DEPARTMENT OF STATE REVENUE

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Letter of Findings: 09-0146
Sales and Use Tax
For the Years 2005, 2006, and 2007

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ISSUES

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-5-15 (Repealed July 1, 2004); IC § 6-8.1-5-1(c); 45 IAC 2.2-4-2; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 8 (May 2002); Sales Tax Information Bulletin 2 (December 2006); Sales Tax Information Bulletin 28S (February 2008); Commissioner's Directive 25 (July 2004).

Taxpayer protests the assessment of sales and/or use tax on tangible personal property.

II. Sales and Use Tax – Successor Liability.

Authority: Sorenson v. Allied Products Corp., 706 N.E. 2d 1097 (Ind. Ct. App. 1999).

Taxpayer protests its tax liability prior to the establishment of its business.

III. Tax Administration – Interest.

Authority: IC § 6-8.1-10-1.

Taxpayer protests the imposition of interest.

IV. Tax Administration – Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana dealer which sells new and used cars. Pursuant to an audit, the Indiana Department of Revenue ("Department") concluded that Taxpayer should have paid sales tax, or self assessed and remitted use tax, due on consumable supplies–such as masking paper and tape, oil dry, sandpaper, buffing pads, and cleaning supplies–Taxpayer used to repair and service motor vehicles. The audit also concluded that Taxpayer sold several cars, without collecting sales tax, to out-of-state customers who came to Indiana and took possession of the cars in Indiana. Additionally, the audit also assessed Taxpayer use tax on the purchases of credit reports, "Patriot Dealer" subscriptions, and "Incentive Reference Sheets." The audit also assessed Taxpayer sales tax on the sales of extended/optional warranties to its customers. Taxpayer protests the assessments, interest, and penalty. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition.

DISCUSSION

The Department's audit first determined that Taxpayer failed to collect sales tax on several cars which it sold to out-of-state customers who came to Indiana to take possession of the cars. The Department's audit also assessed Taxpayer use tax based on its purchases of credit reports, "Patriot Dealer" subscriptions, and "Incentives Reference Sheets" for which no sales tax was paid nor use tax self-assessed and remitted. Additionally, the Department's audit noted that Taxpayer failed to self-assess and remit use tax on consumable supplies, such as masking paper and tape, oil dry, sandpaper, buffing pads, and cleaning supplies, it used to repair and service motor vehicles. The Department's audit further determined that Taxpayer failed to collect sales tax on the sales of extended/optional warranties.

Taxpayer maintained that double taxation will result if the Department held Taxpayer responsible for the sales tax on cars sold to out-of-state customers and consumable supplies. Taxpayer also argued that it subscribed to a service for credit reports, "Patriot Dealer" subscriptions, and "Incentives Reference Sheets," and was not subject to sales and/or use tax. Finally, Taxpayer claimed that it was entitled to a waiver for failure to collect sales tax on the sales of extended/optional warranties.

All tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq.

IC § 6-2.5-2-1 provides:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to

the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-3-2 provides:

(a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Accordingly, all sales of tangible personal property are taxable. An exemption from use tax is granted for a transaction where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

A. Vehicles Sold to Out-of-State Purchasers

The Department's audit assessed Taxpayer sales tax on several vehicles that Taxpayer sold to out-of-state customers, and failed to collect sales tax from the customers at the time of the transactions. Pursuant to IC § 6-2.5-2-1(b), Taxpayer, a car dealer, is a retail merchant and, therefore, is responsible for collecting and remitting the sales tax. Because the customers came to Indiana, traded in their old vehicles, and took possession of the cars before leaving for their home states, Taxpayer should have collected the Indiana sales tax, six percent of the selling price, at that time.

IC § 6-2.5-5-15 (Repealed July 1, 2004) originally exempted sales of vehicles to out-of-state customers. The Department issued Sales Tax Information Bulletin 28 (July 2004) and Commissioner's Directive 25 (July 2004) to address the change in law. Commissioner's Directive 25 stated that the repeal of IC § 6-2.5-5-15 "only affect[ed] situations where the purchaser [took] possession of the vehicle prior to taking the vehicle out-of-state." The Directive stated that:

[The] repeal does not affect out of state sales by dealers. For a sale of a vehicle to be considered out of state, the purchaser must take possession via delivery outside of Indiana. No exemption certificate is required when making an out of state sale. However, the sales contract must specify that the vehicle is to be delivered out of state and the dealer must maintain shipping documentation to verify that the vehicle was delivered to the purchaser at a specific out of state location.

