

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

Excise Appeal No. 50720 of 2020

(Arising out of order-in-original No. 21-45/Pr.Commr/C.Ex/GWL-II/2019 dated 12.12.2019 passed by the Principal Commissioner, CGST & Central Excise, Bhopal).

M/s. Mondelez India Foods Pvt. Ltd.,
(Formerly M/s. Cadbury India Ltd.,)
25, Industrial Area, Malanpur,
Distt - Bhind, (Madhya Pradesh)

...Appellant

VERSUS

**The Commissioner of CGST &
Central Excise**
35-C, GST Bhawan, Arera Hills,
Jail Road, Bhopal, (M.P.) - 462011.

...Respondent

APPEARANCE:

Shri V. Lakshmikumaran, Ms. Sukriti Das and Ms. Mehak Mehra, Advocates for the Appellant

Shri Sanjay Jain, Special Counsel for the Department and Bhagwat Dayal, Authorized Representative for the Department

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

**Date of Hearing: 18.03.2025
Date of Decision: 24.06.2025**

FINAL ORDER No. 50918/2025

JUSTICE DILIP GUPTA:

M/s. Mondelez India Foods Pvt. Ltd.¹ has filed this appeal to assail the order dated 12.12.2019 passed by the Principal Commissioner, CGST and Central Excise, Bhopal² by which the demand of central excise duty proposed under twenty five show cause notices has been confirmed and ordered to be recovered with interest. Penalty has also been imposed on the appellant.

-
- 1. the appellant
2. the Principal Commissioner**

2. The issue involved in this appeal is whether Perk, ULTA Perk, Perk Poppers and Wafer Uncoated Reject³ manufactured by the appellant are classifiable under Excise Tariff Item⁴ 1905 32 11 of the Central Excise Tariff Act, 1985⁵ as claimed by department, or under ETI 1905 32 90 as claimed by the appellant.

3. The appellant claims to be engaged in the manufacture of various food preparations containing cocoa, classifiable under Chapters 18 and 19 of the First Schedule to the Excise Tariff. According to the appellant, the manufactured Products are classifiable under ETI 1905 32 90 with duty @ rate of 16%/12.5% during the relevant period. Serial No. 19 of Notification No. 3/2006-CE dated 01.03.2006 (for period upto March 2012) and Serial No. 28 of Notification No. 12/2012-CE dated 17.03.2012 (for period from March 2012)⁶ prescribed reduced rate of duty of 8%⁷ on '**Wafer Biscuits**' classified under ETI 1905 32 90. The appellant cleared the Products at the reduced rate of duty claiming classification under ETI 1905 32 90 and benefit of the Exemption Notification. One more intermediate product, namely, Real Milk Chocolate was classified by the appellant under ETI 1806 31 00 and was stock transferred on duty payment @ 12.5% without availing the benefit of the Exemption Notification.

4. On scrutiny of the ER-1 returns of the appellant, the department formed a view that the Products manufactured by the appellant are classifiable under ETI 1905 32 11 instead of ETI 1905 32 90. Accordingly, 25 periodical show cause notices were issued to the

3. the Products

4. ETI

5. the Excise Tariff

6. the Exemption Notification

7. Changed to 4% w.e.f. 07.12.2008, 5% w.e.f. 01.03.2011 and 6% w.e.f. 17.03.2012

appellant for the period from November 2006 to July 2017 alleging that the Products manufactured by the appellant deserve classification under ETI 1905 3211 and would, therefore, not be eligible for reduced rate of duty under the Exemption Notification.

5. The appellant filed a reply to the show cause notices and denied the allegations.

6. The Principal Commissioner, by the impugned order dated 12.12.2019, rejected the submissions of the appellant and confirmed the demand of differential excise duty with interest and penalty. The main reasons given by the Principal Commissioner are as follows:

"33. On perusal of the aforesaid submissions of the noticee, it appears that noticee's main contention that their product is wafer and not communion wafer, thus the same is classifiable under 19053290 under other wafers category. The sub heading 19053211 covers only Communion wafer coated with chocolate or containing chocolate and 19053219 covers other communion wafer. **From the above, one thing is clear that the product of the noticee is 'Wafer'. Now next question arises, whether the same is chocolate coated or containing chocolate,** I would like to go through the details of ingredients contained in Ulta Perk and Perk. As per noticee's declaration on the wrapper, Ulta Perk contains 'Sugar, edible vegetable oil, milk solids, wheat flour, cocoa solids, Hydrogenated vegetable oil, cashew nuts, starch, emulsifiers (442, 476, 322), stabilisers (414, 407) salts, raising agents (500, 503) caramel (150C) and colours (102, 110, 122, 133) whereas their other product "Perk", which they have earlier classified under 19053211 now under 19053290 contains sugar, cocoa butter, Milk solids, Cocoa solids, emulsifiers (442, 476)] wheat flour, hydrogenated vegetable oils, starch, emulsifiers (476, 442, 322), edible vegetable oil, caramel (150C), salt and raising agents (500, 503). **On perusal of the above, it is evident that most of the ingredients are same in Perk and Ulta Perk. The**

only difference between these products are, in Perk, wafer is coated/ dipped in chocolate and in Ulta Perk, chocolate is sandwiched in between wafers. I find that noticee has also not disputed this aspect i.e. both the product contain wafers and chocolate.

