君合研究简讯

JUNHE

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税法热点问题

国税总局出台 7 号公告-补充完善 698 号文

2015年2月6日，国家税务总局（以下简称“国税总局”）在其官网上公布了《国家税务总局关于非居民企业间接转让财产企业所得税若干问题的公告》（国家税务总局公告2015年第7号，以下简称“**7号公告**”）及相关解读。7号公告于2015年2月3日发布，自发布之日实施，但是追溯适用于7号公告发布前发生但未作税务处理的事项。

7号公告是国家税务总局在总结了税务机关实施698号文五年多积累的经验和存在的问题的基础上制定的，对698号文执行中产生的诸多问题进行了补充和完善。7号公告废止了国税总局2009年颁布的698号文和2011年颁布的24号公告中有关非居民企业间接转让中国居民企业股权的相关条款，并对非居民企业间接转让中国居民企业股权等财产的所得税处理做出了更详细的规定。7号公告将对未来和过去已发生的间接转让中国居民企业股权等财产的交易产生影响。

7号公告要点

一、间接转让适用范围扩大

7号公告第一条明确规定，非居民企业通过实施不具有合理商业目的的安排，间接转让中国居民企业股权等财产，规避企业所得税纳税义务的，应按照企业所得税法第四十七条的规定，重新定性该间接转让交易，确认为直接转让中国居民企业股权等财产。

7号公告规定的间接转让财产范围相比698号文的规定更为广泛。698号文只适用于非居民企业间接转让中国居民企业股权的情形。7号公告的适用范围从“股权转让”扩大为“中国应税财产”，包括（1）中国境内机构、场所财产，（2）中国境内不动产，以及（3）中国居民企业的权益性投资资产（合称“中国应税财产”）。

根据7号公告的规定，间接转让中国应税财产，是指非居民企业通过转让直接或间接持有中国应税财产的境外企业股权及其他类似权益，产生与直接转让中国应税财产相同或相近实质结果的交易，包括非居民企业重组引起境外企业股东发生变化的情形。值得注意的是，7号公告在“间接转让中国应税财产”的定义中加了一个非居民企业转让“其他类似权益”的概念。实践中，如何认定“其他类似权益”有待国税总局的进一步解释。

二、合理商业目的

1. 合理商业目的的判断要素

对于合理商业目的的判定698号文没有作出明确规定，7号公告则提供了详细的指引。7号公告第三条规定，判断合理商业目的，应整体考虑与间接转让中国应税财产交易相关的所有安排，结合实际情况

综合分析以下相关因素：

● 境外企业股权主要价值是否直接或间接来自于中国应税财产；

● 境外企业资产是否主要由直接或间接在中国境内的投资构成，或其取得的收入是否主要直接或间接来源于中国境内；

● 境外企业及直接或间接持有中国应税财产的下属企业实际履行的功能和承担的风险是否能够证实企业架构具有经济实质；

● 境外企业股东、业务模式及相关组织架构的存续时间；

● 间接转让中国应税财产交易在境外应缴纳所得税情况，包括股权转让方在其居民国应缴税情况和被转让方所在地应缴税情况；

● 股权转让方间接投资、间接转让中国应税财产交易与直接投资、直接转让中国应税财产交易的可替代性；

● 间接转让中国应税财产所得在中国可适用的税收协定或安排情况；

● 其他相关因素。

2. 明确直接认定不具合理商业目的的情形

7号公告规定，对于与间接转让中国应税财产相关的整体安排同时符合以下情形的，无需按照上述相关因素进行分析和判断，应直接认定为不具有合理商业目的：

● 境外企业股权75%以上价值直接或间接来自于中国应税财产；

● 间接转让中国应税财产交易发生前一年内任一时点，境外企业资产总额（不含现金）的90%以上直接或间接由在中国境内的投资构成，或间接转让中国应税财产交易发生前一年内，境外企业取得收入的90%以上直接或间接来源于中国境内；

● 境外企业及直接或间接持有中国应税财产的下属企业虽在所在国家（地区）登记注册，以满足法律所要求的组织形式，但实际履行的功能及承担的风险有限，不足以证实其具有经济实质；

