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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : May-18-2007

Reported in : (2008)110ITD361(Delhi)

Judge : K Singhal, B Khatri

Appellant : A-one Housing Complex Ltd.

Respondent : ito

Judgement :

1. These are the cross-appeals filed by the assessee as well as revenue against the order of learned Commissioner (Appeals) dated 11-6-2004 pertaining to assessment year 1999-2000. The only and the common issue arising from these appeals relates to the addition of Rs. 1,90,10,000 under Section 68 of the Income Tax Act, 1961 ('Act') on account of unexplained share capital and share application money. The assessee is in appeal against the addition of Rs. 3,85,000 sustained by the learned Commissioner (Appeals) while revenue is in appeal against the deletion of Rs. 1,86,25,000 made by the learned Commissioner (Appeals).

2. The briefly stated that the facts are these. The assessee is a limited E company which declared loss of Rs. 2,240 in respect of assessment year 1999-2000. In the course of assessment proceedings, it was noticed by the assessing officer that assessee-company had raised the share capital of Rs. 1,78,60,000 and share application money at Rs. 11,50,000. In support of the same the assessee had filed

most of the confirmations. However, on enquiries made by him, the assessing officer was of the view that identity of the shareholders was not established and, therefore, the share capital and the share application money was liable to be assessed under Section 68. The reasons for coming to this conclusion were as under : (1) Though various parties resided at different locations in Delhi as well as outside Delhi but the language and typing on the confirmations, prima facie, seem to be the same.

(3)Though the notices under Section 133(6) of the Act were issued to allqthe parties on 7-3-2002, only three parties responded. Two parties namely Geeta Jain and Hament Kumar refused to make any A transaction with the assessee-company. The third letter was received from Ramesh Mangla & Co., CA stating that there was no person residing in the name of Laxman Dass Bhatia at the given address.

(4) The assessee was confronted in respect of the above three partiesvide order sheet entry dated 18-3-2002 and the assessee was requestedto produce all the parties on 22-3-2002. Despite the same neither anyreply was filed nor any party was produced.

In view of the above factual position, the assessing officer came to the conclusion that share capital and share application money was nothing but the income of the assessee from undisclosed sources.

Reliance was placed on the decision of Hon'ble Delhi High Court in the case of CIT v. Sophia Finance Ltd. for the proposition that if the identity of the share application is not established then addition can be made under Section 68 of the Act.

Accordingly, the addition of Rs. 1,19,10,000 was made by the assessing officer.

3. The addition made by the assessing officer was challenged in appeal before the learned Commissioner (Appeals) before whom it was submitted as under : (1) As regards Geeta Jain was concerned, her name had been given to the assessing officer by mistake. The actual shareholder was Geeta Arora of 29/326, New Moti

Nagar, New Delhi.

(2) As regards Hament Kumar, it was not known under what D circumstances he had denied the investment. In fact, the payment had been made by account payee cheque. No opportunity was allowed to the assessee to cross-examine Hament Kumar.

(3) As regards Laxman Dass Bhatia, the address had been changed and the present address was 38, Sankar Market, Connaught Place, New Delhi.

(4) Regarding remaining shareholders, all amounts had been received E through account payee cheques. No adverse inference could be drawn merely on the ground that confirmations from them were in the same language and type and on unfolded papers. The addresses of all the shareholders had been supplied to the assessing officer and the assessing officer had sent notices to all of them. There was nothing to indicate that any notice came back unserved. Therefore, the identity of these persons stoods established.

(5)Though the assessing officer asked the assessee on 18-3-2002 toproduce all the 108 shareholders on 22-3-2002, it was an impossibletask particularly in the month of March. If the shareholders are nowsummoned under Section 131, the assessee will do his best toproduce thern.

(6) The facts that (i) the notices issued by assessing officer were served upon the parties at the addresses given, (ii) non-denial of investment by any of the 108 shareholders, and (iii) confirmations were filed by them, clearly proves that the shareholders were existent and, therefore, the addition could not be made under Section 68 of the Act in view of the decision of Hon'ble Delhi High Court in the case of Sophia Finance Ltd. (supra).

