

TR 96/D6 - Fringe benefits tax: meaning of 'business premises'

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Draft Taxation Ruling

Fringe benefits tax: meaning of 'business premises'

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What this Ruling is about

Class of person/arrangement

1. This Ruling considers what constitutes a 'business premises' for the purposes of the *Fringe Benefits Tax Assessment Act 1986* ('FBTAA'). The application of this concept as it relates to the exemption granted in subsection 47(2) of the FBTAA for the provision of child care benefits is also explained.

Ruling

2. Various references are made throughout the FBTAA to the term 'business premises'. Subsection 7(3) considers the availability of a car for private use where the car is not at business premises of an employer. Sections 39A and 39B refer to business premises in the context of car parking benefits. Section 41 provides an exemption for property provided and consumed on business premises. Subsection 47(2) exempts recreational and child care facilities which are located on business premises. Subsection 47(3) exempts the use of property that is ordinarily located on business premises, and for the purposes of that subsection, by virtue of subsections 47(4) and 47(4A), property and facilities used in connection with an employer's business and building and construction sites are taken to be business premises for purposes of the FBTAA.

3. Subsection 136(1) of the FBTAA defines 'business premises' in relation to a person to mean 'premises, or a part of premises, of the

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person used, in whole or in part, for the purposes of business operations of the person'.

4. For any premises to qualify as 'business premises' for purposes of the FBTAA, this definition provides a two fold test. Firstly, the premises to qualify as such must be '**of the person**'. Secondly, the relevant premises must be premises used by the person '**for the purposes of business operations of the person**'.

5. To satisfy the test that the premises are premises 'of the person', we consider that the person must have either exclusive proprietary rights or exclusive occupancy rights in respect of the premises.

6. The words 'for the purposes of the business operations of the person' as found in the definition, allow a wide range of activities to be regarded as satisfying this test. Clearly, the activities that would be included would be those that are undertaken by a person in the ordinary course of carrying on a business and those that, although not undertaken in the ordinary course of carrying a business, are ordinary incidents of the business.

Explanations

'Of the person' test

7. The question of whether a premises is 'of the person' is one of mixed fact and law, to be determined having regard to the nature of the person's interest in the premises, evidenced by the person's rights, obligations, and risks borne in relation to the premises.

8. The term 'premises' is not defined in the FBTAA and, hence, it must be given its ordinary meaning. The ordinary meaning of the term would not be confined to buildings, but would include the land whereon buildings are erected and the land immediately surrounding them and such incorporeal hereditaments as easements (*Bracey v. Read* [1962] 3 WLR 1194; [1962] 3 All ER 472).

9. As defined in subsection 136(1) of the FBTAA, the term 'business premises' can be either the whole or part of any premises.

10. The definition of 'business premises' found in subsection 136(1) of the FBTAA also specifically excludes the following:

- '(a) premises, or part of premises, used as a place of residence of an employee of the person or an employee of an associate of the person; or
- (b) a corporate box; or

- (c) boats or planes used primarily for the purpose of providing entertainment unless the boat or plane is used in the person's business of providing entertainment; or
- (d) other premises used primarily for the purpose of providing entertainment unless the premises are used in the person's business of providing entertainment.'

11. On the other hand, subsection 47(4A) provides that a building site, construction site or similar place where a person carries on business operations shall be taken to be 'business premises' of the person. Subsection 136(2) also provides that a ship, vessel, floating structure, aircraft or train be included in the definition of 'business premises' found in subsection 136(1).

12. The word '**of**' as used in relation to the words 'the person' in subsection 136(1) of the FBTAA, is the key to the interpretation that the words 'of the person' when taken together mean 'the owner or exclusive occupier'. The word 'of' when used in relation to a person is defined in the *Shorter Oxford English Dictionary* as follows:

'In the sense *belonging or pertaining to*: expressing possession and its converse: "the owner of the house", "the house of the owner".'