● 间接转让中国应税财产交易在境外应缴所得税税负低于直接转让中国应税财产交易在中国的可能税负。

三、集团重组安全港规则和其他不适用7号公告的情形

对于符合条件的跨境集团内部重组，7号公告规定了安全港规则，规定同时符合以下条件的跨境集团内部重组应被认定为具有合理商业目的，从而免于在中国缴纳企业所得税：

● 交易双方的股权关系具有下列情形之一：
- 股权转让方直接或间接拥有股权受让方80%以上的股权；
- 股权受让方直接或间接拥有股权转让方80%以上的股权；
- 股权转让方和股权受让方被同一方直接或间接拥有80%以上的股权。

境外企业股权50%以上（不含50%）价值直接或间接来自于中国境内不动产的，则上述的持股比例应提高到100%。上述间接拥有的股权按照持股链中各企业的持股比例乘积计算。

● 本次间接转让交易后可能再次发生的间接转让交易相比在未发生本次间接转让交易 情况下的相同或类似间接转让交易，其中国所得税负担不会减少；

● 股权受让方全部以本企业或与其具有控股关系的企业的股权（不含上市企业股权）支付股权交易对价。

跨境集团重组安全港规则的引入为跨国公司进行

境外重组涉及的间接转让中国境内企业和财产降低了在中国被征税的风险。然而，持股比例和“交易必须全部以股权为对价”的条件都较为苛刻。另外，不支付对价的母子公司之间的合并能否享受安全港规则存在不确定性。

此外，根据7号公告第五条规定，以下两种情形不适用7号公告第一条规定，构成事实上的安全港规则：

● 非居民企业在公开市场买入并卖出同一上市境外企业股权取得间接转让中国应税财产所得；

● 在非居民企业直接持有并转让中国应税财产的情况下，按照可适用的税收协定或安排的规定，该项财产转让所得在中国可以免予缴纳企业所得税。

国税总局的解读明确对于第一种情形的理解：一是买入和卖出交易均应该在公开市场上进行，排除人为控制的可能；二是买入并卖出的标的为同一上市公司的股票。股权转让方在公开市场卖出的上市公司股份为在公司上市之前或者上市之后通过非公开市场买入，或者股权转让方在公开市场买入上市公司股份后再通过非公开市场卖出该股份，均不符合适用安全港规则的条件。

四、报告制度的重大修改

在间接转让的交易信息报告要求方面，7号公告与698号文相比有重大改变，主要体现在：

● 7号公告未对间接转让中国应税财产交易设定强制性的报告义务，交易相关方可以自主选择是否对间接转让中国应税财产向主管税务机关报告。但是，如果交易需缴纳中国企业所得税，7号公告对于是否提交资料规定了不同的法律后果，以鼓励境外转让方和受让方自愿在规定时间内进行报告。698号文虽然规定了转让方对于间接转让股权负有报告义务，但却未规定逾期报告或不报告的法律后果。

● 7号公告明确将可报告交易的主体扩大到间接转让中国应税财产的交易双方及被间接转让股权的中国居民企业。国税总局的解读中提到，这样规定有利于交易相关方选择合适的报告主体和途径。这是否意味着只要有一方向主管税务机关报告了相关交易，其他方就不用另行报告了，且在交易需要缴纳中国企业所得税时不承担未提交资料的更严重的法律后果？ 7号公告和国税总局的解读中都未澄清这一点（698号文仅规定境外转让方负有报告义务）。

● 7号公告规定的自愿报告所需提交的资料相对简单，包括：(1) 股权转让合同或协议；（2）股权转让前后的企业股权架构图；（3）境外企业及直接或间接持有中国应税财产的下属企业上两个年度财务、会计报表；（4）间接转让中国应税财产交易不应被确认为直接转让中国应税财产的理由说明。然而，7号公告同时规定，税务机关可以要求间接转让中国应税财产的交易双方和筹划方，以及被间接转让股权的中国居民企业提供相关资料。

五、未扣缴或未缴纳税款的后果

1. 支付方的扣缴义务

698号文并未对受让方是否对境外转让方取得的股权转让所得具有税款扣缴义务予以规定。7号公告明确间接转让不动产所得或间接转让股权所得按照7号公告规定应缴纳企业所得税的，依照有关法律规定或者合同约定对股权转让方直接负有支付相关款项义务的单位或者个人为扣缴义务人。由于大多数交易中受让方为支付方，意味着在交易需在中国缴纳企业所得税的情形下，受让方负有税款扣缴义务。

