



Govt. of India  
Office of the Commissioner of Central Excise  
'Siddhi Sadan', Plot No.6776/B-1, Narayan Upadhyay Road, Off Waghawadi Road,  
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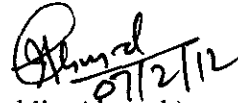
**By R.P.A.D.**

F. No. V/15-40/Dem-ST/HQ/2010-11.

Date: 07/02/2012

## CORIGENDUM

In the Order--in-Original dated 25.01.2012 / 02.02.2012 issued to M/s. Sunfire Petrochemicals Private Limited, Sihor (District: Bhavnagar), in preamble, Order-In-Original No. may be referred to as 09/BVR/Jt.Commr / 2012 instead of 08/BVR/Jt.Commr/2012.

  
(Imamuddin Ahmed )  
Joint Commissioner  
Central Excise  
Bhavnagar.


**By Registered A.D. Post**

To,  
M/s Sunfire Petrochemicals Private Limited,  
Survey No. 34, Ghanghali Road,  
Village: Vadia, Taluka: Sihor,  
District - Bhavnagar.

Copy to:-

- (1) The Commissioner, Cental Excise, Bhavagar (RRA Section).
- (2) The Assistant Commissioner (AE), Central Excise, HQ, Bhavnagar.
- (3) The Assistant Commissioner, Service Tax Division, Bhavnagar
- (4) The Superintendent, Service Tax, Rural Range, Bhavnagar.
- (5) Guard File.

S. T. ~~...~~

	<p>Govt. of India Office of the Commissioner of Central Excise 'Siddhi Sadan', Plot No.6776/B-1, Narayan Upadhyay Road, Off Waghawadi Road, Bhavnagar</p>
	<p>Ph.No. : 0278- 2523627 Fax No.: 0278-2513086</p> <p>E-mail- adjbhavnagar@gmail.com</p>

**By R.P.A.D.**

F. No. V/15-87/Dem-ST/HQ/2010-11.

Date of Order: 25/01/2012

Date of Issue: 02/02/2012

Passed by

IMAMUDDIN AHMED  
Joint Commissioner  
Central Excise  
Bhavnagar

**Order-in-Original No: 08 / BVR / Jt.Commr / 2012**

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

Any person(s) deeming himself aggrieved by this Order may appeal against this order under Section 85 of Finance Act, 1994 to the Commissioner, Central Excise(Appeals), Rajkot, Central Excise Bhavan, Race Course Ring Road, Rajkot-360001 within three months from the date of its communication. The appeal should bear a court fee stamp of Rs 2.50/- paise only.

The appeal should be filed in form ST-4 in duplicate, as per the provisions of Section 85 of the Finance Act, 1994 read with Rule 8 of the Service Tax Rules, 1994. It should be signed by the appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeal) Rules, 2002.

It should be accompanied with the following:

- Copy of appeal in duplicate
- Copies of the order, one of which shall be certified copy **OR** the other must bear a court fee stamp of Rs 2.50/- paise as per Schedule 1 to Article 6 of the Court Fee Stamp Act, 1870.

**BY R.P.A.D.**

To,  
M/s. Sunfire Petrochemicals Private Limited,  
Survey No. 34, Ghanghali Road,  
Village : Vadia, Taluka : Sihor,  
District – Bhavnagar.

Subject: Show Cause Notice Number No. V/15-87/Dem-ST/HQ/2010-11 Dated 18.04.2011 issued to M/s. Sunfire Petrochemicals Pvt. Ltd., Sihor demanding Service Tax of Rs.12,41,571/-.

**BRIEF FACTS OF THE CASE :**

1. M/s Sunfire Petrochemicals Pvt. Ltd. (hereinafter referred to as "the Noticee") was engaged in providing service of bottling of empty gas cylinders with LPG to M/s LPG Infrastructure (I) Pvt. Ltd., Sihor (hereinafter referred to as "LPG Infrastructure") at their bottling plant located at Survey No. 34, Village Vadia, Ghanghali Road, Sihor-364240, District: Bhavnagar, since last 6-7 years. The said service is classifiable as a taxable service under section 65 (105) (zzzf), read with section 65 (76b) of the Finance Act, 1994 (hereinafter referred to as "the Act").

