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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 18th March, 2025

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CUSAA 50/2025 & CM APPL. 13232/2025

COMMISSIONER OF CUSTOMS (AIRPORT AND
GENERAL)

.....Appellant

Through: Ms. Anushree Narain, SSC with Mr.
Ankit Kumar, Adv.

versus

FLYOVER CARGO PVT. LTD.

.....Respondent

Through: Mr. Prachit Mahajan, Adv.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUSTICE RAJNEESH KUMAR GUPTA

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.

CM APPL. 13232/2025 (for exemption)

2. Allowed, subject to all just exceptions. Application is disposed of.

CUSAA 50/2025

3. The present appeal has been filed by the Appellant-Customs Department under Section 130 of the Customs Act, 1962 challenging the impugned order passed by the Customs, Excise & Service Tax Appellate Tribunal ('CESTAT') in *Custom Appeal No.55467/2023* dated 24th July, 2023.

4. The brief background is that the Respondent - M/s Flyover Cargo Pvt. Ltd. is a Customs House Agent ('CHA') who has been issued a Show Cause Notice dated 6th February, 2023 in respect of export of a consignment which included 500 ml of *Triethanolamine*. According to the CHA, the said chemical was being exported by its client ('exporter') for the purpose of soil



testing in a sugar factory. The destination consignee was M/s Pure Diets, Mozambique, South Africa. The Department noted that the chemical was one of the *Specialised Chemicals, Organisms, Machinery, Equipment, and Technology ('SCOMET')* items and it was capable of being used as a *weapon of mass destruction* apart from having industrial use as well. Thus, an export authorization is required from the Directorate General of Foreign Trade ('DGFT') prior to the export of the said product. However, the said DGFT authorization was not obtained and the product was, according to the Department, misclassified by the Exporter and CHA.

5. Accordingly, a Show Cause Notice dated 6th February, 2023 was issued upon the CHA and a personal hearing was also granted. Thereafter, the impugned Order-in-Original ('OIO') came to be passed on 24th July, 2024.

6. The impugned OIO clearly records that the CHA ought to have properly described the product and advised the client to comply with the requisite approvals and authorizations. The adjudicating authority found the CHA's conduct being contrary to the responsibilities affixed on CHAs. The relevant part of the Order-in-Original dated 26th July, 2023 reads:

"17. I have carefully gone through the Show Cause Notice No. 02/ZR/Policy/2023 dated 06.02.2023, Inquiry report dated 03.05.2023 submitted by Shri Sanjay Pandey, Deputy Commissioner, Custom Audit, New Custom House, New Delhi (Inquiry officer), Written Submissions dated 24.05.2023 (received in this office on 29.05.2023) of the CB & submissions during P.H. on 05.07.2023 and available records.

18. For sake of brevity, facts of the case are not being reproduced here again, therefore, I, now proceed to discuss the alleged violations of Regulations of CBLR, 2018 made by the Customs Broker as under:



18.1 Whereas, as per Regulation 10(d) of the CBLR, 2018:-

"10. Obligations of Customs Broker. - A Customs Broker shall-

... .."

(d) advise his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof, and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;

... .."

18.1.1 On going through the above regulation, it is clear that the Customs Broker has to advise his client i.e. the importer to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof, and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs. However, I find that the Inquiry Officer has observed that M/s Fly Over Cargo Pvt. Ltd. failed to advise his client i.e. the exporter about the restrictive nature of the goods making the goods liable for confiscation under Section 113(d) of the Customs Act, 1962 in respect of attempting export of Scomet listed goods without proper Export Authorization and also liable for confiscation under 113(i) for mis-classification of the goods and CB and Exporter were also penalized under Customs Act 1962.

18.1.2 I also find that the Inquiry Officer has also observed that very purpose of granting licence and authorizing a person to act as Customs broker on behalf of importer and exporters is to facilitate import and export of goods at any Customs station in accordance with the provisions of Customs Act, 1962 and any law for the time being in force; that the Customs Brokers licensed under CBLR 2018 enjoins certain duties and obligations on the Customs brokers while transacting



business on behalf of the importer/exporter/trade. Thus, the object granting licence to a Customs broker is to ensure that he acts in a responsible manner as the agent of the importer/exporter, while providing prompt, correct advice and guidance and simultaneously making certain that all rules and regulations are followed. Hence a person so licenced by the Department is expected to abide by all the provisions of the statute. However, in the present matter, the CB has failed to fulfill the obligation mandated under Regulation 10(d) of CBLR 2018 as they failed to advise their client i.e. the exporter about the restrictive nature of the goods.”

