**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Reportable

Case No: 185/2017

In the matter between:

**THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES** **APPELLANT**

and

**DAIKIN AIR CONDITIONING SOUTH AFRICA (PTY) LIMITED** **RESPONDENT**

**Neutral citation:** *CSARS v Daikin Air Conditioning* (185/2017) [2018] ZASCA 66 (25 May 2018)

**Coram:** Maya P and Majiedt, Mbha and Van der Merwe JJA and Davis AJA

**Heard:** 9 March 2018

**Delivered:** 25 May 2018

**Summary:** Customs and Excise Act 91 of 1964 – classification of articles for customs duty – correct tariff to be applied in respect of 'window or wall types, self-contained or "split-system"' air conditioning machines and parts thereof.

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**ORDER**

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**On appeal from:** Gauteng Division, Pretoria (Makhubele AJ sitting as court of first instance):

1 The appeal succeeds with costs, such costs to include the costs of two counsel.
2 The order of the court a quo is set aside and replaced with the following order:
'The application is dismissed with costs, such costs to include the costs of two counsel.'

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**JUDGMENT**

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**Van der Merwe JA (Maya P and Mbha JA concurring)**

[1] The respondent, Daikin Air Conditioning South Africa (Pty) Limited (Daikin), imports and distributes air conditioning machines and parts thereof. Section 47(1) of the Customs and Excise Act 91 of 1964 (the Act) provides that customs duty shall be paid on imported goods in accordance with Schedule 1 to the Act. The appeal concerns the classification for customs duty purposes of parts of air conditioning machines (the products). In terms of s 47(9)*(e)* of the Act, Daikin appealed to the Gauteng Division, Pretoria against the classification made by the appellant, the Commissioner for the South African Revenue Services (the Commissioner), in respect of the products. The court a quo (Makhubele AJ) upheld the appeal but granted leave to the Commissioner to appeal to this court.

[2] Schedule 1 to the Act commences with general rules for its interpretation. In Part 1 of Schedule 1 goods are classified for purposes of ordinary customs duty. Goods are systematically grouped in sections, each containing a number of chapters. Each section and each chapter is headed by notes containing rules for interpreting their provisions. The chapters contain the tariff headings and under

them, subheadings. The subheading under which the goods are classified determines the duty payable, if any. The general rules for the interpretation of Schedule 1 provide, in essence, that for legal purposes classification shall be determined by the terms of the headings and any relative section and chapter notes.

[3] The grouping and wording of Part 1 of Schedule 1 largely emanate from the Harmonised Commodity Description and Coding System (the Harmonised System) established by an international convention to which South Africa is a signatory. The operation of the Harmonised System falls under the purview of the World Customs Organization (WCO) situated in Brussels, formerly known as the Customs Co-operation Council. From time to time the WCO issues explanatory notes to the Harmonised System (the Brussels Notes). Section 47(8)*(a)* of the Act, inter alia, provides that the interpretation of any tariff heading or subheading and every section note and chapter note in Part 1 of Schedule 1 shall be subject to the Brussels Notes issued from time to time.

[4] What this means, was authoritatively explained by this court in *Secretary for Customs and Excise v Thomas Barlow & Sons Ltd* 1970 (2) SA 660 (A). Trollip JA said (at 676B-C):

'It can be gathered from all the aforegoing that the primary task in classifying particular goods is to ascertain the meaning of the relevant headings and section and chapter notes, but, in performing that task, one should also use the Brussels Notes for guidance especially in difficult and doubtful cases. But in using them one must bear in mind that they are merely intended to explain or perhaps supplement those headings and notes and not to override or contradict them.'

And at 679F and 680D Miller AJA stated that the Brussels Notes generally serve as guides and aids to the often difficult task of classification in accordance with the terms of the headings read with the relevant section and chapter notes.

