The Decline of the Successful Tax Shelter

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1. Introduction

This essay reviews the *Income Tax Act* (Canada) (the "Act") tax shelter provisions and provides and overview of relevant issues to demonstrate that despite criticisms that the provisions and Canada Revenue Agency ("CRA") enforcement are overreaching, it has been successful in prohibiting, preventing and reassessing participants in aggressive tax shelter programs. It argues that issues with the broad legislative provisions like potential and inappropriate applicability to legitimate business transactions and CRA overreach are justified given the real and potential harm that abusive tax shelters cause to the tax system and the success in combatting them in recent years. In fact, the legislative and enforcement actions have been so successful that in a matter of decades we have seen the rise and fall of the successful tax shelter in Canada.

2. Legislative History

Income tax was first implemented in Canada in 1917 under the 10-page *Income war Tax Act*[1]. It applied only to 2-8% of individuals and was meant to be a temporary measure to help finance World War 2. In 1948 a new 20-page *Income Tax Act* was passed that increased the percentage of the population paying income tax to 17%. In 1966 the Royal Commission on Taxation under Kenneth Carter, appointed by Prime Minister John Diefenbaker, put forward an expansive report. This report led to the present-day *Income Tax Act,* passed in its first iteration in 1972 under Prime Minister Pierre Trudeau, which, among a great many other things, expanded the number of individuals paying income tax

to 37%[2] As income taxes increased so too did the incentive for taxpayers to come up with avoidance strategies.

Two popular tax shelters that emerged in the 1970s sought to utilize government tax incentives for Canadian films and multiple unit residential buildings ("MURBs"). The Federal government established the Canadian Film Development Corporation (CFDC) in 1967 with $10 million to invest in the promotion of the development of the feature film industry. Its intent was to both promote Canadian popular culture and to foster a distinctive national identity. Achieving both objectives while making a profit turned out to be a difficult task. After significant criticism of direct public funding for "bad" popular culture movies, the grant program was scrapped in favour primarily of a capital cost allowance deduction for investment in Canadian film. This allowed investors to write off all or part of their investment against other income. Film tax shelter investments led to an industry boom. In the early 1980s, however, the repeated financial failure of the vast majority of the films resulted in a loss of investor interest.[3] Additionally, the prevalence of questionable film tax shelters including those that involved leveraged debt using non-recourse loans resulted in a significant number of reassessments denying claimed deductions on the basis that the investment amount claimed was not in fact the amount "put at risk," and therefore deductible, further tarnishing the reputation of film tax shelters.[4]

Similarly, in 1974, the Federal government implemented the multiple unit residential building ("MURB") tax subsidy in order to promote the building of rental housing in

urban areas. The subsidy allowed investors to deduct losses from allowable depreciation deductions associated with the construction of a new residential building against other income.[5] As with film subsidies, aggressive tax shelters used debt as leverage to increase investment tax benefits. The MURB subsidy was removed from the Act in 1981[6] and the investments generally lost their value when the real estate market crashed in the late 1980s.[7]

In 1988 the Act was amended to require that tax shelters obtain a tax shelter identification number.[8] This administrative provision allowed tax administrators to monitor tax shelters and more readily review and reassess those found to be contrary to the Act. The registration requirement did not end the development of new tax shelters, however.

In the 1990s investors flocked to Labour-Sponsored Investment Funds ("LSIFs") and software tax shelters. During the economic recession in the late 1980s and early 1990s the Federal government and most Provincial governments introduced generous tax credits to promote investment in technology and promote job growth. The labour backed venture capital funds invested in start-up technology companies. Like the film credit tax shelters before them, however, the high-risk investments were largely unprofitable and consequently LSIFs lost popularity. Critics argued that the tax credit skewed investment into long-shot companies with very little chance of success. Citing the maturation of the venture capital market, Ontario withdrew its tax credit in 2010. The Federal government followed suit in 2013.[9]

The rise of the high-tech sector in the early 1990s also led to the emergence of a significant number of software tax shelters. The shelters generally sought to take advantage of the negligible cost of duplicating software programs and their subjective value. By relying on leveraged investing with long-term limited-recourse debt, such shelters frequently attempted to generate tax losses by over-valuing software. The participants of such shelters were generally successfully reassessed with claimed deductions denied. [10]

In response to the prevalence of such tax shelters, on December 1, 1994 the Minister of Finance announced the Ministry's intention to strengthen tax shelter laws.[11] The objective, according to the Department of Finance's contemporaneously released explanatory notes, was to "improve the fairness of the tax system by preventing abuses through aggressive tax shelter promotions."[12] An amended version of the legislation was passed into law in 1995.

