

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR**

(HYBRID COURT)

**BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. UDAYAN DASGUPTA, JUDICIAL MEMBER**

I.T.A. No. 201/Asr/2013
Assessment Year: 2006-07

The Asstt. Commissioner of
Income Tax, Circle-II, Bathinda

Vs.

Sh. Sukhbir Singh Badal,
VPO Badal, Bathinda

[PAN: ABSPB1568P]

(Appellant)

(Respondent)

C.O. No. 33/Asr/2013
(Arising out of ITA No. 201/Asr/2013)
Assessment Year: 2006-07

Sh. Sukhbir Singh Badal,
VPO Badal, Bathinda

Vs.

The Asstt. Commissioner of
Income Tax, Circle-II, Bathinda

[PAN: ABSPB 1568P]

(Appellant)

(Respondent)

Appellant by : Sh. Ashwani Kumar, C. A.

Respondent by : Sh. Hitendra Bhauraoji Ninawe, CIT-DR

Date of Hearing : 03.07.2024

Date of Pronouncement : 28.08.2024

ORDER**Per Dr. M. L. Meena, AM:**

The captioned appeal filed by the revenue and the cross objection filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals), Bathinda dated 10.01.2013 [hereinafter referred to as the 'CIT(A)'] which is arising out of the Assessment Order dated 24.12.2010 passed u/s 147/143(3) of Income Tax Act, 1961 by the Asstt. CIT, Circle-II, Bathinda in respect of Assessment Year: 2006-07.

2. The revenue has raised the following grounds of appeal in ITA No. 201/Asr/2013:

- “1. The Ld. CIT(A) has erred both in law and on facts in not appreciating the fact that the assessee never disclosed of his own accord the very material fact that it was having substantial interest in the company, Orbit Resorts Pvt. Ltd., from whom he was in receipt of the impugned amounts , a fact, which was well within the realm of his knowledge , and which had implications on his tax assessment and thereby holding that the reopening of assessment was " neither legal nor justified"
2. The Ld. CIT(A) has erred both in law and on facts in holding that the advances made by the assessee's company to the assessee, in the facts and circumstances of the case, were not struck by the provisions of section 2(22)(e) of the income-tax Act, 1961, particularly as the entire story made up by the assessee is clearly an afterthought.
3. The Appellant craves to add or amend any grounds of appeal before the appeal is heard and disposed off.”

3. Grounds of appeal in C. O. No. 33/Asr/2013:

- “1. That in the facts and circumstances of the case, the Id. Commissioner of Income Tax (Appeals) gravely erred in holding the advance rent of Rs. 8601836/-, received by assessee from M/s Orbit Resorts Pvt. Ltd. as deemed dividend under Section 2(22)(e) of the Income Tax Act.
2. That the appellant craves to add, amend or alter any ground of appeal before or at the time of hearing of appeal, with the permission of the Hon'ble Income Tax Appellate Tribunal, Amritsar.”

4. Briefly facts of the case are that the assessee filed his return of income disclosing total income of Rs. 1,31,68,060/- and agricultural income of Rs.27,76,000/-, on 29.01.2007. Regular assessment was completed u/s 143(3) on 26.12.2008 at a total income of Rs.1,34,69,680/- and agricultural income at Rs.24,98,380/-. Against this assessment order, an appeal was filed before the CIT(A), Bathinda who vide his order No.219-IT-CIT(A)/BTI/08-09 dated 15.06.2010 decided the appeal of the assessee by allowing part relief. Subsequently, the said assessment completed on 26.12.2008 was re-opened u/s 147 for the reason that an amount of Rs.4,66,08,911/- received by the assessee from M/s Orbit Resorts Private Limited, Chandigarh, in which the assessee had substantial interest, had escaped assessment in terms of the provisions of section 2(22)(e) of the I.T. Act, 1961. Accordingly, the proceedings were initiated u/s 147 of the Act were challenged by the assessee, vide his letter dated 15.12.2010 on the ground that copy of

account of the assessee as appearing in the books of M/s Orbit Resorts (P) Ltd., Chandigarh had been submitted during original assessment proceedings before the Assessing Officer. It was submitted before the AO that the various stipulations of the 'lease agreement' entered into between the assessee and the aforesaid company and same were duly discussed at length with the AO, who after considering all the facts and evidence, had completed the original assessment U/s 143(3) of the Act after satisfying himself that no income on account of the amount received from the aforesaid company was liable to tax in the hands of the assessee in terms of section 2(22)(e) of the Act. However, the AO in the reassessment proceeding was being not satisfied and rejected the plea of the assessee and the reassessment proceedings were completed with the passing of order u/s 147/143(3) dated 24.12.2010 assessing the total income of the assessee at Rs.5,98,63,630/- by denomination of agricultural income at Rs.26,99,340/- and Rs. 4,66,08,911/- as deemed dividend in terms of section 2(22)(e).

5. Being aggrieved with the assessment order, the assessee went in appeal before the CIT(A) who granted part relief by observing as under:

“.....From the perusal of reasons recorded, it transpired that the Ld.AO had received information from the Addl.CIT, Range-I, Chandigarh wherein it was intimated that the assessee had more than 60% interest in M/s Orbit Resorts Pvt. Ltd., Chandigarh and the said company had advanced loan of Rs.4,66,08,911/- to the assessee. On the basis of this information, the Ld. AO

formed the belief that the said advance fell within the ambit of section 2(22)(e) of the Act and accordingly the income to the said extent escaped assessment as it had not been disclosed in the return. Such proceedings were objected vide letter dated 15-12-2007 which, somehow, did not find favour with the Ld. AO. It was also brought to his notice that copy of account of the assessee as appearing in the books of M/s Orbit Resorts (P) Ltd., Chandigarh was submitted during original assessment proceedings in as much as the various stipulations of 'Lease Agreement' entered into between the assessee and the aforesaid company were also discussed at length and after considering all the facts and documents, he had completed the original assessment on 26-12-2008 after having satisfied himself that no income on account of the amount received from the aforesaid company was liable to tax in the hands of the assessee. However, without proper appreciation of facts, the re-assessment was completed by him on 24-12-2010 u/s 147/143(3) of the Act by making addition of Rs.4,66,08,911/-. This assessment order is now in appeal before your honour.

