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CRIME AND (NO) PUNISHMENT: JULIE GUINDON V. HER MAJESTY THE QUEEN

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The Tax Court of Canada recently released its decision in *Guindon*,[2] a case concerning the application of third-party penalties under section 163.2 of the *Income Tax Act* (the "Act"). The Court found that the penalty imposed under section 163.2 of the Act is a *criminal* penalty, not a civil one, and therefore subject to the same constitutional protections as other penal statutes enacted by the federal government.

Facts

The case involved an unsuccessful "leveraged donation" plan whereby participants were to purchase "vacation ownership weeks" ("VOWs") in a Turks and Caicos Islands time-share resort and subsequently donate the VOWs to a registered charity called *Les Guides Franco-Canadians District d'Ottawa* (the "Charity"). The participants were to acquire the VOWs from a trust in exchange for a vendor takeback note of $3,248 and subsequently donate the VOWs to the charity at the purported fair market value of $10,825, for which they would receive a charitable receipt.

As part of the promotional package received by participants, there was included a written legal opinion provided by the taxpayer, Ms. Guindon, a lawyer who by her own admission was not an expert in tax matters. The taxpayer was also the president of the Charity at the particular time. In 2001, the Charity issued 135 tax receipts to participants in the VOW donation plan, some of which were identified as being signed by the taxpayer herself. The taxpayer was herself a participant in the program.

The facts disclosed that no trust was settled and no VOWs were created in 2001. The taxpayer, together with one of the promoters of the arrangement, advised participants that there were problems with the program and further advised not to file the receipts issued by the Charity until the issues with the VOWs could be resolved (or to amend their returns if the receipt had already been filed). A subsequent letter sent to the participants, including the taxpayer, although without her consent or involvement, stated that the promoters felt sufficiently comfortable with the progress they had made in resolving these issues so that participants could submit their receipts in filing their 2001 tax returns.

Not surprisingly, after reviewing the program, the CRA denied almost all[3] of the charitable donation tax credits claimed by the participants in respect of receipts issued for the donations. The taxpayer's claim for the credit was among those rejected.

On August 1, 2008, the CRA issued an assessment of the taxpayer for penalties under section 163.2 of the Act in the amount of $546,747.

Section 163.2

Section 163.2 was introduced as part of the 1999 federal Budget, and was enacted effective for statements made after June 29, 2000, being the date the legislation received Royal Assent. The section provides two separate penalty provisions: the so-called "planner" penalty under subsection 163.2(2) and the "preparer" penalty under subsection 163.2(4). The preparer penalty, which was the subject of the taxpayer's assessment, provides the CRA with the ability to levy a penalty on a person who:

> [. . .] makes, or participates in, assents to or acquiesces in the making of, a statement to, or by or on behalf of, another person . . . that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by or on behalf of the other person for a purpose of this Act [. . .]

"Culpable conduct" is defined in subsection 163.2(1) and means

> conduct, whether an act or failure to act, that
>
> (a) is tantamount to intentional conduct;
>
> (b) shows an indifference as to whether [the] Act is complied with; or
>
> (c) shows a wilful, reckless or wanton disregard of the law.

The Department of Finance Technical Notes that accompanied the release of the draft legislation relating to section 163.2 make it clear that the penalty was intended to extend the existing gross negligence penalty under subsection 163(2) of the Act, which applies in respect of a taxpayer's own statements or omissions, to persons "making or counselling false statements in respect of another person's tax liability".[4] That is, there was a concern that the legislative gap between civil penalties for filers and criminal penalties for filers and their advisers needed to be filled.

The culpable conduct test was established to deal with the concerns of tax practitioners that the phrase "gross negligence", being found elsewhere in the Act, could lead to inappropriate results for planners and preparers. Nonetheless, the Technical Notes make it clear that "culpable conduct", as defined, is effectively a codification of the behaviour that courts have historically found to be "grossly" negligent in determining the applicability of a subsection 163(2) penalty.

As stated in the Technical Notes (and reproduced by the Court in the decision):

> It is not the government's policy intent to apply a third party penalty under new section 163.2 in cases of conduct that is an honest error of judgement, or an honest difference of opinion. Rather the gross negligence standard was selected because it addresses this legitimate concern while ensuring that participants in otherwise culpable activity do not escape liability.
>
> Nevertheless, in response to representations of professional bodies, section 163.2 substitutes for "gross negligence" the concept "culpable conduct" which is defined with reference to the types of conduct to which the courts have, in the past, applied a civil penalty under the tax law.

