

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “D”: NEW DELHI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SHRI KUL BHARAT, JUDICIAL MEMBER**

**ITA No. 2336/DEL/2022
Assessment Year: 2017-18**

SAC Finance Company limited, 26/F Tower One Time Square, 1 Matheson Street Causeway Bay, Hong Kong. PAN- AAYCS9516J	<u>Vs</u>	ACIT, Circle International Taxation 3(1)(2), New Delhi.
APPELLANT		RESPONDENT
Assessee represented by	Sh. S.K. Aggarwal, CA	
Department represented by	Sh. Vijay B. Vasanta, CIT(DR)	
Date of hearing	31.10.2023	
Date of pronouncement	22.11.2023	

ORDER

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order dated 27.07.2022, passed by the ACIT, Circle International Tax 3(1)(2), New Delhi u/s 143(3) read with section 144C(13) of the Income-tax Act, 1961, pertaining to the assessment year 2017-18. The assessee has raised following grounds of appeal:

“General

“1. On the facts and circumstances of the case and in law, the final assessment order passed by the Ld. AO under section 143(3) read with

section 144C (13) of the Act is erroneous and bad in law and passed in violation of natural justice.

2. *On the facts and circumstances of the case and in law, the Ld.AO has erred in assessing the income of the Appellant at INR. 16.69,27,557 as against loss of INR 4,69,740 returned by the Appellant.*

3. *On the facts and circumstances of the case and in law,*

a) the Ld. AO erred in exceeding jurisdiction in not following the order dated January 30, 2021 passed by Learned Assistant Commissioner of Income-tax, Transfer Pricing, DC/ ACIT TP Delhi 3(1)(2) ("Ld. TPO") under section 92CA of the Act, and thereby contravening the provisions of section 92CA (4) of the Act and available judicial precedents.

b) the learned Dispute Resolution Panel ("Ld. DRP") erred in stating that the Ld. AO is not precluded from re-examining/ re-evaluating the international transactions wherein certain facts have not been brought to the notice of Ld. TPO during the course of transfer pricing proceedings without pointing out/ substantiating the facts which were not available with the Ld. TPO and ignoring that information/ facts relied upon by the Ld. AO pertains to the subsequent year.

4. *On the facts and circumstances of the case and in law, the Ld. AO erred in not abiding by the following binding directions of Ld. DRP and not undertaking any independent verification:*

a) to independently verify the claim of the Appellant that the entire value of Wormhole Technology (Singapore) Private Limited (Wormhole') is not deriving from the investments in Orbgen Technologies Private Limited (Orbgen");

b) to compute capital gains income in accordance with the provisions of section 48 of the Act and

c) allowing reasonable opportunity of being heard to the Appellant.

5. *On the facts and circumstances of the case and in law, the Ld. AO grossly erred in rejecting the financials of Wormhole for the period ended March 31, 2018, suo-moto submitted by the Appellant post-DRP directions, and passing the final assessment order, on account of the following:*

a) by contradicting its own stand of considering the transaction values pertaining to the FY 2017-18 and thereby determining the alleged sale consideration of Orbgen for the FY 2016- 17 during the course of assessment proceedings; and

b) without appreciating the fact that the financial statement of Wormhole for the period ending March 31, 2018 covering the period beginning from October 25, 2016 till March 31, 2018 and thus includes the financial results both for FY 2016-17 and FY 2017-18.

6. Without prejudice to the above and on the facts and circumstances of the case and in law, the Ld. AO erred in

a) substituting the actual sale price of Equity Shares & Compulsorily Convertible Preference Shares (CCPS) of Orbgen sold to Wormhole, without even pointing out the provisions/ section of the Act that permits such substitution:

b) arbitrarily increasing the actual sale consideration of Equity Shares & CCPS of Orbgen sold by the Appellant during the subject year without appreciating that such sale price was duly supported by valuation report obtained from a Chartered Accountant and Arm's length character of such transaction was duly accepted by the Ld. TPO vide its order dated January 30, 2021:

c) arbitrarily applying a methodology to compute the sale consideration of such shares without appreciating the fact that such shares were acquired/ purchased within close proximity of 3 months and the purchase value has been duly accepted by the Ld. DRP; and

d) without excluding the value of assets situated outside India aggregating to USD 29,93,060 held by Wormhole for the purpose of computing the value of shares of Orbgen.