Sales Tax Information Bulletin 28 provided that the dealer was required to collect the tax and provide forms ST-108 to the purchaser to show that the tax had been paid in Indiana. If the purchaser claimed an exemption, form ST-108E was to be completed and signed by the purchaser with a copy retained by the dealer.

In May 2007, the Department issued Sales Tax Information Bulletin 28S (May 2007) to replace Sales Tax Information Bulletin 28. The language from the previous bulletin was removed and the following added.

A vehicle or trailer sold in interstate commerce is not subject to the Indiana sales tax. To qualify as being "sold in interstate commerce" the vehicle or trailer must be physically delivered, by the selling dealer, to a delivery point outside Indiana. The delivery may be made by the dealer or the dealer may hire a third party carrier. Terms and method of delivery must be indicated on the sales invoice. The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale. The exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of a vehicle or trailer in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third party carrier to transport the vehicle or trailer outside Indiana. If the buyer hires the carrier, the carrier is acting as an agent for the buyer, and thus the buyer takes physical possession within Indiana. Possession taken within the state does not qualify as an interstate sale. See also Sales Tax Information Bulletin 28S (February 2008).

Taxpayer claimed that after the transaction, the out-of-state customers subsequently registered and paid the sales tax in their home states at their home states' rates. Thus, Taxpayer argued that it should not be liable for collecting taxes because doing so will result in double-taxation.

Taxpayer is mistaken. After 2004, when the out-of-state customers come to Indiana and take possession of tangible personal property in Indiana before they return to their home states, the transactions occur and are completed in Indiana and, therefore, are subject to Indiana sales tax. Taxpayer, as a retail merchant, is thus responsible for collecting Indiana sales tax for transactions that occur in Indiana, unless the customers are entitled to exemptions. Whether the purchasers paid the sales tax in their home states is irrelevant to Taxpayer's protest. Had Taxpayer properly collected the sales tax from these out-of-state purchasers, the purchasers would have been able to apply the Indiana tax paid as a credit against their home states' tax levied on the same vehicles.

Taxpayer's protest of the assessment of sales tax on its sale of vehicles to out-of-state customers who took possession of the vehicles in Indiana is denied.

B. Credit Reports, Incentive Reference Sheets, and Patriot Dealer Subscriptions

The Department's audit assessed use tax on Taxpayer's purchases of credit reports, "Incentive Reference Sheets," and "Patriot Dealer" subscriptions because Taxpayer did not pay sales tax at the time of the transactions. Taxpayer claimed that it subscribed to a service, and, as a service, the transactions were not subject to sales and/or use tax.

45 IAC 2.2-4-2, in relevant part, states:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or

other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

(1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;

(2) The tangible personal property purchased is used or consumed as a necessary incident to the service;

(3) The price charged for tangible personal property is inconsequential (not to exceed 10 [percent]) compared with the service charge; and

(4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

Notably, only when the four requirements mentioned above are fulfilled, is a taxpayer entitled to the exemption pursuant to 45 IAC 2.2-4-2.

Sales Tax Information Bulletin 8 (May 2002), in relevant part, states:

F. Sale of Miscellaneous Data:

The sale of statistical reports, graphs, diagrams or any other information produced or complied by a computer and sold or reproduced for sale in substantially the same form as it is so produced is considered to be the sale of tangible personal property unless the information from which such reports was compiled was furnished by the same person to whom the finished report is sold.

The charge for reports compiled by a computer exclusively from data furnished by the same person for whom the data is prepared is considered to be for a service and is not subject to sales or use tax unless it is part of a unitary transaction which is subject to sales or use tax.

1. Credit Reports

Taxpayer stated that it subscribed to a service that provided credit reports from one of the major credit repositories, such as Experian, Equifax, and/or TransUnion.