It is clear, therefore, that Parliament intended the section 163.2 penalty to be a civil penalty, akin to the subsection 163(2) gross negligence penalty. Indeed, a new criminal penalty applicable to third parties would have been unnecessary, as the existing criminal provisions of the Act in section 239 are clearly applicable to third parties.

Despite Parliament's clearly stated intent to the contrary, in the view of the Tax Court, section 163.2 imposes a criminal (and not a civil) penalty. A number of factors influenced the Court's reasoning. The Court looked at the 1987 decision of the Supreme Court of Canada (the "SCC") in *R. v. Wigglesworth*.[5] *Wigglesworth* is a criminal case concerning an RCMP constable who assaulted a suspect while in custody. The constable was found guilty of a "major service offence" under the *Royal Canadian Mounted Police Act* and argued that, as a result, he could not also be convicted for the same behaviour under the *Criminal Code*, as the *Canadian Charter of Rights and Freedoms* (the "Charter") precludes being tried twice for the same offence (i.e., no double jeopardy). The majority found that the relevant sanction under the RCMP Act was not criminal in nature and, therefore, the constable could be tried under the *Criminal Code*.

In rendering its decision, the SCC provided guidance as to the nature of a criminal offence in Canadian law. The Tax Court interpreted *Wigglesworth* as holding that, in Canada, matters are criminal (and thereby attract constitutional protection under section 11 of the Charter) where the matter is by its very nature a criminal proceeding or where the offence involved a "true penal consequence". In the Tax Court's view, section 163.2 results in Charter protection for both reasons.

Section 163.2 as a Criminal Penalty

As to the nature of the matter involved, the Tax Court determined that a section 163.2 penalty goes beyond being a mere administrative penalty, such as a subsection 163(2) penalty, and can be applied to punish persons in situations even where the false statement or omission was not in fact relied upon by a taxpayer. This is because under subsection 163.2(4), a penalty can apply in circumstances where the false statement "could" be used by a taxpayer, regardless of whether it was in fact so used. In the Court's view, this goes beyond mere deterrence and takes on the character of a provision intending to "promote public order and welfare within a public sphere of activity".[6]

The Court also considered the question of whether the penalty applied under section 163.2 amounted to a "true penal consequence". Returning to *Wigglesworth*, the Tax Court noted that section 11 of the Charter could be invoked in respect of provisions, the consequences of which "include imprisonment or a fine which by its magnitude would appear to be imposed for the purposes of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity".[7] In the Court's view, it is the magnitude of the penalty under section 163.2 that helps push it into the criminal realm, in contrast to the civil subsection 163(2) penalty.

Under subsection 163(2), the penalty is limited to 50% of the amount of tax that would have been payable by a person but for the false statement or omission giving rise to the penalty. However, in *Guindon*, the taxpayer was assessed a fine in excess of $500,000 because subsection 163.2(5) limits the amount of the penalty to the amount that the other person would have paid under a subsection 163(2) penalty (i.e., half the tax) and there were over $1 million worth of charitable donation tax credits claimed in respect of the failed VOW donation scheme. In the Court's view, this means that the penalty under section 163.2 can be increased *ad infinitum*. Where a penalty is seemingly limitless and imposed on a third party, in the opinion of the Court, this is suggestive of a penalty intended to redress a social wrong and not a purely administrative matter or one of internal discipline.

It is not clear that the Court's distinction between the penalty limitation in subsection 163.2(5) and that in subsection 163(2) is appropriate. The Court notes that, in its view, the "other person" referred to in subparagraph 163.2(5)(*b*)(i) was intended by Parliament to be a single person. In that case, the limit in section 163.2 and subsection 163(2) would be identical. The Court, however, suggested that "other person" in subparagraph 163.2(5)(*b*)(i) was interpreted by the CRA as being plural, hence the very large penalty.