3. Sections 237.1 & 143.2

Section 237.1 of the Act in its present form defines 'tax shelter' and other relevant terms, requires that tax shelters apply for a tax shelter identification number, display the number on applicable materials and maintain books and records at an address in Canada. It also requires that the promoters of a tax shelter file an annual information return, that taxpayers file a prescribed form when declaring tax shelter related deductions and that beneficiaries, advisors and promoters file an information-return for reportable transactions. It provides for penalties for non-compliance and for certain penalty

exclusions for the acquisition of a tax shelter and in relation to the issuance of flow-through shares. Section 143.2 of the Act deducts limited recourse debt and the at-risk adjustment (available compensation for investor loss) from the investor's investment expenditure for the calculation of applicable tax deductions or benefits.

3.1 Definitions

Section 237.1(1) of the Act defines 'gifting arrangement' as a person making a donation to a charity or a political contribution under the *Canada Elections Act*, or incurring limited-recourse debt (restricting the creditor's ability to collect) in relation thereto. 'Tax shelter' is defined as either a gifting arrangement using limited recourse debt or of property (broadly defined but excluding flow-through shares) where it is represented that the tax savings will be greater than the amount invested within a tax year ending on or before four years from the date of entering the arrangement. It is notable that the definition of 'tax shelter' requires "statements or representation made or to be proposed to be made." This point has been the subject of litigation and will be discussed in greater depth. In Section 237.3(1) of the Act 'reportable transaction' is any transaction that has two of the three hallmarks of a tax avoidance plan: a) a contingency fee for the promoter such as on taxes saved, b) confidential protection prohibiting the disclosure of the details of the scheme to others, and c) contractual protection, such as a promise to pay for the cost of defending the scheme should the participant be reassessed and have benefits denied.

3.2 Registration & Reporting

Section 237.1 of the Act requires that all tax shelters apply to the Minister in prescribed form (T5001) for a tax shelter identification number (237.1(2)). It also requires an undertaking, that is satisfactory to the Minister, at the time of application for the tax shelter number, that books and records with respect to the tax shelter be kept at a place in Canada (237.1(3)) and prohibits tax shelter sales prior to the issuance of an identification number (237.1(4)).

The tax shelter promoters must also make reasonable efforts to ensure that all persons who acquire or invest in the tax shelter are provided with the identification number and that said number be displayed on statements of earnings (237.1(5)). Additionally, in every instance where a written statement is made by the promoters referring to the issuance of the tax shelter identification number, prescribed text must be included with respect to the requirement for the number to be included in any income tax return filed by the investor and that the tax number does not confirm the entitlement of an investor to tax benefits (237.1(5)).

In addition to registration, the tax shelter provision contains reporting requirements. Specifically, the tax shelter promoters are required to file an annual information return (Form T5003 for each investor and Form T5003 SUM, or Form T5013 for a partnership, is filed for the tax shelter) that includes, among other things, the name address, social insurance number or business number and amount invested for each investor (237.1(7)). This form must be filed on or before the last day of February in the following calendar

year (237.1(7.3)). In the year that a taxpayer claims a deduction a form (T5004) must be filed for the year in which the claim is made, including details about the tax shelter including its registration number (237.1(6)). Additionally, every person that benefits from a reportable transaction must file an information return in the prescribed form (RC312) (237.3(2)) on or before June 30 in the year in which a reportable transaction occurred (237.3(5)).

3.3 Penalties

Section 237.1 of the Act levies significant penalties for non-compliance. A tax shelter that starts accepting consideration prior to receiving an identification number or that files false or misleading information is subject to a penalty of 25% of all consideration received or the purported value of donations made until the identification number is issued or the correct information filed (237.1(7.4)). No amount may be deducted or claimed by a person in respect of a tax shelter unless the tax shelter has a registration number (237.1(7.4)) and the person has filed a T5004 Claim for Tax Shelter Loss or Deduction (237.1(6)).

