formations for bringing these to the notice of the trade as also to the concerned Departments.

Prohibitions on import have also been imposed under various other Acts such as the Arms Act, the Copyright Act, the Dangerous Drugs Act, the Destructive Insects and Pests Act, the Indian Explosives Act, the Foreign Exchange Regulation Act, etc. etc., which are administered by the

various Departments of the Government of India. Besides, there are prohibitions under the Customs Act, 1962 administered by this Ministry.

In so far as the Customs authorities are concerned, any prohibition imposed in terms of the Imports and Exports (Control) Act as also many other Acts, is deemed to be a prohibition under section 11 of the Customs Act, 1962. Any goods imported in contravention of the prohibition become liable to confiscation under section 111(d) and, the person concerned with the importation becomes liable to penalty under section 112 of the Customs Act, 1962.

The function of the Customs is to check at the time of clearance that the goods imported are properly covered by a valid import licence or exempted from the requirement of such a licence, failing which the goods and the persons concerned with the importation of the goods would become liable to be proceeded against.

The Reserve Bank of India's function is limited to restricting remittances in respect of goods whose import is banned. Ordinarily, whenever Government's orders banning imports from any particular country are issued, the Import Trade Control authorities do not issue fresh licences permitting import of goods from that country. In regard to licences already issued, authorised dealers in foreign exchange are instructed by the Reserve Bank of India not to enter into any transaction with any person, firm or company, involving remittances to the country concerned in respect of imports from that country, and to refer all applications for such remittances to Reserve Bank for approval. To the extent of irrevocable letters of credit already opened against such licences, remittances will have to be allowed by Reserve Bank. Authorised dealers are, however, prohibited from extending the validity of such letters of credit or enhancing their value. Where commitments have not already been entered into by authorised dealers, as in case of bills received on collection basis, remittances are ordinarily allowed if physical import of goods has already taken place i.e., if goods have allowed clearance by Customs. Where all remittances to the country concerned are required to be suspended, payments due to the exporters in that country, including those where contractual obligations or commitments have

already been entered into, are directed to be credited to non-resident blocked accounts in their names with banks in India."

1.11. Section 111 of the Customs Act lists out the types of goods that shall be liable to confiscation. Sub-section (d) thereunder provides—

"(d) any goods which are imported or attempted to be imported or are brought within the Indian Custom Waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force."

The persons who does any act as to render the goods brought by him liable to confiscation is also liable to penalty as provided in Section 112.

112. Any person—

- (a) 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 111, or abets the doing or omission of such an act, or;
- (b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reasons to believe are liable to confiscation under Section 111.

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 five times the value of the goods or one thousand rupees, whichever is the greater;
- (ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding five times the duty sought to be evaded on such goods or one thousand rupees, whichever is greater.

1.12. The Committee were informed by Audit that prior to the issue of the Notification dated 1st August 1967, there were five imports from Portugal valued at Rs. 1.31 lakhs and subsequent to the

Notification, there were six imports valued at Rs. 6.64 lakhs. While confiscation was done only in respect of two shipments cleared on 17th and 18th October 1967. One clearance of November 1967 was released on warning. Out of the two confiscations, one was set aside by the Madras High Court. In the other cases, no action was taken as the shipments were effected prior to the date of ban.

1.13. The Committee desired to know the reasons for allowing imports from Portugal after the issue of the circular on 6th December 1966. The Finance Secretary stated during evidence:

"Our entire stand is that the instructions that were issued on 6th December, 1966 were merely executive instructions."

1.14. Even if an import licence is issued, it is governed by the condition that nothing in the licence shall affect the application to any goods or any prohibition or regulation affecting the import thereof in force at the time when such goods are imported. When the attention of the Ministry was drawn by the Committee to this condition, the Chairman, Central Board of Excise and Customs stated during evidence that, in this context, the date of prohibition was 1st August 1967. The Finance Secretary added in this connection:

"This applies to the statutory order which would only mean No. 9/67 of August 1967. The orders of 6th December were mere executive instructions—the mechanism of enforcement by stopping remittances of foreign exchange. The remittance was made long before the goods were shipped and goods were shipped in November. I do not see how you can impose a ban in December on goods which were shipped in preceding November. The condition that you mentioned would become applicable when a formal order under the Import Trade Control Act was introduced and that was done only in August 1967. We have made this submission and you can have it checked up by any legal experts."

1.15. Import Trade Control Order No. 9 of 1967 dated 1st August 1967 reads as follows:

"Whereas there is no export to and import from Portugal and whereas it is considered necessary to continue the ban on export to and import from Portugal, now, therefore, in exercise of the powers conferred by section 3 of the Im-

port & Export Order, 1947, the Central Government hereby prohibits the import and export of all goods whether directly or indirectly into or from any part or place in India or from or to any place from Portugal."

1.16. The Committee desired to know the action the Collectors were expected to take on the basis of the instructions dated 6th December 1966. The Chairman, Central Board of Excise & Customs stated in evidence:

"Gist of the instructions is that Custom House does not come in for any action at all in this regard. That is what I am trying to say. Let us follow the language of these executive instructions. What is the result? Export always takes place before hand. It is upto the authority which is giving the export control licence, not to allow goods to leave the country. You were enquiring what is the effect so far as export is concerned, that effect is complete by executive instructions. It is for the Government to give export licence or not. So far as import is concerned the action has already taken place. Goods have already been imported in this country. The question arises how has this to be implemented? They (Commerce Ministry) have themselves treated this letter as 'top secret'. There can be no ban imposed by way of 'top secret' instructions. The intention was that so far as import from Portugal is concerned, Reserve Bank shall stop the remittances, imports will automatically stop. This is the sum and substance. You yourself will pull us up if there is valid import control trade licence issued by the Government of India, how do you ignore it. If we do something like that we may be drawn to the court. In fact, later on, after the ban had actually come, in a case where the order for goods had been placed before the ban came, the Court set aside the order of confiscation."

1.17. The Committee asked whether any exports had been permitted after 6th December 1966. The Chairman, Central Board of Excise and Customs stated during evidence:

"Collectors reported that no exports took place. If any Shipping Bill comes with the Export Trade Control permitting the export, Customs will have no jurisdiction to stop it. That is the submission I am making. The Controller of Imports and Commerce Ministry had sent instructions to these people—to the Controllers at various ports that they

should not give any export licence to export goods, I am making a very clear distinction between export and import. By the time import takes place, the act is complete. The goods have already come into this country. That is the difference. So far as the export is concerned, the action has to start. In this particular case, the instructions which were sent to us in March were 'Top Secret'. Can you impose ban on trade by 'Top Secret' instructions?"

1.18. Since the communication from the Ministry of Commerce was treated as 'top secret', the Committee asked whether the objectives sought to be achieved by the issue of 'top secret' instructions were actually achieved. The Chief Controller of Imports & Exports stated in a written reply:

"The idea behind the issue of the D.O. letter dated 24-11-1966 by the Ministry of Commerce to the Ministry of Finance (Department of Revenue and Insurance and the Department of Economic Affairs) was to ban the trade with Portugal by the issue of executive instructions. This was based on the advice of the Ministry of External Affairs who were the Ministry concerned with the international political relationship. Moreover, the decision was only to ban trade with Portugal and not with the Portuguese Possessions, like Mozambique. The objective sought to be achieved was that these executive instructions should be issued to all Collectors of Customs, authorised dealers in foreign exchange and the Reserve Bank of India for banning trade with Portugal, as the former controlled the import and export from and to India and the latter controlled the remittance from India. The communication dated 24-11-1966 was treated as secret and executive instructions were issued to the Customs and Reserve Bank of India. Thus, the objectives in view, by and large, were achieved."

1.19. The Committee enquired why a circular had been issued in December 1966 instead of a notification under the Imports and Exports (Control) Act, 1947. The Chief Controller of Imports & Exports stated in a written note:

"It was decided not to issue any Notification under the Imports and Exports (Control) Act, 1947, purely on political considerations and in order to avoid publicity."

1.20. In reply to another question whether the question of ban on trade with Portugal was considered at the time of announcement of the Import Policy for 1967-68, the Chief Controller of Imports & Exports stated in another written note:

"The import policy for 1967-68 was announced on 1-4-1967. The question of banning trade with Portugal or with any particular country was not considered at the time of announcement of policy, as it is not the practice to review trade relations with particular countries at the time of announcement of the annual import policy. The policy regarding trade relations with any particular country is taken as and when the occasion demands."

1.21. The Committee desired to know the steps taken by the licensing authorities, on receipt of the instructions dated 24th November 1966 from the Committee Ministry to ensure that no licences were issued either for import from or exports to Portugal. The Chief Controller of Imports & Exports stated in a written note furnished to the Committee:

"The question of taking any steps by the licensing authorities as a result of the executive instructions issued by the Ministry of Commerce in their letter dated 24-11-1966 did not arise, as the licensing authorities were to continue to issue import licences in the normal course, without indicating anything on the licence about the ban on trade with Portugal. As already indicated, the decision was to prohibit remittance of foreign exchange through authorised dealers in foreign exchange, by the issue of instructions to the Reserve Bank of India which would automatically prevent any import from Portugal. As regards prohibiting export of controlled commodities to Portugal, necessary instructions were issued by the Chief Controller of Imports & Exports to import and export trade control authorities at ports to disallow such exports. As regards exports of uncontrolled commodities, the customs authorities were advised not to allow such exports."

1.22. The Committee were informed by Audit that in the judgement of the Madras High Court in respect of the confiscation of goods imported after 1st August 1967, it was observed on the basis of the affidavit filed by the Controller of Foreign Exchange of the Reserve Bank of India that there was a clear indication by the Reserve Bank of India that no such instructions as contemplated in the circular of 6th December 1966 were actually issued by them till 6th September 1967.

1.23. The Committee note that a United Nations Resolution boycotting trade with Portugal was implemented by the Government of India by a formal notification only after a lapse of nearly twenty months. It is surprising that the Ministry of Commerce sought to accomplish a ban on trade with Portugal by the issue of 'top secret' instructions in order to avoid publicity.

1.24. The Committee find that even though the instructions had been issued by the Ministry of Commerce in November 1966, neither the Customs authorities nor the licensing authorities were expected to do anything positive to stop imports from Portugal. Admittedly, the licensing authorities were to continue to issue import licences in the normal course, without indicating anything on the licences about the ban on trade with Portugal. On the other hand, the Customs authorities had been informed that even though licences might continue to be issued without a specific endorsement to the effect that it was not valid for imports from Portugal, no imports would actually take place as the Reserve Bank had been advised to issue instructions to the authorised dealers in foreign exchange prohibiting remittances to Portugal. The Reserve Bank had, however, taken the view that so long as import licences continued to be issued and remained in circulation, and these licences were valid for imports from the General Currency Area, which included Portugal, the prohibition of remittances could not be brought about until a valid notification was issued under the Import and Export Trade Control Act, which was not done for 20 months.

1.25. The net result of all this is that, even after the issue of instructions by the Ministry of Commerce in November 1966, there was no effective ban on trade with Portugal and five imports valued at Rs. 1.31 lakhs had taken place. The Committee fail to understand, in these circumstances, the objective sought to be achieved by the issue of such executive instructions. If the intention was indeed to bring about an effective ban, the Committee feel that a proper notification should have been issued instead of executive instructions. That this was not done till August 1967 would indicate that a seriousness of purpose was totally lacking in implementing an international agreement, particularly when we ourselves were in conflict with Portugal on Goa issue. In the opinion of the Committee, this is most regrettable.

1.26. The Committee however, feel that the contention of the Ministry that the Reserve Bank should have stopped remittances and that the Customs had no responsibility in the matter is not tenable. If that be the view and if the Customs authorities were

not to take any action, there was no need for the issue of the instructions in December 1966. Further, the wording of the circular issued in pursuance of the UN Resolution imposing a ban on trade would indicate that this had been issued only pending a decision on the question whether the ban should be brought out through a formal notification. The Committee consider that this would tantamount to a de facto ban.

1.27. From the circumstances of the case, it would appear that Government had considered that ban by executive instructions would be sufficient and enforceable. Otherwise, the Committee are unable to understand the reason for the preamble to the Notification No. 9/67 dated 1st August, 1967 which states 'whereas there is no export to and import from Portugal, and whereas it is considered necessary to continue the ban on export to or import from Portugal, etc.' It would, therefore, be evident that the notification had been issued only in continuation of the executive instructions and that the ban was effective from December 1966 itself. If this was not so, the Committee see no valid reasons whatsoever for the delay in the issue of notification till August 1967, especially when Government had ample time from December 1966 before announcing the policy of import for 1967-68.

1.28. The Committee are, therefore, not at all satisfied with the manner in which the entire case has been handled. Since the decision to impose a ban had been taken in pursuance of an international resolution to which India had also been a signatory, the Government should have been more purposeful in their approach. The Committee can only sincerely hope that such instances will not recur in future and would urge Government to ensure that decisions affecting our international relations are given effect to with the utmost promptitude.

1.29. The Committee also note that in the case of one import from Portugal that took place after 1st August 1967, the goods had been released on a mere warning. When the provisions of Sections 111 and 112 are amply clear in this regard and a valid ban by notification was also in force on the day the consignment touched Indian shores, the reasons for this special treatment in this case give rise to serious suspicion. The Committee desire that the circumstances leading to the release of goods on warning should be investigated into immediately with a view to ensuring that no mala fides are involved and responsibility fixed. The Committee would await a further report in this regard.

(B) The B.O.A.C. Gold Smuggling Case

2.1. As an offshoot of the Audit paragraph on imports from Portugal notwithstanding a ban on trade with that country, the Committee also decided to examine what has come to be popularly known as the 'BOAC Gold Smuggling Case', in which considerable gold carried by aircraft of the British Overseas Airways Corporation in transit through Delhi to Hongkong had been seized and confiscated by the Collector of Central Excise, Delhi for violation of the conditions of a Reserve Bank of India Notification dated 8th November, 1962 which lays down the conditions for bringing bullion into India. The final destination of one of the two consignments of gold, which was of South African origin, was Macao, a Portuguese Colony. The gold and the aircraft seized by an adjudicating order of the Collector of Customs could be redeemed on payment of a redemption fine. The case had been taken up on appeal by the Central Board of Excise and Customs and the Board of Appeal had quashed the orders of the Collector. The case had also attracted considerable attention both in the press and Parliament.

2.2. In view of both the South African and Portuguese angles to the case and considering the fact that there was a possibility of smuggling of gold into India through Macao, the Committee decided to examine the case in detail, even though the incident had occurred fairly a long time back, in 1967. The examination by the Committee of the various official witnesses and documents in this regard is contained in the succeeding paragraphs.

2.3. The Committee suggested that a brief account of the whole episode beginning from the discovery of the gold might be given by the officials. The Chairman Board of Excise and Customs stated during evidence:

"The facts briefly are like this. The BOAC Aircraft Boeing 707 started from London via Frankfurt-Teheran and arrived at Palam Airport on 14th September 1967 at about 10.30 in the morning. In the normal course, it took off for Bangkok at about 11.20 and returned and relanded at Palam Airport once again at 1.30 P.M. That was on the 14th September. On the 15th, there was a request from BOAC for off loading two Consignments of gold which were on the aircraft and put them under security arrangement. At that stage the concerned officer saw the manifest and in that manifest it was described as metal or

metal bars. But when the consignment notes covering these consignments were also inspected, he found that there they had described the goods as gold. Thereafter, this question became a subject matter of adjudication. The Collector of Central Excise, who has jurisdiction over Palam Airport, had asked the concerned authorities to investigate it. The Director of Revenue Intelligence had made some investigation which he placed before the Collector for adjudication purposes. The Collector adjudicated the case and imposed a fine of approximately Rs. 25 lakhs in lieu of confiscation of the gold. In addition, he also imposed a penalty of Rs. 5 lakhs on M/s. BOAC. He also confiscated the aeroplane which was carrying these consignment and related it on payment of a fine of Rs. 10 lakhs in lieu of confiscation. Thereafter the matter came up in appeal before the CBE&C. There were two appeals from the consignors and one from M/s. BOAC. The Board examined various export witnesses and went into great detail. They did it in a very elaborate manner. As a result of that, they allowed amendment of the manifest, holding that, when they said metal bar or metal instead of gold, there was nothing sinister about it and there was no intention to smuggle gold into India."

2.4. The Committee asked under what rule the Board had permitted amendment of the manifest. The witness replied that it was an amendment of the manifest under Section 30(3) of the Customs Act which reads as follows:

"If the proper officer is satisfied that the import manifest or import report is in any way incorrect or incomplete, and that there was no fraudulent intention, he may permit it to be amended or supplemented."

2.5. In reply to another question whether there was an application to the proper officer for the amendment of the manifest, the Chairman, Central Board of Excise and Customs stated during evidence:

"This is also mentioned in the Board's orders. There was an application and it was oral. Every detail has been given. The crux of the position is that, our regulations require that when gold is being carried through India, but is only in transit, it should be specifically declared as such. Gold is carried through various countries and countries allow

permission for transit. But, we have, in the case of gold, laid down that it must be, even in transit, specifically declared as such, when you say it should be declared as gold. Now, the entire question is this. BOAC declared it as metal or/metal bar and they went into in greater length, explaining why they said so. They said that this was because of security reasons, because if they openly declared it as gold, there were chances of its being falling into wrong hands and dacoity being committed and so on."

2.6. The Committee desired to know whether the BOAC authorities had declared the gold *suo moto* before they approached the Customs Officers at Delhi for protection. The witness stated:

"Declaration is supposed to be made in the manifest and that is how it was declared. In the manifest, it was written metal 'V' and that is metal bar or metal. These are the explanations which came forward after the case started."

The Committee asked whether metal 'V' did not mean white metal or platinum. The witness stated.

"I am not very much aware of this. As far as we are aware, the intention was that any metal which is valuable and which is liable to theft etc. is described as such."

2.7. Since it had been stated by the Chairman, Central Board of Excise and Customs that the Director of Revenue Intelligence had made some investigations into the case which had been placed before the Collector for adjudication purposes, the Committee called for a copy of the Investigation Report of the Director of Revenue Intelligence, which is reproduced in Appendix I. The main conclusions of the Director of Revenue Intelligence were as follows:

"Since... the gold is held to have been imported into India in contravention of the prohibition under the F.E. Regulations, its export out of India even in the shape of transshipment would require the permission of the Reserve Bank of India. The export of the seized gold without such permission would be banned under Section 8(2) of the F.E.R. Act. If the Adjudicating Officer decides that the gold should be allowed to be taken to Hong Kong (in transit to Macao) he should impose the condition that the permission would be accorded on production of permission of the Reserve Bank of India.

Since, in view of the foregoing reasons, it appears that the gold has made liable to confiscation on account of an act of M/s. BOAC, viz. the non-declaration of gold in the manifest, they alone should be liable to personal penalty under Section 112(1) of the Customs Act, 1962. There appears to be no justification for imposing penalty on any other person under the section.

In the aforesaid circumstances, the aircraft is to be held to have been used in the transport of gold liable to confiscation. The aircraft, therefore, appears to be liable to confiscation under Section 115(2) of the Customs Act, 1962.

Before the gold was detected the aircraft had taken off from Palam for its next destination, Bangkok. An attempt to export the gold without the permission of the RBI appears therefore to have been made. The gold therefore is liable to confiscation under Section 113(d) of the Customs Act, 1962, and M/s. BOAC are liable to penalty under Section 114 of the Customs Act, 1962.

2.8. The then Director of Revenue Intelligence, who had conducted the investigations, was also examined by the Committee. The Committee asked him to furnish the details of the investigation conducted by him and the results. The witness stated during evidence:

"The seizures were effected when I was in Allahabad. The gold was still in the process of seizure when I arrived at Palam aerodrome from Allahabad. I saw the gold and I found that it had markings which showed that it was of South African origin. We felt that since it was of South African origin, it had to be confiscated eventually because as our knowledge went at that time, there was an absolute ban even on transit of goods of South African origin through India. Then when we were examining, other things also came into the picture. There was another aspect; and it was whether the gold had been manifested or not; because, according to the Foreign Exchange (Regulations) Act, if the gold is not manifested and it passes through India, it would be liable to be confiscated and treated as being imported into India without an import permit from the Reserve Bank of India. We proceeded on this basis. In the course of the investigations, some

statements were recorded by the officers of the Collectorate of Central Excise, Delhi. A few statements were recorded by the officers of the Directorate of Revenue Intelligence but the division of work was particularly such that all the investigations would be done by the Excise officers and that the Directorate of Revenue Intelligence will try to gather information which was likely to be collected from abroad. One of the things to be found out was this, viz. who was the actual consignee. It appeared that it was stated in some documents that the consignment as to go only to Hong Kong; but from some other documents it appeared that the consignment had eventually to go to Macao. Again, according to our knowledge there was at that time an absolute ban on any export to or import from any Portuguese colony, which was treated as Portugal. Macao was treated as Portugal, since Portugal had claimed that all its colonies should be treated, not as colonies, but as Portugal. Only goods which were imported into India could be allowed to go out of India, to Portugal. Our attention was then invited to the original notification regarding the ban on the transit of goods of South African origin, as amended. According to the amended Notification, it was felt that we could not use it. According to certain clarifications received from the Ministry of External Affairs, we had only to see whether the goods had been manifested. The Collector of Central Excise had held that it was not so. The matter went on appeal and the Board had held that the goods were not manifested, but that it was an omission on account of inadvertence and that there were no *mala fides*. That is the situation; and, therefore, the amendments was allowed; and it was held that the goods were manifested and the order of confiscation was revoked."

2.9. The Committee desired to know whether any request had been made by the witness to the Board to permit him to proceed to London or any other place for finding out the true ownership of the gold flown by the BOAC aircraft to Macao and whether he had been permitted to do so. The Director of Revenue Intelligence stated during the evidence:

"At the initial stage, such a request was made but it was not considered necessary to do so because some co-operation which was expected to come did not come forth."

2.10. In reply to a question whether, during his tenure as Director of Revenue Intelligence, he was aware that gold was being flown by the BOAC aircraft regularly from London to Hong Kong and Macao, the witness stated that some statistics had been collected in this case and would be supplied.

2.11. Under a notification issued by the Reserve Bank of India on 8-11-1962, bringing of bullion into India will not be permitted unless two conditions are satisfied. The two conditions are:

- (a) The gold is not removed from the ship or other conveyance except for the purpose of transshipment; and
- (b) it is declared in the manifest for transit as same bottom cargo or as transshipment cargo.

1.12. This notification was issued by the Reserve Bank of India under section 8(1) of the Foreign Exchange Regulations Act, and this came in for judicial scrutiny by the Supreme Court in the case of 'State of Maharashtra vs. M. H. George' (1965 SC 722). The Supreme Court held that the ban imposed in the Reserve Bank of India notification created an absolute liability and even if a person had no knowledge of the provisions of the notifications, he would still be liable because in the case of absolute liability, intention or knowledge which were the essential ingredients of *mens rea*, were not to be imported. That is, if some one contravenes this notification it would be no defence for him to say that he had no intention of violating the notification; nor that he had no knowledge of the notification. It is enough if he transgresses the provisions of the notification to be made liable under the Foreign Exchange Regulations Act.

2.13. The Committee asked what steps had been taken by him to see that the carriage of the gold fulfilled the conditions prescribed in the Reserve Bank of India Notification. The witness replied:

"After investigation of the case, the whole matter was referred to the Collector of Central Excise, Delhi and it was he who had to see whether the conditions had been complied with. The Director of Revenue Intelligence had no hand in the matter."

2.14. The Committee desired to know whether, when the appeal was heard by the Board against the Collector's order, he had been

allowed to represent his case freely without any pressure of fear.

The witness stated:

"I think so, I represented the case freely and without any pressure. I do not think my witness was pressurised by the Board. I do not feel any member of the Board had put any pressure on me regarding this case."

2.15. In reply to questions whether, during the investigations, he had sought any instructions of guidance from the members of the Board and, if so, who were the members and what were the instructions given, the witness stated:

"I was expected in the initial stage to submit my reports about the progress of the investigations. These reports were submitted to Shri T. C. Seth and Shri Jasjit Singh, the present Chairman. Most of the time I was reporting to them and it was not a question of any guidance from them."

2.16. The Committee asked the witness whether he had filed any affidavit in the High Court alleging pressures and coercion by members of the Board against him resulting in his transfer from the post of Director of Revenue Intelligence. The witness replied that no affidavit was filed by him.

2.17. Copies of the Collector of Central Excise, Delhi, who had adjudicated the BOAC Gold Smuggling case and the Board of Appeal furnished by the Ministry of Finance (Department of Revenue & Insurance), at the instance of the Committee, are reproduced in Appendices II and III.

2.18. The Collector of Central Excise, Delhi held the adjudication proceedings in February 1968 and passed an order on 15th February 1968 confirmed the seizure of gold by confiscation. He further ordered that the confiscated gold might be redeemed on payment of a redemption fine of Rs. 25 lakhs for the first consignment destined for Macao and Rs. 25,000 for the second consignment bound for Okinawa. The main grounds on which the gold was confiscated were:

- (a) The ban imposed by the Reserve Bank of India notification was absolute as had been held by the Supreme Court and there was a failure on the part of the BOAC in complying with the notification.

- (b) This failure could not be attributed to a mere clerical error, nor could it be deemed to be a technical irregularity because in his opinion there was a fraudulent intention to keep away from the knowledge of the Customs authorities in India that gold was being carried in the aircraft. In support of this finding he cited the Traffic Manual of BOAC in which special instructions were given that wherever gold of South Africa origin was to be routed through India, it should be specifically mentioned as 'gold' and not 'metal' or 'metal V', except wherever consignments of negligible value were involved when they could be carried provided they were stowed out of sight.
- (c) This was not the first instance where gold was being carried like this. There had been a regular traffic of such gold disguised as 'metal' or 'metal V' previous to September 1967 and that between April and August 1967, 5382 kilos of gold described as metal or metal bar were carried through India.

2.19. The Board of Appeal consisted of the Chairman, Central Board of Excise and Customs, Member (Customs) and the Member (Central Excise). The hearing of the appeal was taken up in August 1968 and the hearings were concluded on 3rd March 1969. By the appellate order issued on 3rd March 1969, the order of the Collector was quashed mainly on the following grounds:

- (a) The Supreme Court case (in M. H. George's case) was distinguishable from the present one because in the former case the gold carried on the person of M. H. George was not shown in the manifest at all whereas in the latter case i.e. BOAC's case, the gold was manifested though incorrectly and incompletely as metal. This incorrect and incomplete manifestation was not on account of any fraudulent intention but was the result of a clerical error arising from the switching over of writing up of manifest by computers from 1965. As gold carried by BOAC throughout the world was described as 'metal' or 'metal V' and as the persons who fed the computer with the key punch card would not be in a position to know that the aircraft was going through India, they naturally did not take care to correct the description in accordance with the Traffic Manual.
- (b) Since there was no fraudulent intention, the manifest could be corrected under section 30(3) of the Customs Act

and such correction could relate back to the date of presentation of the manifest.

- (c) There was in fact a request for such a correction, though oral, which request was unjustifiably refused by the Customs authorities.

2.20. The Committee enquired as to whom an appeal against the orders of the Collector lay. The Chairman, Central Board of Excise and Customs stated during evidence:

"The appeal lies, under the Act, to the Board as such. So far as the Board is concerned, various members are allotted various duties. At present, one of the members is Member (Appeal) who hears appeals. At that stage there was no such duty allotted to any particular member; Member (Customs) heard customs appeals, Member (Excise) heard excise appeals and so on. It was not defined preciously. The distribution of work among the members was approved by the Minister and that become the final decision. In important cases, it was open to the Board to sit not as one member but more than one member and hear it wholly or partly."

2.21. In reply to another question as to in how many cases more than one member of the Board heard the appeal, the witness stated:

"I do not remember in how many cases we did it but I distinctly remember that in the Bird and Company case it was done. Whether there was any other case in which it was done, I do not recollect."

2.22. The Committee asked whether there was no appellate authority about the Board. The Chairman, Central Board of Excise and Customs replied that there was a revision authority and that the revision order against the Board lay to the Government.

2.23. Explaining, at the instance of the Committee the reasons for the appeal having been heard by a panel of three members, the Finance Secretary stated during evidence:

"I shall read out the then Chairman, Central Board's noting. It starts:

"This refers to the group of appeals filed in the BOAC case. Naturally, appeals are heard and decided by only one

member of the Board. However, considering the importance of the case and the publicity it has received, it will be desirable if this group of appeals is heard and decided by more than one member. I, therefore, propose to constitute a panel consisting of Member (Customs), Member (Central Excise) and myself as the appellate authority for the purposes of this case.

In this connection, my note on page 4 and 5 and the note overleaf might kindly be seen. To avoid any legal objection later on, the papers are submitted for the formal approval of Deputy Prime Minister for considering this case by the enlarged panel as proposed above'.

It is signed by Shri D. P. Anand on 7-6-1968. Below that is the endorsement of the then Finance Secretary—

"I am in agreement with 'A'."

The portion sidelines 'A' is—

'I, therefore, propose to constitute a panel consisting of Member, Customs, Member Central Excise and myself as the appellate authority for purposes of this case'.

A panel is to be preferred to hearing by one Member for obvious reasons.

It was signed by Shri T. P. Singh on 7th June. Below that is the endorsement of the Deputy Prime Minister Shri Morarji Desai on 10th June."

2.24. Subsequently in a written note, the Ministry of Finance (Department of Revenue & Insurance) informed the Committee that apart from the BOAC case, benches of the Board had been constituted in two groups of cases, the Bird & Co. cases and cases which 'can be loosely described as rags cases'.

2.25. The Committee desired to know the reasons given in the adjudicating order of the Collector for confiscation of the gold and the aircraft. The Chairman, Central Board of Excise and Customs stated during evidence:

"The grounds on which the Collectorate confiscated the gold were as follows: Under Section 8(1) of FERA read with relevant notification, bring or sending of gold into India

is prohibited except when the same is covered by the general or special permission of the Reserve Bank. For this purpose, even goods in transit are deemed to be goods brought into India. The Reserve Bank has, however, by notification No. 208/62-RB dated 8-11-1962 given general permission to the transit of gold through India provided that *inter alia* it is declared in the manifest for transit as the same bottom cargo or transshipment cargo. According to the Collector, the two consignments of gold in question were in transit through India. Since, however, they were not declared in the manifest as gold, but were declared as metal bar or gold, they were not covered under the general permission of the Reserve Bank; accordingly, the importation on those consignments was considered unauthorised by the Collector."

2.26. In reply to questions on the quantity of gold brought by this particular firm and its value, the witness stated that the quantity was about 12—18 kilograms and its value would be about Rs. 2 crores calculated at the market price and above Rs. 1 crore at international prices.

2.27. The Committee desired to know the names of the consignor and consignee of the gold and whether they were inter-connected. The Chairman, Central Board of Excise and Customs stated that the consignor was M s. Mocatta and Goldsmid Limited, London, who were authorised dealers of the Bank of England, and that one consignment of the gold was consigned to M/s. Commercial Investment Co., Hongkong for onward transmission to M/s. Companhia de Desenvolvimento Commercial, Meca. The witness also confirmed that Mocatta and Goldsmith, London held 40 per cent of the shares of the Hongkong firm.

2.28. The Committee desired to know the description on the gold bars. The Chairman, Central Board of Excise and Customs stated during evidence:

"Para 9 of the Board's order says:

"The aircraft was carrying two consignments of gold, totally weighing 1018.599 K.G. and valued approximately at Rs. 1.03 crores at the international rate. Twenty-four packages containing 96 bars weighing 120.899 K.G. consigned by Mokata Goldsmith, London to Messrs Commercial Investment Co., Hongkong for onward transmission to... (the Portuguese & Co.), each babore

bare a serial number as also the name of the South Africa refinery, the Rand Refinery Ltd.'

It continues:

"The fineness of the gold, .9951, was marked on each bar. Each bar also bore the inscription Mokata Goldsmith, London, Bullion Brokers'."

2.29. The Finance Secretary stated in this connection that there was also another package containing ten bars of gold weighing 10 kgs. consigned by the Bank of Novascotia, Toronto, to a bank in Okinawa, Japan.

2.30. Since the gold was of South African origin, the Committee desired to know whether it could be permitted to pass through India having regard to the ban on trade with South Africa. The Chairman, Central Board of Excise and Customs stated:

"That point was gone into at the earlier stages; and the advice given was that the ban would not be attracted, because the ban is not against the goods of South African origin; but the Notification talks about goods coming from South Africa'. In this case, the gold had already been purchased by the Bank of England. It was lying with them. They had certified that the gold was later sold to Mokata."

2.31. Since there was an indication of the country of origin, viz. South Africa, on the gold, the Committee desired to know whether it should not have been treated as coming from South Africa. The witness stated:

"No. It would then mean that the goods of South African origin were banned; but the Notification, as framed, does not justify that interpretation."

2.32. In reply to a question in this connection whether there was not, therefore, a loophole in the notification, the witness replied:

"It was so from the Customs' angle, but not from the revenue angle. Goods come from all countries. Because there is a ban in regard to South Africa, they do not come from there; otherwise they would come."

2.33. The Committee desired to know whether any advice had been sought by the Board on this point and, if so, from whom and

on what points the advice had been sought. The Ministry of Finance (Department of Revenue & Insurance) informed the Committee in a written note:

"The Director of Revenue Intelligence, on his own had sent a note to the Ministry of Law for advice and the Joint Secretary, Ministry of Law had made certain observations by the side of the note. One of the points raised by the Director of Revenue Intelligence was regarding Notification 135—CUS of 3-10-64. The observation made by the Joint Secretary, Law was 'prohibition under Notification 135-CUS of 3-10-64 could be applicable subject to proof by Customs that the gold was exported from South Africa to Macau via U.K. and that no intermediate acquisition by ownership of that gold in U.K. by anyone'. Independently of the Ministry of Law's advice this question was examined by the Board also in its appellate order."

2.34. The Committee pointed out that there was a preferential tariff for goods from Commonwealth countries and in this case the criteria of the 'country of origin had to be applied. The Chairman, Central Board of Excise and Customs stated during evidence:

"You are quite correct; but for that purpose, the important thing is the country of origin. You cannot give preferential treatment to something whose country of origin is somewhere else, but which is despatched from England. The preferential tariff will not apply there. Rules are there to determine the countries of origin which will get preferential treatment."

He added:

"They will have definitely to certify that the goods have as their origin, the country which claims preference. There are well-laid-down rules in this regard. Here, it is decided on political grounds that imports from South Africa will not get preference."

2.35. The Committee desired to know whether with the notification, as it stands at present, Government had been able to enforce complete economic blockade by banning goods from and those made in South Africa. The Ministry of Finance (Department of Revenue and Insurance) stated in a note furnished to the Committee:

"The Board in its appellate order had taken the view that the Notification in regard to imports of goods from South Africa prohibited imports only in respect of goods coming from South Africa and since the gold carried by B.O.A.C. had been purchased by the Bank of England and since goods of South African origin were not banned, that Notification would not apply in this case. With regard to Commonwealth Preferential Tariff, the country of origin criteria have to be applied and these are governed by U.K. India Trade Agreement Rules relating to rules of origin. As far as goods coming from South Africa is concerned, the ban was being enforced."

2.36. The Committee enquired as to how it was ensured that countries with which there is a trade ban or for which higher rates of duty have been prescribed do not make use of the preference given to imports from Commonwealth countries and arrange for their goods to be carried to India from these countries so as to circumvent the ban or pay lesser rates of duty. The Ministry of Finance (Department of Revenue & Insurance) stated in another note:

"As regards preference to imports from Commonwealth countries, Customs Authorities insist on a certificate of origin from the supplier or the manufacturer. In doubtful cases they can call for any further evidence to satisfy themselves about the origin of the goods. In the case of trade ban also, where there is doubt that the goods are coming from a country with which there is a trade ban, they can call for evidence to satisfy themselves that the goods are not coming from such a country."

2.37. Since the gold was consigned to Macao, the Committee desired to know whether it was in order to permit this export from India to a Portuguese territory. The Finance Secretary stated in evidence:

"It might be of interest to the Committee to know what was the view of the then Solicitor General, the present Attorney General on this particular point. Certain discussions had taken place and I am reading from a note. It says—

"The second question discussed with the Solicitor General related to the provisions of the Imports and Exports (Control) Act, 1947. Section 2 of the said Act provides

that "Import" and "Export" means respectively bringing into and taking out of India by Sea, land or air. Section 3(1) of the Act empowers the Central Government *inter alia* to prohibit and restrict:

- (a) the import, export, carriage coast-wise or shipment as ship stores of goods of any specified description;
- (b) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried.

In exercise of the powers conferred by Section 3 of the said Act, the Central Government by order 9/67 dated 1st August 1967 prohibited the import and export of all goods, whether directly or indirectly into or from any port or place in India, from or to any place in Portugal.

Two questions arose for consideration:

- (i) whether order 9/67 was issued in terms of clause (a) of sub-section 1 of the Section 3 of the Imports and Exports (Control) Act, or could it be taken also to have been issued in terms of clause (b) of the said section?
- (ii) whether the scope of clause (a) was wide enough to include the situations contemplated by clause (b) and if so, whether as a natural corollary, the words 'import' and 'export' would include bringing into India in the manner as described in clause (b) i.e. bringing into India of goods intended to be taken out of India without being removed from the conveyance? On the first point the Solicitor General was of the view that order 9/67 was clearly issued under clause (a) and not under clause (b)'. It related to export and export directly and not to goods in transit.

Now, I will come to the other point. After having carefully considered both the points of view and also having gone through the definitions of 'import' and 'export' in the Imports and Exports Control Act 1947, the Customs Act 1962... The Foreign Exchange Regulation Act, 1947, the Arms Act and the Dangerous Drugs Act, the

Solicitor General was of the opinion that the provisions of clause (a) were not wide enough to include situations covered by clause (b) and further that the expressions 'import' and 'export' as used in clause (a) would not include bringing into India in the manner described in clause (b). The opinion of the Solicitor General was based on two considerations:

- (a) The fact that the legislature had made a separate provision for entry of goods into India which were only in transit and which were to be taken out of India in the same vessel or aircraft or other conveyance shows that such bringing into India was not covered by the term 'import'.
- (b) Wherever the legislature intended that such entry of goods into India as aforesaid was to be included within the connotation of the word 'import' it has expressly stated so (for example Explanation to Section 8(1) of the F.E.R. Act and Section 2(i) of the Dangerous Drugs Act 1930 etc.). In the absence of any such provision in the Imports & Exports (Control) Act 1947, the normal presumption would be that for the purposes of the said Act, the term 'import' does not include bringing into India of goods in transit intended to be taken out of India without being removed from the conveyance.

I think this opinion of the Solicitor General knocks the bottom completely out of the case for the application of this Notification 9/67 to this particular transaction is concerned."

2.38. Explaining the position further, the Chairman, Central Board of Excise and Customs stated:

"The notification reads as follows:

'Whereas there is export to and import from Portugal and whereas it is considered necessary to issue a ban on exports to and imports from Portugal, now, therefore, in exercise of the powers conferred by section 3 of the Imports and Exports Control Act, 1947 (18 of 47), the Central Government hereby prohibits the import and export of all goods, whether directly or indirectly, into or through any port or place in India from or to any place in Portugal'.

In the BOAC case, the ultimate destination of one of the consignments was shown as Macao. Two points arose for consideration. The first point was whether Macao could be considered as part of Portugal. If you kindly see the notification, it says 'from or to any place in Portugal'.

The External Affairs Ministry was consulted in this regard. The Ministry of External Affairs informed us that on account of the large volume of our trade with Mozambique and other Portuguese colonies in Africa, it was not considered expedient to include these territories within the scope of this ban. However, they did not consider the question of Macao as a distinct unit because we had no direct trade with Macao. Nevertheless, the Ministry of External Affairs felt that any interpretation that ban on trade with Portugal includes ban on trade with Macao will, to some extent, imply conceding the Portuguese thesis that Macao is a part of Portugal. Further, the issue of an order at this stage may not help because that order would not have any retrospective effect. There was nothing categorical one way or the other in what they said. The second is a legal question, which is more important."

2.39. The Committee asked whether the first question, namely whether Macao could be considered as part of Portugal, had been referred to the Solicitor General. The witness stated that this had not been referred because the Ministry of External Affairs themselves were not categorical one way or the other. When the Committee pointed out that that was all the more a reason for seeking the advice of the Solicitor General on this point, the witness stated:

"That second categorical interpretation of the notification given by the Solicitor General clinched the issue. So, this question went into the background.

On the second question, the Solicitor General observed that section 3 of the Imports and Exports Control Act has two clauses, (a) and (b).

Section 3(1) of the Act empowers the Central Government *inter alia*, to prohibit and restrict (a) the import, export, carriage coastwise or shipments as ship stores of goods of any specified description, and (b) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship of conveyance in which they are being carried. These are the two clauses. The Solicitor

General expressed the view that the Legislature had made a separate provision for entry of goods into India which were only in transit and which were to be taken in the same vessel or by other conveyance."

2.40. A copy of the opinion furnished by the Ministry of External Affairs in this regard made available to the Committee by the Ministry of Finance (Department of Revenue and Insurance) is reproduced in Appendix IV. A copy of the Record of Discussion with the Solicitor General also furnished to the Committee by the Ministry is reproduced in Appendix V.

2.41. The Committee desired to know whether the Portuguese angle and UN resolution to ban trade with Portugal had been taken into account by the appellate board. The Member (Customs) stated:

"The Appellate Order is supposed to discuss the issues which have been taken by the Collector for confiscation. The Appellate Order cannot discuss new issues. This is only in appeal against the order of the Collector. The order of the Collector was not based on this particular notification. Therefore, the appeal to order did not discuss it."