With a user-name and password given by the vendor-repository, Taxpayer can search, retrieve, and print what is produced and offered by the vendor-repository. Upon Taxpayer's demand, i.e., entering the search term or terms, the vendor-repository electronically transferred the credit reports to Taxpayer and Taxpayer then paid the vendor-repository for the credit reports based on the volume of the reports Taxpayer purchased. Taxpayer received the credit reports, either in printout form, by electronically storing them in its computer, or simply by viewing the generated reports.

The vendor-repository compiled the individual credit information, in report formats, and sold the reports "in substantially the same form as [they are] so produced." Taxpayer did not contract with the vendor to perform and provide a service, i.e. collecting specific and customized information. Instead, Taxpayer purchased the completed products, i.e., credit reports, after the vendor compiled and furnished standard information in the standard report formats. Pursuant to Sales Tax Information Bulletin 8, the credit reports are tangible personal property and, therefore, taxable.

Since Taxpayer did not pay sales tax at the time of the purchases, use tax is properly imposed.

2. "Incentive Reference Sheets"

Taxpayer also claimed that the "Incentive Reference Sheets" to which it subscribed constituted a "service" and, therefore, was not subject to sales tax. To support its claim, Taxpayer provided a copy of the "Incentive Reference Sheet" and an invoice. The Incentive Reference Sheet contained information including, but not limited to, (1) vehicle models, (2) amount of rebates (cash) if any, (3) several finance rates (APR) for different car loan products, and (4) specials. The vendor regularly compiled information of incentive programs from automotive manufacturers and furnished the information to Taxpayer in report formats.

Upon processing the customers' purchase orders, the vendor electronically delivered the reports to its subscribers, such as Taxpayer, through the subscribers' designated e-mail addresses. The subscribers then either printed out the "Incentive Reference Sheets" and/or stored them in their computers. In the alternative, the customers could choose to receive the "Incentive Reference Sheets" through facsimile.

Pursuant to Sales Tax Information Bulletin 8, the "Incentive Reference Sheets" are tangible personal property. Similar to the purchases of the credit reports, here, Taxpayer purchased the complete product after the vendor already compiled and furnished the information in a report format. Since Taxpayer did not pay sales tax at the time of the purchases, use tax is properly imposed.

3. "Patriot Dealer" Subscriptions

The Department assessed use tax on Taxpayer's "Patriot Dealer" subscriptions because taxpayer did not pay sales tax at the time of the purchases. Taxpayer, to the contrary, claimed that it subscribed to a service and, therefore, as a service the subscriptions were not taxable.

To support its protest, Taxpayer provided invoices showing that it paid an annual flat fee to access the Patriot Dealer database to conduct background checks. Taxpayer also submitted the Patriot Dealer Subscription Agreement stating that the "Patriot Dealer" subscription is information "of individuals, businesses, charitable organizations and governments restricted from financial transactions facilitated by or through US financial institutions, businesses and others." Taxpayer maintained that to be in compliance with the USA Patriot Act, it was required to check and match the information concerning the purchasers' backgrounds and finances to avoid

certain financial transactions involving, but not limited to, terrorists and narcotics traffickers.

In this instance, Taxpayer paid a flat fee for the unlimited access to conduct background checks which ensured the transactions did not involve illicit activities. Taxpayer paid a specific amount for the access, not the information compiled by the vendor in report formats. Thus, Taxpayer had subscribed to a nontaxable service.

C. Consumable Supplies

The Department assessed Taxpayer use tax on consumable supplies (materials) which Taxpayer used to repair and service motor vehicles. Taxpayer did not pay sales tax at the time of purchase, nor did it self-assess and remit use tax to the Department. Instead, Taxpayer collected sales tax on the consumables from its customers. Taxpayer argued that the audit's assessment results in double taxation, because Taxpayer had collected sales tax from its customers and remitted the tax to the Department.

