Docket: 2011-3726(IT)G

BETWEEN:

BELCOURT PROPERTIES INC./LES PROPRIÉTÉS BELCOURT INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Konstantinos Voggas Elisabeth Robichaud
Counsel for the Respondent:	Marie-France Camiré

ORDER

The costs awarded to the appellant shall be taxed by the taxing officer in accordance with the Tariff on the basis that the appeal was a Class A proceeding, subject to supporting documentation being provided, the whole in accordance with my decision in the Reasons for Order.

Signed at Montreal, Quebec, this 22nd day of October 2014.

"Lucie Lamarre"

Lamarre J.

Citation: 2014 TCC 316
Date: 20141022
Docket: 2011-3726(IT)G

BETWEEN:

BELCOURT PROPERTIES INC./LES PROPRIÉTÉS BELCOURT INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Lamarre J.

[1] By judgment dated June 27, 2014, I allowed on the basis that the profit on the sale of the two properties at issue was properly declared as a capital gain the appeal filed by the appellant from the reassessment made under the *Income Tax Act* (**ITA**) for its 2005 taxation year. I awarded costs to the appellant and, at its request, I accepted the filing of written submissions by each party on the amount of costs to which the appellant is entitled. I have now received both parties' submissions and I will address the two issues raised by the parties.

First issue: Class of proceeding under Schedule II, Tariff A and Tariff B of the *Tax Court of Canada Rules (General Procedure)* (**Rules**).

[2] The appellant instituted its appeal as a Class C proceeding under the Rules. The respondent is of the view that it was a Class A proceeding.

[3] Section 1 of Tariff A of Schedule II addresses the classes of proceedings and reads as follows:

SCHEDULE II

Tariff A — Tariff of Fees

1. Classes of Proceedings — Subject to section 1.1, for purposes of this Tariff and Tariff B, there are three classes of proceedings as follows:

(*a*) Class A proceedings which include

(i) appeals in which the aggregate of all amounts in issue is less than $50,000, and

(ii) appeals in which a loss has been determined under subsection 152(1.1) of the *Income Tax Act* and the amount that is in issue is less than $100,000; and

(*b*) Class B proceedings which include

(i) appeals in which the aggregate of all amounts in issue is $50,000 or more but less than $150,000,

(ii) appeals in which a loss has been determined under subsection 152(1.1) of the *Income Tax Act* and the amount that is in issue is $100,000 or more but less than $300,000,

(iii) a reference under section 173 or 174 of the *Income Tax Act*, section 310 or 311 of the *Excise Tax Act*, section 97.58 of the *Customs Act*, section 51 or 52 of the *Air Travellers Security Charge Act*, section 204 or 205 of the *Excise Act, 2001* or section 62 or 63 of the *Softwood Lumber Products Export Charge Act*, *2006*, and

(iv) any proceeding not otherwise specifically provided for under this section; and

(*c*) Class C proceedings which include

(i) appeals in which the aggregate of all amounts in issue is $150,000, or more, and

(ii) appeals in which a loss has been determined under subsection 152(1.1) of the *Income Tax Act* and the amount that is in issue is $300,000 or more.

[4] The appellant is of the view that the aggregate of all amounts in issue in this appeal is $150,000 or more whereas the respondent argues that it is less than $50,000.

[5] The appellant summarized its approach as to the amounts in issue as follows in paragraphs 6, 7, 8 and 9 of its submissions:

> 6. In addition to the amount of tax owed ($46,810) with respect to the Appellant's taxation year ended on December 31, 2005 as a direct result of the Notice of reassessment dated August 26, 2011 (**Appellant's Book of Documents, Exhibit A-1, Tab 20**), the Appellant was also the subject of a proposed assessment pursuant to a letter dated September 29, 2011, advising the Appellant that following the said assessment an amount of $420,952.50 would be assessed against it pursuant to Part III of the *Income Tax Act*, as appears from Document 1 attached herewith under Annex B;
>
> 7. The Appellant as such considered that the Notice of reassessment under appeal entailed an overall disputed tax debt that exceeded the amount of $150,000 referred to in Schedule II of the *Tax Court of Canada Rules (General Procedures* [*sic*]*)* being a minimum of $467,786 in the aggregate (being, the tax liability under Part I in the amount of $46,810 and under Part III in the amount of $420,952);
>
> 8. Moreover the change of treatment of the said gains also resulted in an adjustment to the Appellant's refundable dividend tax on hand account, whereby the gain resulting from the disposition of the two properties under dispute would no longer qualify as investment income following the treatment by the CRA of the gain as business income, resulting in a decrease to the Appellant's balance in the refundable dividend tax on hand account. This adjustment alone represents an effective cost to the Appellant of over $150,000;
>
> 9. In light of the adjustments made both to its income tax payable for the 2005 taxation year end and its capital dividend account and tax liability under Part III of the *Income Tax Act* (without even considering the change to its refundable dividend tax on hand account), the Appellant submits that the total amounts assessed as a result of the Notice of reassessment under appeal was substantially over $150,000 in tax and that as such the present appeal was properly instituted as a Class "C" proceeding.

[6] The appellant has accordingly prepared its bill of costs on the basis that its appeal was a Class C proceeding under the Tariff.

[7] The respondent is of the view that the amount of tax owed with respect to the assessment that was the object of the appeal before this Court was $46,810.

[8] The respondent states the following in paragraphs 23 to 26 of her submissions:

> 23. The respondent agrees with the appellant that the amount of tax owed with respect to the Appellant's 2005 taxation year, as a result of the notice of assessment dated August 26, 2011, is $46,810.[7] That assessment is the only one under appeal[8] and the amount of tax that is no longer payable by the taxpayer, further to this Court's decision, is $46,810.
>
> 24. The appellant's assertion that an amount of part III tax should form part of the aggregate of all amounts in issue is simply not supported by the wording of the Act or the case law.
>
> 25. The appellant's part III tax was never assessed.[9] Furthermore, this part III tax debt is hypothetical.[10] If a part III tax had been assessed, it would have been a part III assessment for the 2008 taxation year of the appellant, which was obviously not part of the appeal.
>
> 26. It follows that this amount cannot be part of the aggregate of all amounts in issue as stated in Schedule II, Tariff A, section 1 of the Rules and section 2.1 of the Act.

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7 Appellant's submissions for costs at para. 6.

8 The assessment under appeal is the one issued pursuant to subsection 165(3) ITA on August 26, 2011.

9 Appellant's submissions for costs, tab B-1[.]

10 For further indication that this amount is hypothetical, please see paragraph 4 of the letter dated September 29, 2011, at tab B-1 of the appellant's submissions on costs. The appellant and the shareholder could have elected for the dividend to be taxed in the hand [s] of the shareholder. That hypothetical debt would have been the debt of a different taxpayer than the appellant and taxed in the 2008 taxation year.

[9] The words "the aggregate of all amounts" in Tariff A have the same meaning as in section 2.1 of the *Tax Court of Canada Act* (**TCC Act**) (see *James v. The Queen*, 2001 CanLII 26508, [2001] 4 C.T.C. 2919, par. 8; *De Mond v. R.*, 2000 CarswellNat 1777, [2000] 4 C.T.C. 2203, par. 16).

[10] Section 2.1 of the TCC Act reads as follows:

> **2.1 Interpretation** — For the purposes of this Act, "the aggregate of all amounts" means the total of all amounts assessed or determined by the Minister of National Revenue under the *Income Tax Act*, but does not include any amount of interest or any amount of loss determined by that Minister.

[11] The key issue here is whether "the aggregate of all amounts in issue" can include the proposed assessment in the amount of $420,952 for Part III tax.

[12] Both parties agree that the reassessment dated August 26, 2011 that was the object of the appeal represented an increase in tax of $46,810 pursuant to Part I of the ITA with respect to the appellant's 2005 taxation year.

[13] As a result of that reassessment, the Canada Revenue Agency (**CRA**) revised the calculation of the appellant's capital dividend account (**CDA**). By letter dated September 29, 2011, the CRA advised the appellant that the capital dividend declared and payable on December 30, 2008 exceeded the CDA by $701,588 and that this excess amount was subject to Part III tax under the ITA in the amount of $420,952.50 (Annex B, Document 1, Appellant's Submissions for Costs).

