IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3361 OF 2018

LSG Sky Chefs (India) Pvt. Ltd. … Petitioner

V/s.

Asst Commissioner of Income-tax
Circle 2(2)(1), Mumbai and ors. … Respondents

Mr.Jitendra Jain with Mr.Sameer Dalal for the Petitioner.
Mr.Suresh Kumar for the Respondent.

CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : JANUARY 24, 2019.

P.C.:-

1. Heard learned counsel for the parties for final disposal of the petition.

2. Petitioner-a private limited company has challenged notice of reopening of assessment issued by the respondent No.1-Assessing Officer on 30th March, 2018. This challenge arises in following background.

3. For the assessment year 2011-12, the petitioner had filed a

return of income on 30th November, 2011 declaring loss of Rs.27.69 crores (rounded off). This included debit of Rs.14.68 crores (rounded off) of Tangible Assets written off. In turn, this amount of Rs. 14.68 crores included a settlement amount of Rs.7.30 crores (rounded off) duly shown by the assessee in computation of income.

3. The return in question was taken in scrutiny by the Assessing Officer, who passed an order of assessment under Section 143(3) of the Income Tax Act, 1961 ("the Act" for short) on 10th March, 2014. To reopen such assessment, he has issued the impugned notice, which as can be seen has been done beyond the period of 4 years from the end of relevant assessment year. In order to do so, the Assessing Officer has recorded following reasons:-

> "**Reasons for reopening of assessment in the case of M/s LSG Sky Chefs India Limited for AY 2011-12 u/s 147 of the Act.**
>
> 1. The assessee company engaged in the business of air-line catering. The assessee company filed its return of income on 30.11.2011 declaring total income of Rs.(-)27,69,49,480/- further the same was processed on 30.03.2013

u/s 143(1) of the IT Act. The scrutiny assessment was completed in this case on 10.03.2014 assessed total income of Rs.(-) 13,01,18, 418/-.

2. Information obtained from perusal audited financials of the assessee company shows that the assessee company has paid amount of Rs.7,30,68,000/- to Joans Woodhead & Sons (I) Ltd.

3. From perusal of the case records it is seen that the amount of Rs.7,30,68,000/- has been debited to profit and loss account but no evidence has been furnished by the assessee concerning the allowability of the said amount as an expense. Thus, the assessee has failed to disclose fully and truly all material facts relating to its income at the time of its assessment.

4. Further, it is seen that no details pertaining to the said transaction has been filed by the assessee.

5. The various facts discussed above clearly imply that the assessee individual has consciously and deliberately evaded paying taxes on an income amounting to Rs.7,30,68,000/-. Thus, there is clear failure on part of the assessee to make full and true disclosure while filing return of income. Hence, I have reason to believe that income amounting to Rs.7,30,68,000/- has escaped assessment due to failure on part of the assessee.

6. By not offering this amount to tax at the time of filing return of income or during the assessment proceeding u/s 143(3) of the Income Tax Act, the assessee company has failed to discharge his duties under the Income Tax Act, 1961 which has resulted in escapement of income chargeable to tax amounting to Rs.7,30,68,000/- and any another income chargeable to tax which has escaped assessment and which comes to the notice of the assessing

officer subsequently in the course of reassessment proceedings.

7. In this case, a return of income was filed on 30.11.2011 for the year under consideration. Since four years from the end of the relevant period has expired in this case, the requirements to initiate proceedings u/s 147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of failure on part of the assessee to disclose fully and truly all material facts necessary for his assessment for the Year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above (refer paragraphs 4 to 7).

8. It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for his assessment for the year under consideration thereby necessitating reopening u/s 147. Even though the assessee has produced computation of income and filed annual report, audited P & L and balance sheet and other supporting documents, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that the material evidence could not be discovered by the AO and could have been discovered with due diligence, accordingly attracting provision of explanation 1 of section 147 of the Act.

8.1 It is evident from the above discussion that in this case, the issues under consideration were never examined by the AO during the course of regular assessment. This fact is corroborated from the contents of notices issued by the AO u/s 143(2)/142(1) and order sheet entries. It is important to highlight here that material facts relevant for the assessment on issue under

> consideration were not filed during the course of assessment proceeding and the same may be embedded in the documents and books of account in such a manner that it would require due diligence by the AO to extract these information. For aforesaid reasons, it is not a case of change of opinion by the AO.
> 8.2 In this case more than four years have elapsed from the end of assessment year under consideration. Hence, necessary sanction to issue notice u/s 148 are sought from Principal Commissioner of Income Tax as per the provisions of sections 151 of the Act."