13. We recognise that the word '**of**' when used in relation to a person embraces a connection or association falling short of absolute ownership (see Gummow J in *Re Simersall; Blackwell v. Bray* 108 ALR 375 at 381 and 382). In the context of subsection 136(1) of the FBTAA and generally in the scheme of the fringe benefits legislation, the words 'of the person' would include beneficial ownership and exclusive occupancy rights. As observed in the Privy Council by Lord Denning in *Council of the City of Newcastle v. Royal Newcastle Hospital* (1959) 100 CLR 1 at 4, it is also important to note that:

'...legal possession is not the same as occupation. Occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering: see *Pollock and Wright on Possession in the Common Law* (1888) pp.12, 13. There must be something actually done on the land, not necessarily on the whole, but on part in respect of the whole.'

14. A 'person' for purposes of the FBTAA is defined widely in subsection 136(1) to include:

- '(a) a body politic;
- (b) a body corporate;
- (c) a partnership;

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- (d) any other unincorporated association or body of persons;
and
- (e) a person in the capacity of trustee'.

15. The above definition includes entities that may not have legal status in law for certain purposes. For example, an unincorporated association or body of persons cannot sue or be sued and cannot buy or own property because it is not a separate legal entity (see *Rigby v. Connol* 14 Ch D 482 at 487 per Jessel MR; *Carlton Cricket & Football Social Club v. Joseph* [1970] VR 487 and also *Amos v. Brunton* (1897) 14 WN(NSW) 69; (1897) 18 LR (NSW) (Eq) 184). In such cases, the property is usually held by a trustee or trustees on behalf of the unincorporated association or body. Because in these cases, whilst the property is held by the trustee/trustees, the beneficial interest is that of the unincorporated association or body, the property can properly be described as property of the relevant person. Where a trustee is the person for purposes of the provisions of the FBTAA and is also the employer, the legal ownership by the trustee will be sufficient to bring the trustee within the definition.

16. In the case of a partnership, section 165 of the FBTAA provides that the Act applies to a partnership as if the partnership were a person. The exclusive proprietary interest in any property held by the partners of the partnership would be regarded as being held by a person by virtue of this section.

17. In most cases, there would be little difficulty in determining whether premises are premises of a person. Clearly, premises owned by a person are premises 'of the person'. The person has exclusive proprietorship rights in respect of the premises which give that person unfettered control over who may occupy the premises and what use the premises may be put to. Similarly, premises held by a person under a normal commercial lease or some other instrument, which gives that person exclusive occupancy rights over the premises and as such imposes on that person normal commercial obligations and risks in relation to the premises, would be premises of that person.

18. Some difficulty may arise in determining whether certain premises are premises of a person where either the ownership or occupancy right in respect of a property is shared amongst several people. Co-ownership may arise where there is a joint tenancy or a tenancy in common.

19. A joint tenancy is a common way for two or more people to share an interest in property. In relation to everyone else, joint tenants are a single owner (see *Wright and Anor v. Gibbons* (1949) 78 CLR 313 at 323). Each joint tenant has possession of the whole and each part of the property. Accordingly, for purposes of the 'of the person'

test the joint tenants would be regarded as a person and would clearly satisfy the test.

20. On the other hand, in the case of a tenancy in common, two or more co-owners own distinct shares of the property. Such shares may be of unequal proportions. Each co-owner has the right to use and occupy the common property, subject to a similar right on the part of the other co-owners.

21. Accordingly, where premises are held on a tenants in common basis under a commercial lease by a number of employers, each employer would only have an interest of an undivided share in the premises, and each employer would be severally liable for a proportionate share of outgoings in relation to the premises. In such circumstances, the premises as a whole could not be said to be premises of any one particular employer.

22. A similar position would arise where the person obtains some lesser interest in the relevant premises and the lesser interest, for example, merely requires the person to pay costs to the extent of services provided to the person at the premises and gives the person some loose right to only terminate the management arrangements with the consent of the other persons using the premises acting through a committee. In such a case the premises are not premises of the person.

'Used for the purposes of the business operations of the person'

23. In addition to the requirement that premises be 'of the person' as referred to above, premises would only be 'business premises' for purposes of the FBTAA where the premises are 'used for the purposes of business operations of the person'.

