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MwSt.VAT Newsletter

November 2014

NEWS FROM THE CJEU

Fixed establishment of the recipient of the supply

CJEU, ruling of 16 October 2014 – case C-605/12 – Welmory

The case was referred by a Polish court and the ruling refers to the place of the supply of services to another company. If no special regulation applies, pursuant to Art. 44 of the VAT Directive (see § 3a (2) of the German VAT Law (UStG)) the place is considered to be the place of supply where the recipient has established his business. If these supplies are provided to a fixed establishment of the recipient that is located at another place, then this place is the place of supply.

The case

In the present case, a Cyprian company organizes auctions on an online platform. On this platform, it sells so called bids to customers that grant them the right to buy products at an auction on the same website from the Polish company. The Cyprian company had concluded with the Polish company a cooperation agreement for these purposes. The dispute now concerns the place of services the Polish company provided to the Cyprian company (advertisement, service, information procurement and data processing).

Ruling

According to the Court of Justice of the European Union (CJEU), a fixed establishment of the Cyprian company in Poland requires that it has a least a structure with an adequate level of stability. This structure must contain personnel and technical equipment to be able to receive and use the services for its business activity in Poland that are provided by the Polish company to it. This business activity consists mainly of the operation of an electronic auction system and the provision and sale of the bids. Despite its special characteristic, such a business activity needs at least an appropriate structure with regard to its personnel and technical equipment, for example, computer equipment, servers and appropriate computer programs.

The Polish company argues that the personnel and the technical equipment for the business activity conducted by the Cyprian company, such as servers, software, IT-services and the system for concluding contracts with the consumers and receiving their payments, are outside the Polish territory. Should these circumstances be true after the examination of the Polish court, a fixed establishment of the Cyprian company in Poland is to be declined according to the CJEU.

Please note:
The ruling of the CJEU makes it clear that the previous principles of the definition of the place of services provided by a fixed establishment (see Art. 45 of the VAT Directive-MwStSystRL,
§ 3a (1) UStG) also apply to the place of supply if provided to a fixed establishment. However, the CJEU did not deal with its earlier ruling of 20 February 1997 – case C-260/95 – DFDS according to which the location of a subsidiary – as a fixed establishment – can also define the place of supply. Therefore, the CJEU did not comment on the question as to whether a fixed establishment of the recipient of the supply

Content

within the meaning of Art. 44 of the VAT Directive MwStSystRL can also be a subsidiary.

Place of supply after processing the item

CJEU, ruling of 2 October 2014 – case C-446/13 – Fonderie 2A

Upon referral from France, the CJEU has commented on the place of supply after processing the item in the Member State of the purchaser.

The case
In 2001, the company Fonderie 2A produced metal parts in Italy that were sold to a company located in France. However, to fulfill the contractual obligations with regard to their condition, the metal parts had to be varnished. Therefore, Fonderie 2A sent the metal parts for its own account to a service provider in France that varnished the parts and sent the finished metal parts directly to the purchaser in France. Fonderie 2A treated this transaction as a zero-rated (VAT exemption with entitlement of input VAT deduction) intra-Community supply of goods from Italy to France. The service provider issued an invoice to Fonderie 2A for the finishing of the product by stating the French VAT. In the course of the special input tax refund procedure, Fonderie 2A applied for a VAT refund. The application was refused on the ground that the supply of the metal parts was subject to VAT in France. As a result, Fonderie 2A would have to file a tax return in France and deduct the input tax.

Ruling
According to the CJEU, the supply in the present case is subject to VAT in France. First, the CJEU bases its ruling on the wording of Art. 8 (1) a of the 6th Directive (now Art. 32 (1) of the VAT Directive) according to which the place of supply is the place at which the item is located at the beginning of the dispatch or transport to the purchaser. Item in this sense means the finished products. Also, according to the systematic status of the provisions governing the place of supply, the place of delivery is France. The provision sets forth the place on which the right to dispose of a tangible object as an owner is transferred. The supplier does not transfer such rights to the purchaser if he sends the items to a service provider for finishing the product. Sending the item is exclusively supposed to bring the relevant items into the condition contractually owed by the supplier so that subsequently the supplier can deliver the goods to the purchaser. In addition, the present case lacks the required sufficient temporal and material relation between the supply of the item and its transport and a continuous procedure. With regard to this, the CJEU refers to the ruling of 18 November 2010 – case C-84/09, EC – X (see VAT Newsletter March 2011). With the literal interpretation of the above-mentioned provision, the place of supply can be defined exactly and any double taxation or non-taxation can be avoided.

