

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 23.07.2015

CORAM :

THE HON'BLE MR. JUSTICE R. SUDHAKAR
AND
THE HON'BLE MS. JUSTICE K.B.K. VASUKI

C.M.A. No: 1865 of 2010

The Commissioner of Central Excise
Chennai II Commissionerate
No. 692 MHU Complex
Anna Salai
Nandanam
Chennai - 600 035.

... Appellant

-Vs-

1. M/s. Urbane Industries
No: 48 SIDCO Industrial Estate
Ambattur, Chennai - 98.
2. Sri. R. Krishna Mohan
Managing Partner
M/s. Urbane Industries
No: 48 SIDCO Industrial Estate
Ambattur, Chennai - 98.
3. The Customs, Excise and Service Tax
Appellate Tribunal
South Zone Bench
Shastri Bhavan Annex
1st floor, No: 26 Haddows Road
Chennai - 600 006.

... Respondents

Civil Miscellaneous Appeal under Section 35 G of the Central Excise Act, 1944 against Final Order No: 3031 of 2010 dated 06.01.2010 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zone Bench, Chennai against the order of the Commissioner of Central Excise, Chennai II Commissionerate, Chennai - 35 dated 14.02.2007 and made in Order-in-Original No.02 of 2007 against the Order of the Commissioner of Central Excise, Chennai II Commissionerate, Nandanam, Chennai - 35 dated 26.02.2003 and made in Order-in-Original No.06 of 2003.

For appellant : M/s. S. Xavier Felix
For resps. 1 & 2 : Mr. J. Shankarraman
3rd respondent : Tribunal

J U D G M E N T

(Judgment of the Court was delivered by R. Sudhakar, J.)

Aggrieved by the order of the Tribunal in partly allowing the appeal filed by the assessee, the Revenue/appellant is before this Court by filing the present appeal. This appeal was admitted on 23.07.2010 on the following substantial questions of law :-

" 1. Whether issuance of separate show cause notice is essential to the dummy units of the 1st respondent / assessee while clubbing the value of the clearances of the said dummy units with that of the assessee / 1st respondent against whom admittedly proceedings commenced with issuance of show cause notice only ? and

2. Whether or not the order of the Tribunal in remitting the matter is a non-speaking order, as it has not at all discussed the reasoning assigned by the original authority for not issuing separate show cause notices to the dummy units and whether the failure on the part of the CESTAT in not giving its own reasoning or finding vitiates the order of remand ? "

2. The respondent assessee was issued with a show cause notice on 03.10.2001 demanding the duty on goods manufactured and cleared to Integral Coach Factory and in the course of verification by the Officers attached to the Head Quarters Preventive Unit of Chennai II Commissionerate on 26.09.2000, records were unearthed showing the case of clearance of goods in the name of the respondent assessee as well as in the name of M/s. Core Tech Glass Composites Pvt. Ltd. (CTGC) and M/s. Glass Composites Company (GCC). The case was first adjudicated ex-parte and by an order of the Tribunal it was remanded and was re-adjudicated. Thus, the Order-in-Original was passed by the Commissioner on 14.02.2007 rejecting the stand taken by the assessee and held that M/s. Core Tech Glass Composites Pvt. Ltd. and M/s. Glass Composites Company are mere paper creations i.e. Dummy manufacturing units of the respondent assessee and hence, the value of clearances shown in their name for the periods in question

are liable to be included in the turnover of the assessee for the purpose of excise levy and therefore, duty amount, penalty and interest was demanded. The order passed by the Commissioner on 14.02.2007 is as follows :

" 22. In view of the above, I pass the following order :