[5] The relevant tariff headings and subheadings are found in Chapter 84 of Section XVI of Part 1 of Schedule 1. They are the following:

| Heading/ Subheading | CD | Article Description |
|---|---|---|
| **84.15** | | **Air conditioning machines, comprising a motor-driven fan and elements for changing the temperature and humidity, including those machines in which the humidity cannot be separately regulated** |
| **8415.10** | | - **Windows or wall types, self-contained or 'split-system':** |
| 8415.10.10 | 6 | - Of a kind used for buildings, compressor operated, having a rated cooling capacity not exceeding 8,8kW |
| 8415.10.20 | 3 | -- Of a kind used for buildings, not compressor operated, having a rated cooling capacity not exceeding 8,8kW |
| 8415.10.50 | 5 | -- Other, compressor operated, having a rated cooling capacity not exceeding 8,8kW |
| 8415.10.90 | 4 | -- Other |
| 8415.20 | 3 | - Of a kind used for persons, in motor vehicles |

| | | |
|---|---|---|
| **8415.90** | | - **Parts:** |

| | | |
|---|---|---|
| 8415.90.05 | 6 | -- Indoor units and outdoor units for machines of subheadings 8415.10.10 and 8415.10.20 |
| 8415.90.20 | 5 | -- Other parts identifiable for use solely or principally with compressor operated machines of subheading 8415.10 having a rated cooling capacity not exceeding 8,8kW |
| 8415.90.90 | | -- Other |

[6] A distinction must be made between ‘split-system’ and self-contained air conditioning machines. A ‘split-system’ air conditioning machine consists of an indoor evaporator unit and an outdoor condenser unit. In a self-contained machine the evaporator unit and the condenser unit are integrated in a single housing. A self-contained air conditioning machine is typically installed through a window of a building. The products are indoor units for ‘split-system’ air conditioning machines. The products are specifically manufactured and structured for mounting in or under a ceiling in a building. They are never mounted through windows or on walls. The outdoor units of the ‘split-system’ machines of which the products form part, are placed or mounted outside the building on the floor, ground or roof.

[7] The Commissioner contends that the products are indoor units for machines of subheading 8415.10.10 and that they should therefore be classified under subheading 8415.90.05. On the other hand, Daikin’s case is that the products are parts for ceiling type air conditioning machines that do not fall within the ambit of subheading 8415.10. Thus, it contends that the products are classifiable under subheading 8415.90.90 (‘Other’). Therefore, the question is whether the complete machines consisting of the products and the appropriate outdoor units fall under tariff subheading 8415.10 or not. The answer lies in the interpretation of the words ‘window or wall types, self-contained or “split-system”’.

[8] The section notes and chapter notes do not give any indication as to the answer. I also do not think that a peering at the words ‘window or wall types, self-

contained or “split-system”’, provides a sufficiently clear answer. Both the terms ‘self-contained’ and ‘split-system’ may refer to what goes before them, that is, ‘window or wall types’. However, it is also a reasonable interpretation of the subheading that only the term ‘self-contained’ qualifies the preceding words, ‘window or wall types’. Therefore, the words of subheading 8415.10 may refer only to window or wall types of air conditioning machines, which may be self-contained or ‘split-system’ (as Daikin contends). They may also mean window or wall types of air conditioning machines that are self-contained or ‘split-system’ air conditioning machines (as the Commissioner contends).

[9] In the circumstances it is appropriate to consider the Brussels Notes to subheading 8415.10. These provide as follows:

‘**Subheading 8415.10**

This subheading covers air conditioning machines of window or wall types, self-contained or “split-system”.

The self-contained type air conditioners are in the form of single units encompassing all the required elements and being self-contained.