XXXXXXXXXXXX

35. I find that noticee has grossly erred in understanding the classifications of the products reflected under Chapter sub heading 1905.32, as reproduced in previous para. **Chapter Sub heading 1905.32 covers "waffles and wafers" and "Communion Wafer" without any tariff entry. Furthermore the sub heading 190532 have been further sub divided into 19053211, which refers coated with chocolate or containing chocolate.** It is also noteworthy that the sub heading are differentiated with "-", "--" "---" and "----". **From the clarification given above in the general explanatory notes, it is clear that the where the description of an article or group of articles preceded by "---" or "----", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-" or "--". It means the Communion Water which is having "---" and the subheading 19053211 containing "----" i.e. coated with chocolate or containing chocolate both are sub headings of "waffles and wafers" being immediately preceding description of the articles having "--". Thus, it is clear that the reference made to 19053211 i.e. coated with chocolate or containing chocolate is in relation to Waffles and Wafers. Therefore, the conclusion drawn by the noticee that sub heading 19053211 covers only Communion Wafer Coated with chocolate or containing chocolate is completely misplaced and liable to be rejected. In view of the fact that their product Ulta Perk and Perk contains wafer and chocolate, they are more appropriately classifiable under 19053211 (being specific**

classification of the said product) instead of 19053290 (being general classification).

36. My view has been further strengthened by the decision of Hon'ble CESTAT in the case of M/s. Dukesh Consumer Care Ltd. vs. Commr of Customs, Hyderabad IV reported in 2018 (364) E.L.T. 116 (Tri.-Hyd.). While deciding a similar issue, the Hon'ble CESTAT has discussed the issue at length and held that, wafer containing chocolates fall under 19053211.

XXXXXXXXXXXX

37. In the present case also, the noticee has never disputed that they are selling wafers. Their product Perk is wafer coated with chocolate and the other product Ulta Perk is wafer sandwiched with chocolate (wafer containing chocolate). The noticee has disputed only the classification of the products referred above and submitted that their product would fall under 19053290 as there is no other entry for wafer. They also contended that the sub headings 1905 32 11 and 1903219 is for communion wafer coated with chocolate or containing chocolate and for other communion wafers respectively and not for wafer, which is their product. **However, the explanatory notes, as detailed above, explained as to how the classification of the products has to be read and further the decision of Hon'ble CESTAT in the case of Dukes Consumer Care Ltd. has further clarified that the product wafer coated with chocolate or containing chocolate has to be classified under 19053211. Thus, in light of the explanatory notes and judicial pronouncement on the issue, I hold that the products namely "Ulta Perk, Perk, Perk Poppers, RMC, wafer uncoated reject" are classifiable under Chapter sub heading 19053211. Held accordingly.**

XXXXXXXXXXXX

39. On perusal of the definitions of "Waffles & Wafers" and "Communion Wafer" given in HSN, I find that under waffles and wafers, it has been stated that "Waffles may also be chocolate

covered and Wafer are products similar to waffles. It means wafers may also be chocolate covered. However as regards Communion Wafer, no such possibility of chocolate coating is reflected. Thus the law is very clear that wherever coated with chocolate or containing chocolate is narrated in the Central Excise Tariff under 19053211, it is specifically and only related to Waffles and Wafers and not to Communion Wafer. In light of the aforesaid definitions given in HSN also, the contention of the noticee that 19053211 and 19053219 is related to Communion Wafer only, seems to be incorrect and liable to be rejected.

40. xxxxxxxxxx. The flow chart makes it very clear that their products Perk contains Wafer and Chocolate along with other ingredients. The chapter sub heading 190532 covers Waffles and Wafers. As the wafer is coated with chocolate, the same is classifiable under 19053211, as discussed in aforesaid paras.

41. As regards noticee's contention that Perk is a wafer biscuit and not a chocolate, I find that department has also not disputed this aspect, if it is so, the said product would have been classified under 18.06 and not under 1905.32, which is not the case here."

(emphasis supplied)

7. It needs to be noted that the show cause notices and the impugned order include Real Milk Chocolate in the list of Products wrongly classified. However, the demand quantified in the impugned order does not include any demand for Real Milk Chocolate, as it had been cleared at full rate of duty without availing the benefit of the Exemption Notification.

8. The issue involved in this appeal is whether the Products are classifiable under ETI 1905 32 11 as claimed by department, or under ETI 1905 32 90 as claimed by the appellant.

9. To appreciate the issue involved in this appeal, it will be useful to reproduce the relevant portion of Chapter 19 of the First Schedule to the Excise Tariff. The two competing Excise Tariff Items have been marked in bold. It is as follows:

Chapter 19
Preparations of Cereals, Flour, Starch or Milk;
Pastrycooks’ products

Tariff Item	Description of goods		Unit	Rate of duty#
(1)	(2)		(3)	(4)
xxxxxxxxxx				
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 10 00	-	Crispbread	Kg.	Nil
1905 20 00	-	Gingerbread and the like	Kg.	Nil
	-	Sweet biscuits; waffles and wafers;		
1905 31 00	--	Sweet biscuits	Kg.	16%
1905 32	--	Waffles and wafers:		
	---	Communion wafers:		
1905 32 11	----	Coated with chocolate or containing chocolate	Kg.	16%
1905 32 19	----	Other	Kg.	16%
1905 32 90	---	Other	Kg.	16%
1905 40 00	-	Rusks, toasted bread and similar toasted products	Kg.	Nil
1905 90	-	Other:		
1905 90 10	---	Pastries and cakes	Kg.	16%
1905 90 20	---	Biscuits not elsewhere specified or included	Kg.	16%
1905 90 30	---	Extruded or expanded products, savoury or salted	Kg.	Nil
1905 90 40	---	Papad	Kg.	Nil
1905 90 90	---	Other	Kg.	Nil

10. It would also be relevant to refer to the General Explanatory Notes contained in the General Rules for the Interpretation of First Schedule and they are as follows:

General Rules for the Interpretation of First Schedule

XXXXXXXXXX

General Explanatory Notes

1. Where in column (2) of this Schedule, the description of an article or group of articles under a heading is preceded by "-", the said article or group of articles shall be taken to be a sub-classification of the article or group of articles covered by the said heading. Where, however, the description of an article or group of articles is preceded by "--", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-". Where the description of an article or group of articles is preceded by "---" or "----", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-" or "--".