ORDER

1. I confirm and demand a duty amount of Rs.51,29,017/- (Rupees Fifty one lakhs, twenty nine thousand and seventeen only) from M/s.Urbane Industries under Section 11A(2) of the Central Excise Act, 1944, along with appropriate interest in terms of Section 11AB of Central Excise Act, 1944.
2. I confirm and demand an amount of Rs. 1,54,396/- (Rupees One lakh, fifty four thousand, three hundred and ninety six only) from M/s.Urbane Industries being the duty payable on capital goods removed from their factory under the provisions of Rule 57U of the erstwhile Central Excise Rules, 1944 read with Section 11A of the Central Excise Act, 1944, along with interest under Rule 57U(8) of the Central Excise Rules, 1944, read with Section 11AB of the Central Excise Act, 1944.
3. I appropriate an amount of Rs. 9,00,000/- (Rupees Nine lakhs only) already paid by M/s. Urbane Industries and adjust the same towards the duty determined under Sl. No. 1 above.
4. I appropriate an amount of Rs. 1,54,296/- (Rupees One lakh, fifty four thousand, three hundred and ninety six only) already paid by M/s.Urbane Industries, vide TR 6 Challan dt.17.2.2001 and adjust the same towards the duty determined under Sl. No. 2 above.
5. I impose a penalty of Rs.51,29,017/- (Rupees Fifty one lakhs, twenty nine thousand and seventeen only) on M/s. Urbane Industries under the provisions of Section 11 AC of the Central Excise Act, 1944.
6. I impose a penalty of Rs. 1,54,396/- (Rupees One lakh, fifty four thousand, three hundred and ninety six only) on M/s.Urbane Industries under the provisions of the Rule 57 U of the erstwhile Central Excise Rules, 1944.
7. I impose a penalty of Rs. 10,00,000/- (Rupees Ten Lakhs only) on Shri. R. Krishna Mohan, Managing Partner of M/s. Urbane Industries, under the provisions of Rule 209A of erstwhile Central Excise Rules, 1944. "

3. On appeal, the Tribunal, by a two page order, remanded the matter for issuance of fresh show cause notice both to M/s. Core Tech Glass Composites Pvt. Ltd. and M/s. Glass Composites Company.

The Department is aggrieved by the said order and hence, the present appeal.

4. Heard the learned counsel appearing for the parties on either side and perused the materials made available on record.

5. The first question of law may not really arise if the second question of law is answered and hence, we proceed to consider the second question of law first.

6. For better understanding of the case, the findings of the original authority in so far as the nature of business activities of the two units which is sought to be clubbed with the respondent assessee has been culled out by the adjudicating authority in paragraph 17 of its order, which reads as under :

" 17. In the interest of justice, it will be proper and necessary to examine the status of GCC/CTGC as available on records. The SCN has stated [para 4 iii] that, GCC a proprietary concern in the name of Shri.M.Suresh, an employee of M/s. UI during 1998-99 had shown clearances of goods valued Rs.1,11,500/-, though the unit did not have any machinery, labour and no purchases of raw material was made by him. Shri.R.Krishna Mohan, Managing Partner of M/s.UI, in his statement recorded on 1.3.2001, [Annexure A to SVN - Sl. No.39 - Q/A No.7], specifically admitted that GCC was floated by him to get more orders from ICF, Chennai; that the policy of ICF, Chennai is to have vendors at different locations to avoid hold-up of supply of items; that the shed at No. 263, Sidco Industrial Estate, Chennai 98, was used by him as address for communication. Further, Shri M.Suresh, in his statement recorded on 12.9.2001 [Annexure A to SCN - Sl.No.10 - Q/A 8] had categorically admitted that he was the proprietor of the company for namesake only and Shri R.Krishna Mohan and M/s. UI looked after all the activities of GCC. Neither Shri.R.Krishna Mohan nor Shri.M.Suresh have retracted their statements, nor M/s. UI have refuted these facts in their written submission dt. 15.12.2006. It is therefore sufficiently evident that GCC was a mere paper creation made by M/s. UI intended to satisfy certain policy norms followed by their customer in the context of procurement of materials. Whereas, the clearances shown during 1998-99 was factually manufactured and cleared by M/s. UI under the direct management of Shri R.Krishna Mohan, since GCC had no infrastructure whatsoever, to engage themselves in manufacture of the said goods.

