Docket: 2013-2024(GST)I

BETWEEN:

SHEILA DIFLORIO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 28, 2014, at Toronto, Ontario.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Counsel for the Appellant:	Leigh Somerville Taylor
Counsel for the Respondent:	Tony Cheung

AMENDED JUDGMENT

The appeal from the assessment made under Part IX of the *Excise Tax Act* for the reporting periods January 1, 2004 to December 31, 2006 is allowed, **with actual costs incurred for counsel**, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant was not in a partnership with her husband during the periods at issue and therefore she is not jointly liable for any Goods and Services Tax owed by her husband's business.

This amended judgment is issued in substitution to the judgment issued on March 5, 2014.

Signed at Ottawa, Canada, this 22nd day of April 2014.

"Gerald J. Rip"

Rip C.J.

Citation: 2014 TCC 67
Date: 20140422
Docket: 2013-2024(GST)I

BETWEEN:

SHEILA DIFLORIO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Rip C.J.

[1] Sheila Di Florio appeals from an assessment of tax purportedly in accordance with Part IX of the *Excise Tax Act* ("*Act*") for the reporting period January 1, 2004 to December 31, 2006 ("Period") on the basis she was a partner with her former husband in the business of selling drugs and is therefore jointly liable for any Goods and Service Tax ("GST") owed by the partnership. Mrs. DiFlorio denies she was a partner in the business.

[2] The GST assessment was preceded by a net worth assessment pursuant to the *Income Tax Act* against both the appellant and Mr. DiFlorio for their 2004, 2005 and 2006 taxation years on the basis each did not report income, from a partnership carrying on business, referred to as "drug business". Mrs. DiFlorio's appeals were filed and the Minister of National Revenue ("Minister") and Mrs. DiFlorio consented to judgment reducing assessed income to less than $28,000 for each year.

[3] The Minister originally assessed the purported partnership for GST, interest and penalties aggregating $35,649 on December 4, 2009 which, upon Objection, was reduced to $16,536. The assessment at bar also includes penalties for failure to file GST returns (section 280.1), remit tax on time for the Period (subsection 228(2)), and late remission (subsection 280(1)). There was no imposition of a penalty for gross

negligence (subsection 272.1(5)) not withstanding the appellant's reference in her notice of appeal.

[4] During the Period Mrs. DiFlorio was married to Sandy DiFlorio; they have since divorced. The business allegedly carried on by the DiFlorio's involved the production and sale of prohibited performance enhancing drugs for racehorses in Ontario.

[5] Mr. DiFlorio distributed drugs and medication to participants in the horse racing industry through his website. He was charged in April, 2006 with unlawful fabrication, packaging and distribution of drugs without a licence and the unlawful sale of a Schedule F drug (erythropoietin − commonly known as EPO) contrary to the *Food and Drugs Act*. He pled guilty to the charges. The appellant was not charged with any offence. Mr. DiFlorio was not a witness at the hearing.

[6] Mrs. DiFlorio described herself as a "stay at home mom", not knowing what her husband was up to. She was aware, however, that "he went to the track a lot" and worked in their home basement. It was in the basement that Mr. DiFlorio prepared the drugs and packaged them for shipment.

[7] The appellant did much of the family banking. She shared bank accounts with Mr. DiFlorio. She changed money at the bank, deposited his pay cheques as well as government cheques and cheques given as gifts. She "always" endorsed the cheques. Household bills were paid by Mr. DiFlorio.

[8] From time to time couriers would attend at the DiFlorio home to pick up parcels for delivery. Mrs. DiFlorio would hand over the packages to the courier. The appellant never went to a courier's office. Mrs. DiFlorio insisted that she did not "box" the parcels; that was done by Mr. DiFlorio. The package was addressed by her husband and, she stated, she knew none of the addressees.

[9] Mr. DiFlorio had been licenced as a race horse owner by the Ontario Racing Commission ("ORC"). The licence expired in September, 1997 and was not renewed.