根据7号公告及其所援引的相关规定，如果扣缴义务人未扣缴税款，且股权转让方亦未缴纳应纳税款的，主管税务机关可以对扣缴义务人处以应扣未扣税款百分之五十以上三倍以下的罚款。但扣缴义务人已在签订股权转让合同或协议之日起30日内按照7号公告规定予以报告的，可以减轻或免除责任。

虽然7号公告规定了支付方的扣缴义务，然而该规定的实际可操作性仍存在问题。首先，目前并无非居民企业扣缴所得税并向税务机关解缴税款的成熟机制；其次，除7号公告明确规定的应在中国纳税的情形外，受让方很难判断转让方是否应就交易所得在中国纳税。可以预见，今后的交易中，买方为减小其风险而扣留相当于税款的交易款项的条款会更为常见。

2. 境外转让方未按时足额缴纳税款的后果

根据7号公告，若间接转让中国应税财产需要在中国缴纳企业所得税且扣缴义务人未扣缴或未足额扣缴应纳税款的，境外转让方应自纳税义务发生之日起7日内向主管税务机关申报缴纳税款，并提供与计算股权转让收益和税款相关的资料。如果境外转让方未按期或未足额申报缴纳应纳税款，税务机关除追缴应纳税款外还应对转让方按日加收利息。如果境外转让方已按照7号公告规定进行交易报告或申报缴纳税款的，则只按人民银行基准利率计算利息；如果转让方未按规定提供资料或申报缴纳税款的，利率为人民银行基准利率加5个百分点。

这一规定要求境外转让方需及时评估交易是否需在中国缴纳企业所得税。

六、一般反避税程序

7号公告规定主管税务机关需对间接转让中国应税财产交易进行立案调查及调整的，应按照一般反避税的相关规定执行，即按照国税总局于2014年12月2日发布的《一般反避税管理办法（试行）》（国家税务总局令第32号，以下简称“32号令”）执行。

简要评论

7号公告相比698号文而言，一方面为间接转让中国应税资产是否应在中国征税及如何征税提供了更为明确、具体的指引，澄清了698号文实施以来产生的诸多问题和困惑，另一方面规定也更为严谨，监管更为严格。

7号公告对于如何确定转让所得和成本价并未作出规定。7号公告虽没有设定强制性报告义务，但却规定了报告后的法律后果。此外，7号公告规定了支付方的扣缴义务。对于7号公告发布之前且境外卖方未按照698号文进行报告的间接股权转让交易，若税务机关认定该间接股权转让交易应在中国缴纳企业所得税，则买方可能会因未履行扣缴义务而受处罚。严格执行此规定必将严重损害已经发生的交易的买方利益；当时税收法规及698号文并未明确规定买方在交易发生时有扣缴税款的义务；如果税务机关依据其对7号公告的解释处罚买方，对买方有失公平。实践中，税务机关将如何执行此处罚规定，有待进一步观察。

我们建议正在或将进行间接转让中国应税财产的各方及已经完成间接转让中国应税财产但尚未作出税务处理的各方仔细研究7号公告，分析其对交易的影响和评估潜在税收风险

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JUN HE BULLETIN

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Hot Tax Law Topics

China Issues New Indirect Transfer Rules Superseding Circular 698

On February 6, 2015, the State Administration of Taxation (the "**SAT**") released the *State Administration of Taxation's Bulletin on Several Issues Concerning Enterprise Income Tax on Income Arising from Indirect Transfers of Property by Non-resident Enterprises* (SAT Bulletin [2015] No. 7, "**Bulletin 7**"). Bulletin 7 took effect on the date of its issuance, i.e., February 3, 2015 (the "**Effective Date**"); it also retrospectively applies to indirect transfers which took place before the Effective Date and in respect of which the PRC tax authorities have not assessed if capital gains tax must be paid.

Bulletin 7 was formulated and issued based on the experience of, and outstanding issues faced by, the tax authorities in implementing Circular 698 over the past 5 years. It has also repealed the relevant indirect transfer provisions in Circular 698 and SAT Bulletin [2011] No. 24, and contains more detailed rules for tax treatment of indirect transfer of equity interest in PRC resident enterprises and other assets situated in China. Bulletin 7 will have significant impact on future and past indirect transfer transactions involving China.