Sales Tax Information Bulletin 28S (February 2008) which addresses issues concerning sales of motor vehicles and trailers, in pertinent part, provides:

IV. SHOP SUPPLIES CONSUMED BY A DEALER

> Consumable supplies used by a dealer, such as masking paper and tape, oil dry, sandpaper, buffing pads, rags and cleaning supplies, used to repair and service motor vehicles are not exempt purchases by the dealer. The dealer should pay sales tax upon these type purchases or remit use tax on the cost of these purchases on their sales tax returns. The purchaser (dealer) becomes the final consumer of such items because its customer does not become the owner of such consumable supplies. Although the dealer may charge the customer a fee for the dealer's consumption of these materials, such items are not being sold to the customer in a retail transaction and sales tax is not to be collected from the customer.

Taxpayer's documentation showed that Taxpayer itemized its invoices: the charges included (1) labor, (2) parts, (3) sublet, (4) warranty deduction, (5) paint/materials, and (6) oil/grease. The audit assessed and Taxpayer protested the use tax imposed on "paint/materials." Notably, the materials are supplies which Taxpayer consumed to repair or service cars. Taxpayer then collected sales tax on the charges for parts and paint/materials. While customers became the owner and/or user of the parts and were responsible for the sales tax, the customers were not the users of the consumable supplies which Taxpayer listed in "paint/materials" column of the invoice. Taxpayer cannot collect the sales tax from its customers for the materials it used or consumed to repair and service motor vehicles. While Taxpayer is certainly entitled to recoup whatever overhead cost it incurred to complete its repair or services, there has been no retail transaction for the items discussed above and, therefore, Taxpayer cannot collect sales tax on the consumables.

Taxpayer further argued that it applied the paint to the customers' vehicles and, eventually, the customers became the owner/user of the paint. Thus, Taxpayer maintained that the customers should be responsible for paying the sales tax on the paint. While Taxpayer's argument is tenable, Taxpayer failed to separate the transactions from the materials, i.e., consumable supplies. At the hearing, the Department requested Taxpayer to provide documentation showing the cost of the paint, but Taxpayer failed to do so. Thus, the issue became moot.

In short, Taxpayer cannot transfer its cost of the consumable supplies to the customers in the form of sales tax or use tax because it is Taxpayer who purchased and consumed them, not the customers. Since Taxpayer did not pay sales tax, use tax is properly imposed.

D. Extended/Optional Warranties

The Department assessed sales tax on Taxpayer's sales of extended/optional warranties because Taxpayer did not collect sales tax at the time of sales. Taxpayer stated that it did not update its computer system to assess tax on sales of extended/optional warranties until November 2007. Taxpayer argued that it is entitled to a waiver due to the fact that the law had only recently changed.

Sales Tax Information Bulletin 2 (December 2006), in relevant part, states:

II. OPTIONAL WARRANTIES AND MAINTENANCE AGREEMENTS

> Optional extended warranties and maintenance agreements may either be purchased alone, or purchased as an option with the sale of the covered product. Typically, the terms of these agreements provide assurances that any required service and parts will be provided in the event of a break down or malfunction of the covered product. However, some of these agreements also contain provisions for periodic inspection or preventative maintenance activities where tangible personal property will be supplied as a part of the unitary price.
>
> Optional warranties and maintenance agreements that contain the right to have property supplied in the event it is needed are subject to sales tax if there is a reasonable expectation that tangible personal property will be provided. Any parts or tangible personal property supplied pursuant to this type of agreement are not subject to sales or use tax. The supplier of the parts or property is not liable for the use tax on the parts or property because the supplier is using the material to fulfill the service called for by the terms of the warranty or maintenance agreement. A merchant that maintains an inventory of parts for resale and uses some of the parts in fulfilling the terms of the warranty or maintenance agreement is not required to self assess use tax on any parts so used.

In this instance, Taxpayer claimed that it is entitled to a waiver because the law was changed in July 2007. Taxpayer stated that it believes that a "grace period" should apply and, therefore, it should not be held liable for

the sales tax. However, the above referenced Information Bulletin was in effect since December 2006, and Taxpayer did not comply until November 2007. The Department is not in a position to grant a "grace period" because Taxpayer was unaware of a change in the law.

FINDING

Taxpayer's protest on its purchase of "Patriot Dealer" subscriptions is sustained. However, the rest of Taxpayer's protest is respectfully denied.