2. XXXXXXXXXXXX

Additional Notes

In this Schedule,-

(1) (a) "heading", in respect of goods, means a description in list of tariff provisions accompanied by a four-digit number and includes all sub-headings of tariff items the first four-digits of which correspond to that number;

(b) "sub-heading", in respect of goods, means a description in the list of tariff provisions accompanied by a six-digit number and includes all tariff items the first six-digits of which correspond to that number;

(c) "tariff item" means a description of goods in the list of tariff provisions accompanying either

eight-digit number and the rate of the duty of excise or eight-digit number with blank in the column of the rate of duty;

(2) the list of tariff provisions is divided into Sections, Chapters and Sub-Chapters;

(3) in column (3), the standard unit of quantity is specified for each tariff item to facilitate the collection, comparison and analysis of trade statistics.

11. The relevant portions of the HSN Explanatory Notes for Chapter 19 are reproduced below:

Relevant portion of HSN Explanatory Notes for Chapter 19

19.05 – xxxxxxxxxxxxxx

(A) **Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa.**

xxxxxxxxxxxx

The heading includes the following products:

1 to 8. xxxxxxxxxxxxxx

(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). Waffles may also be chocolate covered. Wafers are products similar to waffles.

xxxxxxxxxxxx

(B) Communion wafers, empty cachets of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products.

This heading covers a number of products made from flour or starch pastes, generally baked in the form of discs or sheets. They are used for various purposes.

Communion wafers are thin discs made by cooking very pure wheat flour paste between iron plates.

12. The Exemption Notification dated 01.03.2006 was issued in exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944. It provides that the Central Government, on being satisfied that it is necessary in the public interest so to do exempts excisable goods of the description specified in column (3) of the Table from so much of the duty of excise specified thereon under the First Schedule to the Excise Tariff, 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, if any, specified in the corresponding entry in column (5) of the Table. The relevant portion of said Table making reference to ETI 1905 32 19 or ETI 1905 32 90 is reproduced below:

Effective Rates of duty for Goods of Various Chapters

"The Central Government, on being satisfied that it is necessary in the necessary in the public interest so to do, **hererby exempts excisable goods of the description specified in column (3) of the Table below and falling within the Chapter, heading or sub-heading or tariff item of the First Schedule to the Central Excise Tariff Act, 1985. xxxxxxxxxx** from so much of the duty of excise specified thereon under the First Schedule to the Central

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, if any, specified in the corresponding entry in column (5) of the Table aforesaid.

S.No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
(1)	(2)	(3)	(4)	(5)
xxxxxxxxxxxxx				
19.	1905 32 19 or 1905 32 90	Wafer biscuits	8%	-

(emphasis supplied)

13. It would be seen that both ETI 1905 32 11 and ETI 1905 32 90 have 16% as the rate of duty under the Excise Tariff but the rate of duty for ETI 1905 32 19 or ETI 1905 3290 has been reduced to 8% by the Exemption Notification dated 01.03.2006.

14. In terms of Exemption Notification dated 17.03.2012, effective for the period from March 2012, the duty for ETI 1905 32 19 or ETI 1905 32 90 has been reduced to 6%.

15. Shri V. Lakshmikumaran, learned counsel for the appellant assisted by Ms. Sukriti Das and Ms. Mehak Mehra made the following submissions:

- (i) ETI 1905 32 11 only covers 'communion wafers' and does not include the Products of the appellant. Since the Products of the appellant are different from 'communion wafers', they cannot be classified under ETI 1905 32 11. In this connection reliance

has been placed upon a decision of the Tribunal in

Pepsico Holdings Pvt. Ltd. vs. CCE Pune -III⁸;

- (ii) For a product to qualify as 'coated with chocolate or containing chocolate' under ETI 1905 32 11, the product must conform to the description of 'communion wafers ', which is not the case with Products of the appellant as they neither have characteristics of 'communion wafers' nor are they used in church for eucharist purpose. Thus, the claim of the department that the Products of the appellant should be classified under ETI 1905 32 11 is unsustainable;
- (iii) ETI 1905 32 11 cannot be directly read as sub-classification of (--) waffles and wafers, ignoring the (---) communion wafers. ETI 1905 32 11 contains four dash (----) and is preceded by three dash (---) communion wafers. Importantly, the entry (---) communion wafers does not have any prescribed rate of duty. Therefore, if the four dash (----) coated with chocolate or containing chocolate entry is directly read as sub-classification of (--) waffles and wafers, it would render the triple dash (---) communion wafers entry otiose. In this regard reliance has been placed on a decision of the Tribunal **GAIL (India) Ltd. vs. CCE & S.T. Vadodara-II⁹;**
- (iv) ETI 1905 32 11 has, therefore, to be read as 'communion wafers: covered with chocolate or

8. 2019 (25) GSTL 271 (Tri.-Mumbai)

9. 2019 (24) G.S.T.L 626(Tri. Ahmd)

containing chocolate', whereas ETI 1905 32 19 has to be read as 'communion wafers: other';