2. Accordingly, an inquiry was initiated and statement of Shri Kapil Lodha, Manager Operations, of LPG Infrastructure was recorded on 20.10.2010 wherein he stated *interalia*; that the contract of filling the gas bottles was awarded to the Noticee. In their plant, the job of refilling of LPG gas cylinder was carried out and their company had given a contract for this work to the Noticee. The procedure adopted for refilling was simple i.e. LPG in bulk was supplied by M/s Reliance Industries Limited in truck tankers. These tankers were weighed on the weighbridge situated outside their plant. After weighment, the tankers were allowed to enter in the premises of plant where these tankers were emptied in 'Bullets' (big tanks made specially for storage of LPG). Thereafter, LPG was refilled in the gas cylinders which were used as fuel gas cylinder for domestic as well as commercial purpose; that the Noticee had been carrying out the job of bottling the gas cylinders for their company for about last six to seven years.

3. The said service was classifiable as a taxable service under section 65 (105) (zzzf), read with section 65 (76b) of the Finance Act, 1994. Hence, summons was issued to the authorised person of the Noticee to give evidences regarding payment of Service Tax leviable on the said service provided by them. Shri Pradeep Kamal Anand Chaurasiya, Director of the Noticee, in his statement recorded on 12.11.2010 *interalia* stated that their company was engaged in activity of filling of LPG cylinders; that they had entered into an agreement with LPG Infrastructure, which was a subsidiary company of M/s Reliance Industries Limited; that they carried out filling of empty cylinders with gas of M/s. Reliance Industries Limited; that filling of gas into empty cylinders was the main activity and the other activities like loading, unloading and repair of valves of cylinders were incidental and associated with their main business; that he had bought this unit in 2003 with two bullets installed in it; that previously one of these two bullets was used to fill empty cylinders of M/s. Reliance Industries Limited and the other was used to fill empty cylinders of M/s. Sunfire Petrochemicals Pvt. Ltd.; that at present both the bullets are used to fill empty cylinders of M/s. Reliance Industries Limited through LPG Infrastructure. Further, he confirmed that they were a Service Providing Unit and provided services of bottling the empty gas cylinder to LPG Infrastructure; that they were not aware that the services being provided by them were taxable service; that when summons dated 20.10.2010 issued by the Superintendent (AE), Central Excise, HQ, Bhavnagar had been received, they came to know that the service being provided by their unit is a taxable service; that they immediately obtained the Service Tax Registration under Works Contract Service; that on being informed at later stage, they got the same amended to Packaging Services. Further, he accepted that they had not paid any Service Tax against the service provided by their unit during the past years but showed willingness to pay the same with interest thereon. He assured that they would pay the Service Tax applicable on the services provided by them during the past years at the earliest. He further stated that they had not entered into any other agreement with any firm or company. He produced the copies of FORM ST-2 registration certificate issued on 28.10.2010 & amended

on 09.11.2010 and copies of Contract for storage of LPG and filling of LPG Gas Cylinders entered on 14.06.2004, 13.07.2006, 29.05.2008 and 10.06.2010 with LPG Infrastructure. Further, the Noticee had submitted the copy of Ledger Account of LPG Infrastructure for the years 2005-06 to 2009-10 under their letter dated nil to this office on 26.11.2010.

4. The Assistant Commissioner, Service Tax Division, Bhavnagar vide letter F. No. IV/16-27/ST/DIV/2009-10/Tech dated 27.10.2010 informed that the Noticee had filed form ST-1 online for registration on 23.10.2010, however, the Registration Certificate was not issued to them as requisite documents viz. address proof, PAN, Power of Attorney etc. were not submitted along with the ST-1 Form.

5. Section 65 (105) (zzzf) of the Act stipulates that:

*“taxable service” means any [service provided or to be provided],- to any person, by any other person, in relation to packaging activity;*

and Section 65 (76b) of the Act specifies that:

*“packaging activity” means packaging of goods including pouch filling, bottling, labelling or imprinting of the package, but does not include any packaging activity that amounts to ‘manufacture’ within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944).*

6. On going through the copies of Contract between LPG Infrastructure and the Noticee made on 14.06.2004, 13.07.2006, 29.05.2008 and 10.06.2010 following points related to prime activity being carried out by the Noticee, it was observed that the contractor (Noticee herein) agreed to carry out the work of filling LPG in cylinders of LPG Infrastructure at their bottling plant located at Survey No. 34, Village –Vadia, Ghanghali Road, Sihor as per indents placed by LPG Infrastructure for their daily requirement of filled cylinders, along with the dispatch schedule.

