

Docket: 2012-2024(IT)G

BETWEEN:

CHARLES HUGH MADDIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on April 28<sup>th</sup>, 29<sup>th</sup> 30<sup>th</sup> and May 1<sup>st</sup>, 2014,  
at Vancouver, British Columbia

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

Counsel for the Appellant: William A. Ruskin/Anna Sekunova  
Counsel for the Respondent: Karen A. Trustcott

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**JUDGMENT**

IN ACCORDANCE with the reasons for judgment attached, the appeal against the assessment for unremitted source deductions is dismissed on the basis that the Appellant has not established that he exercised a degree of care, diligence and skill which a reasonably prudent person would have exercised in comparable circumstances.

SUBJECT TO and in accordance with the final paragraph of the attached reasons for judgment, costs are awarded to the Respondent on a party and party basis.

Signed at Edmonton, Alberta this 18<sup>th</sup> day of September 2014.

“R.S. Boccock”

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Boccock J.

Citation: 2014 TCC 277  
Date: 20140918  
Docket: 2012-2024(IT)G

BETWEEN:

CHARLES HUGH MADDIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Bocock J.

#### I. Introduction

[1] This appeal arises from a director's liability assessment. In August of 2009, the Minister of National Revenue (the "Minister") levied an assessment against the Appellant director in the amount of \$271,801.11 (the "Assessment"). The Assessment, which related to the period of January 1, 2008 to September 11, 2008 (the "Period"), was issued pursuant to subsection 227.1(1) of the *Income Tax Act* (the "*Act*") concerning the unremitted source deductions (the "Source Deductions") of Quadra Marble and Granite Inc. ("Marble").

[2] The Source Deductions include amounts owing on account of statutory remittances due under the *Act*, the Canada Pension Plan ("CPP") and the *Employment Insurance Act* ("*EI Act*"). No amounts for Goods and Service Tax ("GST") were assessed for the Period. The Assessment also included amounts for penalties and interest. There is no longer any dispute or contest as to the sufficiency, propriety or quantum of the Assessment, certificate, writ of seizure and sale or the latter subsequent non-fulfillment in relation to the Assessment.

[3] The sole issue before the Court is the Appellant's assertion of a due diligence defence under subsection 227.1(3) of the *Act*. The deceptively simple issue is whether the Appellant, as a director of Marble, exercised the requisite

degree of care, diligence and skill to prevent the failure of Marble to remit the Source Deductions during the Period.

## II. Facts

### *(a) Facts not in dispute:*

[4] Initially, the Appellant, Mr. Maddin, owned and operated a family wholesale and retail business called Quadra Stone Company Ltd. (“Stone”), which undertook the distribution, fabrication, sale and installation of marble, granite and stone. By December 31, 2007, the unremitted source deductions (“payroll debts”) owing by Stone to the Minister totalled \$158,880.13. These appear to have been paid in 2008.

[5] On December 31, 2007, Mr. Maddin and two other individuals, Curtis Barker and Caesar Chang, incorporated, as its first directors, a new company called Quadra Marble and Granite Inc. (“Marble”).

[6] On December 31, 2007, the newly incorporated Marble assumed the operations of the pre-existing Stone which transferred all of its material assets and employees to Marble.

[7] Mr. Maddin was also an officer and both chairman and secretary of Marble, as well as being a shareholder. Mr. Barker (President) and Mr. Chang (Vice-President) were also officers and equal shareholders of Marble with Mr. Maddin.

[8] The business operations of Marble continued in the same business premises as Stone. There was no executed lease agreement between Marble and the landlord, Camad Land Corp.(the “Landlord”), a company also owned and controlled by Mr. Maddin and his family members.

[9] Mr. Maddin resigned as a director of Marble on September 11, 2008.

[10] In October 2009, Marble vacated the business premises pursuant to an eviction notice issued by the Landlord.

[11] During the Period, Marble paid its employees salary, wages, and other remuneration. Marble deducted and withheld the Source Deductions respecting the amounts paid to its employees, but did not pay same to the Receiver General.

