IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.04.2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.Nos.31937 & 31938 of 2013

M/s.Tamil Nadu State Marketing Corporation Limited
4th Floor, CMDA Tower-II,
Gandhi Irwin Bridge Road,
Egmore, Chennai-600 008
Rep.by its Managing Director,
Shri.T.Soundiah ..Petitioner in both W.P's

vs.

1.The Chief Commissioner of Income Tax,
Chennai-I,
124, MG Road,
Chennai-34.

2.The Commissioner of Income Tax,
Chennai-III,
124, MG Road,
Chennai-34.

3. The Joint Commissioner of Income Tax,
Company Circle III (1),
124, MG Road,
Chennai-34.

4. The Assistant Commissioner of Income Tax,
Company Circle III (1),
124, MG Road,
Chennai-34.

..Respondents in both W.P's

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PRAYER IN W.P.No.31937 of 2013 : Writ Petition filed under Article 226 of the Constitution of India, to call for the records of the 4th respondent and quash the impugned notice issued under Section 148 of the Income-Tax Act, 1961 in PAN:AAACT2964P dated 26.03.2013 and consequential order dated 29.10.2013 in ACIT/CC/CC-III(1)/148 obj./reply.2013-14 for the assessment year 2006-07.

PRAYER IN W.P.No.31938 of 2013 : Writ Petition filed under Article 226 of the Constitution of India, to call for the records of the 4th respondent in PAN/GIR:AAACT2964P and quash the impugned notice, dated 27.03.2013 issued under Section 148 of the Income-Tax Act, 1961 and the consequential proceedings in ACIT/CC/CC-III(1)/148 obj./reply.2013-14 dated 29.10.2013 in respect of the assessment year 2008-09.

In both W.P's
For petitioner : Mr.R.Vijayaraghavan for Mr.Subbaraya Aiyar

For Respondent : Mr.Hema Murali Krishnan Senior Standing Counsel

C O M M O N O R D E R

The impugned notices dated 26.03.2013 and 27.03.2013 issued under Section 148 of the Income-Tax Act, 1961 and the consequential proceedings dated 29.10.2013 in respect of the assessment year 2006-07, 2008-09 are under challenge in the present writ petitions.

2.The writ petitioner, who is M/s.Tamil Nadu State Marketing Corporation Limited wholly owned and controlled by the Government of Tamilnadu, is engaged in the business of wholesale and Retail vending in Liquor. For the assessment year 2008-2009, under reference the petitioner filed its return of income on 29.09.2008 admitting a total income of Rs.6,17,46,875/-. During the financial year 2007-08 relevant to assessment year 2008-09, the writ petitioner claimed deduction of a sum of Special Privilege Fee amounting to Rs.2030,36,18,402/- in the profit and loss account for the year ended 31.03.2008. The petitioner adopted the rate of SPF as notified in G.O.(Ms).No.54, P & E (VIII) Department dated 04.08.2008 increasing the rate from Rs.57.72 per bulk litre to Rs.66.60 per bulk liter with effect from 01.04.2007. Accordingly, the petitioner provided for the Special Privilege fee calculated at the enhanced rate of Rs.66.60 for the sale made during the entire year.

3. The 4th respondent processed the return of income under Section 143(1) of the Income Tax Act. Subsequently, the case was taken up for scrutiny and a notice under Section 143(2) dated 13.08.2009 was issued. Assessment under Section 143(3) was completed on 07.12.2010 determining the total income at Rs.324,54,68,479/-. While completing the assessment, the Assessing Officer among others added to the total income a sum of Rs.316,34,21,626/- being the difference in Special Privilege Fee claimed and he has disallowed the same.

