

# frontiers in tax

## Polish edition

September 2015

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**50 per cent of VAT deduction on fuel for everyone**

**Evolution of the 'fixed establishment' concept**

**Re-invoicing the utility supply costs in the context of property letting agreements, an important judgement of the Court of Justice of the European Union**

**KPMG**

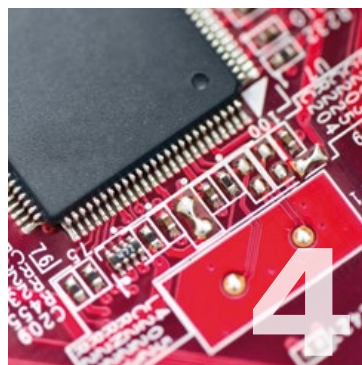
*cutting through complexity*





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**KPMG Poland**









# Introduction:



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The tangible expression of countering fraud in settlement of value added tax is gaining momentum. Fiscal control authorities are stepping up tax audits aimed at identifying VAT phishing criminal groups while the government promulgates regulations that narrow down the scope for fraud. Poland is another country of EU which decided that VAT on consumer electronics should be paid by the buyers. The regulations intended to protect VAT revenues to the state budget are, however, unclear, contain many gaps and may give rise to disputes with tax authorities.

The complete limitation of deduction of VAT on fuel used to power passenger vehicles intended not only for business use had been lifted in July. This is also a good moment to review the solutions introduced over a year ago and to identify the issues which can potentially hinder the deduction of VAT in the future.

The concept of 'fixed establishment' for VAT purposes raises growing concerns. The apparent lack of a precise definition creates room for disparate interpretations, which have undermined the trust in the taxation system. We need to bear in mind that the definition of fixed establishment in practice impacts the process of determination of the entity with the value added tax settlement obligation and the place of taxation.

We present to you the newest issue of the *Frontiers in tax* to discuss all these problems with you. Additionally, we give you an in-depth summary of the CJEU judgement in the case C-42/14 in which the Court of Justice presented its position on the value added tax rate in pass-through invoicing of utility charges to tenants.

Wishing you pleasant reading.

# VAT reverse charge on consumer electronics

As of 1 July 2015, significant changes in the settlement of VAT on deliveries of consumer electronics came into force. Aimed at curtailing fraud in tax on domestic deliveries, the changes in this case mandate settlement of the tax obligation by the purchaser. It is currently unknown whether the measures will bring about the intended effect or whether the budgetary revenues from turnover in electronic goods will rise. What is evident though is that the enacted regulations are unclear, contain gaps and will give rise to many disputes with tax authorities. Adding to the chaos are the newly published clarifications of the Ministry of Finance, which in many aspects constitute a very loose interpretation of the VAT law.





## Economically uniform transaction for years

The newly enacted regulations provide for mandatory settlement of the tax due by the buying taxpayer whenever net value of laptops, mobile phones or video games consoles delivered within an economically uniform transaction exceeds PLN 20,000. The 'economically uniform transaction' is defined here as a single contracted transaction involving one or more deliveries of given goods, even if made on the basis of separate orders or if multiple invoices are raised to document the respective deliveries. The legislator, however, fails to specify the period over which the PLN 20,000 net value threshold is to be measured or at which consecutive delivery the VAT obligation is to be settled by the purchaser.

The absence of any time limit here leads to the conclusion that an economically uniform transaction can continue for years while the new regulations will impose on some taxpayers disproportionate registration obligations of monitoring the legislated threshold. One remedy to the imposed obligations may involve structuring of business relations in a way that ensures the purchasers buying the goods covered under the PLN 20,000 limit only occasionally do not enter into multi-year cooperation agreements, the execution of which would constitute an economically uniform transaction. In the absence of such an agreement, the PLN 20,000 limit can be considered only in the context of a single delivery provided the circumstances surrounding the transaction or the terms on which it is executed do not deviate from the circumstances or terms normal to trade in such goods.

