

Docket: 2016-705(GST)I

BETWEEN:

PERSEPOLIS CONTRACTING INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 20, 2017, at Vancouver, British Columbia.

Before: The Honourable Justice Sylvain Ouimet

Appearances:

Counsel for the Appellant: Michael Gemmiti

Counsel for the Respondent: Jamie Hansen

JUDGMENT

The appeal from the reassessment made under the *Excise Tax Act* for the period from January 1, 2011 to March 31, 2011 is dismissed, without costs.

Signed at Ottawa, Canada, this 23rd day of May 2017.

“Sylvain Ouimet”

Ouimet J.

Citation: 2017 TCC 89
Date: 20170523
Docket: 2016-705(GST)I

BETWEEN:

PERSEPOLIS CONTRACTING INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Quimet J.

I. Introduction

[1] This is an appeal by Persepolis Contracting Inc. (“Persepolis Inc.”) with respect to the reporting period from January 1, 2011 to March 31, 2011 (the “Reporting Period”). For the Reporting Period, the Minister of National Revenue (the “Minister”) reassessed Persepolis Inc. for net harmonized sales tax (“HST”) of \$47,314.05 pursuant to the *Excise Tax Act*, RSC 1985, c E-15, as amended (“ETA”).

[2] On November 6, 2012, the Minister assessed Persepolis Inc. in respect of the making of taxable supplies. The Minister assessed HST collectible of \$69,492.00, allowed input tax credits (“ITCs”) of \$25,992.07 and assessed interest of \$3,168.17 and a failure-to-file penalty of \$1,739.98.

[3] On March 28, 2014, the Minister reassessed Persepolis Inc., disallowing the ITCs previously allowed. On November 18, 2015, the Minister further reassessed Persepolis Inc., allowing ITCs of \$22,177.95, which resulted in a net tax liability of \$47,314.05.

II. Issue

[4] The only issue in this appeal is the following:

Did the Minister correctly determine that Persepolis Inc.'s net tax liability for the Reporting Period is \$47,314.05?

[5] In answering this question, I will conduct an analysis to determine whether Persepolis Inc. was acting as an agent for 0781178 BC Ltd. in carrying out the renovation of the Lion Hotel (the "renovations"). In doing so, I will determine if 0781178 BC Ltd. explicitly or implicitly consented to Persepolis Inc. acting as its agent with respect to the renovations.

III. The Relevant Legislative Provisions

[6] The key applicable provisions of the ETA are:

Subdivision b — Input tax credits

169 (1) General rule for credits — Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:

$$A \times B$$

where

A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and

B is

(a) where the tax is deemed under subsection 202(4) to have been paid in respect of the property on the last day of a taxation year of the person, the extent (expressed as a percentage of the total use of the property in the course of commercial activities and businesses of the person during that taxation year) to which the person used the property in the course of commercial activities of the person during that taxation year,

(b) where the property or service is acquired, imported or brought into the province, as the case may be, by the person for use in improving capital

property of the person, the extent (expressed as a percentage) to which the person was using the capital property in the course of commercial activities of the person immediately after the capital property or a portion thereof was last acquired or imported by the person, and

(c) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person.

...

DIVISION V — COLLECTION AND REMITTANCE OF DIVISION II TAX

Subdivision a — Collection

221 (1) Collection of tax — Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.

...

222 (1) Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

Subdivision b — Remittance of tax

225 (1) Net tax — Subject to this Subdivision, the net tax for a particular reporting period of a person is the positive or negative amount determined by the formula

$$A - B$$

where

A is the total of

(a) all amounts that became collectible and all other amounts collected by the person in the particular reporting period as or on account of tax under Division II, and

(b) all amounts that are required under this Part to be added in determining the net tax of the person for the particular reporting period; and

B is the total of

(a) all amounts each of which is an input tax credit for the particular reporting period or a preceding reporting period of the person claimed by the person in the return under this Division filed by the person for the particular reporting period, and

(b) all amounts each of which is an amount that may be deducted by the person under this Part in determining the net tax of the person for the particular reporting period and that is claimed by the person in the return under this Division filed by the person for the particular reporting period.

