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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: DEBORAH A. BUTLER
Assistant Chief Counsel, CC:DOM:FS

SUBJECT: Section 1256 Contracts

This Field Service Advice responds to your memorandum dated February 25, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND

TAXPAYERS =
A =
B =
C =
D =
E =
F =
G =
H =

I =
J =
K =
L =

YEAR 1 =
YEAR 2 =

YEAR 3 =
YEAR 4 =
YEAR 5 =

DATE 1 =
DATE 2 =
DATE 3 =
DATE 4 =
DATE 5 =
DATE 6 =
DATE 7 =

ISSUES

1. Whether the contracts in foreign currency at issue fall under the "on or subject to" language under I.R.C. §§ 1256(g)(1) and (g)(5)?

2. Whether the TAXPAYERS may take into account losses incurred upon the expiration of certain contracts in foreign currency in YEAR 2 notwithstanding that the dispute with A's broker as to the margin account was not resolved until later?

3. How should the TAXPAYERS have marked to market their § 1256 contracts?

CONCLUSIONS

1. The regulated futures contracts ("RFCs") and listed options will fall under the "on or subject to" language. However, any contract in foreign currency that was traded "over-the-counter" ("OTC") was not traded "on or subject to" an exchange.

2. [redacted]

3. The TAXPAYERS should have treated all § 1256 contracts held on the last day of the taxable year as if they had sold them at fair market value on the last business day of the taxable year. The TAXPAYERS should have recognized any gain or loss that resulted. When they later disposed of the contracts, the gain or loss should have been considered in figuring the gain or loss from the disposition. If they held the § 1256 contracts for more than one taxable year, at the close of each taxable year, the contracts should have been treated as if sold for their fair market value, and the gain or loss recognized should have taken into account the gain or loss recognized on those contracts in earlier taxable years.

FACTS

A, the taxpayer, and B (collectively referred to as “the TAXPAYERS”) filed joint tax returns for the years in issue and are cash method taxpayers. Although the TAXPAYERS filed their returns jointly for all tax years at issue, only A engaged in the foreign currency activities; therefore, we shall discuss A’s activities separately. A has engaged in the buying and selling of foreign currency since YEAR 1. A purchased the foreign currency in the form of futures contracts, forward contracts and option contracts, both through exchanges with a broker and with counterparties directly.[1]

A entered into contracts in foreign currency with C as the counterparty from YEAR 1 through YEAR 2.[2] A entered into these contracts in foreign currency with C on credit, that is, on margin, and through an account known as a margin account. It is unknown whether the taxpayer had an “official” margin account or whether C simply offered credit to A.[3]

On DATE 1, A and C entered into an agreement in which C could cancel or liquidate all contracts with A in the event of A’s default or a termination event. Also on DATE 1, the parties entered into a Security Agreement, pursuant to which A granted C a security interest in all securities, obligations and other property delivered as security. C sent a letter to A dated DATE 2, in which both parties agreed that A would be permitted to engage in foreign currency transactions provided that A reduce A’s risk and not increase C’s credit exposure, and that real estate would secure A’s obligations.

In DATE 3, the value of A’s contracts in foreign currency (mostly K) decreased, and C ceased trading contracts in foreign currency with A after A failed to meet A’s margin liability. In DATE 4, A and C agreed in a letter (not signed by A) that A would secure A’s various foreign currency obligations with C with first deeds of trust on certain properties.

In DATE 4 and DATE 5, F of A’s contracts in foreign currency expired, and became due and payable. The taxpayer settled most of these contracts in foreign currency in cash and offset the gains and losses against each other. Only D of the contracts

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[1] Unless otherwise specifying the type of contract (i.e., future, forward, or option), we shall refer to the contracts generally as contracts in foreign currency for convenience.

[2] It is not clear whether these contracts with C were futures or forward contracts for federal income tax purposes because L.

[3] It appears that A and C may not have entered into a formal margin account agreement; however, we shall refer to the credit-type of arrangement as margin for convenience only.

resulted in delivery of foreign currency. Because the value of these contracts in foreign currency decreased, over $E became due and payable to C in A's margin account. The actual amount of the losses incurred on the expiration of the contracts in foreign currency is unknown.