7. On the facts and circumstances of the case and in law, the Ld. AO erred in not providing relief for expenses of INR 4,89,969 borne by the Appellant in relation to stamp duty on the acquisition of Equity Shares of Orbgen from third-party shareholders,

8. On the facts and circumstances of the case and in law, the Ld. AO erred in levying interest under section 234B of the Act.

9. *On the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 270A of the Act, mechanically on the additions/ disallowance made.”*

2. Briefly stated facts are that for A.Y. 2017-18 the assessee filed its return of income on 31.11.2017 declaring NIL income. The case was selected for complete scrutiny and statutory notice u/s 143(2) of the Act was issued. The basis of selection for scrutiny assessment, as per AO, was high value of international transactions other than issue of shares (T.P. Risk Parameter) as per Form 3CEB amounting to Rs. 1,82,40,89,439/-. During the assessment proceedings the case was referred to the Transfer Pricing Officer (“TPO), who vide order dated 30.01.2021 u/s 92CA(3) of the act did not draw any adverse inference in respect of armed length price (“ALP”). The assessee computed taxable income/(loss) at Rs. 4,69,740/-.

2.1 It is pertinent to note here that against the draft assessment order passed by the AO, the assessee filed objections before the learned Dispute Resolution Panel (“DRP”). The DRP in paras 3.4 & 3.5 of its order dated 16.06.2022 disposed of the objections of the assessee by observing as under:

“3.4 As regards sale of shares of Orbgen India by the assessee to Wormhole Singapore derived its value substantially from Orbgen India, was undertaken within a period of 6 months after sale of shares of Orbgen India to Wormhole Singapore and that all the entities involved at such point of time were related parties. The assessee stated that the TPO has already

examined the arm's-length price of transaction relating to sale of shares of Orbgen India and has not drawn any adverse inference and that the order of the TPO is binding as per provisions of section 92CA(4) of the Act. Undisputedly, under section 92CA(4), the AO is required to compute the total income of the assessee in conformity with the arm's-length price determined by the TPO. However, in a case where certain facts have not been brought to the notice of the TPO during TP proceedings, the AO is not precluded from proceeding on the basis of such facts to determine the total income of the assessee.

3.5 In the present case, the AO has recorded that the fact of subsequent related party sale by the assessee of shares held in Wormhole Singapore (which as per the AO had 75% shareholding of Orbgen India) at a markedly higher valuation was not brought on record by the assessee in TP proceedings. The AO has computed the full value of consideration based on documents available in the public domain which have not been refuted by the assessee. Given substantial shareholding of Orbgen India, the full value of consideration realised on such sale is clearly attributable to Wormhole Singapore's investments in Orbgen India. Drawing from the principle laid down by the Hon'ble Supreme Court in DIT vs M/S Morgan Stanley & Co. Inc) (Appeal (civil) 2914 of 2007) laid down in the context of attribution of profits to PE, if the transfer pricing analysis does not adequately reflect the functions performed, assets utilised and risks assumed by the enterprise, the AO is not precluded from determining the full and correct value of sale consideration and consequent taxable income based on facts that were not available with the TPO at the time of TP analysis. In view of the above, the assessee's objections in this regard are not tenable. However, the AO shall verify the claim of the assessee that the entire value of Wormhole Singapore is not relatable to its investments in Orbgen India and accordingly such value relating to other investments shall be excluded in the determination of full value of consideration. The capital gain shall be computed in accordance with the provisions of section 48 of the Act. Grounds 4 to 15 are disposed of as above.”

2.2 Thereafter, the AO proceeded to finalize the assessment and computed taxable income of the assessee company at Rs. 16,69,27,557/- by making addition on account of short term capital gain amounting to Rs. Rs. 16,69,27,557/-. The

addition was made in respect of capital gain calculated by the AO, thereby adopting a different sale consideration at Rs. 123,22,34,504/- as against Rs. 106,53,06,947/- declared by the assessee.