2.42. Since the appellate Board permitted the manifest of the aircraft to be corrected retrospectively, the Committee asked whether any application had been made by BOAC for correction of the manifest. The Chairman, Central of Excise and Customs stated that what had gone on record was that there was an oral request made. When the Committee asked as to what stage the oral request had been made by the BOAC, the witness stated:

"I would refer to Issue No. 6, page 34 of the Board's Order—Appellate Order—paragraph 44:

"The next point which falls for our consideration is whether on the basis of the evidence on record it can be stated that a request for amendment of the manifest was made and if so at what stage. The rival contentions on this point have already been summarised in paras 27 and 33 above. There is no dispute that under Section 30(3) of the Customs Act no procedure is provided, there is no form of the application and there is also no period of limitation within which the request for amendment has to be made. In fact, it is common ground that a request for amendment of the manifest may be in writing of

oral. Shri S. N. Karkhanis, the Assistant Collector of Customs, Incharge at Palam in reply to a specific question, "Do you accept verbal applications or request for amendment of the manifest" has stated: "In some cases we do accept." He has, however, further added that in that case it is not in the form of a query and "it is allowed on the regular request which is followed by a subsequent action for amending the manifest." During the arguments, the D.R.I. conceded that the application could be made orally but he argued that at least the person to whom the application is made should know that such an application has been made. It is, therefore, necessary to recount the evidence in this regard, in some detail.

Shri Santhanam had stated in his affidavit—

'At approximate 1645 on 15th September I asked the Customs Inspector Mr. Ramachandran for transshipment facility. He asked to see the consignment note which was duly produced to him. When he examined the consignment note he noticed that it had been incorrectly manifested i.e. described as "metal" and not "gold" on the cargo manifest. He stated that he would have to bring this to to notice of his Assistant Collector. I explained to him that this was clearly an error and that I would make an application to make an amendment to the manifest and would pay the usual amendment fee. The Inspector refused to accept the application until he had discussed the matter with the Assistant Collector. I went along with him to the Assistant Collector's office and explained to the Assistant Collector why it was desirable for us to manifest the shipment as metal and that this was a BOAC Regulation to ensure safeguarding. I showed him the relevant instructions in cargo Manual Regulations on safeguarding and also pointed out that the description of the goods on the consignment note was in fact correct. He appreciated my explanation but regretted he could not do anything until he referred the matter to higher authorities as the amount of gold was of a huge quantity and according to him we had violated the laws of the land'.

The Order continues—

'In his oral statement before us, Shri Santhanam stated that he told Shri Ramachandran that the incomplete descrip-

of the manifest was purely due to error and that he be allowed to amend the manifest. This request was not accepted. During the cross-examination Shri Santhanam was asked a question, "Did you make any request for amendment of the manifest to the Collector?" Shri Santhanam replied—"No. In this case the Assistant Collector did not refuse my request. All that he said was that he would consult higher authorities. But thereafter the whole thing exploded and the things moved on so rapidly that I could not even coherently think about the course of action. My Manager being new was not very well conversant with these things."

Shri Karkhanis has stated—

'I scrutinised the manifest and found that it was not declared. Mr. Santhanam at that time also said that "What can be done with regard to amending of the manifest?" He was told that at this point of time the gold was liable to confiscation and nothing can be done'.

During his cross-examination we put a specific question to Shri Karkhanis, "Did Mr. Santhanam request you that he should be allowed to amend the manifest?" The reply of Shri Karkhanis was "At that point of time he did say, Well, why can't we amend the manifest?" I told him that at this point of time the gold was liable for confiscation. Another question put to Shri Karkhanis was "Did he tell you that there seems to be a mistake in the manifest and that it is properly declared in the consignment notes and, therefore, please amend the manifest?" The answer given was, "No, he did say, why can't we amend the manifest." Again in reply to another question, Shri Karkhanis stated: "He told me as far as I remember not in the office but at the counter that this is their practice to describe gold as 'metal' and why can't he amend the manifest." Shri Ramachandran, the Air Customs Inspector on duty at Palam, at the relevant time, stated before us: "I told Mr. Santhanam that our Notification on the subject was very clear and that the gold which was being transisted through India should be declared as gold and by not other term. Since the gold was not mentioned as gold in the manifest, the same was liable to confiscation. Then, Mr. Santhanam thought over a while and asked what could be done and whether I would permit amendment of the manifest. I told him that the question did not arise at that stage.'

However, in answer to a specific question, "Was any application made to you for permission to amend the manifest?" Shri Ramachandran replied, "No, Sir." He was further asked, "Was any such application made in your presence to the Assistant Collector orally or in writing?" The answer was "Not to my knowledge." When Shri Ramachandran was asked "We thought an oral request was made by Mr. Santhanam", the reply was "Mr. Santhanam said what could be done; if the manifest could be amended. I said no." Again, the question put to him was "So you did not take it as an application." He gave the answer "No, Sir. It was a casual query; not an application." A specific question was put to Shri Ramachandran whether he asked Shri Santhanam to make any application in writing. Shri Ramachandran replied "No, I did not, since he only made a query." The answers to two other questions are also relevant. Question—"You mentioned that for the first time it was at about 3 O'clock that Mr. Santhanam asked you whether amendment could be permitted. Is it so?"

Answer: "That is so Sir."

Question: "You told him that it could not be permitted."

Answer: "Yes, Sir."

46. In the reply to the show-cause notice, BOAC stated in sub-para (4) of para 17—19 "When the error was discovered Mr. Santhanam BOAC's Acting Airport Manager did verbally request permission to make such an amendment to the Manifest." In the end of their reply they have further stated: "The bonafides of the respondent, however, are absolutely evident and, therefore, it is requested that as requested by Mr. Santhanam, already the manifest may be allowed to be corrected so as to conform strictly to the Regulations." We also find that during the personal hearing before the Collector they had again made a specific request for permission to get the manifest suitably amended under Section 30(3) of the Customs Act. During the hearing, they also invited attention to the request made verbally by Shri Santhanam to Palam Customs and the request made in their reply to the show-cause notice. In fact, in his order, the Collector while summing up the defence of BOAC has observed that one of the points taken by them was—

"The gold and aircraft were not liable to confiscation simply because of inadequate description of the 'gold' as 'meal V' or 'metal bar V' in the manifest. BOAC should have been given the benefit of Section 30(3) of Customs Act, 1962, the gold being in transit as same bottom cargo, they should have been allowed to amend the manifest as requested by their Airport Manager, Shri K. Santhanam. They requested release of the gold and the aircraft after amending the manifests suitably."

The finding of the Collector in this regard is—

"I also do not accept their contention that at best the case could be treated as a case of incomplete manifestation or insufficient description without any fraudulent intention. I reject their plea that the case should be treated as a case falling under sub-clause (3) of Section 30 of the Customs Act, 1962 and amendment to the manifest be allowed."

47. From the aforesaid evidence, it appears to us that a representative of BOAC has asked for the amendment of the manifest but the same was not permitted because the officers on the spot seemed to have taken the view that since gold had not been declared as gold but as metal or metal bar, the same was liable to confiscation and, as such, amendment of the manifest could not be permitted. We consider that the request made by the representative of BOAC was not a mere query but an oral request for the amendment of the manifest. In any case, a request in writing was made in their reply to the show-cause notice as well as during the personal hearing before the collector. The Collector has specifically rejected the request in his order. We, therefore, hold that a request for amendment of the manifest in terms of Section 30 (3) of the Customs Act was made by BOAC as soon as the mistake was noticed and also at relevant subsequent stages."

2.43. The Committee asked whether any advice of the Ministry of Law had been obtained in this case. The Chairman, Central Board of Excise and Customs stated that the Joint Secretary, Ministry of Law had made various comments on a note of the Director of Revenue Intelligence raising various legal issues connected with the case. A copy of the note recorded by the Director of Revenue Intelligence in this regard along with the comments of the Joint Secretary, Ministry of Law, furnished to the Committee by the Ministry of Finance (Department of Revenue and Insurance) is reproduced in Appendix VI.

2.44. The Committee desired to know whether the Attorney General had been consulted on this case. The Chairman, Central Board of Excise and Customs stated during evidence:

"The Attorney General's advice was sought through the Law Ministry. A reference was made to the Attorney General through the Law Ministry. The Attorney General said that the matter was already before the Board. Therefore, he refused to give his opinion in this matter."

2.45. The Collector, in paragraphs 29 and 30 of his adjudication order, had pointed out that this was not the first instance when gold was being carried like this and that between April and August, 1967, 5,382 kgs. of gold, described as 'metal V' and 'Metal bar V' had been transported from London to Hongkong through India. The Collector, in his order, had observed as follows:

"It is significant that M/s. BOAC have been transporting large quantities of gold from London through India to Hongkong under the guise of 'Metal V' or 'Metal Bar V'. Hongkong is a vulnerable spot in the East for smuggling of gold as well as other commodities. Details of six consignments so transited from London to Hongkong via India during five months from April to August, 1967 are given below:

Date	Airway Bill No.	Description	Quantity (in Kgs.)
5-4-67	061-3582955	V-Metal	1,076
20-4-67	061-3582980	V-Metal	617
1-6-67	061-4861023	V-Metal	1,229
17-6-67	061-4861112	V-Metal	617
29-6-67	061-4861136	V-Metal	1,226
27-8-67	061-4861157	V-Metal Bar	167
			<hr/> 5,382

Transport of over 5,000 kgs. of gold valued at over Rs. 10 crores in a short period of 5 months from London to Hongkong via India describing it as 'V-Metal' or 'V-Metal Bar'. is quite significant. Shipments of gold through India under the guise of 'Metal' have been facilitated by M/s. BOAC."

2.46. The Committee pointed out that this was, therefore, not the first occasion that BOAC was carrying gold through India and asked whether the Board was aware of this fact. The Chairman, Central Board of Excise and Customs stated that gold had been carried previously. The Committee asked whether the Customs authorities were aware that it was gold. The witness stated:

"I do not know whether they had come across that much gold or seen gold consignments being carried through this country. It was never their intention to stop transit once they are declared as gold."

2.47. In reply to an observation of the Committee that it was a fact that the gold went from South Africa or London or from South Africa via London to Macao or Hongkong and that it was possible that it had been sent to Macao with the sole object of being smuggled back into India ultimately, the witness stated:

"I would only give the position as it is. If they had declared clearly as gold, it could come in open daylight. It is not a question whether it comes back or not nor anybody can go into it. Nobody has the authority to presume that this will go to Macao and will come back."

He added:

"I am only trying to put across the situation as it is available under the law. The Government itself has stated. Otherwise, the law would have been that you just will not allow any transit of gold through India and it will become liable to confiscation. The position is very simple."

2.48. When the Committee pointed out that that was precisely the reason why gold had been described as 'metal V' in the manifest, the witness stated:

"I would not comment on that. I would only refer you to what the Board has stated in their very lengthy order. They have discussed everything so that you can draw your own conclusions. So, they came to the conclusion that this was not fraudulent. Therefore, they allowed amendment of the manifest and they have discussed in their order why they are doing so. They also took into consideration the fact that the consignment notes themselves covering this, which were available when the BOAC made their request, did mention it as gold. So, the penalty

imposed on BOAC and aircraft etc. was revoked and this gold was allowed to go to its destination. That is the sum and substance of this case."

2.49. The Committee asked whether BOAC had been suspected of carrying on this business earlier also. The Chairman, Central Board of Excise and Customs stated that while cases in regard to individuals had come to light, he would not be able to say as such whether cases had come to light particularly in regard to BOAC. When the Committee pointed out that this case had ramifications involving BOAC also, the witness stated:

"I cannot say one way or the other. I am prepared to accept, this must be so. When you are saying, it must be so."

He added subsequently that there were BOAC people who had come to notice from time to time.

2.50. In a subsequent note furnished, at the instance of the Committee in this regard, the Ministry of Finance (Department of Revenue & Insurance) stated:

"The Collector in his adjudication order has referred to six previous instances wherein gold weighing in aggregate 5382 kilos and valued at over Rs. 10 crores was carried by BOAC through India. There is no other material readily available in this regard."

2.51. The Committee also desired to know whether, before this seizure in 1967, there was any other occasion when the BOAC or any employee of BOAC was found carrying contraband gold and, if so, the action taken on such cases. The Ministry of Finance (Department of Revenue & Insurance) stated in a note furnished to the Committee:

"In 1959, the Calcutta Customs apprehended one Miss Jenni @ Jenni Wong on arrival at Dum Dum Airport from Hongkong and 16 tolas of gold were recovered from her. On the same night Calcutta Customs also apprehended on D. C. Furlonger, a flight steward of BOAC on arrival at Dum Dum Airport and recovered from his person 170 tolas of gold valued at Rs. 17,000/-. The gold recovered from both the persons was confiscated. They were prosecuted and convicted to fines of Rs. 1,500/- and Rs. 3,000/- in default to R.I. for two months and three months

respectively. A flight engineer of BOAC and 15 kilograms of gold was recovered from his person. The gold was absolutely confiscated and the accused was sentenced to 6 months' R.I.

Investigations in the case of Furlonger revealed that he was acting as a carrier for a Hongkong smuggling syndicate. During the contemporaneous period the BOAC security staff in collaboration with Hongkong police seized in Hongkong from the premises of the Ring Leaders of the said syndicate certain documents disclosing the complicity of certain BOAC crew in smuggling activities. Investigations were pursued by the Director of Revenue Intelligence and the security staff of the BOAC rendered valuable assistance in these investigations. The BOAC management initiated disciplinary proceedings and eventually dismissed 90 of their employees."

2.52. Since the BOAC Traffic Manual specifically provides for declaring gold carried through India as such in the manifest, the Committee desired to know whether such 'clerical errors' of declaring the gold as 'Metal V' or 'Metal Bar' had come to notice in respect of transport of gold on earlier occasions also or whether the gold had been declared in the manifest as 'gold' only, in accordance with the provisions of the Traffic Manual. The Ministry of Finance (Department of Revenue and Insurance) stated in a written note:

"The Board in its appellate order has observed that prior to November, 1965 when the computerisation was introduced for the first time, gold was being carried by BOAC through India by declaring it as gold whereas after this period the gold has been taken through India by declaring it either as metal or metal bar and that the mistake occurred primarily due to the system obtaining after computerisation."

2.53. The Committee asked whether BOAC was the only foreign carrier found to have indulged in carrying gold either through or across India or whether any other carriers were also found to have indulged in similar transactions. The Ministry of Finance (Department of Revenue & Insurance) stated in a note:

"Complete details of the instances when other carriers carried gold through India are not available. A statement showing the particulars of gold and metal in transit manifested from March, 1967 to August, 1967 and carried through Palam is, however, available in the appellate record of the Board."

In this connection, the following particulars were furnished to the Committee:

Date	Name of Air Company	Flight No.	Description of goods	Quantity in kgs	Destination	Coming from
7-4-67	K.L.M.	K.L. 863	Gold	2	KTM	Karachi
10-4-67	Air France	A.F. 195	Metal	3	PNH	Bangkok
27-4-67	K.L.M.	K.L. 863	Fine Gold	1	KTM	Amsterdam.
19-5-67	K. L. M.	K. L. 863	Gold Bars	2	KTM	Karachi

2.54. The Committee desired to know the grounds on which the appeal had been allowed by the Board. The Chairman, Central Board of Excise and Customs stated:

"I will read out Annexure II in this connection.

Grounds on which the Central Board of Excise and Customs released the gold

The Board agreed with the Collector that the declaration of gold in the manifest as 'metal bar' or 'metal' did not fully meet the requirements of the Reserve Bank's Notification of 8-11-62. The Board, however, did not agree with the Collector that this was a case where amendment under Section 30(3) of the Customs Act should not be allowed. On consideration of the various legal authorities including decisions of the Supreme Court and the Privy Council, the Board observed that when the manifest is in any way incorrect or incomplete and a request for amendment of the manifest is made under Section 30(3) of the Customs Act, the proper officer has to satisfy himself that there was no fraudulent intention, but once he is satisfied that there was no manifest unless he has good grounds for holding to the contrary. In this case, on a detailed examination of the evidence, the Board came to the conclusion that there was no fraudulent intention involved in the preparation of the manifest in question; nor was there any wilful neglect or disregard of the Indian Regulations on the subject of the mistake. There were clear instructions in the Traffic Manual of BOAC that for security reasons gold

should be declared as 'metal', these instructions also stated that in so far as India was concerned this practice was not permitted for gold in transit. As such, it could not be said that the management of BOAC did not bother about the Indian Regulations on the subject. According to the Board, the mistake of declaring gold as 'metal' or 'metal bar' in the manifest started as a result of the factors essentially arising from the introduction of the computer system in November, 1965. The Board observed that the finding of the Collector that the intention of BOAC was to conceal from Indian Customs the fact that they were transmitting gold through India was not borne out by evidence. There was also no evidence on record before the Collector on which he could base his findings that the incorrect entry in the manifest was not innocent, that the violation was wilful and deliberate, and that the case could not be treated as a case of incomplete entry or insufficient description in the manifest without any fraudulent intention. The Board did not find that there was any wilful suppression of facts by BOAC or that there was any intention to deceive or to defraud the Customs. The Board also gave a categorical finding that there was no intention nor was any attempt made to smuggle the gold from the aircraft while the same was in India. It also did not find any collusion between the consignors and the BOAC. Further, as held by the Collector, the goods were only in transit through India and this fact was indicated in the manifest. The Airway Bill Nos. were also mentioned in the manifest and in the Airway Bills gold was correctly described as gold. These Airway Bills accompanied the consignments and were open to inspection by Customs, if they so desired. In these circumstances, the Board held that there being no good ground for refusing amendment of the manifest under Section 39(3) of the Customs Act, the same could not be refused under the law. It is to be noted that the BOAC themselves had disclosed the content of gold on the morrow of the grounding of the aircraft asking for special protection. The Board accordingly allowed amendment of the manifest, set aside the order of the Collector and released the two consignments for being in transit to Hongkong."

2.55. The Committee asked whether, apart from the Customs Act, there was not a violation of the Foreign Exchange Act also in this case, and, if so, why no action had been taken by the Directorate of Foreign Exchange. The Ministry of Finance (Department of Revenue & Insurance) stated in a written note furnished to the Committee:

"The contravention alleged was of the prohibition imposed under Section 8(1) of the Foreign Exchange Regulation Act which in terms of Section 23A of the Foreign Exchange Regulation Act was deemed to be a prohibition under the Customs Act and all the provisions of the Customs Act applied as if the prohibition was imposed under the Customs Act itself. The Directorate of Enforcement did not have jurisdiction to impose a penalty."

2.56. In reply to another question whether it was not a fact that if BOAC had not been allowed to amend the manifest they would not have been let off, the Ministry of Finance (Department of Revenue and Insurance) stated in a note:

"The Board in its appellate order has observed that the declaration as metal or metal bar was not a sufficient compliance with the Reserve Bank's Notification of 8-11-62 and therefore if the manifest was not allowed to be amended, there might have been a contravention of Section 8(1) of the Foreign Exchange Regulation Act. The Solicitor General was, however, not sure whether the declaration as metal or metal bar was not a sufficient compliance of the aforesaid Notification."

2.57. The Committee asked if the plea of misdeclaration in the manifest put forth by BOAC constitute an error within the meaning of Section 30 of the Act and whether it was a fact that the Board themselves had entertained a doubt as to the applicability of Section 30 in this case. The Ministry of Finance (Department of Revenue and Insurance) stated in a note:

"The Board in its appellate order did not express any categorical opinion whether the description in the manifest was incorrect or incomplete, but a reading of the order of the Board as a whole appears to show that the Board considered it as a case of incomplete description in the manifest. There is nothing to indicate that the Board entertained any doubt as to the applicability of Section 30 in

this case. It appears that considering the importance of the issue, this question was referred to the Attorney General for opinion who declined to give any advice because the Board was acting as a quasijudicial authority."

2.58. The Committee desired to know whether it was a fact that the British High Commissioner had intervened in the matter prior to adjudication. The Chairman, Central Board of Excise and Customs stated in evidence that he was not aware that the High Commissioner had intervened, but that there was a letter that this may be expedited. The Committee desired to be furnished with a copy of this letter and other letters, if any, from the High Commissioner. The Ministry of Finance (Department of Revenue & Insurance) furnished copies of three letters from the British High Commissioner dated 3rd October, 1967, 19th October, 1967 and 26th April, 1968. The Ministry also added that as a matter of courtesy to foreign diplomatic missions, correspondence with them was not normally published. The High Commissioner had presented the EOAC version of the case and had requested for the early release of the gold seized, as otherwise the Bank of England, it was stated, had to replenish this gold from its stock, which would affect its reserves.

2.59. The Committee asked why it was that instead of confiscating the gold and making them go to a court of law, the Board had yielded the High Commissioner's pressure. The Chairman, Central Board of Excise and Customs stated in evidence:

"I wish to make it clear or let it go on record that I was not in the Board but I was certainly a Joint Secretary in the Department of Revenue, Ministry of Finance, and from whatever by personal knowledge at that stage was I can say that nobody's influence was allowed in any way to have the final sway one way or the other. I can categorically tell you that

The question of confiscating something, which on the face of it as not liable to confiscation, I do not think should be the task of the adjudication officer, though he may play safe and send the matter to court. The original order of the Collector, to my mind-if I may say so makes no sense. If it is liable to confiscation, you jointly well confiscate it absolutely, you do not go on imposing fine and clear it. I have never heard of such a thing before.

Even when questions were asked in Parliament, it would have been very logical if somebody had asked what this

Collector had done. If gold had been found as offending gold, the market value of which was Rs. 2 crores and the official value Rs. 1 crore, you confiscate it; you never impose a fine. But here you let it go by imposing a fine of Rs. 20 lakhs."

2.60. The Chairman of the Public Accounts Committee (1971-72) had also received a memorandum dated 13th March 1972 from one Shri Laxman Prabhu, containing, amongst other matters, allegations against the BOAC case. The theme of the memorandum was that the Government had acted in a *malafide* manner in disposing of the case and that the Board which heard the appeal had sought the advice of the Attorney General in settling a point in favour of BOAC. In support of this statement, he had furnished an extract of the affidavit* filed by Shri Prasad, the then Collector, Central Excise, in a writ challenging the seniority list of collectors.

2.61. In his affidavit, Shri Prasad had, *inter alia*, made the following allegations:

"During the course of adjudication proceedings, the then Finance Secretary started pressurising Shri Prasad to release the gold forthwith, by sending personal messages.

Shri Prasad was called to the Board by Shri T. C. Seth and later on by Shri Jasjit Singh who pressurised him to release the gold and advised that he could obtain a favourable opinion from the Law Ministry.

Shri T. P. Singh, the then Finance Secretary pressurised Shri Prasad to release the gold forthwith and pass an adjudication order favourable to the BOAC. However, Shri Prasad resisted the pressure.

The Director of Revenue Intelligence withdrew his first report and submitted a fresh report as he was also pressurised to do so."

2.62. With reference to the earlier comments of the Chairman, Central Board of Excise and Customs, the Committee drew his attention to Shri Prasad's allegations and asked whether it was true

*A copy of the affidavit furnished by the Ministry of Finance (Department of Revenue & Insurance), at the instance of the Committee, is reproduced in Appendix VII.

that he had made serious allegations against the Board's officials and the then Finance Secretary pressuring him in this case and, if so, what was the reply filed by Government to these allegations. The Chairman, Central Board of Excise and Customs stated:

"Shri Prasad had filed a writ petition in the Delhi High Court on 6th May, 1968 challenging the seniority list of Collectors. It was in that connection that he had gone to the Court. The single judge dismissed his petition on the 31st May, 1968. Against this judgement of the single judge, Shri Prasad had filed a Letters Patent appeal before the Divisional Bench of the High Court. An affidavit in reply to the Letters Patent appeal was filed by the Union of India; and the matter was heard by the Division Bench on 23rd and 24th November 1971; and again on the 20th and 21st December 1971. The judgement of the Division Bench was delivered on 31st January, 1972. I would say how these things had occurred. It is a very small question:

'A considerable time after the judgement was delivered, a copy of a document purported to be an affidavit filed by Shri R. Prasad on 2nd December 1971 came to our notice. A copy of it was not served on the Union of India either directly by the petitioner or through the High Court. Since it was possible that a copy of it may have been made available to our counsel, we made an attempt to trace these things from his file; but even there, it was not available.

The Litigation Section of the Law Ministry has a file on this Letters Patent appeal. This file also did not contain a copy of the said affidavit.

Now, therefore, we deputed our Deputy Secretary to go to the court itself and see the file. He has reported that a copy of Shri Prasad's affidavit dated the 2nd December, 1971 was available in the paper book of one of the judges who had heard the Letters Patent appeal.

On inspection of the court's records, it was found that there is an order of the judges dated the 23rd November 1971 permitting the counsel for the Union of India to file an additional affidavit in respect of certain matters. The judges also ordered that a copy of the additional affidavit should be made over to the counsel for Shri R. Prasad, so

that he can file a reply. Accordingly the Government counsel filed an affidavit, affirmed by Shri B. D. Pande, the then Finance Secretary, on the 24th November 1971.

The affidavit dated the 2nd December, 1971 filed by Shri R. Prasad is in reply to this additional affidavit. Ordinarily, it is not permissible to file a rejoinder to this reply affidavit, without a specific order to that effect by the court. But the fact is that it came to our notice much after the judgement; and that too, at a very late stage'.

The officer who was present in the court says:

'I was present in the court on all the days of the hearing and I can positively state that the various matters mentioned by Mr. Prasad in this affidavit were not brought up during the course of the argument by his counsel. Our counsel also did not deal with them during his arguments. The judgement of the Division Bench also does not refer to the various matters mentioned in the affidavit'."

2.63. When the Committee observed in this connection that it, therefore, appeared that Shri Prasad's allegations before the Hon'ble High Court at Delhi went unrefuted and unchallenged, the Chairman, Central Board of Excise and Customs stated:

"They went unrefuted and unchallenged; but this also should go on record that I have stated the sequence of events and that it did not come to our notice at any stage. This affidavit has come to our notice much later and after a lot of research. Secondly, the ordinary practice is that if one side is allowed to have an additional affidavit, the court allows a reply to that additional affidavit. You cannot have further additional affidavit otherwise."

2.64. Since this affidavit contained a number of serious allegations against the Board's officials and even the Finance Secretary, the Committee asked whether these allegations were examined independently by Government once they came to light even though no reply had initially been filed by Government in the court and, if so, the Ministry were requested to furnish a detailed note indicating the Government's findings regarding these allegations. The Ministry of Finance (Department of Revenue and Insurance) stated in a note:

"The Letters Patent Appeal of Shri R. Prasad was heard by the Division Bench of Delhi High Court on 23rd and 24th November 1971 and thereafter from the 20th to 23rd December 1971. The judgement of the Division Bench was delivered on the 31st January 1972. It is understood from the official who was present at the hearing that the various allegations made in the supplementary affidavit were not brought out by Shri Prasad's counsel nor was there any mention of them in the court's judgement. The copy of the supplementary affidavit was obtained from the High Court's records after the BOAC matter was raised in the Public Accounts Committee. It may be mentioned that some of these allegations were earlier made by Shri Madhu Limaye, M.P. in his letters to the then Deputy Prime Minister and the Deputy Prime Minister in his replies as well as on the floor of the Parliament had refuted those allegations. The correspondence between Shri Madhu Limaye and the Deputy Prime Minister in this regard was placed on the Table of the Lok Sabha. In March 1972 a letter addressed to the F.M. was received and this reproduced a portion of Shri Prasad's affidavit containing most of the allegations. The Government had then also taken the view that the insinuation that the Board's decision was taken on extraneous considerations and under influence of higher authorities was baseless."

2.65. In reply to another question whether the Board had approached the Attorney General for an opinion on an important issue prior to the disposal of the appeal and the opinion given by the Attorney General, the witness stated:

"I am informed that during the course of the hearing, the Attorney General was approached once or twice; but he had refused to give advice, once the hearing had already started."

2.66. The Committee desired to know whether a complaint had not been made by the Director of Revenue Intelligence, in the course of the appeal proceedings, that the questions addressed to the departmental witnesses were so loaded as to cause nervousness, which prevented a fair trial. The Chairman, Central Board of Excise and Customs stated:

"It may have been. I have not gone into the details. During the hearing in the courts, both sides allege various things. It might have been done."

2.67. The Committee desired to know who had represented the appellants and the Government in the proceedings. The Chairman, Central Board of Excise and the Customs stated:

"It will read out the relevant portion of the Order:

"These appeals were heard by us on 17th and 18th June 1968, 6th August, 1968 and 18th and 19th September 1968. BOAC were represented during the hearings by Advocates Shri T. N. Sethi and Shri D. P. Sethi instructed by Solicitor Shri Bernard Wood. The other appellants were represented by Shri A. K. Basu, Advocate, instructed by Shri D. N. Gupta and Shri J. K. Mehra of M/s. Orr Dignam. Solicitors, Shri M. A. Brown and Shri T. Bates, Solicitors held a watching brief on behalf of insurers of gold. Shri S. K. Srivastava, Director of Revenue, Intelligence and Shri C. L. Beri, Assistant Collector of Customs and Central Excise, New Delhi, appeared on behalf of the Customs'."

2.68. When the Committee expressed surprise that the Director of Revenue Intelligence and an Assistant Collector should have been made to face a galaxy of leading barristers, the witness stated that the system of adjudication was that the adjudicating officer must look after the Department. He added:

"But this is the procedure. Otherwise, if you want to have a full-fledged court or a tribunal to discuss the matter, then the Government can take a separate decision."

2.69. The Committee asked how the Government could become so complacent as to leave the matter in the hands of officials, however competent they might be, when all the parties concerned could think it fit to employ leading barristers at a colossal cost. The Chairman, Central Board of Excise and Customs stated:

"There is no departmental representative at all. You hear a party and then you are supposed to read all the records and give a decision yourself."

He added that so far as the Appellate Board was concerned, they had impartially decided what was the correct position. He stated further:

"The same thing is there when you take the original side. The Collectors come across so many infringements. If their time is to be taken up, then they will have to open a regular court and they will cease to function in that

capacity. They are functioning as quasi-judicial officers. If you run it as formal tribunal or if you run it as a court, then, you have to call so many people. For instance, we are enforcing the import trade control regulations—for the sake of argument. You have to call so many witnesses, so many experts, from the CCIE and RBI and so on. Now, the Act does not envisage that because it will stand in the way. In the case of indirect taxation, the goods are lying in the docks. The Act says that the appellate authority may after giving an opportunity to the appellant to be heard—I believe the Income tax wording is quite different because they are appellate and tribunal authorities at the same time—if he so desires, make such further enquiries as he may think necessary and pass such orders as he thinks fit. This august Committee can certainly recommend that these things are becoming outmoded, that there should be separate regular courts and that the proceedings and appellate actions and all that should be separately done. That is a separate issue. But, as at present, there is a ready, rough and quick justice which is being met. If there are lawyers on both sides, then, it is like a court. The customs authorities cannot forget about the files, whether it is for the department or for the appellant. They have to go through each and every file and they have to go through whatever facts are on record. This is how the system functions. Otherwise, you will become bound by all sorts of things.”

2.70. The Committee desired to know how many of the officers of the Customs and Central Excise Departments, who had tried cases or appeared on behalf of the Department, had legal qualifications and background. The Ministry of Finance (Department of Revenue and Insurance) stated in written note:

“Legal qualification is not one of the conditions of recruitment to the various services under the Customs and Central Excise Department. Some of the officers in the department are, however, legally qualified.”

2.71. The Finance Secretary stated in this connection during evidence:

“I would only mention that so far as these provisions for appeals etc. are concerned, that is laid down by statute and there is the necessary statutory backing for that purpose. So, I thought I was in order to call these proceedings quasi-judi-

cial. I would also mention that we are faced with a completely opposite sort of demand by the public. They feel that the balance is tilted very much in favour of the department when these quasi-judicial bodies look into the matter and there is a constant demand for setting up tribunals on the lines of the income-tax tribunals instead of having appeals and revisions heard by the Board. The argument put forward is that these officers who hear these appeals are officers of the Revenue Department and they cannot dissociate themselves entirely from revenue functions and to that extent the public at least feels that the balance is tilted against them and in favour of the department. This also I would submit for the consideration of the Committee that the officers who were hearing these appeals as Members of the Board, or sometimes the appeals are even heard by the Finance Secretary, have some knowledge of customs law and procedures, and to that extent it is expected that they will be much more receptive to the pleadings of the various parties and would not be that extent require advice and guidance by lawyers. However, if the Public Accounts Committee were to feel that in important cases there should be representation of the Government's case by lawyers, we would certainly welcome such a recommendation and it might be useful."

2.72. The Committee desired to know the nature of the information system built up by Government regarding smuggling of gold into India. The Chairman, Central Board of Excise and Customs stated:

"We have the intelligence cells in the customs houses and Central Excise Collectorates who may be located at the ports or depending upon the importance of the area, wherever they may be located. Apart from that, we have Directorate of Revenue Intelligence which collects information from the various Collectorates and customs houses and it has also its own information. Further, it gathers information from abroad and as and when necessary, it feeds information to the various units for action in this regard or for keeping a watch. That is approximately the system we follow."

2.73. Subsequently, in a written note furnished to the Committee explaining the information system built up Government for preventing smuggling into India and the arrangements for coordinating the efforts of various individuals/organisations, the Ministry of Finance (Department of Revenue and Insurance) stated in a written note:

"The Directorate of Revenue Intelligence functions as the Central Intelligence Organisation for the coordination of all anti-smuggling activities in the country. Its chief function is the collection, collation, dissemination of intelligence relating to smuggling and tax evasion. The Directorate maintains liaison with allied agencies in India and abroad for this purpose. Overseas liaison is maintained directly with the agencies concerned as well as through Interpol. This arrangement has contained even after the Directorate was placed under the Cabinet Secretariat (Department of Personnel).

All the field formations under the Central Board of Excise and Customs are required to send intelligence reports in prescribed forms in respect of information received by them on smuggling, Foreign Exchange Regulation Act violations, under-invoicing/over-invoicing etc. This intelligence is properly indexed and pursued by the Directorate by issuing prompt instructions to the field formations under the Central Board of Excise and Customs as well as to their zonal offices. The main sources of information to the field formations under Central Board of Excise and Customs are informers, anonymous and pseudonymous sources, reports from other Government agencies (both Central and States).

For coordinating the efforts of the various individuals/organisations, the post of D.G. (RI&I) was created in 1969 to liaise the activities of the three Directorates viz., D.R.I., Directorate of Enforcement and Directorate of Inspection (Income-tax).

The Directorate also collects useful intelligence through overseas sources and also keep liaison with C.B.I. (EOW) for the purpose. Continuous coordination is also maintained with the B.S.F. and Police at the border states for collection of information etc. The Ministry of Home Affairs and the D.G., Civil Aviation respectively consult the Directorate for grant of visas to suspect foreigners and clearance of persons applying for flying training. The Directorate also in turn approaches the passport authorities for refusal of passport facilities to smugglers and also sends their recommendations to the D.G. Shipping regarding the crew of Indian nationality involved in smuggling for cancellation their CDCs/Registration No. etc.

The Directorate also participates in headquarters and zonal coordination committees through which it maintains co-ordination in respect of various cases. It also exchanges useful information with the Interpol Secretariat through ICPO and ESCAP on matters connected with infringement of Customs law etc."

2.74. The Committee asked what were the reports sent by the officials posted in London, Kuwait and other places to watch and report on the movement of Gold, in 1967, during the relevant period. The Chairman, Central Board of Excise and Customs stated:

"I do not think that at that stage, these officers were yet posted. I have not got the dates. But sometime around 1970, as far as I can recollect, they got posted abroad. There are three places, London, Kuwait and Hong Kong."

2.75. At the instance of the Committee the Ministry of Finance (Department of Revenue and Insurance) also furnished copies of a writ petition and rejoinder filed by the then Director of Revenue Intelligence against the Union of India in the matter of his transfer from the post of Director of Revenue Intelligence, promotion. The petition makes interesting reading, a few extracts from which are reproduced in Appendix VIII.

CONCLUSIONS AND RECOMMENDATIONS

2.76. Going through the entire proceedings of what has come to be known as the 'BOAC Gold Smuggling Case', the Committee are left with the impression that there had been a good deal of effort on the part of the high officials in finding out technical arguments in favour of BOAC. In the appeal proceedings, evidence was admitted in the shape of affidavits, bank statements, balance sheets, etc. and the Committee find that the appellate proceedings took on almost the clour of Original Side proceedings with extensive examinations and cross-examinations. While there is nothing irregular in law about this, because under Section 128 of the Customs Act, the appellate authority is not bound to follow the provisions of the Civil Procedure Code, the Committee feel that it was rather out of the ordinary that such extensive examination was held at the appellate stage and that attempts were being made to spot loopholes in the departmental evidence. In fact, the Committee are distressed to learn that at one stage, the Director of Revenue Intelligence had to protest that the cross-examination was making a departmental witness nervous.

2.77. Prima facie, it would appear that in view of the publicity the case had attracted and the requests of the British Government to expedite the case there had been an anxiety on the part of the Central Board of Excise and Customs to find arguments to favour BOAC, despite the fact that the Director of Revenue Intelligence, the Collector of Central Excise, Delhi and the Ministry of Law had held that there had been a violation by BOAC of the provisions of the Reserve Bank of India notification which prescribe the conditions under which bullion can be carried in transit through India. The Committee find that the Joint Secretary of the Ministry of Law was even positive in his mind that no court would give the benefit of doubt to BOAC.

2.78. The Committee are also of the opinion that the Board of Appeal had not properly appreciated the ratio of the judgement of the Supreme Court in the case of 'State of Maharashtra Vs. Mayor Hans George' reported in AIR 1965 as SC-722. This was an important judgement in which the notification issued by the Reserve Bank of India under Section 8(1) of the Foreign Exchange Regulations Act had come in for judicial scrutiny. In that case, the Committee find that one of the important judgments on the doctrine of absolute or strict liability was pronounced. The Supreme Court had held that, even if there has been an unintentional violation of the Reserve Bank of India regulations, such a violation would be punishable and a plea of lack of fraudulent intention would not prevail. The Committee are, however, distressed to note that, in the BOAC case, this point had been completely sidetracked in the Board's appellate order when it said that that case was distinguishable on facts from the BOAC case.

2.79. It is also not very clear to the Committee whether Section 30(3) of the Customs Act relating to the production of manifest for imported goods would apply at all to a violation of the Foreign Exchange Regulations Act. The Committee also find that Section 30 of the Act deals with the delivery of import manifest and does not deal with transshipment manifest, while the Reserve Bank of India notification deals with transshipment manifest. Therefore, even assuming that the provisions of the Customs Act could be invoked for dealing with a case under the Foreign Exchange Regulations Act, the Committee are inclined to take the view that Section 30(3) of the Customs Act would not be appropriate in the circumstances of this case. Infact, the Board in its appellate order did not also express any categorical opinion whether the description in the manifest was incorrect or incomplete. The Committee feel that the applicability of Section 30 of the Customs Act to this case should be ex-

mined afresh in consultation with the Attorney General and a further report submitted to the Committee in this regard.

2.80. The Committee also find from the evidence that no proper request had been made by the local officer of the BOAC for amending the manifest. Only a casual enquiry appears to have been made to the Customs officials at Palam Airport which, at the time of hearing by the adjudication officer, was sought to be interpreted as a request for amendment of the manifest. When the Board considered the appeal, the position was curiously improved by taking a fresh affidavit on this point.

2.81. The BOAC case had raised the following interesting questions at the time of investigations by the Directorate of Revenue Intelligence: (a) whether BOAC was carrying on a regular activity of smuggling gold in collusion with South African parties or bullion brokers of London; (b) if BOAC was not itself engaged in smuggling, did it aid and abet the London bullion brokers or any other party in smuggling gold into India? and (c) the identity of the legal owners of the gold, particularly of the consignment destined to Macao, since the consignors were stated to be only bullion brokers and the consignee was also a company in which the consignor had 40 per cent interest.

2.82. The Committee, however, find that though the Director of Revenue Intelligence had wanted to proceed abroad with a view to establishing the true ownership of the gold, this had not been considered necessary. Such an investigation, in the opinion of the Committee, could have provided clues to the various missing links in the case. The investigation proposed by the Director of Revenue Intelligence assumed greater importance in view of the significant fact that BOAC had been carrying large quantities of gold from London through India, in the guise of 'Metal V' or 'Metal bar V' to Hongkong, which is a vulnerable spot in the East for smuggling activities, specially gold for illegal entry into India, and that between April and August 1967, as large a quantity as 5,382 kilograms of gold had passed through India.

2.83. Besides, a number of employees of BOAC had also been apprehended prior to this seizure in 1967 carrying contraband gold into India and the investigations of these cases had resulted in the dismissal of 90 employees. The Committee are inclined to think that it would have been difficult for so many employees of BOAC to have indulged in smuggling of gold into India without the tacit support of people in very high positions. In this context, it should also be borne in view that smuggling rackets are organised in the most dubious

ways and that there is always more to it than what meets the eye. The Committee are, therefore, unable to understand why the Director of Revenue Intelligence had not been permitted to pursue his line of investigations. This needs to be explained.

2.84. Under these circumstances, the Committee are inclined to take the view that the appellate decision was a matter dictated by expediency. Otherwise, the Committee are unable to understand the reasons for Government not testing the decision in a court of law which could have resolved a number of legal doubts thrown up in this case. No attempts had also been made to consider the case in revision under Section 131(3) of the Customs Act. Now that the period of one year from the date of the appellate order prescribed for revision is over, the matter will necessarily have to be treated as closed. The Committee are, however, extremely dissatisfied with the manner in which this case has been handled by the Central Board of Excise & Customs. The Committee desire that responsibility should be fixed under advice to them.

2.85. Apart from the legal aspects of this particular case, one aspect of the case compels the immediate consideration of the Committee. Admittedly gold has been flown from London to Macao. It is not unlikely that the practice still continues. Since Macao is only a small islet, the Committee are certain that it would not be in a position to absorb even a fraction of the gold that is being regularly flown into the territory. The obvious inference that the Committee can draw is that Macao is a nerve centre for smuggling operations and there is every likelihood of the gold bars being melted into small biscuits and smuggled mainly into India. In this context the Committee also understand that China itself makes large purchases of gold in the London bullion market and the Chinese price of gold was not attractive enough for gold smugglers. Therefore, the possibility of most of the gold that goes to Macao coming back to India through various illegal channels cannot at all be ruled out. The Committee would like to know what concrete steps have been taken by Government to arrest such smuggling and what arrangements exist to prevent the illicit transport of gold from Macao to India.