Promoters that fail to fully file a tax shelter's annual information return pursuant to section 237.1(7) upon demand are subject to a penalty of 25% of all consideration received or the purported value of donations made by or in relation to the tax shelter (237.1(7.5)).

Any person that fails to file a reportable transaction information return is subject to a penalty equal to the fee that an advisor or promoter is entitled in relation to the transaction where the fee is either contingent on a tax benefit from the transaction or a contractual protection in respect of the transaction (237.3(8)). This penalty is applied jointly and severally if more than one person is liable (237.3(9)) but any person that has exercised due diligence to prevent the failure to file is not liable (237.3(11)).

3.4 Limited Recourse Debt & At-Risk Adjustment

'Limited-recourse debt' is the total of each limited-recourse amount reasonably related to the gift or monetary contribution (143.2(1)). 'At-risk adjustment' is, with some exceptions, any amount or benefit that a taxpayer is entitled to that would reduce any loss in relation to the expenditures or for disposition of property (143.2(2)). The amount that the total tax shelter expenditure exceeds the total of all at-risk adjustment and limited recourse debt is deducted from the total expenditure in the tax shelter for tax purposes (143.2(6)). Debt is not considered to be limited-recourse where there is evidence in writing at the time the indebtedness arose that the debt is to be paid in full with no less than the prescribed rate of interest within 10 years when certain ongoing payment requirements are met (143.2(7)). Short term debt where payment of all principal is made no later than 60 days after the indebtedness arose is also excluded from the definition of 'limited recourse debt' unless such amount is repaid with limited recourse debt or is part of a series of loans that span for greater than 60 days (143.2(11)).

3.5 Application to Legitimate Business Transactions

The tax shelter provisions in the Act are broad and are intended to apply to abusive tax shelters no matter how they have been structured. Notably, however, the breadth of the language can also result in regular business transactions running afoul of the tax shelter provisions in instances where the transaction (such as the acquisition of a share in a partnership) is expected to provide tax deductions and benefits greater than the purchase price in a tax year ending within four years.[13] While the uncertainty that this creates amongst taxpayers is troubling, in practical terms the CRA can address this problem by not reassessing returns and applying penalties in instances where it is clear that the arrangement is not contrary to the spirit of the Act. Taxpayers, on the other hand, can also apply for a tax shelter identification number to protect against potential risk of penalty. While it is certainty not desirable that the current definition of tax shelter can capture unintended transactions, it is not clear how to amend the definition in a manner that would exclude such transactions while including all forms of abusive tax shelters. Ultimately judgment in enforcement must play a role.

4. Statutory Interpretation & Definition of 'Tax Shelter'

4.1 Statutory Interpretation[14]

Sections 237.1 & 143.2 of the Act are interpreted in the same manner that all tax law in Canada is interpreted. Such statutory interpretation is founded on the 1935 House of Lords case *Commissioners of Inland Revenue v. Duke of Westminster*.[15] In the case the Duke drew up a deed so his staff would receive annuity payments in lieu of regular

wages. The wages were not tax deductible while the annuity payments were. The Commissioner of Inland Revenue asserted that the employees were still receiving wages in substance and that the amount therefore should not be tax deductible. Rejecting this argument, Lord Tomlin famously asserted that: "[e]very man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be."[16] Lord Tomlin also affirmed a literal approach to statutory interpretation with respect to tax stating that "[t]he subject is not taxable by inference or by analogy but only by the plain words of a statute applicable to the facts and circumstances of his case."[17]

In the leading Supreme Court of Canada case of *Stubart Investments Ltd v The Queen*,[18] the Court upheld the premise of *Duke of Westminster* while overruling its approach to statutory interpretation. The issue was whether a corporate taxpayer can put future profits through a subsidiary to benefit from its loss carry-forward. Beetz, Estey and McIntyre JJ. affirmed the *Duke of Westminster*: "the longstanding principle that a person might order his affairs to as to attract the least tax liability… [is]… too deeply entrenched in Canadian law to be rejected in the absence of clear statutory authority"[19] while rejecting the use of literal statutory interpretation and asserting the "modern rule": "[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[20]

