

Bombay High Court The Commissioner Of Income Tax ... vs Gulmohar Apartment on 30 August, 2013 Bench: M.S. Sanklecha wp-1266-2013

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1266 OF 2013

The Commissioner of Income Tax City-15]
Matru Mandir, Room No.124,]

Tardeo Road, Mumbai 400 007.] .. Petitioner.

V/s.

1 Income Tax Settlement Commission]
Additional Bench, 2nd Floor,]

Mahalaxmi Chambers, S. K. Rathod
Marg, Mahalaxmi, Mumbai 400 034.

]]

2 M/s. Chirag Construction RMC]

Gulmohar Apartment,]
Factory Lane, Borivali,]
Mumbai 400 092.]

.. Respondents.

Mr. A. R. Malhotra with Mr. N. A. Kazi, for the Petitioner.
Mr. R. A. Dada, Sr. Advocate with Mr. Sashi Tulsiyani and P. C. Tripathi, for
Respondent No.2.

CORAM: MOHIT S. SHAH, C.J. &
M.S.SANKLECHA, J.

RESERVED ON : 20 AUGUST 2013. PRONOUNCED ON : 30 AUGUST 2013.
JUDGMENT (Per M. S. Sanklecha, J.): - By this Petition under Article 226 of
the Constitution of India, the revenue challenges the order dated 31 December
2012 passed by respondent No.1- Settlement Commission under Section 245-
D(2C) of the S.R.JOSHI 1 of 18 wp-1266-2013 Income Tax Act, 1961 (in short
“the Act”) rejecting the petitioner’s prayer to declare the Settlement Applica-
tion filed by respondent No.2- applicant on 14 November 2012 for Assessment
Year 2010-11 as invalid. 2 Brief facts relevant to this petition are as under:- (a)
For Assessment Year 2010-11, the respondent No.2- applicant filed its return of
Income with the revenue on 26 September 2010. (b) The time/period to issue
a notice under Section 143(2) of the Act for Assessment Year 2010 - 11 expired
on 30 September 2011. Admittedly, no notice under Section 143(2) of the Act
has been issued till 30 September 2011 or even thereafter. Therefore, it was
not possible to complete the assessment under Section 143(3) of the Act be-
fore the expiry of the time to complete assessment under Section 153 of the Act
which expired on 31 May 2013. (c) On 14 November 2012, the respondent No.2-
applicant filed an application for Settlement with respondent No.1- Settlement
Commission. By the above application, respondent No.2- applicant sought to
settle its dispute for Assessment Years 2010-11, 2011-12 and 2012-13 with the
revenue. (d) On 19 November 2012, the respondent No.1- Settlement Com-
mission passed an order under Section 245-D(1) of the said Act, allowing the
settlement application to be proceeded with for all the three Assessment Years
i.e. 2010-11, 2011-12 and 2012-13. (e) Thereafter, on 24 December 2012, the
Commissioner of Income Tax forwarded his report in terms of Section 245-D(2B)
of the Act. S.R.JOSHI 2 of 18

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The Commissioner of the Income Tax in his report challenges the jurisdiction
of the respondent No.1- Settlement Commission to settle the application of re-
spondent No.2- applicant for the Assessment Years 2010-11 and 2012-13. This

was on the ground that on the date of the application, there was no pending assessment before the Assessing Officer. It was pointed out that so far as Assessment Year 2010-11 was concerned, the time to issue notice/initiate proceedings under Section 143(2) of the Act had expired, consequently assessment under Section 143(3) of the Act was not possible. So far as Assessment Year 2012-13 is concerned, it was submitted that no proceedings are pending with the Income Tax Department on the date the application was filed with respondent No.1-Settlement Commission. (f) On 31 December 2012, the respondent No.1-Settlement Commission by an order passed under Section 245-D(2C) of the Act found no merits in the objections raised by the Commissioner of Income Tax. Consequently, the settlement application filed by respondent No.2-applicant for Assessment Years 2010-11, 2011-12 and 2012-13 was directed to be proceeded with by the respondent No.1-Settlement Commission. 3 The revenue by this Petition assails the impugned order dated 31 December 2012 of respondent No.1-Settlement Commission only in so far as it admits the settlement application of respondent No.2-applicant for Assessment Year 2010-11. 4 Mr. A. R. Malhotra, learned Counsel appearing for revenue in

