

TAXATION OF SPECIAL INVESTMENT CONTRACTS PARTICIPANTS

Roman A. Shepenko, Andrey G. Isaev

MGIMO University, Moscow, Russia

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The subject. The preferential tax regime provided to the participants of special investment contracts has been functioning in the Russian legal system for about 8 years. Despite the systematic "fine-tuning" of its legal regulation, taxpayers still face the legislative gaps and contradictions of separate normative provisions entailing tax risks. It seems appropriate to put forward the hypothesis that the existing tax treatment of the participants of special investment contracts is not devoid of these drawbacks, especially in terms of regional regulation, and could be improved.

Purpose of the study. The article represents an attempt to verify the aforementioned hypothesis and deals with selected provisions of the Russian legislation regulating preferential tax regime for participants of special investment contracts, which in addition to the Russian Tax Code includes the Federal Law "On Industrial Policy in the Russian Federation", regional and municipal normative legal acts.

Methodology. The methodological basis of this study are general scientific methods (analysis and synthesis, induction and deduction), private scientific methods (interpretation of legal acts), as well as content analysis, study of reports and analytical references of governmental organizations.

The main results. The study revealed that the Russian legislation, mainly regional and municipal, is not fully developed. As a consequence, the preferential tax regime for the participants of special investment contracts cannot efficiently function on the entire Russian territory. Also, the regulatory framework adopted at the federal level uses incorrect terminological apparatus in terms of defining tax support measures available to participants of special investment contracts, which entails tax risks for them.

Conclusions. The revealed drawbacks of the preferential tax regime for participants of special investment contracts can be leveled by means of point-by-point amendments to the federal legislation. To this end, the authors of the present study propose specific steps to overcome these drawbacks.

1. Introduction

As a result of the foreign policy crisis in Russia in 2022 due to the special military operation in Ukraine, a certain part of foreign investors ceased economic activities in Russia or suspended their projects. According to the study of the Yale School of Management, more than 1,000 foreign companies have suspended or ceased operations in Russia¹. At the same time, the declared goal of foreign products substitution has not been achieved by that time².

In this regard, preferential regimes for attracting investments are becoming more relevant in order to solve the problems of foreign products substitution and ensure the transition of the Russian economy from the raw materials export to the innovative type of development. One of such regimes was established in 2014, when a new legal form of cooperation between business entities and the state appeared in Russia - a special investment contract (hereinafter - SPIC). The preferential regime was established in the Federal Law dated 31.12.2014 № 488-FZ "On Industrial Policy in the Russian Federation" (hereinafter - the Law on Industrial Policy); it is designed to stimulate industrial production by providing investors with state financial support measures in exchange for investment [1, p. 58]. One of the most demanded were the tax support measures provided to the participants of SPIC [2, p. 11].

After the introduction of such tax measures in national legislation, a number of problems arose, in particular, contradictions in certain legal provisions that entail tax risks for investors, failure of regional authorities to adopt the necessary legislative acts for the proper functioning of the preferential regime on their territory.

The study of the peculiarities of SPIC

preferential regime and taxation of its participants is currently in the focus of scientists' attention, especially due to its constant "fine-tuning", Russia's foreign products substitution policy and recent foreign policy events [3; 4;]. Although there are already noteworthy developments, we cannot say that the topic is exhausted yet.

The objectives of this study are as follows: (1) to analyze the Russian Tax Code dated 31.07.1998 № 146-FZ³ and dated 05.08.2000 № 117-FZ⁴ (hereinafter – the Russian Tax Code) and the Law on Industrial Policy, regional and municipal legal acts that establish tax support measures for SPIC participants; (2) to identify legal gaps in the functioning of tax measures; (3) to propose directions for improving the Russian legislation.

The subject of the analysis is the Russian legislation, including the regional and municipal legal acts, court decisions, as well as written clarifications of the state authorities regarding taxation of SPIC participants.

2. Degree of development of SPIC legal regulation

Despite the appearance of SPIC preferential regime in the Law on Industrial Policy in 2014, investors were not immediately able to conclude the contract and use the provided tax support measures. For the full-fledged functioning of the regime it was necessary to finalize the federal, regional and municipal legal framework [5, p. 155].