When the taxpayer did not pay A's margin liability, C sued A. The taxpayer ultimately lost, G.[4] In YEAR 5, A paid A's liability to C. As of YEAR 3, however, while A's appeal was pending, A was required by the court to deposit the amount at issue into a trust in order to obtain a stay of execution on the judgment pending appeal.

The TAXPAYERS reported all of their gains and losses from their § 1256 contracts, including the losses from the C contracts in foreign currency for YEAR 2, on Form 6781 for all relevant tax years and reported their net losses on their Schedule D for all relevant tax years.

The TAXPAYERS received a Statutory Notice of Deficiency dated DATE 6, in which the Service proposed to deny certain charitable deductions for their YEAR 4 tax year. The TAXPAYERS filed suit in Tax Court on DATE 7.

In their Amended Petition, the TAXPAYERS alleged that they erroneously reported certain income and losses on their returns from YEAR 1 through YEAR 4. They alleged that A engaged in I.R.C. § 988 transactions pursuant to § 988(b)(3), which resulted in ordinary gain or loss, and not § 1256 contracts, which would have resulted in capital gain or loss, as they had originally reported on their returns. They alleged that A was a trader in securities, not an investor as they had originally indicated on their returns. They alleged that they made an overpayment of income tax for their YEAR 4 tax year based upon a recalculation of their net operating loss ("NOL") carryforwards from YEAR 1 through YEAR 4. To the extent that the losses were not available in YEAR 2, the TAXPAYERS have argued that they incurred $I in NOLs, and should be allowed to carry forward as NOLs a deduction in the amount of $J for their YEAR 4 tax year, the tax year at issue.

[redacted]

Although the TAXPAYERS listed their § 1256 contracts on the Form 6781 for the tax years at issue, they failed to properly mark to market their § 1256 contracts: they failed to value the contracts, and failed to carry over the net gain or loss from one year to the following year.

[4] The court in G determined H.

LAW AND ANALYSIS

Issue 1

Section 1256 requires any "§ 1256 contract" to be marked to market, pursuant to § 1256(a)(1). A § 1256 contract generally includes any regulated futures contract ("RFC"), foreign currency contract, any nonequity option and any dealer equity option.

An RFC is defined in § 1256(g)(1) as a contract (A) with respect to which the amount required to be deposited and the amount which may be withdrawn depends on a system of marking to market, and (B) which is traded on or subject to the rules of a qualified board or exchange. A listed option is defined in § 1256(g)(5) as any option (other than a right to acquire stock from the issuer) which is traded on (or subject to the rules of) a qualified board or exchange. The issue before us is whether the "on or subject to" language will apply to the taxpayer's contracts in foreign currency.

Section 1256 was enacted as a part of the Economic Recovery Tax Act of 1981, ("ERTA") Pub. L. No. 34-97. There is little legislative history illuminating the "on or subject to" language. However, Congress prepared background materials on the commodity tax straddles law, which was enacted by ERTA, in which regulated futures contracts were discussed. Background on Commodity Tax Straddles and Explanation of H.R. 1293, Scheduled for Hearing by Committee on Ways and Means, Staff of Joint Comm. on Taxation, (April 28, 1981) ("Background"). See also Hearing Before Subcommittee on Taxation and Debt Management and the Subcommittee on Energy and Agricultural Taxation of the Committee on Finance, on S. 626, 97th Cong., 1st Sess. (June 12, 1981).

The Background discussed the functions of the futures exchanges[5] as follows:

> In the United States, all trading in futures must be transacted through an exchange by exchange members. Futures traders are not allowed to sell futures contracts which they have executed to third-parties off the exchange.
>
> A clearing association at each exchange guarantees performance on commodity futures contracts, i.e., the clearing association interposes itself as a buyer to every seller and seller to every buyer. The association is substituted as the opposite party in every trade and becomes the payment and collection agency for its members. Thus, responsibility on a contract runs between the clearinghouse and the clearing member, for example, the brokerage firm, which

[5] Initially § 1256 applied to only certain commodity futures contracts.

> executed the contract for its customer.
>
> **All futures contracts are subject to the rules and regulations of the exchange where they are traded**. . . . Exchange rules may allow a seller to substitute delivery of the standard grade with other specified grades of the commodity, at stated premiums or discounts from the delivery price.