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support of the Petition assails the impugned order dated 31 December 2012 as under:- (a) The Settlement Commission could not have entertained the application filed on 14 November 2012 for settlement in respect of Assessment Year 2010-11 as the jurisdictional requirement as provided in Section 245C of the Act read with Section 245A(b) of the Act was not satisfied. This was for the reason that no Assessment proceedings were pending for Assessment Year 2010-11 as on 14 November 2012, when the application for settlement was filed; (b) The condition precedent for the purpose of entertaining the application for settlement as provided under Section 245-C of the Act is that an application can only be made at any stage of a case as defined under Section 245-A (b) of the Act. As no assessment was pending before the Assessing Officer for the Assessment Year 2010-11 there was no case in respect of which an application under Section 245-C of the Act, could be entertained; and (c) For the Assessment Year 2010-11, the respondent No.2 had filed its return of income on 26 September 2010. The period during which the notice under Section 143(2) of the Act could be issued, expired on 30 September 2011, while the application for settlement was made on 14 November 2012. Therefore, as no notice under Section 143(2) of the Act could be issued to respondent No.2- applicant, no occasion to complete the assessment under Section 143(3) of the Act could arise. Thus, on the date

the application was made to the S.R.JOSHI 4 of 18 wp-1266-2013 respondent No.1- Settlement Commission by respondent No.2- applicant, there was no assessment pending before the Assessing Officer to enable the application being entertained. In view of the above, the respondent No.1-Settlement Commissioner had no jurisdiction to entertain the application for settlement in so far it relates to Assessment Year 2010-11. 5 Per Contra, Mr. R.A.Dada, learned Senior Counsel appearing for respondent No.2-applicant in support of the impugned order submits as under:- (a) Admittedly no assessment for the Assessment Year 2010-11 has been made till the filing of the application on 14 November 2012 with the respondent No.1-Settlement Commission. Therefore, the assessment continues to be pending in this case till the filing of the application by respondent no.2-applicant. In support he states that even a notice of intimation issued under Section 143(1) of the Act is not an assessment and notwithstanding the issue of notice of intimation, the assessment continuous to be pending. In support of the aforesaid, reliance was placed upon the decision of the Apex Court in the matter of Assistant Commissioner of Income Tax v/s. Rajesh Jhaveri Stock Brokers P. Ltd. [2007] 291 ITR 500 (SC); (b) Explanation (iv) of the proviso to Section 245-A(b) of the said Act provides that for the purposes of Settlement proceedings under the Act, an assessment was deemed to have been commenced from the first day of the Assessment Year and concluded on the day on which the assessment is made. In this case, no assessment is S.R.JOSHI 5 of 18 wp-1266-2013 admittedly made till the filing of the Settlement Application on 14 November 2012. Thus, the assessment continuous to be pending before the Assessing Officer; and (c) The above view is fortified by Circular No.3 of 2008 dated 12 March 2008 which specifically states that an intimation under Section 143(1) of the Act is not assessment order and that there is no bar in filing an application for settlement subsequent to the receipt of intimation under Section 143(1) of the said Act. Moreover, the circular provides that it is immaterial whether the time limit for issuing notice under Section 143(2) of the Act expired or not for the purpose of approaching the respondent No.1- Settlement Commission, for settlement. In view of the above circular, it is submitted that it is not open to the revenue to object to the jurisdiction exercised by the respondent No.1- Settlement Commission. 6 Before dealing with the rival submissions, it may be convenient to set out the relevant statutory provisions which falls for consideration. Relevant statutory provisions Section 143 (2) (ii) reads as under:- (2) Where a return has been furnished under Section 139 or in response to a notice under Section (1) of Section 142, the Assessing Officer shall (i) (ii) notwithstanding anything contained in clause (i), if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed S.R.JOSHI 6 of 18 wp-1266-2013 excessive loss or has not underpaid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return; Provided that no notice under clause (ii) shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished." Section 153 (i) reads as