*(b) Additional Finding of Facts by the Court.*

[12] Mr. Maddin, Mr. Barker and one of the bookkeepers, Ms. Roberge testified at the four day hearing. Mr. Chang did not testify although he was on the Respondent's witness list. Although the Appellant suggested an adverse inference ought to be drawn from his absence, there was nothing to suggest that Mr. Chang would have offered anything regarding Mr. Maddin's knowledge or actions regarding the Source Deductions since, by consistent testimony of all three witnesses, Mr. Chang was rarely present at the premises, no information meetings were held with him and no conversations were allegedly had between he and Mr. Maddin on the topic.

[13] As to the nature of the involvement of Mr. Maddin as a director of Marble during the Period, it was certainly the initial intention of all that Mr. Maddin would not participate as an active owner/manager in the operations of Marble, but would provide advice relevant to his experience, education and factual corporate history of the predecessor business.

[14] Whether this was ultimately fulfilled or not is dependant upon factual occurrences during the Period. Mr. Maddin attended the business premises of Marble for approximately 2–3 days a week for most of the day. Mr. Maddin was familiar with the business structure, its banking information and operations, the bookkeeper during the period from January 1<sup>st</sup> through to March 31<sup>st</sup>, 2008 (the "2008 winter period") and the inherited computer and accounting systems. As to the computer systems themselves, Mr. Maddin was concerned during the 2008 winter period with the obsolescent of the existing computer system which he had sold to the business, its need for replacement and his heightened concern over its non-replacement during that critical period. At various times, Mr. Maddin executed letters on behalf of Marble, including a termination letter in late January of 2008.

[15] As to the initial business documentation reflecting the transfer of the undertaking and assets from Stone to Marble, the documents may be best described as incomplete, if not inchoate. There was and would be no written lease, no signed agreement of purchase of sale and no shareholders' agreement among the parties. The entire transaction seems to have been concluded as a result of instructions given by Mr. Maddin to his solicitor. The terms were reflected on a signed term sheet which left certain issues outstanding, including the extent of the demised premises, an issue which prevented the conclusion of a lease agreement.

[16] In terms of Mr. Maddin's relationship with the initial bookkeeper, Ms. Roberge, it is one that may be described as trusting and longstanding. Ms. Roberge was the bookkeeper for Mr. Maddin and his related companies both prior, during and after the period of Marble's existence. It is clear that Ms. Roberge was aware of the Source Deductions issue from the very outset. She testified that as the bookkeeper she would prepare the payroll including Source Deductions calculations and was cognizant that such amounts were not being paid. She testified that she advised Mr. Maddin during the 2008 winter period of various accounting issues and challenges surrounding the computer system and the slow payment of bills generally. Ms. Roberge received Mr. Maddin's requests for payments in respect of rental arrears and other monies which were owing to either he or Stone from Marble. In short, the two of them communicated regarding accounting and financial matters generally during the 2008 winter period.

[17] With respect to bookkeeping, in early March 2008, the mother of Mr. Barker (now deceased) was hired by Marble to presumably learn the bookkeeping system and ultimately, as it turns out, replace Ms. Roberge as bookkeeper. It is clear that Mr. Maddin knew of this event from the outset, was advised on almost a daily basis by Ms. Roberge about the incompatibility she had with Ms. Barker and about Ms. Roberge's suspicions that Ms. Barker failed to understand bookkeeping systems.

[18] Mr. Maddin and Ms. Roberge testified that Mr. Maddin did not specifically inquire about the Source Deductions during the 2008 winter period and that any attempts of him to informally call meetings of the directors went unheeded. The term sheet reflecting the sale transaction, although under-documented, revealed that there would be no inventory payment on account of inventory transferred by Stone to Marble for a period of six months, January 2008 would be a base rent free period and a large \$4 million contract, which had been unfulfilled at the commencement of the transaction, would provide cash flow. This was acknowledged in the term sheet executed by all of the directors of Marble. During the 2008 winter period, Mr. Maddin was advised weekly if not daily, either by Ms. Roberge or Mr. Barker, that the \$4 million contract was becoming more and more tentative as time passed.