It is not clear why the Court did not interpret the CRA's assessment as effectively being 134[8] separate penalty assessments, one for each of the participants in the donation scheme. In drafting section 163.2, the legislature was seeking to address a particular form of mischief: tax advisers and preparers who provided intentionally incorrect advice which nevertheless falls short of being a criminal conspiracy for purposes of section 239. Because preparers and advisers will tend to have multiple audiences for their work, it can be expected that where they have engaged in culpable conduct, multiple fines will result. As such, in these facts, the relevance of the magnitude of the penalty to the determination that the penalty is a criminal one is unclear.

The Application of Section 163.2 to the Taxpayer

Interestingly, despite having found that the section 163.2 penalty is an exercise of Parliament's criminal power, which by necessity means that the Tax Court lacked jurisdiction to hear the case, the Court nevertheless considered the application of the penalty to the taxpayer's facts. This necessitated a consideration of the interpretation of "culpable conduct", as defined in subsection 163.2(1) of the Act, cited above. The Court disagreed with the Crown (and the Technical Notes) that culpable conduct is meant to cover the same conduct found by courts over the years to be gross negligence and held that the use of different words must mean Parliament intended something different from gross negligence. In the view of the Court, culpable conduct only exists in cases of "strong" gross negligence. Courts have traditionally held that the gross negligence standard is a difficult test for the Crown to meet, being somewhat akin to the *mens rea* requirement in criminal law (see, for example, the seminal subsection 163(2) penalty case *Udell*, 70 DTC 6019 (Ex. Ct.)). Where the boundary is to be drawn between the traditional meaning and the Tax Court's interpretation in *Guindon*, however, was not elaborated by the Court and is not particularly obvious.

The Tax Court found that the actions of the taxpayer were sufficient to warrant the application of a penalty under section 163.2 of the Act. Nevertheless, the Court could not apply such a penalty because, as noted, one of the implications of the Court's determination that section 163.2 penalties are criminal in nature is that the Tax Court has no jurisdiction to deal with them. Accordingly, the portions of the decision dealing with the application of the penalty are *obiter*. Effectively, the Tax Court found that there was a crime, but could not impose a punishment.

Implications of the Decision

There are a number of implications of the Tax Court's finding that Parliament failed to enact a third-party civil penalty with section 163.2 and instead provided criminal penalties in addition to the extant evasion provisions in section 239. First, because the penalties are criminal, the various constitutional and procedural protections for persons accused of criminal actions would apply to section 163.2 assessments. This includes the protections enumerated under section 11 of the Charter, notably the presumption of innocence under paragraph 11(*d*) and the right against self-incrimination in paragraph 11(*c*).

Second, the burden of proof in a section 163.2 prosecution would be the criminal burden — proof beyond a reasonable doubt. The civil standard applicable in tax decisions of "balance of probabilities" would not be sufficient to impose a penalty. This is a significantly higher standard for the Crown to meet.

Third, the Tax Court of Canada, being a creature of statute without inherent jurisdiction, is limited in its powers by the *Tax Court of Canada Act* and, for income tax purposes, by Division J of Part I of the Act. It cannot hear criminal matters. This is why section 239 cases are tried in provincial court. Accordingly, future section 163.2 cases will have to be dealt with by provincial superior courts, as a result of the *Guindon* decision (if it is not reversed).

Another critical implication of *Guindon* will be the application of the principles established by the SCC in *Jarvis*[9], wherein it laid out the rules prohibiting the CRA from using its audit powers once a review of a taxpayer's file has changed from a civil audit to a criminal investigation. In that case the SCC found that

> [. . .] compliance audits and tax evasion investigations must be treated differently. While taxpayers are statutorily bound to co-operate with CCRA auditors for tax assessment purposes (which may result in the application of regulatory penalties), there is an adversarial relationship that crystallizes between the taxpayer and the tax officials when the predominant purpose of an official's inquiry is the determination of penal liability. When the officials exercise this authority, constitutional protections against self-incrimination prohibit CCRA officials who are investigating ITA offences from having recourse to the powerful inspection and requirement tools in ss. 231.1(1) and 231.2(1). Rather, CCRA officials who exercise the authority to conduct such investigations must seek search warrants in furtherance of their investigation.[10]

Accordingly, the "predominant purpose" procedures established by the CRA in light of *Jarvis* and intended to protect investigations from constitutional attack will need to be followed in section 163.2 cases as well. How the CRA implements such procedures remains to be seen.

