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1. Tax

Service Tax Cut Trial in Shanghai to Lower Corporate Taxes

国务院常务会议决定(10/26/2011)



At the standing committee meeting of the state council, several important policies were discussed and released, including an important value-added tax (VAT) related regulation. Based on the agenda for the January 1, 2012, meeting, the business tax will be replaced by a VAT, a significant portion of which is deductible, that will be assessed in certain regions and industries as a trial. Unlike the business tax, which is charged on a company's revenue regardless of its costs, the VAT can have such costs as fuel and equipment expenses deducted. Shanghai is selected to be the trial city.

Currently, the VAT applies only to enterprises or individuals who sell merchandise, provide processing, repair or assembly services, or import goods within China. Currently, a large number of service enterprises do not enjoy the benefits of VAT deductions. The new policy extends this scope to include transportation and modern service industries.

The meeting also introduces two lower-rate VAT categories as part of the tax reform. The two new VAT rates will be 11 percent and 6 percent in addition to the existing 17 percent and 13 percent VAT brackets.

Another concern is related to the favorable policy related to the business tax. The meeting emphasized that the favorable policy related to business taxes will extend to the VAT with some adjustments, for example, increasing deductible expenses. Although no law or regulation currently reflects this policy, there is no doubt that several related regulations will soon be promulgated in 2012.

- *Resolution of the State Council Standing Committee*
- *国务院常务会议决定*
- *State Council*
- *Date of Issuance: October 26, 2011 / Effective Date: January 1, 2012*

2. Foreign Direct Investment

Repatriation of RMB Funds Raised Offshore to China

商务部关于跨境人民币直接投资有关问题的通知(10/12/2011)

On October 12, 2011, the Ministry of Commerce (MOFCOM) released the Circular of the Ministry of Commerce on Issues Relating to Cross-border Direct Investments in RMB (the "RMB Repatriation Circular"), with the purpose of promoting the benefits

of direct investments and reviewing the proper use of foreign investments. The RMB Repatriation Circular took effect on the same date.

The RMB Repatriation Circular contains 16 provisions. Below are some highlights:

- RMB funds that are eligible for direct investment in China should be obtained from either of two sources: (1) through cross-border trade settled in RMB and RMB funds obtained in China and remitted outside China, including investment profits, profits generated through stock transfer, capital reduction, liquidation and advance recovery of investment; or (2) RMB funds obtained by foreign investors through legal channels outside China, including issuance of RMB bonds or shares outside China.
- Eligible RMB funds shall not be committed, directly or indirectly, to the securities and financial derivatives markets, nor be used to provide entrusted loans. Eligible RMB funds may be used in the private placement of shares of a domestic listed company or the transfer of shares thereof by agreement in accordance with the requirements of the administrative measures for the strategic investments of foreign investors into listed companies.
- In addition to normal application documents, investors intending to make investments in RMB shall submit to the local commercial authority: (1) certificates or descriptions of the source of RMB funds; (2) a description of the use of the funds; (3) a completed form stating the details of cross-border direct investments in RMB.
- RMB direct investment will be approved by relevant local commercial authorities, and in the following four situations, MOFCOM is the approving authority: (1) the total investment amount exceeds 300 million RMB; (2) the investment is made in the industries of financing guarantee, financing lease, micro-credit, auction, etc.; (3) the investment is made in investment companies established by foreign investors, venture capital or equity investment enterprises invested in by foreign investors; and (4) the investment is made in industries generally controlled by the state, such as cement, iron and steel, electrolytic aluminum, ship building, etc.

The RMB Repatriation Circular is considered the last piece to RMB's internationalization process, given that the trial project of cross-border trade settlement in RMB was initiated in 2009 and overseas direct investment in RMB was piloted in early 2011. Analysts believe that these moves will accelerate circulation of RMB funds both into and out of China, and will help the RMB become a more internationalized currency.

