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## Cases, Regulations, and Statutes

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arguments for and against publication, we suggest the proposed revenue ruling be drafted in digest form substantially as follows:

"Amounts paid by an employer, pursuant to an accident and health plan covering all of his employees, to his spouse in her capacity as a bona fide employee as reimbursements for expenses incurred by her for the medical care of herself, her husband, and their children, if they otherwise qualify as 'amounts received under an accident or health plan for employees,' are amounts described in section 105(b) of the Internal Revenue Code of 1954 and the benefits of that section are not to be denied solely because of the marital relationship. Therefore, such amounts are not includable in the employee-wife's gross income. Furthermore, such amounts will be deductible by the husband as business expense under section 162 of the Code."

The revenue ruling as *actually published* stated,

"The taxpayer operated a business as a sole proprietorship with several bona fide fulltime employees including his wife. The taxpayer had an accident and health plan covering all employees and their families. During 1970 two employees, including the wife, incurred expenses for medical care for themselves, their spouses, and their children, and were reimbursed pursuant to the plan. The reimbursed amounts qualified both as amounts received under an accident or health plan for employees within the meaning of section 105(e) of the Internal Revenue Code of 1954 and as amounts described in section 105(b) of the Code.

*Held*, the reimbursed amounts received by the employees are not includible in their gross income pursuant to section 105(b) of the Code and these amounts are deductible by the taxpayer as a business expense under section 162(a) of the Code.

**Requirements for a plan.** In order for a sole proprietorship health care arrangement to have a reasonable chance of surviving the high level of scrutiny expected, several requirements must be met —

- The sole proprietor and the spouse must be able to demonstrate that a bona fide employer-employee relationship exists. A major factor in such a relationship is control by the sole proprietor as employer over the manner and means of performance. Both parties must acknowledge that the sole proprietor is the boss and controls the hours of work, how the employment is carried out and all other relevant details of employment.

- The evidence must be clear that the employee-spouse renders services *in the business*; services rendered in the

operation of the home are immaterial for this purpose. The rendition of services in the business must be well documented.

- The compensation paid to the spouse should be fairly reflective of the amount, type and value of services rendered.

**Factors that weaken the arrangement.** Several factors weaken sole proprietorship-spouse arrangements and failure in one or more areas can be fatal to the arrangement.

- Participation by the employee-spouse in management is more indicative of a partnership arrangement than an employer-employee relationship.

- The ownership or co-ownership of land or other assets used in the business by the employee-spouse in itself does not necessarily preclude a genuine employer-employee relationship but contributing assets on an uncompensated basis raises a question of the proper characterization of amounts paid to the spouse. At the very least, what purports to be employee compensation could be partially or totally reclassified as rent or other compensation for assets provided to the business.

- Service as a part-time employee is less supportive of eligibility of a spouse as employee to participate in a health care plan than full-time service. Many spousal employee situations involve only part-time employment. The fact that other part-time employees have not been eligible for health and accident coverage in the past is not helpful.

All intra-family transactions are subject to close scrutiny and husband-wife arrangements can be expected to be subjected to extraordinary review. If the benefits of an arrangement flow singularly to a spouse, and not to other employees, one can expect a challenge on any one of a number of bases. Many farm sole proprietorships do not involve unrelated employees.

**In conclusion.** For a health care arrangement involving a spouse as employee to succeed with the costs tax deductible and the benefits not includible in the employee's income, several conditions must be met. At the present time, with very little supportive authority for situations where the spouse is a bona fide employee but is the only employee, and a part-time employee at that, the risk of a challenge by the Internal Revenue Service must be viewed as substantial with a not insignificant chance that the challenge will be successful.

