



आयुक्त का कार्यालय, (अपीलस)  
Office of the Commissioner,



केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय

Central GST, Appeal Commissionerate- Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎: 079-26305065

टेलीफैक्स : 079 - 26305136

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क फाइल संख्या (File No.) : V2(19)26/North/Appeals/ 2019-20 / 11350 to 11355  
ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP-72-19-20  
दिनांक (Date): 26/06/2019 जारी करने की तारीख (Date of issue): 09/07/2019  
श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित  
Passed by Shri Uma Shanker , Commissioner (Appeals)

ग \_\_\_\_\_ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-III), अहमदाबाद उत्तर, आयुक्तालय द्वारा जारी  
मूल आदेश सं \_\_\_\_\_ दिनांक \_\_\_\_\_ से सृजित  
Arising out of Order-In-Original No 10/ADC/2019/MSC Dated: 28/03/2019  
issued by: Additional Commissioner-Central Excise (Div-III), Ahmedabad North,

घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s M/s. Print N Pack Pvt. Ltd

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person an aggrieved by this Order-in-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way:

भारत सरकार का पुनरीक्षण आवेदन :  
Revision application to Government of India:

(1) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001 को की जानी चाहिए।

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid:

(ii) यदि माल की हानि के मामले में जब हानि कारखाने से किसी भंडारगार या अन्य कारखाने में या किसी भंडारगार से दूसरे भंडारगार में माल ले जाते हुए मार्ग में, या किसी भंडारगार या भंडार में चाहे वह किसी कारखाने में या किसी भंडारगार में हो माल की प्रकिया के दौरान हुई हो।

In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।



- (b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
- (ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल है ।
- (c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- (घ) अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडीट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (न.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो ।
- (d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
- (१) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए । उसके साथ खाता इ. के मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए ।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

- (२) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000/- फीस भुगतान की जाए ।

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील :-  
Appeal to Customs, Excise & Service Tax Appellate Tribunal:-

- (1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-  
Under Section 35B/35E of CEA, 1944 an appeal lies to:-

- (क) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक न. 3. आर. के. पुरम, नई दिल्ली को एवं

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification valuation and



One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1988 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2018(2018 की संख्या 25) दिनांक: 06.08.2018 जो की वित्तीय अधिनियम, 1998 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,  
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(6)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(6)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.



ORDER-IN-APPEAL

This appeal has been filed by M/s Print N Pack Pvt Ltd., Survey No.147/10, Shed No.1, Sonal Industrial Estate, Sanand-Viramgam Highway, Ahmedabad [hereinafter referred to as "the appellant"] against Order-in-Original No.10/ADC/2019/MSD dated 28.03.2019 [hereinafter referred to as "the impugned order"] passed by the Additional Commissioner of CGST, Ahmedabad-II [hereinafter referred to as "the adjudicating authority"].

2. Briefly stated, the facts of the case are that during the course of Audit of records of the appellant, it was observed that the appellant is engaged in the manufacture of "Sugar Cone" and "Sugar Cone with Aluminum Foil Sleeve" by classifying the goods under chapter heading 19053290 discharging central excise duty @6% adv. They were availing exemption under Notification No.12/2012-CE (Sr.No.28). It was also observed that the notification *supra* is prescribed @6% for "wafer biscuits". Based on statements of authorized persons, scrutiny of manufacturing process of the goods and other supported details/documents, it appeared that the product manufactured and cleared by the appellant is not "wafer biscuit" but in fact "Sugar Rolled Cone/Ice-cream Cone"; therefore, they are not eligible for exemption under the notifications *supra* and liable to pay Central Excise duty @12% ad-valorem. Accordingly, a show cause notice dated 26.12.2017 was issued to the appellant for recovery of Central Excise duty amounting to Rs.1,64,97,246/- being the differential duty on cones cleared with interest during December 2012 to June 2017. The said notice also proposed imposition of penalty under Section 11AC of Central Excise Act, 1944 (CEA). The adjudicating authority, vide the impugned order has confirmed the entire allegations by way of confirming the duty demanded with interest and imposition of penalty, equal to the duty confirmed as per provisions of Section 11AC of CEA.

