CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 311 of 2011

[Arising out of Order-in-Original No. 10/2010 dated 09/11/2010 passed by the Commissioner of Central Excise and Customs, Belgaum.]

M/s. MSPL LTD
BALDOTA ENCLAVE,
ABHERAJ BALDOTA,
HOSPET - 583 203.
BELLARY DIST
KARNATAKA

Appellant(s)

VERSUS

Commissioner of Central Excise and Customs
NO. 71, CLUB ROAD,
CENTRAL EXCISE BUILDING,
BELGAUM – 590 001.
KARNATAKA

Respondent(s)

WITH

Service Tax Appeal No. 1502 of 2012

[Arising out of Order-in-Original No. 03/2012-ST dated 16/03/2012 passed by the Commissioner of Central Excise and Customs, Belgaum.]

M/s. MSPL LTD
BALDOTA ENCLAVE,
ABHERAJ BALDOTA,
HOSPET - 583 203.
BELLARY DIST
KARNATAKA

Appellant(s)

VERSUS

Commissioner of Central Excise and Customs
NO. 71, CLUB ROAD,
CENTRAL EXCISE BUILDING,
BELGAUM – 590 001.
KARNATAKA

Respondent(s)

WITH

Service Tax Appeal No. 21464 of 2014

[Arising out of Order-in-Original No. BEL-EXCUS-COM-BHR-021(ST)-13-14 dated 03/03/2014 passed by Commissioner of Central Excise, Service Tax and Customs, BELGAUM.]

M/s. MSPL LTD
BALDOTA ENCLAVE,
ABHERAJ BALDOTA,
HOSPET - 583 203.
BELLARY DIST
KARNATAKA — Appellant(s)

VERSUS

Commissioner of Central Excise and Customs
NO. 71, CLUB ROAD,
CENTRAL EXCISE BUILDING,
BELGAUM – 590 001.
KARNATAKA — Respondent(s)

WITH

Service Tax Appeal No. 22362 of 2015

[Arising out of Order-in-Original No. BEL-EXCUS-000-COM-BHR-09(ST)-15-16 dated 02/09/2015 passed by Commissioner of Central Excise and Customs, BELGAUM]

M/s. MSPL LTD
BALDOTA ENCLAVE,
ABHERAJ BALDOTA,
HOSPET - 583 203.
BELLARY DIST
KARNATAKA — Appellant(s)

VERSUS

Commissioner of Central Excise and Customs
NO. 71, CLUB ROAD,
CENTRAL EXCISE BUILDING,
BELGAUM – 590 001.
KARNATAKA — Respondent(s)

WITH

Service Tax Appeal No. 20028 of 2017

[Arising out of Order-in-Original No. BEL-EXCUS-00-COM-BKK-011-2016-17 (ST) dated 21/09/2016 passed by Commissioner Of Central Excise And Customs, BELGAUM.]

M/s. MSPL LTD
BALDOTA ENCLAVE,
ABHERAJ BALDOTA,
HOSPET - 583 203.
BELLARY DIST
KARNATAKA — Appellant(s)

VERSUS

Commissioner of Central Excise and Customs
NO. 71, CLUB ROAD,
CENTRAL EXCISE BUILDING,
BELGAUM – 590 001.
KARNATAKA — Respondent(s)

AND

Service Tax Appeal No. 20679 of 2019

[Arising out of Order-in-Appeal No. BEL-EXCUS-000-APP-MSC-400-2018-19-ST dated 05/04/2019 passed by Commissioner of Central Tax (Appeals), BELGAUM.]