#### FOOTNOTES

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| <p><sup>1</sup> See generally Harris, "Health Insurance for Farmers," 9 Agric. L. Update 4 (1991).</p> <p><sup>2</sup> I.R.C. § 162(1).</p> <p><sup>3</sup> I.R.C. § 162(1)(2).</p> | <p><sup>4</sup> I.R.C. § 162(1)(4).</p> <p><sup>5</sup> I.R.C. §§ 162(1)(3), 213(a).</p> <p><sup>6</sup> 1971-2 C.B. 91.</p> <p><sup>7</sup> <i>Id.</i></p> <p><sup>8</sup> <i>Id.</i></p> <p><sup>9</sup> GCM 34488, April 30, 1971.</p> | <p><sup>10</sup> <i>Id.</i></p> <p><sup>11</sup> <i>Id.</i> See GCM 33127, Nov. 9, 1965.</p> <p><sup>12</sup> GCM 34488, April 30, 1971.</p> |
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## CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

### BANKRUPTCY

#### GENERAL

**ADMINISTRATIVE EXPENSE.** The debtor had obtained a bankruptcy court order allowing the debtor to

borrow money from a creditor and grant a security interest on crops to be grown with the borrowed money. After the debtor defaulted on the loan, the creditor sought administrative expense status for the deficiency on the loan after sale of the collateral. The court held that the

bankruptcy order explicitly authorized the credit only under Section 364(c)(2) and did not provide for administrative expense status for any unpaid amounts. **Mulligan v. Sobiech**, 131 B.R. 917 (S.D. N.Y. 1991).

**AVOIDABLE LIENS.** In settlement of a state court suit, the debtor executed an assignment of an interest in the debtor's homestead to a creditor. After filing bankruptcy, the debtor petitioned for avoidance of the assignment as a judicial lien impairing the debtor's homestead exemption. The court held that the assignment was not a judicial lien but a voluntary agreement creating a security interest and that the lien was not avoidable. **In re Inman**, 131 B.R. 789 (Bankr. N.D. Tex. 1991).

**EXEMPTIONS.** The Texas exemption for payments under any stock bonus, pension, profit sharing or similar plan was not pre-empted by ERISA. **Matter of Dyke**, 943 F.2d 1435 (5th Cir. 1991), *aff'g*, 119 B.R. 536 (S.D. Tex. 1990), *aff'g*, 99 B.R. 343 (Bankr. S.D. Tex. 1989).

The debtor's interests in seven IRA's and a profit sharing plan were exempt, under Tex. Prop. Code § 42.0021, as single retirement plan. The Texas exemption was not pre-empted by ERISA. **In re Volpe**, 943 F.2d 1451 (5th Cir. 1991), *aff'g*, 120 B.R. 843 (W.D. Tex. 1990), *aff'g*, 100 B.R. 840 (Bankr. W.D. Tex. 1990).

The debtors owned an interest in an annuity created as part of a settlement of a personal injury claim. The debtors claimed the annuity as exempt under Ohio Rev. Code § 2329.66(A)(10)(b) as a "pension, annuity or similar plan." The court held that the annuity was not exempt under that provision because the annuity was not a pension or retirement plan. The debtors also claimed the annuity as exempt under Ohio Rev. Code § 2329.66(A)(6)(b) as an annuity upon the debtor's life. The court held that the annuity was not exempt under that provision because the annuity was not an insurance policy. **In re Rhinebolt**, 131 B.R. 973 (Bankr. S.D. Ohio 1991).

The Florida exemption for retirement plans was held pre-empted by ERISA. **In re Lesh**, 131 B.R. 1002 (Bankr. M.D. Fla. 1991).

The debtors were allowed a homestead exemption for the proceeds of a residence owned and occupied on the date of bankruptcy filing, although the debtors were in the process of moving to another state and sold the residence 10 days after the filing. **In re Raymond**, 132 B.R. 53 (Bankr. D. Colo. 1991).

The debtors claimed an exemption under Colo. Rev. Stat. § 13-54-102(1)(l) for the cash surrender value of life insurance policies. The court held that the exemption applied only to the proceeds of matured policies and denied the exemption. **In re Raymond**, 132 B.R. 53 (Bankr. D. Colo. 1991).

### CHAPTER 13

**AUTOMATIC STAY.** A secured creditor had obtained a foreclosure judgment against the Chapter 13

debtors pre-bankruptcy and sought relief from the automatic stay. The court held that, under South Dakota law, a judgment of foreclosure terminates the mortgage and the debtor-creditor relationship such that the debtor could not modify the mortgage in the Chapter 13 plan to cure any default; therefore, relief from the stay was granted. **In re Feimer**, 131 B.R. 857 (Bankr. D. S.D. 1991).