3. Being aggrieved with the impugned order, the appellant has filed the instant appeal on the grounds that:

- [i] The department has not disputed the classification of the products in question but only disputed the exemption availed under notifications *supra*; that the exemption under the notification is available only to "wafer biscuit" and the excisable products manufactured is "rolled sugar cones/ice-cream cones"; that once classification is not disputed then the question of denying exemption does not arise. When the notification grants concession duty to "wafer biscuits" falling under 19053290, applying explanatory notes to GIR to the notification, it has to be construed that on a subset of waffles or wafers can be classified under 19053290; that all kinds of wafer biscuits irrespective of use, shape constitution etc would get covered in the notification by application of the explanatory notes.
- [ii] The adjudicating authority has passed the order in gross violation of judicial discipline; that the Appellate Authority, Ahmedabad has already given decision in the matter in case of M/s Big Drum India Pvt, Ltd, vide OIA No.AHM-EXCUS-003-APP-0267-17-18 dated 23.03.2018; that the appellant's case is squarely covered under the said decision. However, the adjudicating authority has not followed the same.



[viii] No extended period is invocable and they have furnished all details to the department.

4. Personal hearing in the matter was held on 22.05.2019. Shri Nirav Shah, Advocate appeared for the same on behalf of the appellant and reiterated the grounds of appeal. The Learned Advocates submitted my earlier OIA No. OIA No.AHM-EXCUS-003-APP-0267-17-18 dated 23.03.2018 and pointed out that the adjudicating authority has not considered the same.

5. I have carefully gone through the facts of the case and submissions made by the appellant in the appeal memorandum as well as at the time of personal hearing. The issue to be decided in the instant case is as to whether the products manufactured by the appellant is [i] "sugar cone" as described by the department or "wafer biscuit cone" as contended by the appellant and [ii] whether said products are eligible for exemption under notification No.12/2012-CE dated 17.03.2012 (Sr.No.28).

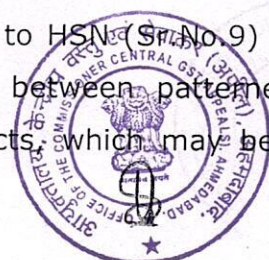
6. At the outset, I observe that the allegation against the appellant is that the excisable goods manufactured by them, classifiable under chapter heading 19053290, is not "wafer biscuit cone" but is "sugar cone"; that therefore, the exemption availed under notification *supra* is not eligible to them. Accordingly, vide the impugned order, the department has demanded short payment of central excise duty amounting to Rs. 1,64,97,246/- being the differential duty for the period from December 2012 to July 2017 and also imposed penalty as per provisions of Section 11AC of Central Excise Act, 1944. The appellant vehemently argued that rolled sugar cone/ice-cream cone is a known as "wafer biscuit cone" and the department has not disputed the classification of the products in question but only disputed the exemption availed under notifications *supra*; that once classification is not disputed then the question of denying exemption thereof on the said products does not arise; that when the notification grants exemption to wafer biscuits falling under chapter 19053290, by applying the explanatory notes to GIR to the notification, it has to be construed that only a subset of "waffles or wafer" can be classified under 19053290.

7. The product is being classified under chapter 19053290 under CETA and description under relevant chapter heading reads as under:

1905 -Bread, Pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa, communion wafers, empty cachets of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products.

1905 32	-	Waffles and wafers	
	-	Communion wafers	
19053211	-	Coated with Chocolate or containing chocolate	12.5%
19053219	-	Other	12.5%
19053290	-	Other	12.5%

9. As per chapter note to HSN (Sr.No.9) "Waffles and Wafers", which are light fine bakers wares baked between patterned metal plates. This category also includes thin waffle products, which may be rolled, waffles consisting of a tasty



filling sandwiched between two or more layers of thin waffle pastry and products made by extruding waffle dough through a special machine (ice-cream cornets, for example). The water content must be 10% or less by weight of the finished product. Waffles may also be chocolate-covered. Wafers are products similar to waffles.