2.86. An offshoot of this question is the adequacy of our organisation for gathering intelligence abroad. Considering the volume of under-invoicing, over-invoicing, smuggling and other economic evils that go on in the country, the Committee are strongly of the view that at important ports and nerve centres of smuggling abroad, the Government should build up an effective organisation to gather

intelligence on these evils on sufficient incentive basis. The Committee feel that merely by posting a handful of officers at London or Kuwait or maintaining liaison with overseas organisations without corresponding results would not serve the objective the Committee have in view. The Committee desire that this should be examined by Government immediately and positive steps taken to build a sound intelligence net work abroad.

2.87. Yet another surprising feature that has come to the notice of the Committee is that even in an important case like this one, Government had not considered it fit to utilise the services of qualified lawyers to present the Department's case. For instance, in the BOAC case, the Director of Revenue Intelligence and an Assistant Collector of Customs had been pitted against some of the choicest legal talents in the country and abroad which, to say the least, is cruel on the part of the officers concerned. Though this is not, in any way intended to cast a doubt on the competence of the officers, the Committee feel that this is an extremely unsatisfactory arrangement. While the Committee take note of the fact that the system of adjudication requires that the adjudicating officer must look after the Department, the Committee would, however, recommend that, at least in important cases, Government should be represented by competent legal experts. The Committee desire that this recommendation should be processed expeditiously and necessary action taken to adequately safeguard the Government's interests. The Committee would await a further report in this regard.

2.88. Incidentally, a disconcerting fact that has been brought to the notice of the Committee during their examination of the case is of topical interest and causes grave concern to the Committee. The Committee find from a writ petition filed by the then Director of Revenue Intelligence against the Union of India in the matter of his promotion, etc. in the High Court of Delhi that his transfer from the post of Director of Revenue Intelligence had become the 'table-talk amongst smugglers.' The Committee are most distressed to note the manner in which the officer had been made to hand over charge of the post at the airport. The writ petition also contains startling disclosures about the complicity of Government officials with smugglers.

2.89. Considering the far-reaching implications and serious nature of the allegations made by a responsible official of the Government, the Committee desire that the various allegations contained in the

writ petition should be investigated into immediately by an independent agency and suitable action taken. The investigation now proposed by the Committee assumes particular importance in the context of the MISA operations now in force against the smugglers. The outcome of the investigation should be reported to the Committee.

NEW DELHI;

April 26th, 1975

Vaisakha 5, 1897 (S)

JYOTIRMOY BOSU,

Chairman,

Public Accounts Committee.

APPENDIX I

Note on results of investigations in the case regarding seizure of gold from B.O.A.C. aircraft G-APEX on 15-9-1967

Investigations in the above case have also been made by the Officers of the Collectorate of Customs and Central Excise, Delhi. A report on these investigations has been received in this Directorate. In order to avoid duplication, the results of investigations made by this Directorate are being summarised with reference to the report of investigation by the officers of the afore-mentioned Collectorate.

2. The following conclusions recorded in the investigation report of the officers of the Delhi Collectorate are endorsed by the Directorate.

- (i) The possibility of the aircraft having returned to Palam due to a genuine engine trouble cannot be ruled out;
- (ii) The possibility of aircraft returning due to uneven loading has to be ruled out;
- (iii) The seizure gold was not meant for Indian market. The possibility of this gold getting converted at Macau into bars of smaller sizes for being smuggled into India cannot, however, be ruled out; and
- (iv) The theory that the seized gold was intended for an air-dropping somewhere around Palam Airport is untenable.

3. With regard to the legal position about the grounds on which the gold can be alleged to have been smuggled into India, and on few other legal issues the findings of the Directorate are as under:—

- (a) It cannot be held that the transit of cargo through India to Macau is banned under the Import and Export (Control) Act;
- (b) The gold cannot be held to have been imported into India from South Africa. It cannot, therefore, be held that the importation of gold into India was prohibited on account of a ban on the importation of goods of South African origin into India;

I may add that the conclusions referred to in (a) and (b) above have been reached in consultation with the Ministry of Law and other authorities.

(c) The gold appears to have been imported into India in contravention of the prohibition imposed under Section 8(1) of the F.E.R.A. read with Notification No. 12(11)F. 1/48, dated 25-8-1948 (as amended) and the Notification No. FERA. 208/62-RB dated 8-11-1962. Under the aforesaid Section and the notifications the gold cannot be brought into India even for the purpose of transshipment or transit without being landed from the carrying aircraft, unless it is declared in the manifest for transit as same bottom cargo or as transshipment cargo.

It has to be determined whether the seized gold had been declared in the manifest for transit on as for transshipment cargo.

M/s. B. O. A. C. appear to argue that the seized gold had been declared in the manifest as 'Metal-V'. For determining whether this declaration in the manifest would amount to the declaration of gold therein, it was examined whether M/s. B.O.A.C. and/or any other airline had at any time prior to the day on which the subject gold had been seized, informed the Customs authorities that if they found contents of any consignment included in the manifest declared as 'Metal-V', they should understand that the contents are gold. It has been ascertained from the Airports at Bombay, Calcutta, Madras and Delhi that the Customs Officers were never made aware of the aforesaid position and that they were not in a position to conclude on perusal of the declaration of 'Metal-V' in any manifest that this description was referring to 'gold'. The literal meaning of 'Metal-V' will have therefore to be taken into account for concluding whether the gold had been declared in the manifest. The conclusion that the description 'Metal-V' on account of its literal interpretation cannot be said to amount to declaration of gold is unavoidable in the light of certain instructions contained in the Traffic Manual of M/s. B.O.A.C. The relevant instructions lay down that in the case of shipments of gold consigned to or in transit through India, gold should not be declared as 'Metal'. These instructions imply that so far as the manifests for India are concerned the description 'Metal V' therein will not cover gold.

In the light of the above position, it is not surprising that some of the employees of M/s. B.O.A.C. themselves are found stating that it could not be possible for them to conclude upon perusal of the descrip-

tion 'Metal V' that gold was being carried in the aircraft. In this connection, attention is invited to the statements of S/Shri R. K. Sobti, N. S. Pu., A. K. Sharma, E. D. Khemchand, V. C. Allagh and V. K. Chopra. These statements form enclosure to the investigation report of the officers of the Delhi Collectorate.

From the investigation report of the officers of the Delhi Collectorate, it further appears that M/s. B.O.A.C. applied for transshipment of one of the consignments of gold and that Appraiser Shri M. J. Nambiar permitted transshipment. The transshipment was not permissible in the light of the provisions of the Section and notifications referred to in paragraph 3 above. The Appraiser Shri M. J. Nambiar has explained that he allowed transshipment of one of the consignments of gold under the impression that the contents of the consignment were metal other than gold. The conduct and the explanation of Shri Nambiar establish that the Customs Officers were at No. . . that the description 'Metal-V' could cover gold in a manifest delivered to the authorities in India.

The investigations reveal that the representatives of M/s. B.O.A.C. would not have brought it to the notice of the Customs authorities that gold was being carried in the aircraft if they had not felt the necessity for approaching the Customs authorities for arranging a guard for the aircraft. In this context, an extract of the statement of Shri K. Santhanam, assumes significance. This extract is quoted below:

"At about 06.00 hours on 15-9-1967 I was advised on telephone that there was metal on board by D/O Smith and I told him immediately to go on board and ensure that the metal was intact and arrange for suitable guard and that I was proceeding to the Airport immediately. I did not advise him to let Customs know as myself was coming to the Airport to deal with the matter."

The above extract reveals that Mr. K. Santhanam was conscious that from the words 'Metal-V' appearing in the manifest Customs could not come to the conclusion that there was gold on board.

It is difficult to come to the conclusion that the gold was described as 'Metal-V' in the case of this particular aircraft through a clerical error. At no time in the years 1966 and 1967 any consignment from London is declared to be consignment of gold in the manifest. It is not the case of M/s. B. O. A. C. that in the years 1966 and 1967 no gold was lifted from London by the aircraft of M/s. B. O. A. C. Something which is found to have been a regular practice during a period of two years will defeat the contention that in a particular

case, it should be held to be a clerical error. There is no evidence that any authority in M/s. B. O. A. C. had objected to the regular practice, although it was inconsistent with the instructions in the Traffic Manual.

At no stage during the investigations by the Directorate any attempt was found being made by M/s. B. O. A. C. to request for amendment of the manifest on the ground that there has been an obvious clerical error. Perhaps, the legal advice to M/s. B. O. A. C., whose attorney flew from London, was against making of a request for the amendment of the manifest. The fact that M/s. B. O. A. C.'s contention is that the description 'Metal-V' should be considered to be declaration for gold also leads to the conclusion that clerical error was not responsible for the description in the relevant manifest.

It is difficult to impute any motive for the non-declaration of gold, as explained above, in the relevant manifest. Motive, however, is not essential for determining whether the gold has been imported into the country in contravention of prohibition in force. The conclusion that the aforesaid prohibition has been contravened appears to be inescapable. The absence of motive can be only a consideration in the matter of determining the quantum of fine and penalty. It cannot be a criterion for determining whether offence itself has been committed.

The plea that for security reasons gold was being declared as 'Metal-V' is also untenable. Some of the Air Companies have been found to be declaring gold as gold in the manifest. Security considerations should have weighed with these Air Companies also. Further, M/s. B. O. A. C. have stated after the seizure of the gold that they have now decided to declare gold in their manifests irrespective of the country where the manifests may have to be delivered to the Customs authorities. If the security reasons were weighty, there appears to have been no justification for M/s. B. O. A. C. changing their time-honoured practice.

(d) Since in the circumstances mentioned hereinabove, the gold is held to have been imported into India in contravention of the prohibition under the F. E. Regulations its export out of India even in the shape of transshipment would require the permission of the Reserve Bank of India. The export of the seized gold without such permission would be banned under Section 8(2) of the F.E.R. Act. If the Adjudicating Officer decided that the gold should be allowed to be taken to Hong Kong (in transit to Maccau) he should impose the condition that the permission would be accorded on production of permission of the Reserve Bank of India.

(e) Since, in view of the foregoing reasons, it appears that the gold has been made liable to confiscation on account of an act of M/s. B.O.A.C., viz., the non-declaration of gold in the manifest, they alone should be liable to personal penalty under Section 112(1) of the Customs Act, 1962. There appears to be no justification for imposing penalty on any other person under the Section.

(f) In the aforesaid circumstances, the aircraft is to be held to have been used in the transport of gold liable to confiscation. The aircraft, therefore, appears to be liable to confiscation under Section 115(2) of the Customs Act, 1962.

(g) Before the gold was detected, the aircraft had taken off from palam for its next destination, Bangkok. An attempt to export the gold without the permission of the R.B.I. appears therefore to have been made. The gold therefore is liable to confiscation under Section 113(d) of the Customs Act, 1962, and M/s. B.O.A.C. are liable to penalty under Section 114 of the Customs Act, 1962.

4. *Other points*

(i) The gold was seized from M/s. B.O.A.C. and for all material purposes, therefore, M/s. B.O.A.C. are to be deemed the owners of the gold. Any other person who wants to make any claim in respect of the seized gold should do so only through M/s. B.O.A.C. However, an intimation to such other persons who appear to be interested in the gold, can be sent so that if they so desire, they can also make submissions against the confiscation of the gold by the Customs authorities in India.

(ii) In the course of investigations by the Directorate, it appeared to be a material point whether the ownership of the gold at the material time it had been seized vested in a Macau firm. It was contended that at the aforesaid material time M/s. Mocatta & Goldsmid Ltd, were the owners of the gold and that the gold was yet to be sold to the Macau Party. The weight of the evidence appears to be in favour of the conclusion that the Macau party had become the owner of the gold at the time of its seizure. The conclusion is based on the fact that before the gold was exported from England M/s. Mocatta & Goldsmid Co Ltd. had made declaration in a statutory form to the effect that to the best of their knowledge the owners of the gold were M/s. Campanhia De Desenvolvimento Commercial, Macau. Since however, it is not material for the purposes of adjudication to determine whether the ownership has been transferred to the Macau firm, this point is not being dealt with at length.

(iii) The Directorate disagrees with the conclusion that the representative of M/s. B.O.A.C. revealed to the Customs authorities that there was gold on board the aircraft only at the time of making application for transshipment of gold. The facts disclose that the revelation was made to the Customs authorities much earlier. The true facts appear to have been stated in the report made soon after the seizure.

(iv) In a day or two, the Directorate would be forwarded a show cause notice for the consideration of the Collector or Customs and Central Excise, Delhi. He may kindly issue suitable instructions so that the vetting and the issue of the show cause notices are attended to promptly.

Sd/- S. K. SRIVASTAVA,

Director.

APPENDIX II

Copy of order passed by the Collector of Central Excise, Delhi

CENTRAL EXCISE COLLECTORATE, DELHI

C. No. VIII (Hqrs) 10/24/67/1037

New Delhi, 15th Feb., 1968

**PASSED BY SHRI R. PRASAD, COLLECTOR OF CUSTOMS AND
CENTRAL EXCISE, NEW DELHI**

ORDER (ORIGINAL) No. 2/68 DATED 15-2-1968

This copy is granted free of charge for the private use of the person to whom it is issued.

2. An appeal against this order lies to the Central Board of Excise and Customs, New Delhi within three months of its date. The appeal should bear a Court Fee Stamp of Rs. 4/- (Rupees four only) and must be accompanied by:—

(a) this copy or another copy of this order bearing a Court Fee Stamp of 50 paise as prescribed under Schedule I. item 6 of the Court Fee Act, 1870; and

(b) a copy of the appeal.

3. Any person desirous of appealing against this decision or order, shall, pending the appeal deposit the duty demanded or the penalty levied therein and produce proof of such payment alongwith the appeal, failing which the appeal is liable to be rejected for non-compliance with the provisions of section 129 of the Customs Act, 1962.

SUBJECT:—Seizure of Gold Bullion from B.O.A.C. Aircraft: Contravention of provisions of Customs Act and Foreign Exchange Regulation Act:

I. Brief facts of the case:

B.O.A.C. Aircraft (G-APFK) arrived at Palam Airport on its routine flight from London on 14th September, 1967 at about 10.35 hours (local time). After the usual ground half and after disembarking the passengers and cargo for Delhi, the plane took off for Bangkok the next port of call, at about 11.20 hours. The Aircraft returned back to Palam at about 13.30 hours with reported engine trouble. On arrival at Palam, it was taken to bay No. 33 for checking and repairs by the engineering staff of M/s. B.O.A.C. It remained there throughout the night.

2. On 15th September, 1967, M/s. B.O.A.C., finding that the aircraft would not be in a position to leave early, started making alternate arrangements for the passengers and cargo on board the aircraft. At about 11.00 hours Shri K. Santhanam, Acting Airport Manager of M/s. B.O.A.C. at Palam approached the Assistant Collector, Customs, Palam and the Inspector on duty for making suitable arrangements to guard the aircraft as it was carrying a large quantity of Gold. The concerned Customs Officers thereupon checked the manifest of the aircraft. They discovered that there was no mention of any 'Gold' in the manifest.

3. On enquiry, the officials of M/s. B.O.A.C. explained that the term 'Metal V' and 'Metal Bar V' appearing in the Transit Manifest stood for 'Gold'. However, they could not quote any authority, permission or order of the Government of India allowing them to declare 'Gold' in their manifest as 'Metal V' or 'Metal Bar V'. Even the B.O.A.C. Traffic Manual contains a clear directive (based on Government of India's instructions) that Gold should be manifested as 'Gold' and not as 'Metal' when it is consigned to or is in transit through India. It has also been clearly mentioned in the B.O.A.C. Manual that declaration of 'Gold' as 'Metal' is not permitted by the Customs Authorities in India.

II. Seizure

4. Bringing of gold bullion into India without a permit from the Reserve Bank of India from any place outside India is prohibited under Section 8(1) of Foreign Exchange Regulation Act, 1947 read with Notification No. 12(11)F 1/48, dated 25th August, 1948, as amended, and read with explanation No. 8(i) of Foreign Exchange Regulation Act. However, in Government of India's Notification No. 208/62-RB dated 8th November, 1962, transit of gold through India is permissible subject to the following conditions:—

- (i) provided that gold in question is not removed from the ship or conveyance in which it is being carried except for the purpose of transshipment; and
- (ii) provided further that it is declared in the manifest for transit as same bottom cargo or as transshipment cargo.

5. According to the manifest presented by M/s. B.O.A.C., the aforementioned aircraft had the following two consignments on board which had been declared as 'Metal V' and 'Metal Bar V'.

Sl. No.	Air way Bill No.	No. of packages	Nature of goods
1	061-4861185	24	Metal V 1227
2	061-4961690	1	Metal V 11

The consignment at Serial No. 1 consisted of 96 gold bars. Each bar bore Serial Numbers as also the name of the South African refinery (Rand Refinery Ltd.). The fineness of the gold 9951—9960 was marked on each bar. Each bar also bore the inscription 'Mocatta and Goldsmid Ltd., London Bullion brokers'.

The consignment at Serial Number 2 consisted of 10 bars of gold of one Kg. each. Each bar bore markings "Engelhard". Its purity was marked as 999.0.

6. Bringing in of this gold into India, without manifesting it as 'Gold', involved violation of the provisions of Notifications issued under Section 8(1) of Foreign Exchange Regulation Act, 1947, referred to above. Attempt to take out this gold from Palam (India) on 14th September, 1967 also involved violation of the provisions of section 8(2) of Foreign Exchange Regulation Act, 1947 as no general or special permission of the Reserve Bank of India had been obtained in respect of the aforesaid gold. These violations attracted the provisions of Section 11 of the Customs Act, 1962, read with Sections 23A and 23B of Foreign Exchange Regulation Act, 1947. In view of these contraventions, the aforementioned consignments of gold were seized by Palam Customs for action under Customs Law.

7. The aircraft carrying the aforesaid consignments of gold bullion was also liable to confiscation under the provisions of the Customs Act, 1962. However, it was allowed to proceed to destination on M/s. B.O.A.C. undertaking to execute a bond as required by the adjudicating authority.

III. Investigation:

8. Investigations pertaining to the gold seized and the aircraft were made by the staff of Palam Customs. Investigations in this case were also conducted by the Directorate of Revenue Intelligence. These investigations revealed the following:—

- (1) M/s. B.O.A.C. had deliberately misdeclared 'Gold' bullion as 'Metal V' and 'Metal Bar V' in the manifests.
- (2) M/s. B.O.A.C. had deliberately suppressed the fact of the presence of such a large quantity of Gold on board the aircraft in question. They did not mention anything about the presence of Gold bullion on the aircraft to Palam Customs on 14th September, 1967 either when the aircraft arrived or when it took off on its scheduled onward flight.

Even on the return of the aircraft to Palam. with reported engine trouble, the fact of Gold being on board was not disclosed to any Customs Officer.

- (3) They approached the Customs Officers at Palam only when there was no escape. When they found that transshipment was inevitable and when they realised that in the process of transshipment the presence of 'Gold' on board the aircraft was bound to be discovered, they disclosed the presence of gold to Customs.
- (4) M/s. B.O.A.C. had no intention whatsoever of disclosing to Palam Customs the presence of Gold on board the aircraft. But for the abovementioned unexpected developments the gold would have gone out of India, in contravention of the country's regulations referred to above and without the knowledge of Indian Customs.
- (5) The aircraft in question actually took off from Palam for Bangkok with this said gold on board. It would have gone to its destination but for the engine trouble. M/s. BOAC did not declare this gold to Customs till 15th September, 1967, under the impression that the same aircraft may still proceed on its flight after repairs.
- (6) Significance of the terms 'Metal V' or 'Metal Bar V' appearing in the manifests was neither explained to Customs nor was it known to them. Palam was the only Indian Port touched by this aircraft. Once the aircraft took off from Palam there was no possibility of Indian Customs even knowing the fact of transit of gold through India.

IV. Issue of show cause notice:

9. In view of the above, M/s. B.O.A.C. were asked to show cause, vide this office letter C. No. VIII(Hqrs) 10/24/67/2893--98, dated 28th November, 1967 as to why the seized gold should not be confiscated under Section 111 of the Customs Act, 1962. They were also asked to show cause as to why the aircraft, which carried the said gold, be not confiscated under Section 115(2) *ibid*. They were further asked to explain as to why penalty should not be imposed on them under Section 112(i) and 114(i) of the Customs Act, 1962. In the Show Cause Memo they were also asked to produce all evidence in support of their defence.

10. The consignment consisting of 96 bars of gold was consigned by M/s. Mocatta & Goldsmid Ltd. Bullion Brokers. London to M/s. Commercial Investment Co. Hongkong for onward transmission to M/s. Companhia de Desenvolvimento Commercial, Macau. The

other consignment of 10 Kgs. of gold was consigned by the Bank of Neva Ccotia, Toronto (Canada) to the Bank of Ryukus, Okinawa (Japan). Since all these parties were concerned, in some way or the other, with the gold seized, copies of Show Cause Memo, issued to M/s. B.O.A.C., New Delhi, were also endorsed to them. They were asked to submit their explanations with regard to the seized gold, if they so desired.

V. Reply to show cause Memo by M/s. B.O.A.C.

11. In their reply dated 11th December, 1967 to the Show Cause Memo issued to them, M/s. B.O.A.C. took up the following defence:—

- (1) The cargo on the aircraft is covered by two documents viz. (i) manifest and (ii) Consignment Note. Manifest is a summarised list whereas the Consignment Note contains full details of the cargo. In the consignment notes in respect of both the shipments, the cargo was mentioned as 'Gold'. The details of the gold were available in the Airway Bill. They had no *malafide* intention.
- (2) Letter 'V' stands for "Valuable". The Customs should be aware of it. In case there was any doubt they (B.O.A.C.) should have been asked to explain its true significance.
- (3) The expression 'Metal' has been used by M/s. B.O.A.C. for 'Gold' for some time past. Similar manifests had been scrutinized by the Customs earlier.
- (4) Since November, 1965, the manifests are prepared on tabulator machines. The officers responsible for preparing the manifests were not familiar with the details of B.O.A.C. Traffic Manual. The failure was not wilful. Before introduction of computer system in their London office, they used to show 'Gold' in their manifests as 'Gold'. This practice is still in existence in respect of manifests in the preparation of which computers are not used.
- (5) The ownership of 96 bars of gold seized vested in M/s. Mocatta and Goldsmid Ltd., London. M/s. Companhia de Desenvolvimento Commercial, Macau, are not the owners. Sale is finalised at Hongkong only after the arrival of the gold and at an agreed price on the date of sale.
- (6) The gold and aircraft were not liable to confiscation simply because of inadequate description of the 'gold' as 'Metal V' or 'Metal Bar V' in the manifest. B.O.A.C. should have been given the benefit of Section 30(3) of Customs Act, 1962, the gold being in transit as same bottom cargo. They

should have been allowed to amend the manifests as requested by their Airport Manager, Shri K. Santhanam. They requested release of the gold and the aircraft after amending the manifests suitably.

- (7) M/s. B.O.A.C. have, for all these years been very co-operative with the Indian Government authorities in general, and in particular they have been cooperating in preventing and investigating the illicit entry of gold into India.
- (8) They requested that the Show Cause Memo be discharged, the gold seized be released and the Security Bond furnished by them for the production of the aircraft be cancelled.

VI. Replies to Show Cause Memo by other parties:

12. As stated earlier, copies of Show Cause Memo were endorsed to the two consignees in the East. A copy of the same was also endorsed to the Macau party, M/s. Companhia de Desenvolvimento Commercial for whom the consignment consisting of 96 bars of gold was meant. All the parties acknowledged receipt of the Show Cause Memo. These acknowledgements were obtained with the help of M/s. B.O.A.C.

13. In respect of the larger consignment M/s. Mocatta & Goldsmid, London Bullion Brokers, claimed ownership. It was explained that the ownership of this gold could not be passed on to Hongkong or Macau firm until its arrival at Hongkong. The two firms at Hongkong and Macau did not say anything. They only acknowledged receipt of the copy of the Show Cause Memo sent to them.

14. With regard to the smaller consignment of 10 Kgs. of gold it was a bank to bank transaction. This transaction has been confirmed by copies of correspondence filed by M/s. B.O.A.C.

VII. Arguments advanced during personal hearing:

15. Opportunity for personal hearing was granted to M/s. B.O.A.C. During the hearing, they reiterated what they had already submitted in their reply to the Show Cause Memo. They particularly emphasised the following points:—

- (1) The description of gold as 'Metal V' in the manifest should not be considered as misdeclaration but as incomplete description. All the details of the consignments were available in the consignment notes. This omission was through inadvertance and error. It was because of computerisation of the manifests in their London Office.

- (2) The gold was not described as 'gold' in the manifest for security reasons. This practice is prevalent throughout the world except in respect of consignments meant for India. B.O.A.C. Traffic Manual clearly provides that consignments of gold for India should be described as 'gold' in the manifests.
- (3) The mistake was not such as to imply any avoidance of Government Revenue or loss of Customs duty. The mistake was purely technical. It was quite unintentional. There would have been no hinderance had the gold been described as 'gold'.
- (4) The B.O.A.C.'s past record in dealing with Delhi Customs has been without any blemish. They have all along been co-operating with the Customs. They have also been complying with the Customs regulations strictly. They have already suffered considerable damage. The loss suffered by them is much more than what they should have suffered for a genuine mistake.
- (5) Section 115(2) of the Customs Act, 1962 is not exclusive of Section 115(1). In Section 115(1) the circumstances in which a vehicle can be confiscated have been mentioned. Section 115(2) should be read with Sub-section (a), (b), (c) and (d) of Section 115(1). This section has to be read as a whole and not in parts.
- (6) In para 12 of the Show Cause Notice, it has been emphasised that according to Notification dated 8th November, 1962 issued by the Reserve Bank of India it was necessary for B.O.A.C. to declare the consignment of gold in the manifest as 'transit cargo' or 'same bottom cargo'. It is clear that transit of gold through India is permissible provided it is declared in the manifest as 'same bottom cargo' or 'transit cargo'. In this case consignment was shown in the manifest as 'same bottom cargo' in transit through India. Hence, the requirements of the Notification of the Reserve Bank of India dated 8th November, 1962 were mainly complied with. The consignment was declared in the manifest. The origin and destination were also mentioned. It was also clear from the manifest that it was same bottom cargo intended for transit through India. The consignment was not meant for India.

- (7) B.O.A.C. sincerely regret the unintentional non-compliance with the country's regulations. B.O.A.C. have had every intention and they have taken adequate safeguards to ensure proper compliance with the Customs regulations. In fact, they can do no better than to regret the mistake. Since this case, they have even gone to the extent of amending their own regulations for consignment of gold despatched to other parts of the world. According to the amended regulations, all consignments of gold are now being shown in the manifests as 'gold', regardless of destination and the countries through which they are transited. Hitherto, 'Gold' was described as 'Metal V' for security reasons.
- (8) B.O.A.C. are worldwide carriers and large number of consignments of gold are transited by them to different countries of the world. The computer was designed to deal with the rule rather than as exception. Description gold as 'gold' was an exception for India only. The mistake was purely un-intentional. It is correctly attributable to the computer system. It is very much regretted. Five copies of the manifest pertaining to the year 1965 originating from London office have been filed. In all these manifests gold has been described as 'Gold' even though it was in transit through India. This is because at that time computer system had not been introduced in the B.O.A.C.'s office. At the end of 1965, when computer system was introduced gold was described in the manifest as 'Metal V' for all countries of the world. India, should have been an exception but unfortunately it was not treated differently.

VIII. Discussion:

16. The main charge against M's. B.O.A.C. is that they imported 'Gold' into India in contravention of the prohibition imposed under Section 11 of the Customs Act, 1962 and Section 8(1) of Foreign Exchange Regulation Act, 1947 read with Notification No. 208/62 R.B. dated 8-11-1962. They are also charged with attempt to export the seized gold in contravention of the prohibition imposed under Section 8(2) of Foreign Exchange Regulation Act, 1947 and Section 11 of the Customs Act, 1962.

17. The charge is based on the fact that particulars given in the two manifests, relating to the two consignments of gold did not meet the requirements of Notification No. 208/62-R.B. dated 8-11-62 issued

by the Reserve Bank of India under Section 8(1) of the Foreign Exchange Regulation Act, 1947. This Notification permits subject to the conditions mentioned therein, the bringing in of gold bullion into India when it is on through transit to a place outside the territory of India, provided that it is not removed from the ship or the conveyance in which it is being carried except for the purpose of transshipment and provided further that it is declared in the manifest for transit as same bottom cargo or transshipment cargo. In the case of both the consignments in question, the description recorded in the manifests was 'Metal V' or 'Metal Bar V' and not as 'Gold'.

18. The plea put forth by M/s. B.O.A.C. that misdeclaration of gold in the manifest as 'Metal V' or 'Metal Bar V' in violation of Reserve Bank of India Notification was due to security reasons and on account of introduction of computers in their London Office is not tenable. This omission cannot be attributed to a clerical error. It is clear that the organisation of M/s. B.O.A.C. was quite conversant with the requirements of the law of the country. The instructions contained in the B.O.A.C. Cargo Traffic Manual are quite clear on this point.

19. It is strange that 'Security' factor weighed more with the B.O.A.C. than compliance of the law of the country. The 'Security' ground is not a cogent ground as all other Airlines, under similar circumstances, have been complying with the requirements of India Law. They have been describing gold transited through India as 'Gold' in their manifests. Compliance of the provisions of the law of the country in this case should not have been subordinated by M/s. B.O.A.C. to the 'Security' factor. M/s. B.O.A.C. state that they have now issued instructions to manifest gold as 'Gold' in respect of all consignments transiting through all countries.

This could have easily been done by them earlier.

20. I find it hard to accept the plea that this was a clerical error due to the introduction of computer system in their London office. It was imperative on the part of M/s. B.O.A.C. to so arrange the compilation of the manifests that the requirements of the law of the country were not made secondary to any other consideration. I do not accept their contention that this was an unintentional irregularity or that it was a clerical error arising from computerisation of their cargo despatches from London office.

21. With regard to misdeclaration, the evidence on record clearly indicates that at no time M/s. B. O. A. C. thought it fit to intimate to the Indian Customs authorities the significance of the terms 'Metal V' or 'Metal Bar V' appearing in their manifests. Even in

the present case, M/s. B. O. A. C. came up with the explanation only on 15-9-1967, when they knew that the Customs were bound to find out the fact that gold was on board.

22. It is significant that M/s. B.O.A.C. never spoke a word about the presence of the gold in the aircraft, when it landed with gold on 14-9-1967 and took off for Bangkoj Bangkok after the usual ground halt. But for its return to Palam with engine trouble the gold would have been carried to its destination in contravention of the law of the country. The terms 'Metal V' or 'Metal Bar V' are not being used exclusively for 'gold' as contended by M/s. B.O.A.C. In the same manifest, in which contraband gold was described as 'Metal V' a consignment of platinum was also manifested as 'Metal V'. It is clear that M/s. B. O. A. C. describe any precious metal as 'Metal V' in their manifests. Such declaration is not confined to gold alone as has been contended by them.

23. M/s. B.O.A.C. have also contended that the manifest contains only brief description of goods carried and that the details are available in the relevant consignment notes which can be obtained on request. For consignments in transit the Air-lines file only the manifests with the Customs. The consignment notes are not made available to the Customs. Even in the instant case, as per evidence on record, the consignment notes were produced only when Palam Customs, had discovered that the gold had not been properly manifested as 'gold', as required by the regulations in force for consignments in transit through India. Their contention that the Customs authorities would have reasonably enquired if the exact meanings of the letters 'Metal' or 'V' were not clear to them and they would have then explained their true significance to Customs is not acceptable. The manifests presented should be clear and complete. They should conform to the prescribed regulations of the country. The law does not provide for wrong or incorrect manifestation to be followed by an explanation on demand. The consignment notes as already stated, are not made available to the Customs as a matter of routine and as such no reliance can be placed on them by the Department.

24. The contention of M/s. B. O. A. C. that according to the Notification dated 8-11-1962 issued by the Reserve Bank of India it was necessary for M/s. B. O. A. C. only to declare the consignment of gold in the manifest as 'transit cargo' or 'same bottom cargo' is not tenable. A plain reading of the Notification indicates that gold has to be declared in the manifest as 'gold' and it cannot be declared as anything else. Mention of gold in the manifest either as 'Metal V' or 'Metal Bar V' will not tantamount to compliance with the re-

quirements of the Reserve Bank of India Notification. This is particularly significant when even consignments of Platinum and other metals are described in the manifest as 'Metal V'. With regard to this matter, I hold that M/s. B. O. A. C. did not comply with the requirements of the Reserve Bank of India Notification dated 8-11-1962.

25. Regarding their plea that there was no mal-intention on their part and that they did not knowingly-infringe the law of the country "mens rea" is not an essential ingredient of the offences under Section 8(1) of Foreign Exchange Regulation Act, 1947. I reply in this case on the Supreme Court Judgment in case of State of Maharashtra (appellant) Vs. Mayor Hans George (Respondent) reported as A.I.R. 1965—Supreme Court 722. In this case, Their Lordships held:

"Mens rea" in the sense of actual knowledge that act done is contrary to law is not an essential ingredient of the offence under S. 8(1) read with S. 23(1A) of the Foreign Exchange Regulation Act, 1947".

26. It also do not accept their contention that as best the case could be treated as a case of incomplete manifestation or insufficient description without any fraudulent intention. I reject their plea that the case should be treated as a case falling under Sub-clause (3) of Section 30 of the Customs Act, 1962 and amendment to the manifest be allowed. The evidence on record indicates that it is a clear case of deliberate mis-declaration of a huge quantity of gold in transit through India, in contravention of the provisions of Notification No. 208/62-R.B. dated 8-11-62 issued by the Reserve Bank of India under Section 8(1) of Foreign Exchange Regulation Act, 1947, read with Section 23A and Section 11 of the Customs Act, 1962. By attempting to export this gold on 14-9-1967 from Palam (India) without permission from the Reserve Bank of India, M/s. B. O. A. C. contravened the provisions of Section 8(2) of Foreign Exchange Regulation Act, 1947 read with Sections 23A and 23B *ibid* and Section 11 of the Customs Act, 1962.

27. With regard to the aircraft carrying the gold, the liability of confiscation of the said aircraft has been contested by M/s. B. O. A. C. They have referred to the provisions of Section 115 of the Customs Act, 1962. I do not accept their plea that Section 115(2) is not exclusive of Section 115(1) *ibid* and that this Section has to be read as a whole and not as a part. The provisions of this Section make a mention of different situations under which a conveyance can be confiscated. Section 115(2) lays down the conditions under

which any conveyance or animal used as a means of transportation in the smuggling of goods or in the carriage of smuggled goods shall be liable to confiscation. The term smuggling is defined in the same Act as "Smuggling in relation to any goods means any act or omission which will render such goods liable to confiscation under Section 111 or 113 of the Customs Act, 1962". This being so, the aircraft carrying 'gold' in contravention of the provisions of Notification No. 208/62-R.B. dated 8-11-1962 is liable to confiscation.

28. A firm of repute and standing of M/s. B. O. A. C. enjoying international status, is not expected and could not violate its own regulations. This wilful violation not only of the Customs Law of our country, but also of their own instructions contained in their Traffic Manual, goes against them. Incorrect manifestation, I am convinced, was not innocent. I cannot accept the plea that this is a case of an unintentional clerical error. M/s. B. O. A. C. I hold, had full knowledge of what they were doing. Their intention was to conceal from Indian Customs the fact that they were transiting gold from London to Hongkong in contravention of the India law.

29. It is significant that M/s. B. O. A. C. have been transporting large quantities of gold from London through India to Hongkong under guise of 'Metal V' or 'Metal Bar V'. Hongkong is a vulnerable spot in the East for smuggling of gold as well as other commodities. Details of six consignments so transisted from London to Hongkong via India during five months from April to August, 1967 are given below:—

Date	Airway Bill No.	Description	Quantity in Kgs.
5-4-67	061-3582955	V-Metal	1,076
20-4-67	061-3582980	V-Metal	617
1-6-67	061-4861023	V-Metal	1,229
17-6-67	061-4861112	V-Metal	617
29-6-67	061-4861136	V-Metal	1,226
27-8-67	061-4861157	V-Metal Bar	617
			<u>5,382</u>

30. Transport of over 5,000 Kgs. of gold valued at over Rs. 10 crores in a short period of 5 months from London to Hongkong via India describing it as 'V-Metal' or 'V-Metal Bar' is quite significant. Shipments of gold through India under the guise of 'Metal' have been facilitated by M/s. B. O. A. C.

IX. FINDINGS

31. In view of the aforesaid discussion, I held that M/s. B. O. A. C. are liable to punishment under Section 112(i) of the Customs Act, 1962 for contravention of provisions of Section 8(1) of the Foreign Exchange Regulation Act, 1947 read with Section 11 of the Customs Act, 1962 for not complying with the requirements of Notification No. 208/62-R.B. dated 8-11-1962 issued by the Reserve Bank of India.

32. I also hold that M/s. B. O. A. C. attempted to take out of India Gold on 14-9-1967 without any permission from the Reserve Bank of India after it had been imported into India in contravention of Section 8(1) of Foreign Exchange Regulation Act, 1947. This act of M/s. B. O. A. C. is in contravention of provisions of Section 8(2) read with Section 23B of Foreign Exchange Regulation Act, 1947 and read with Section 11 of the Customs Act, 1962. They are, therefore, liable to punishment under Section 114(1) of Customs Act, 1962 for the violation of the above said provisions.

33. I also hold that the gold seized is liable to confiscation under Section 111(d) of the Customs Act, 1962.

34. The aircraft which carried the contraband gold is also liable to confiscation under Section 115(2) of the Customs Act, 1962.

35. It may apparently appear that this is a case mere technical breach of the law of the country pertaining to manifestation of gold in transit through India. This could be so if the case is viewed in isolation. The facts, however, tell a different tale. Undernoted accentuating circumstances have also to be given due consideration:—

- (1) This was not a solitary instance. Similar violations of the Indian Law were committed by M/s. B. O. A. C. on numerous occasions in the past.
- (2) The violation was wilful. M/s. B. O. A. C. had full knowledge of the law of the country and the violations were deliberate.
- (3) Purpose of Reserve Bank of India Notification No. 208/62-R.B. dated 8-11-1962 was completely defeated by persistent defiance of its provisions by M/s. B. O. A. C.
- (4) M/s. B. O. A. C. did not want Indian Customs to know that 'Gold' was being transited through India as 'Metal'. They tried to conceal this fact from Indian Customs till the very last minute.
- (5) Gold was transited through India from London to places like HONGKONG and MACAU which are vulnerable

from the point of view of smuggling. The quantities were huge. Movements were frequent. They were on the increase. This could not be attributed to an inadvertent clerical error.

- (6) M/s. B.O.A.C. had scant regard for the law of the country and this cannot be treated lightly.

36. In view of the above considerations it is not possible either to treat this matter as a case of mere technical violation or to view these continued violations leniently and I pass the following orders:

X. ORDER

....

37. I order that the two consignments of gold, one of 96 gold bars (1208.599 Kgs.) and the second of 10 gold bars (10 Kgs.) shall be confiscated under section 111(d) of the Customs Act, 1962 for contravention of Section 8(1) and Section 8(2) of Foreign Exchange Regulation Act, 1947 read with Section 23A *ibid.* and Section 11 of the Customs Act, 1962.

38. The confiscated gold is, however, allowed to be released by the lawful owners on payment of a redemption fine of Rs. 25 lakhs (Rupees Twenty-five lakhs only) in respect of 96 bars of gold (1208.599 Kgs.) and Rs. 25,000/- (Rupees Twenty-five thousand only) in respect of 10 bars of gold (10 Kgs.). If redeemed, the gold shall be released to its lawful owners on production of a written permission from the Reserve Bank of India as required under Section 8(2) of Foreign Exchange Regulation Act, 1947. As the gold was in transit through India and was meant for another country an option to redeem the same has been allowed by me.

39. I also impose a penalty of Rs. 5 lakhs (Rupees five lakhs only) on M/s. B.O.A.C. under Sections 112(1) and 114(1) of the Customs Act, for contravention of the provisions of Sections 8(1) and 8(2) of Foreign Exchange Regulation Act, 1947 read with Section 11 of the Customs Act, 1962.

40. I also order confiscation of the Aircraft (No. G-ApFK) under Section 115(2) of Customs Act, 1962. I, however, give an option to M/s. B.O.A.C. to redeem the aircraft payment of a redemption fine of Rs. 10 lakhs (Rupees Ten lakhs only). The aircraft was released pending decision of the case against a bond executed by M/s. B.O.A.C. The bond executed by M/s. B.O.A.C. shall be treated as cancelled after payment of the redemption fine.

Sd/- R. PRASAD

15-2-68,

Collector.

M/s. British Overseas Airways Corporation,
New Delhi.

APPENDIX III

Copy of Appellate order of the Board

CENTRAL BOARD OF EXCISE AND CUSTOMS

New Delhi, the 3rd March, 1969.

ORDER NO. 50—52 OF 1969 OF THE CENTRAL BOARD OF EXCISE AND CUSTOMS ON CUSTOMS APPEAL

N.B. No further appeal lies against this appellate order. Under Section 131 of the Customs Act, 1962, however, any person aggrieved by the order can prefer a revision application to the Central Government within 6 months from the date of communication of the order. Any such application should be addressed to the Secretary to the Government of India, Ministry of Finance (Department of Revenue), New Delhi. The application should be accompanied by:—

- (a) a copy of this order, bearing Court Fee Stamp of 0.50P. only, prescribed under Schedule 1, item 6 of the Court Fees Act, 1870 and
- (b) a spare copy of the application for revision.

Subject: Appeals—Contravention of Foreign Exchange Regulation Act and Customs Act; Import of gold—Confiscation, fine and penalties.

READ: Three appeals

dated 13-5-68, 16-4-68 and 1-5-68.

from (1) M/s. British Overseas Airways Corporation
New Delhi.

(2) M/s. Mocatta and Goldsmid Limited, London.

(3) Bank of Nova Scotia, Toronto and Shinichi
Kina of Naha, Okinawa.

against Order No. 2/68

dated 15-2-1968.

passed by the Collector of Customs and Central Excise,
New Delhi.

ORDER

These are three appeals against Order No. 2/68 dated 15th February, 1968 passed by the Collector of Customs and Central Excise, New Delhi. One appeal has been filed by the British Overseas Airways Corporation, New Delhi (hereinafter referred to as B.O.A.C.)