4. The 4th respondent/Assessing Officer while competing the assessment under Section 143(3) of the Act disallowed the

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difference in enhanced SPF amounting to Rs.316,34,21,626/- on a estimated basis on the ground that (i) G.O.Ms.No.54 dated 04.08.2008 was not prevailing as on the 31st March 2008; (ii) the G.O.(Ms).No.53 dated 20.07.2007 was not cancelled; (iii) the liability on account of enhanced SPF did not accrue as on 31.03.2008; (iv) liability is not in the nature of Statutory liability but more in the nature of contractual payment to be allowed under Section 43B; (v) charging of SPF on the basis of per litre basis and increasing it every year on the basis of G.O. is not justifiable; (vi) assessee has adopted methodology to take out profits in the name of SPF before arriving at taxable profits and (vii) tax planning made after the end of the financial year so as to reduce profits.

5. It is contended that the petitioner has been vested with the exclusive privilege for whole sale and retail distribution of Indian Made Foreign Liquor (IMFL) and beer in the State of Tamil Nadu. The Government vide The Tamil Nadu Prohibition Act, 1973 read with relevant Rules made there under has fixed additional vend fee (now special privilege fee) payable by the petitioner for having granted the exclusive privilege of whole sale and retail distribution.

6. The Government of Tamil Nadu notifies the Special Privilege Fee to be paid by the petitioner to the Government on the sales made every month by means of Notification. Special Privilege Fee payable is calculated on quantity of IMFS and Beer sold by the appellant during a month and should be paid before the 10th of the succeeding month. On many occasions, the Government has notified the Special Privilege Fee payable by the petitioner to the Government after the period to which the Notification applies. In all those cases, the petitioner has been providing in the accounts for the period to which the Notification applies, at the rates notified by the Government and the same has been accepted by the Income Tax Department.

7. The Government Notified vide G.O.(Ms).No.54, P & E(VIII) Department dated 04.08.2008 increasing the rate from Rs.57.72 per bulk liter to Rs.66.60 per bulk liter with effect from 01.04.2007. Accordingly, the petitioner claimed deduction of special privilege fee on the IMFL and Beer sold during the relevant previous year at the notified rate of Rs.66.60 per Bulk Litre for the Special Privilege Fee for the sale made during the entire year. It is contended that the additions made by the 4th respondent/Assessing Officer in the assessment order dated 07.12.2010 was challenged by way of an appeal before the Commissioner of Income Tax(Appeals). The CIT(Appeals) in order dated 18.03.2011 confirmed the disallowance of claim of special privilege fee claimed on the basis of G.O.(Ms).No.54 dated 04.08.2008. The petitioner filed an appeal before the Income Tax

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Appellate Tribunal and the Tribunal, in its order dated 18.09.2012, allowed the assessee's appeal on merits and in ITA.No.925/Mds/11 dismissed the appeals filed by the Department.

8. On the basis of the order passed by the ITAT, the learned counsel appearing on behalf of the writ petitioner reiterated that the impugned notice issued under Section 147 of the Income Tax Act for re-opening of the assessment is in violation of the judgment of the ITAT and further, it amounts to change of opinion which is impermissible under the provisions of the Act. As far as the Special Privilege Fee is concerned, the ITAT has clearly settled the issues and passed an order in favour of the petitioner. If at all the respondent is aggrieved, they have to prefer an appeal against the order passed by the ITAT and they have no authority to re-open the assessment in the matter of Special Privilege Fee. Thus, initiation of proceedings under Section 148 itself is unsustainable.

9. The learned counsel for the petitioner contended that when the very same subject matter was adjudicated before the ITAT based on the assessment made with reference to the previous years, then the said judgment is binding on the Assessing Officer and by way of change of opinion, they cannot re-open the assessment already concluded. The petitioner relied on the judgment of this Court dated 18.01.2018 passed in W.P.Nos.7598 & 7599 of 2015 and this Court relied on the judgment of the Hon'ble Supreme Court of India. The petitioner relied on the observations made in the judgment holding that in respect of such re-opening of Special Privilege Fee, it was considered earlier and the issues were settled and the said re-opening is nothing but change of opinion. Accordingly, the said notice issued under Section 148 was set aside.