Please note:
With regard to the transport or dispatch, the supply is executed where the item is located at the beginning of the transport. In general, the ruling of the CJEU confirms the legal practice in Germany according to which the condition of the item owed by the supplier has to be taken into account. If this condition requires further processing, the relevant transport does not begin before the processing. As a result, this is also important for the question as to whether a supply is an intra-Community of goods or an export. If the processing is conducted abroad, the supplier might be subject to a VAT registration obligation abroad. Pursuant to § 6a (1) sent. 2 UStG, the supplied item might be processed by contractors before it is dispatched or transported to another Community area. Also, in such case an intra-Community supply is given in accordance with the law. This is based on the same provision in § 6 (1) sent. 2 UStG for exports. The CJEU did not have to comment on whether the provisions are compatible with the EU law. Probably a restrictive interpretation is necessary. Hence, for example, Section 6a.1 (19) sent. 1 of the German VAT Application Decree (UStAE) is being scrutinized according to which the place of the treatment or processing may be in Germany, in a non-Member State or in another Member State with exception of the Member State of destination.

NEWS FROM THE BFH

Requirements for a transitory item

BFH, ruling of 3 July 2014, V R 1/14

The German Federal Tax court (BFH) has upheld its previous rulings that the legislative provisions on transitory items should be interpreted in line with EU law.

The case
The operator of a crematorium supplied taxable cremation services to funeral undertakers and surviving dependants of deceased individuals. A cremation was only permissible if a second post-mortem examination had been performed by an official district medical practitioner. In accordance with the district authority's schedule of fees, a fee of EUR 30 plus travel expenses was charged for each post-mortem examination. In the year in question, the district authority issued numerous collective fee assessments, each containing a list of the deceased, to the crematorium. The crematorium passed on the fee of EUR 30 to the respective clients without VAT or travel expenses. It charged VAT on the rest of the services it supplied. The price lists contained

several different items, such as "cremation including 19 % VAT", as well as the item "Official medical practitioner, second post-mortem examination, fee disbursement (no VAT)". The crematorium also recorded the fees separately in its own accounts. The matter under dispute is whether the fees passed on to the client were transitory items for the crematorium or whether they were consideration for taxable supplies.

The ruling
The BFH ruled that the fees in question were a transitory item pursuant to § 10 (1) sent. 6 UStG. This provision stipulates that the sums which the supplier receives and is charged in the name and for the account of another entity do not constitute consideration. This provision implements Art. 79 (c) of the VAT Directive. This article provides that amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account shall not be included in the taxable amount.

Expenditure incurred in the name of and for the account of a third party requires that there is a direct legal relationship between two parties, with the supplier merely playing the role of an intermediary (paying agent) in the relationship. In the case in question, the crematorium merely informed the district authority which corpses had been carried to it for cremation and allowed the post-mortem examination to be performed on its premises. Based on this there is nothing to indicate that the crematorium intended to commission the performance of a post-mortem examination as one of its own requirements. There was no basis for such an assumption on the part of the district authority either.

Furthermore, clear evidence is required to prove that the business' role is that of an intermediary between the other two parties. As such, the payer and the payment recipient must each be informed of the other party's name and of the amount which has been paid. The BFH ruled that this had been the case in the dispute in question. The crematorium had listed the fee separately from its own services, in both its price list and its invoices, as a disbursement without VAT. The clients therefore knew who had performed the post-mortem examination and how much had been charged for it. The district authority was aware of the identity of the corpses and was therefore also directly aware of the identity of the client, or at least had the means of discovering the client's identity.

The BFH held that the fees were transitory items even though the crematorium and the recipient of its services were jointly and severally liable for the fees. With this ruling, the BFH explicitly rejected the line taken by the tax authorities in Section 10.4 (4) sent. 1 UStAE.