7. The Noticee was engaged in carrying out the activity of bottling the empty cylinders of LPG Infrastructure with LPG, for about previous six years. This activity is well defined as “packaging activity” under Section 65 (76b) of the Act and accordingly in terms of provisions of Section 65A of the Act, the service provided by the Noticee to above mentioned company would merit classification as “taxable service” under Section 65 (105) (zzzf) of the Act i.e. “taxable service” provided by the Noticee to LPG Infrastructure in relation to “packaging activity” since the essential characteristics of bottling of LPG in cylinders covers under above classification.

8. On perusal of the copy of Ledger Account of LPG Infrastructure maintained by the Noticee produced by them vide letter dated NIL on 26.11.2010 and comparing it with the copy of Ledger Account of the Noticee, maintained by LPG Infrastructure, which was produced by them on 07.01.2011 in response of the Summons dated 31.12.2010, it was revealed that the Noticee had received the following amounts towards taxable service provided to LPG Infrastructure.

(Figures in Rupees)

Sr. No.	Period	Taxable Amount received by Noticee from LPG Infrastructure towards bottling (Packaging Services).
1	01.10.2005 to 31.03.2006	6,78,711
2	Financial Year 2006-2007	17,07,857
3	Financial Year 2007-2008	18,35,547
4	Financial Year 2008-2009	26,85,358
5	Financial Year 2009-2010	40,53,266
<b>Total</b>		<b>1,09,60,739</b>

9. The Noticee had provided service of bottling of cylinders with LPG to LPG Infrastructure, which in terms of Section 65A of the Act was classifiable as taxable service in relation to packaging activity under Section 65 (105) (zzzf) of the Act read with Section 65 (76b) of the Act, without applying for registration with the Service Tax Department and without making payment of Service Tax leviable thereon under the Act and the Rules made there under. As per Section 67 of the Act, Service Tax on a taxable service was chargeable on the gross amount charged by the service provider for such service provided. Therefore, the Service Tax at the appropriate rate on Rs.1,09,60,739/- being the gross amount charged/received by the Noticee to/from LPG Infrastructure, for providing taxable service in relation to packaging activity for the period from 01.10.2005 to 31.03.2010, as described in the Annexure-'B' to the Notice was liable to be recovered from the Noticee under Section 73 of the Act along with the interest applicable under Section 75 of the Act. Since the Noticee had suppressed the fact, that they were engaged in providing 'taxable service' in relation to 'packaging activity' from the department, extended period contemplated under Section 73 (1) of the Act was invokable for recovery of Service Tax not paid.

10. It was transpired from the foregoing that the Noticee had contravened the following provisions of chapter V of the Act and the Service Tax Rules, 1994 ((hereinafter referred to as "the Rules") related to service tax matter:

- i] Section 69 of the Act read with Rule 4 of the Rules in as much as they failed to apply to the Service Tax Department for registration under the category of 'Packaging Services'.
- ii] Section 68 of the Act read with Rule 6 of the Rules in as much as they have failed to pay Service Tax at the appropriate rate on the taxable value charged/received by them to/from LPG Infrastructure for providing taxable service in relation to packaging activity for the period from 01.10.2005 to 31.03.2010.
- iii] Section 70 of the Act read with Rule 7 of the Rules in as much as they have failed to furnish the Service Tax Return in respect of taxable service provided, for the period from 01.10.2005 to 31.03.2010.

11. The Noticee, admitted the facts in their statement regarding non payment of Service Tax on "taxable service" in relation to "packaging activity" provided and thereby rendered themselves liable to penalty under Section 76 of the Act, for non payment of Service Tax. Further, the Noticee suppressed the facts of providing taxable services under the category of "Packaging Services" and thereby contravened the provisions of the Act, and the

Rules as discussed hereinabove with an intent to evade payment of Service Tax and had rendered themselves liable to penalty under Section 78 of the Act. Similarly, for the act of non applying for registration under Section 69 of the Act read with Rule 4 of the Rules at the material time and for the act of non submission of required details of amount received for packaging activity, the Noticee had rendered themselves liable for penalty under Section 77 of the Act.