Background, at 5 (emphasis added).

Congress created § 1256 based on the actual operation of the futures markets. Senate Finance Committee Report, S. Rept. 97-144, 97th Cong., 1st Sess., 156 (July 6, 1981). In legislative history, Congress discussed the mark-to-market accounting used by commodity exchanges in legislative history.

> The United States commodity futures exchanges employ a unique system of accounting for every contract's gain or loss in cash on a daily basis. Even though a futures trader does not close out a position but continues to hold it, the trader receives any gain on the position in cash as a matter of right each trading day. . . . However, if a trader's position decreases in value, the trader will have to meet a margin call, that is, deposit additional funds before the next business day. Money paid on position losses is paid into the exchange clearing association which transfers such amounts to accounts which gained during the trading day. This daily accounting which includes the determination of contract settlement prices and margin adjustments to reflect gains and losses is called 'marking-to-market'.

Id. at 156-157.

The functions of the stock market were contrasted with the functions of the commodity futures market.

> When corporate stock is purchased, the buyer must pay the seller the full amount of the purchase price. However, commodity traders do not make any payment for their futures contracts until the contracts' delivery dates. When they enter the contracts, traders merely make a deposit, similar to earnest money, to guarantee performance in the future.

Background, at 7-8.

Nonequity options and dealer equity options are included within the definition of a § 1256 contract. I.R.C. §§ 1256(b)(3) and (b)(4). Nonequity listed options and dealer equity options were included within the definition of a listed option under

§ 1256(g)(5) in 1984 by P.L. 98-369. A listed option means any option (other than a right to acquire stock from the issuer) which is traded on (or subject to the rules of) a qualified board or exchange, pursuant to § 1256(g)(5). A nonequity listed option is defined in § 1256(g)(3) as any listed option that is not an equity option. A dealer equity option is defined in § 1256(g)(4) as any listed option (listed on the qualified board or exchange on which the options dealer is registered) with respect to an options dealer which is an equity option and is purchased or granted by the options dealer in the normal course of A's activity of dealing in options. A dealer in options is defined in § 1256(g)(8) as any person registered with a national securities exchange as a market maker or specialist in listed options, or a person whom the Secretary determines performs functions similar to one who is registered on a national securities exchange as a market maker or specialist. As § 1256 contracts, the options are marked to market under § 1256(a)(1).

Congress intended to extend the mark-to-market rule to nonequity listed options and dealer equity options. Senate Comm. on Finance, S. Prt. 98-169, 98th Cong., 2d Sess., Explanation of the Provisions Approved by Committee 292, 293 (March 21, 1984); H.R. Rept. 98-432 pt. 2, at 1269 (1984).

Certain options contracts in commodities are subject to the jurisdiction of the Commodities Futures Trading Commission ("CFTC"), and are cleared and settled pursuant to the rules of the commodities exchanges (and clearing house) on which it was traded. 7 U.S.C. § 2(a). Options in commodities that are subject to the CFTC include options contracts on a commodity that is not traded on a national securities exchange, and option contracts on futures contracts for a commodity.

Option contracts that trade on U.S. securities exchanges (e.g., the Chicago Board Options Exchange, Philadelphia Stock Exchange, American Stock Exchange) are regulated by the Securities Exchange Commission ("SEC"). 15 U.S.C. § 78 et seq. These options include standardized options on securities. These options are issued, guaranteed and cleared by the Options Clearing Corporation ("OCC"), which is registered with the SEC as a clearing corporation. 15 U.S.C. § 78q-1.

Therefore, like forward and futures contracts that must be cleared through an exchange's clearing house, after the initial trade of an option on an exchange, the option continues to be subject to the exchange's rules because it must be cleared through either the exchange's clearing house or the OCC.