The comments of the Id. AO in the remand report that assessee was receiving huge amounts intermittently from the aforesaid company without any semblance of quid pro quo is also without any basis because the market value of *the property bearing H. No. 256 in Sector 9C of Chandigarh let out to M/s Orbit Resorts Private Limited was in the neighborhood of Rs. 30 crores and in order to keep the lease agreement in force for the times to come, the payment of 'security' and 'advance-rent' at Rs.3 crores and Rs.2 crores respectively were made which were meant to protect the business interest of the company for the times to come and not otherwise. Further, the comments of the Ld. AO in the remand report that the payments made intermittently throughout the year were not any kind of advance in lieu of availing of any premises on rent/lease is also without any basis in view of the facts and submissions made above. The fact of the matter is that the advance payments on account of 'security' and 'advance-rent' were made to the appellant assessee after taking into consideration the availability of funds with the said company. The comments of the Ld. AO in the remand report that odd figure of payments of Rs. 7,41,778/- on 23-02-2006 and Rs.3,40,862/- on 03-03-2006 could not be said to be against the agreed security, is also without any basis and reasons. A simple perusal of copy of account of M/s Orbit Resorts (P) Limited, Chandigarh in the Memorandum of account books of the appellant would show that against the receipts of Salary and Rent, the appellant was returning the aforesaid advances of 'security' and 'advance-rent' alongwith interest to the company from funds available with the appellant. So far as the odd figure of credit of Rs.3,40,862/- on 03-03-2006 is concerned, the said entry was reversed on the same date as it was wrongly*

made by the bank. Further, from the perusal of copy of account of the appellant as appearing in the books of M/s Orbit Resorts Private Limited, it would be seen that this entry does not appear there. With regard to the credit entry of Rs. 7,41,778/- on 23-02-2006, it may be stated that there is no bar for making the advance payments in odd figures. Further, it may also be worth-while to submit here that all other payments made to the appellant on account of 'security' are in round figures and details thereof are also enclosed. For the sake of clarity and convenience, the following bifurcations under each head as per the account of M/s Orbit Resorts Private Limited in the Memorandum of account books of assessee and vice versa is given below:-

	As per S.Sukhbir Singh's Memo. Books of A/c Books	As per Orbit Resort's Books
Totals of credit/debit side of the account.	5,08,31,604.98	4,97,08,865.98
Less: Wrong /contra entry by bank on 3-3-2006.	<u>3,40,862.00</u>	<u>0.00</u>
	5,04,90,742.00	4,97,08,865.98
Less: Opening balance on 1-4-2005.	<u>16,02,805.00</u>	<u>16,02,805.00</u>
	4,88,87,937.98	4,81,06,060.98
Less: Interest credited in the account.	<u>14,97,282,9814,97,282,98</u>	<u>14,97,282,98</u>
	4,73,90,655.00	4,66,08,778.00
Security received (as per annexure-A attached).	3,00,00,000.00	3,00,00,000.00
On account of rent (after TDS)	7,71,919.00	7,09,542.00
[(771919-62377) paid out of account direct Payment]		
On account of salary (after TDS)	80,16,900.00	72,97,400.00
{(8016900-719500) paid out of account direct Payment}		
On account of advance rent.	<u>86,01,836.00</u>	<u>86,01,836.00</u>
	4,73,90,655.00	4,66,08,778.00

From the facts and details given above, it would be seen that the objections/comments of the Ld. AO in this regard is ill-founded, without any merit and has no legal force. The fact of the matter is that the advance payments have been made to the appellant in accordance with the terms and conditions of 'Lease Agreement' and in the interest of business and thus the provisions of section 2(22)(e) were not attracted in this case. "

I have carefully perused the assessment records, assessment order of the AO, written submissions of the A/Rs of the appellant, Remand Report of the AO on the written submissions as well as the counter-comments of the appellant and find that the following two issues are involved in this appeal which require adjudication:-

- (i) Whether re-opening of the assessment u/s 147 of the Act was legally valid and justified; and
- (ii) Whether the payment of 'security' and 'advance-rent' by M/s Orbit Resorts (P) Limited., Chandigarh to the appellant fell within the ambit of section 2(22)(e) of the IT Act, 1961.

First of all, the initiation of proceedings u/s 147 are considered, which have also been challenged by the appellant in Ground No.2 of the appeal. It has been found that the appellant assessee filed his Income Tax Return relating to the assessment year 2006-07 on 29-01-2007 showing income at Rs.1,31,68,060/- and agricultural income at Rs.27,76,000/-. The assessment was completed at a total income of Rs.1,34,69,680/- with agricultural income of Rs.24,98,380/- vide order u/s 143(3) dated 26-12-2008. The Commissioner of Income Tax (Appeals), Bathinda vide his appellate order bearing Appeal No.219- IT-CIT(A)/BTI/08-09 dated 15-06-2010 allowed certain relief to the assessee.

After the completion of original assessment on 26-12-2008, the AO received information from Addl. Commissioner of Income-tax, Range-I, Chandigarh that Shri Sukhbir Singh Badal has interest of more than 60% in M/s Orbit Resorts Private Limited, Gurgaon and the said company had advanced loan of Rs.4,66,08,911/- to him during the period relevant for the assessment year 2006-07. Consequently, the Deputy Commissioner of Income-tax, Circle-II, Bathinda recorded the following reasons on 25-03-2010 for issue of notice u/s 148 of the IT Act, 1961:-

"As per information received from Addl. Commissioner of Income-tax, Range-I, Chandigarh vide letter No. Addl.CIT/R-I/SC-19/2008-09/5274 dated 26-03-2009, it has been informed that Shri Sukhbir Singh Badal has interest of more than 60% in M/s Orbit Resorts Private Limited, Gurgaon and the company M/s Orbit Resorts Private Limited, Gurgaon has advanced loan Rs.4,66,08,911/- (4,97,08,865 - opening balance 16,02,805 - interest of 14,97,149/-) during the year under reference to Sh. Sukhbir Singh Badal.