[14] It is clear, if one disregards the Minister's characterization of the profit from the sale of the two properties at issue as business income (rather than as a capital gain), that the non-taxable portion of the capital gain was correctly added to the CDA, as a result of which the full amount of the dividend declared in 2008 was a capital dividend, and thus no Part III tax was payable as no excess dividend arose.

[15] To my knowledge, the CRA had not issued a notice of assessment for Part III tax arising from any excess dividend by the time the notice of appeal was filed on November 24, 2011, nor did it issue such a notice of assessment at any subsequent time.

[16] Now, because the appeal from the 2005 assessment has been allowed on the basis that the profit from the sale of the two properties was properly characterized as a capital gain, the proposed assessment will vanish as the appellant is not liable for Part III tax.

[17] The question, therefore, is whether, despite the fact that the appeal was brought against the reassessment issued for the 2005 taxation year, it can be said that "the aggregate of all amounts in issue" also includes the proposed Part III tax

on the basis that it constituted an amount determined by the CRA that flowed directly from the dividend declared in 2008, which was determined to be an excess dividend rather than a capital dividend as a result of the 2005 reassessment. In other words, the proposed Part III tax depended on whether the profit on the sale of the properties which were at issue before me for the 2005 taxation year was to be treated as a capital gain or as business income. As I said before, since the appeal has been allowed, Part III tax is no longer exigible.

[18] In its submissions, at paragraphs 13 to 19, the appellant presented its arguments as follows:

> 13. It is well established that the liability for taxes arises under the *Income Tax Act* without the necessity of an assessment being issued;
>
> 14. The fact that the CRA choses [*sic*] to issue separate assessments for separate parts of the *Income Tax Act* does not impact the fact that a tax liability exists;
>
> 15. Similarly, the fact that the CRA choses [*sic*] to carry forward certain tax liabilities deriving from reassessment to further taxation years does not impact the fact that a tax liability has arisen in the course of the year affected by a disputed reassessment;
>
> 16. In fact, said tax liability is deemed to be determined, as a mere consequence of the reassessment issued by the CRA, even though it neglects to collect it in the same taxation year;
>
> 17. As to the specific question of the tax liability arising under Part III of the *Income Tax Act*, we further submit that this tax liability was clearly understood by the parties as being affected and thus in dispute in the course of the current appeal;
>
> 18. More precisely, it was assumed by both parties that a dismissal of the current appeal would also dispose of the Part III tax liability;
>
> 19. The Part III tax liability directly results from the change in treatment from capital gain to business income by the CRA with respect to the proceeds from the disposition of the two properties under dispute and therefore would not exist [if] the treatment of the gain had been allowed as a capital gain;

[19] The flaw in the appellant's reasoning is that the CRA does not choose to issue separate assessments. The Part III tax will only arise if the corporation elects

to pay to its shareholder a capital dividend which is in excess of the amount of the capital dividend account. It is only when an election is made by the corporation that the Minister may assess the Part III tax and only then may that assessment be objected to or appealed (section 185 of the ITA).

[20] I agree with the appellant that the 2005 reassessment under appeal had a direct impact on the calculation of the CDA, which in turn would have generated Part III tax in 2008 if, for example, the appellant had not appealed the 2005 assessment or if the appeal had been dismissed.

[21] However, I agree with the respondent that, for the purpose of establishing the class of proceeding under Tariff A, the assessment under appeal was the one issued under Part I of the ITA for the 2005 taxation year, and the appeal was filed pursuant to subsection 169(1) of the ITA.

[22] The fact that, as a result of the 2005 reassessment, the Minister revised the calculation of the CDA and determined that an amount of $420,952 could be assessed under Part III of the ITA (Part III tax) does not, in my view, have an impact on the amount at issue in the appeal before the Court. I say so for the following reasons.

[23] First, the letter referred to by the appellant, which was sent by the Minister on September 29, 2011 (Annex B, Document 1, Appellant's Submissions for Costs), clearly stated that the new figures were based on information on hand and were subject to revision should further adjustments be made to the appellant's income tax returns. I gather from this statement that those figures were not yet at issue.