- (v) Once entry ETI 1905 32 11 is ruled out because of the fact that the Products are not in the nature of communion wafers, the only remaining classification for the Products of the appellant would be ETI 1905 32 90, which classification has been claimed by the appellant. This submission is supported by the fact that Explanatory Notes to Customs Tariff Act, 1985, which were in pari materia to Excise Tariff were amended by the Finance Act, 2023 in such a manner that four dash (----) entry has be read as sub-classification of preceding three dash (---). The said amendment was introduced to clarify the prevailing dispute whereby the previous interpretation would have rendered triple dash (---) entry without any rate, otiose;
- (vi) The department has accepted classification under ETI 1905 32 90 for similar products in the own case of the appellant in **Little Star Foods (P) Ltd. vs. CCT, Hyderabad** ¹⁰. In the present case, the impugned order admits in paragraph 41 that the Products are in the nature 'wafer biscuit', and the dispute is only whether the products are classifiable under ETI 1905 32 11;
- (vii) 'Wafer' is a kind of biscuit and 'Wafer Biscuit' is nothing but a form of 'wafer'. Therefore, references to 'wafer' in the Excise Tariff is akin to reference to

10. **Excise Appeal No. 1768 of 2012 decided on 06.08.2019**

'wafer biscuit'. If it is otherwise established that 'wafer biscuit' is classifiable under ETI 1905 32 90, the description of 'wafer biscuit' in the Exemption Notification will include all its forms, including the form where such 'wafer biscuit' may be coated with chocolate or may contain chocolate. As there is nothing in the description of Exemption Notification to exclude any particular form of wafer biscuits, all forms of wafer biscuits will be eligible for exemption;

- (viii) Even if the appellant had classified the goods under one Excise Tariff entry, the appellant can always change the classification as there is no estoppel under law in case of taxation. Therefore, the appellant may have declared the classification erroneously as ETI 1905 32 11, but if in law the correct classification for the Products of the appellant is ETI 1905 32 90, then the same has to be held as applicable;
- (ix) Reliance placed by the department on the decision of the Tribunal in **Dukes Consumer Care Ltd. vs. Commissioner of Customs, Hyderabad-IV**¹¹ to hold that Products are classifiable under ETI 1905 32 11 is misplaced;
- (x) The Products cannot be classified under ETI 1905 32 11 due to presence of 'vegetable oil';
- (xi) In any view of the matter, the impugned order has imposed penalty for contravention of rule 25 of the Central Excise Rules 2002. However, once it is held

11. 2018 (364) E.L.T. 116 (Tri.- Hyd.)

that Products have been correctly classified by appellant, there is no basis for imposition of penalty;

(xii) The penalty imposed is also not warranted as the present issue involves interpretation of complex legal provisions and classification of the product; and

(xiii) As the demand itself is not sustainable, interest confirmed by the department is not recoverable.

16. Shri Sanjay Jain, learned special counsel for the department and Shri Bhagwat Dayal, learned authorised representative appearing for the department, however, supported the impugned order and made the following submissions:

(i) The issue involves is related to concessional excise duty under the Exemption Notification for wafers dipped in chocolate/chocolate sandwiched in between wafers and not of classification of communion wafers. For eligibility of concessional excise duty under the Exemption Notification, the burden of proving applicability would be on the appellant to show that the case comes within the parameters of the Exemption Notification;

(ii) Concessional excise duty of 8% was provided for 'Wafer biscuits' under erstwhile 6 digit classification by Notification No. 37/2003-CE dated 30.04.2003. The erstwhile Sub-Heading 1905 39, covered only waffles and wafers other than coated with chocolate or containing chocolate. With effect from 01.03.2006, Notifications were issued/amended so

as to align with 8 digit classification. This alignment was technical in nature and did change the scope of exemption;

- (iii)** The product Perk is wafer coated with chocolate and the other product Ultra Perk is wafer sandwiched with chocolate (wafer containing chocolate). The product Perk contains wafer and chocolate along with other ingredients. Therefore, exemption provided to 'wafer biscuits' under Exemption Notification, in any case is not applicable to the products Ultra perk, Perk, Perk popper which are not wafer biscuits. Thus, irrespective of the classification of impugned goods, the concessional rate of duty would not be not available to the Products as the description does not answer the description specified in the entries of the Exemption Notification;
- (iv)** To finding recorded by the Principal Commissioner that the products of the appellant are classifiable under ETI 1905 32 11 and not ETI 1905 32 90 as claimed by the appellant is correct and it is based on the General Explanatory Notes contained in the General Rules for the Interpretation of Schedule, and the HSN; and
- (v)** The order passed by the Principal Commissioner is a reasoned order and does not call for any interference in this appeal.

17. The submissions advanced by the learned counsel for the appellant and the learned special counsel appearing for the department have been considered.

18. The appellant claims that the Products manufactured by the appellant are classifiable under ETI 1905 32 90 and, accordingly, reduced excise duty under the Exemption Notification would be available. The department, on the other hand contends, that the Products manufactured by the appellant are classifiable under ETI 1905 32 11 and, therefore, the reduced excise duty would not be available. It would, therefore, be appropriate to first discuss the two competing Excise Tariff Items in Chapter 19 of the First Schedule to the Excise Tariff.

19. Chapter 19 deals with Preparations of Cereals, Flour, Starch or Milk; Pastrycooks' products.

20. A perusal of Chapter Heading 1905 would indicate that it has five single 'dashes'. Chapter Heading 1905 is, therefore, divided into five sub-groups, namely:

- (i) Crispbread;
- (ii) Gingerbread and the like;
- (iii) Sweet Biscuits; waffles and wafers;
- (iv) Rusks, toasted bread and similar toasted products; and
- (v) other.

21. It is the third single dash, in which the goods have been described as sweet biscuits; waffles and wafers, that requires consideration. The third (-) entry has two (--) entry namely; (i) sweet biscuits; and (ii) waffles and wafers. The issue that arises for consideration in this appeal is whether (----) entry at ETI 1905 32 11, in which the goods have been described as 'coated with chocolate or containing chocolate' and is

preceded by (---) entry in which the goods have been described as 'communion wafers', should be read as sub-classification of (--) entry 'waffles and wafers' at Excise Tariff Sub-Heading 1905 32 or as sub-classification of (---) entry 'communion wafers' which does not have any Tariff Heading. It is on this sub-classification that the entire controversy regarding the classification of the Products would depend.