It took the legislator a year and a half since the adoption of the Law on Industrial Policy to amend the Russian tax legislation. Federal Law dated 23.05.2016 № 144-FZ "On Amendments to Part One and Part Two of the Russian Tax Code"⁵ was adopted, which established the tax status for taxpayers - SPIC participants. The establishment of the relevant status did not require fundamental changes - it was equated to the status of a taxpayer - participant of a regional investment project⁶, thus

¹ URL: <https://som.yale.edu/story/2022/over-1000-companies-have-curtailed-operations-russia-some-remain> (accessed: 07.02.2023).

² Senator Klishas declared failure of the import substitution program in Russia. URL: <https://www.rbc.ru/politics/19/05/2022/6285f0c79a7947c127bab983> (accessed: 07.03.2023).

³ Available at ConsultantPlus (accessed: 16.02.2023).

⁴ Available at ConsultantPlus (accessed: 16.02.2023).

⁵ Available at ConsultantPlus (accessed: 16.02.2023).

⁶ A similar to SPIC investment attraction preferential regime existing at the level of individual Russian regions. Law Enforcement Review 2023, vol. 7, no. 3, pp. 85–94

extending the tax support measures provided for regional investment projects to the participants of SPICs. Such equalization also gave rise to a number of certain problems in law enforcement. Tax authorities and taxpayers have differently understood the new provisions of the Russian Tax Code in terms of requirements to the investor, namely the extension of the existing requirements for taxpayers - participants of regional investment projects to taxpayers - participants of SPIC [6, p. 12]. The point was made in the written clarifications of the Russian Ministry of Finance. For example, in the Letter dated 12.04.2017 № 03-03-RZ/21627⁷, where the Ministry indicated that such requirements, which appeared to be excessive, should not apply to participants of SPICs⁸.

Only after the specification of the tax status of SPIC participants in 2016 the first contracts were concluded, and the provisions of the Russian Tax Code were able to sufficiently regulate the preferential tax regime [7, p. 107]. However, being a multilateral contract, the parties to which are also the Russian regions and municipalities, the preferential regime of SPIC requires the adoption of a regulatory framework not only at the federal level, since the formulation of all the terms of the contract, including tax support measures, is possible only considering the budgetary and (or) investment interests of each party [8, p. 1043]. In accordance with Clause 3 of Article 18.3 of the Law on Industrial Policy, the conclusion of a SPIC is possible provided that on the date of its conclusion the legal act of the region, which is a party to the contract, defines measures to stimulate industrial activities.

However, for more than eight years of the existence of the SPIC preferential regime, some Russian regions have not adopted the necessary legal acts, despite the systematic recommendations of scientists and lawyers to improve regional legislation [9, p. 946]. According to the information provided on the official website of the Industrial Development Fund, based on the results of

monitoring of legal acts as of January 16, 2023, twelve Russian regions have not provided in their legislation any state financial support measures for SPIC participants, including tax support measures⁹. Taking into account that an investor at the regional and/or municipal level may be provided not only with tax support measures, but also with other state financial support measures¹⁰, the problem with the lack of tax support for investors is of a larger scale. The analysis has shown that a significantly greater number of Russian regions and municipalities do not have legal acts establishing tax support measures.

For example, the Law of the Bryansk Region dated 10.08.2015 № 66-Z "On Industrial Policy in the Bryansk Region"¹¹ allows for the possibility of concluding SPICs, but the Law dated 26.11.2004 № 73-Z "On Reduced Corporate Profits Tax Rate for Certain Categories of Taxpayers"¹² and the Law dated 09.06.2015 № 41-Z "On Investment Activity in the Bryansk Region"¹³ do not contain provisions on relevant tax support measures for investors who have concluded SPICs. A similar gap exists in the legislation of the Republic of Buryatia, the Republic of Sakha (Yakutia), the Republic of Khakassia, Altai Krai, Zabaykalsky Krai, Khabarovsk Krai, Arkhangelsk Oblast, Astrakhan Oblast and some other Russian regions¹⁴.

This significantly reduces the effectiveness and attractiveness of the preferential regime and even serves as a reason for interested parties and prosecutors to file lawsuits with the courts for unlawful inaction of regional and municipal authorities and for their obligation to adopt an appropriate regulatory framework governing SPIC preferential regime, including taxation of its participants¹⁵. Thus, despite the factual possibility of

⁷ Available at ConsultantPlus (accessed: 16.02.2023).