The “split-system” type air conditioners are ductless and utilize a separate evaporator for each area to be air conditioned (e.g., each room). *The indoor heat exchanger unit may be mounted in various locations, for example, in a wall or window, or on a ceiling.*

However, this subheading **excludes** ducted central air conditioning systems which utilize ducts to carry refrigerated air from an evaporator to several areas to be cooled.’ (my emphasis)

[10] The italicized sentence was added to the Brussels Notes by the WCO by way of amendment on 17 December 2012. I agree with the Commissioner that the amendment was intended to explain what the tariff subheading had meant from its inception. It follows that there is no room for the argument that the classification of the products before this amendment of 17 December 2012 should differ from their classification thereafter.

[11] The Brussels Notes favour the interpretation of the Commissioner. First, if the subheading was intended to refer only to window or wall type air conditioning machines and to no other, one would have expected these notes to contain some

limitation to and/or description of window or wall types. Second, the added sentence appears to me to provide decisive guidance. It makes clear that the subheading includes ‘split-system’ air conditioning machines of which the indoor units are mounted on ceilings.

[12] There is support for this conclusion to be found in the explanatory notes to heading 84.15, which, inter alia, provide:

‘The machines may be in the form of single units encompassing all the required elements, such as self-contained window or wall types (referred to as “through-the-wall” units). Alternatively, they may be in the form of “split-systems” which operate when connected together, i.e., a condenser unit for external installation plus an evaporator unit for internal installation. These “split-systems” are ductless and utilize a separate evaporator for each area to be air conditioned (e.g., each room).’

[13] This note refers to window or wall types only as examples of self-contained (single unit) air conditioning machines. It then explains that the heading also covers an alternative to the (self-contained) single units, namely ‘split-systems’. The ‘split-system’ machines are therefore not required to be window or wall types.

[14] There is a further consideration. It is well established that a commercially sensible construction should be preferred. In this regard it appears from the evidence that the machines in respect of which the products constitute the indoor units, fall squarely within the meaning of subheading 8415.10.10. They are ‘Of a kind used for buildings, compressor operated, having a rated cooling capacity not exceeding 8,8 kW’. It also appears from the evidence that the same outdoor units may be used for these ‘split-system’ machines, irrespective of whether the indoor units are mounted on walls or ceilings. It appears quite unbusinesslike to differentiate for customs duty purposes, between ‘split-system’ air conditioning machines of which the indoor units do exactly the same work and the outdoor units are exactly the same, simply because the indoor units are placed on ceilings and not on walls.

[15] Although the matter is by no means free of difficulty, I have come to the conclusion that the interpretation advanced by the Commissioner is to be preferred.

I hold that the products are classifiable under tariff subheading 8415.90.05 of Part 1 of Schedule 1 to the Act and would uphold the appeal.

[16] In the result the following order is made:

1 The appeal succeeds with costs, such costs to include the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following order:

'The application is dismissed with costs, such costs to include the costs of two counsel.'

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C H G van der Merwe

Judge of Appeal

**Majiedt JA and Davis AJA dissenting**

[17] We have had the distinct pleasure of reading the lucid judgment of Van der Merwe JA. Regrettably, we are unable to agree with his conclusions and hence the order that follows therefrom.

[18] The determination of this appeal concerns the meaning of the words 'window or wall types, self-contained or split system' as employed in tariff subheading 8415.10 in Part 1 of Schedule 1 to the Customs and Excise Act 91 of 1964 (the Act). In particular, the question for determination is whether they are air conditioning machines, which are *neither window* nor wall types which fall within this subheading, or stand to be classified as 'other' in terms of subheading 8415.10.90.

[19] Appellant contends that the parts of the air conditioning machines that are imported and form the subject matter of this dispute are components of a 'split system'. They fall to be classified under tariff subheading 8415.10 and the parts are

classifiable under tariff heading 8415.90.05. Respondent contends that these parts stand to be classified under tariff subheading 8415.90.90 being ‘other’.

[20] The nature of the relevant air conditioning machines is common cause. In respondent’s founding affidavit the following description of the relevant air conditioning units appears:

‘The indoor units: These units are always mounted in or below a ceiling. They are never mounted though windows or on walls. These units are specifically manufactured and structured for the purpose of mounting in or under a ceiling.'

