A Constitutional Challenge to New Jersey's Throw-Out Rule — Impacting New Jersey and Beyond

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While finding the rule constitutional on its face, the state supreme court did manage to identify a particular category of receipts upon which the throw-out rule would operate unconstitutionally; the proceedings may resume at the Tax Court under an as-applied challenge.

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In 2002, New Jersey transformed its sales factor from a measure of *total* receipts to a measure of total *taxed* receipts when it adopted the "throw-out rule." [1] Advocated as a "loophole" closer, the throw-out rule modified New Jersey's sales factor by excluding receipts assigned to jurisdictions in which the taxpayer was not subject to an income tax. [2] Throwing out such receipts had the effect of increasing the taxpayer's New Jersey sales factor and, accordingly, the taxpayer's New Jersey "corporation business tax" (CBT) liability.

Whirlpool Properties, Inc. ("Whirlpool") challenged the constitutionality of the throw-out rule on the grounds that it was facially unconstitutional, since it operated to tax income earned outside of New

Jersey. In July 2011, in *Whirlpool Properties, Inc. v. Director, Division of Taxation,* [3] the New Jersey Supreme Court held that, "for corporate taxpayers having a substantial nexus to New Jersey, the [Throw-Out] Rule may apply constitutionally only to untaxed receipts from those states that lack jurisdiction to tax the corporation either due to insufficient connection with the corporation or due similarly to congressional action such as P.L. 86-272." Accordingly, the throw-out rule would operate *in an unconstitutional manner* if applied to receipts that are untaxed in a state that *has jurisdiction* but *chooses not to* impose an income tax. Thus, the court interpreted the phrase "subject to a tax on or measured by profits or income" in the throw-out rule statute to mean subject to the state's taxing jurisdiction rather than that the taxpayer actually had to have paid a tax to the state.

Even though New Jersey has since repealed the throw-out rule effective for tax years beginning after June 2010, [4] the *Whirlpool* decision remains instructive for taxpayers with open tax years for which the throw-out rule was in effect. Additionally, the court's analysis may provide guidance in the context of tax law constitutional challenges both in New Jersey and in other states.

The following discussion summarizes the *Whirlpool* decision by providing a background on the throw-out rule, explaining the New Jersey Supreme Court's approach to facial constitutional challenges, and discussing the court's application of the external consistency test to render the throw-out rule unconstitutional with regard to certain sales receipts but constitutional with respect to other sales receipts.

Summary of the Throw-Out Rule

New Jersey's throw-out rule modified the state's CBT sales factor by excluding receipts assigned to jurisdictions in which a taxpayer was not subject to an income tax. This treatment resulted in an increase to the sales factor, which accordingly increased a taxpayer's CBT apportionment and liability. The throw-out rule provided that:

> "if receipts would be assigned to a state, a possession or territory of the United States or the District of Columbia or to any foreign country in which the taxpayer is not subject to a tax on or measured by profits or income, or business presence or business activity, then the receipts shall be excluded from the denominator of the sales fraction." [5]

The throw-out rule was enacted as part of the New Jersey Business Tax Reform Act of 2002.[6] In describing the purpose of the throw-out rule, the budget committees of both legislative houses provided virtually the same explanation, as follows:

> "The more goods that are shipped out of New Jersey, the lower [the sales] factor is. Some of those sales are made in states where the corporation is not subject to tax because the corporation has no operations in those states. These sales are typically referred to as 'nowhere sales' because they result in income being assigned so that it is taxed nowhere. The bill closes this loophole by 'throwing out' the 'nowhere sales' from the denominator of the sales fraction, which causes more of the income of the corporation to be assigned to states where the corporation actually has operations."[7]

The throw-out rule was effective for the 2002 and 2003 years at issue in *Whirlpool.* As noted above, New Jersey repealed the throw-out rule for tax years beginning after June 2010.