22. The Principal Commissioner has relied upon the General Explanatory Notes to conclude that the (----) entry at ETI 1905 32 11 is a sub-classification of (--) entry 'waffles and wafers' at Excise Tariff Sub-Heading 1905 32.

23. The relevant portion of the General Explanatory Notes, on which reliance has been placed, is reproduced below:

"xxxxxxxx. Where the description of an article or group of articles is preceded by "----" or "----", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-" or "--"."

24. While dealing with this aspect, the Principal Commissioner in paragraph 35 of the order, observed:

"35. xxxxxxxx. It means the Communion Water which is having "----" and the subheading 19053211 containing "----" i.e. coated with chocolate or containing chocolate both are sub headings of "waffles and wafers" being immediately preceding description of the articles having "--". Thus, it is clear that the reference made to 19053211 i.e. coated with chocolate or containing chocolate is in relation to Waffles and Wafers. Therefore, the conclusion drawn by the noticee that sub heading 19053211 covers only Communion Wafer Coated with chocolate or containing chocolate is completely misplaced and liable to be rejected."

25. The contention of the learned counsel for the appellant is that ETI 1905 32 11 covers 'communion wafers' and does include the products of the appellant. Elaborating this submissions learned counsel pointed out that ETI 1905 32 11 cannot be directly read as sub-classification of (--) for 'waffles and wafers', ignoring (---) for 'communion wafers'. According to learned counsel for the appellant, though ETI 1905 32 11 contains (----) and is preceded by (---), but (---) entry in which the goods have been described as 'communion wafers' does not have any prescribed rate of any duty. Thus, if (----), in which the description of goods is 'coated with chocolate or containing chocolate' entry, is directly read as classification of (--) in which the goods have been described as 'waffles and wafers', it would render the (---) entry otiose.

26. To support this contention learned counsel placed reliance upon a decision of the Tribunal in **Gail (India) Ltd. vs. Commissioner of Central Ex. & S.T., Vadodara-II**¹². The department had placed reliance upon the General Explanatory Notes to support the view that (----) shall be taken as sub-classification of immediately preceding (-) and (--) entry and not sub-classification of immediately preceding (---) entry. 'Motor Spirit' had (---) entry with no tariff duty. The Tribunal held that if the contention of the department is accepted, (---) entry with no prescribed rate of duty will be rendered otiose. The observations of the Tribunal are reproduced:

"4.3 xxxxxxxxxxxx.

It is seen that 'Motor Spirit' is "---" entry with no tariff item number. The argument of the Revenue is that sub-heading 2710 11 11, 2710 11 12, 2710 11 13 and 2710 11 19, which are "- - -" entries, are not sub-

classifications of 'Motor Spirit', which is a "- - -" entry immediately preceding those '- - -' entries.

4.3.1 A perusal of the heading 2710, post 1-3-2005, shows that the said heading 2710 has been first divided into two unnumbered "- -" entries, one relating to 'Petroleum oils and oils obtained from bituminous minerals (other than crude) and preparations not elsewhere specified or included, containing by weight 70% or more of petroleum oils or oils obtained from bituminous minerals, these oils being the basic constituents of the preparations, other than waste oils'

And the other '- ' entry relating to

'Waste oils'.

4.3.2 Thereafter the first '- ' entry is further divided into two "- -" entries, one numbered as 2710 11, namely "Light Diesel Oils and Preparations" and the other numbered as 2710 19, namely "Others". The "- -" entry 2710 11 "Light Oils and Preparations" is subdivided into three "- - -" entry, namely 'Motor Spirit' (without any sub-heading), 'National Gas and Liquid' (NGL) heading 2710 11 20 and 'Others' heading 2710 11 90. The "- - -" entry 'Motor Spirit' is followed by "- - -" entries namely, 2710 11 11, 2710 11 12, 2710 11 13 and related to SBPS and heading 2710 11 19 relating to 'Others'.

4.3.3 Similarly the '- -' entry relating to sub-heading 2710 19 is further divided into nine sub-headings numbered as 2710 19 10 (SKO), 2710 19 20 (ATF), 2710 19 30 (HSD), 2710 19 40 (LDO) and so on.

4.4 From the above description it is apparent that if the General Explanatory Note is interpreted in the manner in which Revenue seeks to interpret, "- - -" entry 'Motor Spirit' would become otiose. Similarly the definition of 'Motor Spirit' appearing in clause (a) of supplementary Note to Chapter 27 would also become otiose. Moreover, it is seen that prior to 1-3-2005 the 'Special Boiling Point Spirits' were a "- -" entry immediately

preceded by a “-” entry related to ‘Motor Spirit’. So prior to 1-3-2005 the SBPS were a sub-classification of ‘motor spirits’ even by Revenue’s interpretation.

4.5 Thus the interpretation of Revenue would result in no item falling under the category of ‘motor spirit’ and the definition of the term ‘motor spirit’, and the ‘- - -’ entry relating to it, would become otiose for the period after 1-3-2005. Any interpretation that makes the specific entry, ‘motor spirit’ and its definition appearing in supplementary notes, otiose, cannot be the correct interpretation. In above circumstances, it is apparent that even after 1-3-2005, the Special Boiling Point would have to answer to the description of ‘Motor Spirit’ just the way it was prior to 1-3-2005.”

(emphasis supplied)

27. In view of the aforesaid decision of the Tribunal in **Gail (India), Ltd.** it has to be held that ETI 1905 32 11 has to be read as ‘communion wafers’; ‘coated with chocolate or containing chocolate’, whereas ETI 1905 32 19 has to be read as ‘communion wafers’; ‘other’.