This description is not disputed by appellant. As the tariff determination, which is the subject of these proceedings, only concerns indoor units, there is no need to examine outdoor units which are also described in the founding affidavit.

[21] In his judgment Van der Merwe JA considers that ‘peering at the words “window or wall types, self-contained or split system”’ does not provide ‘a sufficiently clear answer’. For this reason he has recourse to the Explanatory Note to the Harmonised Commodity Description and Coding System (the Harmonised System) established in terms of an international convention to which South Africa is a signatory. The operation of the harmonised system falls under the supervision of the World Customs Organisation (WCO) located in Brussels .From time to time the WCO issues explanatory notes known as Brussels Notes.

[22] Section 47(8)(a) of the Act provides that the interpretation of any tariff heading or tariff sub-heading in Part 1 of Schedule 1 to the Act shall be subject to the Explanatory Notes to the Harmonised System issued by the WCO.

[23] Prior to 17 December 2012, the relevant Brussels Note to subheading 8415.10 read:

‘This subheading covers air conditioning machines of window or wall types, self-contained or “split-system”.

The self-contained type air conditioners are in the form of single units encompassing all the required elements and being self-contained.

The “split-system” type air conditioners are ductless and utilize a separate evaporator for each area to be air conditioned (e.g. each room).

However, this subheading excludes ducted central air conditioning systems which utilize ducts to carry refrigerated air from an evaporator to several areas to be cooled.

**Subheading 8415.20**

This subheading covers equipment which is intended mainly for passenger motor vehicle of all kinds, but which may also be fitted in other kinds of motor vehicles, for air conditioning the cabs or compartments in which persons are accommodated.

**Subheading 8415.90**

This subheading includes both indoor and outdoor units for split-system air conditioning machines of subheading 8415.10 when presented separately. The units are designed to be connected by electrical wiring and copper tubing through which refrigerant passes between the indoor and outdoor units.'

[24] On 17 December 2012, the WCO added the following sentence:

'The indoor heat exchanger unit may be mounted in various locations, for example, in a wall or window, or on a ceiling.'

[25] Before dealing with the implications of the relevant note, it is important to keep in mind the approach to the interpretation of the tariff headings as set out by Trollip JA in *Secretary for Custom and Excise v Thomas Barlow & Sons Ltd* 1970 (2) SA 660 (A) at 679F – 680B-C:

'[T]he primary task in classifying particular goods is to ascertain the meaning of the relevant headings and section and chapter notes, but, in performing that task, one should also use the [Explanatory Notes] for guidance especially in difficult and doubtful cases. But in using them one must bear in mind that they are merely intended to explain or perhaps supplement those headings and notes and not to override or contradict them. They are manifestly not designed for the latter purpose, for they are not worded with linguistic precision usually characteristic of statutory precepts; on the contrary they consist mainly of discursive comment and illustrations and, in any event, it is hardly likely that the Brussels Council intended that its Explanatory Notes should override or contradict its own Nomenclature. Consequently, I think that in using the [Explanatory Notes] one must construe them so as to conform with and not to override or contradict the plain meaning of the headings and notes.'

[26] Appellant adopted the view that, even though the additional sentence was inserted on 17 December 2012, it was only included to bring additional clarity but did

not introduce a new meaning to the original Note. In its view, the Note with its subsequent clarification was dispositive of the dispute.

[27] This submission seems to conflate the mandated inquiry. In the first place the meaning of the header must be ascertained. Only if this task leads to the conclusion that a clear meaning cannot be ascertained from an examination of the words employed should there be reference to the Brussels Note. That is surely self-evident from the dictum of Trollip JA in *Thomas Barlow* above. See also *International Business Machines (Pty) Ltd v Commissioner of Customs and Exercise* 1985 (4) SA 852 (A) at 864B and more recently *The Heritage Collection (Pty) Ltd v CSARS* 2002 (6) SA 15 (SCA) para 10 and *CSARS v Coltrade International CC* [2016] ZASCA 153 para 7.