⁸ In this regard, in 2019, taxpayers participating in SPICs got their own independent status in a separate chapter 3.5 of the Russian Tax Code.

⁹ Status of adoption of SPIC 2.0 legislation in the regions. URL: <https://frprf.ru/download/prezentatsiya-spik.pdf> (accessed: 16.02.2023).

¹⁰ For example, special conditions for leasing land plots, creation of infrastructure facilities, etc.

¹¹ Available at Garant (accessed: 16.02.2023).

¹² Available at Garant (accessed: 16.02.2023).

¹³ Available at Garant (accessed: 16.02.2023).

¹⁴ According to the regional legislation as of 16.02.2023.

¹⁵ For example, the Decision of the Kineshma City Court of the Ivanovo region dated 29.06.2018 in case № 2-1057/2018, the Decision of the Central District Court of

concluding SPIC with the participation of the majority of Russian regions, tax support measures, which are crucial for many business entities when deciding to invest, very often cannot be obtained due to the lack of proper legal regulation of taxation of SPIC participants at the regional and municipal levels.

It leads to another problem related to one of the main tax support measures provided for at the federal level - a reduced corporate profits tax rate. This measure can be applied by a taxpayer participating in a SPIC only if the relevant provision on the reduced corporate profits tax rate is stipulated in the regional legislation¹⁶. Consequently, a significant share of tax support measures is not available to investors in some territorial units, including the above-mentioned Russian regions. Obviously, this does not increase their investment attractiveness and leads to an uneven distribution of investments across the Russian regions [10].

The reasons for not adopting the regulatory framework for SPIC vary. For example, in Khabarovsk Krai, the reduced corporate profit tax rate (0%) for SPIC participants was recognized as ineffective for the purposes of socio-economic development and improvement of public finances in Khabarovsk Krai¹⁷. In other Russian regions, the reasons for the lack of a regulatory framework are much more prosaic: lack of interest or inaction of officials of authorized authorities¹⁸.

In this regard, the subjects of legislative initiative may be requested to specify support

measures or their minimum list in Clause 3 of Article 18.3 of the Law on Industrial Policy. It will increase the number of concluded contracts, which, as noted in the specialized literature, are currently concluded quite few¹⁹. This is especially relevant in the light of the current foreign policy and economic situation in Russia [11, p. 54].

3. Correlation of a reduced tax rate with the definition of "tax benefit"

One of the most common tax support measures to stimulate investment in many countries, including Russia, is a reduced tax rate [12].

Currently, SPIC participants can apply a reduced rate for several taxes [13, p. 24]. For example, Clauses 1, 1.14 of Article 284 and Article 284.9 of the Russian Tax Code stipulate that a SPIC participant applies a 0% corporate profits tax rate, enrolled in the federal budget, and a reduced corporate profits tax rate of up to 0% enrolled in the regional budget (subject to certain conditions). The level of reduction of the regional part of the corporate profits tax rate may vary depending on the location of the investment project and the relevant regional legislation. In some Russian regions, for example, in the Novgorod region, SPIC participants may claim a 50% reduction in transport tax from the established tax rate during the term of the contract in accordance with Clause 4.1 of Article 4 of the Law dated 30.09.2008 № 379-OZ "On Transport Tax"²⁰. Legal acts of some other Russian regions and municipalities establish similar support measures for corporate property tax and land tax. For example, in Article 2.3 of the Law of Volgograd region dated 28.11.2003 № 888-OD "On Corporate Property Tax"²¹ and Clause 3.1 of the Decision of the City Council of Naberezhnye Chelny of the Republic of Tatarstan dated 09.11.2016 № 11/6 "On Land Tax"²².

This tax support measure is defined in

Togliatti dated 24.10.2018 in case № 2F-4990/2018, the Decision of the Kirov District Court of the Republic of North Ossetia-Alania dated 15.05.2019 in case № 2A-119/2019. Available at ConsultantPlus (accessed: 13.01.2023).

¹⁶ Clause 2 of Article 284.9 of the Russian Tax Code.