Since the assessee has a interest of more than 10%, the receipt of Rs.4,66,08,911/- is covered in the definition of Dividend' as per section 2(22)€ of I.T. Act, 1961. The assessee has filed the return of income declaring an income of Rs.1,31,68,060/- with agriculture income of Rs.27,76,000/- and it does not include any dividend income of Rs.4,66,08,911/-. As the assessee has not disclosed this dividend income in the return of income, therefore, I have reasons to believe that an income of Rs.4,66,08,911/- chargeable to tax has escaped assessment for the assessment year 2006-07. Hence to bring this income under tax and also any other income chargeable to tax which has escaped assessment and which may come into notice subsequently in the course of proceedings u/s 148, the notice u/s 148 is hereby issued."

Objections to the initiation of proceedings u/s 147 were filed by the appellant assessee vide letter dated 15-12-2007 but the AO did not agree with them mainly for the reason that 'material facts' had not been disclosed during original assessment proceedings. From the perusal of records, it is noticed that during original assessment proceedings, the appellant assessee furnished copy of his account as appearing in the books of M/s Orbit Resorts Private Limited, Chandigarh wherein complete narration regarding the nature of each transaction was mentioned. It has been explained by the appellant that he had let out his property No.256 situated in Sector 9C of Chandigarh to M/s Orbit Resort Private Limited and he had interest of more than 10% in the said company in as much as a 'Lease Agreement' in this regard was also executed on 10-11-2004. That the said company was running its business smoothly and comfortably at the said premises whose market value was about Rs.30 crores and in order to keep the lease agreement in force for the times to come, it was also agreed that the lessee shall pay a sum of Rs.3 crores as security and Rs.2 crores as advance rent to the lessor which shall carry interest @ 8% per annum. That in consonance of the said lease agreement, the appellant assessee received Rs. 3 crores as security and Rs.8601836/- as advance-rent on different dates during the year under consideration and a part of it was also returned / adjusted against the normal rent and salary due from the aforesaid company and that the said payments were for business considerations and expediencies and the same inno way constituted 'loan' for the purposes of section 2(22)(e) of the Act. It has also been contended by the appellant assessee that the accountant while writing the books of account of the company did not take any note of the aforesaid agreement and thus committed a clerical error by mentioning the word 'loan' against the transactions pertaining to the payments made on account of 'security' and 'advance-rent' as per the terms and conditions of 'lease agreement' executed on 10-11-2004 and consequently the same nomenclature of the transaction was repeated in the Cash Flow Statement

and in the replies submitted during assessment proceedings. In this regard, the appellant assessee, in particular, has inter alia, relied upon the judgment of H'ble Andhra Pradesh High Court in the case of CIT v. J.D. Italia reported at (1983) 141 ITR 948 (AP) wherein it has been held that the name or label given by a party to a particular amount is not conclusive and if an assessee uses a wrong or inappropriate expression, he would not be made liable on that account if, in law, he is not so liable. That since this fact was duly discussed with the AO during original assessment proceedings and he was satisfied that the payments made to the appellant assessee were not 'loans' but payments on account of 'security' and advance-rent which were made for business considerations and thus did not fall within the ambit of section 2(22)(e) of the Act.

During appellate proceedings, the A/Rs of the appellant assessee have vehemently contended that all the material facts of the case were available on record during original assessment proceedings and thus the provisions of section 147 could not be invoked in view of the facts and circumstances in this case. Apart from the other judgments relied upon by the A/Rs, they have strongly argued that the judgments in the case of Dr. Habicht vs. Makhija (1985) 154 ITR 552 (Bom.), Lokendra Singh vs. ITO (1981) 128 ITR 450 (MP) and Atma Ram Properties Private Limited versus DCIT in ITA No.87/2010 decided on 11-11- 2011 (Delhi) reported at (2012) SITC 237 (Del.).

In the judgment of Dr. Habicht vs. Makhija (1985) 154 ITR 552 (Bom.), it has been held that simply because the ITO was not aware of the Circular of the Board is not enough to re-open an assessment. In the case of Lokendra Singh, mentioned supra, the H'ble MP High Court has observed that when at the time of original assessment, primary facts were already before the ITO and after some routine enquiry, the ITO could have assessed the income on the basis of such information, it is not open to him to invoke the provisions of section 147 and reopen the assessment even though he may have omitted to notice the facts mentioned in the return by over-sight. So far as the case of Atma Ram Properties (P) Limited vs. DCIT [(2012) SITC 237 (Del.)] is concerned, its perusal reveals that in the said case the H'ble High Court held that it was apparent from the records that AO at the time of original assessment proceedings had gone into the question of loans and advances from sister concerns which contained particulars like opening balance and closing balance as well as entries/transactions during the year with complete narration and if the AO failed to apply legal provisions / section of the Act, the fault cannot be attributed to the appellant assessee. The relevant gist of this judgment has been quoted supra and the same is not being reproduced here for the sake of brevity.

In the present appeal also, the appellant assessee had furnished his copy of account as appearing in the books of M/s Orbit Resorts Private Limited, Chandigarh during original assessment proceedings which culminated on 26-12- 2008. The said copy of account contained all transactions of payment made to the appellant during the year and the word 'loan' has been mentioned in the various entries (leaving aside, at this stage, the fact whether the word 'loan' was mentioned through clerical error nor otherwise) besides the opening and closing balances and the AO could very well infer that the said payments stood covered by section 2(22)(e) of the Act and further by raising a normal query, he could also ascertain the shareholdings of the appellant in the said company. However, the AO did not take any adverse view in this regard while completing the original assessment. In view of these facts, two possibilities may come up. One, that the AO was not aware about the provisions of section 2(22)(e) and the other that the AO was satisfied that the advances received by the appellant assessee on account of 'security' and 'advance-tax' were for business considerations and thus the provisions of section 2(22)(e) could not be invoked in the circumstances of the case. In the former situation, the judgment in the case of Dr. Habicht vs. Makhija would apply in the case and in the latter situation the judgment of H'ble Madhya Pradesh in the case of Lokendra Singh vs. ITO, quoted, supra, would come into play. Thus, in both the situations, the provisions of section 147 of the Act could not be invoked in this case.