[19] Some time in April of 2008, the bank branch of Marble was changed to a location closer to the business. Mr. Maddin was not advised of this branch location change. In terms the other two directors' presence at the business, their attendance in the offices of Marble was never equal to the frequent attendances of Mr. Maddin. There were no regular meetings of directors, if any at all. Mr. Barker was

away from the office attempting to procure and enhance business for Marble and Mr. Chang, in his capacity as fabricator and installer, was present only briefly in the mornings or the afternoons at the business premises.

[20] Evidence was also provided as to the previous and ongoing other business circumstances of Mr. Maddin. He had a previous history of payroll debts with the Canada Revenue Agency related to the business of Stone and was previously convicted in 2008 of a dozen or so counts for failing to file T1 and T2 tax returns.

### III. The Law

[21] The combination of paragraph 153(1)(a) and subsection 227.1(1) of the *Act* provides for the requirement of Marble to remit the Source Deductions and also for Mr. Maddin's liability as a director where such Source Deductions are not remitted. Subsections 227.1(2) and (3) of the *Act* provide for the limitations on that liability. They are reproduced below in excerpted format:

153. (1) Every person paying at any time in a taxation year

(a) salary, wages or other remuneration, other than amounts described in subsection 115(2.3) or 212(5.1),

...

shall deduct or withhold from the payment the amount determined in accordance with prescribed rules and shall, at the prescribed time, remit that amount to the Receiver General on account of the payee's tax for the year under this Part or Part XI.3.

227.1 (1) Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) or 135.1(7) or section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.

(2) A director is not liable under subsection 227.1(1), unless

(a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 223 and execution for that amount has been returned unsatisfied in whole or in part;

(b) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to

in that subsection has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a bankruptcy order has been made against it under the Bankruptcy and Insolvency Act and a claim for the amount of the corporation's liability referred to in that subsection has been proved within six months after the date of the assignment or bankruptcy order.

(3) A director is not liable for a failure under subsection 227.1(1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances

[22] Provisions within subsections 21.1(1) and (2) of the CPP and within subsections 83(1) and (2) of the *EI Act* provide for analogous director liability for unremitted Source Deductions and incorporate by reference the due diligence defence found within subsection 227.1(3) of the *Act*.

[23] Until the decision of the Federal Court of Appeal in *Buckingham v R*, 2011 FCA 142, there was some debate concerning the perspective of the standard to be applied. In *Buckingham*, Mainville J.A., clarified the objective standard to be used at paragraphs 37, 38, 39 and 40. The same appeal judge then summarized such clarity in the subsequent case of *Balthazard v R*, 2011 FCA 331 at paragraph 32, where the Court states:

In *Buckingham*, this Court recently summarized the legal framework applicable to the care, diligence and skill defence under subsection 323(3), as follows:

a. The standard of care, skill and diligence required under subsection 323(3) of the Excise Tax Act is an objective standard as set out by the Supreme Court of Canada in *Peoples Department Stores Inc.(Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461. This objective standard has set aside the common law principle that a director's management of a corporation is to be judged according to his or her own personal skills, knowledge, abilities and capacities. However, an objective standard does not mean that a director's particular circumstances are to be ignored. These circumstances must be taken into account, but must be considered against an objective "reasonably prudent person" standard.

b. The assessment of the director's conduct, for the purposes of this objective standard, begins when it becomes apparent to the director, acting reasonably and with due care, diligence and skill, that the corporation is entering a period of financial difficulties.

c. In circumstances where a corporation is facing financial difficulties, it may be tempting to divert these Crown remittances in order to pay other creditors and

thus ensure the continuity of the operations of the corporation. That is precisely the situation which section 323 of the Excise Tax Act seeks to avoid. The defence Page: 14 under subsection 323(3) of the Excise Tax Act must not be used to encourage such failures by allowing a care, diligence and skill defence for directors who finance the activities of their corporation with Crown monies, whether or not they expect to make good on these failures to remit at a later date.

d. Since the liability of directors in these respects is not absolute, it is possible for a corporation to fail to make remissions to the Crown without the joint and several, or solidary, liability of its directors being engaged.

e. What is required is that the directors establish that they were specifically concerned with the tax remittances and that they exercised their duty of care, diligence and skill with a view to preventing a failure by the corporation to remit the amounts at issue.