[10] However, Mrs. DiFlorio was also licenced as a horse owner with the ORC; her first licence was issued in 2003 and her second licence in 2004 and expired in 2005. Mrs. DiFlorio at first denied ever having a licence with the ORC and then stating that she "can't recall".

[11] The appellant did not deny that she visited the track but indicated that she did not do so with any enthusiasm. She declared she hated the smell of the barn. She did meet people at the track. On or about April 18, 2003, Mrs. DiFlorio appointed an agent, Blake Curran, to act on her behalf to claim horses. She did not deny her signature on the particular documents.

[12] With respect to her ORC licences, Mrs. DiFlorio asserted that she "trusted" her husband. I note that Mrs. DiFlorio's address on the Renewal Application for Standardbred Licence is that of Mr. DiFlorio's employer and not the home address of the DiFlorios at the time.

[13] Mrs. DiFlorio insisted on several occasions during both examination-in-chief and cross-examination that "all I did was my household chores" and "didn't know what he (Sandy DiFlorio) was doing".

[14] Mr. Vernon Sargeant, an Appeals Officer of the Canada Revenue Agency ("CRA"), testified on behalf of the Crown. The auditor who originally considered Mrs. DiFlorio's tax return is no longer employed by the CRA. Mr. Sargeant reviewed all material in the appellant's file: the auditor's reports, correspondence, working papers. Mr. Sargeant confirmed the income tax assessments against Mrs. DiFlorio were based on a net worth due to "illegal activity". He also confirmed the income tax assessments led to the GST assessments.

[15] Mr. Sargeant produced much, if not all, of the contents of the files of Mr. DiFlorio and that of Mrs. DiFlorio. The majority of the material appears to be related to Mr. DiFlorio. For example, the Summary of Net Worth refers to both Mr. DiFlorio and Mrs. DiFlorio, the schedule of personal expenditures refers to the expenditures of Mr. DiFlorio. Of twelve bank or financial accounts and credit card accounts, five were held jointly by the DiFlorios, six were in the name of Mr. DiFlorio and one in the name of Mrs. DiFlorio. All were applied in the calculation of the net worth of both Mr. DiFlorio and Mrs. DiFlorio. A shareholder loan account of a corporation in which Mr. DiFlorio appears to have owned shares was analyzed to determine Mr. DiFlorio's loan balance as of December 31, 2003. In short, the calculation of the DiFlorio family's net worth relied substantially on Mr. DiFlorio's finances and very little on Mrs. DiFlorio's. On this basis, both Mr. DiFlorio and Mrs. DiFlorio were assessed unreported income in 2004, 2005 and 2006 and, in turn, for unreported GST.

[16] The appellant personally was not a GST registrant during the Period. According to a GST audit report by the CRA, the CRA registered a partnership

account for Sandy DiFlorio and Sheila DiFlorio for "purposes of assessing GST resulting from audit findings, due to the fact that they both were attributed 50% of the Net Worth Assessment". Earlier in the audit report the author writes "that even though Sheila DiFlorio wasn't charged with any criminal activity, she benefited from the criminal activities her husband was involved in … she also used the proceeds of the criminal activities of her husband to support her lifestyle and day-to-day expenditures as she didn't have any significant income from other sources … ".

[17] In a letter of October 28, 2011 to the erstwhile lawyer for the DiFlorios, Mr. Sargeant stated that since the lawyer at the time and an affidavit of Mr. DiFlorio's stated "that Sheila ran errands, mailed packages, had cheques paid to her and did banking all related to the business activities", the Appeals Branch of the CRA "has determined Sheila DiFlorio was involved in the business activities and as such is correctly included on the GST assessment". (These comments are also made in the Report on the Objection.) There was no allowance for input tax credits since there was no request for same, according to Mr. Sargeant.