Whirlpool: Facts and Procedural History

During the periods at issue, Whirlpool was incorporated and located in Michigan. It had no physical presence in New Jersey and conducted all of its activities outside of New Jersey. It owned and managed brand names that it licensed to its parent, Whirlpool Corp., which was a New Jersey taxpayer, as well as to other affiliates and third parties. Whirlpool did not file any New Jersey CBT returns from 1996 to 2003. The New Jersey Division of Taxation (the "Division") issued Whirlpool a CBT deficiency assessment of nearly $25 million for tax years 1996 to 2003. For 2002 and 2003, the Division's assessment included the application of the throw-out rule in apportioning Whirlpool's income to New Jersey.

Tax court and superior court weigh in. In an action brought before the New Jersey Tax Court, Whirlpool challenged the Division's assessments based on three theories: (1) the throw-out rule was unconstitutional on its face, (2) the throw-out rule was unconstitutional as applied to Whirlpool, and (3) Whirlpool was not subject to taxation in New Jersey.[8] The parties agreed that the Tax Court should address the issue of facial constitutionality before it entertained arguments regarding as-applied constitutionality and nexus. (Thus, when the case reached the New Jersey Supreme Court, the determination was limited to the facial constitutionality of the throw-out rule.)

Applying the throw-out rule, the Division calculated Whirlpool's New Jersey apportionment factors as 29.26% in 2002 and 41.86% in 2003. By comparison, before the application of the throw-out rule, Whirlpool's calculated New Jersey apportionment factors during 1996-2001 ranged between 0.95% and 1.33%.

The Tax Court ruled in favor of the Division, holding that the throw-out rule was facially constitutional. On appeal, the New Jersey Superior Court, Appellate Division, affirmed the Tax Court's decision.[9] Whirlpool appealed the Superior Court's decision to the New Jersey Supreme Court.

Facial Constitutional Challenge

The New Jersey Supreme Court recognized that a facial constitutional challenge is "'the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.'"[10] The court's approach adopted the test set forth by the U.S. Supreme Court in *U.S. v. Salerno,*[11] which provided that a statue will be upheld if it can be shown to operate constitutionally in some, even if not all or most, instances. While the New Jersey Supreme Court acknowledged that the *Salerno* standard has been questioned, it nevertheless applied it in *Whirlpool.* Accordingly, Whirlpool was effectively charged with establishing that New Jersey's throw-out rule resulted in an unfairly apportioned tax base under all conceivable factual circumstances.

The court reviewed the constitutionality of the throw-out rule under the four-part test set forth by the U.S. Supreme Court in *Complete Auto Transit, Inc. v. Brady,*[12] namely, the tax must: (1) be applied to an activity that has substantial nexus with the taxing state; (2) be fairly apportioned among the states where the activity occurs; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state. The principal challenge to the throw-out rule, and the court's focus, was on whether the rule prevented the New Jersey income tax from being fairly apportioned.

Fair apportionment: the external consistency test.

Complete Auto's fair apportionment requirement has two elements: (1) internal consistency, and (2) external consistency. As stated by the U.S. Supreme Court in *Container Corporation of America v. Franchise Tax Board,*[13] and acknowledged by the court in *Whirlpool:*

> "The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is, the formula must be such that, if applied by

> every jurisdiction, it would result in no more than all of the unitary business's income being taxed. The second and more difficult requirement is what might be called external consistency—the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated."

In *Whirlpool,* the court found that the throw-out rule satisfied the internal consistency test because if all states threw out untaxed receipts, no more than 100% of a taxpayer's income would be taxed. At issue, therefore, was whether the throw-out rule satisfied the external consistency test.

External consistency "looks 'to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State.'"[14] In other words, the court said, "the question is whether the state's tax law reasonably reflects the activity within its jurisdiction."

In addressing the external consistency test, the court began by focusing on two different types of receipts that might be thrown out:

- Type 1: Receipts that are not taxed because the taxpayer lacks the requisite constitutional contacts with a state or because of congressional action precluding state taxation in certain matters, such as P.L. 86-272.[15]
- Type 2: Receipts that are not taxed because a state chooses not to impose an income tax.

The court found that the distinction between the two types of receipts was critical under the external consistency test because a lack of jurisdiction (Type 1) is reflective of a taxpayer's level of activity in the state. A state's legislative decision not to impose an income tax (Type 2), however, does not relate to a taxpayer's in-state activity.