12. Therefore, the Noticee was issued with Show Cause Notice No. V/15-87/Dem-ST/HQ/2010-11 dated 18.04.2011 asking them to show cause as to why:

- (i) The Service Tax amounting to Rs.12,08,235/- + Education Cess Rs.24,165/- and Higher & Secondary Education Cess Rs.9,171/- Total Rs.12,41,571- (Rupees Twelve lakhs, fourty one thousand, five hundred and seventy one only) as per Annexure-'B' to the notice should not be demanded and recovered under proviso to Section 73(1) of the Act for rendering taxable service in relation to packaging activity to LPG Infrastructure for the period from 01.10.2005 to 31.03.2010.
- (ii) The interest at the appropriate rates, as provided under Section 75 of the Act, on the above amount of Service Tax should not be recovered from them till the actual payment.
- (iii) Penalty should not be imposed upon them for contravention of Section 68, 69 &70, under Section 76, 77 & 78 of the Act respectively.

**DEFENCE REPLY :-**

13. The Noticee vide letter dated 02.01.2012 submitted written reply to Show Cause Notice and submitted as under :-

13.1 They submitted that the principle of cum-tax value has to be accepted as they were not aware that the services being provided by them were taxable service. This fact was came to know when summons dated 20.10.2010 was received by them and they had immediately obtained the Service Tax Registration. They had neither collected nor received any Service Tax from their Service Provider. The demand of Service Tax was made on the gross amount received by them which is not proper and correct. They had not collected any Service Tax from their Service Provider, therefore, the amount received by them ought to have treated the transaction value as cum-tax value and the tax element should have been deducted for the purpose of arriving at the taxable value of the service. They relied on case of CCE, Patna Vs. Advantage Media Consultant [2008 (10) STR 449 (Tri.-Kolkata)] which was affirmed by the Supreme Court to claim the benefit of Section 67(2) of the Act for the period of dispute involved in the present case.

13.2 The Noticee also paid reliance on the following cases in this context.

- (i) Robot Detective & Security Agency Vs. CCE, Chennai [2009(14) STR 689 (Tri.-Chennai)]
- (ii) Rampur Engg. Co. Ltd. Vs. CCE, Jaipur-I [2006 (3) STR 650 (Tri.-Del)]
- (iii) Gem Star Enterprises (P) Ltd. Vs. CCE, Calicut [2007 (7) STR 342 (Tri.-Bang)]

They submitted that the service recipient had not paid the Service Tax amount separately, therefore, they are entitled to assessment treating the value received as cum-tax value and the demand amount would have to be reduced.

14. They also submitted that benefit of Exemption Notification No. 6/2005-ST may be given. The packing service was introduced with effect from 16.06.2005 and they had not provided any other taxable service during the preceding financial year (i.e. 2004-05) as such the aggregate value of taxable services provided by them during the preceding financial year may please be taken as 'NIL' (which is less than Rs. 4 Lakhs) and consequently exemption benefit can be extended to them for the financial year 2005-06. The service provided prior to the date on which the said service is made taxable service, the aggregate value of such services provided during the period prior to date from which the service was made a taxable service cannot be considered for applying the limit of Rs. 4 lakhs since the service was not taxable service during that period. They requested to allow the exemption benefit provided under Notification No. 6/2005-ST dated 1.3.2005 in the financial year 2005-06.

15. They submitted that the figures shown under the column "Gross Taxable Amount received by the Assessee" in the duty calculation sheet was not correct. They submitted the correct figures and requested to correct the demand of Service Tax as per corrected annexure attached with the letter.

16.1 They submitted that they were not liable to penalty as the Service Tax was not paid on account of a bona fide belief that the same was not payable and they were not known to Service Tax Law as stated in the statement dated 12.11.2010 of the Director of the Noticee. They were never advised by the Service Receivers to pay Service Tax. They had facilitated and cooperated with the Department and immediately deposited the Service Tax of Rs. 2,72,614/- and Education Cess of Rs. 5,456/- vide GAR-7 CIN 00600072211201100164 and 02003481912201100001 dated 22.11.2011 and 19.12.2011, the penalty should not be imposed upon them by invoking Section 80 of the Finance Act, 1994. They had not contested the levy of Service Tax and cooperated with the investigating officers. They were under the bona fide doubt regarding their activity falling under Service Tax or not, therefore, there was a reasonable cause on their part in not depositing the Service Tax in time. They were of the view that notwithstanding anything contained in Section 76 & 77 of the Finance Act, 1994, they are entitled for the benefit under Section 80 of the Finance Act, 1994 and requested not to impose penalty on them.