Further, in the reasons recorded, the AO has nowhere mentioned that the appellant assessee *'has failed to fully and truly disclose all the material facts necessary for his assessment'* during original assessment proceedings. The facts and circumstances of the case lead to the conclusion that all the material facts were available on record and no material facts were to be inferred or discovered by the AO once the copy of account of the appellant assessee in the books of M/s Orbit Resorts Private Limited, Chandigarh and vice-versa were available on record. The assessee was not required to disclose, state or explain the law. Failure to apply law or a section to the admitted facts on record is not covered by Explanation (1) to section 147 of the Act. Explanation (1) applies when the AO on the basis of account books or other evidence fails to discover or infer material facts which with due diligence could have been discovered. Explanation (1) deals with failure of the AO to discover or infer all material facts on the basis of books of account or other evidence produced by the assessee. Difference between facts and law is well recognized and under, Explanation (1) reflects the said difference..Thus the judgment in the case of Atma Ram Properties (P) Limited, quoted supra, applies on all the fours on the facts of the case under appeal.

Furthermore, in the case of ITO vs. Nawab Mir Barkat Ali Khan Bahadur (1974) 97 ITR 239 (SC), relied upon by the appellant assessee, it has been held by the Hon'ble Apex Court that having second thought on the same material, and omission to draw the correct legal presumption during original assessment do not warrant the initiation of proceedings u/s 147. The brief facts of the same have been given in the foregoing paragraphs of this order and for the sake of brevity; the same are not being re-produced here. The ratio of this judgment is also fully applicable to the facts of the present appeal.

The facts and the circumstances of the case narrated above lead to the conclusion that all the primary and material facts were available on record during original assessment proceedings and the appellant assessee's duty did not extend beyond the full and truthful disclosure of all primary facts. Once all the primary facts are before the AO, it is for him to decide what inferences of fact can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - for less the assessee, to tell the AO what inference, whether of fact or of law, should be drawn. Accordingly, it is held that the initiation of proceedings u/s 147 of the Act could not be invoked in this case and consequently re-opening of the assessment was neither legal nor justified. Accordingly, Ground No.2 of the Appeal of the appellant assessee is hereby accepted.

In view of the fact that proceedings u/s 147 of the Act in this case have been quashed; the other grounds of appeal have become infructuous and do not require any adjudication. However, in the interest of judicial discipline, the other grounds of appeal are also being decided as under:-

6. The Id. DR has supported the assessment order. He filed a written submission where the relevant parts reads as under:

"7. The basic grievance of the Revenue's appeal is against the quashing of the proceedings u/s 147 of the Act by the CIT(A). On this issue, I would like to submit that the assessee has filed return in Form No. 2D (SARAL). The assessee neither in the return of income nor during the course of original assessment proceedings disclosed / made any submission indicating that he was having substantial interest (60%) in the company - M/s Orbit Resorts Pvt. Ltd. wherefrom he had received an amount of Rs.3 Cr. in the Form of Security Deposit and Rs.2 Cr. as Advance Rent. It is therefore apparent that the appellant failed to disclose material facts while filing

the return of income or in the original assessment proceedings which resulted in reopening of the assessment u/s 147 of the Act and therefore, the action of the AO in this regard was legal and valid. In this regard, I would like to rely upon the decision of the Hon'ble Gujarat High Court in the case of Dishman Pharmaceuticals & Chemicals Ltd. Vs DCIT [2013] 30 taxmann.com 67 (Gujarat). The operational part of the order is a under -

13. The fact remains that from the return filed and the documents annexed with the return, nowhere it can be ascertained what was the holding of the assessee-company (in terms of voting power) in SDBL. If, upon further inquiry by the Assessing Officer, such details could be gathered and the nature of payment received by the petitioner from SDBL could be ascertained, to find out whether the same should be treated as "deemed dividend" under section 2(22)(e) or not, the same, in our opinion, would not satisfy the requirement of fully and truly disclosing all material facts necessary for assessment ; particularly viewed from the expression given in Explanation 1 to section 147 of the Act, which provides, inter alia, that production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within meaning of section 147 of the Act.

In view of the above facts and circumstances of the case and the ratio laid down by the Hon'ble Gujarat High Court in the case of Dishman Pharmaceuticals & Chemicals Ltd. Vs DCIT [2013] 30 taxmann.com 67 (Gujarat), it is requested that the action of the CIT(A) in quashing the reopening of the assessment u/s 147 of the Act may kindly be reversed and that the action of the AO may kindly be upheld.

7. Per contra, the defendant, Id. AR supported the decision of the Ld. CIT(A) in quashing of the proceeding's u/s 147 of the Act as per observations and findings given on page nos. 25 to 29 of the impugned order.
8. We have heard both the sides, perused the material on record, assessment order, the order of the learned CIT appeal and submissions filed

before us. The department has grievances mainly in respect of the two issues as per its grounds of appeal which require adjudication that-

- (i) Whether re-opening of the assessment u/s 147 of the Act was legally valid and justified; and
- (ii) Whether the payment of 'security' and 'advance-rent' by M/s Orbit Resorts (P) Limited., Chandigarh to the appellant fell within the ambit of section 2(22)(e) of the IT Act, 1961.

9. The Ld. CIT(A) has discussed that the appellant assessee filed his Income Tax Return relating to the assessment year 2006-07 on 29-01-2007 showing income at Rs.1,31,68,060/- and agricultural income at Rs.27,76,000/-. The assessment was completed at a total income of Rs.1,34,69,680/- with agricultural income of Rs.24,98,380/- vide order u/s 143(3) dated 26-12-2008. The Commissioner of Income Tax (Appeals), Bathinda vide his appellate order bearing Appeal No.219- IT-CIT(A)/BTI/08-09 dated 15-06-2010 allowed certain relief to the assessee. However, after the completion of original assessment on 26-12-2008, the AO received information from Addl. Commissioner of Income-tax, Range-I, Chandigarh that Shri Sukhbir Singh Badal has interest of more than 60% in M/s Orbit Resorts Private Limited, Gurgaon and the said company had advanced loan

of Rs.4,66,08,911/- to him during the period relevant for the assessment year 2006-07 and consequently reopened the assessment by recording the reasons on 25-03-2010 for issue of notice u/s 148 of the IT Act, 1961 based on the aforesaid information.