Please note:
According to the BFH the supplier ought also to have treated the amounts received in the name and on behalf of a third party as transitory items in its own accounts. Although this requirement under EU law is not explicitly included in the UStG, § 10 (1) sent. 6 UStG is to be interpreted in line with the EU Directive. Ultimately, the supplier has the right to choose whether or not he wishes to declare items of expenditure in the name and for the account of the recipient of his services as part of the basis for assessment. If he does not treat the amounts as transitory items in his own accounts, then they will be deemed to be taxable amounts along with the other services which he supplies.

Punctual accounting evidence

BFH, ruling of 28 August 2014, V R 16/14

In the present case, the BFH concretizes its principles with regard to the time-limited claim of accounting evidence for exports.

The case
A trader supplied items into a non-Member State and treated the supplies as zero-rated pursuant to § 6 UStG. In its accounts, he recorded the exports on a separate account referring to the relevant outgoing invoice. Subsequently, the tax authorities assumed within the course of an audit that the supplies were subject to VAT, because the trader had not provided the documentary and accounting evidence. The Tax Court confirmed zero-rating after the trader had created attachments to the invoices before the last hearing at the court.

Ruling
The BFH rejected the appeal as unfounded. With regard to the time period, the trader can provide the documentary evidence up to the end of the last hearing before the Tax Court. The accounting evidence must generally be provided to it by the date on which the trader has to submit the preliminary returns for the VAT period of the export. The trader that declares the export to be zero-rated must make sure at least on the merits of his accounting records whether he can consider that the prerequisites for a zero-rating are given. After the date for the submission of the preliminary VAT return, the trader cannot create the accounting records for the first time, but only correct and supplement before the end of the last hearing before the Tax Court.

In the present case, the trader provided the documentary evidence with the attachments to the invoices before the end of the last hearing. According to the BFH, the actual appropriate assessment by the Tax Court with regard to the question whether the supplements to the invoices are sufficient to meet the requirements for the accounting and documentary evidence cannot be criticized in law. In order to maintain the accounting evidence in principle (so that a later correction or supplement might be permitted), it is

further sufficient for the trader to record the exports in a separate account including a reference to the relevant invoice. Contrary to the view of the tax authorities, it is not decisive whether the trader additionally keeps a sales register within the meaning of § 144 of the German Tax Code (AO) or whether his accounting is to be considered, in general, as appropriate.

Reasonable doubts as to the correctness of the documentary and accounting evidence are to be denied according to the Tax Court's findings binding for the BFH. Such doubts were also not mentioned by the tax authorities. Whether the prerequisites for zero-rating are also established objectively, it is – contrary to the tax authorities – irrelevant for the zero-rating if the documentary and accounting evidence are already provided. In contrast to the view of the tax authorities, timely corrections of the evidence are allowed if the trader is responsible for a lack of evidence.

Please note:
The principles for keeping the documentary and accounting evidence established by the BFH also apply to intra-Community supplies of goods (see also Section 6.a7 (8) UStAE). With regard to exercising zero-rating, one must also consider, among others, the timely separate accounting as being zero-rated. If the accounting considered to be zero-rated is not punctual, zero-rating only applies if the material conditions for an intra-Community supply of goods or export are given objectively.

NEWS FROM THE BMF

Delivery and return of transport containers

BMF, guidance of 20 October 2014 – IV D 2 – S 7200/07/10022 :002

The German Ministry of Finance (BMF) again commented in its guidance of 20 October 2014 on the VAT treatment of the delivery and return of transport containers. With regard to the guidance of 5 November 2013 (see VAT Newsletter December 2013), the following changes were made:

Return of transport containers
According to the BMF guidance of 5 November 2013, the return of transport equipment for repayment of the deposit is to be considered as a return supply. The return supply is subject to the standard tax rate pursuant to § 12 (1) UStG. Accordingly, the recipient of the return supply is entitled to input tax deduction in accordance with the general conditions. According to the BMF guidance of 20 October 2014, the return of transport equipment for repayment of the deposit is to be considered as a charge reduction. Accordingly, the VAT for the delivery to be qualified as a supply (standard tax rate) is to be corrected if the containers are returned. The correction is to be made for the VAT period in which the change occurred. Further, the recipient of the supply has to correct the input tax deduction of the original supply.

