
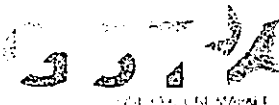


<p>आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क, अहमदाबाद - उत्तर, कस्टम हॉउस, प्रथम तल, नवरंगपुरा, अहमदाबाद- 380009</p>		 <p>OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009</p>
<p>फ़ोन नंबर/ PHONE No.: 079-27544557</p>	<p>फैक्स/ FAX : 079-27544463</p>	<p>E-mail:- oaahmedabad2@gmail.com</p>

निबन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं./F.No. V.19/15-29/OA/2017

आदेश की तारीख/Date of Order: - 28.03.2019

जारी करने की तारीख/Date of Issue :- 30.03.2019

द्वारा पारित/Passed by:-

एँम.एस. चौहान / *M.S.Chauhan*

अपर आयुक्त / *Additional Commissioner*

मूल आदेश संख्या / Order-In-Original No. 10/ADC/2019/MS

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरुद्ध अपील, इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क, केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी, अहमदाबाद 380015-को प्रारूप संख्या इ.ए-1 (E.A.-1) में दाखिल कर सकता है। इस अपील पर रु .2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner (Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.00 only.

इस आदेश के विरुद्ध आयुक्त के शुल्क गये मांगे पहले से करने अपील में (अपील) 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal against this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute. (as per amendment in Section 35F of Central Excise Act, 1944 dated 06.08.2014)

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या इ.ए.-1 में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(3) उक्त अपील की प्रति।

(4) निर्णय की प्रतियाँ अथवा जिस आदेश के विरुद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रु) 2.00 .दो रुपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form EA-1 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(3) Copy of accompanied Appeal.

(4) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.2.00.

विषय: -कारण बताओ सूचना/Show Cause Notice F.No. V.19/15-29/OA/2017 dated 26.12.2017 issued to M/s Print N Pack Pvt. Ltd., Survey No. 147/10, Shed No.1, Sona; Industrial Estate, Sanand-Viramgam Highway, Khoda, Ahmedabad-382110.

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Brief facts of the case:-

M/s Print N Pack Pvt. Ltd., Survey No. 147/10, Shed No.1, Sonal Industrial Estate, Sanand- Viramgam Highway, Khoda, Ahmedabad-382110 (here-in-after referred to as "the said assessee" for the sake of brevity) is engaged in the manufacture of excisable goods falling under Chapter 19 of the first schedule to the Central Excise Tariff Act, 1985 and are holding Central Excise Registration No. AADCP9708JEM004. The said assessee is availing CENVAT Credit facility under the provisions of CENVAT Credit Rules, 2004.

2. During the course of audit of records of the said assessee, it was observed that the said assessee is manufacturing and clearing Sugar Cone and Sugar Cone with Aluminium Sleeves by discharging duty @ 6% adv. After availing the benefit of exemption under Notification No. 12/2012-CE dated 17.03.2012 (Sr. No. 28), which does not appeared to be correct as the said benefit is available only to "Wafer Biscuit". Hence an objection was raised vide procedural para 1 of FAR No. 21/2016-17 dated 19.08.2016 wherein it was observed that the cones manufactured by the said assessee are nothing but ice cream cone solely used by the ice cream industry and not wafer biscuits. Therefore, it appeared that the said assessee is not entitled to avail the benefit of the said notification.

3. The said assessee is manufacturing and clearing the finished goods namely Sugar Cone, Sugar Cone with Foil and Waste and Scrap of Sugar Cone by classifying the same under CETSH No. 19053290 and clearing on payment of duty @ 6% adv. By availing Notification No. 12/2012-CE dated 17.03.2012 (SR. No. 28). The relevant Tariff heading read as under:-

1905	<i>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</i>		
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190532	----- <i>Waffles and wafers:</i>		
	----- <i>Communion Wafer</i>		
19053211	----- <i>Coated with Chocolate or containing Chocolate</i>	<i>Kg</i>	<i>12.5%</i>
19053219	----- <i>Other</i>	<i>Kg</i>	<i>12.5%</i>
19053290	----- <i>Other</i>	<i>Kg</i>	<i>12.5%</i>

CETSH No. 19053290 pertains to items other than 'Communion Wafers' but manufactured out of Wafers.