- *Circular on Issues Concerning RMB Cross-Border Direct Investment*

- *关于跨境人民币直接投资有关问题的通知*

- *Issuing Authority: the Ministry of Commerce*

- *Date of Issuance: October 12, 2011 / Effective Date: October 12, 2011*

3. Corporate Law

Standardization of the Registration of Enterprise Mergers and Divisions (Draft for Public Comment)

国家工商总局《关于规范公司合并分立登记支持企业兼并重组的意见》公开征求意见的通告 (08/29/2011)

On August 29, 2011, the State Administration for Industry and Commerce (SAIC) issued the draft Opinions on Supporting Enterprise Mergers, Acquisitions, and Reorganizations by Standardizing Registration of Enterprise Mergers and Divisions (Draft for Comments) (the "Corporate Registration Opinions"). The deadline for comment submission was September 12, 2011. Major provisions in the Corporate Registration Opinions are summarized below.

- The Corporate Registration Opinions shall be applied to domestic companies established in China. Foreign companies that absorb other domestic companies, or that survive as or create a domestic company during

division, shall also abide by relevant laws, administrative regulations, rules and the Corporate Registration Opinions.

- Companies existing or newly established after a merger or split, when meeting all conditions specified in the Company Law, may choose to be limited liability companies or companies limited by shares.
- When filing for registration due to merger or division, the applicant may, after 45 days of the publication of the announcement, apply for registration of company cancelation, establishment or change at the same time.
- For companies existing or newly established due to a merger or division, the registered capital and paid-up capital shall be determined through the merger or division agreement, but shall not exceed the total registered capital and paid-up capital of all companies prior to a merger, nor exceed the registered capital and paid-up capital of the company prior to split.
- For companies existing or newly established due to a merger or division, the ratio of contributions by shareholders (promoters) and subscribed or paid-up capital contribution shall be determined through merger agreement, or the split resolution or decision, and shall also subject to approval when required by laws, regulation and decisions of the State Council.
- For companies that have not fully paid the registered capital prior to a merger or split, the registered capital of companies existing or newly established after a merger or division shall, in accordance with the merger agreement or the split resolution or decision, be paid in full within the term of contribution stipulated therein prior to a merger or split.
- When companies dissolved or divided due to a merger have branches, the branch disposal plan shall be indicated in the merger agreement, or in the split resolution or decision.
- When companies dissolved or divided due to a merger hold shares of other companies, the share disposal plan shall be indicated in the merger agreement, or in the split resolution or decision.
- In cases when changes occur in other registration items, such as addition of shareholders or increases in registered capital due to mergers or divisions, relevant registration applications may be filed concurrently, but shall conform to relevant laws and regulations.

- *Opinions on Supporting Enterprise Mergers, Acquisitions, and Reorganizations by Standardizing Registration of Enterprise Mergers and Divisions (Draft for Comments)*

- *关于规范公司合并分立登记支持企业兼并重组的意见 (征求意见稿)*

- *Issuing Authority: State Administration of Industry and Commerce*

- *Date of Issuance: August 29, 2011*

4. Corporate Law

Regulate the Registration of Debt for Equity Swaps (Draft for Public Comment)

《公司债权转股权登记管理办法 (征求意见稿)》 (08/18/2011)

On August 18, 2011, the State Administration of Industry and Commerce (SAIC) released a draft of the Administrative Measures on Registration of Debt for Equity Swaps ("Swap Draft") soliciting public comments. The Swap Draft clarifies issues relating to the registration of equity contribution by both domestic and foreign creditors of a PRC-incorporated company, including the foreign-invested enterprise (FIE), in exchange for cancelling their debts.

According to the Swap Draft, a company's creditor can register the debt-for-equity swap with SAIC or its local counterparts. Three types of debt are eligible and will be accepted for swap purposes: (1) debt arising from a contract between the creditor and the company where the creditor does not contravene prohibitory provisions of PRC law and regulation; (2) debt upheld by a court's judgment; and (3) debt included in a reorganization plan

approved by, or a settlement agreement upheld by, the local courts during the reorganization or settlement process. The Swap Draft also specifies the following issues:

- **Approval Requirement.** If a foreign creditor converts its loans registered as foreign debts with the State Administration of Foreign Exchange (SAFE) into the equity of a FIE, the FIE must obtain approval from competent local counterparts of MOFCOM and SAFE.
- **Valuation.** The creditor's rights to be converted into equity interest must be appraised by a qualified asset appraiser, and the value of capital contribution must not exceed the appraised value.
- **Non-Cash Capital Contribution.** The conversion of creditor's rights into equity interest is considered a non-cash capital contribution which, under current PRC Company Law, cannot exceed 70 percent of the total registered capital of the debtor company.
- **Capital Verification.** The capital contribution through debt-to-capital swap must be verified by a qualified capital verification institution that will issue a supporting document specifying the basic information of the debt, the appraisal and appraised value of the debt, the swap agreement, the accounting documents demonstrating relation to the debt cancellation, and applicable approvals.
- **Registration Procedure.** The debtor company will undergo a registration procedure with local AIC modifying its registered capital, actual paid-in capital, and other applicable items. The Swap Draft, if adopted substantially in the current version, will formalize the registration procedures for debt-for-equity swaps and will supersede the existing provincial rules issued by local governments.

- *Administrative Measures on Registration of Debt for Equity Swaps (Draft for Public Comment)*

- *公司债权转股权登记管理办法 (征求意见稿)*

- *Issuing Authority: State Administration of Industry and Commerce*

- *Date of Issuance: August 18, 2011 / Public Comments Accepted Until: September 2, 2011*

5. Bankruptcy

New Judicial Interpretation of the Bankruptcy Law

最高人民法院关于适用《中华人民共和国企业破产法》若干问题的规定（一）(09/09/2011)

On September 9, 2011, the Supreme People's Court (SPC) issued the *Provisions of the Supreme People's Court on Certain Issues Relating to the Application of the Enterprise Bankruptcy Law of the People's Republic of China I* ("Bankruptcy Interpretation I"), clarifying certain issues relating to the application of PRC Enterprise Bankruptcy Law ("Bankruptcy Law") that became effective on June 1, 2007, particularly, the causes of bankruptcy and the burden of proof. The Bankruptcy Interpretation I took effect on September 26, 2011.

The Bankruptcy Interpretation I contains 9 articles. Below are some highlights:

- **Causes of Bankruptcy.** Article 2 of the Bankruptcy Law provides for a two-pronged test to determine whether a debtor must undergo mandatory bankruptcy procedure: (1) if the debtor is "unable to pay off due liabilities"; (2) if the debtor's assets are "sufficient to satisfy all debts" or whether the debtor is "obviously insolvent." The Bankruptcy Interpretation I clarifies how to adopt such a test by defining three relevant terms: (1) "unable to pay off due liabilities" is defined as "the debtor fails to pay off all debts when the debt relation is legally established and the payment is due"; (2) "sufficient to satisfy all debts" can be inferred from facts "drawn from the debtor's balance sheet, audit report or asset appraisal report that all of its assets are insufficient to pay off all its debts" unless "there is adequate evidence to prove that the debtor is able to pay off all debts"; and (3) "obvious insolvency" refers to failure to pay off debts caused by the debtor's serious shortage of funds or fails to realize its assets, debtor's financial loss and inability to turn losses into profits, etc.

- **Burden of Proof.** If the creditor files a bankruptcy application for the debtor, it shall submit evidence showing that the debtor is “unable to pay off due liabilities.” When the court accepts such an application, it will demand from the debtor evidence concerning details of the debt, including a description of the debtor’s financial position, a list of its debts, a list of its credits, financial reports, etc. The court will impose a direct monetary penalty on the person-in-charge of the debtor enterprise if the debtor refuses to provide such materials.
- **Debtor Enterprises that are Liquidated or being Liquidated.** The creditor can also file a bankruptcy application for the enterprises that have been dissolved through liquidation or are under the process of liquidation. The court will accept such applications unless the debtor submits sufficient evidence proving the contrary.

Commentators have opined that the Bankruptcy Interpretation I lowers the threshold for creditors to force debtors into bankruptcy, because it provides an objective criteria for the “unable to pay off due liabilities” test and thus makes it impossible for the debtor not to enter a bankruptcy procedure by denying the existence of a debt.