Leaving to the discretion of the tax authorities the assessment whether a number of separate contracts constitutes an economically uniform transaction is not favourable for the taxpayers. It is feared that the tax authorities will adopt extremely unfavourable transaction interpretations perceiving economically uniform



transactions where there are none, with the objective of challenging the purchasers' right to deduct the input tax. Deduction of the input tax can be successfully challenged if the tax authorities conclude that a given delivery of goods is being made within the framework of an economically uniform

transaction subject to settlement by purchaser, under the regulation which states that if a transaction is to be settled by the purchaser, the output tax charged by the seller does not constitute the input tax of the purchaser.





**Identification of the purchasers will be a major challenge for the seller. The reverse charge mechanism is not applicable if the purchaser is not a registered VAT taxpayer.**



### To adjust, or not to adjust

Assuming the seller charged VAT on a delivery of consumer electronics due to the fact that the PLN 20,000 limit on it was not exceeded, and subsequently – after settlement of that delivery – the PLN 20,000 limit was exceeded, a question arises whether the original transactions need to be now corrected. Though the regulations do not refer to such a situation directly, it must be concluded that adjustment of the original settlements is unfounded. At the time a delivery is made and an invoice documenting the original delivery is issued, VAT settlement by the purchaser is correct as at the moment of invoicing, the value of goods did not exceed PLN 20,000. Moreover, were we to deem such adjustment justifiable, we would deprive the taxpayer of the right to deduct VAT in the month they receive the original invoice, which would undermine the principle of VAT neutrality. We cannot agree with the Ministry of Finance's opinion that the purchaser receiving an adjusted invoice retains the right to deduct the input tax and settles the output tax only 'additionally'. The VAT law provides no justification of such claims. It does, however, include a regulation that prevents VAT deduction if the seller must not include the output tax on the invoice, in other words, whenever settlement of VAT by the purchaser is applicable to a given delivery.

### Identification of the purchaser

Identification of the purchasers will be a major challenge for the seller. The reverse charge mechanism is not applicable if the purchaser is not a registered VAT taxpayer. The Ministry of Finance activated a dedicated portal through which the taxpayer status of purchasers can be checked. It is, however, not possible to check whether a person submitting an order is authorised to act on behalf of such a purchaser. Admittedly, the regulation provides that if the supplier has undertaken all of the necessary steps to settle the tax on a given delivery, they are not under the obligation of settling the tax due on account of that delivery, also in the event where it is established ex post that as a result of actions of an entity participating in the delivery as the purchaser, the preconditions for reverse charge were not met, of which actions the supplier of goods was not aware of or could not be aware of despite exercising due care. The exclusion of the seller's liability for fraudulent activities of the purchaser is, however, limited to a situation in which the payment due for delivery of goods is made from the purchaser's payment account, which includes the use of a payment card or similar payment instrument, provided these enable the supplier of goods to identify the person submitting the payment order. Thus, in practice, sellers accepting a cash payment have no legal protection against fraudulent activities of purchasers. In practice, the taxpayers selling consumer electronics should develop relevant procedures minimising the risk of incorrect purchaser identification.

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# 50 per cent of VAT deduction on fuel for everyone

More than a year has passed since enforcement of new rules on deduction of input VAT on vehicles. In order to benefit from the eligibility for full VAT deduction, entrepreneurs must meet a number of requirements related to the use of business vehicles and related formalities. Ever since these regulations came into force, the tax authorities have issued a number of decisions that reflect a restrictive interpretation of amended provisions. The rules applicable to deduction of value-added tax on fuel have changed in favour of entrepreneurs on 1 July 2015.



### Full deduction is hard to come by

As a general rule, in terms of expenses related to passenger cars and other motor vehicles with gross admissible weight of up to 3.5 tons, the taxpayer is entitled to deduction of 50 per cent of VAT amount.

Full deduction of value-added tax is allowed in case of vehicles used by the taxpayer solely for the purpose of economic activity, which must be essentially reflected by detailed mileage records as well as by terms and conditions of car policy identified by the taxpayer. In addition, a notice about such vehicle must be submitted to the head of the tax office within 7 days from the day on which the first such expenditure was incurred.