Accordingly, the court found that the throw-out rule operated constitutionally when applied to Type 1 receipts because a state's jurisdiction to tax generally is related to the extent of a taxpayer's activity in the state. The fact that a state does not have jurisdiction to impose an income tax indicates minimal business activity within the state. The court reasoned that New Jersey's contribution to receipts could be greater when a taxpayer's business activity in another state is insignificant.

In contrast, however, the court found that the throw-out rule did not operate constitutionally when applied to Type 2 receipts because a state's decision on whether to impose an income tax is independent of a taxpayer's business activity. The court reasoned that a state's choice not to impose a tax is equivalent to taxing at a rate of zero percent. New Jersey's apportionment share should not increase because another state sets its rate at zero any more than if that state's rate was 0.01% or 10%. The court found that increasing New Jersey's apportionment due to another state's decision to not impose an income tax is "neither just nor fair."

Finally, the court considered the relevant statutory language and pointed out that the "plain language of New Jersey's Throw-Out Rule does not distinguish between the categories of receipts herein identified." Finding support for its interpretation in the legislative history to the throw-out rule, the court concluded that "facial constitutionality is satisfied because we interpret the statute to be limited in operation to the setting described favorably above: to receipts that are not taxed because the other state lacks jurisdiction to tax. Thus, we construe the Throw-Out Rule narrowly and in line with its legislative history, and hold that it operates only to throw out sales made in states without taxing jurisdiction."

Analysis of the *Whirlpool* Decision

In *Whirlpool,* the New Jersey Supreme Court recognized that "there exists a measure of uncertainty over the use of *Salerno* as the de facto standard for facial challenges to the constitutionality of a statute...."[16] Nevertheless, the court was not persuaded to abandon its use.

The court seemed to hedge its application of the *Salerno* standard by first determining the types of receipts that would allow the statute to be constitutional and then interpreting the statute to be consistent with what the court determined to be constitutional. It would seem that the proper order of analysis should have been to first determine what receipts the New Jersey legislature intended to be eligible for throw-out and then determine the statute's constitutionality. Although the court appears to conclude that the legislature intended the throw-out rule to apply only to sales in states where the taxpayer was not subject to taxing jurisdiction, if the statute were, in fact, meant to apply broadly to sales in all states where the taxpayer did not *pay* a tax, it would seem that the statute still would be constitutional under the *Salerno* standard. The statute then would operate constitutionally in some circumstances, for example, (1) when the only states where a taxpayer did not pay a tax were in fact states where it was not subject to jurisdiction to tax or, (2) in the case of an example used by the lower courts in *Whirlpool,* where the sales to states that had jurisdiction to impose an income tax were so small as to not cause an unconstitutional increase in income apportioned to New Jersey. One can only speculate as to whether the court's analytical approach to interpreting the statute indicated some potential internal tension with the application of the *Salerno* standard precedent.

The court's primary analysis examined whether the throw-out rule would meet the external consistency test. In that examination, the *Whirlpool* court focused on whether a state's jurisdiction to impose an income tax reasonably reflects the corporation's activity within its jurisdiction. The court reasoned that sales to a state (the "destination state") with no jurisdiction over a taxpayer are indicative of minimal activity in the state, and that the income can reasonably be assigned elsewhere. The court then made a logical leap that an absence of business activity in the destination state equated to a greater contribution from activity in New Jersey. As an example, the court advanced a hypothetical involving a New Jersey-based manufacturer selling products to customers in Nevada, which lacked taxing jurisdiction since the company had no other presence or activity there. The court reasoned that Nevada contributed relatively little to the transaction as compared to New Jersey and, therefore, it was rational to increase New Jersey's apportionment factor by virtue of the throw-out rule.