under:- " No order of assessment shall be made under Section 143 or section 144 at any time after the expiry of - (a) two years from the end of the assessment year in which the income was first assessable; or (b) one year from the end of the financial year in which a return or a revised return relating to the assessment year commencing on the 1 st day of April 1988, or any earlier assessment year, is filed under sub-section (4) or sub-section (5) of section 139, whichever is later: Provided that " Section 245-A reads as under:- In this Chapter, unless the context otherwise requires:- "(a) (b) 'case' means any proceeding for assessment under this Act, of any person in respect of any assessment year or assessment year's which may be pending before an Assessing Officer on the date on which an application under sub-section (1) of section 245C is made: Provided that- S.R.JOSHI 7 of 18

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- (i) a proceeding for assessment or reassessment or recomputation under section 147;
 - (ii) [***]
 - (iii) [***]
 - (iv) [***] Explanation.-For the purposes of this clause-
 - (v) a proceeding for assessment or reassessment or recomputation referred to in clause (i) of the proviso shall be deemed to have commenced from the date on which a notice under section 148 is issued;
 - (vi) [***] (iii)[***] (iiia)[***]
 - (vii) a proceeding for assessment for any assessment year, other than the proceedings of assessment or reassessment referred to in clause (i) or [clause (iv) of the proviso or clause (iiia) of the Explanation], shall be deemed to have commenced from the 1st day of the assessment year and concluded on the date on which the assessment is made." Section 119 (1) reads as under:- " The Board may, from time to time, issue such orders, instructions and directions to other income tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board; Provided that no such orders, instructions or directions shall be issued-
- (a) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or S.R.JOSHI 8 of 18 wp-1266-2013
 - (b) so as to interfere with the discretion of the [***] [Commissioner (Appeals)] in the exercise of his appellate functions." Relevant portion of CBDT Circular dated 12 March 2008 "61.2 Under the existing provisions, an assessee may make an application to the Commission at any stage of the proceedings in his case pending before any income-tax authorities. After 31 May 2007, an assessee can make an application to the Commission only during the pendency of the proceedings before the Assessing Officer. It is

further clarified that (a) since intimation under Section 143(1) is not an assessment order, there will be no bar in filing an application for settlement subsequent to receipt of an intimation under Section 143(1). It is not material whether time limit for issue of notice under Section 143(2) has expired or not; (b) the assessment shall be deemed to have been completed only on the date of service of assessment order to the applicant.” 7 We have considered the rival submissions. The undisputed facts are that when application for Settlement was filed on 14 November 2012, the time to issue notice under Section 143(2) of the Act to complete the assessment under Section 143(3) of the Act for Assessment Year 2010- 11 had expired. In view of the above, it is the revenue’s case that on the date of the application for settlement filed by respondent No.2- applicant on 14 November 2012, there was no assessment pending before an Assessing Officer which would entitle respondent No.1- Settlement Commission to exercise jurisdiction over the application for Settlement. The grievance of the revenue-petitioner is that in spite of the above, the respondent No.1- Settlement Commission has allowed the settlement application to be proceeded with before it by the impugned order dated 31 December 2012. The respondent No.1-Settlement Commission allowed the application for settlement of respondent No.2- applicant, inter alia, S.R.JOSHI 9 of 18 wp-1266-2013 for Assessment Year 2010-11 on the basis of its Special Bench decision dated 13 June 2008 in the matter of Rescuwear Corporation. In the matter of Rescuwear Corporation (supra), the Settlement Commission, inter alia, posed the following question as question (ii) for itself:- For the years for which returns have been processed under Section 143(1) of the Act but now no time is left for issue of notices under Section 143(2) of the Act, whether proceedings for the Assessment Years are pending or not? The Settlement Commission answered the above question in the affirmative. To reach the above conclusion, reliance was placed upon the Circular No.3/2008 dated 12 March 2008 issued by the Central Board of Direct Taxes (CBDT). 8 Mr. Malhotra, on behalf of the revenue submits that the reliance by the Settlement Commission on its Special Bench decision in the matter of Rescuwear Corporation (supra) was incorrect, as the same is no longer good law in view of the decision of the Gujarat High Court in the matter of Commissioner of Income Tax v/s. Income Tax Settlement Commission and Amrish Shukla (Special Civil Application No.859 of 2012) dated 15 September 2012, wherein the Gujarat High Court has considered the decision of Special Bench of the Settlement Commission in the matter of Rescuwear Corporation (supra) and according to him, not followed it. Before the Gujarat High Court in the matter of CIT v/s. Income Tax Settlement Commission and Amrish Shukla (supra), the Settlement Commission had entertained the application for settlement by the applicant therein for the Assessment S.R.JOSHI 10 of 18 wp-1266-2013 Years 2005-06 to 2011-12. However, the revenue challenged the admission of application for settlement only in respect of Assessment Year 2005-06 to 2008-09. In all the years of challenge i.e. As-