In individual tax rulings, tax authorities acknowledge that a vehicle is used for 'mixed' purposes and thus fail to grant the eligibility for full VAT deduction whenever a possibility arises that the car in question could have been used for private purposes even once. In the view of the tax authorities, terms and conditions of the car policy identified by the taxpayer must objectively confirm that the car is used solely for business purposes and no prospects for its private use exist. Therefore, an incidental or an occasional use of the car for purposes other than business

activity, or even insufficient – as seen by the tax authorities – safeguarding measures against such use, make the taxpayer ineligible for full VAT deduction and expose him or her to negative tax consequences. In real life, as a result of complex administrative burdens, restrictive position of tax authorities and the risk of penal and fiscal sanctions, many taxpayers have resigned from the ultimate VAT deduction driven by mileage records, which made them ineligible for any tax deduction on fuel used in passenger cars.

The above restrictions are applicable to expenditures for acquisition or charges related to the use of the vehicle, the cost of fuel and maintenance costs. In line with transitional provisions, the right to partial VAT deduction on fuel was suspended until 30 June 2015, with the exception of vehicles with heavy-vehicle type approval that were eligible for deduction of 50 per cent of VAT on fuel. Therefore, until recently, VAT included in the cost of fuel could be deducted exclusively by entrepreneurs eligible for full deduction or those who drive a specific type of vehicles.

### New rules applicable to VAT deduction on fuel

Following the expiry of the transitional period, it is now possible to deduct 50 per cent of input value-added tax



**Full deduction of value-added tax is allowed in case of vehicles used by the taxpayer solely for the purpose of economic activity, which must be essentially reflected by detailed mileage records as well as by terms and conditions of car policy identified by the taxpayer.**

on fuel purchased after 30 June 2015, regardless of the proportions of the private and business use of the vehicle. It should be stressed, however, that the new rules are applicable to fuel purchased after 1 July 2015 and exclude cases where fuel was purchased prior to that date, but the invoice was delivered to the taxpayer in July.

At the same time, it is worth recalling that current regulations do not impose the requirement to specify the registration number on the fuel invoice. It is yet admissible to provide the registration number on the invoice, e.g. for recording purposes.

### Fuel cards

Considering prospects for partial deduction of value-added tax on fuel used in passenger cars, taxpayers holding fuel cards ought to analyse the eligibility for deduction of value-added tax of invoices received from card issuers. It may turn out, in specific circumstances, that the card issuer does not deliver goods but provides financial services exempt from VAT. In such case, the buyer would not be eligible for deduction of the input tax.

But if, in taxpayer's view, the card issuer is actually supplying fuel, it is advisable to confirm the eligibility for deduction of input VAT on invoices being the evidence of such supplies by obtaining an individual tax ruling which will shield the taxpayer against negative consequences of the opposite position.

### Deducted VAT is not an expense

In addition, it should be also stressed that in line with income tax regulations, VAT constitutes a tax-deductible expense with regard to its portion which, in accordance with VAT regulations, does not make the taxpayer eligible for VAT deduction, provided that the input VAT does not increase the value of a fixed asset or an intangible asset.

Hence, if from 1 July 2015, the taxpayer is eligible for partial deduction of VAT on fuel used in passenger cars, related value-added tax will not be recognised as a cost deductible.

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# Evolution of the 'fixed establishment' concept

The concept of fixed establishment (Polish: '*stałe miejsce prowadzenia działalności gospodarczej*') appears continually in the Polish value-added tax act and its meaning is immense: it is frequently decisive in establishing the place of supply of a given service as well as the possibility of applying the reverse charge mechanism, in other words, it determines which entity (whether the purchaser or the supplier) should settle the value-added tax. The concept of fixed establishment, and in particular the view tax authorities and courts take on the criteria that constitute fixed establishment changes and evolves, as do the realities of doing business.









## The source of the 'fixed establishment' concept

The concept of fixed establishment was legally defined on 1 July 2011 only. Pursuant to the definition of the Council Implementing Regulation (EU) No 282/2011 of 15 March 2011, laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, a 'fixed establishment' means any establishment, other than the place of establishment of a business, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which that fixed establishment supplies.