¹⁷ Order of the Government of Khabarovsk Krai dated 13.09.2018 № 594-rp "On the Plan to Eliminate Inefficient Tax Benefits (Reduced Tax Rates)". URL: <https://minfin.khabkrai.ru/portal/Show/Content/2740/> (accessed: 17.02.2023).

¹⁸ For example, the Decision of the Kineshma City Court of the Ivanovo region dated 29.06.2018 in case № 2-1057/2018. Available at ConsultantPlus (accessed: 13.01.2023).

¹⁹ According to the register of SPICs (public) published on the official website of the Ministry of Industry and Trade of Russia, 69 SPICs were concluded as of 17.02.2023. URL: <https://gisp.gov.ru/spic2/pub/> (accessed: 17.02.2023).

²⁰ Available at Garant (accessed: 17.02.2023).

²¹ Available at Garant (accessed: 17.02.2023).

²² Available at Garant (accessed: 17.02.2023).

different ways in the legislation. For example, in the Law of the Moscow Region dated 24.11.2004 № 151/2004-OZ "On Preferential Taxation in the Moscow Region"²³ the reduced corporate profits tax rate for SPIC participants is defined as a tax benefit. A similar terminology with regard to reduced tax rates is used in Article 3 of the Law of the Republic of Dagestan dated 08.10.2004 № 22 "On Corporate Property Tax"²⁴, in Clause 2 of Article 2.1 of the Law of the Belgorod Region dated 27.11.2003 № 104 "On Corporate Property Tax"²⁵, in Article 4.2 of the Law of the Samara Region dated 25.11.2003 № 98-GD "On Corporate Property Tax in the Samara Region"²⁶, in Article 2 of the Law of the Tomsk region dated 01.09.2017 № 87-OZ "On Granting Tax Benefits to Participants of Special Investment Contracts - Investors in the Tomsk Region"²⁷ and in the legislation of some other Russian regions.

However, the Russian Tax Code distinguishes between the definitions of a reduced tax rate and a tax benefit. In accordance with Clause 1 of Article 53 of the Russian Tax Code tax rate is the size of tax charges per unit of measurement of the tax base and by virtue of Article 17 of the Russian Tax Code tax rate is a mandatory element of taxation. At the same time, according to Clause 1 of Article 56 of the Russian Tax Code tax benefits shall be understood to mean privileges over other taxpayers which are provided for by tax legislation and are granted to particular categories of taxpayers, including the right not to pay a tax or to pay a lesser amount of it. There is an opinion that the difference lies, first of all, in the functional purpose of the tax rate and tax benefits [14, p. 40].

The differences lie not only in the functions of the definitions under consideration. Despite the fact that the reduced rate and tax benefit have a common goal - to reduce the tax burden of the taxpayer, their differences also become noticeable when analyzing the mechanisms of their action.

Thus, the investor has no right to refuse or suspend the use of the reduced tax rate, and the moment of its beginning is conditioned by the fulfillment of the necessary requirements for obtaining it. The use of a tax benefit is carried out in a slightly different way: the taxpayer provides documents confirming the legitimacy of its use during a certain period, within the framework of tax control procedures, and may refuse or suspend it at any time. N.N. Tyutyuryukov [15] and A.S. Balandina [16], who distinguish a separate group of tax support measures – tax preferences, which include reduced tax rates, take a similar approach in distinguishing the definitions under consideration.

The existing practice of application of the provisions of the Russian Tax Code by the highest judicial instances, including the Russian Constitutional Court clarifies that the taxpayer has no right to change the tax rate established by the tax legislation at its own discretion²⁸, the tax rate is a mandatory element of taxation and the taxpayer may not refuse to apply it or change its amount upward or downward²⁹. The Decisions of the Arbitrazh Court of the Moscow District dated 07.12.2017 in case № A40-40587/2017³⁰ states that the tax rate as a mandatory element of taxation is subject to unconditional application, the choice of the tax rate, unlike a tax benefit cannot be conditioned by the will of the taxpayer. Therefore, a reduced tax rate is not a tax benefit in the sense of Articles 17 and 56 of the Russian Tax Code.

Based on the above, regional legislators appear to use incorrect terminology, referring reduced tax rates to tax benefits. Commenting on this legal conflict, the Russian Ministry of Finance confirmed the position that reduced tax rates (in any amount up to 0%) do not refer to tax benefits,

²³ Available at Garant (accessed: 17.02.2023).