The second appeal is from M/s. Mocatta and Goldsmid Limited, London (hereinafter referred to as Mocatta Goldsmid) and the third appeal has been filed by Bank of Nova Scotia, Toronto and Shinichi Kina of Naha, Okinawa. The latter two parties have filed a combined appeal. Since these appeals raise common question of fact and law, this consolidated order is being passed. .

2. These appeals were heard by us on 17th and 18th June, 1968, 6th August, 1968 and 18th and 19th September, 1968. B.O.A.C. were represented during the hearings by Advocates Shri T. N. Sethi and Shri D. P. Sethi instructed by solicitor Shri Bernard Wood. The other appellants were represented by Shri A. K. Basu, Advocate instructed by Shri D. N. Gupta and Shri J. K. Mehra of M/s. Orr Dignam, Solicitors. Shri M. A. Brown and Shri T. Bates, Solicitors held a watching brief on behalf of insurers of gold. Shri S. K. Srivastava, Director of Revenue Intelligence and Shri C. L. Beri, Assistant Collector of Customs and Central Excise, New Delhi appeared on behalf of the Customs.

3. Under Section 128(2) of the Customs Act, 1962 the Appellate Authority may make such further inquiry as may be necessary. Requests were made to us by the appellants that since the Collector had not appreciated the facts correctly they may be permitted to adduce evidence at the appeal stage under section 128(2) of the Customs Act. We also felt that some further enquiry was necessary for a proper determination of the issues involved. We, accordingly, permitted the appellants as well as the Customs to produce witness, and to adduce further documentary evidence. The witnesses examined by B.O.A.C. at Palam, at the relevant time, and Shri T.A.C. Cooper, Supervisor, Cargo Reservations B.O.A.C., London. These two witnesses also filed affidavit which are on record. The Customs examined Shri S. N. Karkhanis, Assistant Collector of Customs, Palam Airport and Shri K. Ramachandra, Air Customs Inspector, Palam Airport. On behalf of Mocatta Goldsmid, Shri E. E. Mocatta, Managing Director of the Company appeared as a witness. All the above witnesses were cross-examined by the opposite side. Shri Bates explained the general practice regarding the system of open covers and the method of dealing with insurance claims. In addition, B.O.A.C. filed two affidavits one given by Shri

G. H. Sommer, Project Officer, Cargo Unit B.O.A.C., London and the other given by Shri Keith Granville, Deputy Chairman Deputy Chief Executive of B.O.A.C. Moccatta Goldsmid also produced an affidavit from Shri Ian Macdonald Bovie, Chartered Accountant and partner in the firm of Peat, Marwick, Mitchell and Co., Chartered Accountants, London, and an affidavit of Shri Peter John Griffiths of M/s. Wilkinson and Grist of Hongkong, a firm of Solicitors. In the course of hearings we desired certain further information to be furnished for which Moccatta Goldsmid wanted some time. Consequently, they furnished three affidavits after the hearings were consulted, one from Shri Ian Francis Clumy Macpherson, Assistant Director of Commerce and Industry of the Hongkong Government, the second from Shri Keneth Andrew Miller, partner of M s. Lowe Bingham and Matthews, Chartered Accountants and authorised Auditors under the Companies Ordinance in Hongkong and the third from Shri Jose Correia Montenegro, Chief of the provincial Department of Economic Services of Macao.

4 In addition, various other documents were also furnished on behalf of each side. The following documents were produced on behalf of B.O.A.C.:

- (1) Two punch Cards.
- (2) Copy of the reply by the Deputy Prime Minister of India to Parliament Question No. 4256 of 24th December, 1967.
- (3) Copy of Memorandum of Director General of Civil Aviation No. 443 64-IR dated 14th April, 1967.
- (4) Correspondence with B.O.A.C. Manager Far East in Hongkong concerning the manner in which written acknowledgements of the "show cause notice" were obtained from commercial investment Co. Ltd., Hongkong, and Companhia De Desenvolviments Commercial, Macau.
- (5) Summary of B.O.A.C. services to Hongkong in winter of 1967-68.
- (6) Job descriptions of Export Service Officers (otherwise known as Flight Allocation Officers) and Punched Card Operators.
- (7) Various letters written from time to time by the successive Directors of Revenue Intelligence and other officials of the Government of India appreciating the services of B.O.A.C. in anti-smuggling measures.

- (8) Letter from Chief of Security B.O.A.C. to Deputy Secretary solicitor B.O.A.C. dated 23rd August, 1968.

The documents produced on behalf of Mocatta Goldsmid were:—

- (1) Photostat copy of the letter dated 16th August, 1968 from M/s. Wilkinson and Grist with enclosures, such as letter from Exchange Controller of Hongkong to the High Commission of India.
- (2) Two original sheets from the accounts of Mocatta Goldsmid covering the period from 18-4-67 to 23-1-68.
- (3) Five slips No. 061927, 062085, 092009, 061466 and 093126.
- (4) Export licence (photostat copy) of Hongkong Government No. 014139 dated 16-1-1968.
- (5) Hongkong Government Import Licence Nos. 800380 of 9-1-68.
- (6) Macau Government Import Licences No. 148, 149 and 154 of 1968 (all photostat copies).
- (7) Photostat copy of the Insurance Policy of Orion Insurance Company dated 12th October, 1967 and the Insurance cover.
- (8) Copy of the statement of accounts for the year ended 31st March, 1967 of M/s. Commercial Investment Co. Limited, Hongkong.
- (9) Photostat copy of letter from DRI to Mocatta Goldsmid dated 25th September, 1967 and its reply with certain enclosures.
- (10) Copy of the balance sheet of the Mocatta Goldsmid at 31st March, 1967.
- (11) Photostat copy of the Resolutions of Directors of commercial Investment Co. Ltd., dated 1st August, 1950 and of the Extract of the Minutes of a Directors' Meeting held on 20th November, 1950.
- (12) File A consisting of documents in relation to the importation into Hongkong of 38,671.651 fine ounces of gold comprising (a) Import Declaration (b) Duplicate Import Declaration (c) Import Licence (d) B.O.A.C. Airway Bill.

- (13) File B consisting of (a) Re-export Declaration, (b) Duplicate Re-export Declaration (c) Export licence (d) Consignment note issued by the Hongkong Macau Hydrofoil Company Limited and (e) Duplicate Macau Import Licences for 19,341.321 fine ounces of gold and evidence of delivery to Macau.
- (14) File C consisting of (a) Re-export Declaration, (b) Duplicate Re-export declaration, (c) Export Licence, (d) Consignment Note issued by the Hongkong Macau Hydrofoil Company Limited, (e) Duplicate Macau Import Licences for 19,330,330 fine ounces of gold and evidence of delivery to Macau.
- (15) File D consisting of documents in relation to the importation into Hongkong of 38,723.257 fine ounces of gold comprising (a) Import Declaration, (b) Duplicate Import Declaration, (c) Import Licence and (d) B.O.A.C. Airway Bill.
- (16) File E consisting of (a) Re-export Declaration, (b) Duplicate Re-export Declaration, (c) Export Licence, (d) Consignment Note issued by the Hongkong Macau Hydrofoil Co. Limited, and (e) Duplicate Macau Import Licences for 19,385,484 fine ounces of gold and evidence of delivery to Macau.
- (17) File F consisting of (a) Re-export Declaration, (b) Duplicate Re-export Declaration, (c) Export Licence, (d) Consignment Note issued by Hongkong Macau Hydrofoil Co. Ltd., and (e) Duplicate Macau Import Licences for 19,385,484 fine ounces of gold and evidence of delivery to Macau.

5. Along with the memo of appeals also certain documents were filed as enclosures. With the appeal of B.O.A.C. there were two annexures both of which were copies of Traffic Manual Cargo Regulations. With the appeal of Mocatta Goldsmid, besides the copy of the show cause notice, the reply of the B.O.A.C. and the order of the Collector, certain other documents were also enclosed. These were:

- (1) Application to the Bank of England dated 12th September 1968 in Form 'X'.
- (2) Letter from Bank of England dated 19th March, 1968.
- (3) Affidavit of Shri E. E. Mocatta.

- (4) Airway Bill of B.O.A.C.
- (5) Shipping Bill submitted for export of gold in U.K.
- (6) Certificate 'C' with the permission to export gold from U.K.

Along with the appeals of Bank of Nova Scotia, Toronto and Shinichi Kina, in addition to the copies of the show cause notice reply and the order, three other documents were enclosed. These were:—

- (1) Cable from Bank of Ryukyus.
- (2) Airway Bill of B.O.A.C.
- (3) Commercial Invoice regarding sale of gold issued by Bank of Nova Scotia.

On behalf of the Customs, Shri Beri furnished all the documents which were already on record at the original stage. In addition to these, he also furnished the copy of show cause notice which was sent to Companhia de Desenvolvimento Commercial, Macau (hereinafter referred to as Companhia, Macau) with the envelope which indicated that the same was returned to the sender as undelivered. Shri Srivastava, the Director of Revenue Intelligence, New Delhi (hereinafter referred to as DRI) also produced copy of his letter dated 25th September, 1967 to Macatt, Goldsmid, the replies dated 9th October, 1967 and 13th October, 1967, from Mocatta Goldsmid, the letter dated 12th October, 1967 from the Bank of England, a copy of the Notice to Authorised Banks and Authorised Dealers in Gold [EC (General) 62], a photostat copy of Certificate 'C', copies of certain cables, the consignment note and weight list of the Bank of England. The DRI also produced the envelope containing copy of his letter dated 25th September, 1967 addressed to Companhia Macau which was returned as undelivered. The DRI also furnished a copy of the Traffic Manual of B.O.A.C. containing extract regarding South African goods.

6. During the hearings we had asked the DRI and the Assistant Collector of Customs and Central Excise, Shri Beri to scrutinise the manifest of various Air Companies filed at Palam Airport during the last six months and prepare a statement of the entire where declarations of gold of metal or metal bar appeared. Accordingly, a statement was prepared and furnished to us. Copies of this statement were supplied to all the appellants. No party raised any objection about the accuracy of this statement.

7. We have gone through all the above evidence, oral and documentary, in detail and shall advert to the same in our order at appropriate stages.

8. Briefly stated, the facts of the case are as follows:

B.O.A.C. Aircraft with Registration marks G-APFK arrived at Palam Aerodrome from London via Frankfurt and Teheran on 14th September, 1967 at about 10.30 A.M. on its way to the Far East. The Aircraft took off for Bangkok at about 11.20 A.M. However, it returned to Palam at about 1.30 P.M. because of engine trouble. The engine could not be repaired on 14th. B.O.A.C., finding that the Aircraft might not be able to leave Palam even on 15th, start making alternative arrangements for the transport of passengers and cargo. In the morning of 15th, sometime between 9.40 A.M. and 11.00 A.M. Shri Santhanam, Acting Airport Manager of B.O.A.C. approached Shri S. N. Karkhani Assistant Collector of Customs. Incharge Palam Customs with the request that consignments of gold carried by the aircraft be permitted to be off-loaded and arrangements made for its security. The Assistant Collector told him that the Customs Warehouse was not secure enough to hold the gold and he should make proper arrangements regarding armed guard for its security. Sometime, between 3 P.M. and 4.45 P.M., on the same day Shri Santhanam approached Shri Ramachandran, Air Customs Inspector Palam with the request that transshipment of gold from the sick aircraft to another aircraft be permitted. Shri Ramachandran called for the manifest and on perusal of the same found that gold had not been declared in the manifest. When this was pointed out to Shri Santhanam, he, *inter-alia*, stated that the entries in the manifest relating to 'metal bar' and 'metal' referred to gold. *Prima-facie*, Shri Ramachandran was of the view that since the gold was not declared as gold in the manifest, the same was liable to confiscation. The matter was, however, taken upto the Assistant Collector whose reaction was also the same as that of Shri Ramachandran. Both Shri Karkhani as well as Shri Ramachandran had examined the consignment notes also where the articles were declared as gold. The gold was detained and formally seized on 16th September.

9. The aircraft was carrying two consignments of gold total weighing 1218.599 kgms. and valued at approximately Rs. 1.03 crore at the international rate.

- (i) 24 packages containing 96 bars weighing 1208.599 kg. consigned by Mocatta Goldsmid, London to M/s. Commercial Investment Company, Hongkong (hereinafter referred to as C.I.C. Hongkonk) for onward transmission to M/s. Companhia De Desenvolvimento Commercial, Macau (hereinafter referred to as Companhia Macau). Each bar bore serial Nos. as also the name of the South African Refinery (Rand Refinery Ltd.). The fineness of the gold 9951-9960 was marked on each bar. Each bar also bore the inscription "Mocatta and Goldsmid Ltd., London Bullion Brokers".
- (ii) One package containing 10 bars of gold weighing 10 Kg. consigned by the Bank of Nova Scotia, Toronto (Canada) to the Bank of Ryukyus, Okinawa (Japan). The latter Bank was acting as agents for one Shrinichi Kina of Naha, Okinawa, who was the actual consignee of this consignment.

10. In the manifest of the aircraft the following entries appeared:—

Airway Bill No.	No. of packages	Nature of goods	For use by owner or operator only	For official use only
0614861185	24	Metal Bar	V 1227 HKG	
0614961690	1	Metal	V 11 YYZ' OKZCA	60013

Airway Bill Nos. are mentioned for both the consignments in the manifest. In the Column "Nature of goods", the nature of the goods is shown as "Metal Bar" and "Metal" respectively and not as gold. In the next column titled "for use of owner or operator only", there is letter "V". (It was explained by B.O.A.C. that letter "V" stood for "valuable" as shown in their Traffic Manual. The Customs, however, contended that they did not know the significance of letter "V" nor were they ever told about it prior to this case. In fact, some of the Delhi officials of B.O.A.C. also did not know the significance of this letter). The destination of the first consignment is shown as Hongkong and of the other as Japan.

11. Section (1) of the Foreign Exchange Regulation Act, 1947 (hereinafter referred to as FERA), *inter-alia*, provides that the Central Government may, by notification in the Official Gazette Order that, subject to such exemption, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank, bring or send into India any gold. The Explanation to this sub-section makes it clear that even goods in

transit are deemed to be goods brought into India for the purpose of Section 8(1) of the F.E.R.A.

12. By Notification No. 12(II)-F.L.748 dated 25th August, 1948, amended, the Central Government directed that, except with the general or special permission of the Reserve Bank, no person shall bring or send into India from any place outside India, *inter-alia* any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not. This notification was issued under Section 8(1) of the F.E.R.A.

13. In pursuance of the said notification of 25th August, 1948 the Reserve Bank issued notification No. F.E.R.A.208 62.R.B. dated 8th November, 1962 giving general permission for bringing of gold bullion etc. subject to certain conditions. The notification of 8th November, 1962 reads as follows:—

In pursuance of the Notification of the Government of India in the Ministry of Finance No. 12(II)-F1/48 dated the 25th August, 1948 and in supersession of the Reserve Bank of India Notification No. FERA 62/48-R.B. dated the 25th August, 1948, as amended from time to time, the Reserve Bank of India hereby gives general permission to the bringing or sending of any of the following articles, namely:—

- (a) any gold coin, gold bullion, gold sheets or gold ingot whether refined or not; or
- (b) any silver bullion, any silver sheets or plates which have undergone no process of manufacture subsequent to rolling, or any
- (c) any jewellery or articles made wholly or mainly of gold or of silver,

into any port of place in India when such article is on through transit to a place which is outside the territory of India,

Provided that such article is not removed from the ship or conveyance in which it is being carried except for the purpose of transshipment;

Provided further that it is declared in the manifest for transit as same bottom cargo or transshipment cargo.

14. It may be seen that the Notification of 8th November, 1962 has two provisos. In the case in question the two consignments of gold were in transit through India and they were also not removed on the conveyance in which they were being carried except for the purpose

of transhipment. Therefore, the first proviso was satisfied. The question, however, arose whether the second proviso was satisfied or not? According to the Collector of Customs, who adjudicated the matter, the second proviso was not satisfied since the consignments were not declared in the manifest as gold.

15. The Collector confiscated the two consignments of gold under Section III(d) Customs Act for contravention of Section 11 Customs Act. He, further, directed that the confiscated gold be allowed to be redeemed by lawful owners on payment of lines of Rs. 26 lakhs and Rs. 25 thousand respectively. If redeemed the gold shall be released to lawful owners on production of a written permission from the Reserve Bank of India as required under Section 8(2) F.E.R.A. The Collector imposed a penalty of Rs. 5 lakhs on B.O.A.C. under Section 112 and Section 114(1) of the Customs Act. He also confiscated the aircraft under Section 115(2) of the Customs Act and imposed a fine of Rs. 10 lakh in lieu of confiscation.

16. Against this order of the Collector, the parties concerned have filed appeals to us. As mentioned above, one appeal has been filed by B.O.A.C as carriers of gold. They are aggrieved since a penalty of Rs. 5 lakhs and a fine of Rs. 10 lakhs have been imposed on them. The second appeal is from Mocatta Goldsmid, who are the consigners of the big lot of gold namely the 24 packages containing gold bars. They feel aggrieved since, according to them, the property in this big consignment of gold continued to remain in them and, therefore, they were the lawful owners of the same and consequently, the liability for payment of the fine of Rs. 25 lakhs in lieu of confiscation of gold devolves on them. The third appeal has been filed by the bank of Nova Scotia, Toronto and Shinichi Kina of Naha, the consigner and the consignee respectively of the smaller consignment of gold. They are also aggrieved against confiscation of the 10 bars of gold. The case of Mocatta Goldsmid and of the Bank of Nova Scotia and Shinchia Kina was argued by Shri A. K. Basu and the pleas put forth on their behalf were identical.

17. Before coming to the main issues involved in these appeals it appears to be necessary to dispose of a preliminary objection raised on behalf of the Customs. It was contended that Mocatta Goldsmid were not the owners of the first consignment of gold and, as such, they had no right to file an appeal against the order of the Collector. In support of this proposition, reliance was placed on three facts.

- (i) In the X form submitted by Mocatta Goldsmid to the Bank of England, they had declared that the owner of the big Consignment of gold was Companhia, Macau.

- (ii) The inscription on the bars showed Mocattas as brokers and brokers could not be owners of the gold.
- (iii) There was no denial from CIC, Hongkong or Companhia, Macau that they were not the owners of the gold.

It was contended that, except for the statement of Shri E.E. Mocatta, there was no other evidence to show that ownership of the gold vested in Mocatta Goldsmid and that the statement made in a statutory declaration should be given preference to the subsequent statement of Shri Mocatta.

18. It may be relevant to mention that in the declaration form X which Mocatta Goldsmid submitted to the Exchange Control Department of the Bank of England on 12th September, 1967, they made a declaration as follows:—

“I/We declare from facts known to me/us or from enquiries I/we have made that to the best of my/our belief the owner(s) of the item(s) mentioned overleaf is/are—Companhia de Desenvolvimento Commercial, Macau”.

At the bottom of this declaration there is a note “In the case of gold evidence of ownership must be furnished”.

19. Shri Mocatta, in his statement, clarified that when they first started this business in 1954, they told the Bank of England the full arrangement under which the gold was to be exported to Macau via Hongkong. They had explained to the Bank of England that they were sending the gold to CIC Hongkong on consignment basis and CIC Hongkong kept the gold on their behalf till they purchased the same. CIC Hongkong, in turn, transferred the gold to Companhia, Macau. The Bank of England knowing the full facts allowed them to make the declaration in this manner. In support of his statement, he referred to two letters written by the Bank of England with reference to the big consignment of gold in question. The first letter is dated 12th October, 1967 and the second letter is dated 19th March, 1968. Both these letters were addressed to Mocatta Goldsmid. A copy of the letter dated 12th October, 1967 was sent by Mocatta Goldsmid to DRI also. A copy of the letter dated 19th March, 1968 was enclosed with the appeal. These letters read as follows:—

Letter dated 12th October, 1967

“I write with reference to your request for assistance from the —in order to enable you to reply to the letter from the Director, Revenue Intelligence, New Delhi. reference DRI

F. No. 1666/74/67 of the 25th September, a copy of which has been forwarded to the Bank.

I have first to say that the Bank of England are content for this letter or the attached copy thereof to be forwarded by you to the Director of Revenue Intelligence in New Delhi together with your own replies to the questions asked. I have also to confirm that the transactions in question were perfectly normal and complied with the United Kingdom Exchange Control Regulations in every way—a copy of the Bank's Notice to Banks and Bankers on this subject, E.C. (General) 62, is attached for reference as may be required.

As you are aware, the import of gold bullion into the United Kingdom is on Open General Licence. The Bank of England are not, therefore, in a position to produce any documents relating to the import of gold into the United Kingdom nor relating to its deposit in the Bank of England nor its clearance by Customs on importation into the United Kingdom. The Bank regret that they cannot specify the period during which the gold had been held at the Bank prior to its sale to your country. They are, however, prepared to state that the gold in question formed part of continuing consignments of gold received over a period of many years, that it was purchased by the Bank of England, that it was subsequently sold to Mocatta and Goldsmid Ltd. and that it was then retained in the Bank for a further period before being delivered up to your company. The bars were not assayed by the Bank of England. The particulars of melter and assayer appear on the bars themselves: the number appearing on the Bank's weight lists (which give the weights and fine ounce contents of the bars as established by weighing and calculation by the Bank) are merely reference numbers representing the name of the melter and assayer."

Letter dated 19th March, 1968—

Gold confiscated in India

"I write with reference to the question raised about the method of completion of Forms X.

Under the provisions of the Notice to Authorised Banks and Authorised Dealers in Gold issued by the Bank of England under the Exchange Control Act, 1947 relating to dealings in gold, Authorised Dealers in Gold (which include your

company) are permitted to sell gold, subject to certain conditions, to persons resident outside the Scheduled Territories. Gold so sold may be exported from the U.K. and Authorised Dealers in Gold are authorised to issue the necessary certificates C to enable export to be effected through N. M. Customs. In these circumstances, Authorised dealers in Gold are required to submit the relative Form X to the Bank of England. In many cases, including that of your company's export under reference X768772, the gold is in course of sale with settlement and consequent change of beneficial ownership to take place upon delivery in an overseas centre. In these cases the Bank of England export the Authorised Dealer in Gold to show the name and address of the ultimate overseas purchaser in the space set aside normally for the particulars of the beneficial owner. It is, of course, understood that, pending delivery and settlement the gold remains in the beneficial ownership of the exporter—in this case, your company."

It was argued on behalf of Mocatta Goldsmid that these letters clearly indicated that the ownership, at the time the gold was seized in India, vested in them.

20. Mocatta Goldsmid also produced two pages from their stock Ledger showing the gold stock held by them from time to time in Hongkong, and various posting slips which record the individual transactions which are posted in the Ledger. In the Ledger there are columns for Date, Particulars, value Date, Debit, Credit and Balance. When gold is sent from London to Hongkong, the same is debited from the London Stock. When gold reached Hongkong it is added to the balance of gold held by Mocatta Goldsmid in Hongkong stock. When out of Hongkong stock of Mocatta Goldsmid, particular quantity of gold is purchased by CIC Hongkong, that quantity is shown in the ledger of Mocatta Goldsmid to the credit of CIC Hongkong and a fresh balance of Mocatta's Hongkong gold stock is drawn. When gold is sent from London to Hongkong, Mocatta Goldsmid issue a slip titled "RECEIVE". It is addressed to CIC Hongkong and says "You will receive for our account" a particular quantity of gold mentioned in the slip. When out of their Hongkong stock they sell some gold to CIC Hongkong, they issue a slip titled "ACTION COPY SAIE". In this slip the quantity and value of gold and method of payment are indicated. Delivery is shown to have been made from "Gold stock account Hongkong". Mocatta Goldsmid produced three such 'Sale' slips and two 'Receive' Slips. One of the 'Receive' slips which is dated 12th September, 1967 refers to the gold which is the

subject matter of these proceedings. This slip which is addressed to CIC Hongkong says "You will RECEIVE for our account by order of London Gold Stock—96 bars Gold Flight: DA 916/13th September, A/W Bill 4861185 CZS. 38693.055 fine gold". This quantity of gold is also shown in the Ledger as debited against London stock on 12th September. But this gold has not been credited in the Ledger to the account of CIC Hongkong nor any 'SALE' slip has been issued. It is seen from these accounts that gold is taken to Hongkong from London on the account of Mocatta Goldsmid and continues to remain on their account in Hongkong stock till CIC Hongkong purchase the same. The gold in question was also going to Hongkong from London, like other despatches, on the account of Mocatta Goldsmid and the fact that in the ledger of Mocatta Goldsmid this gold has not been credited to the account of CIC Hongkong appears to show that this gold had not been sold to CIC Hongkong by 16th September, 1967 when the same was seized in India.

21. In support, an affidavit given by Shri Ian Macdonald Bowie, Chartered Accountant, a partner in the firm of peat, Marwick Mitchell & Co., Chartered Accountants and Auditors of Mocatta Goldsmid, was also furnished. It is stated in the affidavit that gold in question was purchased by Mocatta Goldsmid from the Bank of England for their own account on 9th August, 1967. It is further stated that the procedure of sale to CIC Hongkong was that gold first shipped to Hongkong where it was held under the control of CIC Hongkong who acted as agents for Mocatta Goldsmid. CIC Hongkong, at a convenient time to them, purchased quantities of this gold and then appropriated the gold to themselves. The gold in question was sent to Hongkong, under this procedure. This position was re-affirmed by Shri E. E. Mocatta in his oral statement. On the basis of the aforesaid evidence, it was argued that Mocatta Goldsmid were the owners of the gold. It was also contended that Mocatta Goldsmid had 10 per cent shares in CIC Hongkong and Shri Mocatta himself was a Director of CIC Hongkong; therefore, he could speak on behalf of CIC Hongkong also. As such, there was no point in arguing, as the Customs had done, that since CIC Hongkong had not denied their ownership, Mocatta Goldsmid could not be treated as owners. On the other hand, the fact that neither CIC Hongkong nor Companhia Macau claimed ownership of gold showed that the property in the gold had not passed to them and Mocatta Goldsmid continued to remain as owners. It was further contended that if Mocatta Goldsmid were not owners, who else were the owners? The Customs had not indicated any other name. The argument, that the inscription on the bars showing Mocatta Goldsmid as brokers indicated their lack of ownership, was also repelled on the ground that there was enough

evidence on record to establish that Mocatta Goldsmid had actually purchased this gold on their own account from the Bank of England, after making payment to the said Bank. In any case, it was urged that Mocatta Goldsmid would have no objection if the gold was released to B.O.A.C. as their carriers.

22. From the aforesaid evidence, we find that the gold in question was purchased on their own account by Mocatta Goldsmid from the Bank of England. This fact is also corroborated by the entries in the accounts of Mocatta Goldsmid. The entries in the accounts and the other evidence referred to above also shows that even after the gold reached Hongkong, it remains the property of Mocatta Goldsmid for sometime, till CIC Hongkong purchase it by paying for it and till then CIC Hongkong keep custody of the gold in Hongkong on behalf of Mocatta Goldsmid. There is no evidence that for the gold in question CIC Hongkong or Companhia Macau have already made payment to Mocatta Goldsmid. Also, neither of them are claiming ownership of the gold. It is true that the declaration by Mocatta Goldsmid in form X, by itself, goes against their claim of ownership. But, then, the same has to be read in the context of the clarifications provided by the Bank of England, and if so read there is no inconsistency between the declaration in form X and the claim of ownership as made by Mocatta Goldsmid. In these circumstances, it would be reasonable to hold that the gold belongs to Mocatta Goldsmid. It is, however, not necessary for us to give a categorical finding on this question. The purpose of this enquiry was only to find out whether Mocatta Goldsmid had any right to file an appeal against the impugned order. Under Section 128 of the Customs Act, any person aggrieved by any decision or order may appeal against the said decision or order. Can Mocatta Goldsmid be considered as a person aggrieved by the impugned order? If Mocatta Goldsmid are the owners of the gold, then surely they can be aggrieved by the confiscation of the gold in question. Even assuming that there was some doubt about their claim ownership of the gold, the fact remains that Mocatta Goldsmid were admittedly consigners of the gold and B.O.A.C. were carrying gold on their behalf and under their instructions. That being so, they could be legitimately aggrieved by the order of confiscation of gold. We, therefore, do not find any substance in the preliminary objection that Mocatta Goldsmid had no right to file this appeal.

23. Coming to the main issues involved in these appeals, the stand taken by B.O.A.C is reflected in the following extracts from their reply to the show cause notice issued before adjudication by Collector, the grounds of appeal and the contentions raised at the time of the hearing before us.

- (i) It is not disputed that the term 'Metal V' is an incomplete and insufficient description of gold. It is also agreed that many staff in B.O.A.C. would not know that the term 'Metal V' implied 'gold'. [Reply to 4(x) of show cause notice].
- (ii) "No permission of Reserve Bank of India was necessary for the gold in question. It was covered by the general permission". (reply to para 10 of the show cause notice).
- (iii) "...the respondent admits and regrets that there was a formal, unintentional and consignments were insufficiently described in the manifest. However, the manifest made it very clear that the consignments were being carried on in CAPFK throughout. In effect the manifest made it very clear that these goods were for transit as same bottom cargo"... Full description of lack of such description in the manifest is in essence a formal and technical error". (Reply to paras 12—14 of show cause notice).
- (iv) "The manifest made it clear that the consignments were transiting India as same bottom cargo". (Reply to para 17—19 of show cause notice).
- (v) "It is further submitted in conclusion that the present position is a result of an unfortunate but bonafide mistake in the preparation of the manifest. The bonafides of the respondent, however, are absolutely evident and, therefore, it is requested that as requested by Mr. Santhanam already the manifest may be allowed to be corrected so as to conform strictly to the regulations". (Last para of reply to show cause notice).
- (vi) "That the Learned Collector should have hold that the alleged misdescription or incomplete description in the cargo manifest was not due to any fraudulent intention and that he should accordingly have allowed the cargo manifest to be amended or supplemented under Section 30(3) of the customs Act, 1962, as was requested on behalf of the appellant at the time". [Ground (B) (6) of the appeal].
- (vii) "That the Learned Collector was wrong in holding that the description of the gold in the cargo manifest was a misdeclaration and contravention of the Foreign Exchange Regulation Act, 1947 and the Notification made thereunder or of the Customs Act, 1962". [Ground (B) (9) of the appeal].

- (viii) "That the cargo manifest clearly indicated that these consignments were in the course of being carried to Hong-kong and Chinawa respectively and were, therefore, only in transit through India, and that in the circumstances the consignments were sufficiently described in the manifest as "the same bottom cargo or transshipment cargo" so as to fall within notification No. F.E.R.A. 208/62--RB dated 8th November, 1962". (Group (B) (10) of the appeal).
- (ix) "Metal 'V' was incomplete description for the gold.... Mistake in the manifest was not actuated by any fraud, dishonesty or malafides". (Record of hearing on 17-6-68).
- (x) "Metal was not one article but a nature of article." (Record of hearing on 18-6-68).
- (xi) ".....I do admit my mistake. Here it is so and that is why the amendment of the manifest is requested for..... The manifest may be allowed to be corrected so as to conform strictly to the regulations.....Even if it is incorrect and my submission was it was on complete....." (Record of hearing on 19-9-68).

24. Section 30(3) of the Customs Act, 1962 reads:

"If the proper officer is satisfied that the import manifest or import report is in any way incorrect or incomplete and that there was no fraudulent intention, he may permit it to be amended or supplemented."

25. It was contended on behalf of B.O.A.C. that though "Metal V" or "Metal bar V" was an insufficient description for gold and metal was not one article but a nature of article and there was also no definite evidence to show that Customs knew that these expressions meant gold, the use of these expressions should have at least put Customs on notice and they were reasonably expected to make enquiries as to what that description included and in particular whether the same included gold. On 14th when the plane came for the first time and was allowed to leave, if the Customs had any doubt, they would not have passed the consignment. It was also urged that consignment notes which described the goods as gold were shown to the Customs immediately on being asked. It was next contended that the mistake in the manifest was bonafide and was not actuated by any fraud, dishonesty or malafides. The mistake was not as a result of circumstances designed by them. It was stressed that B.O.A.C. had nothing to gain by this misdescription and, as

such, there could be no motive in making a wrong declaration. The counsel for B.O.A.C. regretted for the wrong declaration; he pleaded that the cause of the mistake were factors incidental to computerisation of the system of manifest preparation introduced in the year 1965 and not any evil design on the part of the BOAC. In support of this plea, the counsel relied upon the various affidavits and the statements of the witnesses produced on their behalf.

26. Shri Sethi, the counsel for BOAC further argued that if he could prove the bonafides of BOAC and that they never acted mala-fide or, in other words, that there was no fraudulent intention on their part, they would be entitled to get the benefit of sub-section (3) of section 30 of the Customs Act. He stated that the amendment of the manifest could not be refused unless there was fraudulent intention. He also stated that fraudulent intention mentioned in sub-section (3) of Section 30 refers to fraudulent intention which had a bearing on the wrong manifestation of the goods and fraudulent intention in any other respect would be irrelevant for the purposes of Section 30(3) of the Customs Act. He, however, urged that in so far as BOAC were concerned, there was no question of any fraudulent intention in any respect what so ever. They have always been cooperating with Customs in their anti-smuggling operations. Shri Sethi produced a number of letters written by the successive Directors of Revenue Intelligence, New Delhi and various other Officers of the Government of India appreciating their services in anti-smuggling drive. The argument of Shri Sethi was that how could it be inferred that BOAC who were so cooperative with the Customs in anti-smuggling operations would have any fraudulent intention in preparing a wrong manifest. Their conduct throughout has been bonafide and as such there was no material to impute malafides to them.

27. Shri Sethi also contended that they had made a request for amendment of the manifest at all possible stages. The moment Shri Santhanam was told by Shri Karkhanis as well as by Shri Ramachandran that there was a mistake in the manifest, he showed them the B.O.A.C.'s traffic manual and made a request to allow amendment of the manifest. This request was rejected by the Asstt. Collector of Customs. So, when the next stage came i.e. the moment the show cause notice came to them, a prayer was made in reply to the show cause notice for amendment of the manifest. Again, the request has been repeated in the memo of the appeal. The argument of the counsel, therefore, was that the request for amendment of the manifest was not an after--thought and was made at every available opportunity. He also added that, under Section 30(3) of the Customs

Act, for applying for the amendment of the manifest, no procedure is provided, no form is provided and no limitation is laid down. He mentioned that the statement of Shri Karkhanis showed that amendment of the manifest could be allowed even on an oral request.

28. In substance the argument of Shri Sethi was that under Section 30(3) of the Customs Act, it was incumbent on the Customs to allow amendment of the manifest if there was no fraudulent intention. Here, there was no fraudulent intention on the part of the BOAC and they had also made a request for the amendment of the manifest at the first available stage. As such, the manifest may be allowed to be amended so as to conform strictly to the regulations. He also contended that once the amendment of the manifest is allowed, it would take effect from the date of representation in other words, it would be deemed as if the amended manifest was originally presented to the Customs. In support of this proposition, he relied upon the decisions reported in AIR 1936 Rangoon 508, AIR 1938 Patna 205, AIR 1914 Lahore 263, AIR 1925 Madras 487, ILR 19 Bombay 320 (1894 AIR 1933 Madras 153).

29. Lastly, it was argued by Shri Sethi that so far as transit goods were concerned much weight was not given regarding the description of the goods in the preparation of the manifest. In this connection he invited reference to be recommendation of International Civil Aviation Organisation. He pointed out that one of the recommendations, which though not accepted by Government of India, was that the description of transit goods need not be given in the manifest. In this connection Shri Sethi invited attention to ground B(10) of the grounds of appeal which has already been reproduced at Sub-Clause (viii) in para 23 above. Since the cargo manifest clearly indicated that these consignments were in the course of being carried to Honkong and Okinawa respectively and were, therefore, only in transit through India, it was argued that in the circumstances, the consignments were sufficiently described in the manifest as "the same bottom cargo or transshipment cargo" so as to fall within the Notification of 8th Nov. 1962.

30. Shri Sethi also invited reference to the Supreme Court decision in the case of State of Maharashtra Vs. Hans George Mayer reported in AIR 1965 Supreme Court 722. He distinguished this decision of the Supreme Court and urged that the same was not relevant to the fact and circumstances of this particular case. In the Supreme Court decision, the passenger concerned had not made any declaration in the manifest with result the Supreme Court had not to consider the question whether the amendment of the mani-

fest could be allowed or not. Here, BOAC have made a declaration which is now doubt incomplete and for considering whether the amendment could be allowed or not, the question of intention was material in terms of Section 30(3) of the Customs Act.

31. The appeals filed on behalf of Mocatta Goldsmid and the Bank of Nova Scotia and Shincihi Kina raise identical points. Their main contentions can be summed up as follows:—

- (i) The appellants delivered the gold to BOAC in London together with copies of the consignment note (Airway Bill) which properly and accurately, described the gold as such. The consignment note was prepared by the Forwarding Agents on behalf of the appellants. They also paid freight at a specially high rate for commodities of a very high value such as gold. In addition the Forwarding Agents on their behalf prepared a shipping bill and a 'C' certificate for the purpose of U.K. Export requirements which also properly and accurately described the gold as such and which were only duly lodged with the U.K. authorities. Thus, so far as the appellants were concerned, a true and proper declaration of the gold was given at the time the same was delivered to B.O.A.C.
- (ii) Although from the order of the Collector it now appears that B.O.A.C. listed the gold as "Metal V" in their manifest, the appellants were not aware until these proceedings that this was or was even likely to be done. The said manifest was not prepared by the appellants but by BOAC for their own purposes in London and they were not aware of the position. They were, however, aware that a copy of the consignment note would accompany the gold on the aircraft and would thus provide a proper and accurate record of the nature of the goods being carried by B.O.A.C.
- (iii) It was a term of the Contract of carriage made by the appellants with BOAC that the latter would carry the gold subject to all applicable laws and to the rules laid down in the Convention for the Unification of certain Rules relating to International Carriage by Air, signed at Warsaw, Oct. 12, 1929 as amended by the Hague Protocol in 1955. Thus, the appellants had, so far as they were able, imposed upon BOAC a duty to act in conformity with the Law. However, by reason and the terms of the aforesaid Convention, BOAC may well be entitled to limit their liability to the appellants to the sum of about £7 per kilo

and that accordingly the appellants may not well be able to obtain full redress from BOAC. Indeed, BOAC had liability for the loss.

- (iv) The findings of the Collector in the order point to the responsibility of BOAC and the Collector has made no finding that the appellants were in any way party to any breach of the law. The Collector erred in not taking into account the fact that neither by word, deed, conduct nor intention did the appellants infringe or attempt to infringe the law. In fact, if the appellants had any ulterior motive, they could have avoided the route through India.
- (v) The Collector erred in failing to apply the fundamental principles of criminal jurisprudence which have been held to be applicable to such cases as the present by the Supreme Court in AIR 1961 SC, 264.
- (vi) In the absence of any fraudulent intention, amendment of the manifest under Section 30(3) of the Customs Act could not be refused. The word 'may' in Section 30(3) has the force of "shall". For this the appellants rely upon a decision of the Privy Council reported in AIR 1923 P.C. 138.
- (vii) In the facts of this case the proper Section which could be applicable was 111(o). By approving the manifest in the first instance when the aircraft was allowed to take off, the proper officer had sanctioned the non-observance of the condition regarding declaration specified in the Notification of the Reserve Bank. The Preventive Officer who approved the manifest should have been presented for cross-examination.
- (viii) A transit manifest is necessary only for the article mentioned in the Notification of the Reserve Bank dated 8th Nov. 1962 and no transit manifest is required to be filed for other articles.

32. The case of the Customs, in the first place, is that the second proviso of the Reserve Bank of India Notification of 8-11-62 requires that gold must be declared as gold and further, that the same is for transit as same bottom cargo or transshipment cargo. The declaration that 'metal bar' or 'metal' was for transit as same bottom cargo was, therefore, not sufficient compliance with the second proviso of the aforesaid Notification. In this connection, on the basis of the extracts

from the reply to the show cause notice cited in Clause (i) and (v) of para 23 above, it is contended that there is a clear admission on the part of BOAC that the breach of the Notification has taken place.

33. The second contention of the Custom is that in this case no application was made in terms of Section 30(3); what Shri Santhanam made was a casual query only. So far as Customs Officers were concerned, there was no application either oral or in writing at any time for the amendment of the manifest. The person to whom application is made should know that the application has been made. If it is made in an ambiguous language, it cannot be said to be an application. It is, further, contended that there is circumstantial evidence also which shows that Shri Santhanam's query could not be an application. There was no question of his making an application when he took it for granted that 'metal' or 'metal bar' was a correct description. Further, if it was an application, BOAC would have pursued the matter with the higher authorities. If they were so eager about this application, why did they not take the matter to the Collector. They were being advised by counsel, various types of requests were made; even a request was made at one stage that gold be allowed to be taken back on a Bank guarantee or some sort of guarantee. But no higher officer was approached at any stage with the request that they should be allowed to amend the manifest.

34. The third contention of the Customs is that even assuming without admitting that there was an application, on merits, amendment of manifest is not justified. According to them, fraudulent intention could not be ruled out; in fact, it is asserted that there was a fraudulent intention. In this connection reference was invited to the following passage in the Traffic Manual of BOAC:

"Officially goods destined to or from South Africa, are not permitted to transit India. However, consignments of negligible value can be carried provided they are stowed out of sight in inner most part of aircraft holds. If the value of a consignment is sufficient to make risk of confiscation a serious matter, the sender must be informed and must give a written indemnity to the carrier against any action the Government of India may take."

It was argued that the instructions very clearly show that, in the mind of BOAC, their state of appreciation of law was that goods of South Africa origin could not be transited through India. The gold in question was of South African origin and it was being taken through India. They did not want the Customs Officers to know that gold of South African origin was being taken. If the Customs Officers

knew that the gold was of South African origin then the same would have been seized. As such, to avoid such a possibility, the declaration was made in this misleading manner. There was, thus, fraudulent intention behind the incorrect manifestation. It was also argued that no person in BOAC took care to see that Indian laws were complied with for a period of about two years; not only that, they flouted their own instructions in their manual for declaring gold as gold. It was also contended that malafides need not be on the part of the person preparing the manifest. In these circumstances, it was urged that the amendment of the manifest should not be allowed.