3. Apropos to the grounds of appeal, learned counsel for the assessee vehemently argued that the action of the Assessing Authority is illegal against the settled principles of law. He submitted that the AO exceeded his jurisdiction by not following the finding of the TPO as well as the direction of the learned DRP. He contended that the AO interpolated his own figure of sale consideration which is not justified. He further reiterated the submissions as made in the written submissions. For the sake of clarity the written submissions made on behalf of the assessee are reproduced as under:

“1. SAC Finance Company Limited (hereinafter referred as 'SAC' or 'Appellant') is a Hong-Kong- based company.

2. SAC acquired shares of an Indian company, Orbgen Technologies Private Limited ('Orbgen'), through fresh subscription of shares (Equity and CCPS) on January 24, 2017 and purchase from independent third-party shareholders of Orbgen on January 30, 2017, at Fair Market Value ('FMV'). FMV was computed as per DCF methodology was duly supported by a valuation report obtained from an independent chartered accountant (refer Page 90 to 108 of Paperbook). The total equity shares of 888,287 and CCPS 151,525 were acquired/subscribed at the cost of USD 1,56,74,058 (equivalent to INR 103,52,71,530).

3. Thereafter, in the same FY, on March 30, 2017, the above shares were sold by SAC to its wholly-owned subsidiary - Wormhole Technology (Singapore) Private Limited ('Wormhole'). Due to close proximity of time, both purchase and sale transactions were undertaken at the same price i.e

USD 1,56,74,058. This value was also supported by the valuation report obtained from independent chartered accountant. (refer Page 109 to 127 of paper book).

4. As the sale was made to Wormhole, which is an Associated Enterprise ('AE'), it was duly reported by the Assessee in Form 3CEB and transfer pricing documentation (refer Page 59 of paper book).

5. SAC duly disclosed the above transaction in the return of Income ("ROI") filed for FY 2016- 17 (AY 2017-18) and reported a capital loss of INR 469, 740 computed due to the stamp duty borne by the Assessee at the time of purchase of shares.

6. The ROI was selected for assessment proceeding and was also referred by the Ld. AO to Transfer Pricing Officer (TPO). TPO accepted the transaction value and passed the order without making any negative inference with respect to arm's length character of transactions (refer para 3.1 to para 5 at page 138 of paper book)

7. Thereafter, in the final order after DRP directions the Ld.AO made the following adjustment to the sale value of shares sold to Wormhole by SAC and computed capital gain of INR 16,69,27,557:

(Amount in INR)

Particulars	As per ROI (converted into INR)	As per Final Order	Remarks
Sales consideration	103,52,71,530	1,23,22,34,505	a) Assessee determined FMV on DCF method supported by report of CA. b) Ld. AO arbitrarily made calculation on the basis of sale of shares of Wormhole in the next FY (i.e. FY 2017-18). c) DRP directed the Ld. AO to verify that the entire value of Wormhole is not relatable to its investment in Orbgen. (refer para 3,5 at page 178 of paper book). However, the Ld. AO does not follow the aforesaid DRP directions.
Cost	103,52,71,530	106,53,06,947	a) The DRP deleted the proposed

Acquisition			adjustment in the cost of acquisition proposed by the Ld. AO in the draft order.
Expense borne on purchase (Stamp duty)	469,736	0	a) The Ld.AO has not allowed the cost of stamp duty while computing the capital gain.
Capital Gain/Loss	(469,736)	16,69,27,557	Capital gain calculated by the Ld. AO in the final assessment order (refer page 198 and 199 of paper-book)

8. The DRP through its directions dated June 21, 2022, accepted the COA disclosed by the Assessee and directed the AO to accept the same for capital gain computation.

9. Further, in relation to the Sale consideration, the Assessee adopted the FMV basis the valuation report obtained from CA (which was same as the value of acquisition of shares due to proximity of time).

However, the Ld. AO substituted the sale consideration by calculating it on the basis of the sale of shares of Wormhole by Assessee in the next FY (i.e. FY 2017-18) alleging that Wormhole derived its 100% value from its investment in shares/securities of Orbgen.