[28] In our view, the words used do admit of a clear meaning. Significantly there is a comma inserted between 'window or wall types' and 'self-contained or split-system'. This serves to indicate that the phrase self-contained or split-system qualifies or describes the nature of the two types of air conditioner set out: being window or wall types. The cogency of this approach to the header can be illustrated by way of the following hypothetical example: 'Car or SUV's; Blue or Black'. This phrase cannot plausibly be interpreted, for example, to extend to trucks or tractors.

[29] As has been the custom recently appellant sought to invoke dicta from the judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

[30] In his judgment Van der Merwe JA invokes this dictum when he concludes that the inclusion of indoor units mounted on ceilings leads to the more sensible commercial construction. It thus becomes necessary to examine the dictum from *Endumeni* as it might apply to this case.[1]

[31] Contrary to *Endumeni*, above at 603 (fn14) which, on the authority of *KPMG Accountants (SA) v Securifin Ltd* 2009 (4) SA399 (SCA), suggests that there is no distinction in the interpretation of contracts, statutes and other documents, we can find nothing in the judgment of Harms DP in *KPMG* that prevents a drawing of the distinction that we have drawn between the interpretation of legislation and contracts or similar documents. All that Harms DP said at para 39 in *KPMG* was that 'the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent'. Self-evidently, the legislative process which culminates in an enactment, and the subsequent interpretation of that enactment, are quite different from the preceding negotiations which lead to the conclusion of a contract and the subsequent interpretation of the contract. It is difficult to see how 'commercial sensibility', alluded to by Van der Merwe JA, can play any role in interpreting a statute. And a statute must apply to all equally – its interpretation cannot be dependent on a particular contextual setting, nor can it vary from one factual matrix to the next. Context is fact-specific and can be applied in the interpretation of contracts and like documents, but not of statutes. [2]

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[1] Expressed in the language of modern linguistic philosophy, the approach adopted by Wallis JA in *Endumeni* draws a distinction between sentence and speaker meaning. While the words used in the text to be interpreted are to be classified as sentence meaning, speaker meaning is that which can be attributed to the speaker from an examination of the context and the circumstances which gave rise to the existence of the sentence under examination interpretative process (Paul Grice *Studies in the Way of Words* (1989)). In other words, sentence meaning is not the alpha and omega of the inquiry. There may, however, be a need to draw a distinction between contracts and similar documents which are created after negotiations between a defined group who participate actively in the process and statutes. The drafting and subsequent interpretation of statutes cannot easily fit into an objectively determined shared purpose of sharing information which may be ascertained in respect of a contract or similar form of document.

[2] The distinction we seek to draw between a contract and a legislative enactment becomes important in that it is difficult to find an analogous purpose to speaker meaning when considering the relationship between the legislature and various parts of the audience affected by the enactment. In short, the purpose may be more difficult to divine by way of reliance on an objective theory to determine speaker meaning. For example, given the negotiations which are part and parcel of the legislative process, it is often the case that a majority of those members of a legislature who vote in favour of a bill has the aim that the legislation not be interpreted accurately, but rather in a way that

[32] What is required when seeking to ascertain the meaning of legislation is to subject the words used to an engagement, not with speaker meaning, but with the principles and standards that are appropriate to relevant law making exercise and the subsequent exercise of legal interpretation. In the case of fiscal legislation, an appropriate standard is the *contra fiscum* rule which is based upon the idea that no tax can be imposed upon a subject of the State without words in legislation clearly evincing an intention to lay a burden on him or her. (*Coltness Iron Co v Black* (1888) 6 App CAS 315 (HL) at 330; LR Dison 'The Contra Fiscum Rule in Theory and Practice' 1976 (93) *SA LJ* 159). In the case of tariff headings, the Brussels Notes and the General Rules for the Interpretation of the Harmonized System provide a further basis to determine the meaning beyond a rigid recourse to sentence meaning.