16.2 They also submitted that mere detection by the department does not mean that non-payment was with intention to evade unless the department brings out clear facts that they were having the knowledge that the Service Tax was payable on such services but still they chose not to pay the tax in order to evade the same. No such fact has been narrated in the show cause notice or forthcoming during the investigation. The bona fide belief on the part of them cannot be outrightly rejected unless some circumstance is shown to establish that they were in the knowledge that Service Tax is payable on such activity. When no such evidence is recovered, there can be bona fide doubt whether service tax was payable in such situation. They requested that no penalty should be imposed upon them and grant immunity from imposing penalty.

#### **PERSONAL HEARING :**

17.1 Shri M. Rafik Sheikh, Chartered Accountant, appeared for personal hearing on 24.01.12 and stated that reply to Show Cause Notice has been filed vide letter dated 02.01.2012. He further submitted a written reply dated 24.01.2012 and reiterated the same and

requested that the Noticee was not aware about the provisions of Service Tax hence Service Tax was not paid. But, immediately after being pointed out, they had paid Rs. 2,78,270/- and remaining amount will be paid shortly. He also requested for cum-duty benefit as the Noticee has not charged the Service Tax from the Service Receivers. He also requested for waiver of penalty u/s 76, 77 & 78 of the Finance Act, 1994 by extending the benefit of Section 80 of the Finance Act.

17.2 The Noticee in their reply dated 24.01.2012 placed reliance on the case of Financerse Vs. CCE, Jaipur [2007 (8) STR 7 (Tri.-Del.)] wheein it was held by the Tribunal that the penalty not simultaneously imposable under Section 76 & 78 of the Finance Act, 1994 – Section 76 and 78 ibid mutually exclusive. They also submitted that Hon'ble Supreme Court in case of Union of India Vs. Rajasthan Spinning and Weaving Mills reported in [2009 (238) ELT 3 (SC) at Para – 19 observed that the penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty for adopting any of the means mentioned in the Section. Section 78 of the Finance Act, 1994 and Section 11AC of the Central Excise Act, 1944 are *pari material provisions*. The decision of Apex Court holding that penalty is punishment for an act of deliberate deception with intent to evade would legitimately govern cases of this nature. Their client had no intention to evade tax as such penalty cannot be imposed. They requested not to impose the penaties under Section 76 & 78 of the Finance Act, 1994 by invoking the provisions of Section 80 of the Finance Act, 1994.

#### **DISCUSSION & FINDING :**

18. I have carefully gone through the facts of the case and written as well as oral submissions made by the Noticee. The issues to be decided in this case are :-

- (a) whether the Noticee has evaded payment of Service Tax for by providing taxable services falling under the category of "packaging activity" without obtaining registration and without following the procedure prescribed under the Service Tax Law as alleged in the impugned show cause notice ?
- (b) whether the amount received by the Notice should be as cum-tax value and the benefit of Section 67(2) of the Act should be allowed by way of deducting the element of Service Tax for the purpose of arriving at the taxable value ?
- (c) whether the benefit of Exemption Notification No. 06/2005-ST can be granted ?
- (d) whether the benefit under Section 80 of the Finance Act, 1994 is extendable so far as imposition of penalty u/s 76, 77 & 78 of the Finance Act, 1994 is concerned ?
- (e) whether simultaneous penalty under Section 76 & 78 of the Finance Act, 1994 is imposable ?

19.1 The provision of Section Section 65 (105) (zzzf) of the Act stipulates that "taxable service" means any [service provided or to be provided], to any person, by any other person, in relation to packaging activity. Further, Section 65 (76b) of the Act specifies that "packaging activity" means packaging of goods including pouch filling, bottling, labelling or imprinting of the package, but does not include any packaging activity that amounts to 'manufacture within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944. This service has been made taxable w.e.f. 16.06.2005 vide Notification No. 15/2005-ST dated 07.06.2005.