IV. The Relevant Facts

[7] Yahya Nickpour (“Mr. Nickpour”), the sole shareholder of Persepolis Inc., testified for Persepolis Inc. Persepolis Inc. also called Jillian Skeet (Ms. Skeet), a national and international business consultant. The Respondent did not call any witness.

A. Evidence of Yahya Nickpour

[8] Before February 20, 2009, Mr. Nickpour owned a single room occupancy (“SRO”) building in Vancouver. Mr. Nickpour carried out his own renovations and repair work on the building. After the renovations were completed, the building was inspected by an inspector from the City of Vancouver, whose name, according to Mr. Nickpour, was Lynn. At the time of this inspection, Lynn told Mr. Nickpour that the City of Vancouver was considering closing an SRO building called the Lion Hotel because it was in very bad shape. She also indicated to Mr. Nickpour that the Lion Hotel was owned by Mr. Abdollahi.

[9] After obtaining this information from Lynn, Mr. Nickpour met Mr. Abdollahi and told him about the potential closing of the Lion Hotel by the City of Vancouver. Mr. Nickpour and Mr. Abdollahi were friends. Mr. Abdollahi had helped out Mr. Nickpour financially with the renovation of his own SRO building. Mr. Abdollahi owned the Lion Hotel through his own corporation,

0781178 BC Ltd. The Lion Hotel was the same type of building as that which Mr. Nickpour had renovated, but much bigger in size. During their meeting, Mr. Abdollahi told Mr. Nickpour that he did not want to carry out the necessary renovations himself or to have to deal with the Canadian Mortgage and Housing Corporation (“CMHC”). Mr. Nickpour decided he wanted to help his friend because the friend had helped him with the renovation of his own SRO building. He offered to carry out the renovation project for Mr. Abdollahi and they came to an agreement. Mr. Nickpour agreed to perform his functions for a management fee of 15% of the cost of the renovations, as the renovation budget was low. His functions included performing work to carry out the necessary renovations, hiring the subcontractors and getting the necessary inspections done.

[10] The first document in the aforementioned agreement is a letter from Mr. Abdollahi, on behalf of 0781178 BC Ltd. and the Lion Hotel, to Mr. Nickpour and Persepolis Inc.¹ The letter is dated December 30, 2008. It reads as follows:

As we have agreed to participate in the City of Vancouver Pilot Project that will result in being fast-tracked for a CMHC grant to undertake extensive renovations of the Lion Hotel, I hereby authorize you to act on my behalf in all matters relating to the project.

To this end, I will provide you with a limited Power of Attorney for my company 0781178 BC Ltd 178 BC Ltd., which owns the Lion Hotel, to specifically deal with financial matters involving the CMHC grant.

Furthermore, I authorize your company, Persepolis Contracting, Inc., to act as the contractor for the project.

[11] Mr. Nickpour incorporated Persepolis Inc. on February 20, 2009 to carry out the renovations. Mr. Nickpour was the sole shareholder of Persepolis Inc.

[12] A Power of Attorney dated February 4, 2011 was submitted in evidence.² Mr. Nickpour explained that the Power of Attorney was executed after the letter of December 30, 2008 because it took a long time to set everything up in order to begin the project. The power of attorney was granted by 0781178 BC Ltd. to Persepolis Inc. and gave Persepolis Inc. the power to act for 0781178 BC Ltd. in all matters pertaining to the Lion Hotel.

¹ Exhibit A-1, Tab 1.

² Exhibit A-1, Tab 2.