Uniform VAT treatment on all trade levels
According to the BMF guidance of 5 November 2013, the VAT treatment of the delivery and return of a transport container as independent supplies (transport equipment) or as dependent ancillary supplies (packing material) on all trade levels (deposit operator – producer – wholesaler – retailer) has to be uniform. The BMF guidance of 20 October 2014 clarifies that (only) the classification of the transport container as transport equipment or packing material is to be made uniformly on all trade levels.

Simplification rules in 10.1 (8) UStAE
According to the BMF guidance of 5 November 2013, in case of packing material the principles of Section 10.1 (8) UStAE are to be considered. Hence, there is for example a possibility to identify the balance of the amount of the deposit at the end of the year. According to the BMF guidance of 20 October 2014, the simplifications in Section 10.1 (8) UStAE also apply to the delivery and return of transport equipment.

Please note:
The principles of the BMF guidance of 20 October 2014 must be applied to all open cases. With its guidance, the BMF complies with the key requirements of industry associations. The BMF guidance of 5 November 2013 is revoked insofar as it conflicts with the new principles. There is no objection if the affected parties proceed in accordance with the previous principles with regard to transactions before 1 July 2015. The statements in the BMF guidance of 5 November 2013 with regard to the provision of transport equipment within the scope of exchange systems remain unchanged.

IN BRIEF

Passing on costs not burdened with VAT without surcharges

Request for a preliminary ruling (Portugal), case C-256/14 – Lisboagás GDL

The request for a preliminary ruling to the CJEU refers to a Portuguese company that provides services to another company and, in the course of this, provides an infrastructure for the distribution of natural gas. The Portuguese company has to pay an amount (Taxas de Ocupacao do Subsolo) to the communities in which the pipes are located that are part of the infrastructure. This payment is not subject to VAT. The Portuguese company passes the costs occurring by the payment of the amount to its customers without any surcharge. It is in dispute whether the passing on of the costs is sub-

ject to VAT. The referring court asked the CJEU accordingly whether applying VAT infringes the EU law even if the passing on is without any surcharge. The request for a preliminary ruling has a general meaning, because the questions always arise, with regard to the passing-on of costs, whether the payment is to be considered as compensation for a supply, which supply is paid for and who paid for the supply (to make a distinction between this and a transitory item, see BFH, ruling of 28 August 2014, V R 16/14, article in this VAT Newsletter).

Claim of the recipient of the supply for compensation of VAT unduly paid in case of insolvency of the supplier?

Münster Tax Court, ruling of 3 September 2014, 6 K 939/11 AO; BFH ref. no.: VII R 42/14

A limited liability company (GmbH) exercised its right to input tax deduction in respect of the invoices received although the invoices contained an incorrect description of supplies. The description of supplies was obviously incorrect in such a way that there was an unauthorized VAT statement pursuant to § 14c (2) UStG (see Section 14c. 2 (2) No. 3 UStAE) due to supplies that were billed but not provided. The GmbH returned the undue input tax deduction to the tax authorities after its tax assessment was changed. Partly, the invoice issuers could not or did not want to return the unduly stated VAT to the GmbH. The tax authorities denied a refund of the returned input tax deduction. The Tax Court dismissed the case. It stated that only the issuers that corrected their invoices were entitled to a refund of an excess payment of VAT. This would not contradict with the Community law principles of neutrality and effectiveness of VAT. These principles were considered even if the recipient of the supply in respect of the refund of unduly paid input tax deductions was referred to the civil courts. According to the CJEU ruling of 15 March 2007 – case C-35/05 – Reemtsma Cigarettenfabriken GmbH – the recipient of the invoice may refer for once directly to the tax authorities if the refund is impossible or excessively difficult.

According to the Tax Court, these principles would not apply to a thoroughly German case. The ruling was only passed on an international case within an input tax refund procedure. Otherwise inter alia, in case of insolvency, the recipient of the supply would be favored over other creditors of the issuer. In the appeal proceedings, the BFH will have the opportunity to comment on the individual consequences of the CJEU ruling.