19.2 It is evident from statement of Shri Kapil Lodha, Manager Operations, of LPG Infrastructure recorded on 20.10.2010 that they had awarded the contract / job of re-filling the gas bottles / cylinders with LPG gas to the Noticee. Accordingly, the Noticee was carrying out the refilling of LPG gas supplied by M/s Reliance Industries Limited in bulk into the empty gas cylinders which were to be used as fuel for domestic as well as commercial purpose. Shri Pradeep Kamal Anand Chaurasiya, Director of the Noticee also admitted in his statement dated 12.11.2010 that their company was engaged in activity of filling of LPG Cylinders in terms of an agreement entered with LPG Infrastructure, which was a subsidiary company of M/s. Reliance Industries Limited. Thus, main activity of the Noticee was bottling of Gas Cylinders which is sufficiently covered in the definition of "Packaging Activity" as provided under Section 65(76b) of the Finance Act, 1994 and Noticee is liable to pay Service Tax as the said service is taxable by virtue of Section 65 (105) (zzzf) of the Finance Act, 1994.

19.3 Moreover, the Noticee obtained the requisite Service Tax Registration in this regard on 09.11.2010 i.e. immediately after detection of the case by the department. Further, the Noticee has also not disputed the levy of Service Tax on the service of bottling of Gas Cylinders being provided by them and shown the willingness to pay the Service Tax alongwith interest on service provided during the past years.

19.4 In view of the above, I find that the activity being undertaken by the Noticee has been rightly classified under 'packaging activity' and appropriate Service Tax is recoverable from them.

20.1 The Noticee has claimed that the benefit of cum-tax value should be allowed by way of deducting the element of Service Tax from the gross amount received by them for the purpose of arriving at the taxable value. In this regard, the Noticee has placed reliance on following judgements :-

- (i) CCE, Patna Vs. Advantage Media Consultant [2008 ( 10) STR 449(Tri.Kolkata)] affirmed by the Supreme Court in CCE Vs. Advantage Media Consultant [2009 (14) STR J49 (SC)]
- (ii) Robbot Detective & Security Agency Vs CCE, Chennai [2009 (14) STR 689 (Tri. Chennai)]
- (iii) Rampur Engg. Co. Ltd. Vs CCE, Jaipur-I [ 2006 (3) STR 650 (Tri.-Del.)]
- (iv) Gem Star Enterprises (P) Ltd. Vs. CCE, Calicut [2007 (7) STR 342 (Tri. Bang.)]

20.2 Section 67 deals with the Valuation of taxable services for charging service tax and sub-section (2) of Section 67 reads as under :-

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

20.3 The plain reading of above provision clearly depict that the benefit of cum-tax value is available only where the gross amount charged by a service provider is inclusive of Service Tax payable. The Noticee did not produce any evidence to this effect. Further, Noticee is providing this Service since 2003 (though same has been made taxable w.e.f. 01.10.2005) that too to a company which is subsidiary of M/s. Reliance Industries Ltd. (a leading Multi-National Company of the country). Thus, it is not convincing that they were not aware that

their service was taxable service and fact came to their notice only when deptt. detected the case against them. In the instant case, the Noticee had not disclosed before the department that they were providing taxable service thereby suppressed vital fact and contravened provisions of Finance Act, 1994 and Service Tax Rules, 1994 by not assessing appropriate Service Tax, payment thereof and filling of prescribed Return.

20.4 I find that the benefit of cum-tax-price should not be allowed in Central Excise and Service Tax cases involving the elements of fraud, collusion, wilful mis-statement, suppression of facts or contravention of any of the provisions of the Act or Rules made thereunder with intent to evade payment of duty. In this regard, I rely on the judgement of the Hon'ble Supreme Court in the case of *M/s. Amrit Agro Industries Ltd Vs. CCE, Ghaziabad* [2007 (210) ELT 183 (SC)] and the decision of Hon'ble CESTAT, Principal Bench, New Delhi in the case of *Dhillon Kool Drinks and Beverages Ltd Vs. CCE, Jalandhar* [2011 (263) ELT 241 (Tri. Del)]. Since, the Noticee has evaded the payment of Service Tax by way of suppression of facts and with intent to evade payment of duty, as discussed in the subsequent part of the order, is not entitled to benefit of cum-tax-value.

25. As regards claim of the Noticee that duty calculation sheet is not correct, I have gone through the ledger provided by the Noticee and I do not find any infirmity, in the calculation of Service Tax demand.