sessment Years 2005-06 to 2008-09, the return of income was processed under Section 143(1) of the Act and not only the time to issue notice under Section 143(2) of the Act had expired but even the period to complete the assessment proceedings under Section 153 of the Act had expired. So far as Assessment Year 2009-10 was concerned, the scrutiny assessment were pending. So far as Assessment Year 2010-11 was concerned, the return of income was processed under Section 143(1) of the Act and the time to issue notice under Section 143(2) of the Act had expired, though there was still time to complete the assessment under Section 153 of the Act. So far as Assessment Year 2011-12 was concerned, the Assessment was admittedly pending before the Assessing Officer. The revenue challenged the order of the Settlement Commission before the Gujarat High Court only to the extent it was admitted by the Settlement Commission for the Assessment Years 2005-06 to 2008-09. The revenue did not challenge the order of the Settlement Commission, admitting the application for settlement in respect of the Assessment Year 2010-11. The Gujarat High Court held that the application for settlement for the Assessment Years 2005-06 to 2008-09 were not maintainable as not only the period to issue a notice under Section 143(2) of the Act expired but also the period during which the assessment could be completed under Section 153 of the said Act had expired. It would, therefore, be noticed that before the Gujarat High Court, the issue for consideration was not a situation identical to the issue before us or before the Settlement Commission as in this case. We are concerned with Assessment Year 2010-11 where the fact S.R.JOSHI 11 of 18 wp-1266-2013 situation is identical to Assessment Year 2010-11 in the matter before the Gujarat High Court in the matter of Amrish Shukla (supra). However, the revenue did not challenge the order of the Settlement Commission, admitting the application for the Assessment Year 2010-11 before the Gujarat High Court. Therefore, the decision rendered by the Special Bench of the Settlement Commission in the matter of Rescuwear Corporation (supra) nor the CBDT circular No.3/2008 dated 12 March 2008 has not been declared bad by the Gujarat High Court so far as fact situation in the present proceedings are concerned. The context in which the Gujarat High Court rendered its decision in the matter of Amrish Shukla (supra) was completely different and distinct from the issue arising in this case. 9 In the case before us, the period to complete the Assessment under Section 153 of the said Act has not yet expired, the period to issue notice under Section 143(2) of the Act had expired just as in the case of Settlement Commission before Gujarat High Court in the matter of Amrish Shukla (supra), for the Assessment year 2010-11. The revenue before the Gujarat High Court in the matter of Amrish Shukla (supra) had not challenged the admission for Assessment Year 2010-11, according to Mr. Dada, in view of the binding Circular No.3/2008 dated 12 March 2008 issued by the CBDT, and particularly paragraph 16.2 thereof which had been reproduced hereinabove. In the circular, the CBDT has categorically mentioned in paragraph 61.2 thereof as under:- " 61.2 Under the existing