[13] A Direction to Pay was submitted in evidence.³ That document is also dated February 4, 2011 and it is signed by Mr. Abdollahi. It is addressed to the CMHC and to Mr. Adrian Wong (“Mr. Wong”), the notary public who worked on this renovation project. The Direction to Pay authorized Mr. Wong to disburse CMHC funds to Persepolis Inc. (after paying certain fees and holding back 10%). The Direction to Pay also specified that “Persepolis Contracting Inc. has been appointed my Attorney to act for me in all matters pertaining to this mortgage and to manage and complete the renovations for me at the Lions [*sic*] Hotel”

[14] A Residential Rehabilitation Assistance Program (“RRAP”) loan agreement and a Rooming House RRAP Operating Agreement (the “Operating Agreement”) were also submitted as evidence. The Operating Agreement was between the CMHC and 0781178 BC Ltd.⁴ Persepolis Inc. was not a party to either agreement. The purpose of the Operating Agreement was to require the Lion Hotel to abide by certain conditions in exchange for the forgivable loan. If the Lion Hotel violated the agreement, the loan could be called.

[15] Mr. Nickpour explained the flow of funds for carrying out the renovations. Mr. Nickpour was required to pay the expenses out of his own pocket at first. He would use his own funds to carry out the renovations on one floor. Once a floor was completed, inspections would be done and, if the inspections were passed, CMHC would then advance the funds to Mr. Wong, who would disburse the money to Persepolis Inc. in accordance with the Direction to Pay.

[16] There was no management agreement between Mr. Nickpour and Mr. Abdollahi because they trusted each other. Mr. Nickpour testified that Persepolis Inc. did not issue invoices to Mr. Abdollahi or to 0781178 BC Ltd for any of the work he performed in carrying out the renovations.

[17] According to Mr. Nickpour, the renovations to the Lion Hotel took approximately one year. During that period, Mr. Abdollahi did not ask to receive any updates on the renovations and he did not visit the hotel while the renovations were ongoing.

B. Evidence of Jillian Skeet

³ Ibid.

⁴ Exhibit A-1, Tab 8.

[18] Ms. Skeet described herself as a national and international business consultant with a background in international relations. Ms. Skeet met Mr. Nickpour years ago, when he was new to Canada and just learning English. At the time, he wanted to have his own business, as he had had in Iran, but needed help dealing with documents in English. Since then, Ms. Skeet has worked for Mr. Nickpour on an “as needed” basis.

[19] In December 2008, Ms. Skeet attended the first meeting between Mr. Nickpour, Mr. Abdollahi and the three levels of government involved in the renovation project, i.e., the City of Vancouver, BC Housing, and the CMHC. It was made clear to Mr. Abdollahi that the Lion Hotel would have to be renovated or it would be shut down by the city. Mr. Nickpour, having recently renovated his own building, felt capable of carrying out this project for his friend, Mr. Abdollahi.

[20] Ms. Skeet handled all the CMHC paperwork for the renovation project. In addition, all communications from the CMHC went through her, including all requests for information. Ms. Skeet would explain the documents to Mr. Nickpour.

[21] Ms. Skeet was the person notified when the CMHC released funds to Persepolis Inc. for the renovation project. Ms. Skeet testified that the CMHC would issue a cheque to Mr. Wong, who would in turn issue a cheque to Persepolis Inc. Ms. Skeet was also the person who notified the CMHC when Mr. Nickpour was ready for the inspections in order that the funds might be released by Mr. Wong.

[22] Ms. Skeet described the CMHC grant as a forgivable loan. The CMHC funded the project in the form of a loan. But the loan was forgivable so long as the Operating Agreement was complied with.⁵ The Operating Agreement had a number of conditions, such as keeping rents at a set level and having a certain number of beds open. If the Lion Hotel violated this agreement, the loan could be called.

[23] Ms. Skeet prepared, signed, and submitted all the invoices from Persepolis Inc. to the CMHC.⁶ The first invoice, No. 101, is issued to the CMHC. The next invoices, Nos. 102 and 103, are issued to 0781178 BC Ltd. In addition, there is another version of invoice No. 101, which is issued to 0781178 BC Ltd.⁷ Ms. Skeet

⁵ Exhibit A-1, Tab 8.

⁶ Exhibit A-1, Tab 9.

⁷ Exhibit R-1, Tab 10.

explained that, initially, invoice No. 101 was issued to the CMHC but the CMHC demanded that the invoices be issued to 0781178 BC Ltd. In addition, the CMHC forms submitted along with the invoices show 0781178 BC Ltd. as the “Applicant” and they are signed by Ms. Skeet. She signed all documents on behalf of the Applicant, who was 0781178 BC Ltd., not Persepolis Inc.

