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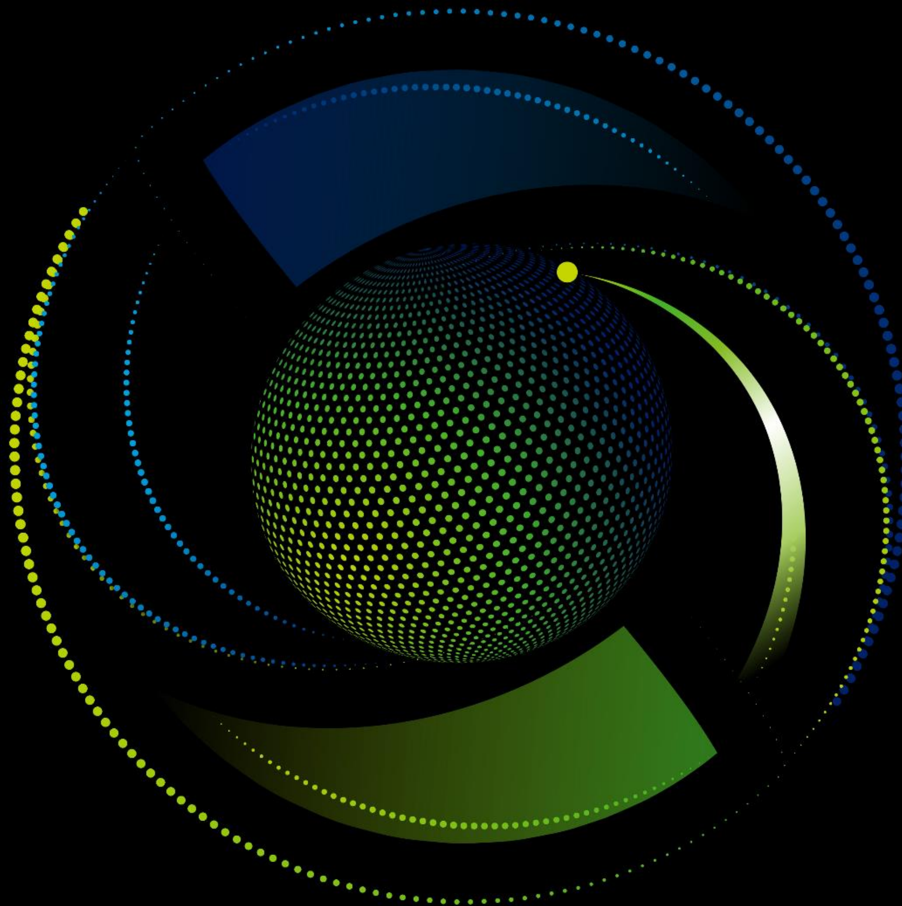

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Indirect Tax Chat

Keeping you updated on the latest news in the Indirect Tax world

July 2022

Issue 7.2022

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Key takeaways:

1. *Customs Duties and Sales Tax technical updates*
2. *Updates from the SST Technical Committee on Sales Tax matters*
3. *High Court decision in favour of taxpayer allowing pre-GST registration input tax credit claim*

Greetings from Deloitte Malaysia's Indirect Tax team

Greetings readers, and welcome to the July 2022 edition of our Indirect Tax Chat. We hope that you are keeping safe and well.

This month, we welcome a new Director General at the Royal Malaysian Customs Department ("RMCD"), Datuk Zazuli Johan who was appointed to the role from 8 July 2022. We congratulate Datuk Zazuli on his appointment and we look forward to working with him.

July also represents a return to Parliament, and we look forward to the release of various pieces of legislation relating to indirect taxes, most notably, the amendments to the Sales Tax Act 2018 to expand the scope to low value goods. The new Law was proposed to take effect on 1 January 2023, but there is still very little public information on how it would operate.

As a sign of increasing audit activity, we have seen a number of taxpayers receiving communications from the RMCD highlighting that the taxpayer is in the list of targets to be audited. These communications provide the taxpayer the option of participating in the second phase of the Special Voluntary Disclosure and Amnesty ("VA") Program and requires a response within 21 days. We see this as a further push from the RMCD to increase participation in the VA, but also as a reminder that audits will be taking place.