10. The learned counsel relied paragraph No.15 of the judgment which reads as under:

> "Thus, for the above reasons, the reopening proceedings are held to be a clear case of change of opinion. Consequently, the impugned assessment orders are not sustainable in law. Accordingly, these writ petitions are allowed as prayed for. No costs. Consequently, connected miscellaneous petitions are closed."

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11. It is contended that the very same issue was decided by this Court in the said judgment and it was the case filed by the assessee. While so, there is no reason to issue the impugned order by the Assessing Officer which is untenable. At the outset, it is contended that the very issuance of notice under Section 148 of the Income Tax Act for re-opening of the Assessment is nothing but change of opinion and cannot be

construed as new materials. Thus, the writ petition is to be allowed.

12. The learned Senior Standing Counsel disputed the said contention by stating that the facts in respect of the writ petitions on hand are entirely different. It cannot be considered as change of opinion. The concept of change of opinion contemplated under the Statute has been misconstrued and misinterpreted by the writ petitioners. Thus, the judgment relied on by the petitioners dated 18.01.2018 passed by this Court is not applicable with reference to the facts of the present case.

13. In order to distinguish the facts, the learned Senior Standing Counsel solicited the attention of this Court with reference to the findings in paragraph No.14 of the judgment delivered by this Court on 18.01.2018 which reads as under:

> 14.As pointed out earlier, the respondent did not follow the guidelines laid down by the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. (supra) by which the respondent should have passed a speaking order and communicated to the petitioner before passing the impugned assessment orders. This defect though said to be stated as a curable defect, I am not inclined to accept the said submission of the revenue, as it affects the rights of the assessee and goes to the very root of the matter. In fact, the assessee has, while submitting the objections to the reopening vide representation dated 10.02.2015, specifically referred to the decision in GKN Driveshafts (India) Ltd. (supra), yet the assessing officer ignored the same and proceeded to pass the impugned assessment orders.

14. Relying on the above findings, the learned Senior Standing Counsel reiterated that the writ petition was allowed in the said case on the ground that the directives issued in GKN Driveshafts (India) Limited. (supra) were not followed. Therefore, the writ petition was allowed and the order of re-opening was set aside. However, in the present case, the directives laid down by the Hon'ble Supreme Court in GKN Driveshafts (India) Limited (supra) has been scrupulously followed by the respondents. Thus, the writ petitioner cannot rely upon the said judgment for the purpose of assailing the order impugned in the present writ petition. When the writ petitions were allowed based on the ground that certain directives of the Hon'ble Apex Court in GKN Driveshafts (India) Limited (supra) were not followed, the said case cannot be cited as precedent for the purpose of quashing the present impugned notice, wherein the respondent has followed the mandates laid

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down by the Hon'ble Apex Court of India in the case of GKN Driveshafts (India) Limited (supra).

15. The learned Senior Standing Counsel further relied on the judgment of the Hon'ble Supreme Court of India in the case of Kalyanji Mavji & cO. vs.Commissioner of Income Tax reported in (1976) 102 ITR 287, wherein four principles are laid down. On a combined review of the decisions of the Hon'ble Supreme Court of India, the Hon'ble Supreme Court held that the principles would apply to determine the applicability of Section 34(1)(b) to the following categories of cases:

> (1) Where the information is as to the true and correct state of the law derived from relevant judicial decisions;
>
> (2) Where in the original assessment the income liable to tax has escaped assessment due to oversight, in advertence or a mistake committed by the Income-tax officer. This is obviously based on the principle that the tax-payer would not be allowed to take advantage of an oversight or mistake committed by the Taxing Authority;
>
> (3) Where the information is derived from an external source of any kind. Such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment;
>
> (4) Where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law.

16. The learned Senior Standing Counsel relied on clause-4 cited supra, wherein the Apex Court held that "where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law."