M/s. MSPL LTD
BALDOTA ENCLAVE,
ABHERAJ BALDOTA,
HOSPET - 583 203.
BELLARY DIST
KARNATAKA — Appellant(s)

VERSUS

Commissioner of Central Excise and Customs
NO. 71, CLUB ROAD,
CENTRAL EXCISE BUILDING,
BELGAUM – 590 001.
KARNATAKA — Respondent(s)

Appearance:

Mr. M. S. NAGARAJA, Advocate (T. RAJESWARA SASTRY & ASSOCIATAES) for the Appellant

Shri P. Gopakumar, Joint Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER
HON'BLE SHRI P. DINESHA, JUDICIAL MEMBER

Final Order No. 20045 -20050/2022

Date of Hearing: 07/02/2022
Date of Decision: 18/02/2022

Per : P. ANJANI KUMAR

The appellants M/s. MSPL assail the following Orders-in-Original and Order-in-Appeal vide the appeals mentioned therein as below:

Sl No	Appeal No	Impugned Orders(OIO/OIA)
1	ST/00311/2011	OIO No.10/2010 dated 10.11.2010
2	ST/01502/2012	OIO No. 03/2012 dated 15.3.2012
3	ST/21464/2014	OIO No. BEL-EXCUS-BHR-021 (ST) 13-14 dated 2.3.2014
4	ST/22362/2015	OIO No. BEL-EXCUS-BHR-09(ST) 15-16 dated 2.9.2015
5	ST/20028/2017	OIO No. BEL-EXCUS-BKK-011/2016-17 dated 23.9.2016
6	ST/20679/2019	OIA No BEL-EXCUS-MSC- 400/2018-19 dated 5.4.2019

Briefly stated the facts of the case are that the appellants are engaged in mining and sale/export of iron ore and are registered with service tax department. The appellants have availed 'own your wagon scheme' introduced by Indian Railways by purchasing and leasing out six rakes of railway wagons under agreements dated 23.2007 and 8.3.2007 to M/s. South Western Railway, Hubli; the dry leaves of wagons was initially for a primary period of 10 years extendable to secondary period of up to 20 years. Central Excise department proposed demand of service tax on the lease/rental charges received on lease of wagons as above under the category 'Supply of Tangible Goods' as per Section 65(105)(zzzzj) of Finance Act, 1994. The department alleged that (i) the appellant-lessor is the

absolute owner of the wagon; (ii) the cost of repairs and modification of the wagons have to be borne by the appellant-lessor; (iii) the lessor has got the right to terminate the agreement under certain circumstances; (iv) the appellants have insured the wagons; and that (v) the appellants have not paid VAT/sales tax on the transaction of the lease.

2. Learned counsel for the appellant submits that the lease agreements are for a period 10 years plus 10 years, the railways were free to use the wagons in the general pool as per their requirement; the terms of agreement clearly indicate that the appellants have transferred the right to use wagons with transfer of possession and control to the railways. Government of India (Railways Board) vide their letter 11.6.2014 have clarified that the effective control of wagons under OYWS lies with the Indian Railways. It follows from the above that Indian Railways has the right to use these wagons for operations including transportation of goods of other parties; Railways' letter dated 24.11.20111 confirmed the merging of the leased wagons and their utilisation under the general pool.

2.1 He further submits that as the right to use is with the railways, the leasing falls under the category of deemed sale under Article 366(29A) of the Constitution of India. The appellants have sought a clarification from the Karnataka VAT Department who have clarified that under Section 60 of the Karnataka VAT Act, 2003 read with Rule 165 of the KVAT Rules, 2005 that the leasing of railways wagons constitute transfer of right to use the goods and VAT is payable at the rate of 5.5%. Appellants have paid VAT on the lease rentals for the period 2007-2008 to September 2016. He relies upon CBEC Circular F.No.334/1/2008-TRU dated 29.2.2008 which clarify that transfer of right to use any goods is leviable to Sales Tax /VAT as deemed sale of goods. He also relies upon followings case laws:

i. Bharath Sanchar Nigam Ltd.: 2006 (2) STR 161 (SC)
ii. Great Easter Shipping Company Ltd.: 2020 (32) GSTL 3 (SC)

iii. GS Lamba and Sons: 2015 (324) ELT 316 (A)

iv. Aggarwal Brothers vs. State of Haryana and Another: AIR 1999 SC 2868

v. Viceroy Hotels Ltd Vs CTO: [2011] 43 VST 424 (AP)

vi. CCE & ST Vs Brindavan Bottlers Ltd: 2019 (27) GSTL 354 (T-All)

vii. Kinetic Communications Ltd Vs CCE, Pune: 2017 (3) GSTL 319 (T-Mum)

viii. GIMMCO Ltd Vs CCE & ST, Nagpur: 2017 (48) STR 476 (Tri – Mum)

ix. Satish Crane Services Vs CCE, CC & ST, Mysore: 2019 (25) GSTL 115 (Tri – Bang)

x. Compucom Software Ltd Vs CCE & ST, Jaipur I:2019 (25) GSTL 75 (Tri – Del)

xi. Petronet LNG Ltd Vs CST, Delhi: 2016 (46) STR 513 (Tri-Del)