[24] Conjunctively then, a director must focus upon the Source Deductions issue and exercise due diligence directed to preventing a failure to remit same. These dual obligations are to be consistent, omnipresent and invariable; a creative or alternative business plan, no matter how plausibly economic or lucrative, which diverts or attempts to divert resources away from remitting Source Deductions to the Crown will end availability of the due diligence defence: *Buckingham* at paragraph 57. The circumstances (ie: the factual particularities) are to be considered, but viewed against the objective standard of a “reasonably prudent person”.

#### IV. Appellant's Submission

[25] Factually, Mr. Maddin has submitted that the following factual conclusions may be drawn in this appeal in order to support the due diligence defence:

- a) Mr. Barker was in charge of management operations of Marble, including all financial operations and the payment of the remittances to the government;
- b) Mr. Maddin was an inactive director, not a manager, supervisor or boss and was simply present there to provide advice when necessary;
- c) sometime in March 2008, without consulting with Mr. Maddin, Mr. Barker and Mr. Chang hired Ms. Barker, changed the locks to the accounting office and fired Ms. Roberge;



- d) Mr. Barker was fully aware of the unremitted payroll deductions, at the latest, in February or March 2008;
- e) Mr. Maddin was not aware of the unremitted payroll deductions until after March 31, 2008;
- f) at the end of March, Marble's bank account was changed, and Mr. Maddin was not informed as to the new branch location; and
- g) commencing in April 2008, Mr. Maddin took various and numerous steps to obtain Marble's financial information, including the status of the Source Deductions, but all of his efforts were thwarted by Mr. Barker and his mother.

[26] In summary, Appellant's counsel argues that, during the 2008 winter period, Mr. Maddin had a reasonable expectation that remittances were being made on behalf of Marble. Mr. Maddin had no knowledge that Marble was in financial difficulty until Ms. Roberge advised him of Marble's arrears of Source Deductions, coincidentally on her last day of work: March 31, 2008. In fact, it is argued by the Appellant that the opposite was true: Mr. Maddin had every reason to think that Marble was doing well. Mr. Barker was working long hours, \$4 million in contracts were coming from a single customer, Marble did not have to pay for any inventory for 6 months, and Marble was getting a one month grace period on its rent at the premises.

[27] Additionally, Mr. Maddin's counsel contends that following the dismissal of Ms. Roberge by Mr. Barker and Mr. Chang, Mr. Maddin continued demanding financial information, including the information relating to the Source Deductions from Marble's new bookkeeper, Ms. Barker and Messrs. Barker and Chang. All of Mr. Maddin's requests for this information were denied, rebuffed or avoided.

[28] As a result, Mr. Maddin was thwarted in his efforts to prevent Marble from failing to comply with its statutory obligations with respect to the remittance of the Source Deductions.

## V. Analysis

### *(a) During the 2008 Winter Period*

[29] The issue is, during this period and in the circumstances, whether Mr. Maddin acted reasonably and with due care, diligence and skill in observing, querying and assessing the financial situation of Marble?

[30] While it is true that Mr. Barker was ostensibly the manager of the business during the relevant period in 2008, the reasons for retaining Mr. Maddin as a director were his experience, knowledge and ownership interest in Marble. While Mr. Maddin may have intended to be an inactive director and shareholder, the evidence does not display the usual hallmarks of such a pattern. Mr. Maddin's lawyer exclusively documented the sale transaction, created the company and advised on the establishment of the new business structure. All of the familiar and known business systems, material employees, outstanding inventory and contracts (with the exception of the \$4 million dollar contract) were placed in use for Marble.