28. It may also be pertinent to note that the Explanatory Notes to Customs Tariff Act 1985, which were in pari materia to the Excise Tariff, were amended by section 135 of the Finance Act 2023 to provide that (----) entry may be read as sub-classification of the preceding (---) entry. Section 135 of the Finance Act 2023 amended the Fourth Schedule. The said amendment is reproduced below:

“The Fourth Schedule

[see section 135(c)]

In the First Schedule to the Customs Tariff Act,-

(1) in the General Explanatory Notes, in paragraph I, after the portion beginning with the words ‘Where the description of an article or group of articles’ and ending with the words ‘the article or group of articles which has “-” or “--”.’, the following shall be inserted, namely:-

'Where the description of an article or group of articles is preceded by "----", in addition to being a sub-classification of "-" or "--", the said article or group of articles may also be taken to be a sub-classification of the immediately preceding description of the articles or group of articles which has "----".';

(2) for the List of Abbreviations Used, the following shall be substituted, namely:-"

29. It is clear that the said amendment was introduced to clarify the dispute as to where by interpretation to the General Explanatory Notes would have rendered (---) entry without any rate, otiose.

30. This amendment of the General Explanatory Notes in the Customs Tariff does give credence to the submission advanced by the learned counsel for the appellant that (---) deals with 'communion wafers', which does not have a Tariff entry, and so the following (----) would have to be treated as sub-classification of (---) and not (--).

31. Such being the position, the Products of the appellant would fall under ETI 1905 32 90 which deals with 'waffles and wafers', other than 'communion wafers'.

32. Thus, for ETI 1905 32 11 to be ruled out, it has to be seen whether the Products are in the nature of 'communion wafers'.

33. The product 'communion wafers' has been described in HSN as 'thin discs' made by cooking very pure wheat flour paste between iron plates.

34. It would also be useful to refer to the dictionary meaning of the words 'communion' and 'wafers'.

35. The word 'communion' has been described in the following two dictionaries as:

Oxford Dictionary of English (Third Edition)

Communion: xxxxxxxxxxxx

2 (often Communion or Holy Communion) the service of Christian worship at which bread and wine are consecrated and shared. See Eucharist.

- The consecrated bread and wine administered and received at Communion: the priests gave him Holy Communion.

Webster's Dictionary

Com-mun-ion an intimate or sublime exchange or communication or thoughts and feelings || a body of people with common faith || fellowship bridging divisions of the Church, they are in communion with the Greek Orthodox Church Com-mun-ion (eccles.) the partaking of the consecrated bread or wine || the sacrament of Holy Communion (* EUCHARIST) [F.].

36. The word 'wafers' has been defined in the following two Dictionaries as:

Oxford Dictionary of English (Third Edition)

Wafer noun 1 a thin, light, crisp biscuit, especially one of a kind eaten with ice cream.

Webster's Dictionary

Wa-fer 1. N. A very thin, crisp cake, e.g. as eaten with ice cream || a thin, papery disk of unleavened bread consecrated in the Eucharist.

37. It would, therefore, be seen that 'communion wafers' has a religious connotation as it is in the nature of thin unleavened bread used in Eucharist ceremonies. The Products of the appellant do not correspond with such a description at all.

38. In this connection, it would be useful to refer to the decision of the Tribunal in **Pepsico Holdings Pvt. Ltd. vs. Commissioner of C.Ex., Pune-III**¹³. The department proposed classification of 3D choco filled snacks under ETI 1905 32 11. The Tribunal did not accept such a classification for the reason that this entry was for 'communion wafers', which has a religious purpose. The relevant portion of the decision of the Tribunal is reproduced below:

"1. xxxxxxxxxxxxxxxx. The heading claimed by the appellant was the residual entry in 'bread, pastry, cakes, biscuits and other bakers' wares, other than crispbread, ginger bread and the like and sweet biscuits, waffles and wafers and communion wafers, pastries and cakes, extruded or expanded products and papad'. Contrarily, Central Excise authorities proposed classification under the sub-heading of 'sweet biscuits, waffles and wafers' and specifically under Heading No. 1905 32 11 pertaining to 'communion wafers coated with chocolate or containing chocolate'.

xxxxxxxxxxxxxx

5. 'Communion wafers' are produced for religious purposes which is evident from the adjective proceeding 'wafer' in the sub-heading. 'Communion' is a rite specific to the ritual of 'mass' celebrated in churches. No other meaning is assigned to that phrase in common parlance.

6. Learned Authorised Representative contends that 'communion wafers' are not normally made of or contain chocolates; however, no material is placed on record to support this contention. We, therefore, do not find any reason to discount the possibility of chocolate covered or chocolate filled 'communion wafers' being used in the ritual."

(emphasis supplied)

13. 2019 (25) G.S.T.L. 271 (Tri.-Mumbai)

39. It is, therefore, clear that for a product to qualify as 'coated with chocolate or containing chocolate' under ETI 1905 32 11, the product should conform to the description of 'communion wafers'. The Products of the appellant neither have the characteristics of 'communion wafers' nor they are used in the Church for Eucharist purpose.

40. The order passed by the Principal Commissioner holds that there is no indication of the HSN that 'communion wafers' can be 'coated with chocolate or containing chocolate'. This issue, as noticed above, has been decided by the Tribunal in **Pepsico Holdings** wherein the Tribunal held that possibility of existence of chocolate coated 'communion wafers' cannot be discounted.