[24] The invoices specify amounts for HST. Ms. Skeet explained that the invoices include HST only because the CMHC told her that they must. The BC HST was brought in while this project was ongoing. Ms. Skeet indicated that the parties had not anticipated this because the then premier of BC had promised there would be no harmonization of the sales tax. The HST represented a significant additional cost for the renovations. The CMHC was clear in stating that the budget already had to cover this additional cost, and that therefore the invoices should specify HST accordingly.

[25] Ms. Skeet also prepared the invoices for the 15% management fee charged to 0781178 BC Ltd by Persepolis Inc.⁸ This fee was applied against the CMHC grant. Persepolis Inc. charged HST on the management fee amounts.

[26] Ms. Skeet explained the flow of funds in the same manner as Mr. Nickpour. She testified that the CMHC released funds to Mr. Wong. Mr. Wong would thereupon cash the cheque, pay any fees, hold back 10%, and then release the remaining amount to Persepolis Inc.

V. Positions of the Parties

A. Persepolis Inc.’s Position

[27] Counsel for Persepolis Inc. submitted that Persepolis Inc. was acting as an agent for 0781178 BC Ltd. with respect to the renovations and did not supply construction services to 0781178 BC Ltd. Therefore, Persepolis Inc. was not required to collect or remit HST in respect of the goods and services acquired on behalf of 0781178 BC Ltd. for the renovations. Consequently, Persepolis Inc. did not collect HST when it submitted invoices to the CMHC. Persepolis Inc. did not submit any invoices to 0781178 BC Ltd., except with regard to the HST collectible on its own 15% management fee.

⁸ Exhibit A-1, Tab 12.

[28] According to Persepolis Inc.'s counsel, invoices were only submitted to the CMHC because Persepolis Inc. needed to submit them in order to obtain the release of the CMHC's grant funds. According to counsel for Persepolis Inc., these invoices should not be interpreted as invoices for general contracting services.

B. Respondent's Position

[29] The Respondent submitted that Persepolis Inc. did not act as agent for 0781178 BC Ltd. with respect to the renovations. The Respondent further submitted that Persepolis Inc. provided taxable supplies as defined by section 123 of the ETA. In this case, the taxable supplies were general contracting services, which included the goods and services acquired for the renovations and a general contractor fee, that is, the 15% management fee. It is the Respondent's position that under section 221 of the ETA Persepolis Inc. had to collect HST in respect of these general contracting services. According to the Respondent, Persepolis Inc. acted as a general contractor and had to collect and remit HST because it had made taxable supplies.

VI. Analysis

[30] Under the ETA, the majority of suppliers of goods and services have to file GST or HST returns for each of their reporting periods. For each of its reporting periods, a supplier has to determine the amount of "net tax" to be remitted to the Minister. If Persepolis Inc. provided taxable supplies to 0781178 BC Ltd. with respect to the renovations, these taxable supplies would have to be taken into consideration in the calculation of the "net tax" to be remitted to the Minister for the Reporting Period.

[31] In the present case, Persepolis Inc. argues that it did not supply any goods or services to 0781178 BC Ltd. with respect to the renovations, except in connection with the 15% management fees it charged because it acted as Persepolis Inc.'s agent. As this Court stated in *Club Intrawest*:⁹

. . . Where an agent is acting for a principal when acquiring property or a service from a third party supplier, the agent is not making a supply of the property or service to its principal, but is merely acting as a conduit.¹⁰

⁹ *Club Intrawest v The Queen*, 2016 TCC 149 [*Club Intrawest*].

¹⁰ *Ibid.*, para 71.

[32] Consequently, if I determine that Persepolis Inc. was acting as an agent for 0781178 BC Ltd. in acquiring goods or services with respect to the renovations, then it was not required to collect and remit HST on these goods and services.