**PLAN.** A creditor obtained a foreclosure judgment against the debtor's house but before the house could be sold, the debtor filed for Chapter 13. The debtor's plan proposed to pay the foreclosure judgment over five years. The court held that the proposed plan was not confirmable because the plan modified the rights of a holder of a secured claim, the foreclosure judgment, on the debtor's principal residence. **First Nat'l Fidelity Corp. v. Perry**, 945 F.2d 61 (3d Cir. 1991).

### FEDERAL TAXATION

**AUTOMATIC STAY.** The debtor was a defendant in an action to determine the debtor's tax liabilities in federal district court prior to filing for bankruptcy. The IRS sought enforcement of a summons of the debtor to appear and provide documents in that case. The debtor argued that the filing of the bankruptcy case and institution of an adversary proceeding involving the same tax liabilities in the bankruptcy case prohibited the IRS from proceeding against the debtor. The court held that the automatic stay did not prohibit actions to determine the tax liability of the debtor, even where an adversary proceeding involving the same issues has been commenced in the bankruptcy case. **In re Moore**, 131 B.R. 893 (Bankr. S.D. Fla. 1991).

**DISCHARGE.** In 1981, the debtor had filed a W-4 form listing 40 exemptions. In 1987, the debtor filed returns for 1982 through 1985 claiming three exemptions. The debtor filed bankruptcy more than three years after the returns were filed and claimed the taxes owed as dischargeable. The IRS argued that the taxes were not dischargeable because the false W-4 form, the late filed returns and the filing of bankruptcy just after the taxes became dischargeable were an attempt to evade taxes. The court held that the circumstances did not prove a willful attempt to evade taxes and that the taxes were dischargeable. **In re Peterson**, 132 B.R. 68 (Bankr. D. Wyo. 1991).

**DISMISSAL.** The Chapter 11 debtor filed for bankruptcy 241 days after an assessment of federal taxes for taxable years for which returns were timely filed more than three years before the bankruptcy filing, thus allowing the debtor a discharge of the taxes. The IRS moved for dismissal because of the debtor's bad faith filing of the bankruptcy case. The court held that the timing of the filing to take advantage of the discharge rules was not sufficient evidence of bad faith filing. **In re Devine**, 131 B.R. 952 (Bankr. S.D. Tex. 1991).

**ESTATE PROPERTY.** Prior to the debtor's filing for bankruptcy, the IRS levied against the debtor's bank accounts. Before the bank released the funds to the IRS, the debtor filed for bankruptcy and argued that the bank account

funds were estate property. The court held that the funds were estate property because the debtor retained the benefits and burdens of ownership in the levied funds for 21 days after the levy and the bankruptcy filing occurred within the 21 days after the levy. *In re West Aire, Inc.*, 131 B.R. 871 (Bankr. D. Nev. 1991).

**REFUNDS.** The debtor's tax return for the year before filing bankruptcy showed a net operating loss and the debtor filed for a refund for the prior taxable year based upon a carryback of the loss. A creditor claimed a priority security interest in the refund over a subsequently filed tax lien. The court held that the security interest did not attach to the refund claim because the IRS was allowed to setoff the refund claim against any outstanding tax liability of the debtor and that a refund would not arise until the tax liability was completely paid. *In re Siebert Trailers, Inc.*, 132 B.R. 37 (Bankr. E.D. Cal. 1991).

## CONTRACTS

**DAMAGES.** The plaintiffs, sunflower growers, entered into production agreements with the defendants for the growing of sunflower seeds wherein the defendants supplied seed, herbicides and pesticides and would purchase the resulting crop at 12 cents per pound for seed over 17/64 of an inch. When the defendant failed to make any payment for small seed, the plaintiffs stopped shipping the harvested seed. Although the parties attempted to modify the contract, the court found that no modification was made and the plaintiffs had breached the contract by stopping shipments. The court held that the amount of damages to the defendant to be the difference between the contract price for the plaintiffs' sunflower seeds and the cost to the defendant of obtaining additional seeds to cover its contracts with other purchasers. *Neibert v. Schwenn Agri Prod. Corp.*, 579 N.E. 2d 389 (Ill. Ct. App. 1991).