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17. By relying on the said principles, it is contended that admittedly, the Special Privilege Fee was allowed during the previous assessment year, more specifically, 2007-08. However, during the assessment year 2010-11, the Assessing Officer found certain materials to disallow the Special Privilege Fee and it is identified that the assessee committed certain intentional acts to evade payment of tax. Therefore, the Assessing Officer formed an opinion that the assessment is to be re-opened. Once new materials were traced out with reference to the Special

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Privilege Fee, while scrutinizing the returns for the assessment year 2010-11, the Assessment Officer is empowered to reopen the previous assessment also as there is a reason to believe. Thus, the case referred by the petitioner is not applicable with reference to the facts and circumstances of the present case. In the present case, the Assessing Officer, while scrutinizing the returns for the assessment year 2010-11, traced out certain new materials with reference to the Special Privilege Fee.

18. The learned Senior Standing Counsel reiterated that by way of Special Privilege Fee, the petitioner/Corporation is showing loss on some occasions which is totally false and in-correct. Under these circumstances, the Assessing Officer formed an opinion that the assessee has failed to submit certain materials, evidences regarding Special Privilege Fee and the said Special Privilege Fee with reference to the Government order is to be adjudicated by reopening the assessment already made. Therefore, the said reopening cannot be construed as change of opinion and the reopening is made based on the tangible evidences which are made while scrutinizing the returns of the assessment year 2010-11. Further, the petitioner has to defend his case before the Authorities Competent and co-operate for the assessment to be made based on reopening of the assessment.

19. In reply, the learned counsel for the petitioner made a submission that the principles laid down by the Hon'ble Supreme Court of India in the case of Kalyanji Mavji and Company cited supra were overruled by the Hon'ble Supreme Court. Therefore, the reliance placed on by the respondents are untenable.

20. The learned Senior Standing Counsel clarified that the Hon'ble Supreme Court has overruled only the principle No.2 of the Kalyanji Mavji & Co. case and not regarding the principle Nos.(3) and (4). Therefore, the submission made in this regard is to be rejected. In support of the said contention, the judgment in the case of Virudhunagar Co-operative Milk Supply Society Limited vs. Commissioner of Income Tax reported in [1989] 46 Taxman 13 (Madras) has been referred wherein the Division Bench of this Court considered the principles laid down by the Hon'ble Supreme Court in the case of Kalyanji Mavji and Company and made an observation as follows:

> The case of the assessee would fall within category (4) enumerated above, in that, the information had been obtained by the Officer from the record of the assessment proceedings in connection with the assessment year 1970-71. We may now notice Indian & Eastern Newspaper Society's case (supra) where the Supreme Court has pointed out at page 1004, referring to Kalyanji Mavji & Co.'s case (supra), that the categorization in

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that decision under category (2) thereof, i.e.,'income liable to tax has escaped assessment due to oversight, inadvertence or mistake, would also fall within Section 34(1)(b) has been stated rather too widely and broadly and goes even farther beyond what is warranted by the statute and that an error discovered, would not give the Officer the power to resort to a reopening under section 147(b) of the Act. Though Indian & Eastern Newspaper Society's case (supra) has taken the view that oversight, inadvertence or mistake, would not fall within section 34(1)(b) nothing has been said by way of disapproval of the other categories enumerated in Kalyanji Mavji & Co.'s case (supra) particularly with reference to category (4), within which the present case would fall, We are, therefore, of the view of the view that the case of the assessee would fall with- in category (4) as per the decision in Kalyanji Mavji & Co.'s case (supra) and that would justify the reopening of the assessment.

21. In the present case, the respondent relied on clause-4 of the judgment in the case of Kalyanji Mavji and Company. Therefore, the writ petitions are to be dismissed.