4. Further, Sr. No. 28 of Notification No, 12/2012-CE dated 17.03.2012 read as under:

28	19053219 19053290	or	Wafer biscuits	6%	-----
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5. From plain reading of the above Sr. No. 28 of Notification No. 12/2012-CE, it appears that only Wafer biscuits falling under CETSH 19053219 or 19053290 are eligible for payment of concessional rate of duty of 6% and not to any other item. The CETSH No. 19053290/19053219 is "Others and to general sub-heading for items other than "Communion Wafers". However, the notification no. 12/2012-CE is very specific and mentioned the "Wafer Biscuits" and not "Others" as mentioned in CETSH No. 19053219/19053290. Thus, it appeared that the products manufactured by the said assessee viz. Sugar Cone, Sugar Cone with foil and Waste and scrap of Sugar Cone is not eligible for the said exemption notification.

6. It appeared that during the period from December 2012 to June 2017, the said assessee has cleared their finished goods viz. Sugar Cone, Sugar Cone with foil and waste and scrap of Sugar Cone, as mentioned in Table-A here below as per the Annexure- A to Show cause Notice.

Table-A

Period	Total assessable Value	Total duty Payable (Rs.)	Total duty paid	Differential duty (Rs.)
December-2012 to June-2017	25,91,61,355/-	3,22,42,813/-	1,57,45,567/-	1,64,97,246/-

7. The Sugar Cones/Sugar cone with Aluminium foil being manufactured by the said assessee are certainly not known as "Wafer Biscuits" in general trade parlance and also have no resemblance to the wafer biscuits sold in the market. Further, the Sugar Cones manufactured by the said assessee are supplied directly only to the Ice Cream manufacturers and not sold in the market as Wafer Biscuits. Thus, it appeared that both the products viz. Sugar Cones and Wafer Biscuits are different.

8. It thus, appeared that the said assessee is classifying their finished goods viz. Sugar Cone, Sugar Cone with foil and waste and scrap of Sugar Cone under CETSH 19053290 and clearing the same on payment of concessional rate duty @ 6% by wrongly availing the benefit of Notification No. 12/2012- CE dated 17.03.2012 (Sr. No. 28).

9. A statement of Shri Ashwinkumar H. Modi, Manager Production of the said assessee was recorded by the Range Superintendent on 05.05.2017 under Section 14 of the Central Excise Act, 1944, which is annexed as Annexure-D to the Show Cause Notice. In his statement, Shri AshwinKumar H. Modi, Manager-Production, stated that-

(i) the products manufactured by them is known in market by different name such as Biscuit Cone, Wafer Biscuit Cone, Sugar Cone, Cornetto, etc.; that the issue of classification of their product is already decided by the Hon'ble Tribunal in their own

case by holding that Sugar Cones which are manufactured by them are to be classified under head of "Waffles and Wafers" i.e. Ch190532.

(ii) the main raw material of the same are Maida, Sugar and vegetable oil and the manufacturing process is that after mixing the inputs in the mixing machine, the finished goods is manufactured by baking the mixture as "Roties" and rolling it in the form of cone.

(iii) the Sugar Cones and Sugar Cones with foil manufactured by them are wafer biscuit in cone shape which is sold directly to different Ice Cream Manufacturers only and not directly supplied in the market and Sugar Cone is consumed with the Ice Cream.

(iv) they mentioned that the said product as "Sugar Cones" in their invoices.

(v) If anyone searches on Google about wafer biscuit, their product would be found there.

10. It appeared that Shri Ashwinkumar Modi in his statement recorded under Section 14 of the Central Excise Act, 1944 wrongly claimed that on searching the "Wafer Biscuits" in Google, their company name will appear. On searching the "Wafer biscuits" manufacturers in Ahmedabad, name of some other dealers appears such as Kisbis Food Industries, Naroda, Ahmedabad, Kizi Foods, Ahmedabad, Kravour Foods, Sarkhej Bavla Road, Ahmedabad, M.R. Food Products, Naroda, Ahmedabad etc. appeared and name of Print N Pack did not appeared. Further, on searching the company of M/s Print N Pack Pvt. Ltd. in Google, the products manufactured by them are shown as "Ice Cream Packaging material, Roller Sugar Cone, Aluminium Foil Cone Sleeves" and nowhere the mention of "Wafer Biscuits" is available. Further, nowhere in the decision of Hon'ble Tribunal in their own case, reported at 2012 (275) ELT, 95 (Tri-Ahmd.), which is related to classification of their product, it is stated that their product is "Wafer biscuit".

11. By mentioning Notification No. 12/2012-CE in their return, they tried to mislead the department by wrongly availing the exemption benefit on Sugar Cone & Sugar Cone with Foil (classifiable under CETSH 19053290), which as per the Notification was available/restricted only to "Wafer Biscuit". By mentioning the wrong notification and serial number they paid concessional rate of duty @ 6% instead of 12.36% / 12.5% full rate of duty, thereby contravening various provisions of Central Excise Rules. It appeared that they have willfully misstated the facts in their ER-1 filed by them as well as during recording the statement and contravened various provisions of Central Excise Rules, hence the short paid duty, is to be recovered from them under the provisions of Section 11A(4) of the Central Excise Act, 1944 by invoking extended period.