4. The written submissions filed by the assessee were forwarded to the assessing officer on 22-10-2002 with the direction to call the shareholders under Section 131 /133(6) of the Act and then sent his report. In response to the same, it was reported by the assessing officer on 16-12-2002 that summons under Section 131 had been issued to 105 parties for 9-12-2002 but only two parties responded

namely, Geeta Jain and M/s. Ganadhipati Finance & Leasing Ltd. It is further stated that they did not appear in person but sent written replies. Geeta Jain refused to make investment of Rs. 2 lakhs but M/s. Ganadhipati Finance & Leasing Ltd. confirmed the investment of Rs. 2.50 lakhs and filed a copy of bank accounts. In view of the same, the assessing officer concluded in his return that the identity and creditworthiness of the shareholders remained unverified.

5. Another letter was sent by learned Commissioner (Appeals) to the assessing officer on13-2-2003 pointing out that many confirmations lying on his assessment record had apparently not been considered while sending the remand report dated 16-12-2002. Accordingly, assessing officer was asked to bestow his person attention and sent a specific report after examining the confirmations lying on his record which contained Permanent Account Numbers of the parties and details of bank accounts. In response to the same, the assessing officer sent his report through his letter dated 1-9-2003. In the said report, it was confirmed that apart from Geeta Jain, Hament Kumar, Laxman Das Bhatia, all other shareholders had filed confirmations of investment, given Permanent Account Numbers and bank account numbers from which they had made the investment. However, only ten of them had independently confirmed the investment to the assessing officer.

6. After considering the aforesaid remand reports, the learned Commissioner (Appeals) observed that assessing officer had not given any adverse report in respect of any shareholders except Geeta Jain, Laxman Das Bhatia and Hament Kumar. The learned Commissioner (Appeals) also made his own enquiries from the assessee inasmuch as he directed the assessee to file of the income-tax return acknowledgements and bank accounts of all the shareholders. In response to the same, the assessee filed the same except in the case of above three persons. Accordingly, he confirmed the addition of Rs. 3,85,000 under Section 68 on account of unexplained credits in the names of Geeta Jain, Hament Kumar and Laxman Dass Bhatia. The balance addition of Rs. 1,86,25,000 was deleted inasmuch as the identity of all the 108 shareholders had been proved through confirmations, bank accounts and income-tax return acknowledgements and absence of any adverse report A from the assessing officer.

7. Aggrieved by the same, the assessee as well as the revenue are in appeal before the Tribunal.

8. The learned DR, Shri R.P. Singh, has assailed the order of the learned Commissioner (Appeals) in respect of additions deleted by him by simply reiterating the reasons given by the assessing officer in his order. However, he tried to improve the case of the revenue by pointing out certain facts. He drew our attention B to page 18 of the paper book which is the list of shareholders to point out that 11 parties of various places had issued cheques/DD from the same bank i.e. South Indian bank Ltd., New Delhi. According to him, different persons from different places could not have obtained the draft from the same bank in the normal circumstances. Further, he drew our attention to pages 75-77 to point out that confirmations were prepared from the same computer. According to him, page 75 shows that confirmation was signed not by the director but somebody else on behalf of the director. Then he drew our attention to various confirmations appearing at pages 113 onward to point out that only GIR Nos. are given instead of Permanent Account Numbers. Even in some cases even the GIR No. was not mentioned.

Particular attention was drawn to page 132 of the paper book. Then he referred to various acknowledgements of income-tax returns in respect of the parties to point out that such returns were filed in March 2001.

It was also submitted by him that in some cases, the balance sheet d had not been filed by the shareholders along with their returns. Coming to the bank accounts of the shareholders, it was pointed out by him that money had been deposited in their accounts few days before issuing the cheques. He relied on the decision of Hon'ble Calcutta High Court reported in CIT v. United Commercial & Industrial Co. (P.) Ltd. in the proposition that mere payment by cheque was not sufficient to discharge the onus under Section 68 of the Act.

Lastly, it was submitted that assessee had failed to discharge its onus of proving the E identity, creditworthiness as well as genuineness of the cash credits and, therefore, the learned Commissioner (Appeals) was not justified in deleting the addition of Rs. 1,86,25,000.