In another example in *Whirlpool,* the court posited the situation where a taxpayer had its factory in Nevada, a state with no corporate income tax (although, in this example, it has taxing jurisdiction), and sold 90 widgets in Nevada and 10 widgets in New Jersey. The court noted that if the throw-out rule were not limited to receipts from states lacking jurisdiction to tax, New Jersey's sales factor in this example would increase to 100% because, with no income tax, Nevada's sales would be thrown out; a result that "is neither just nor fair." Is the result any more fair, however, if the company sold no widgets in Nevada but sold 90 widgets in Utah, which lacked taxing jurisdiction under P.L. 86-272? What is the rationale for the Nevada-based company's increased New Jersey tax? The potential flaw in the court's analysis is that the rationale for an increased New Jersey tax is based on happenstance. Still, in *Whirlpool* the court concluded that "the Throw-Out Rule is arguably externally consistent when the untaxed receipts are thrown out due to a state's lack of jurisdiction to tax. The Throw-Out Rule still operates to increase New Jersey's share, but in this situation New Jersey also *may* have contributed more to the production of a sale than the sales factor, without the Throw-Out Rule, would suggest." (Emphasis added.)

By using the word "may," the court appears to acknowledge that whether the thrown-out sales justify a higher New Jersey apportionment depends on the specific circumstances and is, therefore, a matter of chance. Perhaps, this is where the court was seeking to apply the *Salerno* standard because there are some circumstances where an increase in New Jersey apportionment may be justified. The court's logic would be sound had it been discussing the impact of a throw-*back* rule whereby revenue from sales shipped from a state to a jurisdiction where the taxpayer is not subject to tax would be included in the sales factor numerator of the shipped-from state. In this situation, the shipped-from state arguably has a significant connection to the product's sale that may reasonably justify including the revenue from such sale in the shipped-from state's sales factor numerator.

In *Whirlpool,* the court noted that the U.S. Supreme Court had regularly upheld formulary apportionment that included a sales factor, but none of those cases addressed modifications to exclude certain sales such as under the throw-out rule. The question remains as to the constitutionality of an apportionment formula rule that increases apportionment to a state arbitrarily, without a logical connection between the operation of the rule and an increase in the state's contribution to the generation of taxpayer income. In finding that it was unconstitutional to throw out sales to states that chose not to impose an income tax, the court would appear to have acknowledged that such a rational relationship must exist. The questionable part of the court's reasoning is its focusing on the activity in the state where the sales were thrown out rather than looking realistically at the connection, or lack thereof, between the thrown-out sales and increased activity in, or at least increased income attribution to, New Jersey.

Admittedly, there is a stronger basis for believing that sales to a state are associated with income-generating activities in that state where the state has chosen not to impose a tax, as opposed where the taxpayer's activities are insufficient to create jurisdiction to tax. In neither instance, however, does it logically follow that the taxpayer's activities in New Jersey contributed to the thrown-out sales or that New Jersey has contributed more to the generation of the taxpayers income. Had the *Whirlpool* court adopted a rational-relationship standard, rather than the *Salerno* no-set-of-circumstances standard, and recognized how the throw-out rule could operate irrationally, perhaps the court would have come to a different result.

While the *Whirlpool* decision was limited to a facial discrimination challenge, the court suggested that a certain measure of distortion could render the throw-out rule unconstitutional as-applied to Whirlpool. In a footnote, the court suggested that "there may be untold other circumstances that pose fact-sensitive, unfair applications of the Throw-Out Rule. They also are best addressed through the vehicle of an as-applied challenge seeking relief from the unique unfairness that is posed to a particular taxpayer."

The U.S. Supreme Court has held that a taxpayer always has the right to challenge an apportionment formula as applied to the taxpayer's particular facts.[17] Guidance for the proper constitutional standard may be found in the U.S. Supreme Court's decision in *Trinova Corp. v. Michigan Department of Treasury,* [18] where the Court held: "In order to prevail on [an external consistency] challenge, an income taxpayer must prove by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportions to the business transacted ... in that State, ... or has led to a grossly distorted result." (Internal citations and quotation marks omitted.)

As some of the examples discussed above demonstrate, there appear to be many circumstances where the throw-out rule may operate unfairly. The fact that the rule operates arbitrarily and without regard to a relationship between the thrown-out sales and the taxpayer's New Jersey activity would seem to create situations ripe for abuse and that could spawn litigation.