12. In view of above, it appeared that the said assessee has cleared the goods in contravention of Notification No. 12/2012-CE dated 17.03.2012 and thereby contravened the provisions of

- Rule 4 of Central Excise Rules, 2002, in as much as the said assessee did not pay the appropriate Central Excise duty which was leviable on the goods so cleared.
- Rule 6 of Central Excise Rules, 2002 in as much as the said assessee failed to assess the Central Excise duty payable on excisable goods.

- Rule 8 Central Excise Rules, 2002 in as much as the payable Central Excise Duty was not paid by the 5th of the following month.
- Rule 11 of Central Excise Rules, 2002 in as much as the duty payable was not correctly shown in the invoices.

13. Thus, it appeared that they willfully mis-stated the facts in the statement recorded under Section 14 of Central Excise Act, 1944, wrongly mentioned Notification No. 12/2012-CE dated 17.03.2012 (Sr. No. 28) in their ER-1 returns and also contravened various provisions of the Central Excise Rules with an intention to evade payment of duty. It further appeared that the said assessee cleared the goods without payment of appropriate duty in contravention of various provisions of Central Excise Rules, 2002 and notifications and hence the same are liable to be confiscated under provisions of Rule 25 of the Central Excise Rules, 2002. Therefore, the extended period is invocable in the case as per Section 11A(4) of the Central Excise Act, 1944.

14. As per Para 6, it appeared that during the period from December 2012 to June 2017, they have cleared Sugar Cones, Sugar Cone with aluminium foil and Waste and scrap of Sugar Cones totally valued at Rs. 25,91,61,355/- on payment of total Central Excise duty of Rs. 1,57,45,667/- (@6% adv.) by wrongly availing the benefit of the Notification No. 12/2012-CE dated 17.03.2012 (Sr. No. 28), resulting into short payment of Central Excise duty to the tune of Rs. 1,64,94,246/-, as per Annexure-A to the Show Cause Notice, which is to be required to be demanded under Section 11A(4) of Central Excise Act, 1944. Interest on the duty not paid is also required to be recovered under Section 11AB/11AA of the Central Excise Act, 1944.

15. It further appeared that since the excisable goods were cleared without payment of appropriate duty by the said assessee in violation of the Central Excise Act, 1944 and rules framed thereunder, the said assessee has rendered themselves liable for penalty in terms of Rule 25 of the Central Excise Rules, 2002 read with Section 11AC (1) (c) of Central Excise Act, 1944.

16. As per instruction dated 21.12.2015 of Member (L&J/IT), CBEC, a pre show cause notice consultation was accorded on 18.11.2017, however the assessee did not appear.

17. Therefore, M/s Print N Pack Pvt. Ltd., Survey No. 147/10, Shed No.1, Sonal Industrial Estate, Sanand- Viramgam Highway, Khoda, Ahmedabad-382110, were called upon to Show Cause, as to why:-

(i) Central Excise duty amounting to Rs. 1,64,97,246/- (BED Rs. 1,63,01,359/-+ ECess Rs. 1,30,591/-+ SHEC Rs. 65,296/-), as per Annexure- A, on clearance made availing benefit of exemption Notification No. 12/2012-CE dated 17.3.2012 (Sr. No. 28) for the period December 2012 to June 2017, should not be demanded and recovered under the provisions of Section 11A(4) of the Central Excise Act, 1944 by invoking the extended period of five years;

(ii) Interest should not be charged & recovered on duty mentioned hereinabove under Section 11AB/11AA of Central Excise Act, 1944, as applicable during relevant period;

(iii) Penalty Should not be imposed under Rule 25 of the Central Excise Rules read with Section 11AC(1) of the Central Excise Act, 1944.

Written Submission:-

18. Advocate, Shri Nirav P. Shah, on behalf of the assessee submitted their written submission on 22.01.2019, as under:-

1. The aforesaid notice is issued on the basis of audit of statutory records maintained by my clients. It is observed in the notice that my clients have wrongly availed benefit of entry no.28 of notification No. 12/2012 dated 17.3.2012 on Sugar Cones being manufactured by them. It is observed that Sr. No.28 of the Notification grants exemption to wafer biscuits and the sugar cones manufactured by my clients are not wafer biscuits and accordingly, the exemption is wrongly availed and have sought the same to be denied vide the notice. The notice also proposes interest and penalty for violation of provisions of Central Excise Act.