7. The operative portion of the said Order-in-Original is set out below:

ORDER

In exercise of powers conferred in terms of Regulation 14 & 18 read with Regulation 17 (7) of CBLR, 2018,

(i) I hereby revoke the CB Licence No. R-47/DEL/CUS/2011 (PAN: AABCF6355P) valid upto 03.12.2031 of M/s Fly Over Cargo Pvt. Ltd.;

(ii) I direct the CB to immediately surrender the Original CB License No. R- 47/DEL/CUS/2011 valid upto 03.12.2031 along with all 'F/G/H' Cards issued there under;

(iii) I order for forfeiture of the whole amount of security deposit furnished by them;

(iv) I impose a penalty of Rs. 50,000 /- on M/s Fly Over Cargo Pvt. Ltd. (PAN No.AABCF6355P) under regulation 18 of CBLR, 2018.”

8. As can be seen from the above order, the licence of the CHA was revoked up to 3rd December, 2031 and the CHA was directed to surrender the same. In addition, a penalty of Rs.50,000/- was also imposed.

9. The said order was appealed by the CHA before CESTAT. The CESTAT clearly records that the CHA had a duty to properly advise its client



that the product required authorization. However, after holding that the CHA had violated Regulation 10(d) of the CBLR, 2018, the operative portion was modified and only a penalty of Rs.50,000/- was sustained. The CESTAT also notes that the value of the product was itself Rs.500/-. Under these circumstances, the order revoking the licence of the CHA was set aside.

10. The operative portion of the CESTAT's order dated 24th July, 2023 is set out below:

“14. The appellant's submission on this count is that the client had given a declaration that Triethanolamine is not a SCOMET item and had also given a declaration that it was being exported for use in soil testing. This submission cannot be accepted. Firstly, it is the appellant who should know the law and advise the client and the appellant cannot depend on the client to say if Triethanolamine was a SCOMET item or not. If the appellant had checked the list of SCOMET items, it would have been evident that it was clearly a SCOMET item. Secondly, any declaration by the client cannot prevail over the law.

15. Thus, we find that the appellant had clearly violated Regulation 10(d) of CBLR 2018.

16. Another submission of the appellant is that the SCN was issued 255 days after the receipt of the offence report and hence it was time-barred.

17. We have considered this submission. The Commissioner can be expected to act after he receives the offence report and not before. The Commissioner recorded in paragraph 19 of the impugned order that the offence report in the form of the Order in Original dated 27.7.2022 was received in his office on 29.7.2022 but it contained the name of another Customs Broker and the not of the appellant who was the Customs broker who had handled the consignment. Needless to say that the Commissioner could not have proceeded against the appellant at that stage when the offence report did not



name the appellant at all. So, a clarification was sought by letter dated 8.8.2022 which was followed by a reminder on 4.11.2022. Thereafter, the Assistant Commissioner issued a corrigendum dated 17.11.2022 indicating the correct name of the Customs Broker which was the appellant, This corrigendum was received by the Commissioner on 18.11.2022 and the SCN under CBLR 2018 was issued on 6.2.2023, i.e., within 80 days of the receipt of the correct offence report. We, therefore, find the submission of the appellant that the SCN was issued after 255 days of receiving the Offence Report contrary to facts recorded in the impugned order. The SCN was, therefore, not time-barred.

18. On the question of proportionality of action against the appellant, we find an attempt to export SCOMET item without the required authorization is a serious violation. In this case, it cannot even be said to be a mere oversight because the exporter had given a declaration stating that it was not a SCOMET item and therefore, the possibility of it being a SCOMET item was evident- all that the appellant had to do was to refer the policy where Triethanolamine was explicitly indicated as a SCOMET item. He should then have advised the exporter accordingly.