Highlight

We have set forth below our interpretations and analysis of the key provisions of Bulletin 7.

I. Broadened Scope of Indirect Transfer

According to Article 1 of Bulletin 7, where a non-resident enterprise transfers indirectly equity interest in PRC resident companies and other assets situated in China to avoid enterprise income tax ("**EIT**") through arrangements lacking reasonable commercial purposes, the indirect transfer shall be re-characterized as a direct transfer.

While Circular 698 only covered the indirect transfer of equity interest in Chinese resident enterprises, Bulletin 7 broadened the scope of indirect transfer to encompass non-resident enterprises' indirect transfer of (i) the assets of an "establishment or place" situated in China; (ii) real property situated in China; and (iii) equity interest in Chinese resident enterprises (collectively, "**Chinese Taxable Assets**").

Under Bulletin 7, an indirect transfer of Chinese Taxable Assets refers to a transaction where a non-resident enterprise transfers its equity interest and *other similar interest* in an offshore holding company, which directly or indirectly holds Chinese Taxable Assets, thereby in substance achieving the effect of directly transferring the Chinese Taxable Assets. Such indirect transfer also includes the reorganization of nonresident enterprises resulting in the change of offshore

shareholders of PRC resident enterprise(s).

Notably, Bulletin 7 for the first time covers the transfer of *other similar interest* than equity interest. What exactly the term "other similar interest" covers is still subject to further interpretation by the SAT.

II. Determining Reasonableness of Commercial Purpose(s)

1. Factors in determining the reasonable commercial purpose

Circular 698 did not specify how to determine if reasonable commercial purposes exist, while Bulletin 7 provides detailed guidance in this regard. Article 3 of Bulletin 7 adopts a "totality of circumstances" approach for determining reasonable commercial purposes for the indirect transfer of Chinese Taxable Assets, and stipulates the following circumstances which need to be taken into consideration:

- whether all or most of the value of the offshore holding company's equity is directly or indirectly derived from Chinese Taxable Assets;
- whether all or most of the assets of the offshore holding company comprises of direct or indirect equity investments in China; or whether all or most of the revenue of the offshore holding company is sourced from China;
- whether the functions performed and risks assumed respectively by the offshore holding company and its direct or indirect subsidiaries which hold Chinese Taxable Assets can justify the economic substance of their respective corporate structure;
- how long the shareholders, business model and relevant organizational structure of the offshore holding company(ies) are in existence;
- whether income tax has been imposed in a foreign jurisdiction, including the jurisdiction where the offshore transferor is a resident and the jurisdiction where the holding company whose equity interest is transferred by the transferor, on the gains derived from the indirect transfer of Chinese Taxable Assets;
- whether (A) the indirect investment in, indirect transfer of, Chinese Taxable Asset and (B) direct investment in, direct transfer of, Chinese Taxable Assets are interchangeable;
- whether there is an applicable tax treaty or arrangement in respect of indirect transfer of Chinese Taxable Assets;
- whether other relevant factors are present.

2. Blacklisted indirect transfers

Certain indirect transfer of Chinese Taxable Assets shall be deemed to lack a reasonable commercial purpose per se, if all of the following conditions are met, without going through the above-mentioned analysis of reasonable commercial purposes:

- 75% or more of the value of the offshore holding company's equity is derived from Chinese Taxable Assets;
- anytime in the year prior to the occurrence of the indirect transfer of Chinese Taxable Assets, 90% or more of the total assets (excluding cash) of the offshore holding company are direct or indirect investments in China, or 90% or

more of the revenue of the offshore holding company was sourced from China;

- the functions performed and risks assumed by the offshore holding company(ies), although incorporated in an offshore jurisdiction to conform to the corporate law requirements there, are insufficient to substantiate their corporate existence; and

- the foreign income tax payable in respect of the indirect transfer is lower than the Chinese tax which would otherwise be payable in respect of the direct transfer if such transfer were treated as a direct transfer.