Organizational integration in a VAT group

Münster Tax Court, ruling of 25 April 2013, 5 K 1401/10 U; BFH ref. no.: XI R 30/14

The matter at issue was a VAT group formed between two limited liability companies (A- and B-GmbH) as a family undertaking. The shareholders in A-GmbH were a mother (10 %) and her son (90 %). The son exercised his holding for his father on a fiduciary basis. The son was the sole managing director of A-GmbH but required the consent of the shareholder meeting for core day-to-day management activities. However, with the exception of the resolution on the adoption of the annual financial statements, the shareholder meeting did not adopt any resolutions during the year in question. In fact, it was the father who was the de facto manager of the business. The mother (10 %) and the father (90 %) also had a holding in B-GmbH. Both of them contributed all their shares in A-GmbH to B-GmbH. The Tax Court found that the son had consented to the contribution of his 90 % holding. The father was the sole managing director of B-GmbH. The Tax Court denied that there was a VAT group between B-GmbH as the holding company and A-GmbH as the subsidiary company due to the absence of the organizational integration. It held that the companies did not have the same person holding office as managing director. The father was merely the de facto managing director of A-GmbH at the same time. The Tax Court also referred to the fact that the father was neither the same entity as B-GmbH nor was he its sole shareholder. As such, it argued that B-GmbH had not actually exercised the option, attendant on financial integration, of intervening in the day-to-day management of A-GmbH. The Court said there was no evidence of the father applying his de facto management of A-GmbH to B-GmbH. It stated that, on the contrary, the fact that the father was paid a salary by A-GmbH indicated that he performed his management activities for A-GmbH in his own name and for his own account. The BFH allowed the appeal. For the BFH the question is whether having the same person as the managing director of the subsidiary company and the holding company is sufficient to constitute organizational integration or whether the holding company itself must undertake the management of the subsidiary company.

Tax rate for contract research performed by non-profit institutions

Tax Court of Saxony, ruling of 29 April 2014, 3 K 492/13; BFH ref. no.: V R 43/14

The ruling by the Tax Court of Saxony addresses the circumstances in which a non-profit company's income from contract research should be taxed at the standard rate. In accordance with § 12 (2) (8) (a) sent. 2 UStG, a reduced rate of tax does not apply to the supply of services when they are provided as part of a commercial operation. The additional restrictions under § 12 (2) (8) (a) sent. 3 UStG were not

yet applicable during the period at issue, between 2002 and 2004. A reduced tax rate may apply in particular to science and research institutions, pursuant to § 68 no. 9 of the German Tax Code (AO), which receive the majority of their funding in the form of government or third-party grants or from portfolio management. Contract research also serves science and research purposes. The Tax Court held that when calculating detrimental income for the purposes of § 68 no. 9 AO, for calculation purposes the income earned has to be recognised without VAT. If the research institution is linked with a subsidiary as part of corporate restructuring and as a result the investment income and rental income paid qualify as business income, then the income earned by the research institution is unlikely to constitute income from portfolio management (§ 68 no. 9 AO) that has no effect for tax purposes. The BFH allowed the appeal. The BFH will have the opportunity to elaborate on the principles of the VAT treatment of non-profit organizations which it laid down in its ruling of 20 March 2014, V R 4/13 (see VAT Newsletter August/September 2014).

Use of a vehicle for journeys between the home and place of work/business premises

BFH, rulings of 5 June 2014, XI R 2/12 and XI R 36/12

Both of the BFH rulings relate to the VAT treatment of the use of a vehicle classified as a company vehicle for journeys between the home and business premises (for a proprietor of a small business) or between the home and place of work (for a shareholder/managing director).

According to the BFH, the use of a vehicle for journeys between the home and business premises is not for purposes which are unrelated to the company. The BFH confirmed the position of the authorities as laid down in Section 15.23 (2) sent. 2 UStAE. As such, this kind of use is not subject to VAT as a supply rendered without consideration. Unlike an employee, a business owner visits his business premises in order to engage in a business activity. These journeys allow him to transact business and are generally justified by the requirements of the company. There is therefore – unlike the same journeys made by employees – a direct relationship between these journeys and the business transactions of the supplier. The fact that the journeys from the business premises to the individual's home also have a private element to them is irrelevant, as their purpose is overwhelmingly business-related. The spatial conditions at the business owner's place of residence are immaterial.