17.1 Now coming to the status of CTGC, as seen from records, this unit is situated at No. 9, SIDCO Industrial Estate, Chennai 98. M/s. UI have in their submissions, claimed that CTGC is a private limited company with Smt.R.Sasikala [wife of Shri Krishna Mohan] and her brother Shri Vijaya Kumar as Directors and they are a separate entity legally eligible to avail separate exemptions. However the facts available on records, as listed below, provides an altogether different scenario:

- As per lease agreement dt.1.11.98 entered into between one Mrs.Polammal Naidu [Proprietrix] of M/s. Kuptha Industrial Corporation, No: 9, Sidco Industrial Estate, Chennai 98, and M/s.Urbane Industries, No.48, SIDCO Industrial Estate, Chennai 98, the premises used by CTGC has been leased to M/s. UI against specific considerations. [Annexure A to the SCN - Sl. No.18].
- Shri.C. Vijaya Kumar, of CTGC had confirmed that no advance deposits or monthly rental payments have been made by them to M/s.UI [Mahazar dt.26.9.2000 - Annexure A to the SCN - Sl. No. 19]
- Shri. R. Krishna Mohan, in his statement recorded on 26.9.2000, had stated that no rentals or advance has been collected from CTGC on account of the premises used by CTGC [Annexure A to the SCN - Sl.No.39 - Q/A4]
- M/s. UI have made a deposit of Rs. 2,50,000/- and they have been paying Rs. 35,000/- per month to Mrs.Polammal Naidu, as rent for the premises leased by M/s.UI and used by CTGC viz. - Hydraulic Presses - 4 Nos., Genset - 1 belonged to M/s. UI [Annexure A to the SCN - Sl. No. 19]. These machines were used for manufacture of goods which were cleared on account of M/s. UI as also on account of CTGC [Annexure A to the SCN - Sl. No. 39 Q/A 8]. "

7. Though it is said that both CTGC and GCC are only paper units, in view of the statements made and the findings rendered, atleast in so far as CTGC is concerned, there are materials to show that the unit was functioning. The assessee claims that it is an independent private limited company in which Smt. R. Sasikala, wife of Shri.Krishna Mohan, and her brother Shri. Vijaya Kumar are Directors and it is a separate legal entity.

8. A cursory look into the following decisions can be made to consider the issue of clubbing of clearances - dummy units :

(i) Alpha Toyo Ltd vs. Collector of Central Excise, New Delhi,- reported in 1994 (71) E.L.T. 689

(ii) Ogesh Industries vs. Collector of Central Excise, Kanpur,- reported in 1987 (94) E.L.T. 88

(iii) Ramsay Pharma (P) Ltd. vs. Commissioner of Central Excise, Allahabad - reported in 2001 (127) E.L.T. 789

(iv) K.R. Balachandran vs. Commissioner of Central Excise, Coimbatore - reported in 2003 (151) E.L.T. 68

In Alpha Toyo Ltd vs. Collector of Central Excise, New Delhi, the Tribunal held that,

"4. We have carefully considered the submissions made by both the sides, and have perused the record, and the findings and citations relied before us. The department had proceeded on the basis of the annual report of M/s.Alpha Toyo Ltd. It is noted therefrom about the interest free loans given by them to other four units and have come to the conclusion that they are related persons and that the four units are dummy ones, and as there is a common managerial control, hence the benefit of exemption under Notification No. 175/86-C.E., dt. 1-3-1986 is denied to them. Therefore, the clearances at all the five units have been clubbed. We have considered the grounds and the finding given by the ld. Collector. We are not satisfied with the said findings as Managerial control is different from money flow back, management control and profit sharing. A dummy unit is a unit, which is not in existence in reality, but it is merely created on paper only. In other words, the physical existence of such a unit is not to be found in terms of investment of capital, machinery and labour. The unit which creates such a dummy unit, utilise the dummy unit for the purpose of tax evasion. Therefore, the courts have clearly distinguished on facts each of the cases and have now settled the issue by holding that mere evidence of Directors being common or utilisation of telephone, labour or machinery by itself is not a ground to consider an unit as a dummy unit of the other. It has been held that even if a unit is in existence, but if it is totally controlled in terms of money flow back, profit sharing, management control, and it had been created with a view to evade taxes by a series of acts of omission and