24. The words 'business operations' are only defined in subsection 136(1) in relation to a government body or a non-profit company. In relation to government bodies and non-profit companies 'business operations' include any operation or activity carried out by that body or company.

25. In relation to other persons, the words are not defined and have to be given their ordinary meaning. Whether a particular activity or series of activities amounts to a business operation is a question of fact. The words have not been judicially considered for definition purposes but have a long history in income tax jurisprudence of what is ordinary income (see *California Copper Syndicate v. Harris* (1904) 5 TC 159, *The Colonial Mutual Life Assurance Society Ltd v. FC of T* (1946) 73 CLR 604; 8 ATD 137; *Australasian Catholic Assurance Company Limited v. FC of T* (1959) 100 CLR 502; (1959) 11 ATD 577 and more recently by the High Court in *FC of T v. The Myer Emporium Ltd* (1987) 163 CLR 199, 87 ATC 4363; (1987) 18 ATR

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693 and by the Full Federal Court in *FC of T v. Cooling* 22 FCR 42; 90 ATC 4472; (1990) 21 ATR 13; 94 ALR 121).

26. The above cases dealt with the difference between the mere realisation of an asset of the taxpayer and a gain from a business operation of a taxpayer. From these cases, there is support for the view that a 'business operation' ought to be regarded as wider than 'carrying on a business' and would include both passive and active dealings including isolated transactions of a person without the need to establish that the person was carrying on a business. For example, in *Myer* the Full High Court (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ) in considering the scope of 'an operation of business' made the following observations (163 CLR at 211):

'The important proposition to be derived from *Californian Copper* and *Ducker* is that a receipt may constitute income, if it arises from an isolated business operation or commercial transaction entered into otherwise than in the ordinary course of the carrying on of the taxpayer's business, so long as the taxpayer entered into the transaction with the intention or purpose of making a relevant profit or gain from the transaction.'

27. Ordinary business operations would also include a wide range of activities carried on by a person carrying on a business. This was highlighted in *Cooling* by Hill J in the following example:

'Where a taxpayer operates from a leased premises, the move from one premises to another and leasing of the premises occupied are acts of the taxpayer in the course of its business activity just as much as the trading activities that give rise more directly to the taxpayer's assessable income.'

28. Another example where a broad approach was taken is the decision of the High Court (Latham CJ, Rich, Dixon and McTiernan JJ) in *W Nevill & Co Ltd v. FC of T* (1937) 56 CLR 290; 4 ATD 187. The case concerned the deductibility of certain lump sums paid to terminate the services of a director and restructure the management from a jointly controlled company to be under the directions of a single managing director. The High Court allowed the deductions as being on revenue account. In allowing the deductions, Latham CJ made the following relevant observations:

'The payments in question were actually made bona fide in the course of business in the interests of the efficiency of the business. In my opinion they fall within the terms of the proposition of Viscount Cave L.C., in *British Insulated and Helsby Cables v. Atherton* (1926 A.C. 205) at p.212 - "a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the

grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade." '

29. The words 'used for the purposes of the business operations of the person' ought to be read together and in the context used. The words when read that way, connote a wider operation than being merely confined to directly related operations of a business. The word 'purposes' is not restricted and, accordingly, allows directly and indirectly related purposes to fall within the terms of the words used in subsection 136(1) of the FBTAA (see Lockhart J in *Parker Pen v. Export Development Grants Board* 46 ALR 612 at 621 where his Honour correctly observed that the 'word "purpose" is, of course, susceptible of a variety of meanings depending on its context').

30. The definition of 'business premises', when first inserted in the FBTAA, only excluded 'premises, or a part of premises, used as a place of residence of an employee of the person or an employee of an associate of the person'. The need to exclude premises used for residential purposes from the definition of 'business premises' would support the view that without that exclusion such premises would have been included in the definition. It also supports the view that the words have a fairly broad application.