As shown above, Congress considered the differences between the commodity futures markets and the stock equity markets when crafting the tax law addressing the treatment of commodity futures contracts. Even after the time at which a commodity futures contract is traded, the commodity futures contract and the exchange upon which it was traded have a continuing relationship because of the marking to market and the required use of a designated clearing house for settlement. By comparison, equity stocks and the markets upon which they are traded do not ordinarily maintain this type of on-going relationship. Therefore, the "on or subject to" language describes the continuing nature of this relationship between the commodity futures contract that was, at one time, traded on the exchange, and the exchange. The "on or subject to" language also describes the continuing nature of the relationship between the option that was, at one time, traded on the exchange and the exchange.

Certain futures contracts, but not all, are subject to the Commodities Exchange Act, 7 U.S.C. § 1 et seq. ("the CEA"), and regulated by the CFTC. Certain futures contracts are neither subject to the CEA nor regulated by the CFTC, for example, OTC futures are not regulated futures and, therefore, are not RFCs. Certain options are not regulated by the SEC and are OTC options and, therefore, are not listed options. See generally Dunn v. CFTC, 519 U.S. 465 (1997) (holding that the CFTC is exempted from regulating "off-exchange" trading in options to buy or sell foreign currency).

Therefore, only those futures contracts that either are currently being traded on an exchange by A or continue to be subject to the rules of that exchange will be RFCs as defined under § 1256(g)(1). Likewise, only those options contracts that either are currently being traded on an exchange by A or continue to be subject to the rules of that exchange will be listed options under § 1256(g)(5).

Issue 2

The expiration of A's contracts in foreign currency in YEAR 2 constituted an I.R.C. § 1001 sale or exchange because they were cash settled. Upon the expiration of the contracts in foreign currency, A suffered a loss pursuant to I.R.C. § 165(a) in the amount of approximately $E because the value of the contracts in foreign currency decreased in value. Three years later A paid this amount to C to settle the liability incurred.

Upon the expiration of these contracts in foreign currency, A was required to pay A's margin account indebtedness to C. A actually paid the margin account in YEAR 5; however, in YEAR 3 A was required to place the funds at issue in a trust while A's case was pending in the court of appeals. One issue before us is whether the TAXPAYERS are allowed to take the loss when it occurred in YEAR 2 upon the expiration of the contracts or when A paid A's margin account liability.

A cash basis taxpayer ordinarily may claim deductions and losses only in the year such expenses were actually paid. I.R.C. § 461(a); Treas. Reg. § 1.461-1(a)(1). Until a cash basis taxpayer "suffers an economic detriment, i.e., an actual depletion of his property, he has not made a payment." Rife v. Commissioner, 356 F.2d 883 (5th Cir. 1966), rev'g and remanding 41 T.C. 732 (1964). The giving of a note or other evidence of indebtedness by the cash method taxpayer was long ago determined not to be enough to constitute payment. Baltimore Dairy Lunch v.

United States, 231 F.2d 870, 875 (8th Cir. 1956) (salary "paid" by note not currently deductible); Hart v. Commissioner, 54 F.2d 848, 851-52 (1st Cir. 1932) (execution of a new note does not equal payment of interest on first).

The Supreme Court has specifically rejected the argument that just because a debt instrument has value and would trigger income to the recipient it was payment by a cash method taxpayer to the extent of that purported value. Don E. Williams Co. v. Commissioner, 429 U.S. 569, 578 (1977), citing Eckert v. Burnet, 283 U.S. 140 (1931), and Helvering v. Price, 309 U.S. 409 (1940). [redacted]

Notwithstanding the settled rule of the foregoing cases, it is still true that a current payment can be made with borrowed funds for income tax purposes. See Larkin v. Commissioner, 46 B.T.A. 213 (1942). [redacted] See Franklin v. Commissioner, 683 F.2d 125 (8th Cir. 1982), rev'g on other grounds 77 T. C. 173 (1981). [redacted]

In Page v. Rhode Island Hospital Trust Co., 88 F.2d 192, 194 (1st Cir. 1937) aff'g 14 F. Supp. 481 (D.R.I. 1936), a cash method taxpayer with losses from the sale of stocks in 1923 and 1924 in a heavily leveraged or "margined" account for which notes were given to the broker was denied a current loss for those years. The court stated that, "To be deductible a loss must be paid in cash or its equivalent," and that "[t]here must be an actual depletion of the property of the taxpayer." Rhode Island, 88 F.2d at 194. The losses were held realized in 1928 when the notes were actually paid.