III. Safe Harbors

Bulletin 7 provides a safe harbor for indirect transfer of China Taxable Assets resulting from a qualified intra-group reorganization; in other words, if all of the following three conditions are satisfied, the intra-group reorganization would be deemed to have a reasonable commercial purpose, and therefore will be exempted from EIT:

- the shareholding relationship between the transferor and the transferee meets any of the following:

  - the non-resident transferor holds directly or indirectly 80% or more of the equity of the transferee;

  - the transferee holds directly or indirectly 80% or more of the equity of the non-resident transferor; or

  - the same party holds directly or indirectly 80% or more of the equity of the non-resident transferor and transferee;

  And in cases where more than 50% of the value of shares of the offshore holding companies comes directly or indirectly from real property situated in China, the above-mentioned shareholding percentage must be 100% instead of 80%.

- the China tax burden of any subsequent indirect transfer conducted after the indirect transfer in question would not be less than the China tax burden on an identical or a similar indirect transfer as if the indirect transfer in question had not occurred; and

- the transferee paid all consideration in the form of equity interest in the transferee itself or in its controlled enterprises (shares of listed companies excluded) .

The introduction of the safe harbor rule for qualified intra-group reorganizations reduces the risk for indirect transfer of China Taxable Assets resulting from offshore intra-group reorganization being subject to Chinese capital gains tax. However, the high shareholding percentage requirement and the requirement that payment of all consideration must be in the form of equity interest will put some restraints on companies intending to utilize this safe harbor. Also, it is not clear whether the merger of a subsidiary into its parent without any consideration will qualify for the safe harbor treatment under Bulletin 7.

Additionally, Article 5 of Bulletin 7 provides de facto safe harbors in either of the following two situations:

- A non-resident enterprise buys and then sells, in the public securities markets, the shares of the same foreign listed company, which holds equity interest in a PRC resident enterprise, thereby realizing

capital gains[1];

- Where the offshore transferor who directly holds Chinese Taxable Assets directly transfers such assets, and such transfer would otherwise be exempted from EIT in China pursuant to an applicable tax treaty.

IV. Change in Reporting Obligations

Bulletin 7 has substantially changed the reporting obligations under Circular 698. For ease of reference, we have summarized these changes as follows:

- Bulletin 7 has done away with the mandatory reporting under Circular 698, and provides that the parties to an indirect transfer transaction have the option to decide whether to report the indirect transfer to the competent tax authorities. However, where the indirect transfer is taxable in China, Bulletin 7 provides for different legal consequences depending on whether such indirect transfer has been voluntarily reported for the purposes of encouraging voluntary reporting by offshore sellers and buyers. Circular 698 only imposed on the offshore transferor the obligation to report the indirect transfer transaction to the competent tax authorities; but it did not specify the legal consequences if the transferor failed to report or was late in reporting to the tax authorities the transaction.

- Bulletin 7 extends the reporting party to all parties associated with the offshore transaction, including the offshore transferor and transferee, as well as the Chinese resident enterprise whose equity interest was transferred. According to the SAT's interpretation of Bulletin 7, the expansion of reporting parties gives the parties associated with the transaction the option to choose the appropriate reporting party among themselves.

- The reporting procedure is simplified under Bulletin 7 and the documents to be submitted through a voluntary reporting procedure for an indirect transfer includes: (i) equity transfer agreement, (ii) corporate ownership structure charts before and after the indirect equity transfer, (iii) two years of financial and accounting statements for all intermediate holding companies, and (iv) a statement explaining the reasons why the indirect transfer of the Chinese Taxable Assets should not be deemed as a direct transfer. However, Bulletin 7 makes it clear that the competent tax authority may request further information on the indirect transfer from the offshore transferor, offshore transferee, the Target Company, or the tax advisors who participated in the planning of the indirect transfer.

V. Legal Consequences for Failing to Withhold and Pay Tax

1. Withholding liability for offshore transferees

Circular 698 is silent on whether the non-resident offshore buyer has the legal obligation to withhold tax on capital gains (deemed to be) derived by the offshore seller. Bulletin 7 specifies that the payor, regardless of whether it is a resident enterprise, is required to withhold tax on capital gains realized from an indirect transfer of real property situated in China or equity interest in Chinese resident enterprises. In most indirect transfer transactions, the transferee would be the payor; therefore, if the transaction in question is taxable,

[1] However, in order for the safe harbor treatment to apply, both of the purchase and sale shall be conducted on the public securities markets so as to preclude market manipulation; moreover, the equity interest purchased and sold shall be those of the same enterprise. Where the shares sold on public securities markets were purchased before such shares were listed on a stock exchange or through non-public market, or where the shares were bought on public markets but sold on non-public markets, the safe harbor treatment would not be applicable.

generally the transferee has the withholding obligation.