2. Further, the demand is issued for extended period. It is submitted that the entire demand is worked out on the basis of audit of records maintained by my clients. The period involved in the show cause notice is from Dec. 2012 to June 2017. My clients have been registered with the department since long and have been filing their monthly returns regularly with the department. Hence, entire facts of the case were in the knowledge of the department. Hence, the exemption is claimed under intimation to the department and nothing is hidden or suppressed from the department. As a matter of fact, my clients had been issued various show cause notices for earlier period for classification of sugar cone inserted into aluminum sleeve foils. My clients manufacture aluminum sleeve foils falling under Ch. 76 as well as sugar cones falling under Ch. 1905. The department had never disputed aforesaid two classifications. However, whenever the sugar cones were inserted into aluminum foils, a dispute was raised pertaining to classification of product. The departmental view was that the same is classifiable under Ch. 76 and not under Ch. 1905 as claimed by my clients. In the aforesaid litigation, the Hon'ble Tribunal held in favour of my clients and ratified the stand taken by my clients that sugar cone inserted into aluminum foils are classifiable under Ch.1905. Hence, department is well aware of the product being manufactured by my clients. Even at the relevant point of time while issuance of notice for classification of rolled sugar cone inserted into Aluminum sleeves no dispute was ever raised regarding classification of Sugar Cones cleared independently without being inserted into Aluminum Foil. The same were classified under 1905 3290 and no dispute was ever raised. In such facts, it is submitted that the department is well aware of production and clearance of Sugar Cones in my client's factory and the dispute pertaining to wrong availment of exemption is hopelessly barred by limitation. A copy of order of the Tribunal in my client's own case is annexed hereto and marked as "Annexure - A".

3. It is also submitted that the entire show cause notice is issued without considering the Tariff entries, exemption notification and product itself. It is submitted that the

notification grants exemption to wafer biscuits falling under 19053219 or 19053290. The classification of the product manufactured by my clients are not disputed by the department. Hence, as far as the product is concerned, the same is classifiable under the Major Head "Waffles and Wafers" falling under Ch. 1905 32 of the Central Excise Tariff. Hence the product manufactured and classified under 1905 3211, 1905 3219 or 1905 3290 is a subset of "Waffles and Wafers". The aforesaid classification is also confirmed by the Hon'ble Tribunal in my client's own case. In such facts, as far as product is concerned, the same is nothing but "Waffles and Wafers". Now once this classification is not disputed, the benefit of exemption cannot be denied.

4. It is submitted that Biscuit Cone, Wafer Biscuit cone, sugar cone, ice cream cone, Cornetto etc are different names of wafer biscuits. The products manufactured by my clients are nothing but wafer biscuits and hence, the exemption is correctly availed. Even the authorized signatory while giving his statement dated 5.5.2017, has specifically stated that the product manufactured is known in market by different names such as biscuit cone, wafer biscuit cone, sugar cone, cornetto, etc. The product manufactured is biscuit which is in cone shape and having thickness of wafer. Hence, the product is known in the market as wafer biscuit cone. He has further stated that if one searches on Google about wafer biscuit, the sugar cone manufactured by them will be found. Hence, as per the trade parlance, the sugar cone manufactured by my clients is nothing but wafer biscuit. Hence, it is submitted that the product manufactured by my clients is wafer biscuit as per trade parlance also and they had correctly availed benefit of exemption notification.

5. It is observed in the notice that the product is solely used by ice cream industry and not wafer biscuits. In this regard for the purpose of classification it is not relevant as to who uses the product. Whether used by industry or consumer, the nature of product is not going to alter. Hence the observation made in audit para itself is devoid of merits. Again one has to satisfy whether the product is biscuit or not. It is submitted that the consumer, all across the world consider the product as biscuits only eaten along with ice cream. Hence the notice denying exemption is devoid of merits and requires to be dropped.

6. The issue pertaining to classification of sugar cone is no longer disputed and is settled by the Hon'ble Supreme Court in the case of M/s. Magic Product wherein it is held that ice cream cones are classifiable under the main head of Waffles and Wafers of Ch. 1905. A copy of Judgment of the Apex Court is annexed hereto and marked as "Annexure-B". Hence, ice cream cones / sugar cones are nothing but waffles and wafers. Further, the product ice cream cone is a biscuit only, which is eaten along with ice cream. Hence, the product is nothing but wafer biscuit and accordingly, the exemption is correctly availed. It is also submitted that Learned Commissioner (Appeal), Ahmedabad has also relied upon above Judgments and have set aside the OIO in the matter of M/s Big- Drums India P Ltd. A copy of order is annexed hereto and marked as "Annexure-C". Hence the order of the appellate authority is directly binding and accordingly the notice is required to be dropped.