The definition of a 'fixed establishment' cited above developed primarily through the Court of Justice of the European Union (CJEU) case law. Among the key judgements setting out the criteria of a fixed establishment we need to mention the Judgment of CJEU of 4 July 1985 in the case C-168/84 (Gunter Berkholz), in which it was ruled that a fixed establishment is present only if both the human and technical resources necessary for the provision of the services are permanently present in that place. CJEU concluded that such criteria had not been fulfilled in the case of gaming machines installed on board ferries, which are maintained intermittently by personnel seconded for the purpose.

Similar criteria for establishing a fixed establishment were presented in the Judgment of 2 May 1994 in the case C-231/94 (Faaborg-Gelting Linien A/S), in which CJEU ruled that provision of restaurant services on board ships alone is not evidence of having permanent human and technical resources, characteristic of a fixed establishment.

Also worth mentioning is the Judgment of 17 July 1997 in the case C-190/95 (ARO Lease BV), in which CJEU ruled that if a company does not possess in a Member State either its own staff or a structure which has a sufficient degree of permanence to provide a framework in which agreements may be drawn up or management decisions, it cannot be accepted that a company holds a fixed establishment in that Member State.

## New approach to the definition of a fixed establishment

Considering the definition of a fixed establishment arising from the regulation as well as the aforementioned CJEU case law taken into account in the formulation of the definition, we can specify a number of elements which, if present, can be said to constitute a 'fixed establishment':

- the criterion of time over which the permanent place is maintained ('sufficient permanence');

- technical resources;
- human resources;
- the ability to receive and use services.

Until recently, fulfilment of the above criteria, and particularly the question of the presence of personnel or infrastructure, was perceived exclusively from the perspective of property rights, and in the case of personnel – of the existence of the formal employer-employee relationship.

Thus, in practice, in majority of cases only foreign companies who had own technical resources (machinery, warehousing, plant, etc.) and employed own staff (under an employment relationship) in a given Member State were deemed as entities with a fixed establishment in a given country.

However, with the development of various forms of business activity, interpretation of the abovementioned criteria changed. In one of its latest judgements issued on 16 October 2014 in the case of Welmory Sp. z o.o., a Polish taxpayer (C-605/12), CJEU determined that a taxpayer using the services rendered by a third party may have a fixed establishment in a given Member State through the infrastructure and human resources of that entity (provided such resources enable the taxpayer to receive and use services).





**In practice, this may mean that foreign entities using the services of Polish subcontractors will be ever more frequently required to pay the Polish value-added tax on provision of services or delivery of goods to Polish taxpayers.**

The same position was also presented in one of preliminary rulings issued by a Polish administrative court after the Welmory judgement: the Judgement of the Provincial Administrative Court of 15 June 2015 (file no. III SA/Wa 3332/14). Pursuant to the ruling of the Provincial Administrative Court, a Finnish company operating a business of the manufacture and sale of boats, renting warehousing facilities in Poland, using office and translation services procured from Polish contractors, has a structure in Poland that can be regarded a fixed establishment. As the court stated in the verbal justification of the judgement, to speak of a fixed establishment, engagement of own technical and human resources is not required. It is sufficient that a company uses the resources of another entity.

### **The meaning of the above change in approach for taxpayers**

In connection with above 'new' approach to the criteria of assessing a fixed establishment, it can be expected that the Polish tax authorities

and administrative courts will now put forward more frequently that foreign entities with their registered place of business outside Poland, using infrastructure and/or staff of their Polish subcontractors actually have their fixed establishment in Poland.

In practice, this may mean that foreign entities using the services of Polish subcontractors will be ever more frequently required to pay the Polish value-added tax on provision of services or delivery of goods to Polish taxpayers. The change in the manner of VAT settlement will likewise apply to the services rendered by Polish companies to foreign entities. This is because the possession of a fixed establishment in Poland by service beneficiaries will result in the necessity of settling the VAT due by Polish service providers (the reverse charge mechanism will not be applicable in this case). Thus, both foreign suppliers as well as Polish companies with foreign counterparties should in every case analyse whether the structure the foreign entity holds in Poland is sufficient for it to be regarded a fixed establishment.