35. Next, it was argued on behalf of Customs that neither the Notification of 8-11-1962 nor any other provision of the FERA permits amendment of manifest. As such, for the purpose of Notification either the requisite declaration has been made or not made. The scope of the provision for amendment of the manifest under Section 30(3) Customs Act is limited to the amendments for the purposes of the Customs Act only and can have no application to the declaration required to be made under the said Notification of 8-11-1962. The purposes of manifesting under the two Acts namely the Customs Act and the Foreign Exchange Regulation Act are different and if the purpose of one Act does not permit amendment, it will not be competent for any authority to allow that amendment. Under the said Notification, declaration in the manifest is required in respect of few commodities only whereas provision for manifest under Section 30 is with reference to all goods imported. The argument, therefore, was that for the purpose of the said Notification, the unamended manifest original filed will be relevant, and if the declaration made is not in term of the said Notification, the gold will be liable to confiscation. The amendment of the manifest will not take away the liability of gold to confiscation.

36. On the other hand, the counsel for BOAC contended that Section 23A FERA deems the restrictions imposed by Section 8(1) of FERA to be restrictions by or under Section 11 of the Customs Act and further provides that all the provisions of the Customs Act will have effect accordingly. By this deeming provision, the offence is under the Customs Act, the punishment is under the Customs Act and, therefore, provisions of Section 30(3) will apply to the declaration in the manifest made in pursuance of Notification of 8-11-1962.

37. Having regard to the rival points of view mentioned earlier, in detail, the following issues arise for consideration:—

- (1) Whether on the facts of this case provisions of section 111(o) of the Customs Act have any application as contended on behalf of Mocatta Goldsmid;

- (2) Whether in a case where the article being carried in transit is declared for transit as some bottom cargo or transshipment cargo, but the nature of the article is insufficiently described, there is a breach of the Notification of the Reserve Bank dated 8-11-62;
- (3) Whether the decision of the Supreme Court reported in AIR 1965 SC 722 is distinguishable from the facts of this case as contended by BOAC.
- (4) Whether the declaration made in the manifest in pursuance of the Notification of 8-11-62 can be allowed to be amended under the provision of Section 30(3) of the Customs Act;
- (5) If the amendment of the manifest is allowed under Section 30(3) of the Customs Act, would such amendment take effect as if it existed in the manifest right from the date of its first presentation and if so, would the amendment have the effect of satisfying the second proviso of the Notification of 8-11-62.
- (6) Whether on the basis of the evidence on record, it can be stated that a request for amendment of the manifest was made? If so, at what stage;
- (7) With regard to 'fraudulent intention' mentioned in sub-Section (3) of Section 30 does it refer to fraudulent intention which has a bearing on the incompleteness or the incorrectness of the manifest or fraudulent intention in any other respect can be taken into consideration for the purpose of considering amendment of the manifest;
- (8) Whether the facts on record disclose any fraudulent intention either on the part of BOAC or on the part of consigners which had any bearing on the declaration of gold as 'metal' or 'metal bar' in the manifest;
- (9) Whether in the circumstances of this case amendment of the manifest should be allowed or not;
- (10) Whether in the circumstances of this case the gold was liable to confiscation under Section 111(d) Customs Act for contravention of Section 8(1) FERA read with Section 23A of the FERA and Section 11 of the Customs Act and whether there was justification for levy of a penalty on BOAC under section 112 and Section 114(1) of the Customs Act;
- (11) Whether the aircraft in question was liable to confiscation under Section 115(2) of the Customs Act; and

(12) Whether the fines and penalties imposed in this case are warranted on the facts of this case.

38. We now deal with each of these issues in the same order in which they have been mentioned in para 37 above.

39. ISSUE No. (1)

In our view, the provisions of Section 111(o) of the Customs Act can have no application to the facts of this case. Section 111(o) reads:—

“Any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer.”

One of the essential requirements for the application of this sub-section is that the goods should have been exempted from duty or any prohibition in respect of the import thereof. Gold is not exempt from duty nor, in our opinion, is it exempt from prohibition in respect of the import thereof. The contention made on behalf of Mocatta Goldsmid (referred to in para 31(vii) above) is based on the implied assumption that the general permits of the Reserve Bank under Notification of 8-11-62 amount to exempt from prohibition in respect of import of gold. This assumption is not correct. A reading of Section 8(1) FERA itself would make clear that the said section uses the expressions ‘exemption’ and ‘permission’ in two different senses. Section 8(1) FERA reads:—

“The Central Government may, by notification in the Official Gazette, order that, subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any, prescribed bring or send into India any gold or silver or any currency notes or bank notes or coin whether Indian or foreign”.

It may be seen that exemption, if any, is to be given only by the Central Government and is to be incorporated in the Notification prohibiting import of gold, whereas the general permission can be given only by the Reserve Bank. The notification which has been issued by the Central Government in pursuance of Section 8(1) FERA prohibiting import of gold does not contain any exemption from the said prohibition. On the other hand, the notification dated 8-11-62

issued by the Reserve Bank deals only with the general permission of the Reserve Bank and not with any exemption from prohibition. Thus, gold has not been exempted from the prohibition under Section 8(1) FERA in respect of import thereof. That being so, sub-section 111(o) can have no application to this case and the question of sanctioning non-observance of any condition referred to in the said sub-section does not arise. Even otherwise, no Customs Officer had power to sanction non-observance of the requirements of the Reserve Bank's Notification of 8-11-62 and, as such, he could not have granted any such sanction as alleged. Therefore, the contention of Mocatta Goldsmith that the proper penal sub-section here was 111(o) and not 111(d) under which action has been taken in without substance.

40. ISSUE NO. (2)

The second question for consideration is whether there would be any breach of the Notification of the Reserve Bank dated 8-11-62 if the nature of the article is not sufficiently described in the manifest, though there is a declaration regarding its transit as same bottom cargo or transshipment cargo. One of the grounds taken in the memo of appeal by BOAC is that the cargo manifest clearly indicate that these consignments were in the course of being carried to Hong Kong and Okinawa and were, therefore, only in transit through India, and that, in the circumstances, the consignments were sufficiently described in the manifest as "the same bottom cargo or transshipment cargo" so as to fall within the Reserve Bank's Notification of 8-11-62.

We do not accept this contention. In our opinion, the second proviso of the aforesaid Notification of the Reserve Bank clearly requires that the articles mentioned in the Notification are properly described in the manifest and are shown for transit as same bottom cargo or transshipment cargo. Therefore, declaration of gold as 'metal' or 'metal bar' does not fully meet the requirements of the aforesaid notification of the Reserve Bank.

41. ISSUE NO. (3)

We have carefully read the decision of the Supreme Court reported in AIR 1965 S.C. 722. In the case before the Supreme Court, the passenger concerned had not made any declaration in the manifest and the Court was not required to consider the question whether amendment of the manifest under Section 30(3) of the Customs Act could be allowed or not and how for the existence or otherwise of fraudulent intention was relevant for considering that question. Here, in the case under consideration, BOAC did make a declaration in the manifest but the same was insufficient and, accordingly, they

want amendment of the manifest. For considering whether amendment should be allowed or not, the question of intention is material in terms of Section 30(3) of the Customs Act. Thus, in our opinion, the said decision of the Supreme Court is clearly distinguishable from the present case.

42. ISSUE NO. (4)

The next issue is whether the declaration made in the manifest in pursuance of the Notification of 8.11.62 can be allowed to be amended under the provisions of Section 30(3) of the Customs Act. The contentions of both sides with regard to this point have already been mentioned in paras 35 and 36 above. In order to have a proper appreciation of this issue, it appears necessary to examine some of the relevant provisions of the FERA and the Customs Act. Section 8(1) of the FERA empowers the Central Government to order, by means of a notification, that no person shall, except with the general or special permission of the Reserve Bank bring or send into India any gold or silver or any currency notes or bank notes or coin whether Indian or foreign. By Notification dated 25th August, 1948, as amended, issued under Section 8(1) FERA, the Central Government has directed that, except with the general or special permission of the Reserve Bank, no person shall bring or send into India from any place outside India, *inter alia*, gold bullion. By a Notification of the Reserve Bank dated 8-11-62, which has been issued in pursuance of the Central Government's Notification of 25th August, 1948, general permission to transit through India, *inter-alia*, gold has been given subject to two provisos. Both these notifications, thus, deal with the scope of the restrictions imposed by section 8(1) FERA. Under section 23A FERA, restrictions imposed by Sub-Section (1) of Section 8 F.E.R.A. are deemed to have been imposed under Section 11 of the Customs Act and all the provisions of the Customs Act have effect accordingly. Therefore, the position is that, by virtue of the provisions of Section 23A F.E.R.A., the restrictions imposed by Section 8(1) F.E.R.A. i.e., *inter-alia*, those imposed by the notification of 25th August, 1948 and the Reserve Bank's Notification of 8.11.62, have to be deemed to have been imposed under Section 11 of the Customs Act. In other words, the requirement of a declaration in the manifest under the section proviso of the Reserve Bank's Notification of 8-11-62, becomes a requirement of the Customs Act and all the provisions of the Customs Act have effect accordingly. The provisions of Section 30(3) of the Customs Act would, therefore, apply to a declaration in the manifest made under the Reserve Bank's Notification of 8.11.62 in the same manner and to the same extent as they apply to entry made in the manifest in pursuance of the provisions of section 30(1) of the

Customs Act. We are, therefore, of the view that the declaration made in the manifest in pursuance of the Notification of 8.11.62 can be allowed to be amended under the provisions of Section 30(3) of the Customs Act.

53. ISSUE No. (5)

The question for consideration is that if the amendment of the manifest is allowed under Section 30(3) of the Customs Act, from which date such amendment would take effect. In our opinion, the amendment of the manifest takes effect right from the date of its first presentation. The object of amending the manifest is evidently to set right the position and to remove the incorrectness or incompleteness of the manifest which existed prior to its amendment. If the amendment or supplementation of the manifest is not able to cure the defect in the manifest and to eliminate the evil consequences which would have flowed from the incorrectness or the incompleteness of the manifest, there would hardly be any purpose in amending the manifest and the provision to amend the manifest would become an empty formality. The counsel for B.O.A.C. invited our attention to the decisions reported in AIR 1936 Rangoon 508 AIR 1938 Patna 205, AIR 1914 Lahore 263, AIR 1925 Madras 487, AIR 19 Bombay 329 (1894) and AIR 1933 Madras 153 in support of his plea that the amendment of the manifest would take effect as if the same existed in the manifest right from the date of its first presentation. We have carefully considered these decisions. These decisions refer to the effect of the amendment of pleading under Order 6 Rule 17 of the Civil Procedure Code and are, therefore, not directly in point. But the dicta laid down in these authorities to support the contention that amendment of the manifest should take effect from the date of its first presentation. We consider that the very purpose of amending a manifest would be lost if the amendment does not take effect from the date of its first presentation.

44. ISSUE No. (6)

The next point which falls for our consideration is whether on the basis of the evidence on record it can be stated that a request for amendment of the manifest was made and if so at what stage. The rival contentions on this point have already been summarised in paras 27 and 33 above. There is no dispute that under Section 30(3) of the Customs Act no procedure is provided, there is no form

of the application and there is also no period of limitation within which the request for amendment has to be made. In fact, it is common ground that a request for amendment of the manifest may be in writing or oral. Shri S. N. Karkhanis, the Assistant Collector of Customs, Incharge at Palam in reply to a specific question, "Do you accept verbal applications or request for amendment of the manifest", has stated "In some cases we do accept". He has, however, further added that in that case it is not in the form of a query and "it is allowed on the regular request which is followed by a subsequent action for amending the manifest". During the arguments, the DRI conceded that the application could be made orally but he argued that at least the person to whom the application is made should know that such an application has been made. It is, therefore, necessary to recount the evidence in this regard, in some detail.

45. Shri Santhanam has stated in his affidavit:—

"At approximate 1645 on 15th Sept. I asked the Customs Inspector Mr. Ramachandaran for transshipment facility. He asked to see the consignment note which was duly produced to him. When he examined the consignment note he noticed that it had been incorrectly manifested i.e. described as "metal and not "gold" on the cargo manifest. He stated that he would have to bring this to the notice of his Asstt. Collector. I explained to him that this was clearly an error and that I would make an application to make an amendment to the manifest and would pay the usual amendment fee. The Inspector refused to accept the application until he had discussed the matter with the Assistant Collector. I went along with him to the Assistant Collector's Office and explained to the Asstt. Collector why it was desirable for us to manifest the shipment as metal and that this was a BOAC Regulation to ensure safeguarding. I showed him the relevant instructions in cargo manual Regulations on safeguarding and also pointed out that the description of the goods on the consignment note was in fact correct. He appreciated my explanation but regretted he could not do anything until he referred the matter to higher authorities as the amount of gold was of a huge quantity and according to him we had violated the laws of the land".

In his oral statement before us, Shri Santhanam stated that he told Shri Ramachandran that the incomplete description of the manifest was purely due to error and that he be allowed to amend the manifest. This request was not accepted. During the cross-examination Shri Santhanam was asked a question, "Did you make any request for amendment of the manifest to the Collector", Shri Santhanam replied—

"No. In this case the Asstt. Collector did not refuse my request. All that he said was that he would consult higher authorities. But thereafter the whole thing exploded and the things moved on so rapidly that I could not even coherently think about the course of action. My manager being new was not very well conversant with these things."

Shri Karkhanis has stated—

"I scrutinised the manifest and found that it was not declared. Mr. Santhanam at that time also said that what can be done with regard to amending of the manifest. He was told that at this point of time the gold was liable to confiscation and nothing can be done."

During his cross examination we put a specific question to Shri Karkhanis 'Did Mr. Santhanam request you that he should be allowed to amend the manifest'? The reply of Shri Karkhanis was "At that point of time he did say well why can't we amend the manifest. I told him that at this point of time the gold was liable for confiscation". Another question put to Shri Karkhanis was "Did he tell you that there seems to be a mistake in the manifest and that it is properly declared in the consignment notes and, therefore, please amend the manifest"? The answer given was, "No, he did say why can't we amend the manifest". Again in reply to another question, Shri Karkhanis stated "He told me as far as I remember not in the office but at the counter that this is their practice to describe gold as "metal" and why can't he amend the manifest". Shri Ramachandran, the Air Customs Inspector on duty at Palam, at the relevant time, stated before us—

"I told Mr. Santhanam that our Notification on the subject was very clear and that the gold which was being transferred through India should be declared as gold and by no other term. Since the gold was not mentioned as gold in the manifest, the same was liable to confiscation. Then Mr. Santhanam thought over a while and asked

what could be done and whether I would permit amendment of the manifest. I told him that the question did not arise at that stage".

However, in answer to a specific question "Was any application made to you for permission to amend the manifest?" Shri Ramachandran replied "No Sir". He was further asked "Was any such application made in your presence to the Asstt. Collector orally or in writing"? Then answer was "Not to my knowledge". When Shri Ramachandran was asked "We thought an oral request was made by Mr Santhanam", the reply was "Mr. Santhanam said what could be done; if the manifest could be amended. I said no". Again the question put to him was "So you did not take it as an application". He gave the answer "No Sir. It was a casual query; not an application." A specific question was put to Shri Ramachandran whether he asked Shri Santhanam to make any application in writing. Shri Ramachandran replied "No, I did not, since he only made a query". The answer to two other questions are also relevant. Question—"You mentioned that for the first time it was at about 3 O' clock that Mr. Santhanam asked you whether amendment could be permitted. Is it so"? Answer: "That is so Sir". Question—"You told him that it could not be permitted". Answer: "Yes Sir".

46. In the reply to the show cause notice BOAC stated in Sub-para (4) of para 17—19 "When the error was discovered Mr. Santhanam B.O.A.C.'s Acting Airport Manager did verbally request permission to make such an amendment to the manifest". In the end of their reply, they have further stated "The bonafides of the Respondent, however, are absolutely evident and, therefore, it is requested that as requested by Mr. Santhanam, already, the manifest may be allowed to be corrected so as to conform strictly to the Regulations" We also find that during the personal hearing before the Collector they had again made a specific request for permission to get the manifest suitably amended under Section 30(3) of the Customs Act. During the hearing they also invited attention to the request made verbally by Shri Santhanam to Palam Customs and the request made in their reply to the show cause notice. In fact, in his order, the Collector while summing up the defence of B.O.A.C., has observed that one of the points taken by them was—

"The gold and aircraft were not liable to confiscation simply because of inadequate description of the "gold" as "metal V" or "metal bar V" in the manifest. B.O.A.C. should have been given the benefit of Section 30(3) of Customs Act, 1962, the gold being in transit as same bottom cargo,

they should have been allowed to amend the manifests as requested by their Airport Manager, Shri K. Santhanam. They requested release of the gold and the aircraft after amending the manifest suitably."

The finding of the Collector in this regard is—

"I also do not accept their contention that at best the case could be treated as a case of incomplete manifestation or insufficient description without any fraudulent intention. I reject their pleas that the case should be treated as a case falling under sub-clause (3) of Section 30 of the Customs Act, 1962 and amendment to the manifest be allowed".

47. From the aforesaid evidence, it appears to us that a representative of B.O.A.C. had asked for the amendment of the manifest but the same was not permitted because the officers on the spot seemed to have taken the view that since gold had not been declared as gold but as metal or metal bar, the same was liable to confiscation and, as such, amendment of the manifest could not be permitted. We consider that the request made by the representative of B.O.A.C. was not a mere query but an oral request for the amendment of the manifest. In any case, a request in writing was made in their reply to the show cause notice as well as during the personal hearing before the Collector. The Collector has specifically rejected the request in his order. We, therefore, hold that a request for amendment of the manifest in terms of Section 30(3) of the Customs Act was made by BOAC as soon as the mistake was noticed and also at relevant subsequent stages.

48. *ISSUE NO. (7)*

We have no doubt in our mind that for considering the question whether amendment of the manifest should be allowed or not, what the proper officer has to satisfy himself is whether there was any fraudulent intention which had any bearing on the incompleteness or the incorrectness of the manifest. Intention of the parties in any other respect which could not have any bearing on the preparation of the manifest would be irrelevant in this context. As such, in this case what we are required to consider is whether there was any fraudulent intention either on the part of B.O.A.C. or of Mocatta Goldsmid in making the declaration in the manifest in the manner in which it has actually been made in the relevant entries of the manifest.

49. ISSUE NO. (8)

The next question for consideration is whether the facts on record disclose any fraudulent intention either on the part of B.O.A.C. or on the part of consignors which had any bearing on the declaration of gold as "metal" or "metal bar" in the manifest. In order to find out whether there was any fraudulent intention or not, we have, therefore, to examine the circumstances in which the declaration "metal" or "metal bar" was made in the manifest, the conduct of BOAC in general and in particular with regard to these two consignments, the full facts from the time the plane arrived in India for the first time upto the seizure of gold, the likely advantage or gain which could accrue to BOAC by declaring the gold as "metal" or "metal bar" the possibility of collusion between B.O.A.C. and the consigners, the conduct of the consignors throughout with regard to these two consignments and other allied factors.

50. The Traffic Manual Cargo Regulations of BOAC had at the relevant time following instructions—

"Gold Bullion must be additionally protected as follows:

- (b) The use of the terms "gold" and "bullion" must be avoided. Such shipments must be referred to in correspondence and shown on Manifests and other documents as "metal" except for shipments consigned to or in transit through India, where such practice is not permitted by the Customs authorities".

From these instructions, which were in force at the relevant time, it would appear that BOAC had taken care to issue instructions to their staff that for India declaration of gold as "metal" was not permissible. The affidavit given by Shri Keith Granville, Deputy Chairman and Deputy Chief Executive of BOAC throws light on the history of how the instructions that gold should be described as metal came to be issued. Enclosed to the said affidavit is a copy of "Hand-Book of Instructions and general information" published by Imperial Airways, a predecessor Company of B.O.A.C. These instructions were issued in 1935. Paragraph 11 of the Section dealing with precious cargo reads as follows:—

Documentation

"Gold (coin or bullion), silver, platinum, jewellery etc., should be described on consignment notes labels and manifests as "METAL" and should be referred to the "METAL" in conversation".

In his affidavit, Shri Keith Granville has stated—

"In my early years of Airlines service, I was frequently concerned with the preparation of aircraft documentation and I recall that as long ago as 1934 it was our practice to describe gold as "Metal" in documentation which we prepare. I believe that this practice has continued, firstly in Imperial Airways and then in BOAC since that time. The purpose is and always has been the avoidance of theft, the dangers of which have increased rather than decreased over the years. Nevertheless, it has never been B.O.A.C.'s intention that security interests should take precedence over the requirements of National laws and I greatly regret that as has become apparent from the incident out of which these proceedings arose; our procedures have allowed for important provisions in our own regulations to be overlooked. B.O.A.C. values its reputation for integrity in all its dealings, and in particular its dealing with sovereign Govt., and would not deliberately seek to evade its lawful responsibilities."

51. Shri T. A. A. Cooper, Supervisor, Cargo Reservations B.O. A.C. in his affidavit has given the detailed procedure regarding the preparation of the manifest prior to and after 1965. He says—

"In June, 196 B.O.A.C.'s cargo handling arrangements at London Airport underwent a very great reorganisation and expansion and I was promoted. An important part of the new improved system was the introduction of electronic data processing systems to replace functions previously carried out manually; In the organisation I was called a Manifest Production Officer and my duties involved the supervision of staff and also the responsibility for the programming of IBM 444 Tabulator machines. Until Nov. 1965 the preparation of the cargo manifest was dealt with manually by a Flight Allocation Officer and a clerk who typed out the manifest. Flight Allocation officer would pass to the clerk the consignment notes in batches of destination and the clerk would then type particulars from them into the cargo manifest. During their training Flight Allocation Officers would have been told of the Traffic Manual Cargo Regulations and should have been aware of the provision in Section A 3 regarding the safeguarding of gold and the need to use the word 'metal' instead of 'gold'. They should also have been aware of the exception regarding India. Before Novem-

ber, 1965, the Flight Allocation Officer would have ensured that the exception concerning India was noted and would have instructed the clerk to insert "Gold" and not to use the term 'Metal'. Many of the clerks as a result of experience would have noted this without being told although through pressure of work or some other distraction, one cannot be absolutely certain that even before November, 1965 the exception was noted in each and every case."

52. Regarding the new system, Shri Cooper says—

"In B.O.A.C.'s Cargo Terminal at London Airport there is a long room known as the pre-flight documentation room. After the consignment notes and invoices have been checked in one section of the room where punch card operators are working on IBM 26 Printing Card Punch Machines. These machines contain punch card blanks and each card blank is capable of having punched into it details of each consignment. The operator has a key board bearing certain characters. He checks the details from the consignment note and translates this information on to a card. Because the card has only 14 character spaces, the operator has to abbreviate descriptions of certain goods. Among the details punched on to the card is the destination of the goods, the consignment note No., the number of pieces, the nature of the goods, the weight, the place of original departure and the plan of ultimate destination. This operator is concerned only with the details to be punched on the card and he is punching cards in respect of consignments which are going on various flights and not just one particular flight. Thus although the operator is aware of the place to which the goods are to be taken, he is not aware of the en-route stops. Each day on average approximately 1400 consignment are dealt with in this system. The operator of the card punch machines is aware from his instructions that for security reasons BOAC's general practice is to describe gold as 'metal' and in punching cards he would so describe the consignments of gold. I produce as exhibit "A" reproductions of the two punched cards actually made in respect of the two consignments which are the subject matter of these proceedings. The operators, when they were trained by BOAC to operate card punch mach-

ines, would not have been instructed that when adopting this security description, there was an exception in the case of gold consigned to or in transit through India. The standardisation of procedure as part of the modernisation process meant that individual cases received less personal attention, particularly in view of the greatly increased volume of traffic. Having punched the details on the card relating to the particular consignment, the cards is then placed between the copy of the consignment notes which remains at the cargo terminal and the copy and the invoices which go on with the goods to their destination. The two parts of the consignment note and the invoices and the punched card are then passed on to progress clerks for sorting. If the booking sheet of the aircraft on which cargo is to travel has been received from Skyload, the consignment notes are ticked off the booking sheet and placed underneath it to await collection by the Flight Allocation Officer. If the booking sheet has not been received the consignment notes will be pigeon-holed until the book sheet is received."

Shri Cooper then describes the functions of the light Allocation Officer. Dealing further with the process of manifestation Shri Cooper says—

"The punched cards are then passed to the operator of the IBM 444 Tabulator which runs off the preliminary cargo manifest required to be passed to load despatch at the warehouse in order to prepare the load for the flight. There is fed into this Tabulator a card to show the carrier, a card for the Flight Number, a card for the destination and a card for the cargo leading together with the original punched card for each consignment. These cards are fed in the right order according to the destination of the goods to be shown in the cargo manifest. The operator then presses the necessary buttons and switches. The tabulator then reproduces on to the cargo manifest the necessary information extracted from those cards and in the first place reproduces the preliminary cargo manifest. This is in stencil form and can be reproduced by duplicators. The preliminary cargo manifest is then despatched in the air tube to the cargo warehouse, one copy going to each department where the goods are located, including one in the strong room and a copy goes to the Customs watcher. In the cargo warehouse various consignments are collected into one area from their positions

in the warehouse under the control of a despatcher and the two consignments of gold were removed from the strong room under security and taken to aircraft side. The Flight Allocation Officer makes a final check on the load on board and then prepares with the use of the Tabulator the final cargo manifest which is then reproduced in a number of copies."

53. During his examination before us, Shri Cooper stated that prior to 1965 when the computer system was not installed, barring some cases of error, they were making declaration as gold. Subsequently, the declaration made was 'metal V'. 'Metal V' included gold, silver, platinum and radium. He also mentioned that the punch card operators in London would not, at the time of punching the cards, know of the route by which the plane was to fly with the result they could not take steps to declare gold in the punch cards as gold in cases of transit through India. He explained that the only difference between the two periods has been that during the earlier period the manifests were being prepared by human beings whereas in the subsequent period the Tabulating Machine prepares the manifest from the punched card. The experience of the Flight Allocation Officers remained the same during both the periods. But, because of the mass production of the manifests after computerisation, the time available to the Flight Allocation Officer was not the same and was very much reduced. There was also paucity of staff in U.K. Therefore, with increased productivity, with the increase of speed and with much lesser time available for checking, the Flight Allocation Officers should not bother about Indian Regulations. The consignment notes were prepared on behalf of the consignors by the MIT Transport Agency. If the consignors wanted to avoid India, they could have booked by some other Flight. Normally, B.O.A.C. are honour bound to take by the flight specified by the consignor but they do not guarantee.

54. Shri G. H. Somner, Senior Project Officer Cargo Unit, B.O. A.C., has stated in his affidavit:

"(a) As the officer largely responsible for introducing the system, I was aware of the requirements in the Traffic Manual. I was also aware that under the existing procedures, the Flight Allocation Officers were or ought to have been aware of this requirement and that in the course of their duties, they should have ensured its compliance.

(b) The function of the Flight Allocation Officers under the new System was basically the same as under the old system—the chief difference being that a new and more sophisticated tool had been introduced into the system.

- (c) It was not possible to build into this 'tool' any automatic procedure whereby the machine itself could pick up any exception such as applies in the case of the carriage of gold through India. The machine can only do what it is instructed to do by the punched card. Although, the IBM 444 machine is capable of producing documentation infinitely faster than its human counterpart, it is nevertheless not a very advanced piece of machinery in comparative terms. It is not a computer and has no memory in that, it cannot be programmed in advance to take into account certain given rules or exceptions.
- (d) It was, therefore,, necessary to continue to rely on the human checks provided by Flight Allocation Officers. We did not, however, really foresee the extent to which the pressures on the Flight Allocation Officers under the new system would increase as they in fact did. The increase in pressure was partly due to the fact that they no longer had the assistance of the clerk/typist (who previously typed the manifest) and partly because of the increase in work arising from the introduction of aircraft with much greater capacity and to the general increase in B.O.A.C.'s cargo business."

55. The evidence of these two witnesses shows that prior to November, 1965 the cargo manifests were being prepared by clerks/typists. During this period, by and large, B.O.A.C. were declaring in their manifests gold in transit through India as 'gold'. In November, 1965, a new system for the manifest preparation namely the Unit Record System was introduced. This involved the use of an IBM 026 Printing Card Punch Machine and an IBM 444 Tabulator. After the introduction of the new system, the consignments of gold passing through India have been declared as 'metal' or 'metal Bar'. During both these periods the responsibility for ensuring that the manifest was correct and complied with Customs Regulations was that of the Flight Allocation Officers. It has been urged by B.O.A.C. that in the post November, 1965 period the pressure of the work in the Flight Allocation Officers increased considerably partly due to the fact that they no longer had the assistance of the clerk/typist (who previously typed the manifests) and partly because of the increase in work arising from the introduction of aircraft with much greater capacity and to the general increase in B.O.A.C.'s cargo business. It has also come in evidence that between London and Hongkong there were three routes on which B.O.A.C.'s services operated out of which only one passed through India, and that all these

three routes were used to carry, *inter-alia*, consignments of gold in the normal course. The deposition of Shri Cooper before us at the time of hearing has also brought out the fact that at the time of punching the cards, the punch card operators were not aware of the route of the flight and, as such, according to the general practice of B.O.A.C., they were punching gold as 'metal' only. Further, as stated by Shri Cooper, the standardisation of procedures as part of the modernisation process and the mass production of manifests meant that individual cases received less personal attention, particularly in view of the greatly increased volume of traffic. To sum up, the factors responsible for the declaration of gold in transit through India as 'metal' or 'metal bar' instead of gold in the manifest in the post November, 1965 period appear to be: (i) the absence of the human check and the individual attention which was being provided by the experienced clerks typists who were preparing the manifest prior to November, 1965 without the aid of machines, (ii) at the time of punching the cards, since the punch card operators did not know as to which gold consignments would pass through India, they could not punch the same as 'gold' (the general practice of B.O.A.C. for security reasons being to punch as 'metal' or 'metal bar'), (iii) increased volume of traffic due to the general increase in the B.O.A.C.'s cargo business and the increased work arising from the introduction of aircraft with much greater capacity, (iv) the standardisation of procedures resulting from the computer system and the mass production of manifests meant that individual cases received less personal attention, (v) the consequent increase in the pressure of work on the Flight Allocation Officers under the new system. It appears that the machines caused some complacency in the minds of persons responsible for manifest preparation. The facts that prior to November, 1965, with the exception of stray cases, gold was being declared as 'gold' when in transit through India whereas after November, 1965 till September, 1967 the same has been consistently declared as 'metal' or 'metal bar', also indicate that the mistake in the manifest started as a result of the factors arising from the introduction of the new system and not due to any evil design or dishonest motives on the part of the B.O.A.C. It could not be that under the old system the intentions of B.O.A.C. were bonafide and immediately with the introduction of the new system they became *mala fide*. Further, it so happened, that from November, 1965 until this case the mistake was neither noticed by B.O.A.C. nor by the Customs with the result the same persisted throughout this period. We, accordingly, do not agree with the Collector that this was a case of deliberate mis-declaration or that the mistake was deliberately repeated. This could be said only if the mistake had been earlier noticed either by

B.O.A.C. or by the Customs and in spite of that the same was repeated. It is also relevant to mention that the instructions in the B.O.A.C.'s Traffic Manual (reproduced in para 50) to the effect that the general practice of B.O.A.C. declaring 'gold' as 'metal' was not permitted in India, have been there both before and after November 1965 without any change. Thus, in so far as the higher management of B.O.A.C. was concerned, it cannot be said that they did not bother for the Indian Regulation on the subject as contended by the Customs. There certainly has been some human failure as a result of too much dependence on mechanisation, but we do not discern in the evidence either any fraudulent intention or any intention to disregard Indian Regulations or any wilful neglect or any conscious or deliberate repetition of the mistake.

56. The evidence regarding the events that happened at Delhi consists of the affidavit and the statement of Shri Santhanam, Acting Airport Manager of B.O.A.C. at the relevant time, the statements of various members of the staff of B.O.A.C. taken immediately after the seizure of these consignments and the statements of the Asstt. Collector of Customs, Shri Karkhanis and Air Customs Inspector, Shri Ramachandran.

57. This evidence discloses the following facts:—

- (1) B.O.A.C. service BA 916 was scheduled to arrive at Palam at 0415 Local Time (LT) on the 14th September. The service was, however, operating behind schedule and actually came in at 1040 LT on 14th September and left at 1119 LT on 14th September. The aircraft returned at approximately 1300 LT because of engine trouble.
- (2) A signal was received in the duty room of BOAC at Palam at approximately 1845 LT on the 13th September. This signal read as follows:—

"TO 168

QU FRAFFEBE BKKAPBA HKGAPBA NDHKDBA
LHPFEBA 131227 DG
FE27413 AT IN SECURITY BA916|13 AWB 861185
24|1227 KGS METAL OPEN HOLD STOWAGE
20 HOLD ONE 4 HOLD 3 SAFEGUARD."

The teleprinter operator, Shri Kulkarni put the signal in the trip file without taking any further action. Duty Officer Shri R. D. Smith saw the trip file but neither in-

formed his relieving duty officer Shri Pujji who came on duty in the morning of 14th at about 0715 LT nor the office of Shri Santhanam.

- (3) Duty Officer, Shri Pujji remained on duty from 5715 LT to 1600 LT on 14th September. According to his statement he was not informed by anybody that there was gold on board. The Captain also did not inform him. Therefore, on 14th September when the plane arrived for the first time or when it came back again for the second time Shri Pujji was not aware that gold was on board. He categorically says that duty officer Shri Smith did not inform him about this gold cargo. He had also not seen the signal received on the earlier day. Traffic Asstt. Shri R. K. Sobti and Traffic Clerk, Shri A. K. Sharma also came on duty in the morning of 14th September whereas Shri Sharma came on duty at 0800 LT on 14th. According to the statement of Shri Sobti he had gone through the signals pertaining to this flight immediately on his arrival on duty and distributed the same amongst the staff for action. He took it for granted that the duty officer must have seen the signal; as such he did not consider it necessary to inform either the outgoing or the incoming Duty Officer, namely Shri Smith or Shri Pujji. Shri Sobti, further says that he passed on the signal to Shri Sharma who was attending to the loading on that day. Besides passing on the signal he did not give him any instructions. Shri Sobti further says that there is no special safeguards to be taken for the valuable cargo. He could not make out from the signal as to what safeguard was to be taken and also did not enquire the same from the Duty Officer. According to Shri Sobti by the word 'Metal V' appearing on the manifest and safeguard instructions which were received by the signal, he could not make out that gold was on board. It could be any valuable 'metal'. Even Shri Sharma who had been entrusted the job of safeguarding the 'metal' did not inform him that there was gold on board. Shri Sharma confirms the statement of Shri Sobti. He says that he received signal. He got an impression from the signal that there was something special on the aircraft which required safeguard. He proceeded to the aircraft and took care to see that nothing that was not consigned to Delhi was off-loaded. He did not go into the holds nor did he verify the articles covered by the signal. He did not know that the signal could possibly refer to gold.

(4) According to the statement and affidavit of Shri Santhanam, on 14th September he was not informed by anyone that the aircraft had gold on board. He has further stated that at 1415 LT he was advised that aircraft would be delayed over night with a provisional estimated time of departure of 0130 LT on 15th September and that the aircraft was being repositioned to runway 33 under the instructions of Air Traffic Control. At approximately 16 hours he asked Duty Officer Shri Pujji whether there were any shipments on board which required special handling. He replied in the negative except for live-stock shipment which had been off-loaded and brought into the duty room. He remained at the Airport until approximately 1730 LT before leaving for the Ashoka Hotel to ensure that the passengers were being well looked after.

(5) A approximately 1800 LT on the 14th September the following signal was received in the duty room:--

"TO 135
QU NDHKDBA
HK GFFBA141203 SL
6531409 AT IN SECURITY REF LHR FE 27113 BA
916 129 14 SEP
ON 486 1185 24 1227 KGS METAL LONHK G ENSURE
SAFEGUARD DURING OVERNIGHT AT YRS TOR
1230Z".

This signal was also not passed on to Shri Santhanam. The teleprinter operator merely marked it to the Duty Officer Shri Bali for action. Shri Bali was on duty till 0400 LT on 15th September but in the meanwhile at 0230 LT Duty Officer Shri Smith was called to handle transfer of passengers from BA 916 to PA flight 002. According to the statement of Shri Bali he came on duty at 1900 LT on 14th September 1967. He saw the signal and could make out that he was to ensure that the precious cargo, viz., 'metal' should be safeguarded. On seeing the signal, he could infer that the consignment which was recorded as 'metal' in the message was 'gold' because in the past on one or two occasions on receipt of similar message, the consignment on verification was found to be gold. On such occasions he had notified the same to the Customs Officers on duty either personally or through

the loading clerk. In this particular case he was under the bonafide belief hat the flight having arrived at Palam Airport at about 1000 LT on 14th September, 1967 and having relanded at 1300 LT, this fact would have been notified to the Customs. Shri Bali does not say that he informed Shri Santhanam about the presence of gold on the aircraft.

- (6) According to the statement of Shri R. B. Smith, Duty Officer, he was recalled to the Airport on Friday morning (i.e. on 15th) at 0230 LT to deal with the proposed departure of the plane at 0330 LT. He says that he was informed that precious cargo was on board and as baggage had been moved from the holds he was anxious to check that all was still on board. He, therefore, checked with the manifests and realised that the consignment was very large. He went to the aircraft and personally checked the holds approximately at 0500 to 0530. All the manifested metal was there. He presumed Customs knew of the existence of this gold as they had the manifests given to them at first transit. He also says that he was concerned at the problem of safeguarding the cargo and, therefore, phoned Shri Santhanam about 0600 Friday September 15th, asking what steps should be taken.
- (7) According to Shri Santhanam it was for the first time at approximately 0600 hours on 15th September that he came to know that there was gold on board BA 016. Prior to that he did know at all about the gold. He reached Aircraft at approximately 0715 LT and was engaged until approximately 0915 LT in helping the passengers from BA 916 who were being transferred to BA 718. The moment he became free he asked the Officer in charge of safeguarding the consignments of gold. The Immigration Officer told him that he was unable to do so. Next at about 0945 LT he approached the Asstt. Collector of Customs, Shri Karkhanis to request his permission to off-load the consignment of gold and bring it to the Customs warehouse for safeguarding. According to Shri Santhanam as well as according to the statement of Shri Karkhanis, Shri Karkhanis was unwilling to do this as he felt his warehouse was not secure enough for such a large quantity of gold. He suggested to Shri Santhanam to arrange for armed guard. Thereafter, according to Shri Santhanam, arrangements were made for police guard which turned up as late as approximately 1730 LT on 15th September.

- (8) Both according to the statements of Shri Ramachandran as well as of Shri Santhanam, Shri Santhanam approached Shri Ramachandran sometime on the 15th for his permission to transfer four boxes of gold from hold three into hold one where the other 20 packages were stowed so that only one hold need be guarded. He agreed and the transfer was made under Customs supervision. Hold one was then sealed by Customs and one of the B.O.A.C.'s clerical staff and a loader remained to guard it.
- (9) At approximately 1000 LT on 15th September, B.O.A.C. duty room received a signal from Hongkong requesting them to transfer one consignment of gold BA 916 to BA 920. This request was with reference to the bigger consignment of gold. B.O.A.C. Delhi then asked London to release space on the BA 920 for this purpose.
- (10) On 15th September at about 1230 LT or so B.O.A.C. representative presented two transshipment permits No. 3588/15th September, 1967 and 3589/15th September, 1967 to the Appraiser at Palam Shri Nambiar. These transshipment permits relate to various consignments on board BA 916. Along with the transshipment permits copies of the cargo manifests were attached. In these manifests the small consignment of gold covered by consignment note No. 0614961690 was also included. According to Shri Nambiar, it was not brought to his notice then that this actually was a consignment of gold. He accordingly passed the transshipment permits leaving it to the Preventive Officer on duty to check and packages and supervise the transshipment.
- (11) According to Shri Santhanam, at approximately 1645 LS, he saw the Air Customs Inspector Shri Ramachandran. According to Shri Ramachandran, this time was 3 P.M. Shri Santhanam has stated that he asked Shri Ramachandran for transshipment facility. Shri Ramachandran asked to see the consignment note which was duly produced to him. When he examined the consignment note he noticed that it had been incorrectly manifested, i.e. described as 'metal' and not 'gold' on the cargo manifest. Shri Ramachandran stated that he would have to bring this to the notice of his Asstt. Collector. Thereafter, the matter was taken up to the Asstt. Collector. There is not much of difference in the statements of Shri Santhanam, Shri Ramachandran and Shri S. N. Karkhanis about what actually transpired during this meeting. We have already referred to the same earlier and we need not repeat it here.

- (12) These consignments were seized sometime after 0730 LT on the 16th September.

58. From the aforesaid evidence, it appears that Shri Santhanam himself was not aware of the presence of gold till the morning of 15th when the Duty Officer Shri Smith informed him. The Duty Officers themselves were under some misapprehension. In fact, till Shri Santhanam came to know of the existence of gold, no proper security arrangements were made by the B.O.A.C. about the same on the 14th night even though a signal had been received as early as on 13th night for safeguarding the 'metal' on the aircraft. Surely, if Shri Santhanam or the senior officials of B.O.A.C. were aware of the existence of such a huge quantity of gold in the aircraft prior to 15th morning, they would have taken proper security precautions particularly when the gold was to remain overnight in the aircraft. The absence of such precautions itself indicates that no senior officer was aware of the existence of gold on board till 15th morning.