22. This Court has also considered the reopening of assessment in the case of Dayanidhi Maran vs. Assistant Commissioner of Income Tax, Non-corporate Circle-1, Chennai reported in [2018] 98 Taxmann.com 2020 (Madras), wherein it is held as follows:

93. On going through the said ingredients of the Section 147, this Court has no hesitation to conclude that the Assessing Officer has got wider power in respect of covering the escaped assessments for the purpose of reopening the assessment. The proviso to Section 147 states that "provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment". This also provides various circumstances enabling the Assessing Officer to assess or reassess such income other than the income involving the matters which are the subject matters of any appeal, reference or revision. The wideness of the power has been further clarified in the said proviso clause.

94. Explanation 2 sub-clause (b) to Section 147 also provides power to the Assessee where a return of income has been furnished by the Assessee but no assessment has been made and it is noticed by the

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Assessing Officer that the Assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return.

95. The circumstances are narrated wherein certain materials and informations are provided by the Assessee at the time of filing of the returns and if the same has not been assessed by the Assessing Officer during the relevant assessment year and if it is subsequently noticed, then also the Assessing Officer is empowered to reopen the assessment in respect of the escaped assessments.

96. On a perusal of various circumstances incorporated under Section 147 of the Act, for reopening of the escaped assessment, this Court is of an opinion that it is certainly flexible and wider power has been provided, enabling the Assessing Officer to reopen the assessment in the interest of revenue and to ensure that the Assessees pay the correct tax with reference to the provisions of the Act.

97. This Court is of the firm opinion that where certain doubts in respect of the reasons or otherwise has been raised by the Assessee, such benefit of doubt should be held in favour of the revenue and not in favour of the taxpayer. Contrariness is to be established by the Assessee, while scrutinising the materials available with the Assessing Officer.

98. It is for the Assessee to convince the Assessing Officer in respect of all such escaped assessments, informations and materials available and submit the returns. This being the legal principles to be followed, the provisions are to be interpreted to achieve its purpose and the object and therefore the wider powers provided under Section 147 of the Act, for reopening of the escaped assessments can never be restricted by imposing certain conditions on the Assessing Officer.

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99. Even in case of certain procedural lapses, this Court is of an opinion that such procedural lapses can be taken advantage of by the Assessee only if it causes prejudice to the proceedings, if any. Such procedural lapses not causing any prejudice to the rights of the Assessee during the course of the proceedings of the reassessment, then the Assessee cannot file a writ petition, seeking quashing of the entire proceedings. Such writ petitions also cannot be entertained in view

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of the fact that such procedural lapses or omissions or commissions have not caused any prejudice to the interest of the Assessee nor resulted in denial of fair procedure and opportunity to the Assessee."

23. In paragraph No.99 as stated above, in the present case also, the assessee is not prejudiced on reopening of the assessment as they are entitled for an opportunity to put-forth their contention and defend the case. Contrarily, the High Court under Article 226 of the Constitution of India cannot adjudicate with reference to new materials or informations or evidences collected or identified by the Assessing Officer for the purpose of invoking Section 147 of the Income Tax Act. Such an exercise cannot be done by the High Court and the assessee has to defend his case by following the procedures contemplated under the Statute.

24. In respect of the order passed by the ITAT dated 18.09.2012, those new materials identified by the Assessing Officer in respect of returns of the year 2010-11 were not made available nor adjudicated. Such new materials identified are to be adjudicated on merits and in accordance with law. Contrarily, the said materials cannot be allowed to escape from the clutches of law as rightly pointed out by the respondents in the present case. Therefore, a complete adjudication of such new materials are imminent to cull out the truth, allowability or disallowability of the Special Privilege Fee as claimed by the assessee. The Special Privilege Fee is running to several crores and if any evasions in this regard, the same are to be carefully adjudicated by the Authorities Competent in order to cull out the truth behind the facts and circumstances as narrated by the petitioner. Unless those issues are adjudicated, it may not be possible for the High Court to form an opinion that the reassessment is made on change of opinion.