[31] Most importantly and by his own testimony, Mr. Maddin attended the offices (his offices) at Marble 2 to 3 days a week. Marble's bookkeeper during the 2008 winter period was also an employee of Mr. Maddin and Ms. Roberge continues to act in such capacity to this day. She was well experienced in the payroll debts of Stone, the predecessor company which frequently avoided its own payroll debts to the Crown.

[32] Given their longstanding history, the suggestion that Mr. Maddin had never asked Ms. Roberge regarding payroll deductions remittances during the 2008 winter period rings hollow for several reasons. During the 2008 winter period, there was uncontroverted evidence that Mr. Maddin required payments by Marble to Stone in respect of rent, utilities for the premises and other amounts. He expressed his dissatisfaction of late payments of the vendor take back debt retained by Stone to Ms. Roberge and Mr. Barker. Mr. Barker was rarely present at Marble's premises even during the 2008 winter period. By comparison, Mr. Maddin was present 2 to 3 business days a week with his bookkeeper of many years also on site each day who, in turn, possessed the most detailed and critical information concerning the Source Deductions. He testified that he never inquired of Ms. Roberge specifically regarding the Source Deductions. As Mr. Maddin indicated many times, he had no reason not to believe the money was available and paid.

[33] This is the exact point where Mr. Maddin due diligence defence fails. A director is not entitled to rely upon his expectations independent of reasonable inquiry and assessment in the circumstances: *Balthazard* at paragraph 32(b) *supra*.

Mr. Maddin's testimony is that he had every reason to believe all was well financially with Marble: its prospective order book was full, it had a one month rent free period, a six month inventory payment hiatus and a brand new start. He contends that he believed there was ample cash flow for the purposes of paying the Source Deductions. However, the availability of a due diligence defence requires a reasonable inquiry and assessment be made that such funds are generally available and that the corporation will act to honour its requirement to deduct, withhold, remit and pay the amount in default of which the directors are, as the section mandates, "liable together with the corporation to pay the amount".

[34] In addition and relevant to Mr. Maddin's belief of Marble's fiscal well-being, his frequent inquiries regarding money owed to him and related companies and his requirement that the lease be completed together with the start-up nature of a new business all, on balance, indicate that he could not have reasonably perceived such fiscally blue skies during this 2008 winter period. When coupled with his unconstrained accessibility to Marble's bookkeeper during the 2008 winter period and given his own payroll debt history, a direct and simple question as to whether the Source Deductions had been paid would have been a logical, reasonable and prudent act in the circumstances.

[35] Mr. Maddin's other reasonable business concerns, actions and pre-occupations stand in contrast to the pleaded steady silences and aversion to any discussion with Ms. Roberge relating to the status of the Source Deductions payments. Either the omission was advertent and therefore unreasonable in the circumstances or inadvertent and therefore not meeting the requirement of a director to make reasonable inquiries and assessments in the circumstances as to payment in order to illustrate "that [he was] specifically concerned with the tax remittances". Other circumstances which reasonably ought to have heightened Mr. Maddin's concern and prompted a question of Ms. Roberge during the 2008 winter period were also present: the hiring of a new bookkeeper in early March of 2008 (quite apart from her contrary allegiance described below); the conflict between the new and existing bookkeepers; the reticence of Mr. Barker to abide by Mr. Maddin's advice and replace the almost non-functional obsolete accounting system; the frequent absence from the outset of Mr. Barker from the business office; and Mr. Barker's reluctance to attend to all unfinished transactional documents such as vehicle transfers (which ultimately occurred April 1, 2008).

[36] Lastly, whatever circumstances may have prevented Mr. Maddin from inquiring about the Source Deductions during the 2008 winter period these were objectively dispelled in early March by the hiring of an additional partial and

antipathetic bookkeeper. Such an adverse event to his interests, when combined with the other circumstances, should reasonably have provoked, minimally at least, one question of Ms. Roberge during the 2008 winter period about the payment of Source Deductions. If it had, a truthful answer would have been forthcoming, confidentially from a trusted, well known bookkeeper, who from her own testimony had such knowledge. By not asking such a question, Mr. Maddin did not reasonably turn his attention to the required payment of the Source Deductions in circumstances of ostensible managerial, operational and financial difficulties.

