

Indian Rayon and Industries Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Calcutta

Decided On : May-03-2002

Reported in : (2002)(103)LC841Tri(Kol.)kata

Judge : K Usha, K Bhatia, T, A Wadhwa

Appellant : Indian Rayon and Industries Ltd.

Respondent : Cce

Judgement :

1. Vide the impugned order the Commissioner of Central Excise, Calcutta has confirmed demand of duty of Rs. 46,90,896/- (rupees forty six lakh ninety thousand eight hundred and ninety six) against the appellants and has imposed a personal penalty of Rs. 25,00,000/- (rupees twenty five lakh).

2.1. The appellant is manufacturer of man-made fabrics classifiable under chapter 55 of Central Excise Tariff. During the period June 1991 to December 1995 the appellant received grey fabric from outside parties for the purposes of processing the same. The processed fabrics were cleared by them on payment of duty on the basis of the declaration made by the supplier of the raw materials as regards the sale price of the processed fabrics.

2.2. The appellants were served with a show cause notice on 15.6.1996 alleging that during the processing of the fabrics there was a shrinkage loss of 4%, which was liable to be included in the assessable value of the processed fabric.

Accordingly the notice called upon the appellant to show cause against the proposed demand of duty and imposition of penalty.

2.3. The appellants' main contention before the Commissioner was that when the duty has been paid on the selling price of the processed fabrics at the hands of the sender of the raw material, there was no occasion to go to the costing factor. In fact it was their submission that the price declared by the traders was inclusive of their profit and as such they have paid higher quantum of duty. Various other submissions on the point of limitation as also on the quantification of the demand were also raised.

2.4. The Commissioner vide his impugned order dt. 10.10.2000 did not find favour with the appellants' submissions and confirmed the demand of duty, as proposed in the notice and also levied penalty of Rs. 25,00,000/-. The said order is impugned before us.

3. Shri S.K. Bagaria, Id. adv. appearing for the appellant submitted that they paid the duty on the processed fabric on the basis of the selling price of the processed fabrics, as declared by the suppliers of the grey fabrics. This practice was in consonance with the law declared by the Hon'ble Supreme Court in the case of Ujagar Prints v. UOI 1989 (39) ELT 493 : 1989 (21) ECR 1 (SC) : ECR C 1347 SC. He submits that the selling price, as declared by the supplier of the raw materials was inclusive of the cost of the grey fabric, the value of the job work done, the manufacturing expenses and the manufacturing profit of the appellant. In fact he submits that the traders' profit was also included in the said selling price, so declared by them. He submits that the Commissioner got the said factual position checked and examined by the departmental officers and has held in para 5 of his order that the sale price of fresh cloth has been arrived at by adding up the cost of grey fabric per metre inclusive of transport charges, processing charges, bailing/packaging charges, decatizing and profit.

However, he has rejected the said sale price by observing that for arriving at sale price of one metre of fresh cloth, cost of one metre of grey fabric has been taken into consideration, without any adjustment on account of shrinkage during processing. He submits that the above finding of the adjudicating authority is mis-

conceived and untenable for the following reasons: (a) When the outside parties had declared their selling prices, there was absolutely no scope to ignore the same unless the same were found to be incorrect or unless it was found that they had actually charged a higher selling price. There is no such allegation or finding in the present case. There is absolutely nothing on the record to indicate even remotely that the outside parties had actually charged any higher selling prices.

(b) The appellant was not concerned with as to how the outside parties were fixing their selling prices. As per the normal system of costing, while working out the selling prices of processed fabrics, it is the cost of grey fabrics actually required for manufacture of processed fabrics (including shrinkage loss) that will be taken into account by any prudent businessman. There is nothing to show that the suppliers of grey fabrics had not taken into account the shrinkage loss while working out the cost of grey fabrics. Even no statement was recorded from any of the suppliers of the grey fabrics.

(c) As has been found by the Commissioner on getting the records examined by the departmental officers (last paragraph at page 5 of the order), the suppliers of grey fabrics were determining their selling prices by including their profits. The said suppliers could never work out their profits without taking into account the shrinkage loss.

(d) It is submitted that in the aforesaid circumstances there can be absolutely no scope to make any assumption as if the cost of grey fabrics included for fixing the selling prices of processed fabrics in the hands of the outside parties did not taken into account the shrinkage loss. The purported finding of the Commissioner in this regard is wholly without any basis or material and has been given on totally unfounded assumptions and presumptions and on mere surmises and conjectures.