4.2 Definition of 'Tax Shelter'

Given the severity of associated penalties, it is not surprising that the interpretation of the term 'tax shelter' has been the subject of litigation. Specifically, the element of making a 'statement or representation' has been of particular controversy. Paragraph (b) of the definition of 'tax shelter' requires that, in determining whether there is a benefit greater than the amount invested or donated within a tax year ending four years from the date of investment, that such finding "can reasonably be considered, having regard to *statements or representations made or proposed to be made* in connection with the gifting arrangement or the property" (237.1 (1) tax shelter (b)) (emphasis added). The 2006 cases of *Maege v. The Queen*[21] and *Baxter v. The Queen*.[22] are the leading decisions in this regard.

4.3 *Maege v. The Queen*

Maege v. The Queen involved deductions claimed by two taxpayers related to investments in a partnership made along with a small group of others. The business was not registered as a tax shelter but the total amount in tax deductions was greater than the investments made by participant investors. Norma Maege, an accountant with experience in business, structured the transaction. The Tax Court found the transaction to constitute a tax shelter and ruled that the statements or representations element of the definition of tax shelter had been met for all parties, including for Maege, who made statements and representations to others but had no statements or representations made to her. The Court of Appeal upheld the Tax Court's ruling, asserting that an individual with knowledge of

business and tax can make a statement to themselves in their head that qualifies for the purpose of the provision if they are aware of the transaction's tax benefits.

4.4 *Baxter v. The Queen*

In *Baxter v. The Queen* a taxpayer purchased licenses for software for trading futures contracts and deducted capital cost allowance for the software. The CRA reassessed the claim denying the deductions arguing that the transaction was a tax shelter and that no identification number had been obtained. There was no evidence put forward that tax statements or representations had been made to the taxpayer and consequently, Bell J. for the Tax Court, found that there was no tax shelter. This narrower ruling on statements and representations contrasted with the broad ruling made in *Maege*. Since then, however, the wording of the provisions at issue in *Baxter* has been amended so that the ruling would no longer apply.[23]

On appeal, the Court reversed the Tax Court's ruling, finding that the promoter of the transaction made representations by obtaining a legal opinion and valuation and giving them to some participants. That Baxter did not receive a copy was not material to the Court.[24] As a result, *Baxter* upholds the very broad interpretation of 'statements or representations' found in *Maege*.

4.5 Case Commentary

Nevertheless, commentary on *Maege and Baxter* has been critical of the Court's interpretation of the statements and representations requirement. In their paper *Shelter from the Storm: The Current State of the Tax Shelter Rules in Section 237.1*, Rosemarie Wertschek and James R. Wilson argue that Bell J.'s Tax Court finding in *Baxter* that representations to the taxpayer on the tax consequences of the investment is a necessary element of 'tax shelter' is better law.[25] The rationale for this position is that it is consistent with the a primary meaning of 'representation'[26] and that it is fair, as perhaps best explained by Bell J. in *Baxter*:

> Tax legislation can and does have effects which may seem harsh but that harshness must be the result of legislative precision. I cannot interpret the lack of words requiring the statements or representations to be made to the taxpayer as having the result of unfairly sweeping the taxpayer into consequences which may have been justifiably unforeseen. In a self-assessing system how can one expect a taxpayer *bona fide* investing in what appears to be a totally legitimate investment, to be prejudiced by something he doesn't know and can't know, and yet being required to file a tax return as if that taxpayer did know?[27]

Notwithstanding such criticisms, however, the broad interpretation of the provision is current law.

The rulings in *Maege and Baxter* do indeed appear to be contrary to a plain language interpretation of the provision and in that sense the cases are incorrectly decided. It is likely, however, that the Courts were motivated to interpret the provision to bring about a desired outcome. It is not hard to imagine why the Court would be reluctant to make the unjust finding that sophisticated individuals who do not need third party statements or representations can benefit from abusive tax shelters while those who are less sophisticated cannot. While the appropriate process would have been for the Courts to apply the plain meaning of the text and for the legislature to then amend it as required, to suggest that the outcome of the cases has lead to a lack of clarity is incorrect. The current position of the law, that self-representations count, is clear, even if the Court's reasoning to get there was a stretch.