²⁴ Available at Garant (accessed: 17.02.2023).

²⁵ Available at Garant (accessed: 20.02.2023).

²⁶ Available at Garant (accessed: 20.02.2023).

²⁷ Available at Garant (accessed: 20.02.2023).

²⁸ Decisions of the Presidium of the Russian Supreme Arbitrazh Court dated 20.12.2005 № 9252/05 in case № A75-295/2005, dated 19.06.2006 № 16305/05 in case № A55-20247/04-34, dated 25.11.2008 № 9515/08 in case № A40-45483/07-4-261. Available at ConsultantPlus (accessed: 20.02.2023).

²⁹ Decisions of the Russian Constitutional Court dated 15.05.2007 № 372-O-P, dated 02.04.2009 № 475-O-O, dated 26.01.2010 № 123-O-O. Available at ConsultantPlus (accessed: 20.02.2023).

³⁰ URL: <https://sudact.ru> (accessed: 20.02.2023).

indicating the need to bring the regional legal acts in compliance with the Russian Tax Code³¹.

As the analysis of the regional legislation has shown, many Russian regions have not made the relevant legislative amendments. At the same time, incorrect terminology and misunderstanding of the essence of tax support measures are typical even for federal legislation, in particular, for the Law on Industrial Policy. The literal interpretation of Clause 4 of Article 10 of the said law allows providing state financial support measures to investors under SPIC exclusively in the form of tax benefits, which is in direct contradiction with the provisions of the tax legislation, which provides for other tax support measures, for example, reduced tax rates.

The contradictory nature of these legislative provisions may entail tax risks. For example, the tax authority, which has taken a formal approach, may refuse SPIC participant to apply a reduced tax rate after tax control measures [17, p. 23]. This gap indicates the necessity to make appropriate amendments to the Law on Industrial Policy, as well as regional and municipal legal acts in order to ensure uniform interpretation and use of their provisions and definitions. In particular, this problem can be solved by stipulating the definition "tax support measures" in these legal acts, which will become a generalizing definition for tax benefits and other tax preferences and will allow minimizing the above-mentioned tax risk.

Perhaps, the "stumbling block" seems to be the definition of "tax measures". The definition "tax measures" can be found in publications of the early XX century [18, p. 619]. Along with it, the definition of "taxation measures" is used to identify differences in taxation, including its level between residents and non-residents, domestic and foreign goods [19, c. 186]. In the texts of international treaties they can be used in different meanings.

The definition of "tax measures" can also

be found in the Russian national legislation³², but, in general, in Russian academic literature this definition and its analogues are not yet massively used. In addition to the well-known influence on the academic lexicon of the categorical terminology used in legal acts, it can be explained, perhaps, by the association of the word "measures" with the enforcement of obligations and legal liability.

4. Legality of establishing a differentiated corporate profits tax rates for SPIC participants

Tax legislation does not contain a definition of differentiated tax rates. However, this concept is occasionally found in certain provisions of the Russian Tax Code. The possibility of establishing differentiated rates by the Russian regions is provided for certain taxes, in particular, transport tax, land tax and corporate property tax.

At the same time, differentiated corporate profits tax rates for investors who concluded SPIC can be found in regional legislation. For example, Article 2.4 of the Law of the Republic of Bashkortostan dated 31.10.2011 № 454-z "On Establishing a Reduced Corporate Profits Tax Rate"³³ provides a tax support measure only for manufacturers of motor vehicles, trailers and semi-trailers, as well as manufacturers of chemicals and chemical products. Differentiation of taxpayers - participants of SPIC by type of business activity, and, as a consequence, additional requirements, can also be found in Article 2 of the Law of the Republic of Tatarstan dated 02.12.2017 № 87-ZRT "On Establishment of the Corporate Profits Tax Rate for Organizations - Participants of Special Investment Contracts"³⁴, according to which only companies - manufacturers of cargo motor vehicles have the right to apply the 0% tax rate, subject to enrollment in the regional budget of the Republic of Tatarstan.

The legality of establishing such additional conditions for SPIC participants is questionable and

³¹ Letters of the Russian Ministry of Finance dated 28.04.2008 № 03-02-07/1-1-163, dated 01.10.2018 № 03-05-04-01/70113. Available at ConsultantPlus (accessed: 20.02.2023).