[24] Second, in *Dekker v. The Queen*, 93 DTC 1481, [1993] T.C.J. No. 694 (QL), 1993 CarswellNat 1153, this Court had to determine what was "the aggregate of all amounts in issue in an appeal under the *Income Tax Act*" for the purposes of establishing whether the taxpayer was entitled to an oral discovery of the Crown pursuant to subsection 17.3(1) of the TCC Act. Associate Chief Judge Christie made the following analysis at page 1484 DTC, paragraphs 15 and 16 QL, 20 to 22 CarswellNat:

> The subsection provides:

> 17.3(1) Where the aggregate of all amounts in issue in an appeal under the *Income Tax Act* is $15,000 or less, or where the amount of the loss that is determined under subsection 152(1.1) of that Act and that is in issue is $30,000 or less, an oral examination for discovery shall not be held unless the parties consent thereto or unless one of the parties applies therefor and the Court is of the opinion that the case could not properly be conducted without that examination for discovery.

The key words for present purposes are: "amounts in issue in an appeal under the *Income Tax Act*". Appeals under that Act of the kind presently under consideration are appeals from the Minister's assessment or reassessment of the appellant's liability to income tax in respect of a particular taxation year. This, to my mind is clearly the combined effect of subsections 150(1), 152(1), 165(1) and (3), 169(1) of the Act and it is the amount of tax in dispute in a particular taxation year that is to be compared to the $15,000 in subsection 17.3(1) to determine whether an oral examination for discovery is barred unless the parties consent thereto or the Court is of the opinion that the case could not properly be conducted without an examination for discovery.

In calculating the figure to be compared to the $15,000 the ramifications of an assessment or reassessment made in a particular year as it relates to liability for tax in future years are not to be included. This is the approach adopted by the appellant, which I regard as erroneous. It must be borne in mind that subsection 17.3(1) does not speak of total of amounts of tax liability arising out of a reassessment, but rather it refers to amounts in issue in an appeal. . . .

[My emphasis.]

[25] In *Maier v. Canada*, [1994] T.C.J. No. 1260 (QL), 1994 CarswellNat 3242 (referred to with approval by Webb J. in *Pink Elephant Inc. v. The Queen*, 2011 TCC 395, par. 17), the question was whether "the aggregate of all amounts in issue" reached the threshold amount for the application of the general procedure to an informal procedure appeal pursuant to section 18.12 of the TCC Act. Judge Garon came to the conclusion that "the aggregate of all amounts" in issue in the context of the TCC Act referred to the total of all amounts in issue in a single assessment made under the ITA (par. 5). Judge Garon stated the following at paragraph 6:

> 6 Since a right of appeal under section 169 of the *Income Tax Act* is given in respect of each assessment issued under the *Income Tax Act* it makes more sense to consider that the matter of the applicable procedure must be decided in relation

> to the aggregate of all amounts in issue in each assessment. I am fortified in this approach by a close examination of the wording of section 18.11 where reference is made to an appeal and to an assessment. . . .
>
> [My emphasis.]

[26] It is worth reproducing subsections 18.11(1) and (2) of the TCC Act:

> **18.11 (1) General procedure to apply** — The Court may order, on application of the Attorney General of Canada, that sections 17.1 to 17.8 apply in respect of an appeal referred to in section 18.
>
> **(2) When Court must order that general procedure apply** — The Court shall grant an application under subsection (1) where
>
> (*a*) the outcome of the appeal is likely to affect
>
> (i) any other appeal of the appellant, or
>
> (ii) any other assessment or proposed assessment of the appellant, whether or not that assessment or proposed assessment relates to the same taxation year; and
>
> (*b*) the aggregate of all amounts
>
> (i) in issue in the appeal,
>
> (ii) likely to be affected in the other appeal referred to in subparagraph (*a*)(i), and
>
> (iii) likely to be affected in the other assessment or proposed assessment referred to in subparagraph (*a*)(ii),
>
> exceeds $25,000.