59. We have also tried to find out whether the previous consignments of gold which were also declared as 'metal' in the manifest did reach Macau or not and further what was the nature of the dealings between Mocatta Goldsmid and CIC Hongkong on the one hand and between CIC Hongkong and Companhia Macau on the other. On this point, we have the statement of Shri E. E. Mocatta, the Managing Director of Mocatta Goldsmid and documentary evidence including some affidavits to which we have already referred in the beginning of this order. According to the statement of Shri Mocatta, Mocatta Goldsmid started their business in the year 1964; at that time it was a partnership family concern. The partnership became a limited company in 1957. They have been having business with CIC Hongkong was that they would ship gold from anywhere in the world to Hongkong. When the CIC Hongkong had a demand for gold from Macau, they would cable Mocatta Goldsmid that they had bought so much of their gold and would pay them in the United States Dollars equivalent of the sales price. CIC Hongkong used to receive daily closing price from London. They were entitled to buy from Mocatta Goldsmid's stock of gold with them at this price. The freight and insurance was to the account of CIC Hongkong. Shri Mocatta also stated that Mocatta Goldsmid had 40 per cent shares in CIC Hongkong. He also stated that Companhia Macau was a wholly owned subsidiary of CIC Hongkong. Mocatta Goldsmid do not ensure the movement of gold from Hongkong to Macau and they believe the statement of CIC Hongkong that gold reaches Macau. Shri Mocatta also stated that there was only one firm in Macau by the name of Wong on Hong which was entitled to get import licences from the

Government of Macau. But there was a restriction that this firm Wong on Hong could import gold only from another Macau Company. Companhia Macau was, therefore, brought into existence to comply with this regulation of the Macau Government; CIC Hongkong not being a Macau Company could not directly sell gold to Wong on Hong. Under the Hongkong Exchange Control Regulations gold is only in transit in Hongkong and during the period the gold remains in Hongkong it is under the custody of the Hongkong Customs authorities. When the gold is exported from Hongkong to Macau, the same is done under an export licence issued by the Hongkong Government in the name of CIC Hongkong. The import in Macau is made on the basis of import licences issued to Wong on Hong. From Hongkong to Macau, the gold is carried by a hydrofoil and it takes about an hour for the gold to reach Macau. He has, further, stated that after the gold reaches Macau, an endorsement is made by the Macau authorities on the back of the import licence that gold has reached Macau. This copy of the import licence duly endorsed is submitted to the Hongkong Exchange Control Authorities. In answer to a specific question, Shri Mocatta replied that they send gold to CIC Hongkong on consignment basis; property in the gold remains with them till CIC Hongkong have found a buyer and received payment. Till then gold remains in their account but it is kept in the warehouse of CIC Hongkong and is supervised by the Hongkong Customs Authorities. It is only when the gold is sold that Mocatta Goldsmid lose title to it. In this connection, Shri Mocatta produced two original sheets from the accounts of Mocatta Goldsmid covering the period from 18th April, 1967 to 23rd January, 1968. He also produced five slips which showed the credit and debit entries in the accounts of CIC Hongkong. We have already referred to these earlier in this Order. He also produced Hongkong Government import licences, Hongkong Government export licences and Macau Government import licences on support of his statement. Shri Mocatta also mentioned that he was a Director of CIC Hongkong since 1963. He also stated that the Bank of England was aware of the nature of their dealings with CIC Hongkong and Companhia Macau.

60. Regarding the existence of the Macau subsidiary, a number of questions were put to Shri Mocatta. It was also brought to his notice that the letter which the DRI sent to Companhia Macau and also the copy of the show cause notice, which the Collector of Customs and Central Excise, New Delhi sent to Companhia Macau, came undelivered as the addressee was not known to the postal authorities. The attempt of the Collector of Customs and Central Excise, New Delhi

to trace this firm through Macau Postal Authorities was also of no avail. Shri Mocatta, however, maintained that Companhia Macau have got a sign board and postal authorities might have committed mistake. Shri Mocatta pointed out that the letters and the notices were sent by the DRI and the Collector without giving full address of Companhia Macau. According to him, the correct address was given in the export licence issued by the Hongkong authorities. Shri Mocatta also produced an affidavit given by one Shri Peter John Griffiths of M/s. Milkinson and Grist of Hongkong, Solicitors. In his affidavit Shri Griffiths has stated that on 23rd day of July, 1968 he went to Macau and instructed Dr. Alberto Pacheco Jorge, Notary Public practising in Macau to obtain a certificate from the Treasury Department of Cacau as to the establishment of the firm Companhia Macau. The original certificate given by Treasury Secretary of the Country Borough of Macau has been furnished along with the affidavit. The Treasury Secretary has certified that--

"In going through the Records of Industrial Tax and other pertaining documents, kept in this department, there is mentioned that the firm "Companhia de Desenvolvimento Commercial FUNG CHEONG (Fung Cheong Commercial Investment Company), established at Number one hundred and forty-two Avenida Almeida Ribeiro, is registered under Number Seven thousand eight hundred and eighty-seven, carrying on the import and export of many varieties of merchandise, and its taxes are paid till the end of the current year."

61. One Shri Kenneth Andrew Miller of Hongkong, a partner of M/s. Lowe Bingham and Matthews, Chartered Accountants and authorised auditors under the Companies Ordinance in Hongkong has also given an affidavit. Shri Miller has certified the audited accounts of CIC Hongkong for the year ending 31st March, 1967. He has further certified that Companhia Macau is a Trading Corporation established in Macau. The Chinese name which is used alternatively or additionally to the Portuguese title is Fung Cheong. As Fung Cheong is not a limited liability company whose shares are owned by Commercial Investment Company Limited but a Trading Corporation wholly owned by Commercial Investment Co. Ltd., no special reference to it is made in the accounts but all trading carried by it has been taken into account in preparing the profit and loss figures of Commercial Investment Co. Ltd. and the profit on gold transactions of Commercial Investment Co. includes the profits in respect of gold

sold through Fung Cheong. Along with his affidavit he has also produced a copy of the Resolution of Directors of CIC Hongkong dated 1st August, 1950. This Resolution says—

“Resolved that all future gold transactions outside the Colony conducted under the name of Messrs “Companhia de Desenvolvimento Commercial” (Fung Cheong) of Macau and that all resulting profits or losses on these transactions will be exclusively for the account of Messrs Commercial Investment Company Limited. All documents pertaining to these transactions shall only be valid if signed by a Director of the Commercial Investment Company Limited.”

With the affidavit extract of the Minutes of a Director's meeting held on Monday 20th November, 1950 in which the trade name “Companhia de Desenvolvimento Commercial (Fung Cheong)” was approved is also enclosed.

62. Mocatta Goldsmid have also furnished an affidavit from Ian Francis Cluny Macpherson, Asstt. Director of Commerce and Industry, Hongkong Government. Shri Macpherson has testified that under the “Importation of gold prohibition order 1947”, prior approval of the Exchange Controller, Hongkong is required to import gold bullion, coins or articles made wholly or partly of gold. The import of bullion is authorised only in transit to a destination outside the scheduled territories. Under the Exportation of gold (prohibition) Order 1947, export of gold bullion requires the prior permission of the Exchange Controller, Hongkong. Then Shri Macpherson has described the procedure regarding gold consigned to CIC. He says such gold is only allowed to be imported in transit and is accordingly held in the custody of the preventive service of the Commerce and Industry Department in Hongkong pending re-exportation. On production of a valid import licence issued by the Macau Government, the Preventive service release the gold and supervise its shipment on to a vessel bound for Macau. The gold is usually carried on board a hydrofoil owned by the Hongkong Macau Hydrofoil Company Limited which Company operates a number of daily services between Hongkong and Macau carrying passengers and some cargo. The voyage is of approximately one hour's duration. The Department of Commerce and Industry holds all records pertaining to import and re-export including a copy of the Macau import licence duly endorsed by the Preventive service with the name of the vessel carrying the gold to Macau. Shri Macpherson has then produced, for various consignments of gold, the import declaration, duplicate import declaration, import licence, BOAC Airway Bill, re-export declaration, duplicate

re-export declaration, export licence, consignment note issued by the Hongkong Macau Hydrofoil Co. Ltd. and duplicate Macau Import Licences evidencing delivery of gold to Macau. Each of these duplicate import licences of the Macau Government have an endorsement. "This is to certify that.....ounces of gold under this import licence have landed in Macau on date.....per (name of the vessel.....signed)." This type of evidence has been furnished for import into Hongkong of two consignments of gold weighing 38671.651 and 38723.257 ounces of gold and export of four consignments by which the aforesaid gold was exported from Hongkong to Macau. These consignments figure in the accounts of Mocatta Goldsmid. At the end of this affidavit Shri Macpherson has stated "to the best of my information and belief this shipment would have been held in Hongkong under the supervision of the preventive service and re-exported to Macau in the same way and with the same documentation as all previous consignments and in particular in the same manner as those in respect of which the above documentation has been exhibited." M/s. Mocatta Goldsmid have also furnished an affidavit from Shri Peter John Griffiths of a firm of Solicitors in Hongkong. Shri Griffiths has simply affirmed the genuineness of the certificates issued by Shri Jose Correia Montenegro, Chief of the Provincial Department of Economic Services of Macau. In this certificate it has been stated that the firm of Wong on Hong is authorised by the Government of Macau to do the importation of gold by means of "Certificates of Importation" issued by the Provincial Department during the years of 1967 and 1968. It is further stated in the certificate that this imported in the 1967 four consignments of gold from Hongkong. These consignments are the same as referred to in the affidavit of Shri Macpherson.

63. In the foregoing paras, we have summed up the entire evidence which could have a bearing on the question of fraudulent intention. The question for consideration, now, is on the part of B.O.A.C. or that of the consignors in preparing the manifest Does this show any intent to defraud or deceive anyone? Does this given any indication that the declaration of gold as 'metal' or 'metal bar' in the manifest was with a view to facilitate smuggling of gold from the aircraft when the same was in India. Can it be said that B.O.A.C. were in conspiracy with the consignors in preparing the wrong manifest; were B.O.A.C. to gain anything by declaring gold as 'metal' or 'metal bar' in the manifest or would they have suffered some-loss or inconvenience in declaring the gold as 'gold'? Lastly, is there anything else in evidence on the basis of which an inference of 'fraud-

lent intention could be drawn? There are pertinent aspects for deciding whether there was any fraudulent intention in terms of Section 30(3) of the Customs Act.

64. We have already observed in para 55 that the mistake regarding the declaration of gold as 'metal' or 'metal bar' was largely as a result of the circumstances created by the introduction of the computer system and was not due to any fraudulent intention or any wilful or deliberate neglect. In the earlier paras, we have also indicated the evidence regarding the events that happened in Delhi with regard to these two consignments of gold in detail. From that evidence we did not find that there was any deliberate supersession of any material fact by B.O.A.C. to the Customs; nor was there any false suggestion or misrepresentation. In fact, we found that some of the lower officials of the B.O.A.C. themselves could not make out either from the declaration in the manifest or from the signals received from London that there was a huge quantity of gold on board. The Duty Officers were also under some misapprehension. Until 15th morning the Duty Officers not only did not inform the Customs, they did not inform even their Head Office in Delhi about the presence of gold. Nor did they take any special precaution regarding safety of the gold. The evidence further indicated that Shri Santhanam, Acting Airport Manager of B.O.A.C. at Palam, came to know of the presence of gold on the aircraft only on the 15th morning and on the same day in the morning he approached Customs for permission to off-load the gold and make arrangements for its security and in the afternoon he approached them for allowing the transshipment of gold. Therefore, in the conduct of B.O.A.C. personnel at Delhi, there is nothing which could give rise even to a suspicion, much less to a belief that there was any deliberate intention to suppress facts or to deceive or defraud Customs. We accordingly do not agree with the finding of the Collector that the intention of the B.O.A.C. was to conceal from India Customs the fact that they were transitting gold through India.

65. Does the evidence, then, show that the declaration of gold, in the manifest as 'metal' or 'metal bar' was made with a view to facilitate smuggling of gold into India from the aircraft? In our view, the evidence on record unmistakeably points to the conclusion that there was no intention or attempt to smuggle gold into India from the aircraft. As mentioned earlier, the aircraft for the first time arrived at Palam on 14th Sept., at about 10.30 A.M. and took off for Bangkok after a halt of about 50 minutes. The aircraft was not to halt anywhere else in India. Therefore, if there had been no engine trouble, the aircraft in the normal course would have

left India with the gold it was carrying. Once the aircraft took off from Palam the gold could not be taken out of the aircraft and left in India. It was all the more so since the aircraft was a passenger aircraft and the possibility of its landing at an unscheduled place in India and somehow ejecting the gold out of the aircraft was remote. Apart from the fact that there is nothing in evidence to indicate so, one has even suggested that during the 50 minutes halt of the aircraft at Palam any attempt was made to take the gold out of the aircraft. Therefore, if there had been no engine trouble, there is no doubt that the aircraft would have in the normal course gone out of India with the gold in question. It is purely incidental that the aircraft developed engine trouble after it left Palam. That there was actually an engine trouble and the aircraft had to return to Palam for genuine reasons is clearly borne out by the statements of Shri W. D. Cartwright, Co-Pilot, Shri Hadley, Captain, Shri A. W. Robothan, Shri Frank Edwerd Bills, Flight Engineer and Shri A. G. Reminan, Station Maintenance Engineer of B.O.A.C. B.O.A.C. also forwarded to the DRI a copy of the defect investigation report issued by Rolls Royce Limited which supports the above statements. Thus if the aircraft was compelled to return to Palam owing to genuine engine trouble and but for this emergency would have left India with gold, there can be no room for any allegation that there was any intention to smuggle gold from the aircraft while the same was in India. In fact, the Collector has himself categorically stated in his order that but for the engine trouble the gold would have gone out of India though of course he has added that the same would have been in contravention of Reserve Bank's Notification of 3-11-62. Even during the hearing before us no suggestion was made on behalf of Customs that the gold was intended to be smuggled from the aircraft into India. It is significant to mention that after the aircraft came back to Palam owing to engine trouble, for the whole of the afternoon and the night of the 14th the gold was in the aircraft and except for the men who happened to be engaged in the repair of the engine and a loader, there were no security arrangements for the gold. There is, however, no evidence to show that any attempt was made at any time either at the time of first arrival at Palam or after it had returned to Palam owing to engine trouble to take the gold out of the aircraft. The evidence produced by Mocatta Goldsmid also shows that the previous consignments of gold which were also carried by B.O.A.C. and were declared in the manifest as 'metal' or 'metal bar' reached Hongkong and thereafter Macau. The presumption, therefore, would be that in the same way both these consignments would have also reached their destinations. The Collector has observed

in his order "Gold was transitted through India from London to places like Hongkong and Macau which are vulnerable from the point of view of smuggling." It is likely that Macau may not be importing this much quantity of gold for its own internal consumption. This aspect, however, in our opinion, could have no bearing on the declaration of gold as 'metal bar' in the manifest for two reasons. In the first place, the consignment which was going to Japan was also declared as 'metal' and secondly, even if gold had been declared as 'gold' and taken through India to Macau, the Customs could take no objection to the transit of gold through India merely on the assumption that Hongking and Macau were vulnerable from the point of view of smuggling. The evidence is, therefore, completely lacking for drawing any inference that declaration of gold in the manifest as 'metal' or 'metal bar' was made with a view to facilitate the smuggling of gold from the aircraft while the same was in India.

66. Another relevant aspect to be considered is whether B.O.A.C. made this declaration in the manifest on their own or on the instructions of the consignors? Only if they made it on the instructions of the consignors that the question of the consignor's fraudulent intention could arise. It may be stated at the outset that in the consignment notes prepared on behalf of the consignors by their Forwarding Agents and which are carried with the goods and particulars of which are also mentioned in the Manifest, the gold was properly described as 'gold'. There are no instructions in the consignments notes that in the manifest gold should be declared as 'metal' or 'metal bar'. On the contrary, the terms of the contract of Carriage between the consignors and B.O.A.C. stipulate that B.O.A.C. will comply with the laws of the countries through which the flight takes place. No evidence has been produced by anyone that the consignors' gave B.O.A.C. any instructions regarding the manner in which gold should be declared in the manifest. There is nothing in evidence to indicate any collusion between the consignors and the B.O.A.C. in this respect. It may be relevant to mention that in so far as the smaller consignment of gold was concerned, the consignor and the consignee—both were Banks and, they could not have any motive in getting gold declared as 'metal' in the manifest. Even for the bigger consignment there is no evidence that, Mocatta Goldsmid asked B.O.A.C. to declare gold as 'metal bar' in the manifest. B.O.A.C. have also not even in their own defence, advanced any plea that they were instructed by the consignors to declare the gold as 'metal' or 'metal bar'. B.O.A.C. take upon themselves the full responsibility for the declaration as 'metal' or 'metal bar' and they concede that this was a mistake and was contrary to their own

manual instructions. But the justification advanced is that this mistake occurred through inadvertence and pressure of work after computerisation and not on account of any evil design on their part.

67. If B.O.A.C. did not declare gold as 'metal' or 'metal bar' in the manifest on the instructions of the consignors, as we have seen above, what motive could they have in making this type of declaration? Were they to gain anything by it? We do not see what benefit could accrue to them. On the other hand, they incurred a risk. It is no one's case that they were to gain financially or otherwise in any respect by making this type of declaration. Conversely, were B.O.A.C. to lose anything if they had declared gold as gold? Now here, the consignors themselves had declared gold as gold in the consignment notes and, therefore, B.O.A.C. could not have lost this business by declaring gold in the manifest. Incidentally, B.O.A.C. have a number of flights to Hongkong which do not pass through India and they have been carrying gold through those routes. They could have done the same here also. If B.O.A.C. had nothing to gain by declaring gold as 'metal' nor to lose anything by declaring gold as 'gold', we do not see what fraudulent intention they could have in making the type of declaration they have actually made in the manifest. No prudent man will take any deliberate and calculated risk unless by doing so he was to be benefitted in some way.

68. Earlier, in para 34, we have referred to the contention of the Customs regarding existence of 'fraudulent intention'; they have argued that a particular..... of B.O.A.C. which has been reproduced..... 'fraudulent intention' on the part of B.O.A.C. It has been contended that gold was declared as 'metal' or 'Metal bar' so that the Customs would not know that gold was of South African origin.

69. It is indeed unfortunate that a Company of B.O.A.C.'s reputation should have a passage of this kind in their Traffic Manual. B.O.A.C. have, however, expressed regrets for this and we were informed during the hearing that they have since deleted the particular passage from their Manual. B.O.A.C. have also furnished a number of letters sent to them over a period of last ten years by the Directors and other officers of the Directorate of Revenue Intelligence, New Delhi and, also, by one by the Central Board of Revenue, appreciating the help and cooperation rendered by them to the Indian Customs Authorities in the prevention of smuggling. The conduct of B.O.A.C. has, therefore, to be judged on the basis of their general performance as a whole and not on the basis of the said passage in the Traffic Manual in isolation.

70. The question for consideration is whether this passage in the Traffic Manual had, or could have, any bearing on the declaration of 'gold' as 'metal' or 'metal bar' in the manifest for the two consignments which form the subject matter of these proceedings? If it had, there might be some justification for imputing fraudulent intention to B.O.A.C. in making the said declaration. But if it could not have any bearing on the nature of the declaration made, the allegation of 'fraudulent intention' on the basis of the said passage would be without any substance.

71. It may be stated at the outset that there was no allegation in the show cause notice to the effect that the declaration 'metal' or 'metal bar' was made with a view to suppress the fact that the gold was of South African origin. Nor is it a factor mentioned in the order of the Collector. It is for the first time at the hearing before us at the appeal stage that it has been alleged by the Customs that gold was declared as 'metal' or 'metal bar' so that the customs would not know that it was of South African origin. This inference has been drawn solely from the particular passage in the Traffic Manual cited above and there is nothing else in evidence to corroborate this allegation. Further, the said passage in the Traffic Manual does not refer to the goods of South African origin as such; it says that goods destined to or from South Africa are not permitted to transit India. Here, the gold consignment in question were neither destined to, nor destined from, South Africa. They were sent from U.K. and one consignment was going to Macau and the other to Japan. Therefore, the said passage in the Traffic Manual could have no application to the facts of this case. It may also be mentioned that at the relevant time there was no prohibition on the transit of goods of South African origin through India. It was contended on behalf of Customs that though the legal position was so, the said passage in the Manual indicated that in the mind of B.O.A.C. their appreciation of law was that goods of South African origin could not be permitted to transit India and, therefore, in order that Customs may not know that gold in was of South African origin, they declared that the same as 'metal' or 'metal bar'. This contention is without any force since, as already mentioned by us, the said passage in the Manual merely refers to the goods destined from or to, South Africa and not to goods of South African Origin destined from or to, any other country. Accordingly, there is no ground for assuming that B.O.A.C. had any such erroneous appreciation of law as alleged on the basis of the said passage.

72. Thus, we find that there is no evidence indicating any intent to deceive or defraud the Customs or to smuggle the gold from the

aircraft while in India, nor is there anything to indicate any deliberate suppression of material facts from the Customs. Accordingly, we hold that there was no fraudulent intention whatsoever involved in the preparation of the manifest in question. The Collector in his order has given the following findings—(i) Incorrect manifestation was not innocent (ii) Intention of B.O.A.C. was to conceal from Indian Customs the fact that they were transitting gold from London to Hongkong in contravention of the Indian law; they tried to conceal this fact from Indian Customs till the very last minute, (iii) the violation was wilful and deliberate, and B.O.A.C. had scant regard for the law of the country, (iv) the case could not be treated as a case of incomplete manifestation or insufficient description without any fraudulent intention. For the reasons stated in paras 55, 65, 66 and 67 we do not agree with the findings (i) and (iii); for the reasons stated in paras 57, 58 and 64 we do not agree with the finding (ii) we do not agree with the finding (iv) above. We do not consider that there was any evidence on record before the Collector on which he could base these findings.

Issue No. (9)

73. The next question for consideration is whether, on the facts and circumstances of this case, amendment of the manifest should be allowed or not. Here, there is no doubt that the import manifest is incomplete or incorrect in the sense that the gold is described by the generic term 'metal' or 'metal bar' and not specifically as gold. We have already held that there was no fraudulent intention either on the part of B.O.A.C. or on that of the consignors in declaring the gold as 'metal' or 'metal bar' in the manifest. Thus, the two conditions precedent for the application of Section 30(3) of the Customs Act are present. That being so, the point for consideration is whether amendment of the manifest should be allowed or not. We have already arrived at the finding that B.O.A.C. made a request for amendment of the manifest as soon as the mistake was noticed and subsequently at relevant stages. It was contended on behalf of the appellants that, in the absence of any fraudulent intention, amendment of the manifest under Section 30(3) of the Customs Act could not be refused. For this, they placed reliance upon a decision of the Privy Council reported in AIR 1923 PC 138. In the said decision, the Privy Council has observed "And as the Learned Counsel for the respondent rightly urged 'may' does not mean 'shall'. Neither are the words 'it shall be lawful' those of compulsion. Only the capacity or power is given to the Authority. But when a capacity or power is given to a public authority, there may be circumstances

which couple with the power a duty to exercise it. To use the language of Lord Cairns in the case of *Julius v. Bishop of Oxford*:

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise it when called upon to do so."

The following passage from Maxwell on Interpretation of Statutes is also pertinent—

"Following the decision of the House of Lords in *Julius v. Oxford (Bp)* it was said that from the nature of the English language the word 'may' can never mean 'must' that it is only potential and when it is employed there is another question to be decided viz., whether there is anything that makes it the duty of the person on whom the power is conferred to exercise that power. If not, the exercise is discretionary. But when the power is coupled with a duty of the person to whom it is given to exercise it, then it is imperative."

In the case of *Sardar Govind Rao and others vs. State of Madhya Pradesh* reported in AIR 1965 Supreme Court 1222, the Supreme Court has quoted with approval the following passage from Maxwell on the Interpretation of States:—

"Statutes which authorise persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they 'may' or 'shall, if they thing fit', or 'shall have power', or that 'it shall be lawful' for them to do such acts a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have—to say the least—a compulsory force and so would seem to be modified by judicial exposition."

The Supreme Court while interpreting the word 'may' as used in Section 5(3) of the Central Provinces and Berar Revocation of Land Revenue Exemption Act, 1948 has, in the above case, observed—

"The word 'may' in sub-section (3) has, however, a different purport. Under that sub-section, Government must if it is satisfied that an institution or service must be continued or that there is a descendant of a former ruling Chief grant money or pension to the Institution or service or to the descendant of the former Ruling Chief, as the case may be. Of course, it need not make a grant if the person claiming is not a descendant of a former Ruling Chief or there is other reasonable ground not to grant money or pension. But except in those cases where there are good grounds for not granting the pension, Government is bound to make a grant to those who fulfil the required condition and the word 'may' in the third sub-section though apparently discretionary has to be read as 'must'."

74. Having regard to the above principles, we are of the view that when the manifest is in any way incorrect or incomplete and a request for the amendment of the manifest is made under Section 30(3) of the Customs Act, the proper officers has to satisfy himself that there was no fraudulent intention. Once he is satisfied that there was no fraudulent intention, he bound to permit amendment of the manifest unless he has 'good grounds' for not allowing the amendment.

75. A reading of the Collector's order shows that the Collector did not treat this case as one falling under sub-clause (3) of Section 30 of the Customs Act on the ground that according to him B.O.A.C. had fraudulent intention in declaring a huge quantity of gold in transit through India as 'metal' or 'metal bar'. We have, however, already held that this finding of the collector in our opinion, was not based on evidence and was incorrect.

76. Having come to the conclusion that there was no fraudulent intention in this case, and that a request for amendment of the manifest was made by B.O.A.C., unless there are any 'good grounds' for holding to the contrary, amendment of the manifest ought to be permitted.

77. On behalf of the Customs, two grounds were urged for not allowing amendment: (i) there was fraudulent intention, and (ii) no person on B.O.A.C. bothered to see that the Indian laws were complied with for a period of about two years; not only that, they

flouted their own instructions in their Traffic Manual for declaring gold as 'gold'. We have exhaustively dealt with both these aspects in paras 49 to 72 while considering Issue No. 8, and have given a categorical finding that there was no fraudulent intention whatsoever involved in the preparation of the manifest in question; nor was there any wilful neglect or disregard of the Indian regulations on the subject or of the instruction in their Manual regarding declaration of gold in transit through India as 'gold'. As stated by us in para 55, the mistake of declaring gold as 'metal' or 'metal bar' in the manifest started as a result of the factors essentially arising from the introduction of the computer system in November, 1965. Some of these factors were: absence of the human check and the individual attention which was being provided by the clerks/typists who were preparing the manifest prior to Nov. 1965; the..... not knowing, at the time of punching the.....the particular consignments would be carried through India; the increase in speed under the new system; the increase in work arising from the introduction of aircraft with much greater capacity and to general increase in B.O.A.C.'s cargo business and the consequent increase in pressure on the Flight Allocation Officers; the paucity of staff, the mass production of manifests; the standardisation of procedures resulting from the computer system which meant that individual cases received less personal attention; and the complacency caused by mechanisation. We, have also pointed out that the mistake was not noticed by either B.O.A.C. or by the Customs until this case with the result the same got repeated on several occasions. Further, as already mentioned by us, the instructions in the B.O.A.C.'s Traffic Manual, that the general practice of B.O.A.C. of declaring gold as 'metal' was not permitted in India, have been there both before and after November 1965 without any change. Thus, in so far as the higher management of B.O.A.C. was concerned, it cannot be said that they did not bother about the Indian Regulation on the subject as contended by Customs. According to it, there certainly has been some human failure as a result of too much dependence on mechanisation, but there was no fraudulent intention nor any intention to disregard Indian Regulations nor any wilful neglect nor any conscious or deliberate repetition of the mistake. This finding is also reinforced by the fact that B.O.A.C. had nothing to gain by declaring gold as 'metal' or 'metal bar' nor would they have suffered any loss or inconvenience if they had declared gold as gold in the manifest. Further, we have already held (Para 64) that we did not find in the conduct of B.O.A.C. personnel at Delhi anything which could give rise even to a suspicion, much less to a belief, that there was any deliberate intention to suppress facts or to deceive or to defraud

Customs. We have also held (para 65) that there was no intention nor was any attempt made to smuggle the gold from the aircraft while the same was in India. We have also given a finding (para 66) that there was no evidence to indicate any collusion between the consignors and the B.O.A.C. regarding declaration in the manifest. It is also significant to mention that in the manifest these two consignments are shown for transit as same bottom cargo. The Airway Bill Numbers (consignment notes) are also mentioned in the manifest and in the Airway Bills the gold is correctly described as 'gold'. The Airway Bills accompanied the consignments and were open to inspection by Customs, if they so desired. Therefore, the provisions of the Reserve Bank's Notification of 8-11-62 were complied with in all respects except that the nature of the article was not described specifically but by a generic term. On the principle laid down by the Supreme Court, in the case cited earlier, once we are satisfied that there was no fraudulent intention and there are no other 'good grounds' for refusing amendment, the amendment, if asked for has to be allowed. Here, in this case, we do not see any good ground for refusing amendment of the manifest. On the other hand, as indicated above, there are several 'good grounds', in addition to the absence of fraudulent intention, for permitting amendment of the manifest. We, accordingly, allow amendment of the manifest.

Issues No. 10, 11 & 12.

78. As already held by us, amendment to the manifest takes effect from the date of the initial presentation of the manifest and also that such an amendment equally applies to the declaration made in the manifest in pursuance of the Reserve Bank's Notification of 8-11-62. That being so, the declaration in the manifest for the purpose of Reserve Bank's Notification of 8-11-1962 would be the declaration as amended and consequently the two consignments of gold in question would be covered by the general permission of the Reserve Bank to carry gold in transit through India. The two consignments of gold are, thus, not liable to confiscation under Section 111(d) of the Customs Act for contravention of Section 8(1) + F.E.R.A. read with Section 23A of the F.E.R.A. and Section 11 of the Customs Act. Since the consignments of gold are not liable to confiscation, B.O.A.C. are not liable to a penalty under Section 112 and Section 114(1) of the Customs Act which in terms are attracted only when certain goods are liable to confiscation. For the same reason, the aircraft is also not liable to confiscation under Section 115(2) of the Customs Act.

79. In view of the findings given above, we allow the appeals and direct that these two consignments of gold to be released to B.O.A.C. for being carried in transit to Hongkong. We also direct that penalty, if paid, be refunded. We also set aside the confiscation of aircraft No. G-APFK and direct that fine in lieu of confiscation, if paid, be refunded.

Sd/-

D, P, ANAND,
3-3-69

*Chairman, Central Board of
Excise and Customs.*

Sd/-

M. G. ABROL,
3-3-69

Member, Central Board of Excise and Customs.

Sd/-

S. P. KAMPANI,
3-3-69

Member, Central Board of Excise and Customs.

F. No. 2/53-55/68-Gust. IIA

New Delhi, dated 6th March, 1969.

APPENDIX IV

Opinion given by the Ministry of External Affairs

The Ministry of Finance (Deptt. of Revenue Intelligence) have sought a clarification regarding the application of the Order No. 9/67 notified by the Ministry of Commerce, prohibiting the export to or import from Portugal. The question posed is whether exports to and imports from Macao and other portuguese overseas territories which Portugal considers as her "provinces" would also attract the ban imposed under the above order.

2. The question has risen in the context of a seizure of gold destined for Macao by the Customs authorities at Palam Airport some weeks ago. While preparing the case in justification, the Ministry of Finance were exploring the possibility of quoting the violation of yet another Government of India order in order to strengthen their reasons for the seizure of the gold.

3. There is background to the issue of the Order No. 9/67. It was a UN Resolution adopted by the General Assembly on the 25th January, 1966 which urged the member States to boycott all trade with Portugal which inspired the issue of the said Order. At that time, when this resolution was under consideration, the question whether the ban should apply to Portuguese overseas territories was considered in detail in the Ministry and in the Ministry of Commerce. On account of the large volume of our trade with Mozambique and other Portuguese colonial territories in Africa, it would not have been expedient to include these territories within the scope of this ban. Besides the reason of expediency, we could not possibly accept the Portuguese thesis that here overseas territories are a part of Portugal. By extending the application of this ban to these territories, we would, in fact be accepting the Portuguese thesis. Again, it has always been our principle that the boycott of a colonial power should not make the economy of the indigenous people of the colonial territory suffer. In view of these considerations, a decision was taken at Foreign Secretary's level that the above Order would not apply in respect of our trade with Mozambique, Angola and other Portuguese territories in Africa.

4. At that time, however, the question of Macao as a distinct unit, was not raised nor considered. We have no direct trade with

Macao, although there is illegal traffic in gold, narcotics, etc. between India and Macao. To that extent, banning trade with Macao would be in Government's interest. While in case of Angola, Mozambique and Portuguese Guinea, there are organised Freedom Movements which we have publicly supported, such tendencies in Macao are naturally for unification with the mainland of China, of which we have not publicly taken note. Again while any ban on our trade with Portuguese African territories would affect the indigenous economy and cause hardship to the local people for whom we have expressed sympathy, ban on trade with Macao is not likely to have the same repercussions. Nevertheless any ban on trade with Macao will to some extent imply conceding the Portuguese thesis that Macao is a part of Portugal. Further the issue of an order at this juncture may not help the Ministry of Finance in their present predicament, as it probably cannot be applied with retrospective effect.

5. Ministry of Finance may consult the Ministry of Commerce if necessary.

Sd/-

V. H. COELHO,
Joint Secretary.

[Ministry of Finance (Deptt. of Rev. & Ins.—Shri T. C. Seth)

Min. of E.A. U.O. No. WI/125 (5) /66 dt. 20-11-67]

APPENDIX V

Record of discussion with the Solicitor-General of India on 21-11-1967.

There was a meeting in the chamber of the Solicitor-General of India Shri Niren De to discuss whether gold brought into India in transit and not removed from the conveyance was liable to confiscation under Section 111(d) of the Customs Act, 1962 for contravention of the provisions of Foreign Exchange Regulation Act, 1947 and the Imports & Exports (Control) Act, 1947. Shri R. M. Mehta, Joint Secretary Law, Shri T. C. Seth, Member Control Board of Excise and Customs and Shri S. K. Srivastava DRI participated in the discussions. I was also present.

2. It was brought to the notice of the Solicitor General that Section 8(1) of the FERA empowers the Central Government to order that no person shall, except with the general or special permission of the Reserve Bank, bring or send into India any gold. The explanation to the section makes it clear that the bringing or sending into any port or place in India of gold intended to be taken out of India without being removed from the conveyance in which it is being carried shall nonetheless be deemed to be a bringing into India of gold for the purpose of the said Section. The notification issued under Section 8(1) of the FERA gives general permission to bring gold into India in transit provided the gold is not removed from the conveyance and a declaration is made in the manner provided in the notification. It was explained to the Solicitor-General that in the case under consideration (BOAC gold case) the gold was declared as 'metal' and not as 'gold' and, therefore, the declaration was not as required under the said notification. In that view of the matter the benefit of the general permission was not available and the bringing of the gold into India was in contravention of the provisions of Section 8(1) of the FERA. By virtue of the provisions of Section 23-A of the FERA, the restrictions imposed by sub-section (1) of section 8 of the said act, are deemed to have been imposed under Section 11 of the Customs Act, 1962. The contravention of the restrictions imposed under Section 8(1) of the FERA, 47, therefore, attract the provisions of Section 111(d) of the Customs Act 1962 under which the gold can be confiscated. After carefully examining the relevant provisions of the Customs Act, 1962 and the FERA, 1947

the Solicitor General agreed that the Customs authorities would be competent to proceed on the above lines.

3. The second question discussed with the Solicitor-General related to the provisions of the Imports & Exports (Control) Act, 1947. Section 2 of the said Act provides that 'Import' and 'Export' means respectively bringing into and taking out of India by Sea, land or air. Section 3(1) of the Act empowers the Central Government *inter-alia* to prohibit and restrict:

- (a) the import, export, carriage coastwise or shipment as ships stores of goods of any specified description.
- (b) the bringing into any port or place of India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried.

In exercise of the powers conferred by section 3 of the said Act, the Central Government by order 9/67 dated 1st August, 1967 prohibited the import and export of all goods, whether directly or indirectly into or from any port or place in India, from or in any place in Portugal.

4. Two questions arose for consideration:—

- (i) Whether order 9/67 was issued in terms of clause (a) of sub-section 1 of the section 3 of the Import & Exports (Control) Act or could it be taken also to have been issued in terms of clause (b) of the said section?
- (ii) Whether the scope of clause (a) was much enough to include the situations contemplated by clause (b) and if so, whether as a natural corollary, the words "import" and "export" would include bringing into India in the manner as described in clause (b) i.e. bringing into India of goods intended to be taken out of India without being removed from the conveyance?

5. On the first point the Solicitor General was of the view that order 9/67 was clearly issued under clause (a) and not under clause (b). On the second question two points of view were brought to the notice of the Solicitor General. One view was that the term

"Import" as used in clause (a) would not include bringing into India in the manner as described in clause (b) and that any other view would make the provisions of clause (b) as redundant. The other point of view as that 'import' as defined in the Imports & Exports (Control) Act would include bringing into India of the goods in the manner as described in clause (b) also. Therefore, the provisions of clause (a) were wide enough to include (b). It was stated that clause (b) was intended to provide for these types of cases where Government did not want to impose any prohibition on the import of goods into India as such but wanted to prohibit the goods in transit from being taken out to some enemy country. In other words, clause (b) was inserted to facilitate the Government to prohibit imports in a particular sense only. As against this, it was mentioned that if the idea in inserting clause (b) was only, it could well be achieved by issuing an order prohibiting imports in a limited sense and for that alone there was no need for the legislature to insert a separate clause of the type (b) in the Act itself.

6. After having carefully considered both the points of view and also having gone through the definitions of the 'import' and 'export' in the Imports & Exports (Control) Act, 1947, the Customs Act, 1962, the Foreign Exchange Regulation Act, 1947, the Arms Act and the start Dangerous Drugs Act, the Solicitor General was of the opinion that the provisions of Clause (a) were not wide enough to include situations covered by clause (b) and further that the expressions 'import' and 'export' as used in clause (a) were not wide enough to include situations covered by clause (b) and further that the expressions 'import and 'export' as used in clause (a) would not include bringing into India in the manner described in clause (b). The opinion of the Silicitor General was based on two considerations:—

- (i) The fact that the legislature had made a separate provision for entry of goods into India which were only in transit and which were to be taken out of India in the same vessel or aircraft or other conveyance shows that such bringing into India was not covered by the term 'import'.
- (ii) wherever the legislature intended that such entry of goods into Indian as aforesaid was to be inluded within the connotation of the word 'import' it has expressly

stated so (for example Explanation to Section 8(1) of the F.E.R. Act and Section 2(i) of the Dangerous Drugs Act, 1930 etc.). In the absence of any such provision in the Imports & Exports (Control) Act, 1947, the normal presumption would be that for the purposes of the said Act, the term 'import' does not include bringing into India of goods in transit intended to be taken out of India without being removed from the conveyance.

[This has been seen by Shri S. K. Srivastava, D.R.I. and M(CX-S)].

Sd/- L. P. ASTHANA,

22-11-1967.

Min. of Law (Shri Mehta).

MINISTRY OF LAW
DEPARTMENT OF LEGAL AFFAIRS
ADV.(F) SEC.

The above note is an accurate summing up of the discussion which we had with the Solicitor General except as regards the reference to the notification under S. 8(1) in paragraph 2. I would like to add that when the attention of the Solicitor General was invited to the express language used in that notification, he not feel quite certain whether the declaration of the gold as 'metal' would not have been a sufficient compliance with that notification. He was also not very sure as to the precise nature of the declaration required under the Notification issued under S. 8(i) of the F.E.R.A. He, therefore, did not express any category opinion on this point. He, however, generally agreed that if the Customs authorities thought that the declaration was not in accordance with the notification they would be competent to take action for contravention of s. 8(1) of the F.E.R.A.

Sd/- R. M. MEHTA,

Joint Secretary and Legal Adviser.

Tel. No. 32688, dt. 24-11-67.

APPENDIX VI

Copy of D.R.'s Note and Ministry of Law's opinion (on the margin)

Points on which the advice of the Ministry of Law is required:—

Question—I

The gold in question was part of the same bottom cargo of the aircraft. Can it be said that even though it was same bottom cargo, the more fact that the aircraft transited through India mounted to the importation of gold into India in the sense that it was brought into India.

In answering the above point, the following may be taken into account:—

- (a) The word 'import' has been defined by Section 2 (23) of the Customs Act, 1962. The definition is the following:—

“‘import’, with its grammatical variations and cognate expressions, means bringing into India from a place outside India.”

- (b) Under Notification No. 12(11)—F. 1/48 dated 25th August, 1948 (as amended) issued under section 8(1) of the Foreign Exchange Regulations Act, 1947, the Central Government directed that “except with the general or special permission of the Reserve Bank, no person shall bring or send into India from any place outside India” various goods, which includes gold.
- (c) Under Notification No. F.E.R.A. 208/62-R.B. dated 8th November, 1962, the Reserve Bank of India gave “general permission to the bringing or sending of any of the” articles enumerated in the notification, which includes gold”, into any part or place in India when such article is on through transit to a place, which is outside the territory of India.”

The wordings of the Notifications referred to in (b) and (c) above make it evident that in the circumstances referred to in the question, the gold has to be held to have been brought into India within the meaning of the notification referred to in (b) above and it can also be held to have been imported into India within the definition of the word ‘import’ under the Customs Act, 1962.

- (d) Chapter VIII of the Customs Act, 1962 deals with "goods in transit". No definition of the words "goods in transit" has been given in the Act, Section 53 of the Customs Act, 1962 is worded as under:

"Subject to the provisions of Section 11, any goods imported in a vessel or aircraft and mentioned in the import manifest as for transit in the same vessel or aircraft to any port or airport outside India or any customs port or customs airport may be allowed to be so transited without payment of duty."

The above wordings make it evident goods in transit are in fact imported into India. These wordings, therefore, lead to the conclusion that in the circumstances referred to in the question, the gold had in fact been imported into India.

In the aforesaid circumstances it appears to be evident that the gold should be held to have been imported into India. This conclusion, if right, may be confirmed.

In connection with the above conclusion, attention is invited also to the case of BERNARDO STEENHOG ULTRICH Vs. Collector of Customs, Cochin (AIR 1960 Kerala 170). In this case the facts were that the petitioner was travelling on board the ship from Colombo to Genoa with car on board the ship. The ship entered port of Cochin *en route*. The petitioner was asked by the customs authorities to make a declaration in the prescribed form as to the currency, foreign and India, he was carrying with him. He accordingly made the declaration that he had a certain amount of both currencies. The amount was found on his person. On a search being made of his car, a great deal of Indian and U.S. currency was found concealed in a secret chamber of the car. This amount was not declared. The ship was about to leave Cochin within a few hours and there was no intention the part of the petitioner to land at Cochin. It was, however, held that there was import and export of currency on the part of the petitioner. The petitioner imported and exported foreign currency in contravention of Section 19 of the Sea Customs Act and relevant notifications. The petitioner, therefore, was guilty under paras (1), (2) and (4) of item (8) u/s 167 of the Sea Customs Act.