10. The Ld. CIT(A) has stated that objections to the initiation of proceedings u/s 147 were filed by the appellant assessee vide letter dated 15-12-2007 but the AO did not agree with them mainly for the reason that 'material facts' had not been disclosed during original assessment proceedings. From the perusal of records, it is noticed that during original assessment proceedings, the appellant assessee furnished copy of his account as appearing in the books of M/s Orbit Resorts Private Limited, Chandigarh wherein complete narration regarding the nature of each transaction was mentioned. The Ld. AR while supporting the impugned order stated that it has been explained by the appellant that he had let out his property No.256 situated in Sector 9C of Chandigarh to M/s Orbit Resort Private Limited and that he had interest of more than 10% in the said company in as much as a 'Lease Agreement' in this regard was also executed on 10-11-2004. It is mentioned by the Ld. CIT(A) that the said company was running its business smoothly and comfortably at the said premises whose market value was about Rs.30 crores and in order to keep

the lease agreement in force for the times to come, it was also agreed that the lessee shall pay a sum of Rs.3 crores as security and Rs.2 crores as advance rent to the less or which shall carry interest @ 8% per annum. That in consonance of the said lease agreement, the appellant assessee received Rs. 3 crores as security and Rs.86,01,836/- as advance-rent on different dates during the year under consideration and a part of it was also returned/adjusted against the normal rent and salary due from the aforesaid company and that the said payments were for business considerations and expediencies and the same in no way constituted 'loan' for the purposes of section 2(22)(e) of the Act.

11. Thus, the Ld. CIT(A) has considered the facts and circumstance at length that all the material facts of the case were available on record during original assessment proceedings and thus the provisions of section 147 could not be invoked in the present case in view of the judgments in the case of Dr. Habicht vs. Makhija (1985) 154 ITR 552 (Bom.). Lokendra Singh vs. ITO (1981) 128 ITR 450 (MP) and Atma Ram Properties Private Limited versus DCIT in ITA No.87/2010 decided on 11-11- 2011 (Delhi) reported at (2012) SITC 237 (Del.).

12. In the present case, the appellant assessee furnished his copy of account as appearing in the books of M/s Orbit Resorts Private Limited, Chandigarh during original assessment proceedings which contained all transactions of payment made to the appellant during the year and the word 'loan' has been mentioned in the various entries (leaving aside, at this stage, the fact whether the word 'loan' was mentioned through clerical error nor otherwise) besides the opening and closing balances and the AO could very well infer that the said payments stood covered by section 2(22)(e) of the Act and further by raising a normal query, he could also ascertain the shareholdings of the appellant in the said company. The Ld. CIT(A) has rightly observed that the AO did not take any adverse view in this regard while completing the original assessment, either the AO was not aware about the provisions of section 2(22)(e) or the AO was satisfied that the advances received by the appellant assessee on account of security and advance-Rent were for business considerations and thus the provisions of section 2(22)(e) could not be invoked in the circumstances of the case. In the first situation, the judgment in the case of Dr. Habicht vs. Makhija (Supra) would apply and in the latter situation the judgment of H'ble Madhya Pradesh in the case of Lokendra Singh vs. ITO, quoted, supra, by the CIT(A) would come into play.

Thus, under both the situations, the provisions of section 147 of the Act could not be invoked in present case of the appellant.

13. From the reasons recorded, it is evident that the AO has nowhere alleged that the appellant assessee 'has failed to fully and truly disclose all the material facts necessary for his assessment' during original assessment proceedings. Meaning thereby that peculiar facts and circumstances of the case lead to the conclusion that all the material facts were available on record and no material facts were to be inferred or discovered by the AO once the copy of account of the appellant assessee in the books of M/s Orbit Resorts Private Limited, Chandigarh and vice-versa were available on record. The Failure on the part of the AO to apply law or a section to the admitted facts on record is not covered by Explanation (1) to section 147 of the Act.

14. In the case of ITO vs. Nawab Mir Barkat Ali Khan Bahadur (1974) 97 ITR 239 (SC), it has been held by the Hon'ble Apex Court that having second thought on the same material, and omission to draw the correct legal presumption during original assessment do not warrant the initiation of proceedings u/s 147. The brief facts of the same have been discussed and well considered by the Ld. CIT(A) as the ratio of this judgment is fully applicable to the facts of the present case where all the primary material facts

were available on record during original assessment proceedings and the appellant assessee's duty did not extend beyond the full and truthful disclosure of all primary facts. Once all the primary facts are before the AO, it is for him to decide what inferences of fact can be reasonably drawn and what legal inferences have ultimately to be drawn. Accordingly, the Ld. CIT(A) has been justified in holding the initiation of proceedings u/s 147 of the Act as illegal.

15. The Ld. DR failed to controvert the contention raised by the Ld.AR in support of the decision of the Ld. CIT(A). The Ld. DR has merely filed a written note narrating the part of the discussion from the assessment order. He relied on the case of Dishman Pharmaceuticals & Chemicals Ltd. Vs DCIT(Supra) (Guj-HC) which has not considered the Judgement of the Apex Court (Supra). In our view, the judgement relied by the Ld. DR is distinguishable on peculiar facts of the present case and it would not stand before the Judgement of the Hon'ble Apex Court as relied by the Ld. CIT(A).

16. From the record, it is evident as demonstrated by the Ld. CIT(A) that the facts and circumstances of the case lead to the conclusion that the payment of Rs.3.00 crores by the company to the appellant on account of 'security' was for business considerations because the company in order to

safeguard its business interest wanted to occupy the said premises for the times to come and thus agreed to make the said payment and also incorporated this clause in the 'lease-agreement'. This fact remains uncontroverted by the department. Merely alleging that the entire story made up by the assessee is clearly an afterthought would be of no help to revenue unless the factual evidence brought on record and contention of the appellant are disproved. The Ld. CIT(A) has been justified in relying on the judgement delivered on similar fact in the case of Pradip Kumar Malhotra vs. CIT (Supra). Therefore, no interference is called for in the decision of the Ld. CIT(A) in holding that the payment of Rs.3.00 crores on account of 'security' does not fall within the definition of 'deemed dividends' as per the provisions of section 2(22)(e) of the Act.

17. In view of that matter we find no infirmity or perversity in the decision of the Ld. CIT(A) to the facts on record in quashing the reopening of the assessment u/s 147 of the Act and that payment of Rs.3.00 crores on account of 'security' does not fall within the definition of 'deemed dividends' as per the provisions of section 2(22)(e) of the Act. Thus, the ground no. 1 and 2 of the department are rejected. The other grounds are general in nature which as such require no adjudication.