2.2 Learned counsel for the appellant submits that, in case, it is held that they are liable to pay service tax on the lease of railway wagons to South Western Railway, it is to be held that they are eligible for CENVAT credit of Rs.9,94,68,503/- and Cess of Rs.19,89,370/- as per the invoices issued by the manufacturers as mentioned in appeal No.ST/311/2011. He also submits that as there was no suppression on the part of the appellants, no extended period can be alleged and penalties cannot be imposed on them.

2.3 Learned AR for the Revenue reiterates the findings of the various Orders-in-Original and Order-in-Appeal.

3. Heard both sides and perused the records of the case. In order to appreciate the true nature of the agreement between the appellants and the railways authorities, it would be beneficial to go through the relevant clauses of the agreement.

QUOTE

1.0 General Agreement:

Whereas the Lessee desires to ***take on lease*** from Lessor and Lessor desires to lease to Lessee 60 (number) of BOXNHS (type) wagons procured through either the Ministry of Railways or builders approved by them subject to the terms and conditions herein after appearing.

2.2 Rolling Stock

Rolling stock shall mean BOXNHS, (BOXN/BCN/BTAP/BOY/BTP/BFKI/BTPN etc) ***leased to the Lessee for his use*** and shall include any individual item comprised in the rolling stock including all alterations, replacements and/or additions thereto during the period of this lease.

2.3 Lease Period

The lease period shall be reckoned from the commencement date. The primary period of the lease will extend up to the expiry of 10 years from the date of commencement. The secondary period will commence from the succeeding day after the 10th year and extend up to the next 10 years. At the end of 20 years period, the conditions of these wagons will be ***examined by the Indian Railways so as to find out whether they are operationally and mechanically fit for further retention in service***. If the wagons are found to have outlived their economic life and are not found mechanically and operationally fit, the owner will be entitled to dispose of the same as scrap either directly or through the railways, if the owner so likes. If the wagons are found mechanically fit for service after the expiry of the 20 years period the lease may be continued on mutually agreed terms.

2.0 Validity of Agreement of Lease

This agreement shall remain in force for a period of 20 years from the date of commencement.

5.0 Lease Charges

5.1 Lease charges will be paid by the Indian Railways to the leasing companies in advance on quarterly basis. The calculation of the lease charges will be based on the cost of procurement which will include the transfer price of free supply items provided by the Railways. Central Excise (Net of MODVAT) and any other statutory tax/duty paid by the Lessor will also form a part of the cost of wagons for the purpose of lease charges.

5.2 The lease charges shall be paid on the Asset Value as indicated in Clause 5.1, comprising (i) a base lease charge @ Rs.40/- per thousand per quarter for the primary period of ten years subject to the variation formula contained in following clauses and (ii) at a flat rate of Rs.10/- per thousand per year for the secondary lease period of ten years. This will not be subject to any variation.

6.0 Freight charges:

The freight will be levied at normal tariff rate in force and will be paid by Lessor in the prescribed manner.

7.0 Guaranteed Clearance of Traffic:

The Railway will provide guaranteed clearance of 11 (Eleven) rakes to run between VYS to SVM of IRON ORE (commodity) per month for a period of 20 years from the commencement date. The scheduling of demand and supply of wagons will be decided between the Lessor and Lessee.

10.0 Maintenance:

10.1 No maintenance charges will be levied for maintenance undertaken by IR as per standard norms.

10.2 Modifications of Wagons:

The **Lessee will be at liberty to make the necessary modifications/changes on the leased wagons** which they would carry out on their own wagons of similar design. The changes would be made at the Lessor's cost. This additional cost will also qualify for lease charges for the remaining period of contract. However, minor modification charged to the Revenue expenditure of Railways which are part of the Revenue maintenance will be carried out at the Lessee's cost.