[27] It is interesting to note that paragraph 18.11(2)(*b*) differentiates (i) the aggregate of all amounts in issue in the appeal, (ii) the aggregate of all amounts likely to be affected in another appeal, and (iii) the aggregate of all amounts likely to be affected in another assessment or proposed assessment, whether or not that assessment or proposed assessment relates to the same taxation year. Such a distinction in this particular section of the Rules is in line with this Court's

interpretation, in the above cases, with regard to the meaning of "the aggregate of all amounts in issue" in an appeal and, in my view, can very well be applied here.

[28] Further, as stated in *De Mond, supra*, par. 23 (referred to by the appellant), alluding to the Federal Court of Appeal's decision in *Canada v. Consumers' Gas Co.*, [1987] 2 F.C. 60, [1987] 1 C.T.C. 79, the total amount in issue is not the amounts that were considered or determined in the process but rather the final product of the process.

[29] Here, the Part III tax was the object of a proposed assessment only, and even though it had been the object of a determination by the Minister, it was not at issue in the appeal before me, which appeal was filed pursuant to subsection 169 of the ITA against the assessment issued for the 2005 taxation year. There was no appeal pursuant to section 185 of the ITA in relation to Part III tax, as Part III tax was never assessed.

[30] I therefore conclude that the aggregate of all amounts in issue before me was $46,810 and that this appeal was a Class A proceeding.

Second issue: Appellant's request for increased costs above the applicable tariff amount in accordance with subsection 147(1) and paragraphs 147(3)(*d*) and (*j)* of the Rules

[31] Subsections, 147(1) and 147(3), (3.1), (3.2) and (3.3) of the Rules read as follows:

> COSTS
>
> **147. (1) General Principles** — The Court may determine the amount of the costs of all parties involved in any proceeding, the allocation of those costs and the persons required to pay them.
>
> […]
>
> **(3)** In exercising its discretionary power pursuant to subsection (1) the Court may consider,
>
> (*a*) the result of the proceeding,
>
> (*b*) the amounts in issue,
>
> (*c*) the importance of the issues,

(*d*) any offer of settlement made in writing,

(*e*) the volume of work,

(*f*) the complexity of the issues,

(*g*) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,

(*h*) the denial or the neglect or refusal of any party to admit anything that should have been admitted,

(*i*) whether any stage in the proceedings was,

(i) improper, vexatious, or unnecessary, or

(ii) taken through negligence, mistake or excessive caution,

(*i.1*) whether the expense required to have an expert witness give evidence was justified given

(i) the nature of the proceeding, its public significance and any need to clarify the law,

(ii) the number, complexity or technical nature of the issues in dispute, or

(iii) the amount in dispute; and

(*j*) any other matter relevant to the question of costs.

(3.1) Unless otherwise ordered by the Court, if an appellant makes an offer of settlement and obtains a judgment as favourable as or more favourable than the terms of the offer of settlement, the appellant is entitled to party and party costs to the date of service of the offer and substantial indemnity costs after that date, as determined by the Court, plus reasonable disbursements and applicable taxes.

(3.2) Unless otherwise ordered by the Court, if a respondent makes an offer of settlement and the appellant obtains a judgment as favourable as or less favourable than the terms of the offer of settlement or fails to obtain judgment, the respondent is entitled to party and party costs to the date of service of the offer and substantial indemnity costs after that date, as determined by the Court, plus reasonable disbursements and applicable taxes.

(3.3) Subsections (3.1) and (3.2) do not apply unless the offer of settlement

(*a*) is in writing;

(b) is served no earlier than 30 days after the close of pleadings and at least 90 days before the commencement of the hearing;

(*c*) is not withdrawn; and

(*d*) does not expire earlier than 30 days before the commencement of the hearing.

[32] The appellant's offer to the respondent that the appeal be allowed without costs was made less than two weeks before the hearing. This was not accepted by the respondent.

[33] The appellant relied on this offer to argue that a departure from the applicable tariff is justified in accordance with subsection 147(3) of the Rules. In the appellant's view, given the unreliability of the auditor's work and conclusions, the respondent should have determined that her position in the appeal was weak and should have given consideration to the appellant's offer of settlement and conceded the case, rather than forcing the appellant to incur the costs of litigation and going to trial (Appellant's Submissions for Costs, par. 43). In the appellant's view, the issue to be decided in the appeal "concerned a 'yes-no' issue" with regard to which no element of compromise was possible (Appellant's Submissions for Costs, par. 46). The appellant said that it could only make a settlement offer wherein the entire amount under dispute was treated as capital gains rather than as business income (referring to *CIBC World Markets Inc. v. The Queen*, 2012 FCA 3).