- *Provisions of the Supreme People’s Court on Certain Issues Relating to the Application of the Enterprise Bankruptcy Law of the People’s Republic of China I*

- 最高人民法院关于适用《中华人民共和国企业破产法》若干问题的规定（一）

- *Issuing Authority: Supreme People’s Court*

- *Date of Issuance: September 9, 2011 / Effective Date: September 26, 2011*

6. Merger and Acquisition

Clarification on the Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors

商务部实施外国投资者并购境内企业安全审查制度的规定(08/25/2011)

On August 25, 2011, the Ministry of Commerce (MOFCOM) released *Regulation on the Implementation of the Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (“SRM Regulation”), replacing the *Interim Rules on the Implementation of the Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (“SRM Interim Rules”) that MOFCOM issued in March of 2011. The SRM Regulation took effect on September 1, 2011.

Compared to the SRM Interim Rules, the SRM Regulation makes two key changes: (1) the authority will assess the transaction based on its substance and actual impact during the national security review process; and (2) foreign investors are expressly forbidden to circumvent the national security review through means of nominee holding structures, trusts, multi-tier investments, leases, loans, contractual control, offshore transactions, etc.

The SRM Regulation retains the application and review procedure set out in the SRM Interim Rules. Below are some highlights:

- The national security review mechanism can be triggered in three ways: (1) foreign investors’ voluntary submission if the target company falls within the scope of national security review defined in the “Circular on the Establishment of Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors” (“Circular”); (2) MOFCOM’s acceptance of a suggestion filed by a third party, such as a State Council department, a national industrial chamber, or a competitor enterprise, to review the transaction; (3) local counterparts of MOFCOM’s filing a submission if it finds that the transaction falls within the above scope during its approval process.

- The investor faces a mandatory waiting period of 15 working days during which MOFCOM will consider whether the transaction falls within the above scope. If MOFCOM determines that it will, it will release a formal decision to the investor and deliver the case to a ministerial joint committee for a final decision. It may take 30 or 90 working days (30 working days for general review plus 60 working days for special review) before the final decision is awarded.
- Based on the decision of the ministerial joint committee, MOFCOM will issue a written notice to the applicant that may include (1) an approval to continue the transaction if MOFCOM determines it will not affect national security; (2) an order to cease the transaction if the transaction is likely to affect national security and is not carried out; and (3) an order to take specific measures to remedy the negative effects if the transaction has been carried out and has or is likely to affect national effect.

According to the Circular issued by the State Council in February of 2011, M&A transactions are subject to national review if they are targeted at companies in the military, key agriculture/energy/resource sectors, strategically important manufacturing industries, or other sensitive areas.

- Regulation on the Implementation of the Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors

- 商务部实施外国投资者并购境内企业安全审查制度的规定

- Issuing Authority: Ministry of Commerce

- Date of Issuance: August 25, 2011 / Effective Date: September 1, 2011

7. Anti-Monopoly Law

Guideline for Antitrust Reviews of Concentrations on Assessing Competitive Effects

关于评估经营者集中竞争影响的暂行规定 (08/29/2011)

On August 29, 2011, the Ministry of Commerce (MOFCOM) released *Interim Provisions on Evaluating the Impact of Concentration of Business Operators on Competition* ("Interim Provisions"). The Interim Provision, as a supplement to the Anti-Monopoly Law (AML), took effect on September 5, 2011.

According to the AML, concentration of business operators refers to mergers and acquisitions, or to the gaining of control through contractual arrangements. Article 27 of the AML sets forth certain factors that MOFCOM must take into consideration when reviewing the competitive impact of concentration of business operators: market share accounted for by each business operator; market control power; degree of concentration in the relevant markets; impact of concentration on market entry; technological advances; effect on consumers and relevant business operators; development of the national economy; etc. The Interim Provisions further elaborates on these factors, providing a standard for MOFCOM's assessment. Below are some highlights:

- Preliminary Focus. According to Article 4 of the Interim Provisions, MOFCOM will first examine whether the concentration will result in (or strengthen) a business operator's ability, motive and possibility to exclude or restrict competition.
- Market Control Power. According to Article 5 of the Interim Provision, MOFCOM must consider comprehensively the following factors when determining whether business operators will acquire or increase their market control power: (1) their market shares and competition in the relevant market; (2) substitutability of their products or services; (3) productivity of those business operators not participating in the concentration and the substitutability of the products or services of those operators; (4) their ability to control the retail/wholesale market or the raw materials market; (5) the abilities of buyers to switch suppliers; (6) their financial and technical strength; (7) purchasing power of the downstream customers; (8) other factors that should be taken into consideration.