18. In CO No. 33/Asr/2013 the assessee has challenged that the Id. Commissioner of Income Tax (Appeals) gravely erred in holding the advance rent of Rs. 8601836/-, received by assessee from M/s Orbit Resorts Pvt. Ltd. as deemed dividend under Section 2(22)(e) of the Income Tax Act while granting part relief to the assessee by observing as under:

From the perusal of assessment records it has been found that the appellant assessee had leased out his House No.256, Sector 9C, Chandigarh to M/s Orbit Resorts Private Limited, Chandigarh [in which he had shareholding exceeding 10%] and for this purpose, a 'Lease Agreement' was also executed on 10-11-2004 between the assessee and the said company. One of the stipulations of the said lease-deed read as under:-

"That the lessee shall pay a sum of Rs.3.00 crores as security and Rs.2.00 crores as advance rent to the lessor which shall carry interest @ 8% for the lessor shall give the separate receipt."

During re-assessment proceedings, the appellant assessee relied upon certain orders/judgments in the cases of DCIT vs. Lakra Brothers (2007) 106 TTJ (Chd.) 250; CIT Vs. Ambassador Travels (P) Limited (2009) 318 ITR 576 (Del.); CIT vs. Nagindas M. Kapadia (1989) 177 ITR 393 (Bomb.) and CIT vs. Creative Dyeing & Printing (P) Limited. (2009) 318 ITR 476 (Bom.) wherein the H'ble High Courts / ITAT have held that advance made during the ordinary course of business expediencies do not constitute 'loan' for the purposes of section 2(22)(e) and cannot be taxed as 'deemed dividends'.

However the AO in his assessment order has held that in the case of the appellant assessee there was no business expediency to advance any loan to the assessee especially when in the various replies and documents furnished during assessment proceedings, the word 'loan' had been used. It has also been held by the AO that the excuse of mentioning wrong terminology by the accountant of the company could not be accepted. The AO has also relied upon the judgment of Hon'ble High Court of Madras in the case of CIT Vs. P.S. Abubucker (2004) 135 Taxman 77 (Mad.) wherein it has been held that 'advance rent' will be deemed as dividend even if the amount is received under the lease agreement (not as a

shareholder but as a landlord) or even if it has to be adjusted against future rent. In the Remand Report also, the AO has also stated that receipt of 'advance rent' is not borne out from the Income Tax Return of the assessee and that the payments made intermittently throughout the year were not any kind of advance in lieu of availing of any premises on rent/lease. It has also been stated by him that odd figure of payments of Rs.7,41,778/- on 23-02- 2006 and Rs.3,40,862/- on 03-03-2006 could not be said to be against the agreed security.

The A/Rs of the appellant assessee on the other hand have explained that the genuineness of the "Lease Agreement" executed on 10-11-2004 between the assessee and the said company has not at all been doubted by the AO, in consonance of which the payments on account of 'security' and 'advance-rent' have been made by the company. It has also been explained that the Accountant of the company without going through the 'Lease Agreement' mentioned the word 'loan' in the books of account which was an error clerical in nature and as a result of this inadvertent mistake, the word 'loan' was mentioned in the Cash Flow Statement and other replies furnished during assessment proceedings. That the said error was natural because the agreement has been executed about two years back and the concerned Accountant did not take any note of it due to little knowledge of taxation laws. In this regard, inter alia, reliance has been placed on the judgment in the case of CIT vs. Italia 141 ITR 948 (AP) wherein it has been held that the name given by a party to a particular amount is not conclusive. It has also been stated that the observations of the AO that the payments have been made intermittently throughout the year and two payments have been made in odd figures have nothing to do with the addition made payment of 'security' at Rs.3.00 crores has been made in round figures, for which bifurcation from the copy of account has been furnished. That so far as odd figure of Rs.3,40,862/- on 03-03-2006 is concerned, the said entry was reversed on the same date as it was wrongly made by the bank. Further, from the perusal of copy of account of the appellant as appearing in the books of M/s Orbit Resorts Private Limited, it would be seen that this entry does not appear there. With regard to the other payment of Rs.7,41,778/- on 23-02-2006. it has been stated that there is no bar for making the advance payments in odd figures. It has also been stated that advance payments on account of 'security' and 'advance rent' have been made to the appellant assessee intermittently throughout the year after taking into consideration the availability of funds with the said company. With regard to the observations of the AO in the remand report that payment of 'advance-rent' was not borne out from the Income Tax Return of the appellant assessee, it has been explained by the A/Rs that the said 'advance-rent' was not liable to tax during the year under consideration and in support of it reliance has been placed on the Order of the H'ble ITAT, Amritsar

Bench in the case of DCIT vs. Prince Rubber & Plastics reported at (2004) 1 SOT 85 (Asr) wherein the Hon'ble ITAT has concluded as under:-

“Advance rent could not be brought to tax in the year of receipt as the income from house property could only be computed on the basis of annual lettable value of the property”

The A/Rs of the appellant assessee have vehemently argued that in the leased property, having worth of about Rs.30.00 crores; the company was running its business smoothly and comfortably from the said premises and in order to keep the lease agreement in force for the times to come, the payment of 'security' and 'advance-rent' were agreed to be made to the assessee as per the stipulations of the 'lease agreement' and thus these payments were for business considerations and did not fall within the ambit of section 2(22)(e) of the Act. Reliance in this regard has also been placed on the judgment of Hon'ble High Court of Calcutta in the case of Pradip Kumar Malhotra vs. CIT in ITA No.219 of 2003 wherein it has been held that gratuitous loan by company in return to an advantage conferred upon the company by such shareholder is not 'deemed dividend'. The relevant extract of this judgment has been reproduced in the foregoing paragraphs and for the sake of brevity; the same is not being reproduced again.

It is a fact that the AO has not challenged the genuineness of the 'Lease Agreement' executed between the appellant assessee and M/s Orbit Resorts Private Limited, Chandigarh. It is also a fact that the payments of 'security' and advance-rent have been made to the assessee in consonance of the said agreement. The AO has pressed into service the provisions of section 2(22)(e) of the Act mainly because the word 'loan' has been mentioned in the copy of account whereas plausible explanation in this regard has been tendered by the appellant assessee. The addition of Rs.4,66,08,911/- made by the AO consists of two parts - one is for advance payment made on account of 'security' while the other is for advance payment of 'advance-rent'.