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# Re-invoicing the utility supply costs in the context of property letting agreements, an important judgement of the Court of Justice of the European Union

On 16 April 2015 the Court of Justice of the European Union (CJEU) issued the long-awaited judgement in the “Polish” case C-42/14 (*Wojskowa Agencja Mieszkaniowa w Warszawie* – the Military Housing Agency in Warsaw). The taxpayers expected that the CJEU judgement would finally settle the long-standing controversy around re-invoicing of third-party utility charges in the context of property letting agreements. Is the judgement what they have hoped for?



## Re-invoicing of utility charges and property letting, an unresolved controversy

It is worth recalling at the outset that the seemingly simple issue of re-invoicing of utility costs in the context of property letting agreements has remained a value added tax conundrum for years now. Additionally, because of the prevalence of property letting agreements as business transactions, it is also a practical issue of major importance.

What needs to be resolved first, in order to set out the rules of correct re-invoicing of utility costs in the context of property letting agreements, is whether utilities and property letting service constitute a single service of a complex nature or whether utilities should be treated as independent and distinct from the property letting service.

Resolution of this issue is of great practical importance, the reason being that supply of water is subject to a reduced VAT rate of 8 per cent. Consequently, if immovable property letting and the related provision of utilities are deemed "a single supply of a complex nature" all the constitutive supplies (including supply of water) will be subject of the base VAT rate of 23 per cent. Even though they purchased water at the reduced VAT rate of 8 per cent, the landlord would have to apply the rate of 23 per cent when re-invoicing the cost.

In the field we are considering the tax authorities have consistently taken a position unfavourable to the taxpayers, assuming that property letting and provision of utilities constitute a single supply of a complex nature. In contrast to that, the administrative courts have been more willing in recent times to admit the possibility of separating the provision of utilities from property letting services.

## CJEU on the taxpayer's side

The CJEU judgement should finally enable definition of clear rules of re-invoicing of utility cost. CJEU presented a fairly unequivocal position according to which the letting of immovable property and the related utility charges constitute, as a rule, separate and independent supplies, which should be assessed separately for VAT purposes. It is only in a situation where the rental and the utilities are so closely linked that objectively form a single, indivisible economic supply, which it would be artificial to split, that these can be deemed "a single supply of a complex nature" for VAT purposes.

The position of CJEU would not deserve greater attention (CJEU had taken a similar stance earlier, e.g. in its 27 September 2012 judgement C-392/11 – Field Fisher Waterhouse), were it not for the fact that it provided specific examples, which can serve as valuable criteria for assessment whether a given property letting agreement and the related supply of utilities can be considered independent supplies.

For once, the ability of the tenant to choose between utility suppliers or ways of using various utilities are facts which support the case for "separating" provision of utilities from rental of property. This is specifically the situation we face when the tenant is able to decide on their consumption of water, electricity or thermal energy, which can be determined at installation of individual meters and invoiced basing on meter readings.

In respect of other rental related services (e.g. refuse collection), the facts being arguments in favour of their separateness from the property letting service include a situation in which the tenant can choose the service provider or have a direct contract with that service provider (of importance even if for reasons of convenience they do not exercise that right), and if the payables on account of such other services and the payables on account of immovable property rental appear as separate invoice items.



**For once, the ability of the tenant to choose between utility suppliers or ways of using various utilities are facts which support the case for "separating" provision of utilities from rental of property.**





On the other hand, CJEU also provided examples in which property rental constitutes a single supply of a complex nature with utility supplies. In the opinion of CJEU it can specifically occur in the case of the letting of turnkey offices, ready for use with the provision of utilities and certain other supplies, and in the case of the immovable property which is let for short periods, in particular for holidays. Other facts which point in favour of “complex” treatment of property rental and utility supplies include situations in which tenants do not have the option of independently choosing utility suppliers (particularly so where the landlord, who owns part of the common property parts, is required to use suppliers designated by the co-proprietors collectively and to pay his or her share of the costs related to such supplies).

## Summary

CJEU has provided clear examples, which can be useful in assessing the rules of re-invoicing of utility costs being part of a property letting/ rental agreement. What is particularly significant is that the position of CJEU is much more advantageous than that previously presented by the tax authorities.