7. Even otherwise, the department has to substantiate their demand with positive evidences why the product cannot be considered as wafer biscuits. The notice has miserably failed to provide any supportive facts or evidences in this regard. Hence also the demand is not sustainable and requires to be dropped. Hence it is submitted that the demand is not sustainable on merits and limitation.

Personal Hearing:-

19. Personal Hearing opportunities have been granted on 28.12.2018 and 22.01.2019. Shri Nirav P. Shah, advocate on behalf of the assessee appeared before me for the personal hearing on 22.1.2019. He reiterated the submission made at the time of hearing. He requested to rely upon the latest order of the Commissioner (Appeals) in the case of M/s Big drums India Pvt. Ltd.

Discussion and Findings:-

20. I have carefully gone through the contents of the instant SCN and the defence submissions made by the noticee at the time of personal hearing.

21. The issue to be decided in the present case is whether the noticee had wrongly availed the benefit of exemption under Notification No. 12/2012-C.E. dated 17.03.2012 (Sr. No. 28) as amended, for their product "Sugar Cone, Sugar Cone with Foil and Waste and Scrap of Sugar Cone" manufactured and cleared during the period of December 2012 to June 2017 or otherwise.

22. For ease of reference the contents of the impugned notification is reproduced as follows:-

Notification No. 12/2012 CE dated 17.03.2012 which came in force w.e.f. 17.03.2012 and the contents of same are reproduce below:-

"Notification No. 12 /2012-Central Excise

G.S.R. (E).-In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944) and in supersession of (i) notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 3/2005-Central Excise, dated the 24th February,2005 , published in the Gazette of India, Extraordinary, Part II, Section 3, Subsection (i), vide number G.S.R 95(E), dated the 24th February,2005,(ii) notification No. 3/2006- Central Excise, dated the 1st March,2006, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 93 (E), dated the 1 st March,2006,(iii) notification No. 4/2006-Central Excise, dated the 1 st March,2006 , published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 94 (E) dated the 1 st March,2006,(iv) notification No. 5/2006-Central Excise, dated the 1st March,2006 , published in the Gazette of India, Extraordinary Part II, Section 3, Sub-section (i), vide number G.S.R 95 (E) dated the 1st March,2006,(v) notification No. 6/2006-Central Excise, dated the 1 st

March, 2006, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 96 (E) dated the 1st March, 2006, and (vi) notification No. 10/2006-Central Excise, dated the 1st March, 2006, published in the Gazette of India, Extraordinary, Part II, Section 3, Subsection (i), vide number G.S.R 100 (E) dated the 1st March, 2006, except as respects things done or omitted to be done before such supersession, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the excisable goods of the description specified in column (3) of the Table below read with relevant List appended hereto and falling within the Chapter, heading or sub-heading or tariff item of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the Excise Tariff Act), as are given in the corresponding entry in column (2) of the said Table, from so much of the duty of excise specified thereon under the First Schedule to the Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table and subject to the relevant conditions annexed to this notification, if any, specified in the corresponding entry in column (5) of the Table aforesaid: Provided that nothing contained in this notification shall apply to the goods specified against serial number 296 and 297 of the said Table after the 31st day of March, 2013. Explanation 1.- For the purposes of this notification, the rates specified in column (4) of the said Table are ad valorem rates, unless otherwise specified. Explanation 2.- For the purposes of this notification, —brand name means a brand name, whether registered or not, that is to say, a name or a mark, such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to a product, for the purpose of indicating, or so as to indicate, a connection in the course of trade between the product and a person using such name or mark with or without any indication of the identity of that person.

Table

Sr. No	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition
28	19053219 or 19053290	Wafer biscuits	6%	-----

23. The undisputed fact with regards to the notification reproduced supra is that exemption therein is available to "Wafer biscuits".

24. The main allegation in the instant SCN against the noticee is that they had manufactured and cleared their finished goods namely Sugar Cone, Sugar Cone with

Foil and Waste and Scrap of Sugar Cone by classifying the same under CETSH No. 19053290 for taking benefit of the Notification No. 12/2012-CE dated 17.03.2012 (SR. No. 28), however, as per the said notification duty benefit is for "Wafer biscuits" and not for Sugar cone, Sugar cone with foil and Waste & Scrap of Sugar cone.