II. Sales and Use Tax – Successor Liability.

DISCUSSION

The Department assessed Taxpayer sales and use tax for 2005, 2006, and 2007. Taxpayer argued that it should not be held liable for the tax liability incurred prior to July 1, 2005 because Taxpayer was established on July 1, 2005. Taxpayer maintained that it purchased only the assets from the previous owner of the dealership (seller-dealership) and, therefore, it should not be held liable for the taxes due prior to July 1, 2005.

In general, an asset purchaser, such as Taxpayer, does not acquire the liabilities of the seller. Sorenson v. Allied Products Corp., 706 N.E. 2d 1097, 1099 (Ind. Ct. App. 1999). There are, however, four exceptions to this general rule:

(1) the purchaser expressly or impliedly agrees to assume the liabilities;

(2) the transaction is an effort to fraudulently escape liability;

(3) the transaction is a de facto merger or consolidation; or

(4) the purchaser is a "mere continuation" of the seller. Id.

To support its protest, in addition to a purchase agreement and Registered Retail Merchant Certificate, Taxpayer also provided a copy of Indiana Business Entity Report, which showed that Taxpayer was created on April 29, 2005, as a domestic LLC, domiciled in Indiana. One of Taxpayer's partners, on behalf of Taxpayer, executed the purchase agreement on April 22, 2005. Thus, upon the establishment of Taxpayer, Taxpayer assumed the liabilities resulting from its partner acting on Taxpayer's behalf.

The purchase agreement showed that Taxpayer purchased the assets, including inventory (parts and accessories) and existing office equipment. Upon further inquiry, Taxpayer stated that it did not separate its accounts from the seller-dealership's accounts after Taxpayer took possession of the dealership but, rather, the accounts were commingled. After the 2005 purchase, Taxpayer continues to be the physical custodian of the seller-dealer's invoices and documents. Taxpayer continues doing business with the same vendors and suppliers. Therefore, Taxpayer believed that it is practical to continue using the seller-dealer's accounts.

Taxpayer commingled its accounts with the seller-dealer's accounts and failed to make the Department aware of the change of ownership during the audit. Taxpayer's action and/or inaction is a de facto agreement to assume these liabilities of the seller-dealer. Thus, Taxpayer is precluded from asserting the defense of the general rule that the successor owner does not acquire the seller's liabilities.

Taxpayer's purchase agreement indicated that Taxpayer purchased inventory (including parts and accessories) and office equipment. Had the seller-dealership continued its operation, the seller-dealership probably would have resold parts and accessories to its customers and, therefore, the seller-dealer would not have had to pay sales tax, nor remitted use tax, on these purchases. As the successor, Taxpayer may have qualified for this exemption. However, Taxpayer did not provide any documentation to substantiate the purchase of the inventory.

Taxpayer became the "user" of the consumable supplies, office equipment, and assets after it took possession of the dealership. Since the sales tax was not paid, use tax is properly due.

In short, Taxpayer commingled its accounts with the prior owner's accounts and, therefore, is precluded from asserting the defense that it purchased assets only, and should not be liable for the tax liabilities.

FINDING

Taxpayer's protest is respectfully denied.

III. Tax Administration – Interest.

DISCUSSION

The Department assessed interest on the tax liabilities. Taxpayer protests this imposition of interest.

IC § 6-8.1-10-1(a) provides, as follows:

> If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on the person's return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

Pursuant to IC § 6-8.1-10-1(e), the Department does not have the authority to waive the interest. Therefore, Taxpayer's protest is denied.

FINDING

Taxpayer's protest to the imposition of interest is respectfully denied.

IV. Tax Administration – Penalty.

DISCUSSION

Taxpayer also protests the imposition of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the

taxpayer:

(1) fails to file a tax return;
(2) fails to pay the full amount of tax shown on the tax return;
(3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
(4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

45 IAC 15-11-2(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in 45 IAC 15-11-2(c), in part, as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

(1) the nature of the tax involved;
(2) judicial precedents set by Indiana courts;
(3) judicial precedents established in jurisdictions outside Indiana;
(4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer failed to provide sufficient documentation establishing that its failure to timely remit tax was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest on the imposition of negligence penalty is denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest on the purchases of the "Patriot Dealer" subscriptions is sustained. However, the rest of Taxpayer's protest is respectfully denied.

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