The above interpretation was given at a time when there was no legislation defining the meanings of the words 'import' and 'export'. The existing legislation in the form of the Customs Act, 1962 defines these words and within the scope of the definitions under

the aforesaid Act there appears to be no doubt that the correct conclusion is as indicated earlier.

Question—II

At the material time the subject gold was brought as on through transit gold. Was its importation into India prohibited?

The answer to the above question will depend on the following factors:

- (a) The existence of notifications No. FERA. 12(11)F.1/48 date 25th August, 1948 (as amended) and FERA. 208/62-RB 8th November, 1962.

In terms of the aforesaid notifications, the general permission given by the Reserve Bank of India for bringing into India gold from a place outside the territory of India can be taken advantage of only if the gold is declared in the manifest for transit as same bottom cargo or as transshipment cargo.

The question arises whether in the circumstances of this case it can be held that the gold had been declared in the manifest "for transit as same bottom cargo or transshipment cargo". The contention of the Customs Officers is that the gold had not been declared in the manifest at all. In the manifest there is declaration of 'metal bars'. The Customs authorities contend that such declaration does not amount to the declaration of gold in the manifest presented to them. In support of their contention they assert:

- (i) that they had never been informed by the carriers that it was their practice to declare in their manifest gold as 'metal' or 'metal bars'.
- (ii) that the Traffic Manual of M/s. B.O.A.C. supports the conclusions that the description 'metal' or 'metal bars' in the manifest presented by them in India cannot refer to gold. The said Manual contains the gold. The said Manual contains the instructions to the effect that the practice of declaring gold and bullion as metal is not to be followed in the case of "shipments consigned to or in transit through India where such practice is not permitted by the customs authorities."

The above state of knowledge of India Law in the minds of M/s. B.O.A.C. explains why they did not inform the customs authorities at any material time that gold was being declared, in the mani-

manifests submitted India, as 'metal' or 'metal bars' in the manifest presented in India by M/s. B.O.A.C. cannot refer to gold.

In connection with the above conclusion it is also to be noted that in the material manifest in which the subject gold was described as 'metal bars', platinum was also described as 'metal'. The description 'metal' or 'metal bars', therefore, are ambiguous terms, which rightly are not interpreted by the customs authorities to refer to gold. In the aforesaid circumstances, it appears, that even judicial authorities would find it impossible to reach the conclusion that the descriptions 'metal' or 'metal bars' in the manifests should be interpreted to refer to gold. It appears that is no case even for extending benefit of doubt to M/s. B.O.A.. This conclusion, if right, may be confirmed.

From the foregoing it emerges that the subject gold had not been declared in the manifest for transit as same bottom cargo or transshipment cargo and accordingly its importation into India was prohibited.

(b) The existence of Notification No. 135/Customs dated 3rd October, 1964. Under this notification, issued U/s. 11 of the Customs Act, 1962, the Central Government "prohibits the exports to and imports from the Republic of South Africa of all goods."

The above notification does not, however, apply to "cargo transhipped at Indian ports for places other than in the Republic of South Africa by non-Indian and non-South Africa, which may or may not touch ports in the Republic of South Africa in the course of their voyage."

From the foregoing it emerges that the subject gold had not been declared in the manifest for transit as same bottom cargo or transshipment cargo and accordingly its importation into India was prohibited.

(b) The existence of notification No. 135/Customs dated 3rd October, 1964. Under this notification, issued U/s. 11 of the Customs Act, 1962, the Central Government "prohibits the exports to and imports from the Republic of South Africa of all goods".

The above notification does not, however, apply to "cargo transhipped at Indian ports for places other than in the Republic of South Africa by non-Indian and non-South African ships proceeding to countries other than South Africa, which may or may not touch ports in the Republic of South Africa in the course of their voyage".

The gold is of South Africa origin. This fact is proved by the markings on the gold. It was, however loaded on the aircraft at

London. It was exported from London by M/s. MOCATTA & GOLDSMID LTD. after obtaining a Certificate 'C' from the Exchange Control Department of the Bank of England. Application for the issue of this certificate was made in Form 'X' on 12th September, 1967. While making the application, the exporters made the declaration "We declare from the facts known to us or from enquiries we have made that to the best of our belief, the owners of the items mentioned overlead are COMPANIA DE DESENVOLVIMENTO COMMERCIAL, MACAO". The goods which were mentioned overlead comprised the seized gold of South African origin. It appears that it was necessary for obtaining Form 'C' that the gold was owned by a party in Macao and not be a party within the United Kingdom. The name of M/s. MOCATTA & GOLDSMID LTD. is inscribed on the gold bars also. Their status is also inscribed on the gold bars and that is that of brokers only. They therefore, could not be the sellers of the gold. The persons who supplied the gold from South Africa were also evidently not the owners of gold at the material time. The application was made on 12th September, 1967, the owners at that time were a Company in Macao. The ownership must have been acquired by them prior to 12th September, 1967. There is no evidence that while the gold was lying in U.K., any person had acquired its ownership prior to 12th September, 1967. The ownership can be presumed, in the light of the existing evidence, to have vested only in the Macao firm all through the time the gold was laying in U.K. If so, it would follow that the gold was brought by the Macao firm into England only on its way to Macao. In this sence, the gold can be said to have been imported into India from South Africa via U.K. and the gold cannot be said to have been imported into India from U.K. If so, the importation of gold into India would be deemed to be prohibited in terms of the Notification No. 135/Customs dated 3rd October, 1964. The prohibition is relaxed only in the case of cargo transhipped at Indian ports in ships. It is not relaxed if the cargo is to be transhipped by air. The Customs Act, 1962 specifically deals with the mode of transport i.e., by land, by sea or by air. If it does not specify any particular mode of transport in connection with certain provisions, these provisions will be applied to all modes of transport but if any of the modes of transport are specified, such provisions would apply to the specified modes of transport only.

In view of the foregoing it appears that the subject gold had been imported into India from South Africa and its importation is prohibited under Notification No. 135/Customs dated 3rd October, 1964.

Prohibition under the notification under FER Act is applicable. Prohibition under notification 135-Customs of 3rd October, 1964 could be applicable subject to proof by Customs that the gold was exported from South Africa to Macao via U.K. and that no intermediate acquisition by ownership of that gold in U.K. by any one.

Sd/- R.M.

If having regard to the foregoing, it is concluded that the importation of the subject gold was prohibited, this position may be confirmed and it may further be clarified whether the prohibition imposed under both the notifications viz., under the Foreign Exchange Regulations Act and the Customs Act, 1962 is applicable or only prohibition under one of these notifications is applicable and if so, which is the notification under which it is applicable.

Customs—III

Whether in view of the language of Section 53 of the Customs Act, 1962, the goods can be permitted to be transited?

- (a) the opening words of Section 53 are: "subject to the provisions of Section 11".

These words appear to imply that if the importation of goods is prohibited, its transit cannot be permissible under section 53 of the Customs Act, 1962. The wordings of this section, which have been quoted earlier, appear to imply that even if the importation is not prohibited u/s 11 of the Customs Act, 1962, the transit without payment of duty may not be permitted. Having regard to this provision, it appears only reasonable that the customs authorities should be stopped not from permit transit of those goods which in the course of their journey prior to the reaching of their destination have to be imported into India in contravention of some provision.

Confirmed

It appears that even if the subject gold is deemed to be hit by prohibition under one of the notifications only, its transit cannot be permitted by the customs authorities because there is no provision for permitting transit of such goods.

- (b) Permission to allow the gold to be transited will involve exportation of the gold which has been imported into India. No permission would have been required for the export of the subject gold if all the conditions under the notification had been fulfilled—All these conditions have obvious-

ly not been fulfilled in view of the fact that the gold was not manifested as required under the said notification.

Yes { The export involved, therefore, would be prohibited under section 8(2) of the Foreign Exchange Regulations Act, 1947, in the absence of the general or special permission of the Reserve Bank or a written permission of a person authorised in this behalf by the Reserve Bank.

- (c) Under Order No. 9/67 dated 1st August, 1967, "import and export of all goods, whether directly or indirectly, into or from any port or place in India, from or to any place in Portugal" has been prohibited.

Subject to confirmation by the E.A. Ministry that export to Macao is export to Portugal, this is agreed to.

Sd/- R.M.

The word 'Portugal' represents a political entity. This word can include territories which are commonly known as Portugal and also territories outside it. It has been confirmed by the Ministry of External Affairs that Portugal treats all her possessions as her provinces. Macao is, therefore, a province of Portugal and as such a part of Portugal. Macao, therefore, is also Portugal and exports of any goods from India to Macao would be hit by the prohibition under Order No. 9/67. In view of this prohibition, even if it is stated that the import of gold is not prohibited, its export would be prohibited and in view of this prohibition, the authorities in India would not be competent to allow the transit of gold to Macao.

The provisions of Section 53 of Customs Act, 1962 would also be invoked. In view of the provisions of Section 3(2) of Imports and Exports (Control) Act, 1947 prohibition imposed under Order No. 9/67 dated 1st August, 1967, would be deemed to be prohibition under section 11 of the Customs Act, 1962. It would, therefore, follow that in view of the prohibition on export of goods to Portugal, which is imposed u/s 11 of the Customs Act, 1962, it would not be permissible to permit the transiting of the subject gold.

From the foregoing it would appear that the subject gold cannot be permitted to be exported to Macao in view of:

*Subject to confirmation as above. Sd/- P.M. (i) Order No. 9/67 dated 1st August, 1967;

(ii) The importation being prohibited; and

(iii) Absence of general or special permission of the Reserve Bank of India or of any person authorised by the Reserve Bank of India in this behalf to export the said gold.	YES
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If the above conclusion is correct, it may please be confirmed.

In connection with the above, it may also be noted that Order No. 9/67 dated 1st August, 1967 prohibits export of all goods to any place in Portugal, whether directly or indirectly". The export of the subject gold constitutes certainly indirect export from India to Portugal.

APPENDIX VII

Copy of Affidavit filed by Director of Revenue Intelligence

IN THE HIGH COURT OF DELHI AT NEW DELHI

CIVIL APPELLATE JURISDICTION

L.P.A. NO. 46 OF 1968.

In the matter of

SHRI R. PRASAD, COLLECTOR OF CUSTOMS
AND CENTRAL EXCISE, DELHI—NEW DELHI ... APPELLANT

VERSUS

UNION OF INDIA AND 7 OTHERS ... RESPONDENTS

Reply Affidavit of the Appellant in opposition to the Additional Affidavit of Shri B. D. Pande, Secretary to the Government of India, Ministry of Finance (Department of Revenue and Insurance), North Block, New Delhi, filed on behalf of Respondents No. 1 to 3 in the above-said appeal.

I, R. Prasad, S/o Pandit Dwarka Prasad, aged 57 years resident of C-II/6, Dr. Zakir Hussain Road, New Delhi, do hereby solemnly affirm and state as under:

1. I am the Appellant in the above-said case. I am conversant with the facts of the case and am competent to swear this Affidavit.

2. I have read the Additional Affidavit of Shri B. D. Pande, Secretary to the Government of India, Ministry of Finance (Department of Revenue and Insurance), North Block, New Delhi, filed on behalf of Respondents No. 1 to 3 (hereinafter referred to as the 'Additional Affidavit') and have understood its contents. Being conversant with the facts of the case, I depose as under:—

3. That by the aforesaid Additional Affidavit, the Respondents have sought to introduce and place on the record certain developments which are purported to have taken place since the decision of the Hon'ble Single Judge dated the 31st March, 1968 on the ground that the said developments are relevant for the purpose of deciding the controversy forming the subject matter of the above said appeal.

4. Before giving reply to the various averments raised in the Additional Affidavit, it will be necessary to state the background and bring certain relevant facts already on record to the notice of this Hon'ble Court.

5. Appellant belongs to the erstwhile Indian Central Excise Service. The Appellant was directly recruited as Superintendent (Gazetted) in 1938. The Appellant was selected to the Indian Police Service and was in the I.P.S. for a period of about 5 years from 1950 to 1954. As an officer of the Indian Police Service, the Appellant was given the year of allotment as 1942. In 1954 the Appellant came back to his parent Department i.e. the Central Excise. The Appellant was confirmed as a Collector of Central Excise in the grade of Rs. 1600—1800 on 15th August, 1957.

6. In the year 1956, Central Excise Service was formed after a good deal of struggle. In 1959, the merger of the Indian Central Excise Service and the Indian Customs Service took place. As a result of the merger of the two Services, a combined Seniority List was published in January, 1960.

7. The Appellant was the President of the Central Excise Officers' Association while Shri D. P. Anand, the present Chairman of the Central Board of Excise and Customs, was the then President of the Indian Customs Service Officer's Association. As President of the Customs Service Association Shri D. P. Anand bore a grudge against the senior officers of the Central Excise Service generally against the Appellant particularly as the Appellant was the pivotal force in the Central Excise Service.

8. In the year 1963, the Central Board of Revenue was bifurcated Shri D. P. Anand, the present Chairman of the Central Board of Excise and Customs, were constituted. Shri B. N. Banerjee became the first Chairman of the Central Board of Excise and Customs and Shri D. P. Anand, the present Chairman of the Central Board of Excise and Customs was the second Member of the Central Board of Excise and Customs.

9. At the time of publication of the combined seniority list in January, 1960, it was solemnly declared by the Government of India that the said List was final. According to the said list, the Appellant was senior to the Respondents No. 5 to 8. After the Appellant Sarvashri D. R. Kohli and A. K. Roy of the Central Excise were placed in the combined seniority list immediately above the Respondents No. 5 to 8.

10. Certain representations were made on behalf of the members of both the Services against the aforesaid seniority list. By the said

601 LS—11.

list, the junior Officers of the Central Excise Service suffered a great deal of disadvantage vis-a-vis the Members of the Indian Customs Service, it will be relevant to state here that the Indian Customs Service consisted of a handful of officers in comparison to the large number of officers of the Central Excise Service. The revenue from the Central Excises is at present four time more than that of the Customs.

11. As the Board was dominated by the Members of the erst-while Customs Service, it, in the year 1966, tried to revise the 1960 seniority list with the primary and solo object of making Respondents No. to 8 as senior to the Appellant and the two other senior officers of the Central Excise Service.

12. A joint meeting of the representatives of both the Service Associations was called by the then Finance Secretary to obtain the concurrence to the revision of the 1960 seniority list. the minutes of the meeting were wrongly recorded by the Respondent No. 3 with the ulterior motive and design of giving the proposed 1966 seniority list a colour of agreement by the representatives of the two Services. Strong protests were lodged by the Central Excise Officers Association against the wrong recording of the minutes and against the high handed acts of the Customs dominated Board.

13. A tentative seniority list was published and circulated to both the Associations. The Central Excise Officers' Association vehemently protested against the arbitrary revision of the seniority list and against the high-handedness and vindictive attitude of the Customs dominated Board. Thereupon a further meeting was called by the then Secretary to the Government of India (Shri R. C. Dutt). The Central Excise Officers' Association did not attend the meeting as there was no response to their earlier protests made in this behalf. At the instance of the senior Customs Service Officers, the then Finance Secretary ignored the protests of the Central Excise Officers' Association with the remark that he would see to it that the senior Central Excise Officers are taught a proper lesson for not attending the meeting and they are made junior to the Customs Officers even on merits.

14. In April, 1968 a second combined seniority list was published for the grade of Collectors only with the ulterior design and motive of making the Appellant, Shri D. R. Kohli, and Shri A. K. Roy as juniors to Respondents No. 5 to 8. It is this seniority list which is under challenge and is the subject matter of the present appeal.

15. In 1962, Chinese aggression took place. The Appellant was embodied to the Army and rendered useful service to the country.

16. In 1967, Shri B. N. Banerjee, became the Chairman of the Tariff Commission and in his place Shri D. P. Anand was made the Chairman of the Central Board of Excise and Customs. Shri D. P. Anand continues to be the Chairman of the said Board of Excise and Customs till date. Ever since Shri D. P. Anand assumed charge as Chairman, Central Board of Excise and Customs, a reign of victimization was started by the Customs dominated Board against the senior officers of the Central Excise generally and the Appellant particularly. A systematic, calculated and an organized campaign of vilification was launched against the Appellant personally as would be amply borne out by the facts stated hereinafter.

17. By the promotion of Shri D. P. Anand as Chairman, a vacancy occurred in the Central Board of Excise and Customs. The case of the Appellant (Central Excise) and that of Shri M. G. Abrol (Customs) was considered for selection and appointment as Member, Central Board of Excise and Customs by the Establishment Board of the Government of India and thereafter by the Cabinet Committee on Appointments. The Appellant alongwith Shri M. G. Abrol was selected for appointment as Members, Central Board of Excise and Customs. On the basis of better service record and seniority the Appellant was placed above Shri M. G. Abrol. The selection of the Appellant for the post of Member, Central Board of Excise and Customs was also aproved by the Prime Minister of India in March, 1967.

18. Shri D. P. Anand, the present Chairman of the Central Board of Excise and Customs, did not reconcile himself with the selection of the Appellant to the post of Member, Central Board of Excise and Customs and made up his mind to see to it that the Appellant did not take charge of the post of Member, Central Board of Excise and Customs and his appointment to the paid post was withheld or withdrawn on one excuse or the other. He launched an all out attack against the Appellant and thereby poisoned the entire atmosphere against the Appellant. The then Finance Secretary and then Dy. Prime Minister (Shri Morarji Desai) who was also Finance Minister at that time were completely turned hostile towards the Appellant by the Customs dominated Board. Thereafter when the Appellant was about to take charge as Member, Central Board of Excise and Customs, certain complaints were manoeuvred against the Appellant solely with the ulterior motive and designs of preventing the Appellant from becoming Member, Central Board of Excise and Customs.

19. The Appellant was given to understand that the strategy of the Customs dominated Board was somehow or the other to pull the Appellant down and see to it that he did not take charge of the post of Member, Central Board of Excise and Customs by organizing a systematic campaign of vilification. As a result of this campaign the Appellant was ultimately denied the post of Member, Central Board of Excise and Customs while Shri M. G. Abrol was appointed as Member of the Board sometime in November, 1967. The appointment of the Appellant was arbitrarily, mala fide and illegally withheld by the Respondent No. 3 and the then Finance Secretary and the then Finance Minister. It is submitted that the Finance Minister was not competent in law to withhold the appointment of the Appellant which had been approved by the Cabinet Committee and the Prime Minister.

20. In order to justify the withholding of the appointment of the Appellant to the post of Member, Central Board of Excise and Customs, the Respondents No. 1 to 3 started digging out some material against the Appellant. Adjudication orders and various other Administrative order passed by the Appellant were subjected to close scrutiny. When the Customs dominated Board failed to get anything against the Appellant they came out with a lame excuse that the Appellant had treated one Jai Kishan Das a gold dealer licensee leniently in his quasi-judicial capacity and had imposed a lesser penalty without giving reasons for the same and on that account displeasure of Government of India was communicated to the Appellant. Before communicating the displeasure, the Appellant was sent for and told by the Chairman personally that this displeasure would not stand against the future prospects and promotion of the Appellant and that the same would not form part of his confidential character roll. It is submitted that the real reason for conveying the displeasure of the Government was not the case of Jai Kishan Das but something else.

2. On 15th September, 1967, foreign marked gold of the value of more than Rs. 2 crores was seized by the sub-ordinates of the Appellant from an aircraft belonging to the BOAC at the Palam Airport which gold was brought to India in contravention of the Customs Law and the Rules and Regulations then in force. After the seizure of gold, adjudication proceedings took place and a show cause notice was issued by the Appellant to the BOAC to show cause as to why the gold and the aircraft in which gold was being carried be not confiscated and penalty imposed upon the persons concerned in the offence.

22. During the course of the adjudication proceedings, the then Finance Secretary, namely, Shri T. P. Singh started pressurising the Appellant to release the gold forthwith by sending personal messages. The Appellant did not pay any heed to the personal messages of the then Finance Secretary. The Appellant was called to the Board by Shri T. C. Seth, the then Member, Central Board of Excise and Customs and was apprised of the decision of the Finance Secretary to release the gold. Later on the Appellant was again sent for and in the presence of Shri Jasjit Singh, the present Member of Central Board of Excise and Customs required the Appellant to release the gold forthwith. Shri Jasjit Singh, who was the Gold Control Administrator at that time remarked that if the Appellant felt any difficulty in releasing the gold, he could obtain for the Appellant a favourable opinion from Law Ministry. The Appellant did not submit to this undue pressure and took up the stand that he would see as to what could judicially be done in the matter.

23. The then Finance Secretary (Shri T. P. Singh) personally told the Appellant several times to release the gold forthwith without any further delay and pass an adjudication order favourable and complimentary to the BOAC. He went even to dictate the Adjudication order. The Appellant very humbly submitted that he would consider the matter and pass his adjudication order according to law.

24. The investigation of this case was entrusted to the then Director of Revenue Intelligence. The then Director, Revenue Intelligence, was also pressurised and made to submit another investigation report. He went personally to the Appellant and asked for the earlier investigation report and handed over to the Appellant the subsequent investigation report. The Appellant handed over the earlier report to the then Director, Revenue Intelligence, and kept the new report on the file. After this the Appellant was again called by the then Finance Secretary and told to pass the adjudication order in favour of BOAC releasing the foreign marked gold. The Appellant again refused to submit to this undue and illegal pressure. The then Finance Secretary at that time observed that the Deputy Prime Minister who was also the then Finance Minister was interested in the matter and that it was in the fitness of affairs that the Appellant should pass an adjudication order in favour of BOAC.

25. The Appellant sniffing something in the matter came out of the room of the Secretary and sought for the personal advice and guidance of the then Minister of State for Department of Revenue and Expenditure. The then Minister of State for Department of Revenue and Expenditure advised the Appellant to pass the adjudication order in favour of BOAC.

cation order according to law and in accordance with the evidence on record. The then Minister of State also apprised the Appellant of the hostile propaganda going on against the Appellant in the higher echelons of the Finance Ministry.

26. The Appellant was termed as an Officer belonging to the Prime Minister's group. It may be stated here that the displeasure of the Government was conveyed to the Appellant on 7th February, 1968 when the Appellant refused to submit to the illegal pressure. The adjudication order in the BOAC Gold case was passed by the Appellant on 15th February, 1968. It is submitted that this was the primary reason behind the conveying of the displeasure of the Government and not the case of Jai Kishan Das which was apparently made the ground for conveying the displeasure.

27. After the release of the gold by the Central Board of Excise and Customs by setting aside the order of adjudication a discussion took place in the Parliament. During the course of discussion a reference was also made to the changing of the Investigation Report to which no reply was forthcoming on behalf of the Government. Shri Morarji Desai, the then Deputy Prime Minister went to the extent of branding the Appellant as 'Wrong Man'. The Appellant vehemently protested to this and conveyed his injured sentiments and wounded feelings to the then Finance Secretary. The Appellant also brought to the notice of the then Finance Secretary the injustice done to the members of the Central Excise service during the regime of Shri Morarji Desai. A request was also made to him to convey these feelings to the Hon'ble Deputy Prime Minister.

28. It may be stated here that both Shri T. P. Singh and Shri D. P. Anand were averse to Central Excise Officers generally, because they were opposing vehemently the unfair and under-hand machinations of the Customs dominated Board. They were particularly against the Appellant, because he was the moving spirit in offering resistance to the injustices committed by the Central Board of Excise and Customs and the Ministry of Finance.

29. When the turn of the Appellant for being considered for the post of Member, Central Board of Excise and Customs again came, it was pointed out to the then Finance Secretary that it would not be fair to ignore the Appellant. The then Finance Secretary Shri T. P. Singh remarked that he had to consolidate his position with the Deputy Prime Minister (Shri Morarji Desai) and that he wanted officers of his complete confidence in the Board. Since Shri

Morarji Desai and the then Finance Secretary, Shri T. P. Singh were hostile towards the Appellant as he had not obliged them in the BOAC gold case he was completely ignored.

30. Since the Appellant as the senior most Collector and in the normal course could not be ignored from being considered by the Establishment Board and the Cabinet Committee on Appointment a novel method was devised by the Customs dominated Board and the then Finance Secretary with the blessings of the then Finance Minister (Shri Morarji Desai) of sponsoring a departmental candidate and forwarding his name to the Establishment Board and the Cabinet Committee on Appointment. This novel method of sponsoring the departmental candidate was primarily designed with the ulterior motive and designs of preventing the Appellant from being considered by the Cabinet Committee on Appointment as the then Finance Secretary and the Finance Minister were certain in their mind that if once the name of the Appellant was placed before the Cabinet Committee on Appointment for being considered for the post of Member of Central Board of Excise and Customs, he would certainly be selected and appointed to the post. This is how the Board and the higher officers of the Finance Ministry have been able to prevent the name of the Appellant from being considered by the Cabinet Committee on Appointment.

31. Having arbitrarily and mala fide denied the Appellant the post of Member, Central Board of Excise and Customs, the Respondents introduced and started the above said device of sponsoring a Departmental candidate for the post of Member, Central Board of Excise and Customs. This action of the Respondents in sponsoring a Departmental candidate for the post of Member, Central Board of Excise and Customs is arbitrary, mala fide, discriminatory and violative of Articles 14 and 16 of the Constitution. The name of the Respondent No. 7 was sponsored by Respondent No. 3 as a Departmental candidate. To the best of the knowledge of the Appellant, the case of the Appellant was not forwarded to the Establishment Board and to the Cabinet Committee on Appointments for its consideration.

32. Aggrieved by that and by the revised seniority list published in April, 1968, the Appellant challenged the said seniority list, the selection and appointment of Respondent No. 5 and selection of Respondent No. 7 to the post of Member, Central Board of Excise and Customs.

33. With respect to Paragraph 4 of the Additional Affidavit, I say and submit that the post of Member Central Board of Excise and Customs, though being a selection post and outside the cadre of Service has all along been filled by Members of the Indian Customs and Central Excise Service, in order of seniority except the Appellant, who as already stated hereinabove, has arbitrarily, mala fide and illegally been denied the post of Member, Central Board of Excise and Customs ever since the inception and constitution of the present Central Board of Excise and Customs. In other words, seniority in the Indian Customs and Central Excise Service has always been taken into consideration as a major and very important factor for making selections for the post of Member, Central Board of Excise and Customs. That is the precise reason that Chairman and the other Members of the Customs Service manoeuvred and brought out a revised seniority list in April, 1968 according to which the Respondent Nos. 5 to 8 have been shown as senior to the Appellant, and other senior Central Excise Officers.

34. With respect to Paragraph 5 of the Additional Affidavit, I say and submit that since Shri Jasjit Singh was already a Joint Secretary to the Government of India and as such could be appointed as Member, Central Board of Excise and Customs, there was no necessity of his case being sponsored for selection. The case of the Appellant though examined by the Finance Minister was not sponsored and the name of Shri Jasjit Singh was duly sponsored for appointment to the newly created post. The case of the Appellant was not considered at all by the Cabinet Committee since it was not put up before it. In other words, the Appellant has not been considered for selection and appointment to the post of Member, Central Board of Excise and Customs and his Fundamental Rights as guaranteed by Articles 14 and 16 of the Constitution of India have been arbitrarily infringed and violated.

35. With regard to the Paragraph 6 of the Additional Affidavit, the name of the Appellant was admittedly not sponsored nor it was considered by the Cabinet Committee for selection and appointment to the post of Joint Secretary and Gold Control Administrator in the Department of Revenue and Insurance. The non-consideration of the name of the Appellant for appointment to the said post violates the Fundamental Rights of the Appellant as guaranteed under Articles 14 and 16 of the Constitution. It is submitted that the Finance

Minister and the Board had no right, power or authority to sponsor the name of Shri M. A. Rangaswamy and to arbitrarily withhold the name of the Appellant from being considered by the Cabinet Committee for the post of Joint Secretary and Gold Control Administrator. The Appointment Committee of the Cabinet which is the selecting authority, did not at all consider the case and in fact had no occasion to consider the case of the Petitioner as the name of only one person namely Shri M. A. Rangaswamy had been sponsored by the Finance Ministry. The action of the Finance Minister and the Board in sponsoring the candidature of Shri M. A. Rangaswamy and not forwarding the case of the Appellant for consideration before the Appointment Committee of the Cabinet is discriminatory, arbitrary and malafide and is violative of the Fundamental Rights of the Appellant guaranteed by Articles 14 and 16 of the Constitution of India.

36. With respect to Paragraph 7 of the Additional Affidavit it is submitted that again the name of the Appellant was not considered by the Appointment Committee of the Cabinet as it was not sponsored by the Respondent No. 3 and the Finance Minister while the name of Shri B. Sen, another Officer of the Indian Customs Service was sponsored. Similarly, the name of Shri D. N. Kohli, who is junior to the Appellant in the grade of Collector of Central Excise and Customs was sponsored by the Respondent No. 3 and the Finance Minister. The Appointment Committee of the Cabinet did not consider and examine the case of the Appellant for promotion. It is submitted that the Appellant has the right to be considered by the selecting authority which is the Cabinet Committee and that right has arbitrarily been denied to the Appellant. The appeal of the Appellant is liable to be allowed on this ground alone. Under the instructions and the decision of the Government of India, it is the Appointment Committee of the Cabinet which is entrusted with the job of making selection of the various officers to the post of Member, Central Board of Excise and Customs or to the post of Joint Secretary to the Government of India and not the Finance Minister. The Finance Minister and the Board have no right, power or authority in law to withhold the name and thereby prevent the Appellant from being considered by the Appointment Committee of the Cabinet. Had the Appointment Committee of the Cabinet considered the name of the Appellants, the Appellant would have been selected and appointed to the post of Member, Central Board of Excise and Customs.

37. With regard to Paragraph 8 of the Additional Affidavit, it is denied that the name of the Appellant has been considered for ap-

pointment as Member, Central Board of Excise and Customs and Joint Secretary to the Government of India on every occasion from 1968 onwards. His name has admittedly been considered by the Finance Minister but not by the Appointment Committee of the Cabinet which is the only competent body entrusted with the job of selecting the officers for senior appointments and for the post of Member, Central Board of Excise and Customs. The Appointment Committee of the Cabinet consists of not only the Finance Minister but other Cabinet Ministers including the Home Minister and the Prime Minister. It has been wrongly averred in the Paragraph under reply that the Appellant has been considered for appointment as Member, Central Board of Excise and Customs in accordance with Law

38. With respect to Paragraph 9 of the Additional Affidavit, I say and submit that it is correct that the Appellant is holding the highest grade in the Indian Customs and Central Excise Service. It is submitted that by virtue of the Appellant being the senior-most among the Collectors and by virtue of his service record the Appellant had the right to be considered by the Appointment Committee of the Cabinet in all the 5 vacancies filled up after March, 1967. The perusal of the Additional Affidavit itself shows that the name of the Appellant was not considered by the Appointment Committee of the Cabinet at any time nor sponsored by the Ministry. The Fundamental Rights of the Appellant as guaranteed under Articles 14 and 16 of the Constitution have been violated and infringed. The action of the Respondent being discriminatory, arbitrary, mala fide and capricious, is liable to be quashed by this Hon'ble Court in the present appeal.

39. Your Appellant states and submits that according to the practice of the Government of India—the post of Joint Secretary which is an ex-cadre post is filled up in the various Ministries through nominations received from the various Ministries Departments. So far only the Customs Officers have been nominated by the Custom dominated Central Board of Excise and Customs for the post of Joint Secretaries in other Ministries. Officers of the erstwhile Central Excise Service have not been sponsored and as such have been discriminated against even on this score.

40. It may be stated here that the Appellant has got the highest regard and full confidence and faith in Shri B. D. Pande, Secretary to the Government of India, Ministry of Finance, Department of Re-

venue and Insurance. The Appellant has got absolutely no grievance against him.

DEPONENT

I, R. Prasad, above named do solemnly affirm and state that the facts stated in Paragraph 1 to 40 of the above Affidavit are true to my knowledge while the remaining contents of the above said Affidavit are by way of submissions to the Hon'ble Court. No part of it is false and nothing has been concealed.

Sworn by me this 2nd day of December, 1971.

DEPONENT

APPENDIX VIII

Extrats from the Writ Petition filed in the High Court of Delhi in January, 1971, by Shri S. K. Srivastava, now Collector of Central Excise, Hyderabad.

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(3) That your petitioner served various assignments as Assistant Collector of Customs, Deputy Collector and Assistant Director of Inspection (Vigilance), Additional Collector of Customs, Officer on Special Duty in the grade of Collector of Customs and also as Deputy Director Revenue Intelligence and Collector of Central Excise and Customs in the Various Collectorates under the Central Board of Revenue and the Central Board of Excise and Customs, forming part of the Ministry of Finance, Government of India, New Delhi, hereinafter referred to for the sake of brevity as "the Board", before being selected and appointed in September, 1967 as Director, Revenue Intelligence in the Directorate of Revenue Intelligence at New Delhi.

* * * *

(25) That in the month of July 1970, your petitioner was investigating into smuggling rackets of Prime importance at Bombay—rackets which had caused a lot of damage to national economy. Your petitioner had recorded or caused to be recorded, during the said investigations, statements of important members of the said smuggling rackets, disclosing startling facts as to the new modes of smuggling as also the sources in India which were privy to the said operations of and directly or indirectly assisting the said rackets. These sources, unfortunately, included some of those who were directly and/or indirectly entrusted with anti-smuggling and preventive operations of this young Republic.

These investigations had been going on for quite some time and had reached a new tempo by July, 1970.

(26) That on the 21st July, 1970, your petitioner was attending the Bombay High Court, to assist the Counsel engaged by the Government, in connection with a bail application of one Mastan, a notorious alleged smuggler from Bombay, operating smuggling rackets in various parts of the country. After the hearing of the said bail application of said Mastan was adjourned on that day, i.e. the 21st July, 1970, one of the associates of Mastan consulted the said Mas-

tan in the open court, within the hearing of your petitioner and others, that he (mastan) did not need worry as orders for your petitioner's transfer from the post of the Director of Revenue Intelligence were going to be issued very soon. The said disclosure naturally intrigued your petitioner.

(27) That on the 24th of July 1970, while your petitioner was in Bombay, your petitioner was informed by sources believed to be close to the smugglers that the smugglers had confidently and widely pronounced in Bombay that orders removing your petitioner from the post of the Director, Revenue Intelligence, had been passed.

(28) That as the said news was bound to break the moral of sources, close to the smugglers, who were assisting your petitioner in collection of intelligence and evidence against the said rackets, your petitioner came to Delhi on the 25th July 1970, and immediately called upon the officers in his Directorate and also contacted some of his colleagues in the Central Board of Excise and Customs to verify the correctness and truth of the afore-mentioned rumours. To your petitioners' astonishment, however, each one of the said persons expressed complete ignorance about any knowledge as to any such orders having been passed or being contemplated.

(29) That your petitioner, thereupon, on the same day, wrote a top-secret note and saw the Director-General, Revenue Intelligence and Investigation with the said note, apprising him of the said rumours. The said Director-General carefully went through the said note and heard your petitioner but did not state that any such orders were contemplated nor that any such orders had been passed.

(30) That at 10 A.M. on the 27th July, 1970, your petitioner was summoned to the office of the Director-General, Revenue Intelligence and Investigation, in the North Block of the Central Secretariat of the Government of India, New Delhi, where he was served with order No. 110/70, dated 27th of July, 1970, at about 10.10 A.M.

Annexure 'G' (not printed) is a true copy of the said order, which is purported to have been signed by one Shri T. Ramaswamy, an Under Secretary to the Government of India, in the Ministry of Finance, Department of Revenue and Insurance. By the said order, your petitioner was informed that the President had been pleased to order the petitioner's transfer with immediate effect, and that your petitioner had been posted as Collector of Customs, Calcutta, vice Shri A. K. Bandopadhyaya. The said order directed that Shri M. G. Wagh, the afore-mentioned, Director General, (Revenue

Intelligence and Investigation) would hold charge of the said post of Director of Revenue Intelligence until further orders, and that orders for posting of Shri A. K. Bandopadhyaya would be issued separately later. The said order is hereinafter referred to as the impugned order dated the 27th July 1970. The said order would go to show that it was made and communicated with unusual haste, without even making alternative arrangements for appointment to the said post of Director Revenue Intelligence and without assigning a posting to Shri Bandopadhyaya and that the whole order is and was shrouded in mystery.

(31) That after the receipt of the said impugned order dated 27th of July 1970, your petitioner along with Shri M. G. Wagh, the aforementioned Director-General, called on Shri D. P. Anand, Chairman of the Board, Respondent No. 2 to the petition, and explained to him the risks involved in handing over charge merely by signing a charge report, without going through the normal procedure of physical handing over of important and vital documents in the said Directorate of Revenue Intelligence, to his successor, and without taking a receipt for the same and also without giving to the successor a note about important pending matters in the Directorate of Revenue Intelligence. It was explained to the Chairman that proper lists of documents at Bombay alone would take a few days and that documents at Delhi also required to be listed.

(32) That the meeting with the Chairman took place at about 11.00 A.M. and lasted for about half an hour. At the said meeting your petitioner informed the said Chairman that certain urgent matters pertaining to the Directorate, and consultations fixed for the same night with one of Counsel in Bombay regarding Mastan's case, were also to be attended to, at Bombay.

(33) That your petitioner was then directed to proceed to Bombay for the afore-stated purposes of attending to the urgent matters and consultation fixed with the Counsel, and for preparation of the list of documents to be handed over at Bombay. The Chairman also agreed at the said meeting that your petitioner should prepare the necessary lists for handing over charge at Bombay and Delhi before handing over the charge.

(34) That thereafter your petitioner left the office of the Chairman to leave for Bombay by plane scheduled to leave Palam Airport, New Delhi, at about 1.15 P.M.

(35) That when your petitioner reached Palam Airport at about 0.45 P.M. to emplane for Bombay, your petitioner was informed that there was a telephone message for him, directing him to contact Respondent No. 2 the Chairman of the Central Board of Excise and Customs, on telephone. Your petitioner, in obedience to the said orders, contacted the Chairman on telephone. To your petitioner's utter surprise, and contrary to the directions issued by the Chairman, during the afore-stated conference, your petitioner was directed that before flying to Bombay, he should sign a handing over report in respect of his charge as Director of Revenue Intelligence. He was also informed that further instructions would be conveyed to him at Bombay after consulting Shri H. Lal, a Secretary to the Government of India, in the Ministry of Home Affairs. Your petitioner was further informed that Shri M. G. Wagh, Director-General, was on his way to Palam with the requisite forms for handing over and taking over of the charge, and that if the said Shri M. G. Wagh did not arrive at Palam by the time the flight took off, your petitioner should write out a handing over charge report on an ordinary paper and leave it with the Palam Customs for onward delivery to Shri M. G. Wagh.

(36) That although the mystery behind subjecting your petitioner to the said most humiliating manner of handing over charge of such an important office was incomprehensible to him, he obeyed to orders of the Chairman and wrote out a handing over charge on a sheet of paper. While he was about to hand-over the same to the Palam Customs staff, Shri M. G. Wagh aforementioned, arrived on the scene with the printed handing over and taking over charge forms which were also signed by your petitioner and handed over along-with the earlier written charge handing report to Shri M. G. Wagh.

(37) That on reaching Bombay your petitioner received advice from Shri M. G. Wagh, the aforementioned Director-General, at about 6.30 on trunk telephone, informing him that he was permitted to attend the Conference with the Counsel fixed for the same evening and that it was desired that he should extend his help to the Directorate of Revenue Intelligence in all matters *wherever he was required to do so*.

(38) That your petitioner remained busy in Bombay from 27th of July till 1st of August, 1970, *attending to such work as was assigned to him by Shri M. G. Wagh*, who visited Bombay for the purpose on the 28th of July, 1970. Your petitioner also started preparing list of records at Bombay, to be handed over.

(39) That your petitioner returned to Delhi on the 2nd August, 1970 and had again to go to Bombay on the 3rd August, 1970, along with Shri M. G. Wagh, to attend to matters pertaining to the Directorate of Revenue Intelligence, as per his directions. Your petitioner remained in Bombay till the 8th of August, 1970, and returned to Delhi on the 9th of August 1970.

(40) That on 30th of July, 1970, your petitioner wrote a letter to Shri D. P. Anand, Chairman, Central Board of Excise and Customs, New Delhi, Respondent No. 2 bringing to his notice the aforementioned facts pertaining to the mode of his removal from the post of Director of Revenue Intelligence and other matters. The petitioner is not annexing a copy of the said letter with this petition as it contains various matters which are of a highly secret nature. Your petitioner would, however, request the Hon'ble Court to call for this letter and peruse the contents thereof.

(41) That during his stay at Bombay your petitioner received information, through sources believed to be close to smugglers, which were both shocking and depressing. Your petitioner was reported to have become "the table talk" amongst smugglers, who were reported to be openly publicising their strength and means, and rejoining.

(42) That the aforementioned impugned orders dated 27th of July 1970, completely broke the petitioner particularly in the background and by the mode in which the said orders were made and communicated. Your petitioner availed of leave, applied for by him earlier with effect from the 10th August 1970, and remained confined to bed, at Delhi, for over two weeks about a week after his return from Bombay on the 8th of August, 1970.

* * * *

(44) That on the 9th day of November, 1970 your petitioner called on the Chairman of the Board, Respondent No. 2 and requested him to apprise him of the reasons that had led to his removal from the post of Director, Revenue Intelligence, and his posting to Calcutta as Collector of Customs. The Chairman did not give any reason, whatsoever, to your petitioner for the said orders. Your petitioner again saw the Chairman on the 27th of November, 1970, in the same connection but to no avail. Your petitioner also handed over a written request to the Chairman for being apprised of the reasons for his removal from the post of Director Revenue Intelligence.