25. In the instant SCN it has also been alleged that the product namely Sugar Cone, Sugar Cone with Foil and Waste & Scrap of Sugar Cone are mainly used in Ice Cream industry and not in manufacturing of Wafer biscuits. It has also been alleged in the SCN that Sugar Cone, Sugar Cone with Aluminium foil and Waste & Scrap of Sugar Cone are certainly not known as "Wafer biscuit" in general trade parlance and also have no resemblance to the wafer biscuits sold in the market. It has also been alleged that Sugar Cone manufactured by the said assessee are supplied directly only to the Ice Cream manufacturers and not sold in the market as Wafer biscuits. However, the noticee in their defence reply has submitted that Biscuit cone, Wafer Biscuit Cone, Sugar Cone, Ice Cream cone, Corentto etc are different names of wafer biscuits. They have also submitted that the products made by them are nothing but wafer biscuits and hence, the exemption is correctly availed.

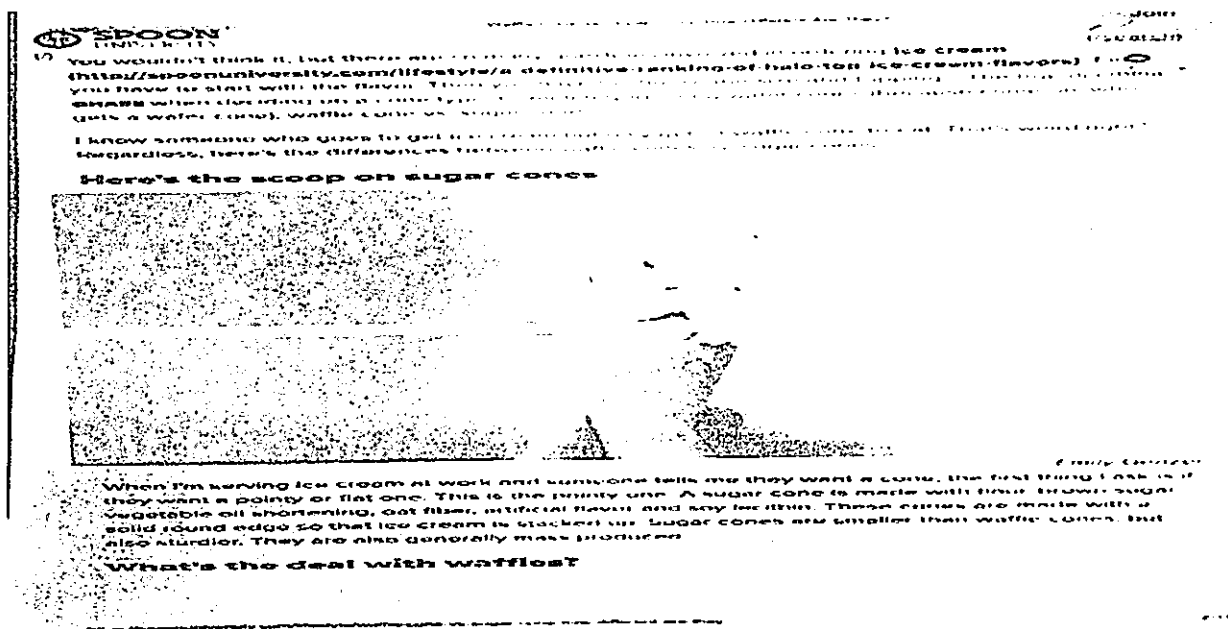
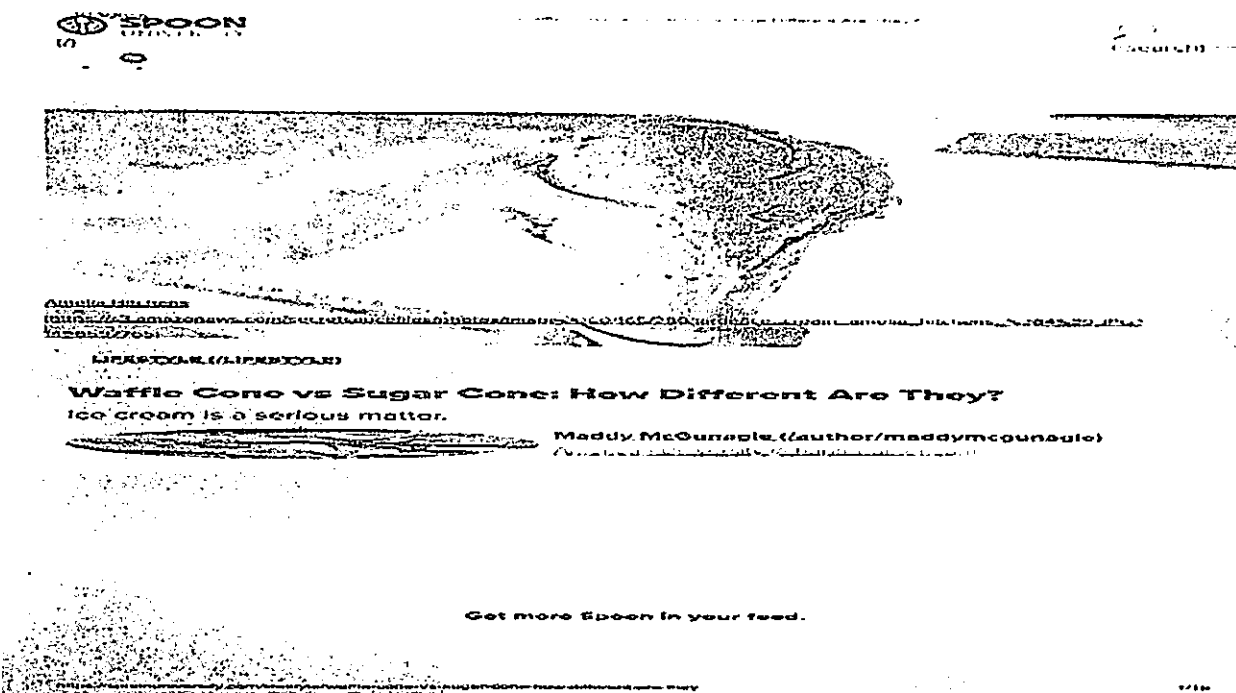
25.1 I also find that Shri Ashwinkumar H. Modi, Production Manager and Authorized signatory of the noticee in his statement dated 05.05.2017 has stated that the products manufactured by them is known in market by different names such as biscuit cone, wafer biscuit cone, Sugar cone, cornetto etc.; the product manufactured is biscuit which is in cone shape and having thickness of wafer; Hence, the same is known in the market as wafer biscuit cone; the main raw material for manufacturing of the sugar cone are Maida, Sugar and vegetable oil; Sugar cone manufactured by them are supplied to different Ice Cream manufacturers such as Vadilal, Amul, Havmor etc; Sugar cone is a wafer biscuit in cone shape which is sold directly to the industrial consumer by them; they are showing Sugar Cone not wafer biscuit in their invoices.

