



सत्यमेव जयते

आयुक्त (अपील) का कार्यालय,  
Office of the Commissioner (Appeal),  
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद  
Central GST, Appeal Commissionerate, Ahmedabad  
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.  
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015  
☎ 07926305065- टैलेफैक्स 07926305136



स्पीड पोस्ट

- क फाइल संख्या : File No : V2(76)156/Ahd-South/2019-20/14443 To 14448
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-06-2020-21  
दिनांक Date : 19-04-2020 जारी करने की तारीख Date of Issue 24/06/2020  
आयुक्त (अपील) द्वारा पारित  
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. 04/DC/Div-I/NT/2019-20 दिनांक: 27.09.2019 , issued by  
Deputy Commissioner, Div-I, Central Tax, Ahmedabad-South
- घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent  
Rashmi Enterprise  
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 प्रकिया 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.



(क) 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।

(A) 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.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) 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।

(c) 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.

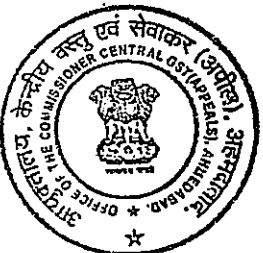
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 2<sup>nd</sup> माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद -380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. 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 filed 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.

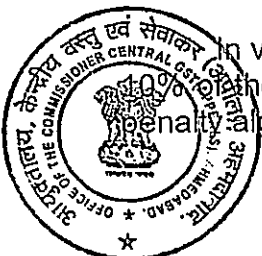
⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

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 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 the duty demanded where duty or duty and penalty are in dispute, or penalty, where alone is in dispute."

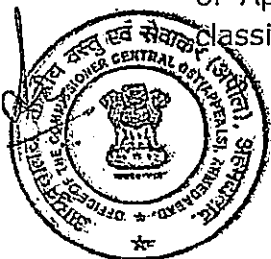
ORDER-IN-APPEAL

This appeal has been filed by M/s Rashmi Enterprise, 39, 40, Plot No.135, 1<sup>st</sup> Floor, Opp Ramdev Estate, NI Municipal Water Tank, Nagarwel Hanuman Road, Sukramnagar, Rakhial, Ahmedbad [new Address-39, 40, Shreeji Industrial Estate, Raipur Mill Compound, Saraspur, Ahmedabad) [hereinafter referred to as "the appellant"] against Order-in-Original No.04/DC/Div-1/NT/2019-20 dated 27.09.2019 [hereinafter referred to as "the impugned order"] passed by the Deputy Commissioner of CGST, Division-I, Ahmedabad South [hereinafter referred to as "the adjudicating authority"].

2. Briefly stated, the facts of the case are that during scrutiny of ER-3/ER-1 returns of the appellant by the department, it was observed that the appellant is engaged in the manufacture of "Ice Cream Cone" and "Cone with Sleeve (Aluminum Foil)" by classifying the goods under chapter heading 19053290 and availing the exemption under Notification No.12/2012-CE (Sr.No.28) dated 17.03.2012 as amended. It was also observed that they were paying Central Excise duty @6% for the said products by availing exemption under Notification supra for the period from April 2016 to June 2017. They also manufactured Sleeve (Aluminum Foil) classified under S.H.No.760413039 and paid duty @12.5% at Tariff Rate. As it was observed that the Notification supra has prescribed duty @6% for "wafer biscuits" and the product manufactured and cleared by the appellant is not "wafer biscuit" but in fact "Ice-cream Cone", it was alleged that they are not eligible for exemption under the notifications supra and liable to pay Central Excise duty @12.5% ad-valorem. Accordingly, a show cause notice dated 26.02.2018 was issued to the appellant for recovery of Central Excise duty amounting to Rs.33,12,586/- being the differential duty on cones cleared along with interest for the relevant period. The said notice also proposed imposition of penalty under Section 11AC of Central Excise Act, 1944 (CEA) on the appellant. The adjudicating authority, vide the impugned order has confirmed the entire allegations by way of confirming the duty demanded along with interest. He also imposed penalty of Rs.16,56,586/- under the provisions of Section 11AC (1c) of the CEA.

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

- [i] The adjudicating authority has not given any findings on the reply given by them and also the judgements relied upon.
- [ii] the appellant was classifying the product under chapter heading 1905 and availing exemption benefit under the Notification supra since taking of Central Excise Registration; that the department has not objected the classification and availment of exemption notification supra except the period of April 2016 to June 2017. Therefore, the department has accepted the Classification and no further duty can be demanded.



- [iii] 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.
- [iv] The adjudicating authority has confirmed the demand along with interest by taking the ground that the department has filed an appeal before the Hon'ble Tribunal against the order M/s Big Drum India Pvt Ltd supra; that the Hon'ble Tribunal has not given any stay on departmental appeal. Therefore, the order of the Commissioner (Appeals) is in force.
- [v] the show cause notice is time barred as it was issued on 26.02.2018 for the period pertaining to April 2016 to June 2017.
- [vi] The case Print-N-Packs, which was not challenged by the Department, is applicable in this case too.