5. Post 1995 Gifting Arrangement Tax Shelters

Since the tax shelter provisions in their current form were introduced in 1995, a variety of charitable gifting arrangements seeking to take advantage of charitable donation tax credits have become popular. Buy-low, donate-high gifting arrangements such as art flips and leveraged donations in particular have gained traction. As will be discussed, the CRA has been resoundingly successful in combatting these schemes, reassessing participants and denying benefits.

Buy-low, donate-high gifting arrangements are tax shelters that seek to facilitate transactions where a donation is made to a charity in exchange for a charitable tax receipt greater in value than the cost at which the donor obtained the donated property. Goods

that have a high degree of subjectivity in their valuation are commonly used. The CRA has been attacking these shelters primarily based on the arguments that such transfers do not meet the common law definition of 'donation' and because the valuation of the donated good has been inaccurately and/or fraudulently inflated. In addition to the tax shelter provisions, amendments to the Act have been made to specifically target charitable gifting arrangements. Such amendments include changes to the listed personal property rules to remove capital gains breaks for amounts under $1,000, third party penalties for fraudulent valuations and a deemed valuation of the purchase price when donated within 3 years of acquisition.[28]

5.1 *Klotz v. Canada*

The 2005 case of *Klotz v. Canada*[29] was the first major buy-low, donate-high art-flip case to be heard by the Courts. It involved a charitable gifting arrangement where 250 art prints were purchases at a low price then valuated and donated at a high price. The Court found that the appropriate valuation was the bulk price for all of the prints rather than the retail price of selling each print one-at-a-time on its own. Consequently, the Court rejected the price of the valuator and instead found that the purchase price paid by the participants was the most accurate measure of fair market value.

5.2 *Maréchaux & Kossow*

In *Maréchaux v. The Queen*,[30] F. Max E. Maréchaux, a partner at a law firm, participated in a charitable gifting program, paying $10,000 in fees and donating $20,000

in cash and $80,000 by way of a an interest free promissory note. The Court found that because Mr. Maréchaux received the benefit of an interest free loan as part of the arrangement, the transfer (including the cash) was not a 'gift' at common law and was therefore not entitled to a charitable tax credit.

The 2013 case *Kathryn Kossow v. The Queen*[31] followed and affirmed the ruling in *Maréchaux*. It involved a virtually identical fact pattern with charitable receipts claimed for the 2000, 2001 and 2002 tax years. The Court followed the ruling in *Maréchaux*, upholding the CRA's reassessment.

5.3 *Berg v. The Queen*

The 2014 case *Berg v. The Queen*[32] involved a charitable gifting arrangement where cash and timeshare units were donated to a charity. The timeshare units were paid for with cash and what was purported to be a promissory note. Berg received a charitable donation receipt for the combined total of both the cash and promissory note and deducted said amount on his income tax return. Mr. Berg was reassessed and the entire amount of the donation was denied. Mr. Berg acknowledged that the promissory note was discharged contemporaneously upon signing and argued that, consequently, no benefit had accrued to him other than the tax receipt – for which he is entitled in an amount reflective of the fair market value. The Tax Court accepted this argument, but on Appeal it was rejected and the Court of Appeal found that he had received a benefit from the so-called promissory note in that it facilitated the gifting arrangement. Because the donation

was made for a benefit the Court found that the transfer did not meet the common law definition of 'donation' and the charitable tax credit was denied.

Klotz, *Maréchaux*, *Kossow* and *Berg* demonstrate the lack of success tax shelters and their participants are having. While the CRA has been successful in their efforts fighting tax shelters, they have not gone without criticism.

6. CRA Enforcement & Overreach

The CRA has declared its intention to aggressively fight abusive tax shelters, stating that it "…audits every mass-marketed tax shelter arrangement and no arrangement has been found to comply with the *Income Tax Act*."[33] The CRA, in its zeal to fight such arrangements, has run afoul of the law, as seen in *Ficek v. Canada*,[34] and has raised the ire of tax shelter participants as seen in *Canada v. Scheuer*.[35] As will be discussed, the government's legislative reform and aggressive CRA enforcement have largely been upheld by the Courts and have been remarkably successful in putting an end to successful tax shelters in Canada.

