IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Fitzgerald, P.J., Wilder and Murray, JJ.

ANDRIE INC.,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY,
STATE OF MICHIGAN,

Defendant-Appellant.

Supreme Court No. 145557

Court of Appeals No. 301615

Court of Claims No. 08-95-MT

BRIEF ON APPEAL OF PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

Plaintiff-Appellee, Andrie Inc. ("Andrie"), agrees with Defendant-Appellant's, Department of Treasury, State of Michigan (the "Department"), Statement of Basis of Jurisdiction.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

On December 5, 2012, this Court granted the Department's Application for Leave to Appeal and directed the parties to address three specific issues:

1. Whether the Court of Appeals correctly determined that a retail transaction in Michigan subject to the Sales Tax Act, MCL 205.51 *et seq.*, is not subject to the Use Tax Act, MCL 205.91 *et seq.*

   Plaintiff-Appellee answers, "Yes."

   Defendant-Appellant answers, "No."

   Court of Claims answers, "Yes."

   Court of Appeals answers, "Yes."

2. Whether a retail purchaser is entitled to a presumption that sales tax is paid on retail transactions in Michigan.

   Plaintiff-Appellee answers, "Yes."

   Defendant-Appellant answers, "No."

   Court of Claims answers, "Yes."

   Court of Appeals answers, "Yes."

3. Whether the exemption in MCL 205.94(1)(a) applies in this case.[1]

   Plaintiff-Appellee answers, "No."

   Defendant-Appellant answers, "Yes."

   Court of Claims answers, "No."

   Court of Appeals answers, "No."

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[1] In its brief, the Department's statement of this third issue is incorrect and argumentative.

I. INTRODUCTION

Under Michigan law, sales tax, not use tax, applies to purchases in Michigan from a Michigan retailer. This Court has long held that it is unlawful for use tax to be imposed on sales by Michigan retailers where sales tax applies. *Lockwood v Comm'r*, 357 Mich 517; 98 NW2d 753 (1959). The Sales Tax Act, MCL 205.51 *et seq.*, and Use Tax Act, MCL 205.91 *et seq.*, are complimentary to each other, not overlapping statutes permitting double taxation. *World Book, Inc v Dep't of Treasury*, 459 Mich 403; 590 NW2d 293 (1999). This Court has consistently held that the Use Tax Act only applies to those transactions to which the Sales Tax Act does not apply. *Id.* Because the use tax does not apply to retail transactions subject to the sales tax, the use tax exemption under MCL 205.94(1) does not apply.

Michigan law is clear that sales tax liability falls on the Michigan retailer, rather than the purchaser. Further, a purchaser is entitled to presume that sales tax was included in the purchase price. MCL 205.73(1); *Sims v Firestone Tire & Rubber Co*, 397 Mich 469; 245 NW2d 13 (1976). The Department itself has recognized this presumption. The Department failed to follow this Court's well-established precedent and exceeded its statutory authority in assessing use tax on Andrie. This Court should affirm the decisions below.

II. LEGAL STANDARDS

A. Counter-Statement of Standard of Review.

The Court of Appeals' holding that Andrie was entitled to rely on the presumption that sales tax had been included in the purchase price from a Michigan retailer is a question of law that this Court reviews *de novo*. *Danse Corp v Madison Hts*, 466 Mich 175, 178; 644 NW2d 721 (2002) ("Issues concerning the interpretation and application of statutes are questions of law that this Court decides *de novo*.").

B. Taxing Statutes Must Be Interpreted in Favor of a Taxpayer.

When tax statutes are construed, any ambiguities are resolved in favor of the taxpayer. *Int'l Bus Machines v Dep't of Treasury*, 220 Mich App 83, 86; 558 NW2d 456 (1996). Tax laws may not be extended by implication or forced construction. *JB Simpson, Inc v O'Hara*, 277 Mich 55, 61; 268 NW 809 (1936) ; see also *Metzen v Dep't of Revenue*, 310 Mich 622, 627; 17 NW2d 860 (1945), quoting *Gould v Gould*, 245 US 151, 153; 38 S Ct 53; 62 L Ed 211 (1917) (citations and internal quotation marks deleted) ("In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."). Moreover, in *In re Dodge Bros*, 241 Mich 665, 669; 217 NW 777 (1928), this Court determined that "[t]ax collectors must be able to point to such express authority so that it may be read when it is questioned in court."