[18] In his affidavit, Mr. DiFlorio also stated that:

> My wife Sheila does not have the knowledge or expertise to become involved in the development of my supplements. She would sometimes run errands and take items to UPS to mail them for me while I was at work but she was not involved in what I did. The cheques that came through in her name were because she sent some of the packages and so it was her name on the documentation that the horsemen would receive. This happened more in the early stages than later on and it was only a few of the horsemen who made this mistake. I did not see that there was a problem with the cheques being in her name and so never questioned it. She absolutely had no involvement in the research I was doing.

[19] I note Mrs. DiFlorio denied taking items to couriers.

[20] Mr. Sargeant acknowledged that in the majority of cases a net worth involves family if there are joint bank accounts and other finances. The CRA, he stated, does not necessarily allocate the increase in net worth to both husband and wife; "it depends on the circumstances." In fact, the CRA auditor made no finding that Mrs. DiFlorio was involved in the drug business or the racing business but nevertheless allocated 50 per cent of the increase in the family net worth to her.

[21] The issue, therefore, is whether during the Period the appellant carried on the drug business in partnership with her husband at the time.

[22] The activities took place in Ontario and, therefore, I should first refer to the *Ontario Partnership Act* ("*OPA*") to determine if a partnership existed between Mrs. DiFlorio and Mr. DiFlorio.

[23] Section 2 of the *OPA* reads:

> Partnership is the relation that subsists between persons carrying on a business in common with a view to profit, but the relation between the members of a company or association that is incorporated by or under the authority of any special or general Act in force in Ontario or elsewhere, or registered as a corporation under any such Act, is not a partnership within the meaning of this Act.

[24] The *OPA*, at section 3, states that one shall have regard to a list of rules to determine whether or not a partnership exist; the following rules may be relevant to the appeal at bar:

> 1. Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.
>
> 2. The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.
>
> 3. The receipt by a person of a share of the profits or a business is proof, in the absence of evidence to the contrary, that the person is a partner in the business, but the receipt of such a share or payment, contingent on or varying with the profits of a business, does not of itself make him or her a partner in the business, and in particular,
>
> (a) the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make the servant or agent a partner in the business or liable as such;
>
> (b) a contract for the remuneration of a servant or agent or a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;
>
> …

> (d) the advance of money by way of loan to a person engaged or about to engage in a business on a contract with that person that the lender is to receive a rate of interest varying with the profits, or is to receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such, provided that the contract is in writing and signed by or on behalf

[25] In addition, section 45 of the *OPA* states that rules of equity and of common law applicable to partnership continue in force, except so far as they are inconsistent with the express provisions of the *OPA*.

[26] The Supreme Court of Canada has considered the formation of a partnership on several occasions.[1] In each case the Court has confirmed that the three "essential ingredients" of a partnership are (1) a business; (2) carried on in common; and (3) with a view to profit.

[27] The inquiry into these "essential ingredients" is fact-specific and based upon the subjective intentions of the parties. In *Continental Bank*,[2] Justice Bastarache stated, at paragraph 23:

> The existence of a partnership is dependent on the facts and circumstances of each particular case. It is also determined by what the parties actually intended. As stated in *Lindley & Banks on Partnership* (17th ed. 1995), at p. 73: "in determining the existence of a partnership ... regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case".
>
> [Emphasis added.]

[28] In the appeal at bar "essential ingredients" (1) and (3) are clearly met. A business was carried on with a view to profit. It is clear from the evidence that the business was carried on at least by Mr. DiFlorio. Was the drug business carried on in common by the appellant and her former husband?

[29] The words "in common" mean that partners carry on a business together based on some sort of agreement. In *Backman*,[3] the Court held, at paragraph 21:

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1 *Continental Bank Leasing Corp. v. R.*, [1998] 4 C.T.C. 77, 98 D.T.C. 6501 at para. 22 ("*Continental Bank*"); *Backman v. R.*, [2001] 2 C.T.C. 11, 2001 D.T.C. 5149 ("*Backman*"); *Spire Freezers Ltd. v. R.*, [2001] 2 C.T.C. 40, 2001 D.T.C. 5158.

2 S*upra* note 1.

3 *Supra* note 1.