[33] Recourse to the meaning of the speakers of words used in a statute is not determined in the same fashion as that of words used in a contract. In order to ascertain the intention of the lawmaker, one must have regard to the appropriate principles of law-making. In the instance of the *contra fiscum* rule, absent unambiguous language, the rule will be decisive in favour of the taxpayer in cases of doubt (*Estate Reynolds and others v Commissioner for Inland Revenue* 1937 AD 57 at 70; *Willis Faber Enthoven Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) at 216 C). The words employed in the statute must be the primary enquiry to consider whether they admit of any doubt or ambiguity. If not, effect must be given thereto, unless a glaring absurdity results which the lawmaker could not have contemplated. (*Public Carriers Association and others v Toll Road Concessionaries (Pty) Ltd and others* 1990 (1) SA 925 (A) at 942I – 943A). As is correctly pointed out in Lawsa, this approach, laid down in a number of judgments of our courts relating to the interpretation of a legislative enactment, is based upon the literalist-cum-intentionalist view (*Lawsa* (2 ed) vol 25, Part 2 ibid at 331, footnote 38).

[34] In addition there is the compelling consideration that the Interpretation Act 33 of 1957 applies only to legislation. Section 1 reads:

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yields stronger or weaker regulation than was in fact enacted. (In general, see Mark Greenberg UCLA School of Law of Research Paper No 10 -35 at 4).

‘1. **Application of the Act.**

The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at, or after the commencement of this Act in the Republic or in any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.’

This distinction reinforces the view that the interpretation of a statute cannot simply be equated that of a contract. Finally s 39(2) of the Constitution mandate a recourse to the spirit purport and objects of the Bill of rights in interpreting any legislations.

[35] Applied to the present dispute, at best for the appellant the words employed may be considered to be open to the interpretation for which it argued. But as we have suggested, the application of speaker meaning as determined by the purpose of the provision, the background and production of the document which appellant seeks to call into aid, (*Endumeni* at para 18) is not easily applicable to legislative enactments, including a customs tariff.

[36] Appellant contends that, even if the narrow meaning is plausible, it must give way to the more expansive interpretation of the header as contained in the Brussels Note. But, as is clear from the hypothetical analogy to cars and SUV’s, the wording employed is far from ambiguous. Indeed, the South African Embassy and Mission to the European Committees in a letter to the WCO of 16 August 2002, in which the meaning of subheading 8415.10 was debated, wrote:

‘South Africa is therefore of the view that the current wording of the subheading is restrictive and relates to window or wall type only, hence the use of a comma, rather than a semi-colon. An important point to note here is that the intention of what is to be covered by this subheading is not the issue. It may very well be that the Secretarial intended this subheading to cover ceiling types as well. The question that needs to be addressed is whether the wording currently used can be seen to reflect that.’

[37] This letter provides a succinct summary of the proper interpretive exercise to be applied to the subheading, one which is consistent with the approach to the classification of goods as was confirmed by this court in *The Heritage Collection*, above at para 10. A further consideration in favour of this interpretation is that the

appellant's suggested interpretation, namely that all self-contained and split-system air conditioning machines fall within tariff heading 8415.10, would render the use of the words 'window or wall types' in the heading superfluous. Such an interpretation would be contrary to the presumption against superfluity (see *Commissioner for Inland Revenue v Southern Life Association* 1986(4) SA 717(A) at 729J-730A). Accordingly, we would dismiss the appeal with costs.

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S A Majiedt

Judge of Appeal

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D Davis

Acting Judge of Appeal

APPEARANCES

| | |
|---|---|
| For Appellant: | A Meyer SC, with him W Mothibe<br>Instructed by:<br>MacRobert Attorneys, Pretoria<br>EG Cooper Majiedt Inc, Bloemfontein |
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