III. COUNTER-STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

This case involves the Department's assessment of use tax for the tax period beginning November 1, 1999 and ending December 31, 2004, and for the tax period beginning January 1, 2004 and ending July 31, 2006 (the "years in issue"). Andrie's Business.

Andrie is an S-corporation organized and incorporated in Michigan since 1988. Testimony of Stan Andrie, President of Andrie Inc. (hereinafter "Andrie Testimony"), Trial Tr at 71:10, App 64a.[2] Andrie has two business divisions: a marine construction business and a marine transportation business. *Id.* at 71:20-22, App 64a. For its marine transportation business during the years in issue, Andrie focused mainly on the transportation of asphalt and asphalt-

[2] Trial testimony is cited herein as page:line to page:line.

related products throughout the Great Lakes. *Id.* at 72:2-5, App 64a. Andrie's major customers included large oil companies, such as Marathon, Seneca Petroleum, and Amoco/BP. *Id.* at 72:16-17; 73:7-9, 18-23, App 64a. Andrie regularly purchased fuel, supplies and fixed assets from Michigan retailers.

A. The Department's Audit.

The Department conducted audits of Andrie for the years in issue.[3] The Department assessed use tax on Andrie's purchases from Michigan retailers where an invoice did not list sales tax as a separate line item. Andrie objected to this assessment on the basis that sales to it by Michigan retailers were subject to sales tax, not use tax. Testimony of James Bartkowiak (hereinafter "Auditor Testimony"), Trial Tr at 115:11-15, App 75a. The Department's auditor admitted that all of the Michigan retailers' sales at issue were subject to sales tax and the retailer has an obligation to collect and remit the tax on the sale. *Id.* at 115:20-23, App 75a. The auditor testified that he did not even know there was a provision in Michigan law that allows a Michigan retailer to include the sales tax in the price—i.e., remit the tax, but not separately state or collect the sales tax on the invoice. *Id.* at 115:24 to 116:13, App 75a. Further, the auditor admitted that he did not determine whether any of the Michigan retailers that had sold items to Andrie without listing sales tax separately on the invoice had, in fact, remitted the sales tax to the Department. *Id.* at 116:14 to 119:24, App 75a to 76a. The auditor also conceded that contacting the Michigan retailer would show whether the retailer, indeed, collected and remitted sales tax on items sold to Andrie. Auditor Testimony, Trial Tr at 117:8 to 119:15, App 75a to 76a. Nonetheless, the

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[3] See, e.g. Joint Trial Exhibit 9, Audit Report 11/1/1999 to 12/31/2004, App 121a; Joint Trial Exhibit 10, Audit Report 1/1/2005 to 7/31/2006, App 132a; Joint Trial Exhibit 49, Audit Work Papers, 1/1/2005 to 7/31/2006, App 143a.

Department's auditor assessed use tax on Andrie for items Andrie purchased in Michigan from Michigan retailers. *Id.* at 119:16-24, App 76a.

B. Court of Claims Proceedings.

Andrie paid the use tax assessment under protest and then filed suit. The Court of Claims conducted a bench trial on July 26, 2010. On November 22, 2010, the Court of Claims issued an Opinion and Order, App 17a, holding (among other things) that the Department improperly assessed use tax on certain items Andrie purchased in Michigan from Michigan retailers. November 22, 2010 Opinion and Order of the Court of Claims (hereinafter "Trial Court Opinion") at 15-16, App 31a-32a. The Court of Claims concluded that the Use Tax Act applies only to those transactions to which the Sales Tax Act does not apply. *Id.* at 15, App 31a. Because the sales at issue were consummated in Michigan from Michigan retailers, and Michigan law provides that a purchaser has the right to presume sales tax is included in the purchase price, the Sales Tax Act applied and the tax liability fell on the Michigan retailers, not Andrie. *Id.* at 16, App 32a. Because Andrie was entitled to rely on the presumption that sales tax had been included in the purchase price, the Court of Claims concluded that the Department unlawfully reversed the burden of proof and improperly assessed use tax on Andrie. *Id.*