26. In reference to the instant case the noticee relied upon the judgment in the case of *Pint -N-Pack Pvt. Ltd. vs. Commissioner of Central Excise, Ahmedabad [2012(275)E.L.T. 95(Tri- Ahmd.)]*; *Magic Products vs. Commissioner of Central Excise, Hyderabad [1998(98) E.L.T. A206 (S.C.)]*. I have carefully gone through the judgments of above cited cases and found that in the instant case there is no dispute regarding classification of the product. However, in the instant case I have to decide whether manufacturing and clearance of Sugar cone are eligible for benefit of exemption under Notification No. 12/2012-CE dated 17.03.2012 (SR. No. 28) or otherwise.

26.1 Noticee has also relied upon the Order-In-Appeal bearing No. AHM-EXCUS-003-APP-0267-17-18 dated 23.03.2018 of Ld. Commissioner (Appeal) in the matter of M/s Big Drum India Pvt. Ltd. I have carefully gone through the case detail and have found that in the matter of *M/s Big Drum India Pvt. Ltd.* was the case of mis-

declaration wherein the noticee declared their product as "Wafer Biscuit Cone" but department has contested that the product is not "Wafer Biscuit Cone", whereas in the instant case the noticee declared their product as "Sugar Cone". Hence, the instant case is not squarely applicable to case of M/s Big Drum India Pvt. Ltd.

27. In this reference to know whether Sugar Cone and Wafer Cone/Wafer biscuit are same or otherwise, I have gone through the internet and from the website viz. [https:// spoonuniversity.com](https://spoonuniversity.com) and [https:// huffingtonpost.in](https://huffingtonpost.in), I find that Sugar Cone and waffle cones look very similar. They both have the "waffled" marks. They both come in that lovely golden hue that's the sign of a well- backed pastry. They both crunch nicely when bitten into. But the two cones aren't exactly equal. A sugar cone is made with flour, brown sugar, vegetable oil shortening, oat fiber, artificial flavor and soy lecithin but waffle cones are made with flour, salt, eggs, sugar, butter and milk. Waffle cones contain more sugar than Sugar Cone. Waffle cones are more fragile than Sugar Cones. Relevant pages showing the details are reproduced below for reference purpose:-



It is undisputed fact that the wafer biscuits and Sugar Cones are separate & distinct products known in the market. Generally, the wafer biscuits are meant for direct consumption by the end user, whereas the Sugar Cones are used as an edible container for ice-creams. No doubt, the sugar cones are also consumed by the consumer, but it is consumed along with the ice-cream. Even if there are stray exceptional instances where the sugar cones are consumed without ice cream it is not known in the market as wafer biscuits. No seller sells sugar cones as wafer biscuits in the market for retail consumption.

