



सत्यमेव जयते

## केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

केंद्रीय कर भवन,

7<sup>th</sup> Floor, GST Building,

Near Polytechnic,

सातवीं मंजिल, पोलिटेकनिक के पास,

Ambavadi, Ahmedabad-380015

आम्बावाडी, अहमदाबाद-380015

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(19)36/Ahd-South/2018-19  
Stay Appl.No. /2017-18

5412 to  
5416

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-029-2018-19  
दिनांक Date : 30-07-2018 जारी करने की तारीख Date of Issue

8/8/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. 07/AC/Div-I/KN/2017-18 दिनांक: 18.04.2018 issued by  
Assistant Commissioner, Div-I, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent  
Vadilal Industries Ltd.  
Ahmedabad

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 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) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक 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।

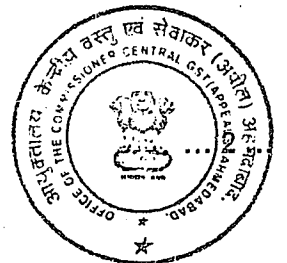
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4<sup>th</sup> Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

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

(ii) 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.

(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 हो।



(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 मामलों 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 हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट 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 (नं.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 and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) 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. का 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.

(2) 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 से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

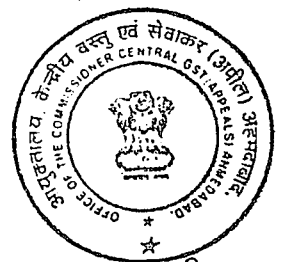
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैन्टल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.



The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt., As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall 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 उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

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।

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."



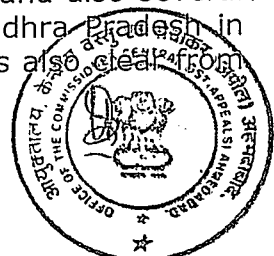
ORDER-IN-APPEAL

This appeal has been filed by M/s Vadilal Industries Limited, Ice Factory Compound, Near Ramakrishna Mill, Gomtipur, Ahmedabad [*hereinafter referred to as "the appellant"*] against Order-in-Original No.07/AC/Div-1/KN/2017-18 dated 18.04.2018 [*hereinafter referred to as "the impugned order"*] passed by the Assistant Commissioner, Central GST, Divisin-1, Ahmedabad South [*hereinafter referred to as "the adjudicating authority"*].

2. Briefly stated, the facts of the case are that the appellant is engaged in the manufacture of "Ice Cream Cone with Aluminum Foil. They were declaring the said products under Chapter Sub-Heading 19053290 and availing exemption under Notification No.12/2012-CE dated 17.03.2012 for the period from March 2012 to October 2014 (Sr.No.28). During the course of audit, it was observed that appellant was resorting to mis-declaration of the said goods so as to avail the benefit of exemption wrongly under notifications *supr*; that the appellant was choosing improper description of their goods as "wafer biscuits" so as to avail the benefit of exemption notification *supra* though they manufactures the product 'Ice cream cone with Aluminum foil'. Based on statements of authorized persons; scrutiny of manufacturing process of the goods and other supported details/documents and the marketability of the goods and its end-use, it appeared that the product manufactured and cleared by the appellant is not "wafer biscuit" but in fact "Ice-cream Cone with aluminum foil"; 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 07.12.2016 was issued to the appellant for recovery of Central Excise duty amounting to Rs.34,13,556/- being the differential duty on the products cleared during the relevant period with interest. The said notice also proposes 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 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:

- The encyclopedia of Food Grain and invoices of other similarly situated manufacturers establishing that similar goods manufactured by them in Gujarat, Hyderabad, Coimbatore and Haryana were accepted as 'wafer biscuits' and were allowed concessional rate of duty have not considered while adjudicating the matter.
- The department has admitted that the goods merit classification under SH No.19053290 of the Tariff and therefore, it is an admitted facts that the goods in question are wafers inasmuch as only wafers are classifiable under the said chapter heading.
- By virtue of explanatory notes under heading 1905 of HSN and also several judgments including judgment of Hon'ble High Court of Andhra Pradesh in case of M/s International Foods -1978 (2) ELT-J 50; that it is also cleared from



the decision of Appellate Tribunal in case of Magic Products -1997 (95) ELT 590- that ice cones were wafers and accordingly the goods were classifiable under chapter heading 1910511 that covered 'biscuits, waffles and wafers'. In case of Print N Pack Pvt Ltd-2012- (250) ELT 95-Tri, Ahm- it has been held that the goods in question were classifiable under SH No.19053290 and consequent upon the jurisdictional officer has allowed concessional rate of duty under notification 3/2006-CE.