C. Court of Appeals Proceedings.

On appeal, the Department argued (among other things) that the Court of Claims erred when it concluded the Department unlawfully imposed use tax on certain personal property that Andrie purchased in Michigan from Michigan retailers. The Court of Appeals observed that the Department assessed use tax on these Michigan purchases from Michigan retailers because Andrie purportedly did not prove that any sales tax was paid on the purchases in Michigan. Opinion at 8, App 43a. The Court of Appeals affirmed the Court of Claims and, likewise, held that the Department's assessment was unlawful. In doing so, the Court of Appeals observed that

both it and this Court have repeatedly held that "the mere fact that a transaction is subject to sales tax necessarily means that the transaction is not subject to use tax." *Id.* at 9, App 44a, citing *Elias Bros Restaurants v Dep't of Treasury*, 452 Mich 144, 146 n 1; 549 NW2d 837 (1996) ("The Use Tax Act, as amended, is an 'excise' or 'privilege' tax that covers transactions not subject to the general sales tax."); see also *Fisher & Co v Dep't of Treasury*, 282 Mich App 207, 209; 769 NW2d 740 (2009) ("The Use Tax Act is complementary to the Michigan General Sales Tax Act . . . and is designed to cover those transactions not subject to the sales tax.").

Indeed, the Court of Appeals concluded that sales tax is imposed on the retailer for "the privilege of engaging in the business of making retail sales." Opinion at 8, App 43a, quoting *Combustion Eng'g, Inc v Dep't of Treasury*, 216 Mich App 465, 467; 549 NW2d 364 (1996). Moreover, the Court of Appeals observed that a "retailer is not obligated to include the sales tax in the property's selling price, although the retailer has this option." *Id.* Accordingly, the Court of Appeals determined that, while sales tax is ordinarily passed on to the purchaser at retail, the retailer is obligated to pay the tax due and bears the direct legal incidence of the Sales Tax Act. *Id.* at 8-9, App 43a–44a. Therefore, the Court of Appeals held:

> In the present case, there is no dispute that the transactions in question involved Michigan retailers and transfers of title within the state of Michigan. Because the retailer has the ultimate responsibility to pay *any* sales tax, it is erroneous to place a duty on a purchaser to show that the sales tax was indeed paid to the state. *Combustion Eng'g*, 216 Mich App at 469. Thus, the transactions are not subject to use tax, and the trial court properly held in favor of [Andrie] on this issue. [*Id.* at 9, App 44a.]

The Department filed a Motion for Reconsideration, which the Court of Appeals denied. App 15a. Subsequently, this Court granted the Department's Application for Leave to Appeal and directed the parties to address three specific issues. See December 5, 2012 Order of the Supreme Court granting Defendant/Appellant's Application for Leave to Appeal.

IV. ARGUMENT

A. This Court Has Held That A Retail Transaction In Michigan That is Subject To Sales Tax Is Not Subject to Michigan Use Tax.

In this case, the parties agree that Michigan sales tax applies to all the transactions at issue. Trial Tr at 115:11-19, App 75a. Where sales tax applies, use tax does not. This Court has concluded that the test for whether the Sales Tax Act or Use Tax Act applies is whether the sale was consummated within Michigan. *World Book*, 459 Mich 403. In *World Book*, this Court determined:

> [W]e hold that the correct test for deciding whether a sales transaction is subject to a sales, not a use, tax is whether it was consummated within the state. Only a transaction consummated within Michigan is a taxable "sale at retail" under MCL 205.51(1)(b); MSA 7.521(1)(b).
>
> Our holding lessens the danger of double taxation. It comports with the principle that the sales tax is to be imposed on sellers for the privilege of selling personal property at retail in this state and this state only. [*Id.* at 411.]