According to the BFH, the provision of a vehicle for journeys between the home and place of work is subject to VAT if there is a link – the existence of which is to be verified on a case-by-case basis – between the provision of the vehicle and the work performed by the entrepreneur in the sense of "consideration" passing (a transaction akin to an exchange, § 3 (12) sent. 2 UStG) or where the requirements of a supply rendered without consideration are met (as is the case where use of a vehicle is based on a corporate relationship, § 3 (9) UStG). Because in the dispute at hand, the shareholder/managing director's employment contract stipulated that he was only entitled to a medium-segment vehicle, the provision of a vehicle from a higher segment may have been based on the corporate relationship. In the event of a transaction akin to an exchange, the value of each transaction counts as consideration for the other transaction. This value can be estimated based on the costs or expenditure (since 1 July 2004) for the provision of the vehicle. In the event of a supply rendered without consideration, the costs or expenditure are to be taken into account in so far as they are fully or partially eligible for the deduction of input VAT. For the sake of simplicity, the tax authorities have ruled that in both cases the payroll tax values could be used as a basis for the estimate. A supplier may only take advantage of this simplification ruling either in full or not all. In the dispute at hand, it is therefore necessary to establish which values in relation to payroll tax were taken into account. In so far as a supply was rendered without consideration, no objections could be raised if the supplier were to assume that the so-called 1 % rule laid down in § 6 (1) no. 4 sent. 2 of the German Income Tax Law (EStG) applies in line with the simplification ruling and subtract a flat-rate discount of 20 % from this value for the costs on which no input VAT is charged. Based on the simplification ruling, the specific extent to which the vehicle is used for journeys between the home and place of business would be irrelevant.

VAT rate for passenger transportations of car hire companies

BFH, rulings of 2 July 2014, XI R 22/10 and XI R 39/10

Following the CJEU ruling of 27 February 2014 in the joint cases C-454/12 Pro Med Logistik GmbH – and C-455/12 – Eckard Pongratz (see VAT Newsletter April 2014), the BFH commented on the taxation of passenger transportation. According to the BFH, the reduced VAT rate in the local traffic by taxis (§ 12 (2) no. 10 UStG) is compatible with the EU law. The reduced VAT rate does principally not apply to relevant supplies of car hire companies due to lack of similarity. The passenger transportation by taxi is rather subject to special obligations that do not apply to car hire companies. However, a reduced VAT rate may be considered for patient transfer based on special agreements that also apply to taxi companies. The Tax Court has yet to make its own investigations.

It remains to be seen which concrete requirements the Tax Court lays down for the special agreements in the present case. A reduced VAT rate may principally be considered in for other special agreements, such as replacement journeys for busses and trains.

OTHER

Recommendations of the Commission on the VAT reform

Working paper SWD (2014) 338 final of 29 October 2014

The European Commission has published a working paper that contains explanations of ideas on the design of simple, effective and fraud-proof VAT system for the domestic market in the EU (see press release of 30 October 2014).

The aim is to create a „definitive VAT system" that is to replace the preliminary and outdated system that has been in place in the EU for over 20 years. According to this system, intra-Community supplies of goods between companies are zero-rated in most cases while the intra-Community acquisition of the purchaser is subject to VAT.

The "definitive VAT system" is to better fulfill the economic needs of the domestic market and to be less prone to fraud than the current system. In future, the taxation of supplies is to depend either on the location to which the items are delivered or where the customer is resident. The two options further need a definition as to whether persons liable to tax are suppliers or purchasers. A further option might be to keep the current status, however, with some changes to be made. In the context of the follow-up of the Green Paper presented on 1 October 2010 (see VAT Newsletter May 2011), the Commission is adopting proposals.

The Commission will make a detailed assessment to identify what effects the individual options would have on companies of the Member States. In spring 2015, the Commission plans to explain its further approach based on their findings.

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Cologne VAT Congress 2014

Event organized by publisher Dr. Otto Schmidt in cooperation with KPMG

4 December 2014 – 5 December 2014 in Cologne

Practical exchange with leading experts

Topics

- Input VAT deduction in case of contributions in kind/use and equity holdings
- Recent VAT developments in Austria and Switzerland
- The latest from tax authorities, BFH and practice
- Cross-border supplies of goods including installation (Werklieferungen) and supplies of work (Werkleistungen)
- Intersections of VAT and Customs & Trade in case of transactions with non-EU countries

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