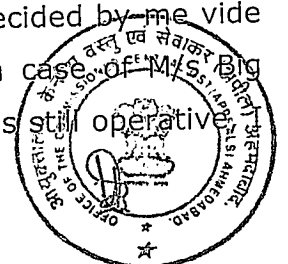
- No suppression or willful mis-statement as alleged is involved in the instant case. Hence larger period is not invocable. They relied on various case laws.
- The issue in dispute has recently stands conclude by the Commissioner (Appeals), Ahmedabad vide order-in-appeal No.AHM-EXCUS-003-APP-0267-17-18 dated 23.03.2018 in case of M/s Big Drum India Pvt Ltd.

4. Personal hearing in the matter was held on 24.07.2018. Smt. Shilpa P Dave, Advocate appeared for the same and reiterated the grounds of appeal. The Ld Advocated cited the decision of Commissioner (Appeals), Ahmedabad in case of M/s Big Drum India Pvt Ltd.

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] "ice-cream 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 No.12/2012-CE dated 17.03.2012 (Sr.No.28)

6. At the outset, I observe that the audit observation against the appellant, alleging that the excisable goods manufactured by them, classifiable under chapter heading 19053290, is not "wafer biscuit cone" but is "ice-cream cone"; 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. 34,13,556/- being the differential duty on the goods in question with interest during the relevant periods and also imposed penalty as per provisions of Section 11AC of Central Excise Act, 1944. The appellant vehemently argued that the said goods viz., "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 to only a subset of "waffles or wafer" and can be classified under 19053290.

8. I observe that similar issue involving classification of "ice-cream cone" and "wafer biscuits" under chapter heading 19053290 and eligibility for exemption under notification 12/2012-CE *supra* thereof, has already been decided by me vide OIA No. AHM-EXCUS-003-APP-0267-17-18 dated 23.03.2018, in case of M/s Big Drum India Pvt Ltd in favour of assessee. Since the said decision is still operative, follow the same in this case also.



8. 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.

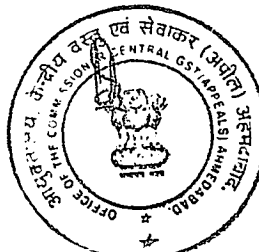
1905 32	-	Waffles and wafers	
	-	Communion wafers	
19053211	-	Coated with Chocolate or containing chocolate	12.5%
19053219	-	Other	12.5%
19053290	-	Other	12.5%

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 "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 1905 3290 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 1905 3290 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. 1 The appellant has contended that as per **Encyclopedia of Food Grains II Edition (2016), Volume 3**, enclosed as Annexure 17 with the appeal papers, 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."**

Relevant pages showing details are reproduced below:

### Wafers: Methods of Manufacture

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#### Topic Highlights

- Wafers are in our everyday foods, as crisp low-fat products made of wheat flour.
- The two basic types are no- or low-sugar wafers and higher-sugar wafers.
- Manufacturing steps involve:
  - batter preparation and deposition onto the baking mold;
  - baking, usually between heated plates, often carrying engraved markings;
  - wafer release and cooling;
  - treating from the release moisture content (about 1-10%) to minimize cracking;
  - final enhancements, such as cutting, creaming, book building, or enrobing.
- Wafer manufacture usually involves an automatic production line of specialized machinery.

#### Learning Objective

- Achieve understanding of the manufacturing process for making wafers in their many forms.

#### Introduction

Wafers are thin, crisp, and precisely shaped products, generally made from the flour of wheat, occasionally incorporating other cereals. The ice-cream cone is the most familiar member of the wafer product group. Like many uses of wafers, the ice-cream cone (Figure 1) is the ultimate illustration of the concept of providing food in an edible container. Indeed, wafers often serve the function of being edible carriers of an added food. However, the crispness of the wafer enhances the appeal of the added food, making the wafer much more than an inert carrier.

Wafers are a special member of the biscuit/cookie/cracker family of cereal products. The 'wafer book' (Figure 2) verges on being called a biscuit with flat wafer sheets being interleaved with cream fillings. The diversity of wafer shapes (illustrated in Figure 3) 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. They may be made from quite different formulas, using a diversity of manufacturing equipments, and destined for a variety of uses. However, they share the same fundamental sequence of manufacturing steps detailed in this article. To understand the manufacturing process, the concepts of water activity and of glass transition are of critical importance.