Here, Andrie purchased certain fuel supplies and fixed assets from Michigan retailers. In each instance, title transferred and delivery occurred within Michigan. Under *World Book* and the Department's own admission,[4] Andrie's purchases are consummated in Michigan and, thus, the Sales Tax Act applies. Simply, the purchases are subject to "a sales, not a use, tax." *World Book*, 459 Mich at 411.

This Court has already rejected the Department's faulty position that sales and use tax may be imposed on the same transaction. Appellant's Brief at 9. In *Lockwood*, 357 Mich 517, this Court examined the constitutional limitation (Const 1963, art 9, § 8) on the imposition of

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[4] See Appellant's Brief at 5, conceding that the Department "imposed use tax on fuel and supply purchases Andrie made in Michigan, from Michigan retailers."

sales tax. At the time of *Lockwood*, the Michigan Constitution limited the sales tax to 3%.[5] Because some purchasers were seeking to avoid paying Michigan sales tax by purchasing items outside of Michigan and then bringing such items back to Michigan, the Legislature enacted a 3% use tax for such purchases outside of Michigan. In addition, the Legislature imposed a 1% use tax upon retail sales in Michigan. When the validity of this 1% use tax was questioned, the Department argued, as it does here, that the enactment did not violate the constitutional limitation of 3% sales tax since the imposition of 1% use tax was on a different person (consumer, not retailer) and a different transaction (use, not purchase). This Court flatly rejected the Department's theory.

This Court reasoned that both sales and use taxes were imposed on the same transaction and would ultimately be paid by the same person – the consumer. *Lockwood*, 357 Mich at 559. Accordingly, this Court concluded that the imposition of use tax on a transaction that was subject to the sales tax violates the constitutional limitation on the sales tax rate. *Id.* The same reasoning applies to the Department's faulty position in this case. The Department's assessment violates the constitutional limitation of 6% sales tax by subjecting Andrie to both sales and use tax on the same transaction that falls squarely under the Sales Tax Act; namely, purchases in Michigan from Michigan retailers. Therefore, neither this Court, nor the Court of Appeals, misspeak when they note the well-established principle that a transaction subject to Michigan sales tax is not subject to Michigan use tax because to hold otherwise would be unconstitutional. See, e.g., *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 237; 644 NW2d 734 (2002) ("a transfer of property that has already been subjected to Michigan's sales tax is not subject to this state's use tax"); *id.* at 243 (Cavanagh, J., dissenting) ("Under MCL 205.94(1)(a), no use tax

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[5] The Michigan Constitution currently limits sales tax to a rate of 6%. Const 1963, art 9, § 8.

is owed on retail sales subject to sales tax."). Because the transactions at issue are subject to the sales tax, the Department may not impose use tax on these same transactions.

B. A Retail Purchaser Is Entitled To A Presumption That Sales Tax Is Paid On Retail Transactions In Michigan.

It is well settled that a retailer is liable for the sales tax and a retail purchaser is entitled to a presumption that it paid the sales tax on a retail transaction in Michigan. The Legislature's power to impose a sales tax is limited by Const 1963, art 9, § 8, which directs sales tax to be imposed upon the retailer. *Sims*, 397 Mich at 472. The Sales Tax Act contains the statutory scheme that implements the constitutional provision. *Id.* at 473. The Sales Tax Act imposes the sales tax as follows:

> Except as provided in section 2a, there is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act. [MCL 205.52(1).]

Accordingly, the constitutional and statutory language imposes the direct legal incidence of the sales tax on the retailer for the privilege of engaging in retail business. *Sims*, 397 Mich at 473; see also *Federal Reserve Bank of Chicago v Dep't of Revenue*, 339 Mich 587; 64 NW2d 639 (1954). Therefore, for purposes of the Sales Tax Act, the retailer – not the purchaser – is the taxpayer. *Sims*, 397 Mich at 473.