In this month's edition, we cover the new Customs Duties and Sales Tax Orders that came into effect on 1 July 2022. We also cover sales tax updates from the recent SST Technical Committee meeting, as well as a court case regarding exceptional input tax claims for Goods and Services Tax ("GST").

Separately, here are some recent news that may interest you:

- Small and medium enterprises are in favour of the return of the GST, but they want the rate to be lowered from the previous 6% to 4%. Small and Medium Enterprises Association Malaysia chairman, William Ng said the consumption tax was a fairer and broader tax regime that avoids a cascading tax effect, while allowing output tax to be set off against input tax. In addition, the full range of products and services that are exempt or zero-rated should be made known prior to its reintroduction. For more information, please click here.

- Chartered accountant, Appadu Rao Santhariah said the GST's "invoice-based system" and start-to-end traceability would reveal the income earnings of those who have not disclosed it previously. With GST, businesses have to declare income tax because the RMCD can review the businesses' turnover and compare it with the income tax turnover - There will be a higher risk of being audited. For more information, please click here.

To our readers celebrating, we wish you a wonderful *Awal Muharram*!

Best regards,
Tan Eng Yew
Indirect Tax Leader

1. Customs Duties and Sales Tax technical updates

The levying of customs duties and sales tax is based on the Harmonised System ("HS") structure under the prevailing customs duties order. In conjunction with the update to the Customs Duties Order 2022 to reflect the Harmonised System adopted by the World Customs Organisation, the relevant customs orders and sales tax orders have also been updated/amended and gazetted to take effect from 1 June 2022.

- Customs Duties (Labuan) (Amendment) Order 2022
- Customs Duties (Tioman) (Amendment) Order 2022
- Customs Duties (Pangkor) (Amendment) Order 2022
- Customs Duties (Langkawi) (Amendment) Order 2022
- Sales Tax (Rates of Tax) Order 2022
- Sales Tax (Goods Exempted from Tax) Order 2022

Customs Duties Orders for Labuan, Langkawi, Pangkor, and Tioman

These orders prescribe the goods that are currently subjected to import duty at the prevailing rate specified in the Customs Duties Order 2022 when imported into the Labuan, Langkawi, Pangkor, and Tioman or transported from the principal customs area into these areas.

These orders have been amended in paragraph 2 by substituting for the words "Customs Duties Order 2017 [P.U. (A) 5/2017]" the words "Customs Duties Order 2022 [P.U. (A) 114/2022].

Sales Tax (Rates of Tax) Order 2022 ("STRO")

STRO specifies the following:

1. All goods except the following (and goods listed in the First Schedule and Second Schedule) are subject to sales tax at 10%:
   - goods which are included in any exemption order made under section 35 of the Sales Tax Act;
   - goods imported on or with any person entering Malaysia or in the baggage of such person and the goods are not for commercial use, excluding motor vehicles, alcoholic beverages, spirits, tobacco, cigarettes, tyres, and tube.
2. Goods listed in the First Schedule of the STRO are subject to sales tax at 5%.
3. Goods listed in the Second Schedule of the STRO are subject to sales tax at specific rates.

The STRO has been updated in accordance with the Customs Duties Order 2022 (CDO 2022) which reflects the Harmonised System adopted by the World Customs Organisation. Please take note of the following new headings and changes to sectors under the CDO 2022 when reading the STRO:

New headings:

(a) 03.09 - Fish meals and flours
(b) 24.04 - Novel Tobacco
(c) 38.27 - Mixtures of HFCs
(d) 84.85 - 3D Printers

(e) 85.24 - Flat Panel Display
(f) 85.49 - E-waste and scrap
(g) 88.06 - Drones parts of aircraft

Changes to sector of goods:

(a) Agricultural, food and tobacco
(b) Chemical sector
(c) Wood sector
(d) Textile sector
(e) Base metal sector
(f) Machinery sector
(g) Transport sector

The Sales Tax (Goods Exempted from Tax) Order 2022 has now included new headings:

(a) 03.09 - Fish meals and flours
(b) 84.85 - 3D Printers
(c) 88.06 - Drones parts of aircraft

Deloitte's comments

The key additions and amendments made are in accordance with the Customs Duties Order 2022 which came into effect on 1 June 2022. The major features of the amendments are in relation to the recognition of new product streams and addressing environmental and social issues of global concern.