26. As regards claim of the Noticee for the benefit of Exemption Notification No. 06/2005-ST, I find that that the packaging service was introduced w.e.f. 16.06.2005 and as such the said Service was not taxable prior to 16.06.2005. Thus, value of service provided for 'packaging activity' prior to this date in the year 2005-06 and 2004-05 cannot be considered as taxable value. The Notification No. 06/2005-ST provide exemption to taxable service of aggregate value not exceeding four lakh rupees in any financial year from the whole of the Service Tax provided that the aggregate value of taxable services from one or more premises does not exceed rupees four lakhs in the preceding financial year. As such, I find that Noticee is entitled for exemption of rupees four lakhs under the said Notification in the Year 2005-06. Accordingly, the taxable value during the year 2005-06 would get reduced to Rs. 2,78,711/- from Rs. 6,78,711/- and in turn duty liability in that year would be Rs.28,707/- (Rs. 27,871/- Service Tax + Rs. 557/- Ed. Cess + Rs. 279/- S & H Ed. Cess). Accordingly, total duty liability would be Rs. 12,01,050/-.

27.1 I find that the Noticee has contravened the provisions of Section 68 of the Finance Act, 1994 (the Act) and rule 6 of the Service Tax Rules, 1994 (the Rules) as they have failed to pay Service Tax at appropriate rate on the value of taxable services provided by them from 16.06.2005. They have also contravened the provisions of Section 70 of the Act and rule 7 of the Rules as they have failed to assess the service tax payable on the value of taxable services received from their clients. Section 76 of the Finance Act, 1994 reads as under:

"Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax in accordance with the provisions of section 75, a penalty which shall not be less than two hundred rupees for every day during which such failure continues or at the rate of two per cent. of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax:

Provided that the total amount of the penalty payable in terms of this section shall not exceed the service tax payable.”

27.2 The service tax demanded in the Show Cause Notice ought to have been deposited by the Noticee within the stipulated time, having failed to do so they are liable to penalty under the provisions of Section 76 of the Finance Act, 1994. Hence, penalty under Section 76 of the said Act is imposable on the Noticee for failure to make timely payment of Service Tax.

28.1 The Section 77 of the Finance Act, 1994 read as under :

“(1) Any person,—

(a) who is liable to pay service tax, or required to take registration, fails to take registration in accordance with the provisions of section 69 or rules made under this Chapter shall be liable to pay a penalty which may extend to five thousand rupees or two hundred rupees for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance;

28.2 Since, the noticee has failed to pay service tax and to take registration as required under the law. Therefore, they have become liable for penal action under provisions of Section 77(1) (a) of the Act.

29.1 I find that the Noticee has failed to obtain registration upto 09.11.2010 under the category of “Packaging Activity”. Thus, Noticee failed to get themselves registered and failed to make payment of service tax and subsequent filing of Service Tax Return within the prescribed time limit. It is also a fact that they have suppressed the fact of providing taxable service to company with an intention to evade payment of Service Tax. As the Noticee has suppressed the vital facts with an intention to evade service tax and violated the provisions of Acts / Rules of Service Tax, they are liable for penal actions under Section 78 of the Finance Act, 1994.

29.2 I do not agree with the contention of the Noticee that Service Tax was not paid on account of bona fide belief that same was not payable and they were not aware about Service Tax law in as much as they were providing this services since long back (i.e. 2003) and that too to the subsidiary of M/s. Reliance Industries Ltd. – a Multinational Company. Moreover, the Service Tax become leviable on this service on 16.10.2005 and it may not be the case that they were not aware of it for five years. I, therefore, find that the Service Tax was not paid with intent to evade the same. Therefore, the Noticee is not entitled for waiver of penalty u/s 76, 77 & 78 as contemplated and claimed by the Noticee by virtue of Section 80 of the Finance Act, 1994. The Noticee has not proved that there was a reasonable cause for failure to get registration, payment of Service Tax and filing of prescribed return and mere ignorance of law cannot be the excuse to avail benefit of this Section.

29.3. In view of the provisions of law and the facts of the case, as discussed herein above I hold that the Noticee has provided service under category of “Packaging Activity” from 16.10.2005 and suppressed this fact from the department till a case has been booked against them by the department, with an intention to evade payment of Service Tax on this service. The Noticee is required to pay service tax as calculated hereinabove alongwith interest and for the act of not obtaining registration and for not paying amount of service tax they have rendered themselves liable for penalty under Section 76, 77 and 78 of the Finance Act, 1994.