10.3 If the Lessor requires/owns a private siding, he will be governed by the relevant siding agreement in respect of the infrastructure facilities including maintenance of the wagons within the siding premises.

12.0 Termination of Arrangement:

12.1 In the event of termination of the arrangement by the lessor/owner on account of liquidation/merger with other company or due to any alteration/deletion in the scheme, the ownership of the leased wagons would remain with the Lessor. However, the lessor shall have the option to sell the wagons to the Lessee at a mutually agreed price.

UNQUOTE

On the perusal of the above, it appears that though the wagons are purchased and provided by the appellants, the effective control of the wagons is with the Indian Railways. From the clauses of the agreement, it shows that the lessor-appellant need not pay for the standard maintenance; Indian Railways will be at liberty to make the necessary modifications/changes on the leased wagons and that Indian Railways are free to deploy the wagons as per their schedule and not necessarily only to the appellants. A combined reading of the same goes to prove that during the leased period, the effective control of the wagons is with the Railways.

3.1 We find that the relevant provisions of law as follows:

> "**Section 65 (015) (zzzzj)** of the Finance Act, 1994 defines taxable service in respect of **"supply of tangible goods"** as under:
>
> "T*axable service" means any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring the right of possession and effective control of such machinery, equipment and appliances".*
>
> **Section 65B (44)** of the Finance Act, 1944 defines "service" as under –
>
> *"(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but* ***shall not include****-*
>
> *(a) an activity which constitutes merely,-*
>
> *(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
>
> *(ii) such transfer, delivery or supply of any goods which is deemed to be sale within the meaning of clause (29A) of article 366 of the Constitution;*
>
> *or*
>
> *(iii) a transaction in money or actionable claim;*
>
> *(b) a provision of service by an employee to the employer in the course of or in relation to his employment;*
>
> *(c) fees taken in any Court or tribunal established under any law for the time being in force."*

The above provisions indicate that to be a taxable service, the supply of tangible goods, etc., for use should be without transferring the right of possession and effective control and such transfer of goods should not be a sale or deemed sale. Comparing the provisions with the factual matrix of the case, we find that in the instant case, in terms of the agreement which we discuss in the forthcoming paras, right of possession and effective control of the wagons is with the Indian Railways and not with the appellants. Moreover, the transaction entered into by the appellants with the Indian

Railways constitutes a deemed sale in terms of Clause 29(A) of Article 366 of the Constitution of India as the appellants have demonstrated that they have paid appropriate VAT along with penalties to the Karnataka State VAT Department. We find from the records that the Government of India, Ministry of Railways have clarified vide letter dated 11.6.2014 that this is a case of deemed sales tax under Article 366 (29A) of Constitution of India; deemed sales shall attract provisions of VAT/CST Act, as applicable in that state and that there is no service tax payable on this in leased case. Though, it can be argued that the railways are no authority to clarify the matters in respect of excisability of certain service to the service tax or sales tax for that matter, it is understandable that such a clarification will not be issued by a Ministry in the Government without having due legal consultation. Moreover, the payment of VAT is evidenced by the proceedings No.AR.CLR.CR.38/2016-17 dated 20.6.2018 before the Advanced Ruling Authority of Karnataka VAT and the proceedings of Deputy Commissioner of Commercial Taxes, Davangere dated 26.12.2018 wherein it was ordered inter alia that:

> "Later it has come to the notice of the undersigned that, during the tax period from April 2007 to March 2008, the dealer company have leased, Railway wagons to South Western Railways, Hubli and received an amount of Rs.12,11,68,095/- and this turnover is liable to tax under Entry No.76 of the IIIrd Schedule to the Karnataka Value Added Tax Act, 2002. Incorporating the same, following notice under subsection (1) of Section 69 of the KVAT Act, 2003 read with subsection (1) of Section 36 and subsection (2) of Section 72 of the KVAT Act, 2003 was issued on 14/11/2018.
>
> …
>
> The Commercial Tax Officer (Enforcement-3), Bellary Inspected your business premises of the dealer company on 06-06-2018 and during the course of inspection, the inspecting authority found that, the dealer company have received Rs.12,11,68,095/- towards leasing of Railway wagons to South Western Railways, Hubli and not reported this taxable turnover in the monthly return of turnover filed in Form VAT 100 for the tax period from April 2007 to March 2008 and not paid the taxes. The inspecting authority confirmed the information already with the undersigned.
>
> ….
> ….