9. On the other hand, learned Counsel for the assessee Shri Salil Aggarwal hasvehemently supported the order of learned Commissioner (Appeals) in respect of the additions deleted by him. He relied on the decision of Hon'ble Delhi High Court in the case of Sophia Finance Ltd. (supra) for the proposition that once the F identity is proved, nothing more is required to be proved by the assessee regarding the creditworthiness of the creditors or genuineness of the transaction. On facts, it was submitted that assessee had filed all the confirmations from the shareholders and share applicants who are duly assessed to tax. The payments had been made by cheques and the genuineness of the bank accounts of the parties had not been doubted. It was also submitted by him that in view of the amended provisions of Section 251 of the Act, the Commissioner (Appeals) could not set aside the order and restore the matter to the file of assessing officer for fresh adjudication since the amended law provided the adjudication of the issues by the learned Commissioner (Appeals) who can cause any enquiry himself while adjudicating the issue. In this context, it was submitted that learned Commissioner (Appeals) had forwarded written submissions of the assessee to the assessing officer on 22-10-2002 with the direction to issue notices under Section 131 /133(6) of the Act and then sent his report. Though the report was submitted by assessing officer on 16-12-2002, the learned Commissioner (Appeals) was not satisfied with the same and, therefore, he again sent a letter to the assessing officer on 13-12-2003 with the request to consider all the confirmations lying on the assessment record after giving his personal attention. In response to the same, the assessing officer had given his report wherein it has been mentioned that except three parties all other shareholders had filed confirmations of investment, given Permanent Account Numbers and bank account numbers from which the investments were made. The learned Commissioner (Appeals) did not stop there and he made his own enquiries by asking the assessee to file the copies of income-tax return acknowledgements and bank accounts of all the shareholders, which were duly furnished before the learned Commissioner (Appeals) by the assessee. It is only after considering the entire material on record that learned Commissioner (Appeals) had come to the conclusion that identity of the shareholders were well-established and, therefore, no addition was required to be made except the addition of Rs. 3,85,000 in the name of three parties. It has been

submitted by the learned Counsel for the assessee that the assessee had done what it could do in the circumstances mentioned. The onus which lies on the assessee was duly discharged. To support this proposition he relied on the decision of Hon'ble Supreme Court in the case of CIT v. Orissa Corpn. (P.) Ltd. (1986) 159 ITR 781 as well as latest decision of the Hon'ble Delhi High Court in the case of CIT v.Devine Leasing & Finance Ltd. (2007) 158 Taxman 440.

10. In reply, it has been submitted by learned AR that learned Commissioner (Appeals) had not verified the identity of the parties himself and simply relied on the confirmations and other material filed by the assessee. According to him, the powers of the learned Commissioner (Appeals) are co-terminus with that of assessing officer and, therefore, learned Commissioner (Appeals) himself should have issued the summons to the parties or in the alternative should have restored the matter to the file of assessing officer for afresh adjudication.

11. Coming to the appeal of the assessee, the learned Counsel for the assessee has submitted that assessee had committed a mistake in giving the name of the one of the shareholders as Geeta Jain instead of Geeta Arora and, therefore, on that account no adverse inference can be drawn. It was also submitted that assessee had given the correct name and address to the learned Commissioner (Appeals) and the learned Commissioner (Appeals) had asked the assessing officer to issue summons at the new address but still the assessing officer issued the A summons in the name of Geeta Jain. He, therefore, drew our attention too para 4.3 of the order of the learned Commissioner (Appeals) to point out that learned Commissioner (Appeals) was not happy with the action of assessing officer in sending the notice in the name of Geeta Jain instead of Geeta Arora. In these circumstances, it was submitted that addition could not have been sustained by the learned Commissioner (Appeals). Regarding Laxman Dass Bhatia, it has been submitted by him that he is an income-tax assessee which is apparent from the acknowledgement issued by Income Tax department appearing at page 392 of the paper book. According to him the summons should not be served as the address has been changed and, therefore, no adverse inference could be drawn. Regarding Hament Kumar, it v/as submitted that he had filed the confirmation but is not clear under what circumstances he denied the investment in shares.