4. Being supplied with the reasons, the assessee filed objections to the notice of reopening of assessment on 8th October, 2018. Such objections were rejected by the Assessing Officer on 24th October, 2018. Hence, the petition.

5. Having heard learned counsel for the parties and having perused the materials on record, we find that the impugned notice cannot be sustained. Firstly, the notice was issued beyond the period of 4 years from the end of relevant assessment year. Reasons recorded by the Assessing Officer for issuing the impugned notice neither record nor point out that there was any failure on part of the assesse to disclose truly and fully all material

facts necessary for assessment. Infact, the reasons proceed on the perusal of the case recorded by the Assessing Officer. Thus, clearly the mandatory requirement for reopening of assessment beyond 4 years flowing from the first proviso to Section 147 of the Act in the present case is not satisfied.

6. There is yet another reason why the impugned notice cannot survive the legal test. This is so because the reasons proceed on entirely erroneous ground. In other words, the reasons lack validity. We may recollect in the reasons the Assessing Officer refers to a sum of Rs.7.30 crores as having been debited to profit and loss account without the evidence furnished by the assessee concerning the allowability of such sum by way of expenses. In this context, the learned counsel for the assessee would point out that the said sum of Rs.7.30 crores was part of the assessee's larger claim of Rs.14.68 crores. This claim was examined by the Assessing Officer during the original assessment proceedings. The assessee had made a detailed representation why such claim was valid. In successive communications dated 10th February, 2014 and 13th February, 2014 the petitioner

had outlined the reasons why the entire claim of Rs.14.68 crores and a part of it of Rs.7.30 crores was allowable. The Assessing Officer did not agree with the assesse on this count and in the order of assessment dated 10th March, 2014 disallowed the entire claim of Rs.14.68 crores. After noticing the petitioner’s representation, in the order of assessment itself, he reproduced the petitioner’s representation in this regard, relevant portion of which reads as under :-

> “The expenses incurred on the said projects over the years, which were pooled under one head, were written off during the year under consideration. The rental expenditure of Rs.7,30,68,000/- as mentioned in your letter is not a separate expenditure- it forms part and parcel of the total amount of Rs.14,68,31,602/- claimed by the assessee as tangible assets written off.”

7. The Assessing Officer rejected the claim in its entirety making following observations :-

> “Reply of the assessee has been considered, but found not acceptable. The assessee has claimed various expenses as revenue expenditure during the year as intangible assets which was earlier shown as work-in-progress. During the year under consideration, as per assessee's submission, project was abandoned and no income on this account has been generated, despite the fact that construction of

> such assets was carried out by the assessee. It cannot be accepted that no income even on account of scrap sale or debris has been generated. Once the construction work was started, then it must have been sold to other persons. It is a fact that entire expenditure was incurred on capital account. Now assessee's claim as revenue expenditure treating it as a write off when entire expenditure were in the nature of capital, cannot be accepted and treated as revenue expenditure. Further, genuineness of the expenses is also not proved because assessee has paid huge amount on account of rent, which is almost 50% of the total expenses. The genuineness was not brought into question in earlier years as the assessee was capitalizing all project expenses. Now the assessee is claiming to write off entire expenditure. The assessee failed to justify rent payment which was paid arbitrarily without any comparative rate with market. A vacant piece of land cannot be charged so much high rent. Assessee's claim that project was abandoned due to recession is also contrary to the facts because when assessee has started the project, condition of air catering market were more or less same from start to end of the assessee's project. This fact can be verified from the receipt of the assessee because revenue receipt is almost remains the same between F.Y. 2008-09 to 2010-11."

8. Against this order of assessment, the petitioner filed appeal. It can thus be seen that the Assessing Officer had occasion to examine the claim and infact in the order of assessment, he had disallowed the same. In the context of such sum, therefore, it

cannot be stated the income chargeable to tax has escaped assessment. In the result, the impugned notice is set aside. Petition allowed and disposed.

(M.S.SANKLECHA,J.) **(AKIL KURESHI,J.)**