[33] Whether or not an agency relationship existed between Persepolis Inc. and 0781178 BC Ltd. is a question of fact.¹¹ An essential quality of the agency relationship is the ability for the agent to affect the principal's legal position with respect to the transaction at issue.¹² As an agency relationship can be created explicitly or implicitly,¹³ I must determine if 0781178 BC Ltd. explicitly or implicitly consented to Persepolis Inc. entering into contracts on its behalf with respect to goods and services acquired in order to complete the renovations.

A. Was explicit consent given by 0781178 BC Ltd.?

[34] In this case, Persepolis Inc. submitted in evidence several documents, which, it alleged, establish the explicit consent of 0781178 BC Ltd.

[35] The first document was the letter dated December 30, 2008 from Mr. Abdollahi and 0781178 BC Ltd. to Mr. Nickpour and Persepolis Inc.¹⁴ This letter authorizes Mr. Nickpour to act on behalf of Mr. Abdollahi "in all matters relating to the project", meaning the renovations.

[36] The letter also states the following:

To this end, I will provide you with a limited Power of Attorney for my company 0781178 BC Ltd., which owns the Lion Hotel, to specifically deal with financial matters involving the CMHC grant.¹⁵

[My emphasis.]

[37] In a separate and distinct paragraph that follows the statement quoted above, the letter states finally:

¹¹ G.H.L. Fridman, *Canadian Agency Law*, 2nd ed (Markham, Ont: LexisNexis, 2012) at §1.3 [Fridman].

¹² *The Queen v Merchant Law Group*, 2010 FCA 206, at paras 17, 22, and 28. See also Fridman, *supra* note 11, at §1.1, cited in, for example, *Club Intrawest*, *supra* note 9, at para 77.

¹³ *Kinguk Trawl Inc v The Queen*, 2003 FCA 85, at para 35.

¹⁴ Exhibit A-1, Tab 1.

¹⁵ *Ibid.*

Furthermore, I authorize your company, Persepolis Contracting, Inc., to act as the contractor for the project.¹⁶

[38] According to this letter, in my view, Persepolis Inc. had two distinct roles with respect to the renovations: 0781178 BC Ltd. gave a limited power of attorney to Persepolis Inc. “to specifically deal with financial matters involving the CMHC grant”, and it authorized Persepolis Inc. to act as the contractor.

[39] The second document was the actual Power of Attorney, dated February 4, 2011. The Power of Attorney authorized Persepolis Inc. “[t]o act for me in all matters pertaining to [the Lion Hotel]”.¹⁷ Because of the wording used in this document, it might be that it gave Persepolis Inc. the power of attorney to act as agent for 0781178 BC Ltd. for the renovation of the Lion Hotel.

[40] The third document is the Direction to Pay, also dated February 4, 2011, which states that Persepolis Inc. “has been appointed my Attorney to act for me in all matters pertaining to this mortgage and to manage and complete the renovations for me at the Lions [*sic*] Hotel . . .”¹⁸ I note that the word “and”, not the word “including”, is used here. In my opinion, in light of the language used, it could be argued either that the document gave Persepolis Inc. the power of attorney to act as agent for 0781178 BC Ltd. in all matters, including the renovation of the Lion Hotel, or that it gave the power of attorney in all matters pertaining to the mortgage only.

[41] In the end, considering the documents submitted in evidence and described above, it is not clear whether the parties agreed to an agency relationship solely for the purpose of dealing with the CMHC or also for the purpose of carrying out the renovations. The documents themselves appear to distinguish between those two functions and, at the same time, to combine them.

[42] In my opinion, none of these documents establish on the balance of probabilities that Mr. Abdollahi consented expressly to establishing an agency relationship with Persepolis Inc. for the renovations. The agency relationship consented to in the letter appears narrower in scope than the power of attorney. As for the Direction to Pay, as stated previously, the wording of the letter does not allow me to make, on the basis of this document alone, a determination as to whether Persepolis Inc. was given the power of attorney to act as a contractor.

¹⁶ Ibid.

¹⁷ Exhibit A-1, Tab 2.

¹⁸ Ibid.