## FEDERAL AGRICULTURAL PROGRAMS

**FEDERAL CROP INSURANCE.** The FCIC has issued proposed regulations adding provisions permitting the amount of insurance for certain crops to be based on the adjusted yield which the ASCS has established for the farming unit rather than the recorded and appraised yield as established by the FCIC. 56 Fed. Reg. 57296 (Nov. 8, 1991).

**FEDERAL FARM PRODUCTS RULE.** The PSA has amended the certification of the Oklahoma central filing system to include rice. 56 Fed. Reg. 57314 (Nov. 8, 1991).

**SEASONAL AGRICULTURAL LABOR.** Migrant agricultural workers challenged the USDA's omission of sod from the definition of "other perishable commodities" in the regulations governing which migrant seasonal agricultural workers are eligible as "Special Agricultural Workers" under the Immigration Reform and Control Act. The court held that the exclusion of sod was

arbitrary and capricious and ordered the USDA to include sod in the definition of "other perishable commodities" in the regulations. *Morales v. Yeutter*, 772 F. Supp. 1033 (N.D. Ill. 1990).

**WETLANDS.** The FmHA has issued proposed regulations implementing FACTA 1991 provisions requiring the establishing of perpetual conservation easements on FmHA inventory properties. The regulations provide for restrictions on the easements on farms for which the previous owner has leaseback/buyback rights. 56 Fed. Reg. 56474 (Nov. 5, 1991).

## FEDERAL ESTATE AND GIFT TAX

**CHARITABLE DEDUCTION.** The decedent's will provided for a bequest to a charitable organization church with the income from the bequest to be paid to church priests as stipends for offering masses for the decedent. Under the church regulations, the church did not sell masses and honored requests for masses without charging for them. The IRS ruled that the bequest qualified for a charitable deduction. Ltr. Rul. 9145005, July 16, 1991.

**CHARITABLE REMAINDER TRUST.** Under the taxpayer's will, if the taxpayer's spouse survived the taxpayer, the surviving spouse would receive property in trust which would be QTIP. The surviving spouse had a testamentary special power of appointment over trust corpus but if the power was not exercised, the trust property passed to another trust for charitable organizations. The IRS ruled that if the second trust otherwise qualified as a charitable remainder trust, the surviving spouse's estate could take a charitable deduction for the present value of the charitable beneficiaries' rights to receive the principal at the end of the trust term. Ltr. Rul. 9144016, July 31, 1991.

**CREDIT FOR PRIOR TRANSFERS.** Under the decedent's predeceased spouse's will, an amount of the estate was to pass to a marital trust equal to the amount necessary to reduce the estate tax to zero. Any remaining estate property passed to a trust for the decedent and any surviving issue, with discretion by the trustee to distribute or accumulate income. The predeceased spouse's executor funded the marital trust with the full amount but did not make a QTIP election for the full amount. The IRS ruled that the failure of the executor to make the QTIP election was allowed by the predeceased spouse's will and that the portion of the marital trust for which a QTIP election was not made was eligible for the credit for prior transfers. Ltr. Rul. 9145004, July 12, 1991.

## FEDERAL INCOME TAXATION

**ACCOUNTING METHOD.** The taxpayer was a family farm corporation required to maintain a suspense account because of a previous change in tax year. The taxpayer changed its tax year again to match the tax year of another corporation owned by the family. The IRS ruled that the taxpayer's gross receipts from farming for the short taxable year created by the change could be calculated on an

annualized basis for purposes of comparing gross receipts with the previous taxable year. After the gross receipts on an annual basis have been determined, the taxpayer would not recognize taxable income from the suspense account if the annualized gross receipts are not less than the gross receipts from the previous taxable year. **Ltr. Rul. 9145016, July 31, 1991.**

**CAPITAL GAINS.** The taxpayers were farmers who received payments over several taxable years under a 1985 mining contract which produced capital gains during those years. The taxpayers filed for a refund based on the argument that the repeal of the capital gains deduction in 1986 should not apply to a pre-existing contract and that because the taxpayers were farmers, they were eligible for the special treatment for the sale of cattle under the Dairy Termination Program. The court held that long-standing precedent allowed application of changes in the tax laws to contracts with taxable payments over several years. In addition, the court held that the special treatment for the sale of dairy cattle clearly did not apply to the sale of other capital assets. The court also held that the special treatment for dairy farmers did not violate the equal protection provisions of the U.S. Constitution. **Mostowy v. U.S., 24 Cl. Ct. 193 (1991).**