One of the major environmental issues which has been a topic of conversation recently is in connection to electrical and electronic waste, commonly referred to as e-waste. The amendment to the Sales Tax (Rates of Tax) Order 2022 have included provisions for its classification to assist countries in their work under the Basel Convention.

Furthermore, the addition of novel tobacco which includes e-cigarette currently has its own classification resulting from the previous struggle on the classification of these products. It was difficult for Authorities to track the trade statistics of novel tobacco products given the very high monetary value of this trade.

With the advancement of technological sectors, the previous headings provided lack of statistical data due to classification difficulties. As such, key changes have been made to subheadings of heading 70.19 for glass fibres and for heading 84.62 for metal forming machinery which provides detailed classification of these goods.

In addition to above, drones or officially known as unmanned aerial vehicles ("UAV") has also obtained its own classification, easing the classification of these UAVs.

Business and/or individual should take note of the changes on the tariff codes and descriptions of the goods rates to ensure correct HS codes are used in the relevant declaration to the authorities.

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2. Updates from the SST Technical Committee on Sales Tax matters

The SST Technical Committee raised several issues pertaining to Sales Tax and Service Tax ("SST") which have been incorporated in the minutes of Meeting No.1/2022 ("Minutes"). We have summarised the relevant key issues in relation to Sales Tax that were raised by the SST Technical Committee.

Item 1 of Minutes – whether 'export' under Item 57, Schedule A of the Sales Tax (Persons Exempted from Payment of Tax) Order 2018 ("Item 57") should cover movement of goods to the Designed Areas ("DA") or Special Areas ("SA")

Before the amendment came into operation on 6 October 2020, Item 57 exempts any Customs-approved person from paying sales tax on goods purchased from locally manufactured goods for export, subject to conditions. Clarification from the RMCD was sought as to whether "exports" as mentioned in Item 57 above should include movement of goods from Malaysia to DA and SA as these places are considered as "not in Malaysia" under the special provisions relating to DA and SA of the Sales Tax Act 2018.

However, the RMCD's view was that Item 57 only granted sales tax exemption on goods for export to places outside Malaysia, and export did not cover goods transported to DA and SA. Consequently, the RMCD have on a number of instances requested companies to pay back the relevant sales tax.

Subsequently, Item 57 has been amended (with effect from 6 October 2020) which explicitly extends the sales tax exemption to movement of goods to DA and SA. The RMCD has clarified that such amendment only applies prospectively, and if there is any non-compliance prior to the amendment which involves claim of back taxes, companies are advised to submit an appeal to the Ministry of Finance ("MoF").

Deloitte's comments

It is unfortunate that the RMCD has taken the position that Item 57 amendment does not apply retrospectively. Businesses should review historical transactions (i.e., prior to 6 October 2020) for any non-compliance of Item 57 exemption conditions that results in underpayment of sales tax and appeal to the MoF.

Item 6 of Minutes: Clarification on the required disclosure for importation/movement of goods from Licensed Manufacturing Warehouse ("LMW") into Malaysia

Under Section 57 (b) of the Sales Tax Act 2018 ("STA"), sales tax shall be levied and payable on all taxable goods transported to Malaysia from an SA, which includes LMW. The STA does not specify the type of disclosure required to cover such transaction.

The RMCD has clarified that the disclosure relating to sales tax on importation/movement of goods from an LMW would need to be made as per the procedures implemented by the Customs Division, where companies are required to declare the relevant sales tax payable via Customs Form No.1 or Customs Form No.9.

Deloitte's comments

This is consistent with Section 59 of the STA where any taxable goods that are imported / transported from SA to Malaysia shall be declared under the prescribed forms as per Customs Act 1967 ("CA") by the companies.

Item 8 of Minutes: Invoice compliance for export sales by a sales tax registrant

According to Section 21 of the STA, every registered manufacturer who sells taxable goods shall issue an invoice containing all prescribed particulars as stated in Regulation 7 of the Sales Tax Regulation 2018 ("STR"). As taxable goods for export are exempted from sales tax, it is unclear if Section 21 of the STA will also apply to invoices issued for export sale by a sales tax registrant.