Even though the retailer bears the direct legal incidence of the sales tax, it is well-established that, under MCL 205.73, the sales tax is included in the price that the purchaser must pay for the product. As this Court stated in *Sims*, 397 Mich at 473, "[i]t is a generally accepted principle of economics that the cost of production (raw materials, labor, overhead and *taxes* are examples of such costs) is included in the market price which must be paid by the consumer of

the product." (Emphasis added.) Further, this Court concluded that the "Legislature has recognized this principle" in MCL 205.73. *Id.*

MCL 205.73(1) provides, "a person engaged in the business of selling tangible personal property at retail *shall not advertise or hold out to the public in any manner, directly or indirectly, that the tax imposed under this act is not considered as an element in the price to the consumer.*" (Emphasis added). This provision allows a Michigan retailer to not collect the sales tax from the customer, even though it is remitted to the Department. See Revenue Administrative Bulletin 1990-24 (July 12, 1990) at *1 (stating that a veterinarian that sells pet supplies may collect the sales tax from its customer or include the sales tax a part of the selling price) (attached to Andrie's Brief on Appeal in the Court of Appeals as Exhibit 8), App 1b; Michigan Letter Ruling 70-2 (attached to Andrie's Brief on Appeal in the Court of Appeals as Exhibit 9), App 5b. As this Court determined in *Sims*, 397 Mich at 473-474, however, (a) retailers are required to pay the sales tax on all retail sales in Michigan, (b) Michigan law nonetheless allows retailers to shift the economic burden of the tax to the shoulders of the purchasers, and (c) Michigan law, therefore, presumes that the sales tax is included in the price of the good sold.

Further, this well-established presumption is even more important because a retailer is not required to separately state sales tax on any receipt or invoice. As the Department concedes, there is a reason "[f]urniture stores and car dealers often" advertise that they will pay a purchaser's sales tax. Department's Brief, p 15. The reason: a person who purchases something from a Michigan retailer is entitled to presume that the furniture store, car dealer, or similar retailer paid the sales tax on that transaction. This presumption is all the more important because Michigan law provides that a retailer is not required to separately state sales tax on any receipt or

invoice. Accordingly, even though an invoice does not state that the purchaser paid the sales tax, Michigan law presumes that tax was included in the price the purchaser paid. Further, this presumption comports with economic reality and the common practice of Michigan retailers to include the amount of the sales tax in the selling price, thereby collecting the sales tax from the purchaser, and then remitting the sales tax to the Department. The Department, however, seeks to abrogate this longstanding presumption and force purchasers to pay tax twice on the same transaction. This is unlawful because a retail transaction in Michigan that is subject to sales tax is not subject to use tax. To hold otherwise would be unconstitutional.

This Court has held that, where there is no evidence that a purchaser has agreed to a separate sum for sales tax in addition to the purchase price, the purchaser has a right to assume that the tax was included in the purchaser price. *Laurentide Leasing Co v Schomisch*, 382 Mich 155, 161; 169 NW2d 322 (1969). Under Michigan law, the seller may include the amount of the tax in the selling price, but it is not required to do so. MCL 205.73(1); *Combustion Eng'g, Inc v Dep't of Treasury*, 216 Mich App 465, 467; 549 NW2d 364 (1996).

Here, as a purchaser of property from Michigan retailers, Andrie is entitled to rely upon the requirement of MCL 205.73(1) that the sales tax was included in the price of the goods it purchased, whether the sales tax was separately stated or not on any receipt or invoice. *Swain Lumber Co v Newman Dev Co*, 314 Mich 437, 441; 22 NW2d 891 (1946) (buyer has no liability to pay tax on Michigan sales unless tax was incorporated into price or added to price); OAG, 1981, No 5,998 (October 19, 1981) (sellers are the taxpayers under the Sales Tax Act and are liable for the payment of tax on Michigan sales) (attached to Andrie's Brief on Appeal in the Court of Appeals as Exhibit 10), App 7b. Therefore, the Court of Appeals was entirely correct when it held that Andrie was entitled to rely on the presumption that sales tax had been included

in the purchase price of items Andrie bought in Michigan from Michigan retailers, and not to be held personally liable subsequently for the payment of that tax. Opinion at 16, App 32a.