> In determining whether a business is carried on "in common", it should be kept in mind that partnerships arise out of contract. The common purpose required for establishing a partnership will usually exist where the parties entered into a valid partnership agreement setting out their respective rights and obligations as partners. ...

[30] In the present appeal, there is no evidence of any express agreement. However, a partnership agreement need not be expressed; it can be inferred from the conduct of parties. As stated in *The Law of Partnerships and Corporations*:[4]

> Whether an agreement exists is determined objectively, in the sense that persons may be characterized as partners without their knowledge and even contrary to their intention so long as the court decides that the circumstances show the existence of partnership. The agreement must demonstrate the intention to participate in the relationship that fits within the definition of partnership.
>
> [Footnotes omitted.]

[31] In the absence of an express partnership agreement, courts look to certain factors that indicate the existence of a partnership. Some of the judicially recognized factors are:[5]

- Sharing profits;
- Sharing responsibility for losses, including guaranteeing partnership debts;
- Jointly owning property;
- Controlling the partnership business;
- Participating in management;
- Stating an intention to form a partnership in a contract;
- Making government filings showing partnership (e.g., registration under business names legislation, tax returns);
- Access to information regarding the business;
- Signing authority for contracts, bank accounts;
- Holding oneself out as a partner;
- Contributing money, services, or property as capital (especially if the contribution is complementary to the contribution of others for the purpose of running a business);
- Full-time involvement in the business;
- Use of a firm name, perhaps in advertising; and
- A firm having its own personnel and address.

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4 J. Anthony van Duzer, *The Law of Partnerships and Corporations*, 3d ed., (Irwin Law, Toronto: 2009) at 36.

5 Taken from *Ibid* at 48.

[32] There is no specific guidance as to whether any factor, alone or in combination, is determinative. In *Continental Bank*, Bastarache J. cautioned that regard must be paid to the "whole facts of the case".[6] In *Backman*, Iacobucci and Bastarache JJ. advocated a common sense approach to this inquiry. At paragraph 26, the Court stated:

> Courts must be pragmatic in their approach to the three essential ingredients of partnership. Whether a partnership has been established in a particular case will depend on an analysis and weighing of the relevant factors in the context of all the surrounding circumstances. That the alleged partnership must be considered in the totality of the circumstances prevents the mechanical application of a checklist or a test with more precisely defined parameters.

[33] In the context of marriage, courts have been reluctant, though not unwilling, to find the existence of a partnership in the absence of an express agreement. In *A Practical Guide to Canadian Partnership Law*, Alison Manzer explains at section 3.65:[7]

> If the relationship between a husband and wife is apparently only that of a good spousal relationship, rather than specific partnership participation in business activities, it is likely a partnership will not be found. This is particularly the case where prior to the matter at hand, the spouses had never filed tax returns as partners or treated their assets or income as partnership assets or income.

[34] In *Sedelnick*,[8] Christie A.C.J.T.C (as he then was) canvassed authorities on business partnerships between spouses:

> In *Lindley on Partnership*, 14th Ed. (1979) (Scamell and Banks) it is stated at 64:
>
> > There is no reason why a married woman should not enter into partnership with her husband although as in the case of other potentially contractual obligations, the court will be less ready to infer a partnership where the parties are husband and wife.
>
> Drake [*Law of Partnership*, Charles D. Drake, 3rd ed. (1983)] said at 76:

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6 *Continental Bank*, *supra* note 1 at para. 23; majority of the Court not agreeing with Bastarache J, with respect to s. 34 of the *OPA*.

7 Alison R. Manzer, *A Practical Guide to Canadian Partnership Law*, loose-leaf (consulted on February 18, 2014), (Toronto: Thompson Reuters, 1996).

8 *Sedelnick Estate v. Minister of National Revenue*, 1986 CarswellNat 431, [1986] 2 C.T.C. 2102 ("*Sedelnick*").

> Clearly, husband and wife may enter into a valid partnership agreement, but in view of the reluctance of the Courts to presume that spouses living together in amity intend their discussions concerning money matters to have legal effect, it is doubly important that their wishes should be unequivocally set forth in a partnership deed.