According to Bulletin 7, where neither the transferor pays the taxes on capital gains realized from its indirect transfer, nor has the withholding agent withheld and transmitted to the competent tax authority the said taxes, the competent PRC tax authority may impose a penalty ranging from 50% to three times the amount of the unpaid taxes on the withholding agent for its failure to withhold the capital gains tax. However, Bulletin 7 provides that the penalty may be reduced or waived if the withholding agent has reported to the tax authorities by submitting the required documents within 30 days after the equity transfer agreement is executed.

It remains to be seen how in practice how the PRC tax authorities will enforce the withholding obligation against non-resident transferees/ withholding agents, as (A) the offshore transferees which do not have any assets in China are generally not subject to Chinese jurisdiction, and (B) there is not a matured mechanism under which non-resident enterprises could withhold EIT and remit such EIT to Chinese tax authorities. Another obstacle is that offshore buyers usually are not able or in a position to determine whether the indirect transfer is taxable in China unless the indirect transfer is a blacklisted indirect transfer transaction under Bulletin 7.

It is foreseeable that in order to minimize its potential tax exposure, buyers will attempt to include in the offshore share transfer agreement a clause requiring the seller to put in escrow an amount equal to the potential tax exposure.

2. Liability for offshore transferors to make tax payments

Under Bulletin 7, offshore sellers are required to file a tax return and pay taxes within seven days after the tax liability arises if the withholding agent fails to withhold the taxes from the capital gains realized from the indirect transfer. If the offshore seller fails to pay taxes due within the prescribed time limit, the offshore seller is subject to a daily interest rate equal to the benchmark rate published by the People's Bank of China plus 5%. The additional 5% punitive interest charge will be waived if the offshore seller voluntarily reports to the tax authorities as described above.

No doubt that the above provision would give the offshore transferor some incentive to evaluate whether its contemplated indirect transfer would be subject to EIT in China.

VI. Administrative Measures on GAAR

On December 2, 2014, the SAT issued the *(Trial) Measures on the Application of General Anti-Avoidance Rules* (GAAR) ("**GAAR Measures**"). Since Circular 698 and Bulletin 7 are an application of the GAAR, Bulletin 7 provides that GAAR Measures should be followed when the competent tax authorities initiate an investigation of an indirect transfer of China Taxable Assets.

Further Analysis and Comments

In comparison with Circular 698, Bulletin 7 provides more specific and detailed guidance on whether an indirect transfer of China Taxable Assets is subject to EIT in China and clarifies the confusion and uncertainties arising out of the implementation of Circular 698. In addition, Bulletin 7 has introduced more rigorous and stricter provisions on scrutinizing indirect transfer of China Taxable Assets.

Although it does not stipulate that the reporting obligation is mandatory, Bulletin 7 provides different legal consequences, depending on

whether the indirect transfer has been voluntarily reported. For indirect transfer of equity interest which took place before the release of Bulletin 7 and for which no Circular 698 reporting was made by the offshore transferor, the transferee may be subject to penalties for failure to withhold capital gains tax pursuant to Bulletin 7. If such penalties will indeed be imposed, the legal interest of the buyer to such historical indirect transfer transaction will be severely harmed. Circular 698 did not impose the withholding obligation on the buyers to the indirect transfer transactions. Retroactively imposing such penalties on the buyers would be an extremely unfair practice. Like the interested parties, we are anxiously waiting to see if the Chinese tax authorities will actually impose such penalties on the buyers for their failure to withhold capital gains tax in respect of indirect share transfer transactions which occurred prior to the issuance of Bulletin 7.

We strongly recommend the parties associated with the indirect transfer transactions, be it going-on, future or pre- Bulletin 7 indirect transfer in respect of which the tax authorities have not assessed if it was taxable, to carefully study Bulletin 7, and analyze and evaluate the potential tax risks they may face.

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