³² Article 13 of Federal Law dated 23.02.2013 № 15-FZ "On Protecting the Health of Citizens from Exposure to Ambient Tobacco Smoke and the Effects of Tobacco Consumption". Available at ConsultantPlus (accessed: 06.03.2023).

³³ Available at Garant (accessed: 21.02.2023).

³⁴ Available at Garant (accessed: 21.02.2023).

needs to be analyzed. Thus, the regional legislative authorities may establish the peculiarities of determining the tax base, tax benefits, grounds and procedure for their application only in the manner and within the limits provided for by the Russian Tax Code³⁵. Article 284.9 of the Russian Tax Code stipulates that a regional legislative body is authorized to establish a reduced corporate profits tax rate subject to enrollment in the regional budget.

However, the analysis of legislative provisions does not reveal the authority of the regional legislative body to establish differentiated corporate profits tax rates, subject to enrollment in the regional budget, depending on the type of investor's activity. Consequently, it can be stated that some Russian regions introduce excessive requirements without direct grounds provided for by the Russian Tax Code.

The relevant problem has been repeatedly raised by SPIC participants or potential investors in written requests addressed to the Russian Ministry of Finance. The replies of the state body published in the public domain also contain a similar conclusion about the illegality of the establishment of differentiated corporate profits tax rates by the regional legislative authorities³⁶. In this regard, the federal legislator should consider stipulating a direct prohibition in the Russian Tax Code on the establishment of differentiated corporate profits tax rates by the regional legislative authorities.

5. Conclusions

The study revealed a number of problematic aspects of taxation of SPIC participants.

Firstly, despite the long existence of this preferential regime, Russian legislation still contains gaps in the legal regulation of certain tax support measures and requires its "fine-tuning". This problem is mainly characteristic of regional

and municipal legislation, which is an integral part of the general regulation of SPIC. Due to the specifics of the preferential regime, it is impossible for investors to receive tax support measures without such regional and municipal legislation. The solution may be to specify support measures or a minimum list of them in Clause 3 of Article 18.3 of the Law on Industrial Policy, which establishes the obligation of the regional legislative authorities to adopt appropriate legislation on state support for SPIC participants.

Secondly, already adopted legislation, including federal legislation, uses incorrect terminology in terms of defining tax support measures available to SPIC participants, which entails tax risks for investors. The equalization of tax benefits and reduced tax rates should be excluded from legal acts due to their different nature, and the application of these definitions should be harmonized with the provisions of the Russian Tax Code.

Thirdly, the analysis of the legislation of certain Russian regions revealed some redundancy of requirements to taxpayers – SPIC participants in the form of differentiated corporate profits tax rates depending on the type of investor's activity. This approach contradicts the requirements of the Russian Tax Code and can be eliminated by stipulating a direct prohibition in the Russian Tax Code on the establishment of differentiated corporate profits tax rates by the regional legislative authorities.

Problematic aspects of the regulation of taxation of SPIC participants are characteristic, mainly for the Russian regions and municipalities. In contrast, the federal SPIC legislation promptly responds to emerging problems and is constantly being improved [20, p. 36; 21, p. 12]. In this regard, the federal legislator may be requested to consider the possibility of vesting the Industrial Development Fund (as the main operator for concluding SPICs) with additional authorities to monitor and advise regional and municipal legislative authorities in this regard.

³⁵ Clause 3 of Article 12 of the Russian Tax Code.

³⁶ For example, Letters of the Russian Ministry of Finance dated 21.01.2020 № 03-03-05/2838, dated 31.05.2022 № 03-03-05/51359. Available at ConsultantPlus (accessed: 20.02.2023).

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INFORMATION ABOUT AUTHORS

Roman A. Shepenko – Doctor of Law, Professor,
Department of Administrative and Financial Law
MGIMO University
76, Vernadskogo pr., Moscow, 119454, Russia E-
mail: r.shepenko@inno.mgimo.ru
ORCID: 0000-0003-0767-9661

Andrey G. Isaev – PhD student, Department of Ad-
ministrative and Financial Law
MGIMO University
76, Vernadskogo pr., Moscow, 119454, Russia E-
mail: andr.isaew2016@yandex.ru

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