19. On the other hand, there is no evidence of the appellant profiting from this attempted export of Triethanolamine valued at about Rs. 500/-. Action has been taken against both the exporter and the appellant under the provisions of Customs Act and penalty of Rs. 5,000/- was imposed on the appellant under section 114(i). The appellant has been without a licence since 26.7.2023 which means out of work for about an year.

20. Balance of consideration, we find it would meet the ends of justice if, the penalty of Rs. 50,000/-imposed on the appellant is upheld but the revocation of licence and forfeiture of security deposit are set aside.



21. The appeal is partly allowed and the revocation of licence and forfeiture of security deposit of the appellant in the impugned order are set aside but imposition of penalty on the appellant is upheld. The appellant shall be entitled to consequential relief.”

11. This order of CESTAT is under challenge in this Petition. Ms. Anushree Narain, Id. Senior Standing Counsel appearing for the Department submits that considering the grievous nature of the violation which the CHA has committed, the suspension of license was completely valid and CESTAT ought not have interfered in the same. She relies upon the findings of CESTAT to argue that the nature of the product being a SCOMET product, there could be serious consequences if such products are not declared and are permitted to be exported.

12. On the other hand, Id. Counsel for the CHA submits that the shipping bill had several products, out of which, this product was one of them and that too of a very minimal quantity. Thus, he submits that there was no deliberate intention to violate the law. He further submits that the total value of the product was itself Rs.500/- and clearly the product had alternate uses.

13. Heard the Id. Counsels for the parties. There can be no doubt that, in the case of the export of *SCOMET* products which are capable of being misused for dangerous purposes, the DGFT's authorisation ought to have been obtained by the Respondent. However, in view of the arguments raised, there are two issues that the Court would have to deal with.

- (i) Does the product having dual use exempt it from SCOMET item?
- (ii) Whether the reduction of the quantum of punishment by CESTAT justified?



14. On the first issue, the learned single bench of this Court in *AR Sales (P) Ltd. v. Union of India, 2024 SCC OnLine Del 5508* had dealt with a similar issue. The Court therein was dealing with the export of civilian aircraft engines and accessories which, the DGFT, alleged to be SCOMET items due to its potential military uses. The judgment dated 6th August, 2024 captures the submissions as under:

“ 8. The learned Counsel for the Petitioner further contends that the company has been importing civil/commercial aircraft parts from various countries, such as the U.A.E. and has then further exported such aircraft parts to Russia and other CIS countries on numerous occasions in the past after complying all legal and procedural formalities provided under the FTP. He states that all these have been directly sold to Civil and Commercial Airlines which are publicly registered and he adds emphasis on the fact that they have also provided end user certifications for the aircraft parts that they are exporting to lend clarity as to the usage of the aircraft parts.

9. Per contra, the learned Counsel for the Respondent states that aircraft engines and certain other aircraft parts are components that can have the potential of both civil as well as military use, and hence may be controlled under the SCOMET list. This potential for dual use is the reason why an extra license for its export is required. He further adds that as per Para 10.05 of the FTP if the exporter has been notified in writing by the DGFT or has reason to believe that an item may not be covered under the SCOMET list but has potential of use as a Weapon of Mass Destruction or can be diverged to production of Weapons of Mass Destruction, or in missile system or military use, the exporter has to apply for SCOMET Authorization. He further adds that the product that is being imported in this case has the potential of being used for military



purposes and hence it is essential that the Petitioner company should apply for the SCOMET Authorization before being allowed to export such products.”

15. In these circumstances, the Court observed the as under:

5. Material on record indicates that the on-site physical inspection of the goods that were being exported were purely for civil application and therefore would not attract any of the restrictions that were mentioned in the SCOMET list or Catch-All provisions. A perusal of Appendix 3 of the SCOMET lists shows the exception that has been carved out under Clause 8A901.1.A, i.e. Catch-all or SCOMET provisions do not apply to any of those aero gas turbine engines that are certified by civil aviation authorities of India and have a type rated certificate. Perusal of the DRDO report and the type certificate issued by the DGCA was that the GE CF-34-8E5 model of engines is a recognized type of civil engine and has also been further cleared by the DRDO as having civilian application. Further the Petitioner in this case has also provided end user certificates, from the party they are exporting the product, to help verify the civil nature of the end use of these products.