C. Use Tax Exemptions Are Inapplicable to Sales Subject to The Sales Tax Act and Not The Use Tax Act.

This Court has consistently and correctly concluded that the Sales Tax Act and Use Tax Act are complementary and supplementary. See *General Motors*, 466 Mich at 237. Further, this Court has correctly determined that "a transfer of property that has already been subjected to Michigan's sales tax is not subject to this state's use tax." *Id.* This distinction is embraced under the Use Tax Act itself. For instance, the Use Tax Act, MCL 205.94(1)(a), precludes assessment of use tax when sales tax has been paid on a sale. But this is not an exemption. Instead, MCL 205.94(1)(a) provides that use tax does not apply to "property sold in this state on which transaction a tax is paid under the general sales tax . . . if tax was due and paid on the retail sale to the consumer." Therefore, MCL 205.94(1)(a) sets forth an unremarkable principle that is deeply rooted in Michigan law: the Sales Tax Act and Use Tax Act are mutually exclusive.

This principle is demonstrated by the facts of this case. Here, the Department's auditor assumed that no sales tax was paid by the Michigan retailer on all sales made by Michigan retailers to Andrie when there was no separate listing of sales tax on the invoice. As set forth above, however, the Department's auditor's actions were contrary to the law and the presumption under MCL 205.73(1) that the sales tax is included in the price of the goods sold. See *Sims*, 397 Mich at 473. Nonetheless, and citing to MCL 205.94(1)(a), the Department argues to this Court that, because Andrie was unable to provide documentation showing it paid sales tax on its purchases in Michigan from Michigan retailers, the Department's assessment of use tax was proper. As the Court of Claims reasoned, however, the Department's position is illogical because it "improperly reverse[s] the burden of proof, placing it on [Andrie] to prove

that the sales tax had been paid, and assessing use tax against [Andrie] for any of those items where [Andrie] was unable to meet that burden of proof." *Id.* Simply, the Department's argument cannot stand because it abrogates the well-established presumption set forth in MCL 205.73(1).

Not only does the Department's position run contrary to MCL 205.73(1), it constitutes inappropriate practice because the Department, not the consumer, such as Andrie, has the information on whether each of the retailers listed in Andrie's audit has actually paid the tax. The Department's position is especially harsh in this case because the auditor admitted that he made no inquiry to determine if any of these retailers paid taxes on the invoices at issue. Auditor Testimony, Trial Tr at 116:18 to 117:14, App 75a.

Andrie is not asserting that it is exempt from use tax. Rather, Andrie is asserting that the use tax does not apply to the transactions at issue. Thus, the use tax exemption is not applicable. The Department may not double tax the same transaction. Imposition of both sales and use tax on the same transaction constitutes unlawful double taxation. Sales and use taxes are complimentary; in other words, use tax applies when sales tax does not so as to prevent double taxation. *World Book,* 459 Mich at 408. Where the Department is the only entity that can verify whether sales tax was remitted on the invoice and does not do so, the taxpayer is entitled to rely upon MCL 205.73(1) and that sales tax is included in the price. Construing the tax statute in favor of the taxpayer and against the Department, as required by law, unless the Department can show that the retailer violated the Sales Tax Act and failed to remit sales tax that is required to be included in the price of the goods, the Department has not established a basis in law for imposing the use tax. See MCL 205.73(1). Tax collectors must be able to point to express authority for imposition of a tax when questioned in court. *In re Dodge Bros,* 241 Mich at 669. The retail

sales at issue were subject to Michigan sales tax; therefore, the use tax exemption is inapplicable and the retailer, not Andrie, is liable for sales tax. Imposition of sales tax precludes the imposition of use tax.

V. CONCLUSION

The Department's assessment of use tax on sales in Michigan subject to sales tax is unlawful, and the Court of Appeals' Decision on this issue should be affirmed.

Respectfully submitted,

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Dated: March 6, 2013

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