[37] As to the question never posed to Ms. Roberge, in the circumstances, it was reasonable (or at least not unreasonable) to ask this simple, solitary question. At best, not asking arose from inaction and lack of due attention. At worst, the omission was deliberate because the response was reasonably certain. Either way, the facts remain that disturbing and unsettling events were unfolding around Mr. Maddin during the 2008 winter period on the 2 to 3 days a week when he was present at the very epicentre of their occurrence, mere feet away from a familiar friendly and discreet source with the answer. Even when characterized as beneficially as in the first alternative, neglecting to ask in the circumstances denies the due diligence defence to a director uniquely placed to act reasonably to inform himself of the status of the Source Deductions. In such factual circumstances, inaction and aversion will not suffice: *Chell v Her Majesty the Queen* 2013 TCC 29 at paragraph 40.

*(b) After the 2008 Winter Period*

[38] Mr. Maddin's counsel admits that Mr. Maddin knew of the arrears after April 1, 2008, but thereafter all his efforts to see to the payment of the Source Deductions were thwarted by the avoidance and the diversion of Mr. Barker and/or Mr. Chang to that direction. Given the finding above, further analysis of this period beyond the 2008 winter period is not required. However to complete the analysis, the Court notes the defence of due diligence would not be available for this subsequent period (once the arrears were admittedly known by Mr. Maddin) for the following reasons:

- a) after the 2008 winter period, Mr. Maddin's concerns were primarily directed towards recouping the arrears of rent, protecting his vendor take back debt and completing the transfer of assets from Marble to Stone (ie to complete the transaction prior to any operational interruption of Marble);

- b) no written note, email or memorandum to anyone reflected any request, direction or requirement by Mr. Maddin that the Source Deductions be remitted, or steps be taken to remit, by the corporation or the remaining two directors;
- c) Mr. Maddin requisitioned no formal directors meeting either as a director or as a shareholder of Marble which was his statutory right;
- d) factually all of his attempts to contact Mr. Barker were made by untraceable, unrecorded and unanswered telephone calls, although on one occasion the call was answered, but there was no evidence adduced that the subject matter of that call turned to Source Deductions arrears or attempts to pay them; and,
- e) during this period, the evidentiary record has not established a reasonably prudent course of action designed to prevent a failure to remit the Source Deductions given Mr. Maddin's attention to his own debts due from Marble.

[39] In summary, Mr. Maddin's actions during the 2008 winter period were insufficient to establish reasonably prudent steps to discover the Source Deductions arrears under the circumstances: the simple asking of a discreet and confidential question from a long standing trusted source. Although moot, upon becoming aware of the arrears, Mr. Maddin has not sufficiently established through evidence that he took steps to prevent the failure or continued failure by Marble to pay those arrears for the period after the 2008 winter period. Instead the evidence shows he exhibited a preferred and exclusive pre-occupation with his other role as a landlord and/or creditor of Marble.

[40] For these reasons, the appeal is dismissed. Costs are awarded to the Respondent on a party and party basis in accordance with the relevant provisions of the Tariff, however, either party may make submissions otherwise for consideration by the Court within 30 days of this judgment.

Signed at Edmonton, Alberta, this 18<sup>th</sup> day of September 2014.

“R.S. Boccock”

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Boccock J.

CITATION: TCC 2014 277

COURT FILE NO.: 2012-2024(IT)G

STYLE OF CAUSE: CHARLES HUGH MADDIN AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 28<sup>th</sup>, 29<sup>th</sup> 30<sup>th</sup> and May 1<sup>st</sup>, 2014

REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Randall S. Boccock

DATE OF JUDGMENT: September 18, 2014

APPEARANCES:

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