That is why the CJEU judgement should be perceived as an opportunity for reviewing of settlements under immovable property letting agreements, with the view of searching out the possibilities for optimising these settlements, in particular where the purchaser cannot deduct their VAT charge fully, or with the aim of limiting the tax risk of incorrect application of reduced VAT rates.

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# KPMG publications

The KPMG analyses and reports are an output of our expertise and experience.

The publications take up issues important to enterprises operating in Poland and globally.



## Poland – a modern business services center in the heart of Europe

The report presents Poland as a potential location for shared services centres (SSCs) or business process outsourcing centres (BPOs) and introduces new potential locations for the consideration of investors. The publication covers the subjects as key economic and political data for Poland, availability and cost of educated human capital, grants and incentives available for investors, experiences of shared services centres already established in Poland, key potential locations and their characteristics.



## Perspective neighbourhood. Polish-German economic cooperation.

The report was prepared in cooperation with Polish-German Chamber of Commerce and Industry and summarizes the Polish-German economic relations. The publication provides a summary of existing cooperation between Poland and Germany and includes an assessment made by German investors of the attractiveness of Poland as well as promising areas of cooperation between the two countries.



## The Luxury Real Estate Market in Poland

The report was prepared as a result of cooperation between KPMG in Poland and REAS. Its purpose is to provide an analysis of the situation in the market for luxury properties with a focus on the luxury apartment segment. The study presents a situation in the luxury property market in five Polish cities (Warsaw, Kraków, Wrocław, Poznań and Tri-City) and focuses on the buyers of luxury real estate in Poland.



## Partners in Development? The Perception of Private Equity Funds by Family Businesses in Poland

The KPMG in Poland report is based on a survey conducted among the owners and co-owners of nearly 30 family businesses in Poland. Over 60% of them are companies with annual revenues of over PLN 100 million, while 15% of the companies achieve annual revenues from PLN 50 to 100 million. Respondents were asked about their knowledge of funds and the private equity market, the attractiveness of PE funds as a source of funding and issues related to cooperation with funds in this area.



## Towards Development! Polish-Italian Economic and Business Cooperation

The report was prepared by KPMG in Poland in cooperation with the Embassy of Italy in Poland under the honorary patronage of the Ministry of Economy. The publication provides a summary of existing cooperation between Poland and Italy and includes an assessment made by Italian investors of the attractiveness of Poland as well as promising areas of cooperation between the two countries and an economic analysis of Polish-Italian economic relations, including details relating to trade and foreign direct investment.



## At the Crossroads. Challenges and Priorities for Grocery Chains in Poland

The report is an analysis of the Polish retail market in Poland, whose value is estimated at PLN 192 billion per year. The report covers issues such as retail chain development, operational and financial efficiency, economic and consumer trends, shopping habits of Polish consumers, human resource management, the multi-channel environment, advanced analytical expertise, corporate social responsibility and regulatory trends. The survey was conducted among half of the twenty biggest non-specialised retail chains, i.e. those focused mainly on foodstuffs, in the first quarter of 2015.



## The Printing and Printed Packaging Market in Poland

The fifth edition of the report was prepared by KPMG in Poland in cooperation with the Polish Brotherhood of Gutenberg Knights. It presents an analysis of the printing market in Poland. The analysis is based on 300 interviews carried out among managers of Polish printing companies. The study took place in February and March 2015.

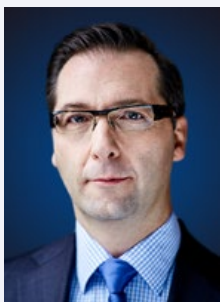


## The automotive industry, Q2/2015 Edition, KPMG in Poland and PZPM Quarterly Report

The report aims at presenting the current trends in the Polish automotive industry, which includes both the automotive market, the industrial production and the automotive financial services. The publication is a joint project of the Polish Automotive Industry Association and KPMG in Poland.

# Tax Department at KPMG in Poland

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**KPMG Poland**

**Please be informed that on the 17th of August 2015**

**KPMG Poland and D.Dobkowski LP  
a law firm affiliated with KPMG Poland  
have moved office to a new location.**

The new address is

**4A Inflancka Street, 00-189 Warsaw.**

All phone numbers, fax numbers,  
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