6.1 *Ficek v. Canada*

In the 2013 case *Ficek v. Canada* the CRA believed that the taxpayer, along with ~27,500 others, had participated in an abusive charitable donation tax shelter. The CRA, to avoid paying out refunds and then auditing and reassessing thereafter, delayed issuing refunds to participants until after the shelter had been audited. In 2012, after Ms. Ficek's

2010 return had still not been assessed, she sought an Order from the Court to compel the CRA to assess. The matter at issue was the application of the Minister's duty to assess "with all due dispatch" as per Section 152(1) of the Act. The Court found that the CRA had an obligation to assess returns in a reasonable time, with resulting payment of associated refunds. Delay, the Court found, is only permissible as required to ascertain taxpayer liability. The Court further found that the CRA's failure assess in this case was an improper tactic to deter donations to tax shelters outside of its lawful authority, rather a necessary step in verifying claimed donations.

The taxpayer victory in *Ficek* was short lived. Promptly thereafter amendments were made to overturn the consequences of the ruling including requiring taxpayers to pay 50% of disputed tax, interest or penalties in respect of a charitable tax shelter disallowance (225.1(7)).[36]

6.2 *Canada v. Scheuer*

In the 2016 case *Canada v. Scheuer,* tax shelter participants sued the CRA. They argued that the CRA permitted the tax shelter to be marketed with their approval by issuing a tax shelter identification number, that the CRA owed them a duty of care and that therefore, doing so constituted negligence. The Court found in favour of the CRA, noting that the CRA had no alternative but to issue the tax shelter identification number and that doing so was neither an endorsement of the shelter nor a guarantee. Additionally, the Court noted that the shelter participants had received professional opinions from

parties that had profited from the shelter and suggested that these parties would be better placed to indemnify the plaintiffs in the event of negligence.

Ficek and *Scheuer* further demonstrate the seemingly futile nature of tax shelter's and their participant's attempt to use the Courts to counter aggressive CRA actions to put an end to abusive tax shelters. Even when the Court sides with the taxpayer, government is quick undo any tax shelter participant gains with legislative amendments.

7. Successful Abusive Tax Shelter Prevention

The modern Canadian tax shelter rose to prevalence with the *Income Tax Act* of 1972 coupled with the introduction of government tax credits meant to promote investment in different sectors. Aggressive action by government and the CRA has seen a dramatic reduction in the number of tax shelter participants. As of 2014, 189,000 tax shelter participants have been reassessed with $3 Billon of tax shelter donation tax credits denied. Additionally, $162 Million of third-party penalties have been levied with numerous charitable registrations revoked. Notably, the number of tax shelter participants has been declining. The 1995 amendments to the Act seem to have limited mass marketed tax shelter arrangements primarily to charitable gifting arrangements. A recent focus on stopping charitable gifting arrangements has similarly resulted in a decline. In 2012, for example, there were 8,410 participants giving $266,675,953 while in 2013 there were only 2,517 participants giving just $7,518,712. The new rule requiring a taxpayer to pay 50% of the amount assessed in a dispute (225.1(7)) and the CRA policy of not assessing a taxpayer's return until the tax shelter is audited so long as the deduction is included in the

filing are two notable factors in the decline[37] along with the CRA's commitment to audit every mass-marketed tax shelter arrangement.[38]

8. Conclusion

Though perhaps in some instances slow to respond, government and the CRA have waged a largely successful war against tax shelters. The introduction of the tax shelter registration requirement to the Act in 1988, the amendment of the tax shelter provision and restrictions on limited recourse debt and at-risk amounts in calculating deductions in 1995, ongoing minor amendments in response to developing case law and dedication to aggressively reassessing tax shelters and their participants has resulted in reported near universal audits and re-assessments and a track record of the CRA either winning in Court or the legislature promptly undoing tax shelter participant victories. The cornering of tax shelters into charitable gifting arrangements in the 2000's and now their significant decline marks the end of the vast majority of successful mass-marketed tax shelters in Canada. While objections to an overly broad definition of 'tax shelter' and the CRA acting outside of its lawful authority are legitimate, such issues are minor in comparison to the social benefit of putting an end to Billions of dollars of illegitimate deductions and credits created by tax shelters that unfairly transfer the tax burden to non-participants.

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