The Ld. AO calculated the sale consideration at INR 1,23,22,34,505 instead of FMV of INR 103,52,71,530 (USD 1,56,74,058)

10. The Assessee claimed before the DRP that the total assets of Wormhole also include assets (situated outside India) other than investment in Orbgen and therefore, the Ld. AO is grossly erred in deriving the value of shares of Orbgen on an assumption that 100% value of Wormhole is relatable to its investment in Orbgen. The copy of the accounts of Wormhole for the period October 25, 2016 till March 31, 2018 (on page 209 of paper book) and management-certified accounts for the period (October 25, 2016 till March 31, 2017) (on page 229 of paper book).

11. In relation to calculation of sale consideration, the DRP instructed the Ld.AO to verify the claim of the Assessee that the entire value of Wormhole is not driven by the investments in Orbgen. Relevant extract of the DRP directions reproduced hereunder (refer para 3.5 at page 178 of paper book):

“Para 3.5..the AO shall verify the claim of the assessee that the entire value of Wormhole Singapore is not relatable to its investments in Orbgen India and accordingly such value relating to other investments shall be excluded in the determination of full value of consideration. The capital gains shall be computed in accordance with the provisions of section 48 of the Act.”

12. The Ld.AO while passing the final assessment order dated July 27, 2022, accepted the direction of the DRP in relation to CoA.

However, for sale consideration, no verification was undertaken, and the Assessee suo- moto submitted the accounts of Wormhole vide submission dated July 08, 2022, which was rejected by the Ld. AO alleging that the accounts shared by the Assessee are not relevant for FY 2016-17 and therefore, cannot be taken into consideration.

Basis the above, the Ld. AO passed the final assessment order and computed a revised capital gain of INR 16,69,27,557.

OUR CONTENTIONS

Ld. AO exceeded its jurisdiction by not following the order of Ld. TPO [Ground 3(a) of our appeal]

TPO order-refer para 3.1 to para 5 on page 138 of Paper-book

1. As per the provision of section 92CA(4), that the order passed by the Ld. TPO has a binding effect and the assessing officer is bound to incorporate the order of Ld. AO on as-is-basis and compute total income of the assessee in conformity with the ALP determined by the Ld. TPO. The said principle is duly supported by following judgments:

- Cushman & Wakefield India Pvt. (ITA No.3933/Del/2010)- Delhi ITAT [refer para 39 at page no. 16 of the case law compilation).*

Later on, duly affirmed by Delhi High Court in case of Cushman And Wakefield India Pvt (ITA 475/2012)/ [2014] 46 taxmann.com 317 (Delhi) [refer para 42 at page 35 of the case law compilation];

Vodafone India Service (P.) Ltd. [2013] (37 taxmann.com 250)- Bombay High Court [refer para(s) 69 to 75 at pg no. 75 and 76 of the case law compilation]; and

Carraro India Private Limited ([2019] 104 taxmann.com 166/(ITA No 1260/PUN/ 2018)- Pune ITAT} [refer para 6 at page 120 of the case law compilation].

Ld. AO did not abide by the direction of DRP to verify the claim of the Appellant that entire value of Wormhole does not derive from its investments in Orbgen shares and to compute capital gain income in accordance with section 48 of the Act [Ground 4 of our appeal]

DRP directions-refer para 3.5 on page 178 of paper book

1. As per section 144C(10) of the Act the DRP directions are binding in nature and any order passed not in conformity with the directions is bad in law and needs to be quashed. The said principle is duly supported by the following judgments:

- M/S. ESPN Star Sports Mauritius S.N.C. ET Compagnie ([2016] 68 taxmann.com 377 (Delhi)/[2016] 388 ITR 383 (Delhi)) (Delhi High Court) [refer para 31 at page 135 of the case law compilation]; and*

Yokogawa India Ltd ITALIA No. 1715 & 692/Bang/2016 (ITAT Bangalore) [refer para 11 at page 144 of the case law compilation/

- Olympus Medical Systems (P) Ltd [2022] 137 taxmann.com 306 (ITAT Delhi) [refer prettet e no. 152 of the case low compilation!*

- Global One India (P) Ltd. (2019) 112 taxmann.com 185 (ITAT belli) (refer para 11 at page 172 of the case law compilation)*