41. The decision of the Tribunal in **Little Star Foods Pvt. Ltd. vs. Commr. of Central Tax, Hyderabad**¹⁴ also needs to be examined. It transpires from the aforesaid decision that the department had accepted the classification of the product 'Perk' under ETI 1905 32 90. The dispute that the department had raised was that the Exemption Notification covers only those products of ETI 1905 32 90 which are in the nature of wafers biscuits and as 'Perk' is not in the nature of 'wafers biscuits' exemption had been wrongly claimed. The Tribunal only agreed to the extent that the department was correct in denying the Exemption Notification, but the classification of 'Perk' under ETI 1905 32 90 was maintained. The relevant portions of the decision of the Tribunal is reproduced below:

"4. Initially, a show cause notice dated 8-11-2011 was issued to the appellants covering the period October 2009 to September 2010 proposing to classify the product under [Tariff Item] 1905 32 11 and demanding appropriate

14. 2019 (368) E.L.T. 730 (Tri.-Hyd.)

amount of differential duty. It was also proposed in that show cause notice that the product deserved to be valued under Section 4A instead of Section 4 of Central Excise Act, 1944. **Thereafter, another show cause was issued to the appellant covering the period October 2009 to September 2011. In this second show cause notice, the department did not contest either classification by the appellant or the fact that they are not covered by Section 4A but are covered by Section 4 for the purpose of valuation. The second show cause notice only sought to deny the exemption notification claimed by the appellant and also sought to value the goods under Section 4 of Central Excise Act, 1944 as per the price list denying some exclusions claimed by the appellant. Both the show cause notices were decided by Ld. Adjudicating authority vide O-I-O No. 09/2012-Adjn. (Commr.) CE, dated 26-3-2012. He dropped the proceedings in pursuance of the first show cause notice. Therefore, the dispute with regard to the classification and valuation under Section 4A instead of under Section 4 have reached finality.** The adjudicating authority has also held that their products are classifiable under chapter Heading 1905 32 90 and that their products are not covered under Section 4A and therefore are chargeable as per valuation under Section 4. The subsequent show cause notices are periodical demands which have been confirmed by the Adjudicating authority and are in challenge in these appeals.

xxxxxxxxxx

8. On the question of exemption notification, Ld. Counsel for the appellants submits that it is undisputed that Little Star are manufacturing "Cadbury Perk with Glucose Energy" which has been described by them as 'chocolate coated wafers for some period and subsequently as coated wafers. He produces before us a sample copy of the product, the label of which also describes the product as 'coated wafers'. xxxxxxxxxxxx.

21. We have considered the arguments on both sides and perused the records. It is not in dispute that

the appellant has manufactured coated wafers (described for some time also as chocolate coated wafers) and cleared them. The goods were not described as "wafer biscuits" either to the department or in the invoices or on the wrappers of the product. Therefore, both the Revenue and everyone in the trade including the consumer understands them as wafers or coated wafers and not as wafer biscuits. It is true that wafer is technically a thin biscuit by itself. Therefore, in the context of the erstwhile Central Excise Tariff, the Hon'ble High Court of Andhra Pradesh has held that the same can be charged to Central Excise Duty on the Tariff Item 1(C) as biscuits. However, this judgment was not in the context of either the new Central Excise Tariff or on how to interpret the exemption notification. The interpretation of exemption notification has to be done strictly giving the benefit of any ambiguity in the exemption notification to the Revenue and against the assessee as has now been laid down by the Constitutional Bench of Hon'ble Apex Court in the case of Dilip Kumar & Company and Others (supra). **A plain reading of the exemption notification does not show that it is intended to cover all products covered by the Tariff Heading 1905 32 90 or wafers (coated or uncoated) falling under tariff heading. It specifically includes only wafer biscuits falling under tariff heading.** If the intention of the notification was to exempt 'wafers' also, it would have said so. **The assessee's products are not described as 'wafer biscuits' by the assessee themselves either to the department or in any of the documents or to the ultimate consumers on their wrappers.** Thus, we find nobody in the chain of trade from the manufacturer to the ultimate consumer know the products as 'wafer biscuits' but know them only called as coated wafers. It is not for this Tribunal to enlarge the scope of an exemption notification meant for 'wafer biscuits' to cover 'coated wafers' as well. Even if it is held that 'wafers' could possibly be broadly considered as wafer biscuits, the matter is definitely not free from doubt/ambiguity. xxxxxxxxxxxx."

(emphasis supplied)

42. It needs to be noted that the aforesaid decision of the Tribunal is in the context of six appeals which had been filed by **Little Star Foods** and **Mondelez India Foods**. Thus, when in the case of the appellant itself, the department classified 'Perk' under ETI 1905 32 90, it is not open to the department to now contend that 'Perk' would not fall under ETI 1905 32 90 but would fall under ETI 1905 32 11. It also needs to be noted that the product 'Perk' was found to be not a 'wafer biscuit'.

43. In the present appeal, the order passed by the Principal Commissioner in paragraph 41 accepts the contention of the appellant that 'Perk' is a 'wafer biscuit' and not a chocolate as this fact was not disputed by the department. The Principal Commissioner only examined whether the Products would fall under ETI 1905 32 90 or ETI 1905 32 11.

44. It would also be useful to refer to the definition of 'wafer' and 'wafer biscuits' as defined in Words & Phrases of Central Excise & Customs.

45. 'Wafer' has been defined to mean:

"**Wafer** is a variety of biscuit,

-A thin, flat cake or biscuit [Encyclo. Brit, 1953 Edition].

-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. (Chambers 20th). International Foods v. Collector-1978(2) E.L.T. (J50) (A.P.)

-A thin, crisp cake or buiscuit, often sweetened and flavoured. A thin disc of unleavened bread. (Roman Catholic Church) etc. (RH).

-1. A thin, crisp cake, biscuit or candy.

2. A thin disc of unleavened bread, used in the Eucharist.

3. Any small, thin disc.

-Disc – Any thin, flat circular plate or object. Eucharist
– 2. The consecrated bread and wine of the Holy Communion, especially the bread.”