The parties have until November 1, 2012 to appeal.

A number of tax lawyers from Fraser Milner Casgrain LLP write commentary for CCH's Canadian Tax Reporter *and sit on its Editorial Board as well as on the Editorial Board for CCH's Canadian* Income Tax Act with Regulations, Annotated. *Fraser Milner Casgrain lawyers also write the commentary for CCH's* Federal Tax Practice *reporter and the summaries for CCH's* Window on Canadian Tax. *Fraser Milner Casgrain lawyers wrote the commentary for* Canada–U.S. Tax Treaty: A Practical Interpretation *and have authored other books published by CCH:* Canadian Transfer Pricing *(2nd Edition, 2011);* Federal Tax Practice; Charities, Non-Profits, and Philanthropy Under the Income Tax Act; *and* Corporation Capital Tax in Canada. *Tony Schweitzer, a Tax Partner with the Toronto office of Fraser Milner Casgrain LLP, and a member of the Editorial Board of CCH's* Canadian Tax Reporter*, is the editor of the firm's regular monthly feature articles appearing in* Tax Topics.

For more insight from the tax practitioners at Fraser Milner Casgrain LLP on the latest developments in tax litigation, visit the firm's Tax Litigation blog at http://www.canadiantaxlitigation.com/.

Notes:

[1] The author gratefully acknowledges the assistance of Earl Miller of FMC in preparing this article.

[2] *Julie Guindon v. Her Majesty the Queen*, 2012 TCC 287.

[3] Four of the participants' donations were "missed" by the CRA auditor who reviewed the donation claims. It is unclear from the case if those taxpayers were subsequently reassessed to deny the credit.

[4] Department of Finance Technical Notes, December 7, 1999.

[5] [1987] 2 S.C.R. 541.

[6] *Guindon*, para. 57.

[7] *Wigglesworth*, para. 24, cited in *Guindon*, para. 60.

[8] Although there were 135 participants in the scheme, since one was the taxpayer herself, she was properly assessed a penalty for that claimed credit under subsection 163(2) and not section 163.2. The CRA initially incorrectly assessed the taxpayer on this point, but conceded at trial that this was wrong.

[9] 2002 DTC 7547.

[10] *Jarvis*, para. 2.

NOTICE OF WAYS AND MEANS MOTION TABLED

On October 15, 2012, the Minister of Finance tabled a Notice of Ways and Means Motion to implement most of the remaining 2012 Budget proposals (first released as draft legislation on August 14, 2012, CCH *Special Report* No. 066H) as well as measures related to pooled registered pension plans (first released as draft legislation on December 14, 2011, CCH *Special Report* No. 063H). Subscribers to the *Canadian Tax Reporter* (print, DVD, or online) will receive a copy of CCH *Special Report* No. 067H, which contains the Notice of Ways and Means Motion and Explanatory Notes. Additional copies of the *Special Report* may be ordered by calling (416) 224-2248 (toll-free 1-800-268-4522), by faxing (416) 224-2243 (toll-free 1-800-461-4131), or by emailing cservice@cch.ca.

MANDATORY ELECTRONIC FILING FOR TAX PREPARERS — QUESTIONS AND ANSWERS

As described in *Tax Topics* No. 2098, dated May 24, 2012, the *Income Tax Act* was amended to require tax preparers who file more that 10 returns to file them electronically. This requirement is for 2012 tax returns filed after 2012 (subsection 150.1(2.3) of the *Income Tax Act*). The Canada Revenue Agency has released some questions and answers regarding this change which are reproduced below.

Q1. I am a tax preparer; how will this affect me?

A1. If you are an individual, a corporation or a partnership, and you accept payment to prepare more than 10 T1 General income tax and benefit returns or more than 10 T2 corporation income tax returns per year, you must file those returns electronically. An employee who prepares returns as part of their work duties is not a tax preparer.

Q2. Are there any exceptions to the new legislation?

A2. The following returns do not need to be filed electronically:

- returns for tax years before 2012;
- T1 General income tax and benefit returns filed after November 30;
- excluded T1 returns; and
- T2 returns with restrictions.