10. In the instant case, the differential duty amount was demanded on the grounds that the appellant is not eligible for exemption under notification *supra* as the products manufactured by them is called as "sugar rolled cone/ice-cream cone" and the exemption under the said notification is only for "Wafer Biscuit". The said notification provides exemption to the products as under:

No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
28	1905 32 19 or 1905 32 90	Wafer biscuits	6%	-

11. In the instant case, I observe that the adjudicating authority has not disputed the classification of the subject goods under heading 19053290 but questioned that the goods manufactured by the appellant is only *sugar rolled cone/ice-cream cone* and not *wafer biscuit cone*. Therefore, exemption under above notification is not available to them. I observe that the products under chapter heading 19053290 covers under the description "Waffles and Wafers". As per chapter note to HSN, "Wafers" are products similar to "Waffles". However, as per description mentioned in the notification, only "wafer biscuits" are eligible for concessional rate of central excise duty falling under the chapter heading 19052390/19053219. In the circumstances, now the question that arises and dispute to be decided is whether the product manufactured by the appellant is "wafer biscuits cone" as argued by the appellant or "rolled sugar cone/ice-cream cone" as alleged by the department?

12 As per **Encyclopedia of Food Grains II Edition (2016), Volume 3**, which deals with the topic "Wafers: Methods of Manufacture" the introduction states as follows :

**"Wafers are special member of the biscuit/cookie/cracker family of cereal products. The wafer book verges on being called a biscuit with flat wafer sheets being interleaved with cream fillings. The diversity of wafer shapes includes flat wafers, hollow wafers, molded cones, rolled wafer cones and wafer sticks. In addition these many forms of wafer are enhanced by their use, for example, in sandwich format with cream fillings and by enrobing with chocolate."**

13. In the case of International Foods [1978(2) ELT J 50(AP)], the Hon'ble High Court of Andhra Pradesh, held that wafer is a kind of biscuit. Para 4 of the said decision reads as under:

**"4. In Oxford Dictionary the word 'biscuit' means a piece of unleavened bread of various materials, usually crisp, dry, hard and in small flat thin cakes, and the word 'wafer' means a kind of very thin sweet honey-comb faced biscuit now chiefly eaten with ices; thin disk of unleavened bread used in Ucharist. Similarly in Chambers'**



*Dictionary biscuit means hard dry bread in small cakes; a soft round cake; and wafers means a very thin crisp cake or biscuit baked in wafer-irons or tongs, formerly eaten with wine; a similar biscuit eaten with ice-cream a thin round cake of unleavened bread. These definitions leave us in no doubt that wafer is a kind of biscuit. Although it might be different in size and shape. Mr. V. Jagannandha Rao has taken me through Encyclopaedia Britannica to show that the method of manufacture of biscuits and wafers is completely different and, therefore, it would not be proper to place wafers in the category of biscuits. In Encyclopedia Britannica, 1953 Education, it is stated that the variety of products by the term biscuits has shown a marked increase since the beginning of the 20th Century, and the products of a large modern biscuit bakery include a great number of specialized varieties of which the composition and methods of manufacture differ widely and that in the United States among the most popular varieties are also sugar and other wafers". The ingredients used in biscuits are numerous and of these wheat flour is the most important. The type of flour used depends upon the kind of biscuit to be produced and varies. from a very soft flour, used in the more tender cookies, to "stronger" flours, used in soda crackers, containing more and stronger gluten. In addition to the common white wheat flour, other cereal flours such as whole wheat, oatmeal, rye, corn, rice, soy and arrowroot flour may be used to give variations in flavour. It is also stated that the manufacture of biscuits varies considerably depending upon the type to be produced. The Encyclopaedia Britannica defines wafer as a thin flat cake or biscuit. Thus, it leaves us in no doubt that wafer is a variety of biscuit. Once this position is accepted wafer being a variety of biscuit is liable to excise duty under the Act. Mr. V. Jagannadha Rao, contended that a perusal of the counter affidavit filed by the respondent No. 1 would show that he had considered wafer to be a biscuit because wafers are known as biscuits in the market and not as to whether wafers are biscuit objectively. Mr. Subrahmanya Reddy, counters this contention stating that the respondent has considered wafers as a variety of biscuits not only because they are known as biscuits in market but also on the ground that the meaning assigned to biscuits and wafers in the Chamber's 20th Century Dictionary and also in Corpus Juris Secudum, where in wafer is described as a thin cake or biscuit. Mr. Subrahmanya Reddy contended that the word 'goods' is not at all defined in the Act and, therefore, either a dictionary meaning should be given the word 'goods' or the word 'wafer' as known to the market and since wafers are known as biscuits in the duty levied is proper. In support of his contention he cites a ruling in S.B Sugar Mills v. Union of India (AIR 1968 S.C. 922) where it was held that as the Act does not define goods the legislature must be taken to have used that word in its ordinary dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market. Thus, I am of the opinion that wafer is a kind of biscuit and as such is liable to excise duty. Therefore the action taken by the first respondent cannot be quashed in these writ petition."*