- Degree of Concentration of Relevant Market. Article 6 of the Interim Provisions adopts the Herfindahl-Hirschman Index and the Concentration Ratio Index in determining the degree of concentration of relevant markets.
- Effects of Concentration on the Market and Relevant Parties. The Interim Provisions also discuss the positive and negative effects of the concentration on market entry, technological advances, consumers, relevant business operators and development of the national economy. The discussion is descriptive and does not set forth factors, tests or standards that may be applied during the assessment.

- *Interim Provisions on Evaluating the Impact of Concentration of Business Operators on Competition*

- 关于评估经营者集中竞争影响的暂行规定

- Issuing Authority: Ministry of Commerce

- Date of Issuance: August 29, 2011 / Effective Date: September 5, 2011

8. Labor

Specific Implementing Rules for Social Security Mechanism

实施《中华人民共和国社会保险法》若干规定(06/29/2011)

In order to clarify and complement the *Social Insurance Law of the People's Republic of China*, the Ministry of Human Resources and Social Security has issued the *Several Provisions on Implementing the Social Insurance Law of the People's Republic of China* (the "Social Security Provisions"), which shall come into effect on July 1, 2011.

The Social Security Provisions specify that the savings in a personal account for basic endowment insurance for employees shall not be withdrawn in advance. When an individual leaves China to inhabit abroad prior to satisfaction of the statutory requirement of claiming basic endowment insurance, his or her personal savings account shall be reserved; when he or she has met the requirement of claiming, he or she shall be entitled to enjoy the endowment insurance. When an individual has lost Chinese nationality, he or she may apply to terminate the basic endowment insurance relationship for employees in writing, then he or she will be paid the individual savings in the personal savings account in a lump sum.

With respect to the basic medical insurance, the Social Security Provisions clarify that when an individual participating in basic medical insurance for enterprise employees transfers and continues his or her basic medical insurance relationship, the premium payment period of basic medical insurance shall be calculated cumulatively.

When an enterprise employee (including part-time practitioners) works for two or more employers simultaneously, both or all employers shall pay work-related injury insurance premiums respectively. When a work-related injury occurs, the employer whom the employee works for when injured shall take the responsibility of work-related injury insurance in accordance with the law.

With respect to unemployment insurance, the Social Security Provisions also provide that suspension of employment under which an unemployed person may claim unemployment insurance compensation shall include circumstances such as when the employer proposes to rescind the labor contract or an employee is dismissed, removed or expelled by an employer, etc.

- *The Ministry of Human Resources and Social Security Issues the Several Provisions on Implementing the Social Insurance Law of the People's Republic of China*

- 实施《中华人民共和国社会保险法》若干规定

- Issuing Authority: Ministry of Human Resources and Social Security

- Date of Issuance: June 29, 2011 / Effective Date: July 1, 2011

9. Labor

Foreigners Living and Working in China are Required to Participate in Social Insurance

在中国境内就业的外国人参加社会保险暂行办法(09/06/2011)

According to the *Interim Measures for the Participation of Foreigners Employed in China in Social Insurance* (the "Foreigners Measures") formulated by the Ministry of Human Resources and Social Security approved by the State Council, foreign workers in China refers to people lawfully employed without Chinese nationality who have obtained employment and residence certificates for foreigners in accordance with the law, and possess a Permanent Residence Certificate for Foreigner. Employing units that shall participate in the social insurance include any enterprise, public institution, social group, privately owned non-enterprise institution, foundation, law firm, accounting firm or other organization incorporated or registered in accordance with the law in China. Any foreigner who, upon signing an employment contract with a foreign employer, is dispatched to work in any branch or representative office of the foreign employer incorporated or registered in China (hereinafter the "domestic work unit") shall also participate in the social insurance.

When a foreigner is employed or dispatched in China, the employing unit or the domestic work unit shall, within 30 days of the date on which the employment certificate is handled, register the foreign employee for social insurance. If the foreign worker leaves China before reaching the required age to be entitled for a pension, he or she can choose to leave his or her personal savings account reserved, or to draw the account in a lump sum.