Tata Power Solar Systems Ltd (2023) 149 taxmann.com 294 (ITAT Bangalore) (refer porn 23 at page 158 of the case law compilation)

- VMware Software India (P) Ltd (2022) 141 taxmann.com 105 (ITAT Bangalore) [refer pore 12 of page 165 and 166 of the case law compilation]*

3. Ld. AO erred in rejecting the financials of Wormhole for the period ending March 31, 2018, alleging that the same pertains to the next financial year (e. FY 2017-18 (AY 2018-19)) and are not relevant for relevant AY. (Ground 5 of our appeal)

3.1. Ld. AO for computing the sale consideration of the shares transferred by the Appellant himself took basis of the transaction undertaken by the Appellant during FY 2017-18 (ie. AY 2018-19)- Refer para 1.2 and pare 15.2 of draft assessment order on Page 150 and 152 of Poper Book

3.2. *The audited financial statements of Wormhole submitted for the year ended March 31, 2018 are the first financial statement of Womhole prepared for the period beginning from October 25, 2016, till March 31, 2018 and thus include the value for both FY 2016-17 and FY 2017-18. Sefer page 209 of paper book. Without prejudice, the management certified accounts of Wormhole at Page 229 of paperbook also substantiate it holds other assets amounting to USD 2,993,060 and accordingly, it cannot be assumed that Wormhole derives 100% value from its investment in Orbgen. Therefore, the calculation made by the Ld.AO needs to be re-calculated based on the DRP directions by reducing the value of other assets.*

4. *Ld. AO substituted the value of sale consideration without giving reference to any provision/section of the Act (Ground 6(a) of our appeal).*

4.1. *During the subject year, the Act embodies no substitution of sale consideration provisions.*

Section SOCA of the Act which provides power to substitute full value of consideration with the FMV was inserted by Finance Act. 2017 e. 1.4.2018 (AY 2018-19) and has no application to the subject FY

5. *Ld. AO erred in not providing relief for expenses of INR 489,969 borne by the Appellant in relation to stamp duty on the acquisition of shares [Ground 7 of our appeal]*

5.1. *The Appellant's claim of expenses borne at the time of the acquisition of shares was not granted by the Ld.AO while computing capital gains in the final assessment order. As per the principle laid down by various judgments any cost incurred to acquire an asset can be considered as its cost of acquisition."*

4. On the other hand, learned DR opposed the submissions and supported the assessment order.

5. We have heard rival submissions and perused the material available on record. The moot question that arises for our consideration is, whether the AO is bound by the order of TPO passed u/s 92CA(3) of the Act, even in the situation

when the material evidence was not brought on record by the assessee in T.P. proceedings. There is no quarrel so far cost of acquisition is concerned. The Ld. DRP deleted the proposed adjustment in respect of cost of acquisition. The dispute is with regard to sale consideration. In the impugned assessment order the AO adopted sale consideration at INR 123,22,34,515/- as against fair market value of INR 103,52,71,530/-. Thus, the AO treated INR 16,69,27,557/- as capital gain. Under these facts, the assessee has raised two fold objections. Firstly, the AO exceeded its jurisdiction by not following the order of TPO passed u/s 92CA(3) of the Act. In support of this contention, ld. AR drew our attention towards provisions of Section 92CA of the Act and placed reliance on various judicial pronouncements. Secondly, the value adopted is erroneous and contrary to settled position of law. It is stated that the fair market value (FMV) was computed as per DCF methodology and was duly supported by a valuation report obtained from an independent Chartered Accountant. The AO substituted the sale consideration on the basis of the sale of shares of Wormhole by the assessee in the next financial year i.e. F.Y. 2017-18. The assessee claimed before the ld. DRP that the total assets of Wormhole also included the assets (situated outside India) other than investment in Orbgen and, therefore, the AO grossly erred in deriving the value of shares of Orbgen on the assumption that 100% value is relatable to its investment in Orbgen. There is no dispute that the ld. TPO did not propose any adjustment. As

per Section 92CA(4) of the Act, the AO is required to compute the Arm's Length Price in conformity with the ALP so determined by the TPO. But in the present case, the AO deviated from the order of TPO. Such deviation is not permissible under law in the light of the statutory provisions and judicial pronouncements as relied by the assessee in its written submissions. In this regard reference is made to the decision of the Coordinate Bench in the case of Cushman & Wakefield (P.) Ltd. v. ACIT rendered in ITA No. 3933/Del/2010 (order dated 18.11.2011), observing as under:

“38. It is clear from the above explanation that the provisions of transfer pricing are applicable as well to expenses and outgoing in an international transaction. The impugned amount represent the outgo of the assessee or the expense of the assessee for earning income with reference to the real property transactions in the shape of lease etc. It cannot be disputed by the revenue that the impugned transaction is international transaction falling within the scope of transfer pricing regulations as the Assessing Officer himself has referred this transaction to the TPO on the ground that it is an international transaction entered into by the assessee with its associate enterprises, the arm's length price of which was to be determined by the TPO, If it is so, then, the post amended provisions of Section 92CA(4) will be applicable and arm's length price determined by the TPO is binding upon the Assessing Officer. It has already been mentioned that all the six transactions entered into by the assessee are referred in the TPO's order and the impugned transaction has been mentioned at SL.No.1 and it has been recorded by the TPO in its order that "regarding transactions 1-4 above no adverse inference is drawn." Therefore, Ld. TPO has accepted the impugned transaction of the assessee at arm's length. According to the provisions of Section 92CA(4), as applicable to the present case, the arm's length price determined by the TPO is binding on Assessing Officer. Once

the arm's length price is determined by TPO, the Assessing Officer cannot have the jurisdiction to re-determine the profit or loss arising out of that transaction under the normal provisions of the Act. By bringing this transaction again under the normal provisions of the Act, the Assessing Officer has sought to do an act indirectly which he cannot do directly. Such action of the Assessing Officer is against the well settled proposition of law according to which what cannot be done "per directum" is not permissible to be done "per obliquum" meaning thereby whatever is prohibited by law to be done, cannot legally be effected by an indirect or circuitous contrivance on the principle of "quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud". Applying the above principle, we hold that after determination of arm's length price by the TPO, Assessing Officer did not have jurisdiction to re-examine the said transaction and by re-examination of the transaction the Assessing Officer has sought to do an act indirectly, which he cannot do directly. Such proposition of law is supported by following judicial pronouncement:-

In Jagir " Singh v. Ranbir Singh AIR 1979 SC 381, the Apex Court has observed that an authority cannot be permitted to evade a law by "shift or contrivance". While deciding the said case, the Supreme Court placed reliance on the judgment in Fax v. Bishop of Chester [1824] 2 B & C 635, wherein it has been observed as under (page 384):

To carry out effectually the object of a statute, it must be construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined.

Law prohibits to do something indirectly which is prohibited to be done directly. Similar view has been reiterated by the Apex Court in M.C. Mehta v. Kamal Nath AIR 2000 SC 1997, wherein it has been held that even the Supreme Court cannot achieve something indirectly which cannot be achieved directly by resorting to the provisions of article 142 of the Constitution, which empowers the court to pass any order in a case in order to do 'complete justice.' (pp. 477 and 478 of the report)"

5.1 The aforesaid finding of the Coordinate Bench has been affirmed by the Hon'ble Jurisdictional High Court of Delhi vide order dated 23.05.2014 rendered in IT Appeal no. 475 of 2012 [2014] 46 taxmann.com 317 (Delhi), inter alia, by observing as under:

“In view of the above discussion and analysis of the statutory provisions, two issues on the merits of the AO's assessment assume importance. Firstly, having regard to the TPO's stamp of approval to the fees charged for the stated (though still not proven) referral transactions, the AO was bound to accept that finding, it is, post 2007, binding.”

5.2 Therefore, looking to the facts of the present case, where TPO has not proposed any adjustment and valuation has been adopted by the AO without verifying the true and correct facts qua the assets, we are unable to sustain such erroneous finding both on legality and facts. The grounds raised by the assessee are allowed.

6. In the result appeal of the assessee in ITA no. 2336/Del/2022 is allowed.

Order pronounced in open court on 22nd November, 2023.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

MP

Copy forwarded to:

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2. Respondent
3. CIT
4. CIT(Appeals)
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