* * * *

(46) That in the afternoon of the 8th of December, 1970 during the lunch break, while your petitioner was attending the Collector's conference at Delhi, and hoping for redress of the wrong done to him, your petitioner was served with another order being order No. 196/70—hereinafter referred to for the sake of brevity as the impugned order dated 8th of December, 1970—signed by the aforementioned Shri T. Ramaswamy, Under Secretary to the Government of India, in the Ministry of Finance, Department of Revenue and Insurance, whereby the petitioner was informed that the impugned order dated 27th of July 1970 made by the Ministry of Finance, posting the petitioner as Collector of Customs, Calcutta, had been cancelled and that orders giving him another posting would be issued separately. In the same order it was stated, that as the earned leave granted to the petitioner had expired on the 7th of December, 1970, the period from the 8th of December, 1970, to the date of issue of the fresh posting order would be suitably adjusted if necessary by extending the joining time admissible to the petitioner. Annexure 'H' (not printed) hereto is a true copy of the said order dated 8th of December, 1970.

* * * *

(47) That in the evening of the 17th of December 1970, at about 6.00 P.M. your petitioner was served with another order being order No. 202/70, dated 16th of December, 1970. The order was served through a special messenger and it was signed by Shri T. Ramaswamy, the aforementioned under Secretary in the Ministry of Finance, Department of Revenue and Insurance, Government of India. By this order your petitioner was informed that the President was pleased to order your petitioner's posting as Collector of Central Excise, Hyderabad vice Shri M. L. Routh due to retire in the afternoon of the 31st of December, 1970. The said order is hereinafter referred to, for the sake of brevity, as the impugned order dated the 16th December, 1970—true copy whereof is Annexure 'I' (not printed) hereto.

* * * *

(49) That your petitioner went to the office of the Director Revenue Intelligence, on three or four occasions prior to 26-11-70. He did so in connection with his own personal matters, for example to make enquiry about the delay in the payment of his leave salary (which was paid only on 20-1-1971) and also to render some assistance in official matters, which he was asked to render. Unidentified vested interests, apparently felt disturbed by these visits of the petitioner to the said office of the Director of Revenue Intelligence. They misguided even certain Members of Parliament one of whom,

601 LS—12.

Shri Shashi Bhushan stated on the floor of the Lok Sabha on 28-11-1970, that your petitioner had visited the office allegedly to hush up a gold smuggling case, in which Kanti Desai, son of Morarji Desai the former Finance Minister of the Government of India was involved allegedly carrying smuggled gold on 24-11-1970, in his own car from Meerut. When your petitioner read about the said statement in the Newspapers, he submitted to the Chairman of the Board on 28-11-1970 a petition addressed to the Speaker of the Lok Sabha, and requested him to forward it to the Speaker of the Lok Sabha, wherein your petitioner vehemently refuted the all allegations and submitted *inter alia* that the matter be referred to a Parliamentary Committee to pass a verdict on your petitioner's submissions, contained therein. The other affected parties also refuted the allegations through the press and in the Parliament. Your petitioner is informed and verily believes that the Government had soon after 26-11-1970, caused extensive enquiries to be made, and found that the alleged incident had not taken place and that the statement made in the Lok Sabha by the Honourable Member was not correct. Nonetheless, on receipt of an alleged anonymous letter, the Board did not rule out further enquiry and contemplated enquiry by the C. B. I. The petitioner submits that even taking cognisance of the alleged anonymous letter, particularly so in the aforesaid background, apart from being patiently *malafide* is contrary to the Board's and Government's general practice in regard to anonymous and pseudonymous complaints and to the policy decision on the subject of handling of such complaints which decision was given wide publicity on 7th April, 1965 by the Board, through the Directorate of Inspection, Customs and Central Excise (Vigilance Wing).

* * * *

(50) That faced with the said situation, which displayed that there was no ray of hope left for your petitioner and that your petitioner was victimised with renewed vigour, instead of being dealt justice, your petitioner submitted a Memorandum to the President of India, being his Memorandum dated 28th/29th December, 1970, whereby he specially brought it to the notice of the President of India that your petitioner had become a victim of an Organised villification campaign and the petitioner prayed for revocation of order of the petitioners removal from the post of Director Revenue Intelligence, and of his posting as Collector of Central Excise, Hyderabad. The petitioner has not received justice so far.

* * *

Your petitioner has a glorious record as Director Revenue Intelligence. Your petitioner makes bold to say that the Directorate of Revenue Intelligence has grown with the petitioner. The petitioner has been responsible for unearthing powerful and entrenched gangs of smugglers in the country, who have, many a time enjoyed the patronage of some of those entrusted with the enforcement of anti-smuggling laws and preventive operations of the nation. Your petitioner has spared no means in the matter of unearthing these gangs and their patrons, helpers and sympathisers, whatever be their status in life, source and support. The petitioner submits that the confidential Government records, bear a strong testimony to the assertion of your Petitioner. Annexure 'N' (not printed) hereto is a very short account of some of the achievements to your petitioner's credit in the field of specialised work for which the Director of Revenue Intelligence was set up and which merited and resulted in his appointment as Director of Revenue Intelligence.

* * * *

Your petitioner is informed by sources, who ought to know, and verily believes that his removal from the post of Director Revenue Intelligence, is the direct result of the influence and efforts, of these whom your petitioner has exposed and particularly so during the last few months of his office as Director Revenue Intelligence. Your petitioner submits that the unusual haste and hurry with which the impugned order dated 27th July, 1970 was made and the uncalled for an unusual anxiety and interest shown in making your petitioner handover charge at the Airport, as detailed herein-before, points to the obvious.

* * * *

Your petitioner submits that the apparent malafides behind your petitioner's removal from the office of the Director Revenue Intelligence, will be apparent, if the Court summons the various statements recorded or caused to be recorded by your petitioner during the course of his investigations at Bombay, particularly between July 1969 and August, 1970, and in particular the statements of Shri Y. A. Patel Shri Pravin Thaper, Shri Mohammad Hussain Lighwalls and others, whose names, if disclosed in open court, would cause grave risks to the lives of the unnamed deponents. Your petitioner has not disclosed the contents of the said statements and the names and particulars of the persons disclosed to be involved in the said smuggling rackets as the same at this stage are matters of a secret nature and your petitioner is prevented not only by his official status but by his status as a Citizen from disclosing the same in public interest. Your petitioner is advised and he believes that the

hon'ble Court can, however, summon the said statements and peruse for itself the background of your petitioner's removal from the office of the Director Revenue Intelligence. Your petitioner further submits that his removal from the post at a time when the preventive and detecting and investigating aspects of anti-smuggling work and of work relating to the bursting of influential and entrenched smuggling had reached a new tempo, is obviously the result of sinister designs on the part of these as are adversely affected by and/or had otherwise involved themselves in circumventing and sabotaging the economic fibre of the country and who had of necessity to commit themselves to sabotaging the honest activities of the Director of Revenue Intelligence and of other agencies against smugglers and their aiders and abettors. The importance of the operations and the crucial stage thereof is evidenced by the fact that even after your petitioner was made to hand over charge in the most humiliating, mysterious and dramatic, manner, refreshed to in detail hereinbefore, he was directed to proceed to Bombay twice in order to be available for further consultations in connection with proceeding operations, though denied opportunity to develop the same further.

APPENDIX VIII(A)

Extracts from Rejoinder affidavit filed in the High Court of Delhi in April, 1971 by Shri S. K. Srivastava, new Collector of Central Excise, Hyderabad.

* * * *

Smuggling rackets are organised in the most dubious way and operated with utmost secrecy and by methods of gansterism like the mafia of the USA. It is impossible for any person who dedicates himself to do anything useful in exposing these rackets to achieve anything without going to the battle front and directly and/or indirectly but ostensibly associating himself with these who are directly or indirectly connected with these rackets, although such an enterprise is attended by grave risks to the personal safety of such officer and of those whose assistance he seeks. There is no other magic formula to achieve the desired result than ostensibly associating with one or more of such persons and seeking their confidence, if anything worthwhile is to be achieved. The petitioner in his zest for his job and out of love for the mission he was assigned to chose this grave and risky path—risky to himself, and slowly and steadily gained the confidence of some of such persons.

One of the said persons was at one time very actively associated with such rackets, though only as early as in 1955, and he thereafter reformed himself as to become a useful prone of the Directorate to gather information about the old timers in smuggling. The other one, amongst such persons, had valuable information with regard to the several gangs of very important smugglers and was reported to have been buying solver on their behalf on a very big scale to pay for the gold illicitly imported into India, by the said operators again on a very big scale to pay for the gold illicitly imported into India, by the said operators again on a very large scale. The petitioner's resulted in very useful information which let to valuable clues as regards the *modus operandi* of these rackets and the particulars and whereabouts of the principal operators and their collaborators.

To cloak the intercourse between the petitioner and one of these two persons in particulars, and to continue to get information and

at the same time to ensure that the operators do not get a scent of the fact that the said person was supplying information to the petitioner, the petitioner ostensibly developed friendly relations with one of them whose residence was made the rendezvous for collecting information.

Unfortunately as the racketeers got exposed and/or started getting exposed and were apprehended, and/or getting apprehended their counter-espionage appeared to have revealed to them roles of informers exposing both these valuable cooperators who were thus exposed to grave risks. The authorities are aware that in November, 1969, one of the said co-operators was companion succumbed to the injuries received by him. This happened despite a note of warning sent by the petitioner to the Government and to the Commissioner of police of the area concerned as early as in July, 1969, pertaining to the imminent possibility of an attempt being made by racketeers on his life.

Despite the murderous attack, the said cooperator became still more cooperative resulting in his furnishing more valuable clues and some positive evidence.

Unfortunately your petitioner's investigations exposed a good number of officers in the Government who came to be known to be actively associated with these rackets. The desperate device that was adopted by these affected was the earnest attempt to have the petitioner removed from the post and to that end they did many a things, including the attempt to terrorise the petitioner and starting a campaign of villification of the petitioner of which also timely notes of warning were sent to the Government from time to time.

When the petitioner was riding the crest of wave of cooperation, resulting in successes in collecting clues against the racketeers and their collaborators, in May 1970, he was shown by Shri M. G. Wagh, the Director General of Revenue Intelligence and Investigation a telegram which named the two collaborators of the petitioner and his family had been staying with one of the collaborators and that the petitioner had been favouring the other co-operator in his personal matters. The petitioner is not disclosing the names of the cooperators or the exact language of the telegram and prays that the same be called by the Hon'ble Court.

The Director General of Revenue Intelligence and Investigations told the petitioner that the Chairman of the board—Respondent No. 2

wanted to know the petitioner's version about the contents of the said telegram but did not give any hint that any enquiry was proposed against the petitioner on the basis of the said telegram much less so that the petitioner was likely to be penalised on the basis of the statements contained in the said telegram.

The Petitioner being faced on one hand with the eventuality of having to disclose the real secret relations and interlocking of the petitioner with the said gentlemen, and on the other hand with his sacred duty to the country in maintaining these relations and continuing to gather information through such co-operators against smugglers, at the same time safeguarding the personal safety of such cooperators penned down and handed over a brief note to the Director General of Revenue Intelligence and Investigations, admitting briefly that he had his family did stay with one of the named gentlemen. The petitioner only referred to one of the special circumstances in which his family had come to Bombay, and stayed with one of the said gentlemen, but as in duty bound did not disclose the real purpose behind this story. The petitioner did so in deference to the sacred duty which he owed to himself as the Director of Revenue Intelligence of the Government of India and to that gentleman, by way of ensuring his safety, as the petitioner was fully aware of the motive behind the telegram. The petitioner also sanguinely hoped that the Chairman of the Board knowing the petitioner, his background, and his integrity could and would not want the petitioner to offer any explanation for his relations with a one time known smuggler. The petitioner could not even dream much less visualise, that no less a person than the Chairman of the Board could not visualise the truth and would fall a prey to the well known methods and tactics of racketeer and the corrupt officers who had been exposed by the petitioner to the Chairman's knowledge. However, as the name and the role of the other co-operator was already well known to the Government because of notes of warning sent by the petitioner about the imminent attack on his life and about his role in exposing the smugglers, officers and others in the high places who had been collaborating with the smugglers, the petitioner dealt with the allegations about this co-operator in a more lucid though brief manner and repudiated the allegations furnishing proof 'per se' of the absurdity of the allegations.

The petitioner never heard from the Government on the subject thereafter, nor was the matter ever brought up at any meetings between the petitioner and the Chairman or the Director General of Revenue Intelligence and Investigations or any member of the Board or any-one else till the 9th November, 1970, when the petitioner was

summoned to the Chairman's room and put certain questions about this stay with one of the aforesaid two co-operators. That was the first and the last time that the subject was broached with the petitioner after the petitioner's note on the said telegram in May, 1970.

The petitioner was never informed about any other complaint having been received against him, Nor was his conduct ever challenged in relation to any incident or any person whatsoever.

* * * *

Likewise, the anonymous complaint received in the Board about the alleged incident of smuggling of gold by the son of Shri Morarji Desai, after petitioner's removal from the post of Director of Revenue Intelligence, and the petitioner's alleged attempt to hush up the same and the Government's decision to have the same inquired into by the C.B.I. with regard to the petitioner's role therein, also found its way from the Board's office to outsiders. Likewise, the petitioner's written note to the 2nd Respondent submitted on the 30th day of July, 1970, to the effect that a very important smuggling case, which has proved to be one of the biggest and most complicated of the matters under investigation about smuggling offences, had been attempted to be scuttled at an earlier stage by a Deputy Secretary in the Board, and that if it had not been taken out of his hands, the startling disclosures revealed during investigations would have never come to light, also failed to evince any interest of the Board or the 2nd Respondent.

25. The Petitioner submits that he can furnish sufficient data to establish that the villification campaign, through complaints despatched to Government in April, 1970, was intended by vested interests, some of whom can be identified, to remove him from the post of the Director, Revenue Intelligence, to prevent utmost and most effective exploitation of certain clues. The petitioner submits that the vested interests included not only smugglers but also gazetted and non-gazetted officers and others, still more highly placed. The petitioner submits that if the complaints relied upon by the respondents had been shown to him and his explanation or elucidation sought, he would have furnished to the authorities in suitable manner all the relevant information which would have exposed the untruth of the insinuations implied in the contents of these alleged complaints, likely inspires of such complaints, the specific interests betrayed by the contents of such complaints etc. etc. The petitioner would wish at this stage to refrain from exposing in open court the particulars of individuals who had reasonable cause to be frightened by the continuance of the petitioner in the post of Director of Revenue Intelligence. The petitioner submits that certain Government organisations also had reasonable cause to be frightened of exposure as

a result of investigations conducted by and or under the petitioner. The petitioner would wish, at this stage, to refrain from making exposure in open court about these agencies also.

The petitioner volunteers and prays to the Government, through this Hon'ble Court, that the alleged complaints against the petitioner be referred to a secret high powered administrative committee of two or more Hon'ble Ministers of the Govt. of India, with known legal acumen, which our present Cabinet abounds in, so that the petitioner may furnish all relevant information to them, most of which is of top secret nature. The petitioner would abide by the verdict of the said high powered Committee, after the petitioner is afforded the opportunity of placing his case before them, in the light of the contents of the alleged complaints against the petitioner and various other matters of great public importance and of highly secret nature.

* * *

The petitioner submits that the foregoing would disclose the extent of confidence and trust which the public have at all times, and even after July 27, 1970 reposed in the petitioner, and which the petitioner has been able to inspire in the public. No other officer has been able to match the petitioner in the above respect. The petitioner's ability to persuade members of public, even at the risk of jeopardising their own personal interests and safety, to cooperate with the Government would also be found matchless. This ability fosters on the confidence created in the public about the integrity in widest sense of the possessor of such ability. Against the positive indications of the public reaction to the petitioner, reliance has been placed on undisclosed alleged complaints from vested quarters for removal of the petitioner from the post of Director of Revenue Intelligence, casting stigma on the petitioner, and that without any opportunity to the petitioner to show cause against the same.

The petitioner submitted that he has succeeded in investigations of certain matters in a manner which astonished and shocked certain agencies of the Government, mainly because he was able to inspire in the members of public the feeling that the petitioner would treat them as normal human beings, although he would act according to legal advice in respect of their illegal acts. It is known among the honest citizens and the accused alike that, in his official dealings with them and/or otherwise, the petitioner would not deal with them in any manner, other than that indicated to them wither implicitly or expressly. The petitioner is known for his qualities of extending no false hopes, making no false promises, and refraining from exploiting clues, furnished by citizens guilty and not guilty, for his own personal ends.

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26. That as to paragraph of the affidavit in reply deny that the petitioner's part in the investigations which were in progress in Bombay in the month of July 1970, have no relevance to the alleged transfer of the petitioner from the post of Director of Revenue Intelligence, I reiterate, more particularly in the light of the contents of the return on affidavit, that the tempo which the investigations had reached in July 1970 was a relevant factor which had precipitated the transfer of the petitioner which is alleged to have been under the consideration of the Government, since May 1970. The petitioner submits that the sudden decision, allegedly taken late on 25-7-70 which was a Saturday, mode of its communication, involving denial of opportunity to the petitioner even to visit his office between the time of passing of the order and its communication, absence of any convincing explanation for the delay about finalising the alleged tentative decision approved by the Minister in May, 1970, and by Prime Minister, as the Finance Minister, in June 1970, the smugglers being kept informed about the matter of the transfer about which the petitioner himself as also the officers of the Directorate were meticulously kept in dark, requiring the petitioner to hand over merely by the process of signing the charge report, posting the petitioner at Calcutta, which according to the 2nd Respondent is equally sensitive and important post, as the post of Director of Revenue Intelligence—indicate that there was something more behind the alleged transfer of the petitioner from the post of Director of Revenue Intelligence, than what has been disclosed by the 2nd Respondent. The petitioner is not in a without divulging highly secret matters, to refer to further facts which contradict the 2nd Respondent's averments. Reference to some of these facts was made by the petitioner in his note dated 25th July, 1970, which was submitted to Shri M. G. Wagh, the Director General, and in the petitioner's letter dated 29th December, 1970, which was submitted to the 2nd Respondent. These are Top Secret Communications, which the petitioner is not in a position to disclose at this stage. The petitioner prays that the Hon'ble Court may call for and scrutinize the same. The petitioner begs to point out that whereas in the affidavit, dated 22-2-71 of Shri P. B. Rajagopalan the deponent averred that the petitioner was transferred for good and sufficient administrative reasons only, in paragraph 26 of the return on affidavit the 2nd Respondent has averred that the transfer is due to "*administrative and other reasons.*"

* * * *

I submit that the very fact that the alleged earlier decision was taken in May, 1970 and not implemented till 27th July, 1970 and that on the said later date the petitioner was served the transfer order

only after he had met the Director General on the 25th July, 1970 and lodged his protest against the information circulating amongst smugglers in Bombay, and the fact that he was made to sign the Charge Report at the Airport, go to show that the order was communicated and implemented with undue haste and motivated by reasons other than those mentioned in paragraph 2 of the affidavit in reply. I further reiterate that the impugned order could not have been made for the reasons stated in para 2 of the affidavit in reply without affording the petitioner an opportunity to show cause against the same, in accordance with the prevalent statutory rules and the mandatory provisions contained in Article 311 of the Constitution of India. I submit that it has been re-affirmed by the Hon'ble Supreme Court time and again, as has been stated in the case of *A. K. Kraipak vrs. Union of India* and others, reported as AIR 1970 Supreme Court page 150 that principles of natural justice will apply even to administrative authorities, the aim of both quasi judicial as well as administrative inquiries being to arrive at a just decision.

* * * *

The petitioner again craves leave to refer to his averments that he had seen the Director General of Revenue Intelligence and Investigation on the afternoon of 25th July, 1970 (After 3.00 P.M.) and stated to him the fact that it was widely given out by smugglers in Bombay that the petitioner had been removed from the post of Director of Revenue Intelligence and further that the Director General expressed complete ignorance about the same. It has been clearly stated in para 2 of the Annexure R-VI to the affidavit in reply that when the final decision to allegedly transfer the petitioner from the post of DRI was taken on 25th July, 1970. It was already late on that day and that the orders could only be executed on Monday with immediate effect. The petitioner affirms that the apparent *malafides* of the transfer are evident by the fact that even though the decision to allegedly transfer the petitioner from the said "sensitive" post was allegedly taken on 25th May, 1970, the petitioner was allowed to continue on the said post till he protested against the rumours spread by smugglers in the afternoon of 25th July, 1970. The petitioner will make detailed submissions in this regard orally in the court.

* * * *

The petitioner submits that the second respondent has knowingly and falsely blamed the petitioner for the situation which led to the signing at the Palam Aerodrome of the charge handing over report by the petitioners. The 2nd respondent has tried to controvert the main facts recorded in paragraphs 30 to 40 of the petition by reference

to two of his notes—one dated 28/29th July, 1970 and other dated 28th July, 1970. It appears from Annexure R-IV to the return on affidavit that the note dated 28/29th July, 1970 was seen by only two other officers, viz. the Finance Secretary Shri Govindan Nair and the Member Shri M. G. Abrol. The other note appears to have been seen by the aforesaid two officers and by the Minister Shri V. C. Shukla and Shri M. C. Wagh. In the first note there is no reference at all to the discussions with the second respondent, and in his room, which the petitioner and Shri M. G. Wagh had soon after the impugned order dated 27th July, 1970 was served on the petitioner in the room of Shri M. G. Wagh. It appears that the Finance Secretary was deliberately not informed by the second respondent of the reasons due to which the petitioner and Shri M. G. Wagh did not sign charge report before the petitioner left the North Block for the Palam Aerodrome via his residence. In the report dated 28th July, 1970 there is reference to the discussions in paragraph 3 of the note, but there is no reference in this paragraph and in the note to the Chairman's decision about the postponing the handing over by a few days.

The Chairman's alleged notes, disclosed in Annexure R-VI, were written behind the back of the petitioner. As against these notes, which the petitioner has been, for first time, made aware of only after 31st March, 1971 the petitioner has recorded the facts, including the Chairman's discussions for the deferment of the handing over, in paragraph 7 to 11 of a letter dated December 29, 1970, that is more than a month before the petition filed his petition. The second respondent did not controvert the facts recorded in the said paragraph 7 to 11 at any time before filing his return on affidavit. The second respondent has meticulously avoided to refer to this letter.

On perusal of Annexure R. VI to the return of affidavit it is again evident that the second respondent has taken meticulous care to ensure that the notes conveyed to the Finance Secretary and the Minister that the 2nd Respondent did not controvert the facts recorded in the said paragraphs 7 to 11 at any time before filing his affidavit in reply. The second respondent has meticulously avoided to refer to this letter.

On perusal of annexure R-IV to the return an affidavit, it is again evident that the second respondent has taken the meticulous care to ensure that the notes conveyed to the Finance Secretary and the Minister that the second respondent took no decision on his own on any of the points which the petitioner Shri M. G. Wagh had discussed with the second respondent. The notes don't even record

that the petitioner went to Aerodrome only after the 2nd respondent had permitted and asked him to do so. The note dated 28th July, 70 is capable of conveying that Shri H. Lal had been contacted before the petitioner left for Bombay and that petitioner had been briefed in Delhi itself before leaving for Bombay, about the duties which the petitioner was to carry out at Bombay. It would also imply that the petitioner was allowed to go to Bombay only after Shri H. Lal had concurred that the petitioner should be permitted to go to Bombay. After the Minister had seen the note on 4th August, 1970, the 2nd respondent allegedly recorded another brief note on 5th August, 1970 clarifying that Shri Lal was contacted only after the petitioner had left Delhi and Palam for Bombay. This note dated 5th August, 1970 was not put up to the Finance Secretary and the Minister. It appears that the 2nd Respondent did not wish the Minister and the Finance Secretary to know that he had taken certain decision without consulting Shri H. Lal.

* * * *

The petitioner submits that signing of the handing over charge report constitutes an even of ordinary occurrence only if the mode of signing the said report and the actual handing over, which such signing signifies, are normal. The normal procedures of handing over would have involved serving of the order in the petitioner's office, signing of the forms in the petitioner's office after compliance with the instructions contained in the Board's Secret letter F. No. 14/23/61 O & M dated the 1st August, 1961 on the subject of "Handing over charge by heads of Departments—Notes to be prepared on administrative, vigilance and technical control.

* * * *

The petitioner submits that it is highly significant that the 2nd Respondent has meticulously avoided to refer to the petitioner's letter dated 29th December, 1970 which was handed over to the 2nd Respondent on that day by the petitioner himself. This is a top secret letter, and the petitioner is, therefore, not in a position to disclose it to the Court. The 2nd Respondent may be called upon to place it before the Honourable Court. Paragraph 7 to 12 record the facts, which are relevant in connection with the matters relating to the serving of the impugned order dated the 27th July, 1970 and the events soon after the service of this order.

* * * *

In the said paragraph No. 49 of the Writ Petition, the petitioner has unequivocally stated that he had gone to the office of D.R.I. in connection with his leave salary and also to render assistance in

official matters which he was asked to render and that unidentified vested interests apparently felt disturbed by the visit of the petitioner to the said office and misguided even Members of the Parliament like Shri Shashi Bhushan, M. P., who made the allegation on the floor of the House. The petitioner has further averred that the petitioner, after reading about the said statement in News papers submitted to the 2nd respondent on 28-11-70, a petition addressed to the Speaker of the Lok Sabha and requested him to forward the same to the Speaker of Lok Sabha, in which petition the petitioner had sought the verdict of the concerned Parliamentary Committee on the allegations made in the House. The other affected parties also refuted the allegations vehemently denied the same through the Press and in the Parliament. The Government also, soon after 26-11-70, when the said allegation was levelled in the House, caused extensive enquiries to be made and found that the alleged incident had not taken place and that the statement made in the Lok Sabha by the Hon'ble Member was not correct. None of these averments have been refuted by any of the respondents in their detailed affidavits before the learned Court. Nevertheless, on receipt of the alleged anonymous letter, on the same subject, the Board referred the matter for inquiry against the petitioner to the C.B.I.

The petitioner submits that apart from the aforementioned aspects of the case, it would be apparent that the allegation in the Lok Sabha was made by a Member of the New Congress against Shri Kanti Desai, son of Shri Morarji Desai, Ex-Deputy Prime Minister and Finance Minister to the Government of India, who was at the relevant time in the Opposition Congress and the leader thereof in the Lok Sabha. Neither the aforementioned facts nor even the absolute *prima facie* absurdity of the allegation that the said Shri Kanti Desai himself smuggled gold in his own Car from Meerut to Delhi, an enquiry was sought to be conducted by the C.B.I. against the petitioner, whose alleged role was that he had gone to the office of the revenue Intelligence to help white wash the matter that was again *prima facie* baseless.

* * * *

The achievements of the Directorate of Revenue Intelligence during the stewardship of the petitioner, have been of an outstanding quality and exemplary all through, including during the seven months of 1970 and during and after April 1970 to July 1970, the most relevant period, and constitute the most glorious achievements in the history of the Directorate of Revenue Intelligence (or for that matter of any other organisation) in the matter of seizures and exposures of notorious smugglers, as also in the matter of unravel-

ling of deeply rooted corruption in the Customs and Central Excise Service itself and elsewhere in various Government Agencies entrusted with the enforcement of laws of the National pertaining to Anti-smuggling laws. I submit that the clues which had been collected by the Directorate, especially through the stewardship and effort of the petitioner, in the course of investigations during 1970, if properly processed, could lead to exposure of corruption at still higher levels, apprehension of still more notorious smugglers and exposure of still more of smuggling rackets. The petitioner verily believes that his removal from the post of Director of Revenue Intelligence was the unfortunate result of his zest and zeal to discharge his functions as Director of Revenue Intelligence unbiased and undaunted by the fould atmosphere which he found around him the services itself. The petitioner's various secret notes to the Government, and particularly those submitted in July 1970 and before on and after the 25th day of July, 1970 the fateful day, in the late evening of which the final orders to remove the petitioner forthwith from the said post were allegedly taken, would go to establish the absolute malafides of the impugned orders. The petitioner makes bold to assert that as a result of his removal from the post of Director of Revenue Intelligence the temp of the activities in the Directorate has slackened, and that there has been an all round set-back in the performance of this organisation, and that the vested interests appear to have achieved their objective to a certain extent already by having the petitioner removed from the post of Director of Revenue Intelligence. The petitioner is informed and verily believes that ever since his removal from the post of Director of Revenue Intelligence, smugglers and other vested interests have actively started demoralising and intimidating witnesses and those who had offered valuable clues during the petitioner's tenure as Director of Revenue Intelligence. The petitioner submits that it is unfortunate that because of his duty of secrecy, and the secret character of the notes which he submitted to the Government from time to time containing vital information, he cannot disclose identity of the vested interests, to the court. The petitioner, however, submits that if these notes and the statements referred to hereinbefore are summoned and perused by the Court the obvious will be established.

APPENDIX IX

Summary of Conclusions/Recommendations

S. No.	Para No.	Ministry/Deptt. concerned	Conclusions/Recommendations
1	2	3	4
1	1.23	M/o Commerce	The Committee note that a United Nations Resolution boycotting trade with Portugal was implemented by the Government of India by a formal notification only after a lapse of nearly twenty months. It is surprising that the Ministry of Commerce sought to accomplish a ban on trade with Portugal by the issue of 'top secret' instructions in order to avoid publicity.
2	1.24	M/o Commerce „ Finance (Deptt. of Revenue & Insurance)	The Committee find that even though the instructions had been issued by the Ministry of Commerce in November 1966, neither the Customs authorities nor the licensing authorities were expected to do anything positive to stop imports from Portugal. Admittedly, the licensing authorities were to continue to issue import licences in the normal course, without indicating anything on the licences about the ban on trade with Portugal. On the other hand, the Customs authorities had been informed that even though licences might continue to be issued without a specific endorsement to the effect that it was not

valid for imports from Portugal, no imports would actually take place as the Reserve Bank had been advised to issue instructions to the authorised dealers in foreign exchange prohibiting remittances to Portugal. The Reserve Bank had, however, taken the view that so long as import licences continued to be issued and remained in circulation, and these licences were valid for imports from the General Currency Area, which included Portugal, the prohibition of remittances could not be brought about until a valid notification was issued under the Import and Export Trade Control Act, which was not done for 20 months.

3 1.25 Do.

The net result of all this was that, even after the issue of instructions by the Ministry of Commerce in November 1966, there was no effective ban on trade with Portugal and five imports valued at Rs. 1.31 lakhs had taken place. The Committee fail to understand, in these circumstances, the objective sought to be achieved by the issue of such executive instructions. If the intention was indeed to bring about an effective ban, the Committee feel that a proper notification should have been issued instead of executive instructions. That this was not done till August 1967 would indicate that a seriousness of purpose was totally lacking in implementing an international agreement, particularly when we ourselves were in conflict with Portugal on Goa issue. In the opinion of the Committee, this is most regrettable.

187

4 1.26 Do.

The Committee, however, feel that the contention of the Ministry that the Reserve Bank should have stopped remittances and that the

Customs had no responsibility in the matter is not tenable. If that be the view and if the Customs authorities were not to take any action, there was no need for the issue of the instructions in December 1966. Further, the wording of the circular issued in pursuance of the UN Resolution imposing a ban on trade would indicate that this had been issued only pending a decision on the question whether the ban should be brought out through a formal notification. The Committee consider that this would tantamount to a *de facto* ban.

From the circumstances of the case, it would appear that Government had considered that ban by executive instructions would be sufficient and enforceable. Otherwise, the Committee are unable to understand the reason for the preamble to the Notification No. 9/67 dated 1st August, 1967 which states 'whereas there is no export to and import from Portugal, and whereas it is considered necessary to continue the ban on export to or import from Portugal, etc.' It would therefore, be evident that the notification had been issued only in continuation of the executive instructions and that the ban was effective from December 1966 itself. If this was not so, the Committee see no valid reasons whatsoever for the delay in the issue of notification till August 1967, especially when Government had ample time from December 1966 before announcing the policy of import for 1967-68.

6 1.28 M'o Finance (Deptt. of Rev. & Ins.) & M o Commerce

The Committee are, therefore, not at all satisfied with the manner in which the entire case has been handled. Since the decision to impose a ban had been taken in pursuance of an international resolution to which India had also been a signatory, the Government should have been more purposeful in their approach. The Committee can only sincerely hope that such instances will not recur in future and would urge Government to ensure that decisions affecting our international relations are given effect to with the utmost promptitude.

7 1.29 M'o Finance (Deptt. of Rev. & Ins.)

The Committee also note that in the case of one import from Portugal that took place after 1st August, 1967, the goods had been released on a mere warning. When the provisions of Sections 111 and 112 are amply clear in this regard and a valid ban by notification was also in force on the day the consignment touched Indian shores, the reasons for this special treatment in this case give rise to serious suspicion. The Committee desire that the circumstances leading to the release of goods on warning should be investigated into immediately with a view to ensuring that no malafides are involved and responsibility fixed. The Committee would await a further report in this regard.

8 2.76 Do.

Going through the entire proceedings of what has come to be known as the 'B.O.A.C. Gold Smuggling Case', the Committee are left with the impression that there had been a good deal of effort on the part of the High officials in finding out technical arguments in favour of B.O.A.C. In the appeal proceedings, evidence was

admitted in the shape of affidavits, bank statements, balance sheets, etc. and the Committee find that the appellate proceedings took on almost the colour of Original Side proceedings with extensive examinations and cross-examinations. While there is nothing irregular in law about this, because under Section 128 of the Customs Act, the appellate authority is not bound to follow the provisions of the Civil Procedure Code, the Committee feel that it was rather out of the ordinary that such extensive examination was held at the appellate stage and that attempts were being made to spot loopholes in the departmental evidence. In fact, the Committee are distressed to learn that at one stage, the Director of Revenue Intelligence had to protest that the cross-examination was making a departmental witness nervous.

180

9. • 2.77

M/o Finance (Deptt. of Rev.
& Ins.)

Prima facie, it would appear that in view of the publicity the case had attracted and the requests of the British Government to expedite the case there had been an anxiety on the part of the Central Board of Excise and Customs to find arguments to favour B.O.A.C., despite the fact that the Director of Revenue Intelligence, the Collector of Central Excise, Delhi and the Ministry of Law had held that there had been a violation by B.O.A.C. of the provisions of the Reserve Bank of India notification which prescribe the conditions under which bullion can be carried in transit through India.

The Committee find that the Joint Secretary of the Ministry of Law was even positive in his mind that no court would give the benefit of doubt to B.O.A.C.

10. 2.78

Do.

The Committee are also of the opinion that the Board of Appeal had not properly appreciated the ratio of the judgement of the Supreme Court in the case of 'State of Maharashtra Vs. Mayor Hans George' reported in AIR 1965 as SC-722. This was an important judgement in which the notification issued by the Reserve Bank of India under Section 8(1) of the Foreign Exchange Regulations Act had come in for judicial scrutiny. In that case, the Committee find that one of the important judgements on the doctrine of absolute or strict liability was pronounced. The Supreme Court had held that, even if there has been an unintentional violation of the Reserve Bank of India regulations, such a violation would be punishable and a plea of lack of fraudulent intention would not prevail. The Committee are, however, distressed to note that, in the BOAC case, this point had been completely sidetracked in the Board's appellate order when it said that that case was distinguishable on facts from the BOAC case.

191

11. 2.79

Do

It is also not very clear to the Committee whether Section 30(3) of the Customs Act relating to the production of manifest for imported goods would apply at all to a violation of the Foreign Exchange Regulations Act. The Committee also find that Section 30 of the Act deals with the delivery of import manifest and does not deal with transshipment manifest while the Reserve Bank of India notification

deals with transshipment manifest. Therefore, even assuming that the provisions of the Customs Act could be invoked for dealing with a case under the Foreign Exchange Regulations Act, the Committee are inclined to take the view that Section 30(3) of the Customs Act would not be appropriate in the circumstances of this case. In fact, the Board in its appellate order did not also express any categorical opinion whether the description in the manifest was incorrect or incomplete. The Committee feel that the applicability of Section 30 of the Customs Act to this case should be examined afresh in consultation with the Attorney General and a further report submitted to the Committee in this regard.

12. 2.80 M/o Finance (Deptt. of Rev. & Ins.)

The Committee also find from the evidence that no proper request had been made by the local officer of the B.O.A.C. for amending the manifest. Only a casual enquiry appears to have been made to the Customs officials at Palam airport which, at the time of hearing by the adjudication officer, was sought to be interpreted as a request for amendment of the manifest. When the Board considered the appeal, the position was curiously improved by taking a fresh affidavit on this point.

13. 2.81 Do.

The B.O.A.C. case had raised the following interesting questions at the time of investigations by the Directorate of Revenue Intelligence: (a) whether B.O.A.C. was carrying on a regular activity of smuggling gold in collusion with South African parties or bullion

brokers of London; (b) if B.O.A.C. was not itself engaged in smuggling, did it aid and abet the London bullion brokers or any other party in smuggling gold into India? and (c) the identity of the legal owners of the gold, particularly of the consignment destined to Macao, since the consignors were stated to be only bullion brokers and the consignee was also a company in which the consignor had 40 per cent interest.

14. 2.82 Do.

The Committee, however, find that though the Director of Revenue Intelligence had wanted to proceed abroad with a view to establishing the true ownership of the gold, this had not been considered necessary. Such an investigation, in the opinion of the Committee, could have provided clues to the various missing links in the case. The investigation proposed by the Director of Revenue Intelligence assumed greater importance in view of the significant fact that B.O.A.C. had been carrying large quantities of gold from London through India, in the guise of 'Metal V' or 'Metal bar V' to Hongkong, which is a vulnerable spot in the East for smuggling activities, specially gold for illegal entry into India, and that between April and August 1967, as large a quantity as 5.382 kilograms of gold had passed through India.

193

15. 2.83 Do.

Besides, a number of employees of B.O.A.C. had also been apprehended prior to this seizure in 1967 carrying contraband gold into India and the investigations of these cases had resulted in the dismissal of 90 employees. The Committee are inclined to think that it

1	2	3	4
			would have been difficult for so many employees of B.O.A.C. to have indulged in smuggling of gold into India without the tacit support of people in very high positions. In this context, it should also be borne in view that smuggling rackets are organised in the most dubious ways and that there is always more to it than what meets the eye. The Committee are, therefore, unable to understand why the Director of Revenue Intelligence had not been permitted to pursue his line of investigations. This needs to be explained.
16	2.84	M/o Finance (Deptt. of Revenue & Insurance)	<p>Under these circumstances, the Committee are inclined to take the view that the appellate decision was a matter dictated by expediency. Otherwise, the Committee are unable to understand the reasons for Government not testing the decision in a court of law which could have resolved a number of legal doubts thrown up in this case. No attempts had also been made to consider the case in revision under Section 131(3) of the Customs Act. Now that the period of one year from the date of the appellate order prescribed for revision is over, the matter will necessarily have to be treated as closed. The Committee are, however, extremely dissatisfied with the manner in which this case has been handled by the Central Board of Excise & Customs. The Committee desire that responsibility should be fixed under advice to them.</p>
17	2.85	Do.	<p>Apart from the legal aspects of this particular case, one aspect of the case compels the immediate consideration of the Committee.</p>

Admittedly, gold has been flown from London to Macao. It is not unlikely that the practice still continues. Since Macao is only a small islet, the Committee are certain that it would not be in a position to absorb even a fraction of the gold that is being regularly flown into the territory. The obvious inference that the Committee can draw is that Macao is a nerve centre for smuggling operations and there is every likelihood of the gold bars being melted into small biscuits and smuggled mainly into India. In this context the Committee also understand that China itself makes large purchases of gold in the London bullion market and the Chinese price of gold was not attractive enough for gold smugglers. Therefore, the possibility of most of the gold that goes to Macao coming back to India through various illegal channels cannot at all be ruled out. The Committee would like to know what concrete steps have been taken by Government to arrest such smuggling and what arrangements exist to prevent the illicit transport of gold from Macao to India.

195

18. 2.86

De.

An offshoot of this question is the adequacy of our organisation for gathering intelligence abroad. Considering the volume of under-invoicing, over-invoicing, smuggling and other economic evils that go on in the country, the Committee are strongly of the view that at important ports and nerve centres of smuggling abroad, the Government should build up an effective organisation to gather intelligence on these evils on sufficient incentive basis. The Committee feel that merely by posting a handful of officers at London or Kuwait or maintaining liaison with overseas organisations without corresponding results would not serve the objective the Committee have in

1	2	3	4
			view. The Committee desire that this should be examined by Government immediately and positive steps taken to build a sound intelligence net-work abroad.
19	2.87	M/o Finance (Deptt. of Revenue & Insurance)	<p>Yet another surprising feature that has come to the notice of the Committee is that even in an important case like this one Government had not considered it fit to utilise the services of qualified lawyers to present the Department's case. For instance, in the B.O.A.C. case, the Director of Revenue Intelligence and an Assistant Collector of Customs had been pitted against some of the choicest legal talents in the country and abroad which, to say the least, is cruel on the part of the officers concerned. Though this is not, in any way intended to cast a doubt on the competence of the officers, the Committee feel that this is an extremely unsatisfactory arrangement. While the Committee take note of the fact that the system of adjudication requires that the adjudicating officer must look after the Department, the Committee would, however, recommend that, at least in important cases Government should be represented by competent legal experts. The Committee desire that this recommendation should be processed expeditiously and necessary action taken to adequately safeguard the Government's interests. The Committee would await a further report in this regard.</p>
20	2.88	Do.	<p>Incidentally, a disconcerting fact that has been brought to the notice of the Committee during their examination of the case is of</p>

topical interest and causes grave concern to the Committee. The Committee find from a writ petition filed by the then Director of Revenue Intelligence against the Union of India in the matter of his promotion, etc. in the High Court of Delhi that his transfer from the post of Director of Revenue Intelligence had become the 'table-talk amongst smugglers.' The Committee are most distressed to note the manner in which the officer had been made to hand over charge of the post at the airport. The writ petition also contains startling disclosures about the complicity of Government officials with smugglers.

21 2.89

Do.

Considering the far-reaching implications and serious nature of the allegations made by a responsible official of the Government, the Committee desire that the various allegations contained in the writ petition should be investigated into immediately by an independent agency and suitable action taken. The investigation now proposed by the Committee assumes particular importance in the context of the MISA operations now in force against the smugglers. The outcome of the investigations should be reported to the Committee.