25. The concept of change of opinion is provided only to avoid multiplicity of proceedings regarding the assessment and therefore, certain new materials if identified, cannot be fit-in with the concept of change of opinion. In other words, the Assessing Officer in the event of identifying any new material during the subsequent assessment year, then the said materials would certainly a ground for reopening the previous assessment and it cannot be construed as change of opinion. If such contentions are accepted, then in all such cases, the assessee will claim that the issue was already adjudicated and the reopening is nothing but change of opinion. Thus, the Courts are expected to be cautious while considering the ground regarding the change of opinion raised by the assessee. The change of opinion has got a limited scope and only in the event of non-availability of any material, reopening is made based on the

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materials which were already adjudicated, then alone, the ground can be raised and not otherwise.

26. For instance, with reference to Special Privilege Fee, the sale was adjudicated and scrutinized during the previous assessment year in the present case. The matter went upto ITAT and the ITAT passed an order in favour of the petitioner. Under these circumstances, if the Assessment Officer while scrutinizing the returns of the year 2010-11, identified new materials with reference to Special Privilege Fee, then there is a reason to believe and accordingly, the notice was issued under Section 148 for reopening of the assessment. In such circumstances, it cannot be construed that the Special Privilege Fee was already adjudicated and therefore, any further notice for reopening amounts to change of opinion.

27. The very ground raised by the petitioner that the Assessing Officer cannot sit on the judgment of the ITAT Tribunal was considered by the Assistant Commissioner of Income Tax in its order dated 29.10.2013. While considering this ground, the Assistant Commissioner formed an opinion that "in the course of the proceedings u/s.143(3) for the assessment year 2010-2011, the issue of the special privilege fee paid/payable to the Government of Tamil Nadu was examined in depth and it was concluded that the said payment to the Government of Tamil Nadu was nothing but an application of your income which could not be allowed as deduction u/s.37(1) or any other provisions of the Income Tax Act, 1961 while computing your total income. Without prejudice to this stand, an alternative finding was also given that instead of paying dividend to the State Government from your profit after taxation, the profits of your business is sought to be routed back to the State Government by way of frequent revision of the special privilege fee and, thereby, a colourable device has been adopted to evade the legitimate payment of corporation tax to the coffers of the Central Government".

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28. The above findings of the Assistant Commissioner of Income Tax is sufficient enough to form an opinion that there is a reason to believe for reopening of the assessment, based on new materials, which were not scrutinized or considered during the earlier assessment year. The observations are strong enough to form an opinion by the Assessing Officer to reopen the assessment. Further, in the present case, the respondent/Department has followed the mandates of the judgment of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Limited. Therefore, there is no perversity or infirmity in respect of reopening of the previous assessment.

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29. This being the factum established, this Court do not find any acceptable ground for the purpose of interfering with the impugned order passed by the respondent and the petitioner is bound to defend their case by following the procedures contemplated. It is pertinent to note that the writ petitions are filed in the year 2013 and pending for the past about seven years. Under these circumstances, the speedy disposal of the proceedings by the respondents are imminent. Thus, the respondents are directed to proceed with the reopening of the assessment by following the procedures contemplated as under the Statute and Rules and conclude the same as expeditiously as possible preferably within a period of four months from the date of receipt of a copy of this order.

30. With these directions, the writ petitions stand dismissed. No costs.

s/d-
Assistant Registrar

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Sub-Assistant Registrar

To
1. The Chief Commissioner of Income Tax,
   Chennai-I,
   124, MG Road,
   Chennai-34.

2. The Commissioner of Income Tax,
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   Chennai-34.

+2 Ccs M/s. Subbaraya Aiyar Padmanabhan, Advocate sr 23251, 23250.
+1 CC to M/s. Hema Muralikrishnan, Advocate sr 23072.

W.P.Nos.31937 & 31938 of 2013

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