[34] In such a case, the appellant contends, a settlement offer for the full amount of the claim can be a valid settlement offer for the purpose of determining costs.

[35] The appellant adds that no new facts or arguments were presented during the trial stage and that the respondent had all relevant information needed in order to determine the merit of its case without obliging it to incur the cost of court procedures (par. 52, Appellant's Submissions for Costs).

[36] With respect, I differ with the appellant. The case before me was what we call in tax jargon a "trading case".

[37] The issue in such cases mainly revolves around how the judge will interpret the facts surrounding the acquisition, retention and disposition of the property at issue. The judge has to rule, among other factors, on the intention of the taxpayer when it acquired the property and what particular fact or event triggered the sale of the property.

[38] It is true, as was argued by the appellant, that the matter of secondary intention was not raised in the assumed facts taken into account by the auditor. However, this matter was nonetheless pleaded by the respondent in her reply to the

notice of appeal. The appellant, not having the onus of proof in this regard, certainly benefited from the lesser burden imposed on it. However, it was not unreasonable for the Crown to try to argue secondary intention in the hope of convincing the Court of the existence of such intention.

[39] The present case can be distinguished from the cases of *Walsh v. The Queen*, 2010 TCC 125, 2010 CarswellNat 470, 2010 DTC 1109, or *Langille v. The Queen*, 2009 TCC 540, 2009 CarswellNat 3309, 2009 DTC 1351, referred to by the appellant in that a trading case is the type of case where the respondent may need to have the complete facts come out under oath and be tested in cross-examination. Furthermore, there was not just one witness called by the appellant and, as mentioned by the respondent, one of the witnesses called had never been examined by the Crown before.

[40] I do not agree with the appellant that there was no possible element of compromise and that the only option was for the appellant, which really wanted to settle the case before the hearing, to offer the respondent a settlement whereby she would consent to judgment for the full amount sought, without costs. There were two properties at issue and the circumstances surrounding the acquisition and the sale of those properties differed.

[41] Finally, as argued by the respondent, the so-called offer of settlement was not made well before trial, but was presented very close to the trial. I agree with the respondent that this element (the timing of the offer) does not call for a departure from the party and party costs to which the appellant is entitled under the Tariff (subsection 147(3.3) of the Rules).

[42] Having reviewed the factors enumerated in subsection 147(3) of the Rules, I am of the view that the appellant has not demonstrated that the Crown's position did not have a reasonable degree of tenability. I find that there were no unusual circumstances that would justify my assessing an increased award of costs against the respondent.

Decision

[43] I therefore conclude that the costs awarded to the appellant shall be taxed by the taxing officer in accordance with the Tariff on the basis that the appeal was a Class A proceeding, subject to supporting documentation being provided.

[44] In doing so, I direct the taxing officer to accept, among the fees in the appellant's bill of costs that are contested by the respondent, the fee for second counsel during the hearing, in accordance with paragraph 1(1)(*h*) of Tariff B, and all supported photocopy fees.

[45] The appellant shall also be awarded fees for services after judgment in accordance with paragraph 1(1)(*i*) of Tariff B.

[46] The appellant shall be reimbursed the excess amount paid in filing its appeal as a Class C proceeding rather than a Class A proceeding.

Signed at Montreal, Quebec, this 22nd day of October 2014.

"Lucie Lamarre"

Lamarre J.

CITATION:	2014 TCC 316
COURT FILE NO.:	2011-3726(IT)G
STYLE OF CAUSE:	BELCOURT PROPERTIES INC./LES PROPRIÉTÉS BELCOURT INC. v. THE QUEEN
PLACE OF HEARING:	N/A
DATE OF HEARING:	N/A
REASONS FOR ORDER BY:	The Honourable Justice Lucie Lamarre
DATE OF ORDER:	October 22, 2014

APPEARANCES:

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Counsel for the Respondent:	Marie-France Camiré

COUNSEL OF RECORD:

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Name:	
Firm:	
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