According to him no opportunity to cross-examine was given by the assessing officer or the learned Commissioner (Appeals) even though it was mentioned in the statement of facts before the learned Commissioner (Appeals) as well as in q written submissions. A quarry was raised by the Bench as to whether the denial by Hament Kumar was confronted to the assessee or not. In response to the same it was admitted by him that this fact was confronted but assessee was not given opportunity to cross-examine him. On the other hand, learned DR had relied on the reasons given by the lower authorities. He also drew our attention to the signatures made by Laxman Dass Bhatia on the confirmations as well as acknowledgement slips of the income-tax return to point out that the signatures do not tally each other. He also drew D our attention to the confirmation filed in the name of Geeta Jain to point out that it is not even signed. Therefore, the question of accepting the same does not arise.

12. Rival contentions of the parties have been considered carefully in the light of materials placed and the case law cited by them. There is no dispute to the settled legal position that onus is on the assessee to prove the identity and creditworthiness of the creditors as well as genuineness E of the transaction in respect of cash credits appearing in the books of assessee. If the onus is not discharged then such cash credit may be assessed as deemed income of the assessee under Section 68 of the Act. It is also not in dispute that application of Section 68 is not restricted to receipts by way of loans or deposits. Such provisions are applicable to any receipt irrespective of its nature.

Reference can be made to the Full Bench judgment of Hon'ble Delhi High Court in the case of Sophia Finance Ltd. (supra) and Divisional Bench decision in the case of CIT v. Dolphin Canpack Ltd. (2006) 283 ITR 190 (Delhi) where provisions of Section 68 were held applicable to share capital receipts.

13. However, the pertinent question for our consideration is when the onus as assessee can be said to be discharged. In our humble opinion, the degree of onus would depend on the facts of each case and no standard degree of proof can be applied in all cases irrespective of the nature of receipt. It may be stringent or light depending upon the facts of the case. We would like to explain through examples

hereafter.

(a) The amount may be received from close relatives or friends by wayof loan or deposit or gift or otherwise. In such situation, the onuswould be stringent since the assessee is supposed to know all theparticulars of such creditors.

(b) In the case of deposits received by a money lender or a bank, the onusBwould be lighter as such banker is not supposed to know all the particulars of general public. Any person whether a millionaire or beggar can come to a bank and open the account with such banker.

The banker is not supposed to know the source of money deposited by his customers. Hence, the onus would be lighter than the one mentioned in example (a). Similar would be the position where share capital is received through public issue since the company is not supposed to know about the source from which share applicant makes the investment.

(c) The position would be different where the shares are issued by aprivate limited company. The reason is that the public issue cannotbe made by a private limited company. However, with requisitepermission, the share capital can be received through privateplacement normally to known persons i.e. the relatives and friendsof directors. In such cases, the onus would be heavy on the assessee Das held by Delhi Bench of the Tribunal in the case of Finquick. Similar would be the position even when shares are allotted by public limited company on private placement basis as observed by the Jurisdictional High Court in para 6 of the judgment in the case of Divine Leasing & Finance Ltd. (supra).

(d) Where the payment is received in cash or by demand draft, thestandard of proof would be rigorous and stringent than where the transaction is by cheque where the date and source of the investment cannot be manipulated as observed by the Hon'ble Delhi High Court in para 11 of its judgment in the case of Devine Leasing & Finance Ltd. (supra).

The above situations are illustrative and not exhaustive. By giving these examples, the purpose is to point out that no standard proof is required to discharge the onus

which lies on the assessee. It would be stringent or p light depending upon the facts of the case.