Other exceptions apply if you are a tax preparer who:

- applied to use EFILE, but was not accepted; or
- had EFILE privileges suspended or revoked.

Q3. How do I file electronically?

A3. If you prepare and file more than 10 T1 General income tax and benefit returns, you will be required to file them electronically through the Canada Revenue Agency (CRA) EFILE system. EFILE is an automated service that permits approved tax preparers to file current year income tax and benefit returns online.

If you prepare and file more than 10 T2 corporation income tax returns, you will be required to file them electronically through the available service in Represent a Client or through Corporation Internet Filing.

Q4. I have never filed electronically. How do I start?

A4. As a tax preparer, you will need to register with the CRA in order to be allowed to file T1 General income tax and benefit returns electronically. This must be done at least 30 days before the service is required.

For more information on how to register for T1 General returns, go to EFILE — New Registration.

For more information on how to register for T2 corporation returns or how to file corporation returns electronically, go to Corporation Internet Filing.

Q5. I currently file my clients' returns electronically. Do I need to re-register?

A5. If you currently file your clients' returns electronically with an EFILE number, you need to renew your EFILE eligibility every year. As such, you will be contacted to renew your registration every year in late

October.

Q6. I use in-house software to file returns for my clients, but I don't use EFILE. What do I do?

A6. Your software package will need to be certified by the CRA before you can use it to file electronically. To find out more about certification:

For T1 General returns: EFILE — Software

For T2 corporation returns: Corporation Internet Filing

Q7. Are there penalties if I do not comply with the new legislation?

A7. If you are required to file electronically but do not comply, you may be charged a penalty of $25 for each T1 General return that is paper-filed and $100 for each T2 corporation return that is paper-filed.

Q8. Where can I get help to file returns electronically?

A8. For T1 General returns, contact your EFILE Helpdesk.

For T2 corporation returns, contact our Corporation Internet Filing Helpdesk.

COURT APPOINTMENTS

This month, the Prime Minister and the Minister of Justice have announced appointments to various courts in the country. The appointments in courts where income tax cases may be heard are noted below.

- Supreme Court of Canada — Mr. Justice Richard Wagner, formerly a judge of the Court of Appeal of Quebec;
- Federal Court of Appeal — Mr. Justice Wyman Webb, formerly a judge of the Tax Court of Canada;
- Federal Court — Mr. Justice Michael Manson, formerly in private practice; and
- Tax Court of Canada — Mr. Justice David Graham, formerly in private practice.

CCH'S INCOME TAX ACT AND REGULATIONS ON CCH ONLINE AND DVD — WHAT'S CHANGED

CCH has recently introduced a slight change in the output in the links for the related material that appears in the *Income Tax Act* and Regulations on CCH Online and on DVD. The links to the Former Act, Historical Explanatory Notes, the *Canadian Tax Reporter* Commentary, and the *Canada Income Tax Guide* commentary are now contained in "Related Matter" that appears at the end of a provision. Previously, the links to this content were listed separately. Related Matter continues to include links to related sections, related regulations, CRA Publications, CCH Newsletters, *Canadian Petroleum Tax Journal* articles, CRA Tax Window Files and case annotations, as well as references to Canadian Tax Foundation Journal articles and conference papers.

RECENT CASES

Crown had claim for tax liability as unsecured creditor

The taxpayer made a voluntary assignment into bankruptcy after unsuccessful attempts to dispute tax amounts of $530,000 owing under the *Income Tax Act*. The trustee in bankruptcy disallowed the Crown's claim to the tax amounts because evidence leading to the reassessment and the eventual tax liability was inadmissible in a related criminal matter and, therefore, would be inadmissible for use in the taxpayer's tax liability matter. The Crown brought an application under sections 108 and 135(4) of the *Bankruptcy and Insolvency Act* to set aside the trustee's disallowance, and for a direction that the trustee allow its proof of claim as an unsecured creditor. The trustee argued it has authority to look behind an assessment or judgment in accepting credit claims and that the taxpayer's case was never decided on its merit because he did not file his objection within the limitation period.

The Crown's application was allowed. The trustee was wrong to disallow the Crown's proof of claim based on his own reading of the application of the Charter-based defence of the taxpayer. The taxpayer's assessment was upheld and certified as a judgment of the Federal Court and that should govern, not the interpretation of the trustee.