31. The broad approach can also be gleaned from the wide scope given by the legislature in subsection 136(1) of the FBTAA in relation to 'business operations' of government bodies and non-profit companies.

32. On this broader view, an activity would constitute a business operation where:

- (a) it is an activity which is undertaken in the course of carrying on a business, being either:
 - (i) an activity undertaken in the ordinary course of carrying on a business (such as one that comprises the day to day operations of the taxpayer); or
 - (ii) an activity which is not undertaken in the ordinary course of carrying on a business, but is still undertaken in the course of carrying on a business (such as an activity which has a reasonable incident to, or is in connection with, or facilitates the carrying on of a business operation); or
- (b) it is an activity which, although not undertaken in the course of carrying on a business, has a business or commercial character (cf. *FC of T v. Whitfords Beach Pty Ltd* 12 ATR 692; 82 ATC 4031; (1982) 150 CLR 355).

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33. A place that is used as a base, or one of the bases, of business operations of a person is clearly a place used for the purposes of business operations. Such a place may be described as a main place of business, and would be the premises where the day to day business operations of the person are carried out. If the premises in question are not used for the carrying out of the relevant day to day business operations of the employer, but is used for some other purpose, such as the provision of a service to an employee for a wholly private purpose or in the spirit of benevolence, it cannot be objectively said that the premises are 'business premises' (see (1972) 17 CTBR (NS) *Case 99*).

34. Certain facilities and premises used by employees in relation to their employment have, for the sake of clarity, been specifically taken to be principally used directly in connection with business operations of the employer under subsection 47(4). Under that subsection, toilets, bathroom facilities, food or drink vending machines, tea or coffee making facilities, water dispensers or other amenities (not being facilities for drinking or dining) for the use of employees of an employer are taken to be principally used directly in connection with business operations of the employer. These premises are, by virtue of the deeming provisions found in subsection 47(4), part of the business premises of the employer and, likewise, the relevant facilities are located on such business premises of the employer.

35. On the other hand, it will be a different situation if premises are used by an employer for *bona fide* purposes to improve the productivity or efficiency of a business. In these situations, the use of the premises for any such facilities would not be regarded as being for the private needs of employees. These facilities would be considered as being provided for the purposes of the business operations of the employer. The premises would be 'business premises' of the employer for purposes of the FBTAA. These facilities on premises independent of and located not on the site of the principal business premises of the employer, would also be regarded as being located on 'business premises' of the employer on the basis of what constitutes a 'business operation' of the employer as suggested by case law and the scheme of the FBTAA as discussed in the preceding paragraphs.

36. On this broader view of what is considered an activity for the purposes of the business operation of a person, the provision of facilities such as child care, recreational, car parking or health care for employees would be an activity for the purposes of the business operations of the employer. The premises used to provide any of these facilities would be regarded as 'business premises' of the employer. This would also be the case even where the relevant facility is provided on premises away from the premises used to carry on the principal business operations of the employer.

Alternative views

37. The alternative view in relation to the 'of the person' test is that the test can be satisfied in circumstances where a person may not have a clearly defined exclusive occupancy right but has a proportionate interest or share in the relevant premises. We do not agree with this view on the basis of the explanations given above and in particular those contained in paragraphs 12 and 13 above.

38. The alternative view in relation to the second test is that the provision of certain facilities like child care and recreational facilities are for the private needs of employees and are not principally used in connection with the business operations of the employer. This view requires that the words 'for the purposes of the business operations of the person' be given a narrow interpretation. In other words, the relevant operations must be directly connected with the business of the person.

39. This argument would, on one interpretation of the law, have support from the scheme of the FBTAA. In particular, if the view of the law contained in this Ruling is correct, it would not have been necessary for the legislature to insert subsection 47(2) in its present form. Subsection 47(2) exempts a residual benefit that would otherwise arise where an employee is provided with the use of a recreational facility or where the employer provides a child care facility for the employee's children. The exemption is only available if the relevant recreational facility or child care facility is located on the business premises of the employer or a person related to the employer. In other words, neither is in terms of the provisions of the law in section 47 regarded as a 'business operation'.