The Division's Reaction to *Whirlpool*

In September 2011, the Division issued a notice recognizing the New Jersey Supreme Court's decision in *Whirlpool.*[19] The notice states that the Division has revised its audit policy concerning the throw-out rule's application to receipts assigned to Nevada, South Dakota, and Wyoming. According to the notice, "since these three states do not impose a corporate income tax or a similar business activity tax, the Division will not throw-out receipts assigned to these states." The Division has not altered its policy regarding the throw-out rule's application to other states.

There is some uncertainty as to whether the Division's response is fully compliant with the court's decision. In *Lanco, Inc. v. Director, Division of Taxation,*[20] the New Jersey Supreme Court held that, under the Commerce Clause of the U.S. Constitution, physical presence was not required for a state to impose an income tax and, therefore, a company licensing intangibles to users in the state was subject to New Jersey tax. Apparently, this theory was the basis under which the Division argued that Whirlpool, as a company licensing intangibles to users in New Jersey, was subject to the state's income tax. Under the *Lanco* decision, Whirlpool would appear to be subject to a state's jurisdiction to tax in any state where its activities were the same as its New Jersey activities, which were limited to licensing intangible assets. What if a state has decided to retain a physical presence standard in order to impose its income tax? Given the *Lanco* holding, such a state would have jurisdiction to impose its income tax on a taxpayer such as Whirlpool, but would appear to have voluntarily decided not to impose the tax. Thus, under the court's decision in *Whirlpool,* sales to such a state would, apparently, not have to be thrown out for New

Jersey purposes. Perhaps this issue will be addressed by the New Jersey Tax Court on remand for Whirlpool's as-applied challenge to the throw-out rule.

Conclusion

In *Whirlpool,* the New Jersey Supreme Court was charged with determining the constitutionality of the state's throw-out rule. The court was somewhat restricted in its analysis because the only issue before it was a facial constitutional challenge. While the court applied a strict standard that generally results in a statute's surviving a constitutional challenge, the court managed to identify a particular category of receipts upon which the throw-out rule would operate unconstitutionally—receipts that are not taxed in another state because that other state chooses not to impose an income tax.

Left unanswered is the question of how the court would view the throw-out rule under an as-applied challenge, particularly with regard to a taxpayer who may be able to show significant distortion under a "fair apportionment" analysis to render the throw-out rule unconstitutional as applied to certain revenue streams (for example, with respect to revenue streams that have no other connection to New Jersey). Following the resolution of the facial constitutional challenge, the *Whirlpool* proceedings may resume at the Tax Court, perhaps offering that court, and courts in subsequent proceedings, the opportunity to address these unanswered questions. ■

ENDNOTES

1

A.B. 2501, 7/2/02 (P.L. 2002, ch. 40), §8 (adopting throw-out).

2

Specifically, the throw-out rule provided that receipts are "excluded from the denominator of the sales fraction" when the receipts otherwise would be assigned to a location where "the taxpayer is not subject to a tax on or measured by profits or income, or business presence or business activity." N.J. Stat. Ann. §54:10A-6(B). For purposes of this article, we refer to all such taxes as "income" taxes.

3

208 N.J. 141, 26 A3d 446 (2011), *aff'g and modifying* 25 NJ Tax 519, 2010 WL 2795154 (Super. Ct. App. Div., 2010).

[4] A.B. 2722, 12/19/08 (P.L. 2008, ch. 120), §2.

[5] N.J. Stat. Ann. §54:10A-6(B) (repealed effective for tax years beginning after June 2010).

[6] For background, see Hoffman, "The New Jersey Business Tax Reform Act of 2002—Will Other States Follow Suit?," 12 J. Multistate Tax’n 10 (October 2002) .

[7] Whirlpool, *supra* note 3, citing "Assembly Budget Committee Statement to Assembly, No. 2501, State of New Jersey (June 27, 2002)," and "Senate Budget and Appropriations Committee, Statement to Senate, No. 1556, State of New Jersey (June 27, 2002)."

[8] Pfizer, Inc. v. Director, Division of Tax'n, 24 NJ Tax 116, 2008 WL 2357918 (Tax Ct., 2008). Along with Whirlpool, Pfizer was a party to the earlier proceedings but the company settled prior to oral argument before the supreme court.