> In response to the said notice, the dealer company have filed their written objections on 21/11/2018 which is reproduced as under:
>
> .....
>
> The advance ruling was given by the prescribed authority on 20th June 2018 showing that VAT liability accrued on lease rental income which was manifested in the form of tax demand dated 17th July 2018 relating to period FY 2006-07 to FY 2016-17. The liability is amounting to Rs.5,95,04,180/- along with interest accrued thereon for the period concerned together with penalty imposed on the said sum amounting to Rs.6,64,57,938/- and Rs.59,50,418/- respectively totalling to Rs.13,19,12,536/-.
>
> We agree with your demand for the year 2007-08 Rs.48,46,724/- tax.
>
> The matter has already been dealt with by Commercial Tax Officer (Enforcement-3), Bellari.
>
> We have already requested Hon'ble Chief Minister, Government of Karnataka, to waive off penalty and interest vide letter No.MSPL/2018-19 dated 25.09.2018. A copy of letter enclosed for your ready reference.
>
> ....."

It is on record that the appellants have paid the relevant VAT for the impugned transaction along with penalty though in a belated manner, the agreement entered by the appellant with the Railways cannot be deemed to be a not sale by any standard. As the VAT stands paid in view of the provision of Section 65B(44) of the Finance Act, 1944, the transaction of the appellants constitutes a deemed sale and as such, the supply of wagons by the appellants in the impugned case will automatically go out of taxable service.

3.2 We find that this issue of "Supply of Tangible Goods" has come before various Courts and Tribunals for scrutiny. We find that Hon'ble Supreme Court in the ***Bharat Sanchar Nigam Ltd. vs. UOI*** (s) have enunciated the principle of transfer of right to goods and have held that:

> ***"91.*** *To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes :*
>
> *a. There must be goods available for delivery;*

b. There must be a consensus ad idem as to the identity of the goods;

c. The transferee should have a legal right to use the goods- consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;

d. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor this is the necessary concomitant of the plain language of the statute - viz. a "transfer of the right to use" and not merely a licence to use the goods;

e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

3.3 We find that Supreme Court in the ***Great Eastern Shipping Company Ltd. vs. State of Karnataka*** (supra) held that:

"33. *When we peruse the various terms and conditions of the Charter Party Agreement (Annexure I), clause 1 provides that the contractors "let" and the charterer "hire" the goods vessel for six months. The expression 'let' has been used, and the vessel most significantly during the charter period has been placed at the "disposal" of the charterers and under their control in every respect. The charterers have been given the right to use all outfits, equipment, and appliances on board the vessel at the time of the delivery, including the whole reach, burthen, and deck capacity. Thus, in our considered opinion, merely by providing the staff, insurance, indemnity, and other responsibilities of bearing officials costs. Effective control for the entire period of six months has been given to the charterers. It is a case of transfer of right to use the vessel for which certain expenses and staff are to be provided by the contractor, which is not sufficient to make out that the control and possession of the vehicle are with the contractor. The possession and control are clearly with the charterer. As in essence, it has to be seen from a conjoint reading of various conditions whether there is a transfer of right to use the vessel. In our considered opinion there is not even an iota of doubt that under the charter agreement coupled with the instructions to tenderers, general conditions and special conditions for the contract as specified in the tender documents and charter-party clauses, there is a transfer of right to use the vessel for the purposes specified in the agreement.*