**COMMODITY STRADDLES.** The taxpayers entered into several commodity straddle transactions involving the purchase of offsetting futures contracts. The court joined the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuit Courts of Appeals in affirming disallowance of deductions from these transactions. **Bohrer v. Comm'r, 945 F.2d 344 (10th Cir. 1991), aff'g, 87 T.C. 1087 (1986).**

### C CORPORATIONS

**DIVIDENDS.** Amounts paid to shareholders as compensation was held not to be deductible as a business expense but were held to be dividends because the amounts were not related to the value of services rendered to the corporation by the shareholders but were related to the shareholders' proportional stock ownership. **Friendly Finance, Inc. v. Comm'r, T.C. Memo. 1991-551.**

**DISASTER LOSSES.** The taxpayer suffered damages to a citrus grove in late December 1989 in an area determined by the President to be a disaster area, thus making the taxpayer eligible for the election to declare the losses in 1988. The taxpayer was unable to determine the amount of the losses until after the election deadline because the extent of the loss was not known until the growing season began. The IRS ruled that the taxpayer had demonstrated good cause for an extension to file the election and an extension of 45 days after the date of the letter ruling. **Ltr. Rul. 9145009, July 31, 1991.**

**INSTALLMENT REPORTING.** The taxpayers sold a property on the installment method, paid their estimated tax based on an election out of the installment method of reporting the gain, and informed their return preparer of their decision to election out of installment reporting. The tax return was filed a few days late. The

IRS granted the taxpayers' request to make the election out on the late return. **Ltr. Rul. 9145015, July 31, 1991.**

**INTEREST.** The taxpayer was a partner in a partnership which invested in timeshare units in a vacation home. The partnership paid less than 25 percent of the purchase price for each unit with annual payments for ten years. No payments were required for the next 20 years, at which time the partnership had the option to make a balloon payment or forfeit the interest in the timeshare. The amount of the balloon payment was found to be much in excess of the anticipated fair market value of the timeshares. The court held that the investments were sham transactions in that the purchase price exceeded the fair market value of each unit, the balloon payment exceeded the fair market value of each unit and, therefore, the investors did not intend to make the balloon payments. The taxpayer's deductions for partnership losses from the transaction were denied. **Lukens v. Comm'r, 91-2 U.S. Tax Cas. (CCH) ¶ 50,517 (5th Cir. 1991), aff'g, T.C. Memo. 1990-87.**

### PARTNERSHIPS

**ADMINISTRATIVE ADJUSTMENTS.** For purposes of the small partnership exception to the administrative adjustment proceeding rules, the custodians of minor partners were held to be not included as "pass-through partners." **White v. Comm'r, T.C. Memo. 1991-552.**

**RETIREMENT PLANS.** The IRS has issued transitional rules to allow retirement plan administrators until the end of 1992 to make full use of the design options where such options have not been elected by the effective date of the new nondiscrimination and separate line of business regulations. **Notice 91-38, I.R.B. 1991-48, 34.**

**RETURNS.** The IRS has adopted as final regulations defining certain monetary instruments having a face value of not more than \$10,000 (effective for amounts received on or after February 3, 1992), including cashier's checks, money orders, bank drafts and traveler's checks, as cash for purposes of the requirement for reporting designated transactions involving cash in excess of \$10,000. Designated transactions include a retail sale of consumer durable goods, collectibles and travel or entertainment activities. Excluded from the definition of designated transaction are loan proceeds and payments on promissory notes and installment contracts. **56 Fed. Reg. 57974 (Nov. 15, 1991).**

The IRS has announced that the following transactions are not subject to reporting requirements of I.R.C. § 6045 for 1991 and previous years: (1) spot or forward sales of (but not sales of interests in) agricultural products or commodities and (2) sales of negotiable commodity certificates issued by the CCC. **Ann. 91-177, I.R.B. 1991-48, 29.**