[9] The Appellate Division's decision was analyzed in Sollie and Gutowski, "New Jersey: Appellate Court Upholds Throwout Rule; Supreme Court Will Hear Appeal," 20 J. Multistate Tax’n 37 (February 2011).

[10] Quoting U.S. v. Salerno, 481 US 739, 95 L Ed 2d 697 (1987). Moreover, the New Jersey Supreme Court noted that the U.S. Supreme Court has never held an apportionment formula unconstitutional on its face (citing Hellerstein and Hellerstein, *State Taxation,* Vol. I, Third Edition (Thomson Reuters/WG&L, 2008), ¶8.12[1]).

[11]

Note 10, *supra.*

12

430 US 274, 51 L Ed 2d 326 (1977). For a more detailed discussion of the Complete Auto standards, see Lieberman, "*Complete Auto Transit, Inc. v. Brady*: How Many Parts Are There?," 3 J. Multistate Tax'n 4 (Mar/Apr 1993).

13

463 US 159, 77 L Ed 2d 545 (1983).

14

Whirlpool, *supra* note 3, quoting Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 US 175, 131 L Ed 2d 261 (1995). (That case was analyzed in Haynes, Schultz, and Stromen, "*Jefferson Lines*: Will the U.S. Supreme Court's Decision Be Extended to Other Services?," 5 J. Multistate Tax'n 100 (Jul/Aug 1995).)

15

Codified at 15 USC §§381-38415 USC §§381-384 (the "Interstate Commerce Tax Act"), it limits a state's ability to assert income tax jurisdiction over a business whose only activity in the state is the solicitation of orders for sales of tangible personal property, provided the orders are sent out of the state for approval and are filled by shipment from outside the state. P.L. 86-272 does not protect other types of activities in a state and does not apply to non-income taxes (e.g., sales or use taxes) or to the sale of intangibles. See Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 505 US 214, 120 L Ed 2d 174 (1992), which was analyzed in Marcus and Lieberman, "Does *Wrigley* Clarify 'Solicitation' for Purposes of Taxing Interstate Commerce?," 2 J. Multistate Tax'n 148 (Sep/Oct 1992). See also Lieberman, "MTC Guidelines on P.L. 86-272 Implement the U.S. Supreme Court's Decision in *Wrigley,*" 5 J. Multistate Tax'n 52 (May/Jun 1995) .

16

See, e.g., Justice Stevens' memorandum concurring in the denial of certiorari in Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 US 1174, 134 L Ed 2d 679 (1996), and the New Mexico Supreme Court's rejection of the Salerno standard as applied to a claim that a tax discriminated against interstate commerce in Conoco, Inc. v. New Mexico Tax'n and Revenue Dept., 931 P2d 730 (N.M., 1996).

17

Hans Rees' Sons, Inc. v. North Carolina, 283 US 123, 75 L Ed 879 (1931); Norfolk and Western Railway Co. v. Missouri State Tax Comm'n, 390 US 317, 19 L Ed 2d 1201 (1968). (For a discussion of the grounds for as-applied challenges to the operation of apportionment formulas, see, e.g., Meleney and Thomas, "Alternative Apportionment: Seeking a Fairly Apportioned Tax Base in a World of Increasing Reliance on the Sales Factor," TM Weekly State Tax Report (BNA), Vol. 17, No. 49, 12/10/10.)

18

498 US 358, 112 L Ed 2d 884 (1991).

19

"Notice: New Jersey Supreme Court Decision in Whirlpool Properties, Inc. v. Director" (9/7/11), available online via the Division's website at www.state.nj.us/treasury/taxation/whirlpool_notice.shtml.

20

908 A2d 176 (N.J., 2006), *cert. den.* U.S. S.Ct., Docket No. 06-1236, 6/18/07. This case was analyzed in Weiss, "*MBNA America Bank*: A New Standard for Nexus in Income and Franchise Taxation?," 17 J. Multistate Tax’n 8 (Mar/Apr 2007); also see Sollie and Gutowski, "New Jersey: What Now for Intangible Holding Companies in the Wake of *Lanco*?," 15 J. Multistate Tax’n 18 (January 2006) .

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