provisions, an assessee may make an application to the Commission at any stage of the proceedings in his case pending before any income-tax authorities. After 31 May 2007, an assessee can make an application to the Commission only during the pendency of S.R.JOSHI 12 of 18 wp-1266-2013 the proceedings before the Assessing Officer. It is further clarified that (a) since intimation under Section 143(1) is not an assessment order, there will be no bar in filing an application for settlement subsequent to receipt of an intimation under Section 143(1). It is not material whether time limit for issue of notice under Section 143(2) has expired or not; (b) the assessment shall be deemed to have been completed only on the date of service of assessment order to the applicant." It is the case of respondent No.2-applicant that the Special Bench of the Settlement Commission in the matter of Rescuwear Corporation (supra) had in fact, relied upon the aforesaid circular to conclude that an assessment will continue to be pending before the Assessing Officer even where the time to issue notice under Section 143(2) of the Act had expired. 10 Mr. Dada, learned Counsel appearing for respondent No.2 strongly relied upon Section 119 of the Act in support of his submission that is not open to the revenue to challenge the orders of the Settlement Commission particularly when the same is in accordance with CBDT circular dated 12 March 2008. In fact, he points out that even after the order of the Full Bench of the Settlement Commission in the matter of Rescuwear Corporation (supra), on 13 June 2008, the revenue has not chosen to withdraw the circular dated 12 March 2008. Therefore, it must follow that the CBDT circular dated 12 March 2008 being a Circular beneficial to the assessee must prevail and it is not open to the revenue to file a Petition contrary to the binding Circular dated 12 March 2008. In support of his submission, that circular issued by the CBDT are binding upon the revenue, Mr. Dada relied upon the decision of the Apex Court in S.R.JOSHI 13 of 18 wp-1266-2013 the matter of K. P. Varghese v/s. Income Tax Officer, Ernakulam and Another 131 ITR page 597, wherein the Court has held that the instructions issued in the Circular issued by the CBDT was binding upon the department. The Court observed as under:- " The two circulars of the CBDT to which we have just referred are legally binding on the revenue and this binding character attaches to the two circulars even if they be found not in accordance with the correct interpretation of sub- Section 2 and they depart or deviate from such instruction. It is not well settled as a result of two decisions of this Court, one in Navnit Lal C. J haveri v/s. K. K. Sen AAC (1965) 56 ITR and the other in Ellerman Lines Ltd. v/s. CIT(1971) 82 ITR 913 that circulars issued by the CBDT under Section 119 of the Act are binding on all officers and persons employed in the execution of the Act even if they deviate from the provisions of the Act." Reliance was also placed upon the decision of the Supreme Court in the matter of Commissioner of Wealth Tax v/s. Vasudeo V. Dempo 196 ITR page 216 and the decision of our Court in the matter of Unit Trust of India and another v/s. P. K. Unny and Others, 249 ITR page 612, wherein it has been held that the circulars

issued by the CBDT are binding on the department. Moreover, it was held that the revenue is estopped from raising any arguments contrary to the interpretation placed upon the statutory provisions by the CBDT. We may profitably reproduce the observations of our Court in the matter of UTI (supra) which reads as under:- " It is well settled by a catena of decisions that benevolent circulars are binding on the Department, even if they are based on deviations. It is equally well settled that interpretations given by the CBDT in favour of the assessee S.R.JOSHI 14 of 18 wp-1266-2013 are binding on the Department. That, the Department is estopped from raising any argument contrary to the interpretation placed by the CBDT. In the circumstances, we hold that the Department is estopped from now raising an argument contrary to the circular dated October 11, 1991." 11 In view of the above, though there may be some merit in the contention raised on behalf of the revenue viz. that where time limit to issue notice under Section 143(2) of the said Act has expired, then in such a case, it cannot be stated that assessment is pending before the Assessing Officer. This is particularly so as under Section 246-A of the said Act, an appeal can be filed by the Assessee to the Commissioner of Income Tax (A) from an intimation received under Section 143(1) of the Act. Therefore, even if the notice of intimation for the relevant year is in appeal before an Appellate Authority, it would still be open to an assessee to file an application before the Settlement Commission so long as no order of assessment under Section 143(3) of the said Act has been passed within the period of time provided under Section 153 of the Act. However, as the Circulars issued by the CBDT are binding upon the authorities under the Act, we see no reason to interfere with the order of Settlement Commission as the Apex Court has taken a view in respect of Income Tax matters in *Catholic Syrian Bank Ltd. v/s. CIT 2012(3)SCC 784* that Circulars issued by the CBDT which are beneficial to the assessee must be applied and observed as under:- " Effect of Circulars