14. At this juncture, it would be appropriate to refer the judgment of Full Bench of Hon'ble Delhi High Court in the case of Sophia Finance Ltd. (supra) relied upon by the Learned Counsel for the assessee for the proposition that once the identity of the share applicant is established then nothing more is required to be established. The assessing officer has also relied on this judgment in support of his conclusion that even the identity could not be established by the assessee. This judgment has been critically analyzed and explained by the court in its later judgment in the case of Devine Leasing & Finance Ltd. (supra) by observing as under : 1. We find it indeed remarkable that the attention of the Sophia Finance (supra) Full Bench had not been drawn to the decision of the Supreme Court in Orissa Corpn. (P) Ltd. 'case (supra), which if cited would really have left no alternative to the Full Bench but to arrive at the conclusion it dlearned (Fara 6) 2. That Section 68 reposes in the Income Tax Officer or assessing officer the jurisdiction B to inquire from the assessee the nature and source of the sum found credited in its books of account. If the explanation offered by the assessee is found not to be satisfactory, further enquiries can be made by the Income Tax Officer himself, both in regard to the nature and the source of the sum credited by the assessee in its books of account, since the wording of Section 68 is very wide. (Para 10) (3) That the court had not reflected upon the question of whether the burden of proof rested entirely on the assessee, and at which point, if any, this burden could justifiably be shifted to the assessing officer. The Full Bench in fact clarified that they were "not deciding as to whom and to what extent is the onus to show that an amount credited in the books of account is share capital and when does that onus stand discharged. This will depend on the facts of each case. It has been argued, but without substance, that the Full Bench did not go further than holding that the only responsibility on the assessee is to identify the subscriber; or that the assessing officer was not required to delve into the creditworthiness of the subscriber; or that the assessing officer need not be satisfied about the genuineness of the transaction. (Para 10) (4) But we hasten to clarify that the statement of law made by theTribunal to the effect that in case of share capital no additions could be made if it is established t hat the shareholders exist is not completely correct, and has not been so

enunciated by this Court in Sophia Finance (supra). (Para 21) The above observations made it clear that judgment of Hon'ble High Court in the case Sophia Finance Ltd. (supra) does not restrict the enquiry under Section 68 of the Act to the establishment of the identity of the shareholders/share applicant. The assessing officer can still make enquiries regarding the nature and source of the sum credited in the books of p the assessee.

15. The judgment of the Jurisdictional High Court in the case of Devine Leasing & Finance Ltd. (supra) is also relevant for deciding the issue whether in a given case, onus on the assessee can be said to be discharged. In para 6 of its judgment, the court held that reasoning given in the judgment of Apex Court in the case of Orissa Corpn. (P.) Ltd. (supra) would also apply to large scale subscription to the shares of a public company where the assessee may have no material other than the application forms and bank transaction details to give some indication of the identity of the subscribers. That means that where the assessee had furnished (2) the names and address of the share applicants (ii) the GIR Nos./P.A.N. Nos. (iii) the Ward Nos. where assessed (iv) the mode of payment and (y) other information which the assessee knows or possesses, then it can be said that initial burden on the assessee can be said to be discharged. No doubt, the assessing officer is not debarred from making further enquiry. If the assessing officer fails to bring any adverse material on record then the Tribunal would be justified in coming to the conclusion that onus on the assessee has been discharged. The court also discussed various decisions of its own court as well as of other courts and then concluded in para 13 as under: There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the revenue. Equally, where the preponderance of evidence indicates absence of culpability and complexity of the assessee it should not be harassed by the revenue's insistence that it should prove the negative. In the case of a public issue, the company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The company must, however, maintain and make available to the assessing officer for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the

same.

delicate balance must be maintained while walking the tightrope of Sections 68 and 69 of Income Tax Act. The burden of proof can seldom be discharged to the hilt by the assessee; if the assessing officer harbours doubts of the legitimacy of any subscription he is empowered, nay dutybound, to carryout thorough investments. But if the assessing officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company.

16. Now we proceed to ascertain whether, in the present case, the assessee can be said to have discharged its onus under Section 68 of the Act. First, we would refer to the addition of Rs, 1,86,25,000 deleted by the learned Commissioner (Appeals). There is no dispute that all the confirmations were filed before the assessing officer. The notices issued by the assessing officer under Section 133(6) of the Act were duly served upon the parties where confirmation filed, since none of the notices returned unserved. Though the GIR Nos. were given, the assessing officer did not presume the matter further for making enquiries from the various assessing officers assessing such persons.