The RMCD is of the view that as goods sold are taxable, a valid invoice should be issued, even though these goods would eventually be exported and subsequently exempted under Item 56, Schedule A of the Sales Tax (Persons Exempted from Payment of Tax) Order 2018.

Deloitte's comments

Companies who are registered for sales tax need to be aware of the liability in issuing a valid invoice for taxable goods (including taxable goods to be exported) as prescribed under Regulation 7 of STR. Non-compliance constitutes an offence under the STA.

Item 9 of Minutes: Sales tax treatment on intermediate taxable goods produced 'in-house' as part of manufacturing process for non-taxable goods

Businesses requested the RMCD to advise on the sales tax treatment of the production of intermediate taxable goods that are subsequently used to produce/pack another finished non-taxable goods manufactured by the manufacturer.

The RMCD has provided the following advice:

a) For non-sales tax registered manufacturer

The taxable intermediate goods produced 'in house' by a non-sales tax registrant for the use of its own manufacturing of non-taxable finished goods is not subject to sales tax.

Where the taxable intermediate goods were sold and such sales exceed the annual sales tax registration threshold (i.e., RM500,000), the company is required to register for sales tax under the STA and charge sales tax accordingly on the sale of such intermediate goods.

b) For sales tax registered manufacturer

The taxable intermediate goods produced 'in house' by a sales tax registered manufacturer and used for the purpose of manufacturing its non-taxable finished goods is subject to sales tax. Thus, it is required to account for sales tax on the taxable intermediate goods. However, the sales tax registered manufacturer is allowed to utilise Item 3, Schedule C of the Sales Tax (Persons Exempted from Payment of Tax) Order 2018 ("Item C3 exemption") on the purchase of raw materials, packaging material, and components used for the manufacturing of the taxable intermediate goods.

Where the non-taxable finished goods are meant for export sales, the registered manufacturer is allowed to apply for sales tax exemption under Item 4, Schedule B of the Sales Tax (Persons Exempted From Payment of Tax) Order 2018 ("Item B4 exemption") on the taxable intermediate goods (which produced 'in-house') used for the manufacturing of its own non-taxable goods for export.

Deloitte's comments

For manufacturing processes involving multiple processes, we are of the view that it is not easy to identify at which point the goods produced in the manufacturing processes are treated as intermediate products. Ideally the tax status of the intermediate products should be redefined where sales tax will only be triggered if the taxable goods are not for used in manufacturing.

Nevertheless, it is still uncertain as to whether such sales tax treatment on taxable intermediate goods would apply prospectively or retrospectively. If it applies retrospectively, there will be a sales tax underpayment of tax on taxable intermediate goods used by the registered manufacturer for its manufacturing of non-taxable goods for local market.

Item 13 of Minutes: Clarification on Item 34, Schedule A of the Sales Tax (Person Exempted from Payment of Tax) Order 2018 ("Item 34")

Under the Item 34 exemption, goods imported, transported from Free Industrial Zone or Labuan or moved from a LMW under section 65A of the Customs Act 1967 for repair and subsequently re-exported, transported back are exempted from sales tax.

Businesses have requested the RMCD to extend the sales tax exemption to cover products that are imported temporarily for "testing and valuation" purposes.

The RMCD has provided clarification on the definition of 'repair' which refers to a process of restoring a product to its original or better condition by replacing damaged parts or improving its existing specification. Activities that fall within the scope of Item 34 exemption are as below:

- Calibrate
- Adjustment
- Maintenance
- Recondition
- Reconfigure
- Overhaul

The RMCD further commented that testing and valuation are not included as part of 'repair' activity and not eligible for sales tax exemption under Item 34.

<u>Deloitte's comments</u>

Any person that is currently utilising the Item 34 exemption must ensure that the imported goods are solely for 'repair' activities as listed above, and that all conditions for the exemption are complied with. Any non-compliance of the sales tax exemption will result to a claw back of sales tax.