40. Some support is also found in the need by the legislature to deem, in subsection 47(4) of the FBTAA, toilets, bathroom facilities and other amenities for use of employees of an employer to be taken to be principally used directly in connection with business operations of the employer.

41. Support for this view can also be found in the consideration of the phrase 'for the purposes of business' by the courts in relation to landlord and tenant legislation (see: *Chapman v. Freeman* [1978] 3 All ER 878).

42. In relation to the provision of child care facilities to employees by an employer under this view, the facility must be located on the premises which constitute a place that can be described as a base of operations or a place of business, for the provisions found in subsection 47(2) of the FBTAA to apply.

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43. On the basis of this argument, any facility set up at a location away from the business premises by an employer merely to improve the productivity or efficiency of a business would not constitute a business operation.

44. The provision of a child care facility would only be regarded as a business operation, or be an activity for the purposes of business operations, where the employer operated the facility as another business.

45. The alternative view is rejected on the basis of arguments used to support the principal view expressed in this Ruling. The words 'for the purposes of the business operations of the person' are clearly words that suggest a very wide interpretation. If the words were to be construed narrowly and apply only to directly connected business transactions of the business, the legislature would not have had to make any exclusions. For example, premises used for residence of an employee are specifically excluded in subsection 136(1) definition of 'business operations'.

Examples

Example 1

46. ABC Pty Ltd is a company that has one principal place of business where it carries out certain manufacturing activities. There is no space on the premises for employees to park their cars during working hours. The company purchases premises situated two blocks away from its principal place of business and converts the premises into a car park for use only by its employees. As part of their remuneration package, employees pay no fees for the use of the facility.

47. The car parking facility, although not situated on the principal business premises of the company, would be regarded as situated on another business premises of the company - as the provision of a facility to remunerate employees - and in the interest of efficiency of the business, would be regarded as a business operation of the company.

Example 2

48. DEF Pty Ltd is a firm that provides software computer services. It is located in a suburb some three kilometres from the CBD. It decides to provide recreational facilities for staff at lunch time and acquires a vacant plot of land one kilometre away from its office. It constructs a squash (rackets) court and a gymnasium on the plot.

Employees are allowed to use the facilities during the working day at lunch time.

49. The recreational facilities provided here would be similar to Example 1 above and the premises would be regarded as the business premises of the employer.

Example 3

50. D Mining Ltd, with its administrative office in a capital city, conducts mining operations some 1,000 kilometres away from the city and in a remote area. Mining staff are located in a company town about 30 kilometres from the actual mining operations. To encourage more women to work at the mine, D Mining Ltd constructs a child care centre in the town to provide child care facilities for employees requiring the facility.

51. The child care facility would be regarded as being provided in connection with the business operations of D Mining Ltd and the exemption under subsection 47(2) would be available.

Example 4

52. Keepaus Kleen Pty Ltd is a manufacturer of detergents, with two main operating plants. At one operating plant, it manufactures heavy duty detergents for commercial use and at the other, domestic use detergents. As part of their 'Keep Employees Happy' program, the company has leased part of premises situated about two kilometres from both operating plants and converts the leased premises into a child care centre. It engages a professional company to manage and provide all the necessary facilities. It offers places without a charge to children of employees of Keepaus Kleen Pty and related companies. If there are any vacant places not utilised by employees of the companies, they are offered for a fee to any parent requiring the facility.

53. Under these arrangements the premises would be considered as 'business premises' of Keepaus Kleen Pty Ltd and the exemption under subsection 47(2) would be available only to places provided to employees' children of both Keepaus Kleen Pty Ltd and related companies.

Example 5

54. A, B, and C in partnership are carrying on the business of manufacturing tools. The partnership leases premises to operate a commercial child care service for any children including their

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employees' children. They renovate the premises to turn them into a child care centre. The partnership oversees the centre's management and hires a professional child carer to manage the day to day operations of the facility. The partnership has the power to hire and fire the child carer, and has a management team to review regularly the centre's operations, set policy and review the centre's budget. The partnership also has the full responsibility for the operations of the centre.