23. Now, we shall proceed to examine the effect of the Circulars which are in force and are issued by the Central Board of Direct Taxes (for short "the Board") in exercise of the power vested in it under Section 119 of the Act. Circulars can be issued by the Board to explain or tone down the rigours of S.R.JOSHI 15 of 18 wp-1266-2013 law and to ensure fair enforcement of its provisions. These circulars have the force of law and are binding on the Income Tax Authorities, though they cannot be enforced adversely against the assessee. Normally, these Circulars cannot be ignored.
24. A Circular may not override or detract from the provisions of the Act but it can seek to mitigate the rigour of a particular provision for the benefit of the assessee in certain specified circumstances. So long as the circular is in force, it aids the uniform and proper administration and application of the provisions of the Act." Thus, we find merit in the submission of Mr. Dada that though respondent No.1- Settlement Commission may not

be specified as Income Tax Authority under Section 116 of the Act, yet the petitioner cannot urge a view contrary to the Circular for the purpose of challenging the impugned order dated 31 December 2012. 12 Before parting, we would like to deal with the decision of the Apex Court in the matter of Commissioner of Central Excise v/s. Ratan Melting & Wire Industries 231 ELT page 22. In the aforesaid decision, the Constitutional Bench of the Apex Court was considering the binding nature of a circular issued under the Central Excise Act, 1944 which were contrary to decisions rendered by the Supreme Court. The Apex Court in the above case held that :- "Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and S.R.JOSHI 16 of 18 wp-1266-2013 of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the Court. It is for the Court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law." The aforesaid observations of the Constitutional Bench of the Apex Court in a Central Excise case reiterates the view taken by the Apex Court in an Income Tax case in Hindustan Aeronautics Ltd. v/s. C.I.T. 243 ITR

25. The above decisions are not applicable to the facts of the present case inasmuch as our attention has not been invited to any decision of the Apex Court or of any High Court which has taken a view contrary to the view expressed by the CBDT in a Circular dated 12 March 2008. Thus, there being no ruling of the Apex Court or any High Court taking a view contrary to the CBDT Circular dated 12 March 2008, the circular has a binding force upon the revenue and they cannot contend to the contrary. Thus, the decision of the Apex Court in the matter of Ratan Melting & Wire Industries (supra) would have no application to the present case. 13 Moreover before us no submission was even urged by the revenue that the Circular issued by CBDT dated 12 March 2008 is not correct or not binding upon the revenue. The Special Bench of the Tribunal in the matter of Rescuwear Corporation (supra) has also relied upon the circular dated 12 March 2008 as far back as on 13 June 2008 and parties have acted on the basis of the decision declared by the Special Bench, following the circular dated 12 March 2008. The revenue has not till date withdrawn the circular to the extent it clarifies that it is immaterial for the purpose of filing an application before the S.R.JOSHI 17 of 18 wp-1266-2013 Settlement Commission whether the time limit for issuing of notice under Section 143(2) of the Act has expired or not. 14 We must also not lose

sight of the fact that the entire purpose and objective of Chapter IXA of the Act providing for settlement is to give an opportunity to a tax defaulter to surrender and pay up the taxes in consideration of immunity from prosecution and penalty (either wholly or in part). Thus, a beneficial interpretation to the word 'case' in Section 245A(b) of the Act given by the Circular dated 12 March 2008 issued by the CBDT is understandable so as to mitigate/lessen the rigour of the definition of the word 'case'. 15 In view of the above, Writ Petition is dismissed, with no order as to costs. (CHIEF JUSTICE)

(M.S.SANKLECHA, J.)

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