[35] In *Sedelnick*, Christie A.C.J., ultimately held that, in the absence of a written partnership agreement, a joint bank account and joint ownership of farm properties and dwelling houses were not conclusive evidence of the existence of a partnership between a husband and wife. Specifically, he stated:

> Where there is no evidence of the existence of an express partnership agreement between husband and wife then in the absence of some special reason, which I cannot at the moment foresee, the existence of such a partnership should not be inferred from the conduct of the parties if that conduct is equally consistent with conduct arising out of the community of interests created by the marriage. This can embrace many activities which are purely commercial in nature**.**

[36] In *Bains v. The Queen*,[9] a married couple jointly owned commercial property which they leased. The Minister assessed them on basis that the rental income was income from a partnership. Sarchuk J. agreed. He found that the couple shared the profits and expenses from the property because the rental income went into a joint bank account.

[37] However, the Federal Court of Appeal overturned this Court's decision in *Bains*. The appellants were joint owners and not in partnership. Specifically, the appellate court held the use of joint bank account in this marital context was not determinative of a business partnership. At paragraph 7, Sharlow J.A. stated:

> … The use of a joint account in these circumstances is nothing more than a normal way of managing the family's resources. That is consistent with the appellants' contention that they were merely joint owners.

[38] In *Scott-Trask v. The Queen*,[10] Justice MacArthur found that the appellant, a fulltime schoolteacher, was not a partner in her husband's landscaping business, despite having registered and signing a bank loan as such. The Minister assessed the appellant for the business's GST liability when her husband declared bankruptcy. McArthur J. found that no partnership existed. There was no synergy between the

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9 *Bains v. R.*, 2005 CarswellNat 3739, 2005 FCA 378 rev'd *Bains v. R.* (2005), [2005] G.S.T.C. 83, 2005 TCC 156 ("*Bains"*).

10 *Scott-Trask v. R.*, 2008 CarswellNat 4138, 2008 TCC 638 ("*Scott-Trask*").

spouses as partners. Instead, the business was a sole proprietorship carried on by her husband.

[39] However, courts are not entirely unwilling to find the existence of a partnership between married persons. There are several cases where the courts have done so: *Loewen*,[11] *DenHaan*,[12] *Stefanson Farms*,[13] *Neufeld*,[14] and, *Duivenvoorde*.[15] In each case, the conduct of spouses went beyond that arising out of the community of interests created by the marriage. Specifically, there was clear evidence of one of the following factors suggesting the existence of a partnership:

- Sharing profits (*Loewen*, *Neufeld*);
- Signed partnership agreement (*Stefanson Farms*);
- Sharing responsibility for losses by guaranteeing partnership debts (*Duivenvoorde*);
- Contributing services and full-time involvement in the business (*Duivenvoorde*); or
- Filing income tax returns as partners (*Denhaan*).

[40] Courts are therefore reluctant to infer a business partnership between a husband and wife unless evidence of the intention to establish one is clearly made out. Conduct that is reflective of a good spousal relationship is insufficient. A different standard of proof is required than as between non-spouses.

[41] The respondent's position is that the appellant was a partner in her husband's drug business. Where there is an illegal activity a written partnership agreement normally will not exist, as in the case here. If a partnership between Mrs. DiFlorio and Mr. DiFlorio did exist it must be as a result of the conduct of the appellant and her former husband.

[42] The respondent suggests the following factors indicate such an agreement:

i) the appellant endorsed cheques from the sale of the drugs in joint bank accounts made payable to her;
ii) the appellant was involved in shipping the drugs;
iii) the appellant was a licensee ORC for the years 2004 and 2005;

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11 *Loewen v. R.*, 1998 CarswellNat 9, (sub nom. *Loewen v. Canada*) [1998] G.S.T.C. 6 ("*Loewen*").

12 *Denhaan v. R.*, 2008 CarswellNat 514, 2008 TCC 126 ("*Denhaan*").