In the course of appellate proceedings, the learned Commissioner (Appeals) gave two more opportunities to the assessing officer for making specific enquiries. Despite the same, the assessing officer could not get any adverse material as is apparent from the remand reports discussed by the learned Commissioner (Appeals). Not only that learned Commissioner (Appeals) made his own enquiries from the assessee and obtained the copies of acknowledgements of income-tax returns filed by the concerned parties and bank accounts of such parties. After considering the entire material placed on record, the learned Commissioner (Appeals) in our view, rightly concluded that these parties were existent parties and payments were made by banking channels. Despite the sufficient opportunities provided to the assessing officer by the learned Commissioner (Appeals), no adverse material has been brought on the record. As already noted that onus on assessee in the case of share capital by public issue is lighter one and therefore such onus would stand discharged if identity of the share applicant

is established. In the present case, the same is established beyond doubt. No doubt, the assessing officer could bring adverse material on record by making his enquiries but nothing adverse to assessee has been brought on record in respect of 108 share applicants.

Considering the case law discussed by us, it is held that onus on assessee stand discharged. Consequently, the learned Commissioner (Appeals) was justified in deleting the addition.

17. Before parting with this issue, we would refer to certain observations made by the assessing officer. Firstly, it is stated that language and type of confirmation is same and there is no fold on such confirmation. In our opinion, there is nothing wrong if confirmations are prepared by the assessee and got signed from the share applicants since assessee was required only to prove the identity of the share applicant. Even otherwise, the same have not been found to be false or forged. Secondly, it has been observed that parties did not respond to the notices issued. This observation does not carry any weight since the assessing officer did not pursue the matter further as observed by their Lordship in the case of Orissa Corpn. (supra). The learned DR has also stated that certain payments were made from the same bank. There is nothing wrong if some of the shareholders are having account with the same bank. It is not the case of Revenue that such accounts are bogus or operated by the assessee. Aquery was raised whether any cash was deposited by any of the applicant before issuing cheques. The learned DR could not point out any such instance.

It is also not the case of revenue that either of the share applicant was benami of assessee-company. Accordingly, the reasons given by the assessing officer or submissions of the learned DR in this behalf are hereby rejected.

18. Now we proceed to discuss the addition of Rs. 3,85,000 sustained by the learned Commissioner (Appeals). Regarding Geeta Jain/Geeta Arora, we find from the paper p book that confirmation filed by the assessee is not signed by any one. This fact was confronted to the assessee's counsel but he could not say anything on this fact. Thus, basic evidence is lacking. Therefore, we need not probe further. The addition, in our opinion, was rightly confirmed by the learned Commissioner

(Appeals). Regarding Hament Kumar, we find that the share applicant denied making any investment in shares of assessee-company.

This fact was confronted to assessee in assessment proceedings. Despite the same, the assessee never asked for cross-examination. The cross-examination is not a matter of right. It has to be sought specifically before the assessing officer. Reference can be made to the decision of the Apex Court in the case of State of Kerala v. Shaduli Yusuf 39 STC 478 (SC), wherein it was held that right to cross-examination would depend on the facts of the case and it is not a matter of right in each case. In the present case, the onus was on assessee to prove the genuineness of transaction. The confirmation was filed by the assessee. The assessing officer issued the summons in response to which the alleged persons, Hament Kumar, denied to have made any investment in such public issue. This fact was admittedly confronted to the assessee. At that stage, the assessee never sought the cross-examination of Mr. Hament Kumar. Thus, assessee accepted the denial made by Hament Kumar. On these facts, it cannot be said that assessee could discharge its onus. Accordingly, it is held that learned Commissioner (Appeals) rightly confirmed the addition. Regarding Laxman Dass Bhatia, we find that assessee had submitted before the learned Commissioner (Appeals) that his address was changed and, therefore, he could not be found from that address. The learned Commissioner (Appeals) asked the assessing officer to issue summons at the correct address. It appears that notice was sent at the correct address.

However, in the remand report, there is no adverse material in respect of Laxman Dass Bhatia. The confirmation and income-tax return acknowledgements are placed on record. Mere non-compliance of notice/summon would not lead to the inference that onus has not been discharged as held by the Apex Court in the case of Orissa Corporation (supra). Therefore, we are of the view that the sum of Rs. 95,000 in the case of Laxman Dass Bhatia cannot be assessed under Section 68.

Accordingly, the order of learned Commissioner (Appeals) is modified to that extent and consequently, the addition is restricted to Rs. 2,90,000.

19. In the result, appeal of the revenue is dismissed while the appeal of the assessee is partly allowed.

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