55. In this situation, the partnership is conducting the centre as part of the partnership's business operations, and the partnership has under the lease exclusive occupancy rights in relation to use of the premises. The child care facility would, therefore, be treated as being located on the partnership's business premises.

Example 6

56. A commercial child care centre operator conducts its business on premises over which it holds a lease. It enters into an arrangement with various employers to provide child care services to their employees' children. Under this arrangement, each employer separately contracts with the operator to sub-lease an undivided share in the premises, and each employer will only ever be separately liable for rental in respect of its own share. Also, under a management agreement, each employer participates in the centre's management committee, which has overall responsibility for the management of the centre, including the power to terminate the services of the operator as manager of the centre. Each employer's share in the premises and voting rights on the committee are determined by the number of child care places it wishes to utilise.

57. In this situation, no employer has exclusive occupancy rights in respect of the premises. The premises are, therefore, not considered to be business premises of any individual employer, and the exemption in subsection 47(2) would not apply.

Example 7

58. TOT is a professional provider of child care facilities and already owns six centres in various cities in Australia providing child care to children independently of any employer involvement. It now seeks to expand its operations by setting up a large centre in the heart of the CBD of a major city.

59. TOT enters into a lease for the relevant premises and enters into arrangements with various employers to allow their employees to use the centre with payments made directly by the employers of all fees.

Employees contributions are made by way of salary sacrifices to the employer.

60. Under the arrangements the following 'legal' documents are executed:

Joint Venture Agreement - features of which are akin to an association of employers with a committee of some representatives of the employers managing the 'venture'. The Committee under this agreement is required to meet only once a year and the 'venture' has no real assets or responsibilities. In any case the rights, duties, obligations and liabilities of the employers are several and not joint or joint and several.

Sub-lease - with employers having no responsibility for the care of the premises nor any indemnities.

Management Agreement - provides a clear indemnity by the provider of the facilities to employers for any claim whatsoever in respect of the premises.

61. Like Example 7 above, under these arrangements the relevant premises are not premises of any of the employers. The exemption under subsection 47(2) would not be available to any of the employers on the basis that neither are the premises those of the employer nor are any 'business operations' of the employers being conducted at the relevant premises.

Example 8

62. Able Accounting Pty Ltd and Abler Taxation Services Pty Ltd are two leading accountancy and tax advising firms in a capital city. They are not related and compete for the work in that capital city. However, the firms have joined their resources to provide child care facilities for the employees. They have set up a child care centre in premises situated at Able's premises. Under the arrangements, Abler merely enters into an agreement to a joint venture child care centre with only the responsibility to pay fees depending on the number of child places taken by its employees. Able has the lease of the premises and also arranges for the management of the centre.

63. Under these arrangements the relevant premises would be properly considered as the 'business premises' of Able but not Abler. The exemption under subsection 47(2) would only apply to Able.

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Date of effect

64. This Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

65. Where a taxpayer has received a private binding ruling inconsistent with the interpretation of subsection 47(2) as set out in this Ruling, and has entered into a child care arrangement, the private binding ruling will continue to apply for the period that the private binding ruling is valid. However, this Ruling would apply to any material variation to existing arrangements or any new arrangements commenced after the binding ruling expires.

66. Where an operator or taxpayer has received an Advance Opinion, this would permit any existing arrangements to continue until 31 December 1996. This would give the operator or taxpayer time to restructure the arrangement and comply with this Ruling.

Your comments

67. If you wish to comment on this Draft Ruling, please send your comments by: 10 May 1996

to:

Contact Officer: Amarjit Verick
Telephone: (02) 354 3380
Facsimile: (02) 354 3333
Address: Mr Amarjit Verick
Senior Tax Counsel
Australian Taxation Office
Jessie Street Centre
2-12 Macquarie Street
Parramatta NSW 2123.

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case references

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- Bracey v. Read [1962] 3 WLR 1194; [1962] 3 All ER 472
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