> ***34.*** *To constitute a transaction for the transfer of right to use of goods, essential is, goods must be available for delivery. In the instant case, the vessel was available for delivery and in fact, had been delivered. There is no dispute as to the vessel and the charterer has a legal right to use the goods, and the permission/licence has been made available to the charterer to the exclusion of the contractor. Thus, there is complete transfer of the right to use. It cannot be said that the agreement and the conditions subject to which it has been made, is not a transfer of right to use the goods, during the period of six months, the contractor has no right to give the vessel for use to anyone else. Thus in view of the provisions inserted in Article 366(29A)(d), Section 5C, and definition of 'sale' in Section 2 of the KST Act, there is no room for doubt that there is a transfer of right to use the vessel."*

3.4 We find that Andhra Pradesh High Court in the case of ***G.S. Lamba & Sons*** (supra) held that:

> ***"45.*** *Reading the recitals and various clauses, indeed there is a transfer of the right to use Transit Mixers. All the tests as indicated hereinabove exist in the contract between the petitioners and Grasim. The vehicles are maintained by the petitioners. They appoint the drivers and fix their roster. The licences, permits and insurances are taken in their names by the petitioners, which they themselves renew. The Transit Mixers go to Grasim's batching plants in Miyapur and Nacharam, where they are loaded with RMC and then proceed to the construction sites of customers. The product carried is manufactured by Grasim, which is delivered to the customers and the customers pay the cost of the RMC to Grasim and the petitioners nowhere figure in the process of putting the property in Transit Mixers to economic use. The entire use in the property in goods is to be exclusively utilised for a period of 42 months by Grasim. The existence of goods is identified and the Transit Mixers operate and are used for the business of Grasim. Therefore, conclusively it leads to the only conclusion that the petitioners had transferred the right to use goods to Grasim. For these reasons, we are not able to countenance any of the submissions made by the petitioners' counsel."*

3.5 We find that Supreme Court in the case of ***Aggarwal Brothers vs. Haryana and Another*** (supra) have held that:

> "5. The said Act defines 'sale' to mean the transfer of property in goods for cash or deferred payment or other valuable consideration and includes the "transfer of the right to use any goods for any

purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration." Such transfer of the right to use goods for consideration is "deemed" to be a sale. The provision expressly speaks of "transfer of the right to use goods" and not of transfer of goods. There is, therefore, no merit in the submission that to be a deemed sale within the meaning of the abovementioned provision of the said Act there must be a legal transfer of goods or that the transaction must be like a lease.

6. Where there is a transfer of a right to use goods for consideration, the requirement of the abovementioned provision of the said Act is satisfied and there is deemed to be a sale. In the instant case, the assessees owned shuttering. They transferred the shuttering for consideration to builders and building contractors for use in the construction of buildings. There can, therefore, be no doubt that the requirements of a deemed sale within the meaning of the abovementioned provision of the said Act are satisfied."

3.6 We find that Tribunal in the case of ***Kinetic Communications Ltd. vs. CCE, Pune: 2017 (3) GSTL 319 (Tri.-Mum.)*** held that:

"7. *It is seen from the records that there is no dispute as to the fact that the capital goods are in the possession of the lessee and is being used by him for the intended purpose without any interference or hurdle from the appellants. On going through the clauses of agreement, as produced before us, we find that the appellants had handed over the capital goods' possession to the lessee as also the right to use. These two important factors that determine the requirement as to whether the service is a taxable service or otherwise under 'supply of tangible goods for use services'. We find strong force in the contentions raised by the appellant that the case does not fall under supply of the tangible goods for use service. We also find that identical issue is settled by the Tribunal in the case of Praveen Engineering Works and Bhima SSK (supra)".*

4. In view of the facts of the case as detailed above, our discussion and analysis and the case law cited and paraphrased above, we are of the considered opinion that in the impugned case, the appellants have transferred the right of possession and effective control of the wagons leased out by them to the South Western Railways. The appellants have also discharged applicable VAT / Sales Tax on such transaction, therefore, the activity undertaken by the appellants does not constitute a taxable service of

"Supply of Tangible Goods". In view of the same, all the impugned orders are liable to be set aside and appeals are allowed with consequential relief, if any, as per law. We order so.

(Order pronounced in the Open Court on **18/02/2022**.)

P. ANJANI KUMAR
TECHNICAL MEMBER

(P DINESHA)
JUDICIAL MEMBER

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