commission, by manipulation of accounts and records then in such an eventuality, the clearances of a dummy unit can be clubbed. As rightly pointed out by the ld. senior advocate there is no definition of the term "dummy unit", but what flows from the judgments cited by him is that a dummy unit is a unit, created by the main unit with a view to evade taxes and that the first main unit totally controls its activity in terms of profit sharing, management control, decision making, and acts of such nature. The dummy unit would be a mere facade one and in reality it is one and the same with the main unit. In this particular case, there is no such evidence at all, to show that such an arrangement is in existence. The mere fact of management control and a few directors being common and also by the fact that interest free loans are being given to the other units by the first unit, these factors, by itself, is no ground for holding them as dummy units and for ordering clubbing of all their clearances, and to deny the benefit of the exemption Notification. There is no dispute in all these cases that all the four units are independent in existence, with independent transactions, without any profit sharing, management control or money flow back to the main unit. Each unit is having independent bank transactions, loans, sales, purchase & tax registrations. Therefore, on the facts and circumstances of this case, the ground taken by the department is not sustainable. The concept of related persons, as envisaged under Section 4 of the Central Excises and Salt Act, 1944, is for the purpose of valuation. This is a independent concept by itself. It has no relationship with the concept of dummy units and units set up as a facade to evade taxes. As pointed out by the ld. senior advocate, the ld. Collector has confused this aspect of the matter with the aspect of creation of dummy units. The ground taken by the Revenue in this case is already answered against them in the case of Jagjivan Das & Co., Bhagwan Das Kanodia and Others, Prabhat Dyes and Chemicals, Bapalal & Co. and Prima Control referred before us. The other judgments cited before us also deals on the same aspect of the matter. Applying the ratio of these rulings, we have to hold that the mere fact of management control or of grant of interest free loans is not sufficient to hold the four units as dummy units of M/s. Alpha Toyo Ltd., in the absence of any money flow back, profit sharing and total control on other four units by M/s. Alpha Toyo Ltd. In the result the appellants succeed in all these appeals. The impugned order is set aside and appeals allowed. "

9. In the case of Ogesh Industries vs. Collector of Central Excise, Kanpur, the Tribunal went on to hold that,

"3. The first argument advanced by Shri Gujral, ld. Advocate, was that M/s. Gore Industries were a separate corporate entity from M/s. Ogesh Industries. He has shown that in his order, the Dy. Collector has observed that he had no reason to disbelieve that these two corporate entities were separate and distinct. It is his claim that no Panchnama was conducted in the premises of M/s. Gore Industries. In the absence of Panchnama, there was no basis to the observation of the Dy. Collector that the officers on a visit, found no machines, no raw materials or other evidence to establish that no manufacture could be undertaken therein. He submitted that the attendance records would show that there were workers working in the factory of M/s. Gore Industries. He stated that the work of pressing the sheets in the form of locks was done by hand. Other operations were got done on job work basis from M/s. Ogesh as well as from other concerns, referred in the statement of Shri Raizada, partner of M/s. Gore Industries. He stated that when at all times, the existence of Gore Industries separately from Ogesh Industries was projected, the department should have issued a show cause notice to M/s. Gore Industries. The decisions arrived at on the basis of a show cause notice sent to M/s. Ogesh Industries alone, are patently violate all the principles of natural justice. We find the various claims made by Shri Gujral to be correct. A show cause notice had to be issued to M/s. Gore Industries. Thereafter the adjudicating authority could go into the question whether the two units were really independent or whether one was a dummy unit of another. But he could not pre-determine the issue and limit the show cause notice only to that unit which he considered to be the only real unit. As per the statements of S/Shri Raizada and Verma, the partners in the two units, there was movement of goods in process from M/s. Gore Industries to M/s. Ogesh Industries for completion of certain manufacturing processes. The failure to issue the show cause notice to one of them would show non-application of mind on part of the authorities. As a consequence, the show cause notice must be held to be bad in law. "

10. In the decision reported in Ramsay Pharma (P) Ltd. vs. Commissioner of Central Excise, Allahabad, reported in 2001 (127) E.L.T. 789, the Tribunal followed the decision rendered in Ogesh Industries cited supra and held that,