### S CORPORATIONS

**PASSIVE INVESTMENT INCOME.** An S Corporation was a limited partner in a partnership which

operated a natural gas processing, purchasing and sales business. The IRS ruled that the S corporation should include in its gross receipts the corporation's share of gross receipts of the partnership, determined using the corporation's profit share. The IRS also ruled that the corporation's share of income from the partnership was not passive investment income. **Ltr. Rul. 9144024, Aug. 1, 1991.**

### SAFE HARBOR INTEREST RATES

#### DECEMBER 1991

	Annual	Semi-annual	Quarterly	Monthly
<b>Short-term</b>				
AFR	5.63	5.55	5.51	5.49
110% AFR	6.20	6.11	6.06	6.03
120% AFR	6.77	6.66	6.61	6.57
<b>Mid-term</b>				
AFR	7.07	6.95	6.89	6.85
110% AFR	7.80	7.65	7.58	7.53
120% AFR	8.51	8.34	8.25	8.20
<b>Long-term</b>				
AFR	7.88	7.73	7.66	7.61
110% AFR	8.68	8.50	8.41	8.35
120% AFR	9.50	9.28	9.17	9.11

## PROPERTY

**THEFT.** The defendants were convicted of criminal theft in the harvesting of a grain crop. The crop was planted by one of the defendants on land which was the subject of several civil cases involving foreclosures and partitioning. The court acknowledged that ownership of a growing crop follows a change in ownership of the land, that several exceptions were available and not litigated in the criminal proceedings. Thus, a legitimate dispute as to ownership of the crop existed and the criminal proceeding was an improper method of resolving the dispute. The

criminal conviction was reversed. **State v. Brakke, 474 N.W.2d 878 (N.D. 1991).**

## SECURED TRANSACTIONS

**FARM PRODUCTS.** The debtors operated a chicken farm under a contract with a third party who supplied the chicks, feed and medication. The debtors had granted a security interest to the FmHA in all crops growing or to be grown and had assigned the proceeds of the sale of the mature chickens to or through the third party. The FmHA asserted its security interest in two payments to the debtor from the third party under the chicken raising contract. The court held that the security interest did not reach the payments because the proceeds were not from the crops grown by the debtor. The court also held that the assignment did not reach the proceeds because title to the chickens under the contract always remained with the third party; therefore no sale occurred and the assignment only reached proceeds from the sale of the chickens. **In re Barton, 132 B.R. 23 (Bankr. W.D. Ark. 1991).**

## CITATION UPDATES

**McLennan v. U.S., 24 Cls. Ct. 102 (1991)** (charitable deduction) see p. 182 *supra*.

**Heyen v. U.S., 945 F.2d 359 (10th Cir. 1991), aff'g, 731 F. Supp. 1488 (D. Kan. 1990)** (gift) see p. 180 *supra*.

**Est. of Reno, 945 F.2d 733 (4th Cir. 1991), vac'g on reh'ing, 916 F.2d 955 (4th Cir. 1990)** (marital deduction) see p. 181 *supra*.

**In re Gran, 131 B.R. 843 (E.D. Ark. 1991), aff'g, 108 B.R. 668 (Bankr. E.D. Ark. 1989)** (embryo transplant activity) see p. 126 *supra*.

## BACK ISSUES

Back issues of Volumes 2 of the Agricultural Law Digest may be ordered for \$5.00 each from Agricultural Law Digest, P.O. Box 5444, Madison, Wisconsin 53705. The following lists the issue numbers and the titles of the articles by Dr. Harl published in issues 13 through 23 of Volume 2. See Volume 2, No. 12 for a publication list of Nos. 1 through 12.

No. 13 "Handling Commodity Credit Corporation Loans"	No. 18 "Making Valid Disclaimers"
No. 14 "Divisive Corporate Reorganizations" Property"	No. 19 "Disclaiming the Survivorship Interest in Joint Tenancy"
No. 15 "Repossessing Land"	No. 20 "Generation Skipping-Transfers Subject to Tax"
No. 16 "Interest Rates on Installment Sales"	No. 21 "Generation Skipping-The \$1 Million Exemption"
No. 17 "Renting Farm Machinery at Retirement or Otherwise"	No. 22 "Generation Skipping-Planning Principles"
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