¶48,213, *Jones*, 2012 DTC 5139

No reasonable grounds to believe delay in collection would jeopardize collection of assessed amounts; jeopardy order overturned

The taxpayers were reassessed for 2006 and 2007, and third-party civil penalties were imposed respecting tax returns prepared by the taxpayer RP. The taxpayers filed notices of objection to the reassessments and penalties, and pursued litigation in the Tax Court of Canada. The Minister obtained a jeopardy order of which the taxpayers sought a review. Of the $900,000 that was assessed, $160,000 was associated with taxes, and the balance with administrative penalties and interest. The Minister's justification for the jeopardy order was his concern that, should the taxpayers' home (their largest asset) be sold, the proceeds would be used to pay other creditors.

The jeopardy collection order was overturned, and the Minister was ordered to stop any collection actions. On an application to review a jeopardy order, the taxpayers were obligated to show that there were reasonable grounds to doubt that the collection of the amounts assessed would be jeopardized by a delay in collection. If their demonstration succeeded, it would fall to the Minister to justify the jeopardy order by demonstrating, on a balance of probabilities, that it was more likely than not that the collection would be jeopardized. The evidence showed that there were factual inconsistencies in the evidence that the Minister provided. The value of the house was between $1.8 million and $1.92 million, and not $1.2 million as the Minister suggested. The Minister's concern that proceeds would be used to pay other creditors was not a reason to justify a jeopardy collection order. There was no clear evidence that the taxpayers' behaviour would jeopardize collection. What the Minister identified as suspicious deposits were transfers between RP's business and personal accounts. Given that most of the $900,000 assessed consisted of administrative penalties and interest, it would not be appropriate to prevent the taxpayers from using any equity in their house to pay for living expenses or legal counsel. There was sufficient equity in the house that any of the taxpayers' other debts would not dissipate the funds available for the Ministers' assessments. Therefore, the taxpayers succeeded in demonstrating that a delay in collection would not jeopardize the Minister's assessments, and the Minister did not provide enough evidence to rebut that finding.

¶48,215, *MNR v. Patry*, 2012 DTC 5142

Information required by Minister not subject to solicitor-client privilege

The respondent 100530 P.E.I. Inc. was the sole shareholder of the respondent Island Business Initiatives Inc. ("IBI"). The individual respondent, a solicitor, was the sole director of both corporations, as well as the in-house legal counsel for IBI. As an investment intermediary, IBI facilitated investments between potential immigrants and businesses located in Prince Edward Island, relating to a provincial government program (the "PNP"). The Minister applied to the Federal Court for a compliance order requiring the respondents to produce some documentation and banking and accounting information relating to transactions involving the PNP. The respondents claimed solicitor-client privilege.

The Minister's application was granted. The Federal Court has set out the requirements for solicitor-client privilege to apply. There must be oral or written communications of a confidential character between a client and a legal adviser, and those communications must be directly related to the seeking or giving of legal advice. In this case, the PNP-related documents sought were merely evidence of acts or transactions, but did not involve "communications", and therefore were not subject to solicitor-client privilege.

¶48,216, *MNR v. Clark*, 2012 DTC 5143

Taxpayer guilty of income tax evasion and improperly obtaining input tax credits

The taxpayer was charged with failing to report a net business income of $462,091 and with evading the payment of $74,995 in income tax. He was also charged with making false statements in a GST return and obtaining certain income tax credits ("ITCs") for himself and his spouse that they were not entitled to, based on his understated income.

The taxpayer was found guilty of income tax evasion. The taxpayer's income tax returns were incredibly inaccurate. His returns showed substantial business losses at a time when his own business records noted significant profit, and the only reason for grossly misstating his income and expenses was to avoid paying income tax. The taxpayer claimed that he was mentally incapacitated due to diabetes-induced dementia, but he failed to provide sufficient evidence to support the claim. He was also found guilty of improperly obtaining ITCs; however, he was not found guilty of the GST offences. Although the taxpayer failed to properly collect and remit GST, the Crown failed to establish that he had knowingly provided false GST statements in order to avoid the collection and remittance of tax.

¶48,217, *Her Majesty the Queen v. Smith*, 2012 GTC 1050

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