14. I observe that the issue relating to the description as to whether the "ice-cream cones or "sugar cones"" are "wafers" or not has further been settled by law in case of M/s Magic Products by the Hon'ble Tribunal Madras [1997 (95) ELT 590]. In the said case, the department has pleaded that "ice-cream cones" are classifiable under CETSH 1905.11 as "waffles and wafers" . By rejecting the assessee's contention that ice-cream cones are distinct from "waffles and wafers" the Hon'ble Tribunal has held that:

*"5. We have considered the submissions of both the sides. We observe that the term waffles and wafers as such have not been defined in the Central Excise Tariff. The Central Excise Tariff is designed on the scheme of the HSN and in case of any doubt, the reliance can be placed on the HSN and the Notes there under. As pointed out by the learned JDR, waffles and wafers as set out in the HSN cover ice cream cones. The Hon'ble Supreme Court has also held that for the purpose of classification the HSN Notes can be relied upon. We, in the circumstances are of the view that notwithstanding the opinion that the appellants have got from the suppliers of the machinery and also the view of the DGT, correct classification in our view would be 1905.11."*

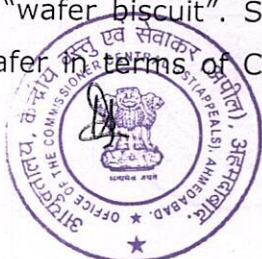


The said decision has been upheld by the Hon'ble Supreme Court, vide order dated 27.01.1998 [1998 (98) ELT A 206]. The ratio of the above decisions has been followed by the Hon'ble Tribunal, Ahmedabad in the appellant's case i.e M/s Print-N-Pack Pvt Ltd V/s CCE Ahmedabad [2012 (275) ELT 95]. In view of above decision, I observe that the question regarding whether "ice-cream cone or "sugar cone"" is classifiable under "waffles and wafers" and whether "wafer" is a kind of "biscuit" is no more *res-integra* and the department has finally accepted that "ice-cream cone or "sugar cone"" is classifiable under "waffles and wafers" and "wafer" is a kind of "biscuit".

15. I observe that the Hon'ble Tribunal, Bangalore had an occasion to deal a similar issue in the case of M/s Little Star Food Pvt Ltd [2014 (300) E.L.T. 532]. While dealing the issue regarding a stay petition filed by the assessee in the matter as to whether the 'Cadbury perk' can be called as 'wafer biscuits" or not, the Hon'ble Tribunal viewed that Cadbury perk being classifiable as 'wafer' under Tariff Item 1905 32 90 of Central Excise Tariff and wafer being biscuit vide High Court decision [1978 (2) E.L.T. (J50) (AP)], the goods in question is eligible for exemption as wafer biscuit under Notification No. 3/2006-C.E. Relevant portion reads as under:-

