IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 41825 of 2019

(Arising out of Order-in-Appeal No. 329/2019 (CTA-I) dated 22.10.2019 passed by the Commissioner of G.S.T. & Central Excise (Appeals-I), 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai – 600 034)

M/s. Lancor Holdings Limited, **: Appellant**
VTN Square, 2nd Floor,
No. 58, G.N. Chetty Road,
T. Nagar, Chennai – 600 017

VERSUS

The Commissioner of G.S.T. and Central Excise **: Respondent**
Chennai North Commissionerate,
26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai – 600 034

APPEARANCE:

Shri. S. Gokarnesan, Advocate for the Appellant

Shri. Arul C. Durairaj, Authorized Representative (A.R.) for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 40783 / 2020

DATE OF HEARING: 12.02.2020

DATE OF DECISION: **08.09.2020**

By this appeal, the assessee is challenging the denial of refund.

2.1 Brief facts leading to the present litigation *inter alia* are that M/s. Lancor Sriperumbudur Developments Limited ('M/s. LSDL' for short) had entered into a construction service agreement with M/s. Lancor Guduvancherry Developments Limited ('M/s. LGDL' for short); that both the above two entities subsequently merged with M/s. Lancor Holdings Limited vide

amalgamation order of the Hon'ble High Court of Madras; that at the time of signing the construction service agreement, M/s. LSDL had paid the consideration including Service Tax of Rs. 48,11,244/- to the service provider i.e., M/s. LGDL; the said receipt was declared in M/s. LGDL's ST3 return for the half-yearly period October 2013 to March 2014; that the above payment and receipt was duly recorded/accounted in the books of account of both the entities; that no service could be provided as agreed since the amalgamation took place, with no service provider-service recipient, and also since the same amounted to providing service to the self; that subsequent to the merger, the amount shown in M/s. LSDL's account as advance given to M/s. LGDL was adjusted against the amount shown as advance received from M/s. LSDL, as required by the accounting principles (squared off); that pursuant to merger, both the entities have become part of the Amalgamated Company and the service, for which advance was originally given, automatically got cancelled since the same could not be proceeded with, etc.

2.2 This prompted the Amalgamated Company to claim refund of the above amount paid as advance since there was absolutely no service provided. Accordingly, they filed the refund claim on the grounds that since service did not materialize, they are entitled for refund in terms of Rule 6 (3) of the Service Tax Rules, 1994; that when an agreement is cancelled or no service provided, the tax paid originally becomes a deposit and the amount would lose the identity of Service Tax and hence, for claiming refund of such amount, Section 11B of the Central Excise Act, 1944 would not apply.

3. A Show Cause Notice dated 22.03.2019 was issued proposing *inter alia* to reject the appellant's claim on limitation under Section 11B ibid., to which the appellant filed a detailed reply explaining that the provisions of Section 11B ibid. would not apply and also relied on

various case-laws in their support. However,the Adjudicating Authority after hearing the appellant, vide Order-in-Original No. 03/2019 (R) dated 21.05.2019, rejected the refund claim holding that the appellant's claim was hit by the limitation under Section 11B ibid. The Adjudicating Authority has *inter alia* referred to the fact of the Hon'ble High Court passing the order of amalgamation on 03.01.2017 whereas the application for refund was made on 09.07.2018, which was beyond the one-year time prescribed under Section 11B ibid. The appellant having not met with success in its first appeal before the Commissioner of G.S.T. and Central Excise (Appeals-I), Chennai, who vide impugned Order-in-Appeal No. 329/2019 (CTA-I) dated 22.10.2019 having rejected the same, has filed the present appeal before this forum.

4. Heard Shri. S. Gokarnesan, Learned Advocate appearing for the assessee and Shri. Arul C. Durairaj, Learned Superintendent (Authorized Representative) appearing for the Revenue. I have gone through the documents placed on record and also various decisions relied on during the course of arguments.

5. The only issue that arises for consideration is, when advance amount is paid for a service and such service could not be provided due to amalgamation, whether Section 11B ibid. applies when refund of the above amount is claimed?

6. I find, on going through the orders of both the lower authorities, that there is no dispute as to the eligibility or otherwise for refund except the claim being rejected as barred by limitation. There is also no dispute that both the service provider and the service recipient having merged into a single entity, there was no service provider or service receiver. Hence, the service for which the agreement was signed could not be provided also since the same would have amounted to providing a service to the self. Further, even Rule 3 of the Point of

Taxation Rules, 2011 will have no role since the same would not apply to the case of service to the self. Section 66B of the Finance Act, 1994, which is the charging Section, requires the levy of Service Tax on the value of services other than the services specified in the Negative List, provided or agreed to be provided, by one person to another. Subsequent to the amalgamation in this case, there remained only one person for having provided service to himself/itself.

7.1 Rule 6 (3) of the Service Tax Rules, which is relied upon by the Learned Advocate for the appellant, reads as under :

> *"RULE 6. Payment of service tax. —*
>
> .
> .
> .
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> *(3) Where an assessee has issued an invoice, or received any payment, against a service to be provided which is not so provided by him either wholly or partially for any reason, [or where the amount of invoice is renegotiated due to deficient provision of service, or any terms contained in a contract] the assessee may take the credit of such excess service tax paid by him, if the assessee -*
>
> > *[(a) has refunded the payment or part thereof, so received for the service provided to the person from whom it was received; or]*
> >
> > *(b) has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued.]"*

7.2 This, in my view, would take care of a situation where an agreed service could not be provided either wholly or partially; that the above Rule, in such a situation, permits the assessee to take credit of such excess Service Tax paid which falls under a separate category by itself, as a deposit and hence, loses the characteristics of "tax", for which reason provisions of Section 11B ibid. are not attracted. There is also no

dispute that even the ST-3 return itself recognizes this aspect by providing a separate column for taking credit without any time-limit and without even any reference to cash or credit, thereby enabling the taxpayer to set off the credit so taken against any tax liability.

8. As observed by me in the earlier paragraphs, the Revenue has not alleged unjust enrichment. When the amount loses the character of Service Tax, it could only be treated as a deposit, as held in innumerable precedents, which becomes an item for adjustment in terms of Rule 6 (3) ibid., since no service could ever be provided. Thus, the provisions of Rule 6 (3) would only apply and not the provisions of Section 11B ibid.

9. On going through the various decisions/orders relied upon by the Learned Advocate for the appellant, I find that they are in support of my above views, in principle.

10. For the above reasons, the rejection of refund is not in order and hence, the same is unsustainable and consequently, the impugned order is set aside.

11. The appeal is allowed with consequential benefits, if any, as per law.

(Order pronounced in the open court on **08.09.2020**)

Sd/-

(P. DINESHA)
MEMBER (JUDICIAL)

Sdd