30. The Noticee have also contested proposed imposition of penalty under Section 76 and Section 78 of the Act taking recourse of judgement passed by the Tribunal in case of The Financerse Vs. CCE, Jaipur [ 2007 (8) STR 7 (Tri. Del)]. The reliance have also been placed in this regard on judgment of Hon'ble Supreme Court in case of Union of India Vs. Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (S.C)] wherein it was observed that penalty u/s 11AC is punishment for act of deliberate deception with intent to evade duty and Section 78 of the Finance Act, 1994 is pari materia thereof. Since, the Notice had not intention to evade tax, penalty cannot be imposed upon them. The ratio of these two judgements are not applicable as facts of the matter before hand is different from the two judgement cited by the Noticee. Further, I find that in case of Assistant Commissioner of Central Excise vs. Krishna Poduval, Hon'ble high Court of Kerala while setting aside order of single Judge withdrawing penalty, has held that incidents of imposition of penalty are distinct and separate under two provisions and even if offences are committed in course of same transaction or arise out of the same act, penalty is imposable for ingredients of both offences and that person who is guilty of suppression deserve no penalty under section 80 of the Act. Relying upon this judgement, I hold that the Noticee are liable for penalty both under Section 76 and Section 78 of the Act and since there was suppression of facts as discussed earlier, I am not inclined to invoke Section 80 in this case. Further, this Notice was proposed to recover Service Tax of Rs. 12,41,571/- whereas Noticee paid merely a small amount of Rs. 2,72,614/- (Service Tax) + Rs. 5456/- (Ed. Cess) despite the facts that they were aware with their liability of Service Tax. This act of the Noticee also deserves no sympathy for waiver of penalty.

In view of the above, I pass the following order :-

#### ORDER

- (i) I confirm the demand of Rs.12,01,050/- (Rupees Twelve lakh One thousand Fifty only) under proviso to Section 73(1) of the Finance Act, 1994 alongwith interest at appropriate rate under Section 75 of the Finance Act, 1994.
- (ii) I impose penalty of Rs.200/- (Rupees two hundred only) per day or 2 (two) percent per month whichever is higher, under Section 76 of the Finance Act, 1994 for failure to make the payment of Service Tax within the period and in the manner prescribed under Section 68 of the Act read with Rule 6 of the Rules, during the period in which such failure continued during 1.10.2005 to 10.05.2008, provided that the total amount of penalty payable in terms of this account shall not exceed the service tax payable.
- (iii) I impose penalty of Rs. 1,000/- (Rupees One Thousand only) under Section 77 of the Act, for failure to obtain registration during the period upto 10.05.2008. I impose penalty of Rs.5,000/- (rupees five thousand only) or Rs.200/- (rupees two hundred only) per day whichever is higher, under Section 77 (1) (a) of the Finance Act, 1994, for failure to obtain registration during the period from 10.05.2008 till the date of actual compliance i.e. 28.10.2010.
- (iv) I impose penalty of Rs.5,000/- (Rupees Five Thousand only) under Section 77(2) of the Finance Act, 1994 upon Noticee, for failure to file prescribed return, under section 70 of the Finance Act, 1994 read with Rule 7 of the Rules.

- (v) I impose penalty of Rs.12,01,050/- (Rupees Twelve lakh One thousand Fifty only) under Section 78 of the Finance Act, 1994. If the amount as determined under serial number (i) above is paid within 30 days from the receipt of the order alongwith the interest payable then as per proviso to section 78 of the Finance Act, 1994, the penalty will be only 25% of the Service Tax determined at serial number (i) above. The benefit of reduced penalty shall be available only if the amount of penalty so determined has also been paid within the period of thirty days from the receipt of this order.

  
 (Imamuddin Ahmed)  
 Joint Commissioner  
 Central Excise  
 Bhavnagar.

F. No. V/15-87/Dem-ST/HQ/2010-11

Date: - 02.02.2012

By Registered A.D. Post

To,  
 M/s Sunfire Petrochemicals Private Limited,  
 Survey No. 34, Ghanghali Road,  
 Village: Vadia, Taluka: Sihor,  
 District - Bhavnagar.

Copy to:-

- (1) The Commissioner, Cental Excise, Bhavagar (RRA Section).
- (2) The Assistant Commissioner (AE), Central Excise, HQ, Bhavnagar/Recovery Cell
- (3) The Assistant Commissioner, Service Tax Division, Bhavnagar
- (4) The Superintendent, Service Tax, Rural Range, Bhavnagar.
- ✓ (5) Guard File.