During appellate proceedings, the A/Rs have explained that the addition of Rs.4,66,08,911/- was made by the AO as intimated by the Addl. CIT, Range-I, Chandigarh and he did not go through the copy of account of the assessee in the books of the company and vice-versa. Bifurcations of the amounts received on account of 'security' and 'advance-rent' have been given by them in the counter-comments on the remand report of the AO and the same have also been reproduced in the foregoing paragraphs of this order. It has been seen that the

appellant assessee received payment on account of 'security' at Rs.3.00 cores while payment of Rs. 8601836/- has been received on account of 'advance-rent'.

The facts and circumstances of the case lead to the conclusion that the payment of Rs.3.00 cores by the company to the appellant on account of 'security' was for business considerations because the company in order to safeguard its business interest wanted to occupy the said premises for the times to come and thus agreed to make the said payment and also incorporated this clause in the 'lease-agreement'. This fact also finds support from the judgment in the case of Pradip Kumar Malhotra vs. CIT, quoted supra. Thus, it is held that the payment of Rs.3.00 cores on account of 'security' does not fall within the definition of 'deemed dividends' as per the provisions of section 2(22)(e) of the Act.

So far as the 'advance-rent' payment of Rs. 8601836/- by the company to the appellant assessee is concerned, it has been found that in respect of the premises leased out to the company, a rent of Rs.75,000/- per month was settled and it was also agreed by the parties that the said lease rent shall be escalated by 7-1/2% after the expiry of every year. In such a situation, the advance-rent paid by the company bears the character of 'loan' to the appellant assessee and falls within the ambit of section 2(22)(e) of the Act. This also finds support from the judgment of Hon'ble Madras High Court in the case of CIT vs. P.K. Abubucker reported at (2003) 259 ITR 507 (Mad.) which has also been relied upon by the AO. In the said judgment, the Hon'ble High Court has arrived at the following conclusion:-

"Advance given by company to assessee (managing director) for construction of a building constituted deemed dividend under section 2(22) (e) even though the building was to be leased out to the company and the advance was required to be set off against the rents payable in future years."

In view of the aforesaid facts and circumstances of the case and the judgment quoted supra, the addition of Rs. 8601836/- on account of 'advance- rent' paid by the company to the appellant assessee is hit by section 2(22)(e) and thus requires to be sustained."

19. Having heard both the sides and perusal of material we find that the AO has not challenged the genuineness of the 'Lease Agreement' executed between the appellant assessee and M/s Orbit Resorts Private Limited,

Chandigarh. It is an undisputed fact that the payments in advance of rent have been made to the appellant assessee by the company in consonance of the said agreement. The Ld. AR submitted before the CIT(A) that the addition of Rs.4,66,08,911/- was made by the AO as intimated by the Addl. CIT, Range-I, Chandigarh without going through the copy of account of the assessee in the books of the company and vice-versa and rebutting the submission of the appellant. The appellant had given bifurcations of the amounts received on account of 'security' and 'advance-rent' in the rejoinder to the remand report of the AO and the same have also been reproduced in the foregoing paragraphs of this impugned order. It has been seen that the appellant assessee received payment on account of 'security' at Rs.3.00 cores which has already been considered and deleted by the CIT(A) being not covered under the definition of deemed dividend as per provisions of section 2(22)(e) of the Act and the said finding are sustained by us.

20. The appellants' grievance is that the advance rent of Rs. 86,01,836/-, received by assessee from M/s Orbit Resorts Pvt. Ltd. can not be treated as deemed dividend under Section 2(22)(e) of the Income Tax Act. Undisputedly, the amount of payment of Rs. 86,01,836/- has been received by the assessee on account of 'advance-rent' in respect of the premises leased out to the company, @ rent of Rs.75,000/- per month, settled and it

was also agreed by the parties that the said lease rent shall be escalated by 7-1/2% after the expiry of every year. The Ld. CIT(A) observed that in such a situation, the advance-rent paid by the company bears the character of 'loan' to the appellant assessee and falls within the ambit of section 2(22)(e) of the Act, relying on the the judgment of Hon'ble Madras High Court in the case of CIT vs. P.K. Abubucker reported at (2003) 259 ITR 507 (Mad.), which has also been relied upon by the AO and the Ld DR. In the said judgment, the Hon'ble High Court has arrived at the following conclusion:-

“Advance given by company to assessee (managing director) for construction of a building constituted deemed dividend under section 2(22) (e) even though the building was to be leased out to the company and the advance was required to be set off against the rents payable in future years.”

21. The Ld. AR argued that assessee has received advance rent from company in respect of the premises leased out to the company, and such advance rent was later adjusted towards rent payable to assessee and that it is a commercial transaction and would be outside the purview of section 2(22)(e). In support, he placed reliance on the judgement delivered by Hon'ble Karnataka High Court in the case of Smt. Jamuna Vernekar Vs. Deputy Commissioner of Income-tax, Circle 12(5), Bangalore,[2021] 129 taxmann.com 380 (Karnataka) IT Appeal No. 43 of 2013, February 10, 2021

where the Hon'ble Court adjudicated the issue whether loan or advance given to a shareholder can be treated as deemed dividend under section 2(22)(e) of the Act, in favour of the assessee vide para 6 and 7 as under:

6. We have considered the submissions made on both sides and have perused the record. The only issue, which arises for consideration in this appeal is whether loan or advance given to a shareholder can be treated as deemed dividend under section 2(22)(e) of the Act, which reads as under:

"any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern, in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits."