4. Personal hearing in the matter was held on 25.02.2020. Shri N.K.Oza, Advocate, appeared for the hearing and reiterated the submission made in Appeal Memorandum. He further submitted a copy of Final Audit Report No.482 dated 03.11.2015 to impress upon the fact that the department was in knowledge of classification adopted by the appellant and concessional duty paid by them and had not objected. He also submitted a copy of judgment in Print-N-Pack Ltd reported in 2012 (275) ELT 95-Tri. Ahm and stated that the identical case was decided in this case which support the classification adopted by them.

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 [i] as to whether the products manufactured by the appellant is "Ice cream cone with or without foil" as contended by the department or "wafer biscuit" as contended by the appellant; [ii] whether the said product is eligible for exemption under Notification No.12/2012-CE dated 17.03.2012 (Sr.No.28); and [iii] whether the Show Cause Notice barred by limitation.

6. I find that the allegation against the appellant is that the excisable goods manufactured by them and classified under chapter heading 19053290 is not "wafer biscuit cone" but it is a "Ice cream cone"; that therefore, the exemption availed under notification *supra* is not eligible to them as the said Notification give exemption from duty only to the description of goods viz. "wafer biscuits". The demand has occurred because of preliminary scrutiny of ER3/ER1 Returns and pertain to period 2016-17 and 2017-18 (upto June 2017). Accordingly, vide the impugned order, the adjudicating authority has confirmed the short payment of central excise duty amounting to Rs. 33,12,586/ along with interest and also proposed penalty as per provisions of Section 11AC of Central Excise Act, 1944. The appellant vehemently argued that ice-cream cone is also known as "wafer biscuit"



and the department has not disputed the classification of the products in question but only disputed the exemption availed under notifications *supra*.

7. The products classified under chapter 19053290 under CETA, 1985 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 short payment of 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 product is 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 find that the Show Cause Notice as well as 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 *ice-cream cone* and not *wafer biscuit*. Therefore, exemption under the notification *supra* is not available to them. I find 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 arises and the dispute to be decided is



whether the product manufactured by the appellant is falls under "wafer biscuits " as argued by the appellant or "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 Encyclopaedia 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 find 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 the case of M/s Print-N-Pack Pvt Ltd V/s CCE Ahmedabad [2012 (275) ELT 95] and the products "Ice cream cone placed in Aluminum Foil is classified under chapter 19053290.

14.1 In view of above decision, the question regarding whether "ice-cream 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" is classifiable under "waffles and wafers" and "wafer" is a kind of "biscuit".

15. I further find 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 department contended that the product viz. 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". However, the product "Ice cream cone" in question is covered under the category of "wafer" in terms of CET and the Hon'ble High Court and Tribunal, vide their decision supra, has held that Ice cream cone is classifiable under waffles and wafer, and hence it may not be correct to take a view to deny the exemption that the product manufactured by the appellant is not wafer biscuit. In the circumstances, the contention of the adjudicating authority is not legally sustainable.

17. Further, I find that this issue has already been decided by the Commissioner (Appeals), Ahmedabad, vide OIA mentioned above in case of M/s Big Drum Pvt Ltd by allowing the exemption under the Notification supra to the product viz "Ice cream cone/sugar cone". However, the adjudicating authority has not considered the said decision as the department has gone in appeal against the said OIA. However, the said OIA was not stayed till date and there is no decision of higher authority in this regard, I follow the said OIA and hold that the appellant has correctly discharged duty by availing exemption notification 12/2012-CE supra.

18. The appellant has further contended that the Show Cause Notice is time barred as it was issued on 26.02.2018 for the period pertaining to April 2016 to June 2017. As per Provisions of Section 11 A of the Central Excise Act, 1944, with effect from 14.05.2016, the demand is required to be issued within two years from the relevant date. In the instant case demand in question was issued on the basis of scrutiny of ER-3 (quarterly) returns for the Financial Year 2016-17 and ER-1 (monthly) for the year 2017-18. Therefore, relevant date for issuing demand notice is as per Explanation [ii] to the Section ibid which reads as under:

*"in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid and the return has been filed,, the date on which such return has been filed;"*



The due date for filing ER-3 return for the relevant quarter is within 10 days after the close of the quarter to which the return relates. Under the circumstances, the ER-3 return filed by the appellant for the quarter ending April 2016 to June 2016, obviously in the month of June 2016. Under the circumstances, the demand notice question for the relevant period was issued within the time limit prescribed under the Section *ibid*.

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

*Akhilesh Kumar*  
 (Akhilesh Kumar)  
 Commissioner (Appeals)  
 /04/2020



Attested

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

To  
 M/s Rashmi Enterprise,  
 Plot No.135, 1<sup>st</sup> Floor,  
 Opp Ramdev Estate, NI Municipal Water Tank,  
 Nagarwel Hanuman Road, Sukramnagar,  
 Rakhial, Ahmedbad

Copy to:

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