"3. We see great force in the above submission. In the case of Ogesh Industries cited supra, it has been held that when a demand is raised by clubbing of the value of clearances of two units, and show cause notice has been issued only to one unit and not to the other, when the separate existence of both Units was projected, the notice is bad in law and the proceedings have been set aside by the Tribunal on this basis. The above decision has been followed in the case of M/s. Dawn Fire Works Factory and Others and both these decisions have been followed in the recent decision in the case of M/s. S.K.N. Gas Appliances v. Commissioner of Central Excise, New Delhi reported in 2000 (120) E.L.T. 732 (Tribunal). Learned DR Shri Dube seeks to distinguish the decisions in the case of Ogesh Industries and Dawn Fire Factory Works cited supra by submitting that the present case is not one of clubbing of clearances; however, we find from the impugned order that the Department has proceeded on the basis that the aggregate value of clearances of excisable goods effected by the appellants and all the units of M/s.Shree Baidyanath Ayurved Bhawan taken together exceeds the ceiling limit on value of clearances prescribed in the SSI exemption Notifications. Therefore, the ratio of the above cited decisions is applicable on all fours to the present case and following the same, we set aside the impugned order as bad in law on this preliminary point alone without going into the merits of the case. "

11. In the decision reported in K.R. Balachandran vs. Commissioner of Central Excise, Coimbatore, - reported in 2003 (151) E.L.T. 68, it was held by the Tribunal that,

" 14. We have carefully considered the submissions made by both the sides and have perused the enormous paper book and the defence filed by the appellant. The main case against the appellant is that they were manufacturing pressure pans, pressure cookers with the brand name of "Seetha". That they were using the brand name of Rama Industries and thus they were ineligible for SSI exemption and as a consequence the demands have been raised to club the clearances of both Meera Industries and Rama Industries and demands the same from Meera Industries. On perusal of the entire records we notice from the paper book that both the units were independently functioning. Rama Industries was in existence from 1990 and the Department had acknowledged the RT 12 returns, and even had inspected the

premises of both the units which were located separately. Both the units had been filing income-tax returns and also sales tax returns and maintained separate registers under various legislations. They had separate plan and factory plan which have been approved. The said plan had been filing with the department and the department had acknowledged the receipt of the same. There is a rental agreement in respect of both the units. They had been having separate profit and loss accounts and separate dealings. Goods manufactured by both the units are different and have different brand names. Further we notice from the records that Rama Industries was issued with a letter dated 20-8-90 by Superintendent of Central Excise, Range III 'C', Madras-III Division directing them to file the details pertaining to SSI certificate and details regarding the same, brand name certificate, xerox copies of invoices for the goods received from Ambala (Mixie Parts), turn over details for the financial year 1989-90. The Rama Industries by their letter dated 3-9-90 furnished all the details which has been received by Inspector of Central Excise, Madras III Division. The Assistant Collector of Central Excise, Madras III Division by his letter dated 8-8-91 to Rama Industries and 3 other separate units called upon them to report to him and explain the reasons for not filing the declaration for the financial year 1991. In response to the said letter Rama Industries filed the declaration on 4-7-91 which has been acknowledged by the Assistant Collector on 9-7-91. Certificate of registration dated 7-11-94 issued by Superintendent of Central Excise, Range III 'C' Madras - III Division to Rama Industries have also been produced showing the details of items manufactured by them. A separate certificate issued by the Department of Industries and Commerce registering both the units as SSI Units have also been produced. Form A.R. 4 for export under QBAL and application for removal of excisable goods for export by Meera Industries and Rama Industries which has been attested by the Superintendent of Central Excise, Range III has also been produced. RG 1 register showing register of parts of daily stock account of both the units have also been produced. The Superintendent of Central Excise had issued summons to both the units separately on 7-3-97 calling upon them to produce the various registers which had been done. The Deputy Commercial Tax Officer has also certified the premises of both the units and has given inspection of Form D 1 of the Commercial Tax Office Act which has also been produced to show the existence of functioning of two separate units.