#### The Main Features of Wafers

Wafers are baked as sheets, cones, and sticks or with different fancy shapes. The characteristic features with respect to other bakery products are as follows:

- Wafers are very thin biscuits; the overall thickness is usually between <1 and 5 mm. They often have a typical 'wafer pattern' on one surface or on both. The surfaces are smooth and precisely formed, with the dimensions and all the details - engravings, logos, etc. - of the baking mold. These features may be seen in the examples in Figures 1-3.
- Wafers are cereal-based low-fat products made of wheat flour, sometimes with the addition of other flours or starches. The product density is in the range of 0.10-0.25 g cm<sup>-3</sup>. In cross-section, the wafer matrix is highly acidified and primarily of gelatinized starch.
- Wafers, by their typical delicate and crisp texture, combine well with different fillings (cream, lot cream, and foam) and coatings.

There is sometimes confusion in terminology between the crisp 'wafers' as described here and 'waffles', which are of a soft, cake-like texture but show some kind of wafer pattern, too.

#### The Main Types of Wafers

There are two basic types of wafers:

- No- or low-sugar wafers.** After baking, these contain from zero to a very low percentage of sucrose or other sugars. Typical products are flat and hollow wafer sheets, molded cones, cups, and fancy shapes.
- Higher-sugar wafers.** Well over 10% of sucrose or other sugars are responsible for the plasticity of the hot, freshly baked sheets. These are formed into different shapes before sugar recrystallization occurs. Typical products are rolled sugar cones, rolled wafer sticks or tubes, and deep-formed fancy shapes. As in both wafer types, the main ingredient is flour; wafers fit very well into current dietary recommendations to consume more cereals. They are high-carbohydrate, low-fat products.

The baking of 'wafers' between hot metal plates has been known since medieval times, but these first wafers were more similar to our waffles or pancakes in their high fat and egg contents and their texture. Modern wafers are low-fat cereal products, very similar to the 'zhar breads' for Christian churches, and are basically made out of flour and water. The first wafer ovens were used after the First World War, but modern automatic manufacturing lines have been available since the mid-1950s.



WHEAT-BASED FOODS | Wafers: Methods of Manufacture

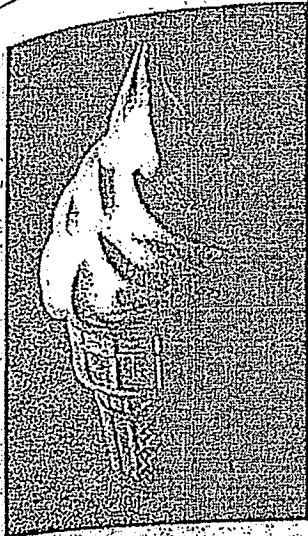


Figure 1. Probably the most popular form of wafer technology – the ice cream cone.

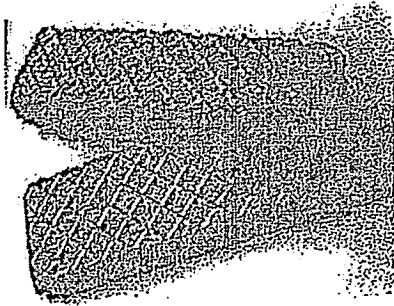


Figure 2. Flat wafers sandwiched with chocolate or strawberry fillings known as 'wafer books'.

#### The Main Formulas for Wafers

There are two questions to be answered before deciding upon a wafer formula:

1. What is the end use of the wafer? If it is part of a cream-filled, chocolate-covered biscuit, where contributing a crisp textural element is far more important than the taste of the wafer itself, formulas with few components are recommended. If the wafers are consumed directly as wafer bread or wafer sticks, more sophisticated formulas are chosen.
2. What kind and quality of raw materials are available? Low- to medium-protein soft wheat flours with a low water absorption work best, especially for no-sugar wafers. Problems with suboptimal flours must be balanced by variations

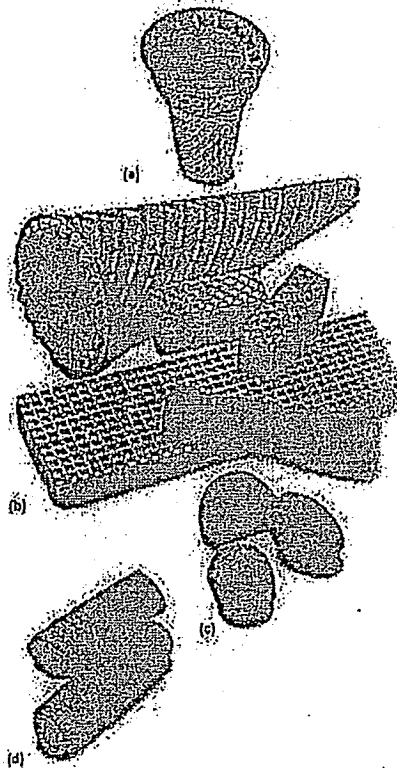


Figure 3. Some of the varieties of wafer products. From top to bottom: (a) molded cones; (b) flat wafers, cream-filled; (c) wafer pieces; and (d) wafer sticks. Reproduced from *Encyclopedia of Food Sciences and Nutrition*, 2nd edn, (2003), p. 559, Elsevier Ltd.