28. From the above para 27, I find that composition as well as the properties of Sugar Cone and Wafer Cone/Wafer Biscuit is not same. I also find that Notification No. 12/2012-CE gives exemption to wafer biscuits only not to sugar Cones. Had the wafer biscuits & sugar cones were the same product, the notification would not have specified the product "Wafer Biscuit" and would have mentioned as "All goods" against the heading/sub heading no.

28.1. It is well settled principle of law that an exemption Notification has to be interpreted strictly and in case of any doubt, the benefit of the same should go the Revenue and not the assessee. The Hon'ble Supreme Court in the case of *M/s Star Industries reported at [2015 (324) E.L.T. 656 (S.C.)]* held that

" 31--- it is rightly argued by the learned senior counsel for Revenue that exemption notifications are to be constructed strictly and even if there is some doubt, benefit thereof shall not ensure to the assessee but would be given to the Revenue. This principle of strict construction of exemption notification is now deeply ingrained in various judgments of this Court taking this view consistently."

28.2 Hence, the claim of noticee that products made by them are nothing but wafer biscuits is not sustainable. Hence, I find that duty exemption benefit under Notification No. 12/2012-CE dated 17.03.2012 (Sr. No. 28) claimed by the noticee is not proper and legal as such benefit has been granted on the Product namely "Wafer Biscuit" not on the products viz. Sugar Cone, Sugar cone with aluminium sleeves etc are being manufactured and cleared by the noticee. Therefore, I find that demand of Central Excise Duty of Rs. 1,64,97,246/- raised in the SCN is correct.

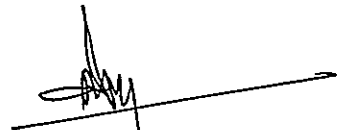
29. In the instant case I also find that in the era of self assessment the assessee is sole responsible for payment of correct amount of Central Excise duty , however the noticee has willfully mis-stated the facts for wrongly taking benefit of the notification with an intention to evade payment of duty. I also find that since the noticee has cleared the goods without payment of appropriate Central Excise duty in violation of the Central Excise Act, 1944 and rules framed there under, they rendered themselves liable for penalty in terms of Rule 25 of the Central Excise Rules, 2002 read with Section 11AC(1)(c) of the Central Excise Act, 1944. Hence, penalty proposed under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC (1) (c) of the Central Excise Act, 1944, in the instant SCN is legal, proper and sustainable.

30. In view of above discussion and findings, I pass the following orders:-

Order

- (i) I confirm the demand for recovery of Central Excise Duty amounting to Rs.1,64,97,246/- (Rs. One Crore Sixty Four Lacs Ninety Seven Thousands Two Hundreds and Forty Six Only) on clearances made availing benefit of exemption Notification No. 12/2012-CE dated 17.03.2012 (Sr. No. 28) for the period December 2012 to June-2017, under Section 11A (10) of the Central Excise Act, 1944.
- (ii) I confirm the levy of interest on the demand confirmed in (i) above under Section 11AA of the Central Excise Act, 1944.
- (iii) I impose penalty of Rs. 1,64,97,246/- (Rs. One Crore Sixty Four Lacs Ninety Seven Thousands Two Hundreds and Forty Six Only) under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC (1) (a) of the Central Excise Act, 1944, for the period prior to 14.05.2015 and Section 11AC (1) (c) of Central Excise Act, 1944 post 14.05.2015.
- (iv) In terms of Section 11AC(1) (c) pre 14.05.2015 and Section 11AC (1) (e) post 14.05.2015, the penalty imposed herein shall be reduced to 25% of penalty, if duty, interest and penalty is paid within 30 days from the date of communication of this order, subject to the condition that such reduced penalty is also paid within the period so specified.

31. SCN F. No. V.19/15-29/OA/2017 dated 26.12.2017 is disposed of in the above terms.


(Mahavir Singh Chauhan)
Additional Commissioner
CGST, Ahmedabad North

F. No. V.19/15-29/OA/2017

Date- 28.03.2019

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- (2) The Dy/Asst. Commissioner, CGST, Division-III, Ahmedabad North
- (3) The Superintendent, CGST, AR-IV, Division-III, Ahmedabad North

✓ (4) Guard File.

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