Various notices received from the Deputy Commercial Tax Officer has also been produced. Rama Industries has also compounded the offences and compounding order passed by Deputy Commercial Tax Officer have also been produced. Correspondences between Rama Industries and Bureau of Indian Standards and a certificate from the Department of Commercial Tax has also been produced to show the existence of individual units. The financial balance sheet of both the units have been audited and have been accepted by the Income-tax Department. Both the units have huge turn over and from the records produced it is very clear that Rama Industries was in existence and that the department was aware of its existence and have accepted RT 12 returns and declarations and also various register maintained under Central Excise Act and has been inspected and seen by the Departmental officers. The Rama Industries has been separately located with separate lease deed and unit has been manufacturing different items namely LPG domestic gas stoves while Meera Industries had been manufacturing domestic pressure cookers and pans. The item being different the brand name is also different and the evidence on record here shows that Meera Industries could not have used the brand name of Rama Industries as the product of the Rama Industries is different. Be that as it may it is fundamental principles of natural justice that when these enormous evidences were examined at the time of inspection and the department was aware of the existence of Rama Industries then it was incumbent to have put the Rama Industries to notice. The violation of issue of show cause notice to Rama Industries has vitiated the proceedings. However we notice that the department in the show cause notice had alleged that Meera Industries were using brand name of Rama Industries and made themselves ineligible for the benefit of notification, while the Commissioner in the impugned order has proceeded to hold besides holding that Rama Industries is only on paper and a deemed unit and has also held flow back of funds between both the units. There is a clear contradiction in the finding of the Commissioner. Therefore, all the more it was incumbent for the department to have issued show cause notice to Rama Industries which had an independent existence with separate partners. None issue of show cause notice to Rama Industries and also for the reasons that department has taken different stand on the status of Rama Industries therefore the proceedings have become bad in law we are constrained to set aside the impugned order on this ground above in the light of the judgments relied by the ld.

Counsel in the case of CCE v. Madan Lal; CCE v. Supreme Electrical Appliances and Dawn Fire Works v. CCE (supra).

15. We are also agreeable with the ld. Counsel's argument that the department was fully aware of the existence of the Rama Industries and that it had been receiving RT 12 returns and Rama Industries was maintaining separate registration under various legislation and their registration have been checked by the Inspectors, Superintendents and Assistant Commissioners of Central Excise. Therefore it follows that the department had full knowledge of the existence of Rama Industries and in that view of the matter, suppression of facts for invoking larger period is not sustainable and the demands are time-barred and requires to be set aside on this ground also. In view of the fact that the department has not issued show cause notice to Rama Industries and has proceeded to hold that Meera and Rama Industries to be one and the same and also that Meera Industries has used the brand name of Rama Industries making them ineligible for SSI exemption is bad in law. Therefore, on this ground alone the impugned order is set aside and appeal allowed besides the other ground of time-bar and also for insufficiency of evidence to uphold the charges of evasion of duty in the matter. Appeals allowed."

(emphasis supplied)

12. In view of such findings and in the light of the decision of the Tribunal in the aforesaid matters, especially in Ogesh Industries and Ramsay Pharmaceuticals, it is clear that the consistent view of the Tribunals is that if there is an element of independent existence of a unit, the Department has to issue Show Cause Notice to such unit to sustain the plea for the purpose of clubbing the clearances. In the instant case, though there is material to that effect, no notice has been issued and the Tribunal remanded the matter for issuance of notices and that has been accepted by the assessee and not by the Department.

13. In the light of the various decisions of the Tribunal and also the findings of the adjudicating authority in the present case, it is clear that the department should have issued notice to all the units. However, learned counsel appearing for the respondent / assessee states that in respect of the other matter for which no appeal has been filed, they are not aggrieved and that the order of the Tribunal need not be set aside only on the ground that it has called upon the department to issue notice to the two units namely CTGC and GCC. According to him, the issue is only regarding the clubbing of clearances which could be agitated on

merits before the authority as and when Show Cause Notice is issued in terms of the orders of the Tribunal.

14. Accordingly, the authority concerned is directed to issue show cause notice to all the parties, afford them an opportunity of hearing and pass appropriate orders afresh, on merits and in accordance with law. With the aforesaid observations, the Civil Miscellaneous Appeal stands disposed of and the questions of law raised are answered accordingly. There shall be no order as to the costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1.The Customs, Excise and Service Tax
Appellate Tribunal
South Zone Bench
Shastri Bhavan Annex
1st floor, No: 26 Haddows Road
Chennai - 600 006.

2.The Commissioner of Central Excise
Chennai II Commissionerate
No. 692 MHU Complex
Anna Salai
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+1cc to Mr.S.Xavier Felix, Advocate, S.R.No.37915

C.M.A. No: 1865 of 2010

JSV(CO)
CA(30/09/2015)

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