[redacted]

[redacted]

[redacted]

[redacted]

Losses from the sale or exchange of commodities are allowable as a deduction under § 165(a) during the taxable year in which they were sustained. Cullin v. Commissioner, T.C. Memo. 1997-292. The issue for the court in Cullin was whether the taxpayer's losses from trading commodity futures were capital or ordinary. The court determined that the losses were capital losses. When the taxpayer was allowed to take his losses was not an issue in Cullin, except insofar as § 165(a) provided.

[redacted]

[redacted]

[redacted]

[redacted]

Issue 3

Section 1256 only applies to "§ 1256 contracts." Section 1256(b) includes RFCs, foreign currency contracts, nonequity options and dealer equity options in the definition of § 1256 contracts.

Even if a contract is a § 1256 contract, the provisions of § 1256 may not be applicable if the contract is a hedging transaction. Section 1256(e)(2), prior to its amendment in 1999,[6] defined a hedging transaction as any transaction entered into in the normal course of a taxpayer's trade or business primarily to reduce certain types of risk and the gain or loss from the transaction would be ordinary in nature. Section 1256(e)(2) imposed the additional requirement that, to qualify as a hedging transaction under § 1256, the taxpayer had to clearly identify the transaction as a hedging transaction by the close of the day the transaction was entered into.

If a contract is a § 1256 contract and is not a hedging transaction, § 1256(a) applies. Section 1256(a)(1) provides that each § 1256 contract held by a taxpayer at the close of a taxable year is treated as if the taxpayer had sold that contract for its fair market value on the last business day of the taxable year. These gains and losses are aggregated with the gains and losses from the sale or other disposition of § 1256 contracts for the taxable year. The taxpayer is required to take any resulting gain or loss into account for that taxable year.

Under section 1256(a)(3), the gain or loss with respect to a § 1256 contract will be divided into two pieces, except if the § 1256 contract is also a § 988 transaction.[7] Forty percent (40%) of the gain or loss will be treated as a short-term capital gain or loss, and the remaining sixty percent (60%) will be treated as a long-term capital gain or loss.

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[6] Note that § 1256(e)(2) was revised by Congress in 1999 to provide a cross reference to I.R.C. § 1221(b)(2)(A), which somewhat modified the language in former § 1256(e)(2). See P.L. No. 106-170, § 532, generally applies to any instrument held, acquired, or entered into, and any transaction entered into, on or after December 17, 1999.

[7] If the contract is both a § 1256 contract and a § 988 transaction, the contract will be marked to market under § 1256(a)(1) and the resulting gain or loss will be treated as ordinary under § 988(a)(1).

I.R.C. § 1212(c) provides rules to govern the carryback or carryforward of losses from § 1256 contracts. A taxpayer with a net § 1256 contracts loss for a taxable year may elect to carry back the net § 1256 contracts loss to the three taxable years preceding the taxable year (carryback years). If a carryback is allowed pursuant to §§ 1212(c)(2) and (3), 40% of the loss will be treated as short-term capital loss from § 1256 contracts and 60% of the loss will be treated as long-term capital loss from § 1256 contracts.

I.R.C. § 1211(b) provides that non-corporate taxpayers are permitted to deduct losses from the sale or exchange of capital assets only to the extent of gains from sales or exchanges of capital assets plus (if the losses exceed the gains) the lower of $3000 or the excess of the losses over the gains.

If, after the application of § 1211(b), a taxpayer still has an excess of capital losses over capital gains, § 1212 permits the taxpayer to carry forward or back the excess losses. Section 1212(b) generally restricts non-corporate taxpayers to the carryforward of losses.

However, § 1212(c)(2) permits a taxpayer to elect to carry back losses from § 1256 contracts to offset prior gains on § 1256 contracts. If a taxpayer elects to carry back a net § 1256 contracts loss, the taxpayer is required to carry back the entire net § 1256 contracts loss for a taxable year to the earliest of the three carryback years. The amount carried back to the second earliest carryback year is the amount not absorbed in the earliest carryback year. The amount carried back to the taxable year immediately preceding the taxable year with the net § 1256 contracts loss is the amount not absorbed in the other two carryback years.