Currently, the sales tax exemption does not cover temporary import for the purpose of testing and evaluation, with exception of the valuation or testing conducted by a Federal or State Government Department or a Statutory Body under Item 52, Schedule A of the Sales Tax (Persons Exempted from Payment of Tax) Order 2018. To facilitate businesses, the RMCD should extend the sales tax exemption to cover temporary import of goods for testing and evaluation purposes.

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3. High Court decision in favour of taxpayer allowing pre-GST registration input tax credit claim

A recent judicial review decision by the High Court (HC) in *KMSB v Ketua Pengarah Kastam* (*"KMSB case",* 7 December 2021, unreported as yet) has allowed a taxpayer (KMSB) a refund of input tax credit ("ITC") that was claimed as exceptional ITC claim, under regulation 46(1), Goods and Services Tax Regulations 2014 ("GSTR"). The favourable outcome for taxpayer mimics a similar favourable outcome in an earlier HC case on exceptional ITC claim i.e. *JEPSB v Ketua Pengarah Kastam* ("*JEPSB case*" on 15 April 2021 - you can access our write up including comments on that case here). [Note: The *JEPSB case* is understood to be pending an appeal by the DG at the Court of Appeal.]

An exceptional ITC claim under regulation 46, GSTR is made on GST paid by a taxable person on the supply of goods or import of goods essentially before the effective date of that taxable person's GST registration, for the purpose of a business carried on or to be carried on at the time of the supply or payment.

<u>Key background facts</u>

- KMSB is involved in the manufacturing and sale of automotive lighting products.
- In 2018, KMSB made an application to the Director General of Customs ("DG") for exceptional ITC claim under regulation 46(1), GSTR, in respect of land and factory constructed on it (together with assets), and supporting documents were provided to the DG.
- Subsequently, the exceptional ITC claim was rejected by the DG without any reason.
- Pursuant to the above decision, KMSB appealed to the DG highlighting that the requisite requirements, under regulation 46(2), GSTR, to make the exceptional ITC claim have been fulfilled by KMSB.
- However, the DG maintained its earlier decision and raised a Bill of Demand (BOD) dated 14 August 2020 in relation to the exceptional ITC claim made by KMSB.
- Aggrieved by DG's above decision, KMSB applied to the HC on 11 November 2020 for judicial review of the DG decision to issue the BOD.

<u>HC decision</u>

After hearing submissions by counsel for taxpayer and DG respectively, the HC decided in favour of KMSB, indicating that the DG has erroneously rejected KMSB's exceptional ITC claim, and thus KMSB is entitled to the same. The reasoning of the HC has not been reported, but the submissions of parties have been summarised in a newsletter of the legal firm that represented KMSB. KMSB's submissions were as follow:

a) The DG had erred in disallowing KMSB's claim on the basis that the Goods and Services Tax Act 2014 ("GST Act") has been repealed. *(Note: while this basis of the DG was not provided in the background of the case in the legal firm's newsletter, it may be inferred that this basis could have been made known by the DG in the course of judicial review proceedings.)*

b) Regulation 46(1), GSTR must be read together with section 30 of the Interpretation Acts 1948 and 1967, which provides that the repeal of a written law shall not affect any right accrued under the repealed law (i.e. GST Act).

c) KMSB is entitled to claim exceptional ITC under regulation 46(1) of GSTR, as it had provided all the supporting documents and the DG has not alleged any non-compliance by KMSB but merely disallowed KMSB's claim on the basis that the GST Act has been repealed (see point a), above).

d) KMSB also relied on *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1993] 4 CLJ 339*, which held that, in case of ambiguity in any tax statute, it must favour the taxpayer.

e) KMSB argued that regulation 46, GSTR provides a discretion to DG to decide on exceptional ITC claim. However, this discretion is not unfettered, citing *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1978] LNS 143 ("*Sri Lempah*"), which emphasised that all legal powers have limits and discretion cannot be free from legal constraint.

f) The DG's decision would increase business cost (the disallowed input tax) to KMSB, which clearly contradicts the spirit of the GST Act.

The DG's main arguments were as follow: a) KMSB did not obtain the approval required to make the exceptional ITC claim under regulation 46(1), GSTR, b) KMSB is challenging the BOD and not the earlier decision of DG that denied KMSB's exceptional ITC claim, and c) DG has the discretion to allow or disallow the exceptional ITC claim.