46. ‘Wafer biscuit’ has been defined to mean:

“**Wafer biscuit**’ – A cracker-like biscuit prepared from flour and water. (RHA).”

47. Learned counsel for the appellant has also placed reliance upon a judgment of the Andhra Pradesh High Court in **International Foods vs. Collector of Central Excise, Hyderabad**¹⁵ to contend that ‘wafer’ is a kind of biscuit. The High Court examined whether ‘wafer’ is a biscuit, because the case set out by the writ petitioner was that ‘wafer’ does not come within the category of biscuits. The High Court held that wafer is a kind of biscuit and, therefore, would be liable to excise duty.

The relevant portion of the judgment is reproduced below:

“4. In Oxford Dictionary the word ‘biscuit’ means a piece of unleavened bread of various materials, usually crisp, dry, hard and in small flat thin cakes, and the word ‘wafer’ means a kind of very thin sweet honey-comb faced biscuit now chiefly eaten with ices; thin disk of unleavened bread used in Ucharist. Similarly in Chambers’ Dictionary biscuit means hard dry bread in small cakes; a soft round cake; and wafers means a very thin crisp cake or biscuit baked in wafer-irons or tongs, formerly eaten with wine; a similar biscuit eaten with ice-cream a thin round cake of unleavened bread. **These definitions leave us in no doubt that wafer is a kind of biscuit.** Although it might be different in size and shape. Mr. V. Jagannandha Rao has taken me through Encyclopaedia Britannica to show that the method of manufacture of biscuits and wafers is completely different and, therefore, it would not be proper to place wafers in the category of biscuits. In Encyclopedia Britannica, 1953 Education, it is stated

15. 1978 (2) E.L.T. (J50)(A.P.)

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 Secundum, 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."

(emphasis supplied)

48. Thus, when the Products are 'wafer biscuits' and it has been found that the classification of the Products would be under ETI 1905 32 90, the Products of the appellant would clearly be entitled to the benefit of the Exemption Notification.

49. The Principal Commissioner has placed reliance upon the decision of the Tribunal in **Dukes Consumer Care** to conclude that wafer containing chocolates would fall under ETI 1905 32 11. The issue that arose for consideration before the Tribunal in **Dukes Consumer Care** was whether the products were classifiable under ETI 1905 32 11 or ETI 1905 32 19. These two entries were examined by the Tribunal and it was held that the product would fall under ETI 1905 32 11. The classification of the products under ETI 1905 32 90 was not examined by the Tribunal. In the present case, as noticed above, the two competing entries are ETI 1905 32 11 and ETI 1905 32 90. This apart, the issue as to whether ETI 1905 32 11 pertains to 'communion wafers' was not raised nor considered by the Tribunal. The said decision would, therefore, not come to the aid of the department.

50. It has also been contended by learned counsel for the appellant that in any view of the matter the Products would not fall under ETI

1905 32 11 as the said entry covers products that are 'coated with **chocolate**' or 'containing **chocolate**'.

51. This contention advanced by learned counsel for the appellant deserves to be accepted. The main ingredients of the Products of the appellant are cocoa solids, sugar and vegetable fat/oil. Chocolate is a product which will not contain vegetable fat as is clear from the provisions of the Foods Safety and Standards Regulations, 2011 and Prevention of Food Adulteration Act, Rules, 1955. In **Britannia Industries Ltd. vs. Collector of Central Excise, Bombay**¹⁶ the Tribunal held that the products which contain vegetable oil do not conform to the definition of chocolate. Civil Appeal No. 1314 of 1987 filed by the department before the Supreme Court against the order of the Tribunal was dismissed on 16.04.1990.

52. In **Brindavan Beverages Pvt. Ltd. vs. Commr. of Cus., C. Ex. & ST., Meerut**¹⁷ a Lager Bench of the Tribunal held that Foods Safety and Standards Regulations, 2011 can be relied upon for determining the classification.

53. Learned special counsel for the department, however, submitted that concessional duty to 'wafer' was provided under the erstwhile six digit classification in the Notification dated 30.04.2003 and w.e.f. 01.03.2006 the Exemption Notification was issued so as to align it with eight digit classification. Learned special counsel pointed out that in the earlier Exemption Notification concessional excise duty was restricted for 'waffles' and 'wafer' other than coated with chocolate or containing chocolate. The eight digit alignment was technical in nature and did not change the scope of the Exemption.

16. 1986 (26) E.L.T. 628 (Tribunal)

17. 2019 (29) G.S.T.L. 418 (Tri.-LB)

54. What is important to notice is that the show cause notice did not call upon the appellant to submit any reply on this aspect now sought to be contended by the learned special counsel for the department. The order passed by the Principal Commissioner also does not deal with this aspect. A new ground cannot be taken up by the department to defend the order in this appeal, particularly when the department has not filed Cross Appeal. In any view of the matter, the entries of the present Exemption Notification have to be examined to ascertain whether the Products of the appellant would fall under ETI 1905 32 90 and would be entitled to reduced rate of duty under the Exemption Notification.

55. It, therefore, follows from the aforesaid discussion that the Products of the appellant would fall under ETI 1905 32 90 and would be entitled to reduced rate of excise duty under the Exemption Notification, as amended from time to time. The demand of excise duty confirmed by the Principal Commissioner in respect of the 25 show cause notices, therefore, cannot be sustained. Accordingly, the recovery of interest and imposition of penalty cannot also be sustained.

56. The impugned order dated 12.12.2019 passed by the Principal Commissioner, therefore, deserves to be set aside and is set aside. The appeal is, accordingly, allowed.

(Order Pronounced on **24.06.2025**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)