Section 1212(c)(3) limits the amount of net § 1256 contracts loss that may be carried back. The amount to be carried back to each carryback year may not exceed the net § 1256 contracts gain for that carryback year, and the allowance of the carryback may not increase or produce a net operating loss (as defined in I.R.C. § 172(c)) for that carryback year. In each carryback year, a taxpayer must treat 60% of the carryback amount as a long-term capital loss and 40% as a short-term capital loss from § 1256 contracts.

For the purposes of § 1212(c), “net § 1256 contracts loss” is defined as the lesser of: 1) the net capital loss for the taxable year determined by taking into account only gains and losses from § 1256 contracts, or 2) the sum of the amounts which, but for the provisions in § 1212(c)(6)(A) that treat as gains amounts equivalent to the amounts carried back, would be treated as capital losses in the succeeding taxable years under §§ 1212(b)(1)(A) and (B). See § 1212(c)(4). Section 1212(c)(5) defines “net § 1256 contracts gain” as the lesser of: 1) the capital gain net income for the taxable year determined by taking into account only gains and losses from § 1256 contracts, or 2) the capital gain net income for the taxable year.

The net § 1256 contracts gain for any carryback year is determined without regard to the net § 1256 contracts loss for the loss year or any later taxable year.

Section 1212(c)(6) provides rules for determining the amount of the net § 1256 contracts loss that is carried forward to taxable years subsequent to the year of loss. To calculate the carryforward amount, if any of the net § 1256 contracts loss was carried back to prior taxable years, then 40% of the amount allowed as a carryback will be treated as short-term capital gain for the loss year and 60% of the amount allowed as a carryback will be treated as long-term capital gain for the loss year. Any net capital loss amount that is carried forward will, to the extent attributable to losses from § 1256 contracts, be treated as losses from § 1256 contracts for that taxable year. However, the loss on any § 988 transaction that is neither an RFC nor a nonequity option would not be carried back pursuant to § 1212(c), but would rather be subject to the NOL rules of § 172 (to the extent that the taxpayer has engaged in a trade or business).

Examination did not find any facts indicating that these contracts had been identified as hedges; it thus appears that the § 1256(e) exclusion of hedging contracts from § 1256 does not apply. Accordingly, the TAXPAYERS should have applied § 1256(a) to these contracts. The TAXPAYERS should have marked to market any § 1256 contracts held on the last day of a taxable year, and all gain or loss with respect to § 1256 contracts, including gain or loss from marking to market as well as gains or losses upon disposition of contracts, should have been treated as 40% short-term capital gain or loss, and 60% long-term capital gain or loss.

To mark contracts to market under § 1256, the TAXPAYERS should have treated all § 1256 contracts held on the last day of a taxable year as if they had sold them at fair market value on the last business day of the taxable year. The TAXPAYERS should have recognized any gain or loss that resulted. When they later disposed of the contracts, the gain or loss should have been considered in figuring the gain or loss from the disposition. The following example may help explain how to calculate the gain or loss at disposition.

> On June 23, 1998, X bought a foreign currency contract for $50,000. On December 31, 1998 (the last business day of the taxable year), the fair market value of the contract was $57,000. X had a $7,000 gain recognized on X's 1998 tax return, treated as 60% long-term and 40% short-term capital gain. On February 2, 1999, X disposed of the contract for $56,000. Because X had already recognized a $7,000 gain on X's 1998 return, X recognized a $1,000 loss ($57,000 – $56,000) on X's 1999 tax return, treated as 60% long-term and 40% short-term capital loss.

If the TAXPAYERS held a § 1256 contract for more than one taxable year, at the close of each taxable year, the contract should be treated as if sold for its fair market value, and the gain or loss recognized should take into account the gain or loss recognized on that contract in earlier taxable years.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[redacted]

[redacted]

[redacted]
With respect to whether the trust that the TAXPAYERS established to obtain a stay in execution of judgment qualifies as a trust pursuant to § 461(f), this issue arose late in the time for this request, and we will provide an answer at a later date if necessary.

[redacted]

If the TAXPAYERS wish to pursue the issue of hedging, we request that you contact us for assistance.

Please call if you have any further questions.

JOEL E. HELKE, Chief
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