<u>Deloitte's comments</u>

Despite the absence of reasons by the HC, the HC decision in *KMSB case* to uphold taxpayer's exceptional ITC claim is ultimately just, and promotes the general purpose of GST law that businesses should not bear the burden of input tax cost, as in the earlier *JEPSB case*.

It appears the DG did not provide any written reasons to disallow KMSB's exceptional ITC claim at the decision-making stage. In this regard, the HC does not seem to have considered, and neither did taxpayer counsel argue on, the binding precedent of the Court of Appeal in *Uniqlo Malaysia Sdn Bhd v Ketua Pengarah Kastam [2020] 9 CLJ 521* ("*Uniqlo"*), that a public decision-making body has a duty to give written reasons for its decision at the decision-making stage (and not during judicial review proceedings), where failure to do so may result in its decision being quashed via judicial review for breach of natural justice. (Note: *Uniqlo* was not considered by the HC in *JEPSB* case as well. It remains to be seen if *Uniqlo* would be argued and considered in the appeal in the *JEPSB case* pending at the Court of Appeal.)

As in the *JEPSB case*, the compliance with regulation 46(2), GSTR, as alluded to in the background in *KMSB case*, is that the goods (*KMSB case* deals with pre-GST registration ITC on goods) are not:

(a) supplied or consumed;
(b) used partially or incorporated into some other goods; or
(c) held for other than business use by the taxpayer before the effective date of GST registration.

However, unlike the *JEPSB case*, there does not seem to be any point raised by either party on compliance with the DG's GST Guide on goods capitalised in the accounts of taxpayer (the goods in *JEPSB case* and *KMSB case* both seem to include goods that are capital in nature i.e., factory/plant).

The main points raised by the DG in *KMSB* case, that the taxpayer is challenging the BOD and not the earlier decision by the DG to not approve the exceptional ITC claim, seems convoluted. Although not explicitly stated in the background of the case, it may be inferred that KMSB has claimed the exceptional ITC in its GST return (normally the first GST return, as required by regulation 46(3), GSTR) and had already obtained the benefit ('approval') of the ITC, either by way of set off against output tax in its GST return or as refund; thus, the DG issued the BOD (being challenged by KMSB) to recover the exceptional input tax that has already been accrued to the benefit of KMSB.

In the present context, the 'fettered discretion' principle from *Sri Lempah* seems to be a restatement of the long-standing general principle of reasonableness required of public decision-makers, such as the DG, when exercising discretion under the law. In *KMSB case* (and *JEPSB case)*, the relevant 'fettered discretion' of the DG is whether or not the DG ought to have reasonably approved taxpayer's exceptional ITC claim under regulation 46(1), GSTR due to fulfilment of relevant requirements under the GST law such as regulation 46(2), GSTR discussed above.

The apparent common issue of substance in *KMSB case* and *JEPSB case* is that whether the repeal of the GST Act would negate the right accrued to taxpayer in respect of the exceptional ITC claim, under section 30, Interpretation Acts 1948 and 1967. In this regard, it remains to be seen whether the Court of Appeal in *JEPSB case* would shed any more light on this common issue. (Note: We had also commented before – see article referenced in our comments on *JEPSB case* - that, based on section 28, Interpretation Acts 1948 and 1967, the repeal of written law (GST Act) would allow the continuance of provisions of subsidiary legislation (GSTR) that were made under the repealed law (GST Act), provided those provisions of the subsidiary legislation (GSTR) were not inconsistent with the repealing legislation (GST Repeal Act 2018). In *KMSB case*, there does not seem to be any point raised in DG's submissions that KMSB's exceptional ITC claim would be inconsistent with the GST Repeal Act 2018. Thus, the exceptional ITC claim under regulation 46(1), GSTR should continue to prevail despite the repeal of the GST Act.)

Hopefully, the Court of Appeal in the *JEPSB case* would consider all relevant points including those not yet argued before at the HC, in either *JEPSB case* or *KMSB case* (e.g. *Uniqlo* and section 28, Interpretation Acts 1948 and 1967, as discussed above), to arrive at a favourable result to taxpayer based on comprehensive reasons.

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