*"There is no dispute as regards classification of Cadbury perk manufactured by the appellant and both sides agree that it is classifiable under 1905 32 90. This heading comes under the general category of wafers. Therefore there is no dispute that the product before us for consideration is a wafer. Hon'ble High Court has held that wafer is also a biscuit. Under these circumstances, the only question that comes up is whether the product of the appellant is called as a wafer biscuit. The Commissioner has relied upon the definition of wafer biscuit as per Cambridge dictionary. According to which the definition of wafer biscuit is "a light sweet, biscuit slightly thicker than a wafer with a creamy filling". He has taken note of the fact that the product manufactured by the appellant has 26% centre cream, 22% wafer and choco layer above the cream part is 52%. According to him, a wafer biscuit is one which is basically wafer but with a creamy filling and sometimes plain wafer without filling also. According to him, if a choco layer is given to the product, it goes out of the definition of wafer biscuit. In addition, he has also gone into other details like common parlance but there is no evidence gathered. Once it is accepted that the product is a wafer and wafer is a biscuit, it may be difficult to take a view that it is not a wafer biscuit. Needless to say, it will require more detailed consideration as to whether wafer biscuit is wafer and whether the exemption notification covers only wafers without choco layer; if choco layer is 52%, whether it will go out of the category of wafer biscuit are questions for which we have not been able to find an answer. However, in our opinion, the decision of the Hon'ble High Court taking the view that wafer is a biscuit and therefore in view of the fact that there is no dispute that the product is covered under the category of wafer in terms of classification of Central Excise Tariff, it may not be correct to take a view to deny the exemption that it is not a wafer biscuit. Therefore, we find that the appellant has been able to make a prima facie case for eligibility of exemption under Notification No. 3/2006."*

16. In the appellant case, the jurisdictional Central Excise department has challenged that the products i.e ice-cream cones or rolled sugar cones are not "wafer biscuit" and accordingly they are not eligible for exemption notification No.12/2012-CE dated 17.03.2012 (Sr.No.28) since the said notification extended exemption only to the goods viz "wafer biscuit". Since the product in question is covered under the category of wafer in terms of CET and the Hon'ble High Court





and Tribunal has held that wafer is a biscuit, it may not be correct to take a view to deny the exemption that it is not a wafer biscuit. In the circumstances, the contention of the adjudicating authority is not correct.

17. Further, as contended by the appellant, this issue has already been decided by me, vide OIA mentioned above in case of M/s Big Drum Pvt Ltd. I find that while deciding the issue by the adjudicating authority, the appellant has placed my above decision before the adjudicating authority and he has not considered by stating that in the case of M/s Big Drum Pvt Ltd, the assessee declared their product as "wafer biscuit cone" but the department has contested that the product is not "wafer biscuit cone", whereas in the instant case the appellant declared their product as "sugar cone". Hence, the said decision is not applicable. The said argument is not tenable as in the case of M/s Big Drum Pvt Ltd, it has been held that "sugar cone" is classifiable under "waffles and wafers" and whether "wafer" is a kind of "biscuit" is settled by the Hon'ble Tribunal and the department has finally accepted that "sugar cone" is classifiable under "waffles and wafers" and "wafer" is a kind of "biscuit". In the circumstances, the contention of the adjudicating authority that "sugar cone" and "wafer biscuit" is separate and distinct product is not correct and not acceptable. Further, the adjudicating authority, in the impugned order (para 27) has referred relevant pages of certain website and contended that "sugar cone" and wafer cone" are different with its composition. However, as per **Encyclopedia of Food Grains II Edition (2016), Volume 3**, described at para 12 above, I do not find that the description mentioned in the impugned order as per website details have more merits.


18. In view of above discussion and also following my decision in case of M/s Big Drum Pvt Ltd supra, I uphold that the appellant has correctly discharged duty by availing exemption notification 12/2012-CE supra.

20. In view of foregoing discussion, I allow the appeal filed by the appellant. The appeal filed by the appellant disposed of in above terms.

उमा शंकर

उमा शंकर)  
प्रधान आयुक्त (अपील्स)  
Date: /05/2019

Attested

  
(Mohanan V.V)  
Superintendent (Appeals)  
CGST, Ahmedabad  
By R.P.A.D

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