Upon the death of any foreign worker, the balance of his or her individual social insurance account may be inherited in accordance with the law. But before death, the foreigner who obtains social insurance benefits on a monthly basis outside China shall provide, at least once a year, a certificate of survival issued or legalized by relevant Chinese embassy or consulate, or by entering China and proving in person to the social insurance administration agency that he or she is alive.

- *The Interim Measures for the Participation of Foreigners Employed in China in Social Insurance*
- 在中国境内就业的外国人参加社会保险暂行办法
- Issuing Authority: Ministry of Human Resources and Social Security
- Date of Issuance: September 6, 2011 / Effective Date: October 15, 2011

10. Foreign Exchange

Reform of Foreign Exchange Administration System for Goods Trade

三部委联合发布《关于货物贸易外汇管理制度改革试点的公告》(09/09/2011)

On September 9, 2011, the State Administration of Foreign Exchange (SAFE), the State Administration of Taxation (SAT), and the General Administration of Customs (GAC) jointly issued the *Announcement on the Implementation of the Pilot Program for the Reform of Foreign Exchange Administration System for Goods Trade* (the "Foreign Exchange Announcement"), which took effective on the same day.

According to the Foreign Exchange Announcement, the pilot program to improve the foreign trade administration system, shall be implemented in order to optimize and upgrade the information sharing system for export proceeds and export tax rebate. The Foreign Exchange Announcement states that from December 1, 2011, the pilot program will be implemented in Jiangsu, Shandong, Hubei, Zhejiang (excluding Ningbo city), Fujian (excluding Xiamen city), Dalian and Qingdao. During the implementation period, the pilot regions should implement the Guidance on the Implementation of the Pilot Administrative Measures for Foreign Exchange

Control in Goods Trade (“Guidance”) and the Detailed Implementing Rules for the Guidance on a trial basis, and enterprises located within the pilot regions are no longer required to go through the formalities for the writing-off of export proceeds in foreign exchange or the onsite item-by-item verification.

The Foreign Exchange Announcement also stipulates that it is imperative to implement differentiated and dynamic administration of enterprises located within pilot regions, simplify export tax rebate vouchers, adjust export declaration procedures, and strengthen collaboration between departments in supervision and administration.

- Announcement on the Implementation of the Pilot Program for the Reform of Foreign Exchange Administration System for Goods Trade

- 关于货物贸易外汇管理制度改革试点的公告

- Issuing Authority: State Administration of Foreign Exchange, State Administration of Taxation and General Administration of Customs

- Date of Issuance: September 9, 2011 / Effective Date: September 9, 2011

The *China Newsletter* is prepared by Greenberg Traurig's [China Practice Group](#). Inquiries regarding this information or about our China Practice may be directed to the following GT attorneys:

[George Qi](#)

+86 (21) 6391-6633
qiq@gtlaw.com

[Dawn Zhang](#)

+86 (21) 6391-6633
zhangd@gtlaw.com

[Thomas Loo](#)

310.586.7890
loot@gtlaw.com

Albany
 518.689.1400

Las Vegas
 702.792.3773

Philadelphia
 215.988.7800

Amsterdam
 +31 20 301 7300

Los Angeles
 310.586.7700

Phoenix
 602.445.8000

Atlanta
 678.553.2100

London*
 +44 (0) 203 349 8700

Sacramento
 916.442.1111

Austin
 512.320.7200

Mexico City
 +52 55 5029 0000

San Francisco
 415.655.1300

Boston
 617.310.6000

Miami
 305.579.0500

Shanghai
 +86 21 6391 6633

Chicago
 312.456.8400

New Jersey
 973.360.7900

Silicon Valley
 650.328.8500

Dallas
 214.665.3600

New York
 212.801.9200

Tallahassee
 850.222.6891

Delaware
 302.661.7000

Orange County
 949.732.6500

Tampa
 813.318.5700

Denver
 303.572.6500

Orlando
 407.420.1000

Tysons Corner
 703.749.1300

Fort Lauderdale
 954.765.0500

Palm Beach County North
 561.650.7900

Washington, D.C.
 202.331.3100

Houston
 713.374.3500

Palm Beach County South
 561.955.7600

White Plains
 914.286.2900

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