13 *Stefanson Farms Ltd. v. R.*, 2008 CarswellNat 4729, 2008 TCC 682 ("*Stefanson Farms*").

14 *R. v. Neufeld*, 2009 CarswellNat 1950, 2009 TCC 352 ("*Neufeld*").

15 *Duivenvoorde v. R.*, 2011 CarswellNat 4600, 2011 TCC 525 ("*Duivenvoorde*").

iv) on occasion, the appellant met with people in the horse racing industry; and
v) the appellant appointed an agent to act on her behalf to claim horses.

[43] The foregoing facts, the respondent argues, differentiate the appellant's circumstances from those in *Scott-Trask*. In that case, the appellant was a schoolteacher with an independent source of income and she was not involved in her husband's business in any way. In *Scott-Trask*, Justice McArthur found that there was no "synergy" between the parties in respect of the business. At bar, the respondent submits the degree of the appellant's involvement in her husband's business implies an agreement to carry on the business in common. Her husband could not have operated his business without her. He was not licenced by the ORC. She was. He did not have access to the horse owners, stable owners and, racetracks. She did. That was their "synergy" as partners. He made the drugs; she advertised and distributed them.

[44] I do not agree. The appellant was, in her own words, "a stay at home mom". There was no evidence or suggestion to contradict this statement. Her involvement in the business is consistent with running errands, not participating in a business partnership. She handed over wrapped packages to couriers. She endorsed cheques made out to her in joint bank accounts. She trusted her husband and didn't inquire into his activities. At trial, counsel for the respondent conceded that the foregoing activities were consistent with those of a partner in marriage, not business. Furthermore, as in *Bains*, the use of joint bank accounts was nothing more than a normal way of managing the family's resources and by itself did not reflect a sharing of business profits.

[45] The respondent submits that factors iii) through v) in paragraph 42 serve to distinguish the appellant's involvement from that of a supportive wife or conduct reflective of a good spousal relationship. They meet the "higher standard" of circumstances required to find a partnership between spouses. These activities imply that she actively advertised and distributed her husband's drugs. In other words, she was an active participant in the business. Again, I do not agree.

[46] As to the ORC licence, the appellant could not recall having being issued one. The address listed on the appellant's Renewal Application for the ORC licence was her husband's work address. This is one indication that in all probability it was his doing. It is not unreasonable to expect that she simply signed what he asked her to, not realizing its legal significance. That is not unlike the situation in *Scott-Trask*. The same could be said for having authorized an agent to act on her behalf to claim

horses. These facts simply suggest the appellant supported her former husband's business as a partner in marriage, not as a business partner.

[47] The respondent's position is that "someone must have been a go-between" as between Mr. DiFlorio and his customers. The implication is that the appellant was that "someone". But the evidence suggests there was no need for a "go-between". The appellant's husband operated the drug business through a website. Clients registered with his site. He pre-screened registrants to ensure they were not law enforcement. It is within reason that he ran his business from his computer without Mrs. DiFlorio's knowledge.

[48] The appellant denied any significant involvement in the drug business without hesitation. She admitted to running errands and visiting stables. But she stated she did not know what her husband was doing. The respondent did not offer any evidence to contradict her testimony. On the whole, I will accept the evidence of Mrs. DiFlorio and allow her appeal **with actual costs incurred for counsel**.

[49] These amended reasons for judgment are issued in substitution to the reasons for judgment issued on March 5, 2014.

Signed at Ottawa, Canada, this 22nd day of April 2014.

"Gerald J. Rip"

Rip C.J.

CITATION:	2014 TCC 67
COURT FILE NO.:	2013-2024(GST)I
STYLE OF CAUSE:	SHEILA DIFLORIO v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 28, 2014
REASONS FOR JUDGMENT BY:	The Honourable Gerald J. Rip, Chief Justice
DATE OF AMENDED JUDGMENT:	April 22, 2014

APPEARANCES:

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Counsel for the Respondent:	Tony Cheung

COUNSEL OF RECORD:

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