7. Thus, from perusal of the aforesaid provision, it is evident that it is only where a loan is advanced by a company to the registered shareholder and in case other conditions as set out in section 2(22)(e) of the Act are satisfied, the amount of loan would be liable to be treated as deemed dividend within the meaning of section 2(22)(e) of the Act. The purpose of insertion of sub-clause (e) of sub-section (22) of section 2 of the Act was to bring within the tax net accumulated profits which are distributed by closely held companies to its Shareholders in the form of loans to avoid payment of dividend distribution tax under section 115-0 of the Act. Loan or advance given to shareholders or to a concern would not normally qualify as dividend and only in case, where such loan or advance is given to a shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such a case, such advance or loan cannot be said to be deemed dividend within the meaning of the provision. The word 'loan' means anything lent specially money on interest whereas, deposit means is some of money paid to secure an article at service etc. Therefore deposit is not covered by the definition of section 2(22)(e) of the act. In the instant case the assessee received certain sum from the company which was subsequently adjusted with the security deposit. The company did not give loan to the assassin to construct a building but captain deposit as any other commercial transaction. The sum soaked has been adjusted towards security deposit which is evident from the books of the

company and therefore, the aforesaid deposit is outside the purview of section 2(22)(e) of the Act. A sum of Rs. 19,37,355/- amounts to trade advances which was recovered from rentals during the usual course of business. The trade advances arising during usual course of business and not for individual benefit of the assessee and the same amounts to advance payment of the rents adjusted monthly with the ledgers of the assessee. The Commissioner of Income-tax (Appeals) has also held that under the commercial transactions, the assessee had given prime property and after construction to the company and the company was benefited as the building after construction was let out to the company at much lower rate than the market price and therefore, the transaction in question is commercial transaction and is outside the purview of section 2(22)(e) of the Act. However, the aforesaid aspect of the matter has not appreciated by the tribunal. Therefore, the finding recorded by the tribunal cannot but be termed as perverse.

In view of preceding analysis, the substantial question of law is answered in the negative and in favour of the assessee and against the revenue.

22. Without prejudice to the above, Id. counsel for the assessee submitted that the advance rent paid was not liable to be taxed during the year under consideration and would be taxable in the year the rent is accounted for by accrual in books. In support, he placed reliance on the judgment delivered in the case of Delhi Tourism & Transportation Development Corporation Ltd. vs Additional Commissioner of Income-tax [2023] 156 taxmann.com 550 (Delhi - Trib.) where a similar issue was decided in favour of assessee that assessee received advance rent from Government Agencies - Whether it could be taxed in hands of assessee in year under consideration and was subject to taxation in subsequent assessment vide para 61, which reads as under:

“61. We have heard both the parties and perused the material available on record. The assessee in the present case following mercantile system of accounting and there is no dispute on the said fact. Being so, the income accrued and received relating to the year under consideration has to be taxed. In the present case, the assessee received advance rent from the Government Agencies which is not accrued to the assessee and the same has

to be taxed in the assessment year for which the same is related. Therefore, it cannot be taxed in the hands of the assessee in the year under consideration. The said advance rent is subject to taxation in the subsequent Assessment Year, being so, the same cannot be taxed in the year under consideration. Accordingly, we allow the Ground No. 1 in ITA No. 5167/Del/2019 (for Assessment Year 2015-16) and delete the addition.”

23. The Id. DR supported the impugned order and placed reliance on the judgment of Madras High Court as relied by the Id. CIT(A).

8. *Regarding the assessee’s cross objection on the issue of sustaining of addition of Rs.86,01.836/- on account of ‘advance rent’ paid by the company to the assessee u/s 2(22)(e) of the Act by the CIT(A), it is submitted that both the CIT(A) and the AO had relied upon the decision of the Hon’ble Madras High Court in the case of CIT Vs. P.K. Abubucker [2004] 135 Taxman 77 (Madras)/[2003] 259 ITR 507 (Madras) and the CIT(A) confirmed the action of the AO. The facts of the present case and that of the case of P.K. Abubucker are identical. On both the cases, the advance rent received was to be adjusted against the future rent receivable. The copy of the judgment is enclosed as **Annexure “B”**, In view of the facts and circumstances of the case, it is requested that the addition made by the AO which was confirmed by the CIT(A) may kindly be upheld and the cross objection filed by the assessee may kindly be dismissed.”*

24. In the present case the assessee has leased prime properties at Chandigarh and received an advance rent in respect of the said premises leased out to the company, and such advance was to be later adjusted towards rent payable by the company. In our view, the amount of advance rent received by the assessee from the company would be a commercial transaction and it would certainly fall outside the purview of section 2(22)(e) of the Act. The assessee being having substantial interest in the company

would not change the character of the transaction. In the present case where we have a situation of contrary views having been expressed by the non-jurisdictional High Courts and there is no decision of Hon'ble Jurisdictional Punjab and Haryana High Court, we are guided by the decision of the Hon'ble Supreme Court in case of Commissioner of Income tax vs M/s Vegetables Products Ltd reported in 88 ITR 192 where it was held that where the provision is capable of more than one reasonable interpretation and different High Courts have taken different view on the matter, the view which is favourable to the assessee should be adopted. In view of the same, we are inclined to follow the views expressed by Hon'ble Karnataka High Court in the case of Smt. Jamuna Vernekar Vs. Deputy Commissioner of Income-tax (Supra), where it was observed that such loan or advance is given to a shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder is a commercial transaction and it is outside the purview of section 2(22)(e) of the Act. In the present case, advance rent or even security was given in lieu of the use of rented premises in terms of lease agreement and therefore, such an advance rent and not even loan cannot be said to be deemed dividend within the meaning of the provision of section 2(22)(e) of the Act.

25. Considering the factual matrix of the case and that contrary views have been expressed by the non-jurisdictional High Courts, we follow the decision of the Hon'ble Supreme Court in case of Commissioner of Income tax vs M/s Vegetables Products Ltd (Supra) and accordingly, we hold that 'advance-ment' paid by the company to the appellant assessee amounting to Rs. 86,01,836/-is not hit by section 2(22)(e) and as such, the said addition of Rs. 86,01,836/-is deleted. Thus, the ground. No.1 of the CO. of the assessee is allowed.

26. In the result, the appeal of the revenue is dismissed, and that the Cross Objection of the Assessee is allowed.

Order pronounced in the open court on 28.08.2024

Sd/-
(Udayan Dasgupta)
Judicial Member

Sd/-
(Dr. M. L. Meena)
Accountant Member

GP/Sr.PS

Copy of the order forwarded to:

- (1) The Appellant:
- (2) The Respondent:
- (3) The CIT concerned
- (4) The Sr. DR, I.T.A.T.

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By Order