*16. The contention of the Respondent that these products have dual use and can potentially be used for military purposes, and hence should not be exported without further clearance of the DGFT finds no footing with this court. **Almost everything can have a dual use, like soap being manipulated into a bomb, but rationality must guide the implementation of export regulations. Import and export regulation must be rational to effectively balance economic interests with national and global security concerns.** Items that have been certified by subject matter experts as having civil use and are allowed within the ambit of the export policy, cannot be stopped from being exported to countries with which India has established export ties, with no restrictions in the realm of economic policy, on*



the pretext that the products may have a potential military use.

16. A perusal of the above order underscores that the implementation of export regulations must be guided by rationality, balancing economic interests with national and global security concerns. In the present case, the seized product, *Triethanolamine*, is explicitly classified as a restricted item under Schedule 3, Part B of the Chemical Weapons Convention (CWC). This classification is not arbitrary but stems from the fact that Part B of Schedule 3 specifically pertains to the manufacture of precursors that can be used in the production of toxic chemical weapons. Given the serious implications associated with such substances, the principle of rationality must lean towards stringent regulation rather than unfettered trade.

17. While it is true that many substances may have multiple applications, including legitimate commercial uses, the potential risk of their misuse in the production of chemical weapons necessitates a heightened level of scrutiny. The mere fact that *Triethanolamine* may be utilized for lawful industrial or pharmaceutical purposes does not, in itself, exempt it from the SCOMET regulatory framework. Unlike in the case of aircraft engines, where clear and certified distinctions exist between civilian and military use, chemicals classified under Schedule 3, Part B inherently carry the risk of diversion to prohibited activities.

18. Accordingly, the Respondent's contention that the product in question falls under the purview of SCOMET regulations due to its potential use in chemical weapon production is well-founded. The requirement of prior authorization serves as a crucial safeguard against any unintended proliferation, and in such circumstances, regulatory oversight cannot be



diluted merely on the ground that the chemical has alternate permissible uses. Therefore, the argument that *Triethanolamine* should be exempt from SCOMET regulations on the basis of its dual-use potential is untenable, as the overarching national and global security concerns necessitate controls over its trade and export. The necessary licences from the authorities ought to have been therefore obtained prior to export.

19. On the second issue, the Order-in-Original had suspended the license of the Respondent – thereby disabling the Respondent from conducting its business itself. However, the CESTAT, while bearing in mind the quantity seized and the price of the product, considered the question of proportionality of punishment and had observed as under

18. On the question of proportionality of action against the appellant, we find an attempt to export SCOMET item without the required authorization is a serious violation. In this case, it cannot even be said to be a mere oversight because the exporter had given a declaration stating that it was not a SCOMET item and therefore, the possibility of it being a SCOMET item was evident- all that the appellant had to do was to refer the policy where Triethanolamine was explicitly indicated as a SCOMET item. He should then have advised the exporter accordingly.

19. On the other hand, there is no evidence of the appellant profiting from this attempted export of Triethanolamine valued at about Rs. 500/. Action has been taken against both the exporter and the appellant under the provisions of Customs Act and penalty of Rs. 5,000/- was imposed on the appellant under section 114(i). The appellant has been without a licence since 26.7.2023 which means out of work for about an year.
20. Balance of consideration, we find it would meet the ends of justice if. the penalty of Rs. 50,000/-imposed on



the appellant is upheld but the revocation of licence and forfeiture of security deposit are set aside.

20. Considering the fact that the CESTAT has exercised its discretion based on the quantity of the product and the price, and has only modified the penalty and consequences as contained in the Order-in-Original, this Court is of the opinion that no interference is warranted. However, the violation being of a serious nature, the Respondent-CHA shall ensure that it is careful in future when such products are involved for export and if there is a second misconduct which is found, then the Department is free to take stringent action in accordance with law.

21. With these observations, the appeal is disposed of. All pending applications, if any, are also disposed of.

**PRATHIBA M. SINGH
JUDGE**

**RAJNEESH KUMAR GUPTA
JUDGE**

MARCH 18, 2025
Rahul/Ar.