[43] Furthermore, the three abovementioned documents were all executed unilaterally by Mr. Abdollahi. Mr. Abdollahi was not called as a witness by Persepolis Inc., even though he is the individual who would have been able to clarify the ambiguities found in those documents.

B. Was implicit consent given by 0781178 BC Ltd.?

[44] As stated recently by this Court in *GEM Health Care Group Ltd. v. The Queen*,¹⁹ in the absence of a written agency agreement, the Court must closely examine the conduct of the parties to determine whether there was an implied intention to create an agency relationship.²⁰

[45] In order for it to be proved that the principal had the implied intention to create an agency relationship, the circumstances must clearly indicate that the principal has given the authority to the agent to act on his behalf and that the principal has accepted the agency relationship. Importantly, silence is insufficient to prove acceptance of an agency relationship.²¹

[46] On the facts of the present case, I have come to the conclusion that 0781178 BC Ltd. did not consent implicitly to Persepolis Inc. acting as its agent in respect of the renovations. Simply put, I was not presented with any evidence indicating that, by its actions, 0781178 BC Ltd. had implicitly accepted an agency relationship with respect to the renovations. The circumstances of this case do not clearly indicate that 0781178 BC Ltd. gave authority to Persepolis Inc. to act on its behalf. I was not presented either with any evidence that would lead me to conclude that 0781178 BC Ltd. implicitly gave authority to Persepolis Inc. to act on its behalf with respect to the renovations.

[47] The renovations were funded by the CMHC, and the mortgage agreement was between 0781178 BC Ltd. and the CMHC. What is clear from the facts is that Persepolis Inc. received a power of attorney from 0781178 BC Ltd. with respect to the financial matters involving the CMHC. Therefore, Persepolis Inc. could have obtained the funds to pay the renovation costs from the CMHC on behalf of 0781178 BC Ltd., instead of getting them from 0781178 BC Ltd. after that entity received them from the CMHC. This is in no way proof that 0781178 BC Ltd. had

¹⁹ *GEM Health Care Group Ltd v The Queen*, 2017 TCC 13.

²⁰ *Ibid.*, at para 29.

²¹ *Fridman*, *supra* note 11, at §2.8.

implicitly consented to Persepolis Inc. acting as its agent with respect to the carrying out of the renovations themselves.

[48] Persepolis Inc. charged 0781178 BC Ltd. a 15% management fee for its services. According to the evidence, the management fee was charged separately. The fact that Persepolis Inc. did not add a 15% surcharge on the invoices it sent to the CMHC does not prove that 0781178 BC Ltd. implicitly consented to Persepolis Inc. acting as its agent for the renovations. It is unclear from the evidence how and when the management fee was to be charged to 0781178 BC Ltd., as no contract between 0781178 BC Ltd. and Persepolis Inc. was submitted in evidence.

VII. Conclusion

[49] In the present case, I have come to the conclusion that Persepolis Inc. was not acting as agent for 0781178 BC Ltd. with respect to the renovations, since 0781178 BC Ltd. did not consent, either explicitly or implicitly, to Persepolis Inc. acting in that capacity.

[50] With respect to the renovations, the only evidence submitted was that Persepolis Inc. performed functions that a general contractor would normally perform. Whether Persepolis Inc. was acting as agent for 0781178 BC Ltd. in performing these functions was for Persepolis Inc. to prove, which it failed to do.

[51] Therefore, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 23rd day of May 2017.

“Sylvain Ouimet”

Ouimet J.

CITATION: 2017 TCC 89

COURT FILE NO.: 2016-705(GST)I

STYLE OF CAUSE: PERSEPOLIS CONTRACTING INC. v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: Vancouver, British Columbia.

DATE OF HEARING: February 20, 2017

REASONS FOR JUDGMENT BY: The Honourable Justice Sylvain Ouimet

DATE OF JUDGMENT: May 23, 2017

APPEARANCES:

Counsel for the Appellant: Michael Gemmiti

Counsel for the Respondent: Jamie Hansen

COUNSEL OF RECORD:

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