In minor ingredients in the formula. The use of wholemeal flour is possible, and in some regions, other cereals such as rice or corn are used for wafer production. Table 1 lists the common ingredient ranges for both types of wafer.

#### In-Line Manufacturing of Wafer Biscuits

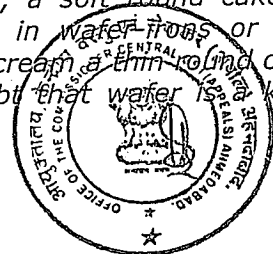
Wafer biscuits are the most important products by volume. The different steps of manufacture are illustrated in Figure 4.

#### Batter Preparation

Wafers are made from a fluid batter with a typical viscosity in the range of 300–2000 mPa. First, the water-soluble components are dissolved. By adding the farinaceous ingredients, a homogeneous suspension, the wafer batter, is obtained within a few minutes of mixing (Figure 4, process 1).

13. The appellant has further stated that 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 wafers from 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



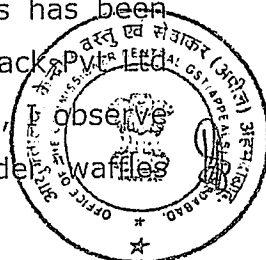


*biscuit. Although it might be different in size and shape. Mr. V. Jagannandha Rao has taken me through Encyclopaedia Britannica to show that the method of manufacture of biscuits and wafers is completely different and, therefore, it would not be proper to place wafers in the category of biscuits. In 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 petitions."*

14. I observe that the issue relating to the description as to whether the "ice-cream 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 DGTD, 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 case of 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" is classifiable under

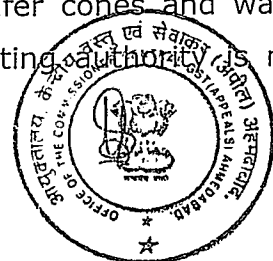


and wafers" and whether "wafer" is a kind of "biscuit" is no more *res-integra* and the department has finally accepted that "ice-cream cone" is classifiable under "waffles and wafers" and "wafer" is a kind of "biscuit".

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 are not "wafer biscuit" and accordingly they are not eligible for exemption under 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. Further, as per Enclopedia of Food Grains II Edition, "Wafers" are special member of the biscuit etc. The diversity of wafer shapes includes flat wafers, hollow wafers, molded cones, rolled wafer cones and wafer sticks. In the circumstances, the contention of the adjudicating authority is not correct.



17. The appellant further argued that no show cause notice was issued to any other units in Ahmedabad Zone or elsewhere except in case of M/s Big Drum India Pvt Ltd, which was decided by the Commissioner (Appeals) in favour of the assessee. The appellant has furnished sample copy of invoices pertains to their other units also invoices of other manufacturers who also manufactures similar goods and availing exemption under the said notification.

18. I find that the Hon'ble High Court of Gujarat in the case of M/s Ralli Engine Ltd & Anr. [2006 (72) RLT 721-Guj] held that same goods manufactured by different units to be given same treatment and no discrimination can be done against one unit. This decision was followed by the Hon'ble Court of Gujarat in case of M/s Darshan Boardlam Ltd [2013 (287) ELT 401-Guj]. The Hon'ble Court contended that *"the Central Excise is a central levy and, therefore, such a levy has to be collected uniformly from all similarly situated manufacturers located all throughout the country. If Excise authority of a particular Commissionerate or State refuses to allow benefit of exemption to manufacturers located in that Commissionerate or State but other manufacturers located elsewhere are allowed such exemption, then the same would be in violation of Article 14 of the Constitution of India and also of Article 19(1)(g) of the Constitution of India."*

19. In view of above discussion and decision taken by me in case of M/s Big Drum India Pvt Ltd No.AHM-EXCUS-003-APP-0267-17-18 dated 23.03.2018, I allow the appeal filed by the appellant. The appeal filed by the appellant disposed of in above terms.

*उमा शंकर*

(उमा शंकर)  
आयुक्त (अपील्स)

Date: /03/2018

Attested

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

To  
M/s Vadilal Industries Limited,  
Ice Factory Compound, Near Ramakrishna Mill,  
Gomtipur, Ahmedabad

Copy to:

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Principal Commissioner, CGST, Ahmedabad South.
3. The Deputy/Assistant Commissioner, CGST, Division-1, Ahmedabad South
4. The Assistant Commissioner, System-CGST Ahmedabad South
5. Guard File.
6. P.A. File.