4. Shri Bagaria draws our attention to the clarificatory judgements of the Hon'ble Supreme Court in the case of Ujagar Prints 1989 (21) ECR 1 (SC) : ECR C 1347 SC and submits that it was clearly held that trader, who sends man-made fabrics to the processor for processing on job work basis gives a declaration as to what would be his selling price, that would be taken by the excise authorities as the

assessable value of the processed fabrics. In the said judgment the Hon'ble Supreme Court was also pleased to hold that the traders' profit is not liable to be included in the assessable value. Thus, submits the Id. adv., the system followed by the appellant was fully in accordance with the aforesaid judgment of the Hon'ble Supreme Court save and except that even the profits of the suppliers of the raw material were also included in the assessable value and thus to that extent there was a higher payment of duty. There was no short levy of duty at all in the facts and circumstances of the case.

5. Shri Bagaria also assailed the impugned order on the point of limitation inasmuch as the show cause notice for the period from June 1991 to December 1995 was raised on 15.6.1996. He submits that the central excise range office is situated within the appellants' factory premises and is only meant for their factory. The Commissioner has simply invoked the longer period of limitation by holding that the appellants did not disclose that the declared value was only of grey cloth and the fact of shrinkage was suppressed. He submits that the system of arriving at the assessable value was fully known to the Revenue and no objection was ever raised. Merely because subsequently the departmental authorities proposed to change their view, longer period of limitation cannot be invoked by holding the appellants guilty of suppression with intent to evade duty. In support he relies upon various decisions of the Hon'ble Supreme Court and the Tribunal.

7. We have heard Shri V.K. Chaturvedi, Id. SDR for the Revenue, who reiterates the reasoning of the authorities below.

8. We have given our careful consideration to the arguments advanced by the Id. adv. In their clarificatory judgement, in the case of Ujagar Prints referred supra the Hon'ble Supreme Court in para 2 has observed as under: 2. If the trader, who entrusts cotton or man-made fabric to the processor for processing on job work basis, would give a declaration to the processor as to what would be the price at which he would be selling the processed goods in the market, that would be taken by the Excise authorities as the assessable value of the processed fabric and excise duty would be charged to the processor on that basis provided that the declaration as to the price at which he would be selling the processed goods in the

market, would include only the price or deemed price at which the processed fabric would leave the processor's factory plus his profit. Rule 174 of the Central Excise Rules, 1944 enjoins that when goods owned by one person are manufactured by another the information is required relating to the price at which the said manufacturer is selling the said goods and the person so authorised agrees to discharge all the liabilities under the said Act and the rules made thereunder. The price at which he is selling the goods must be the value of the grey-cloth or fabric plus the value of the job work done plus the manufacturing profit and the manufacturing expenses but not any other subsequent profit or expenses. It is necessary to include the processor's expenses, cost and charge plus profit, but it is not necessary to include the trader's profits who gets the fabrics processed, because those would be post-manufacturing profits.

The appellants have been paying duty on the selling price, so declared by the supplier of the grey fabrics. However, as observed by the Hon'ble Supreme Court such selling price must be the value of the grey cloth + the value of the job work plus the manufacturing profit and the manufacturing expenses. The Commissioner in his impugned order has observed that the said selling price, so declared by the traders include the cost of the grey fabrics and the other expenses plus the profit made by the trader. When the cost of the grey fabric per metre has been taken into account by the trader and when the profits have been arrived at by him after taking the various factors into consideration, it cannot be said that the shrinkage has not been taken into consideration by him while arriving at his profits. In fact we find that the Revenue is not doubting the selling price of the traders.

The observation of the adjudicating authority that for arriving at the sale price of one metre of processed cloth, cost of one metre of grey fabric has been taken into account without any adjustments on account of shrinkage is not based upon any evidence on record and is in fact against the very principle of costing. In fact we find that the Hon'ble Supreme Court has held that the profit made by the trader is not liable to be included in the assessable value of the processed fabric, whereas the appellants have paid the duty on the entire selling price of the trader which also includes profits. In any case in the absence of any allegations that the traders have suppressed their actual selling price or have charged extra from their

customers, than what has been declared to the appellants, we are of the view that the impugned order confirming demand of duty by including 4-5% shrinkage loss in the assessable value cannot be upheld. Had the appellants been paying duty on the assessable value arriving at on the basis of the costing data the shrinkage would have definitely become a part of the assessable value. Inasmuch as in the instant case the assessable value has been arrived at on the basis of the declarations of selling price made by the supplier of the raw materials, which have not been found to be incorrect and not on the basis of the assessable value arrived at by taking into account the cost factors, the ratio of the Hon'ble Supreme Court's clarificatory decision in the case of Ujagar Prints, referred supra, clearly applies. Accordingly we set aside the impugned order on this ground itself and allow the appeal.

9. Inasmuch as the appeal has been allowed on the main ground of adoption of selling price of trader as the assessable value we are not passing any orders on the other issues of the demand being time barred or on the appellants arguments of wrong quantification of demand. Please see Separate Order. Sd/-(K.K. Bhatia) (Archana Wadhwa) Member (Technical) Member (Judicial) 10. The Commissioner has observed in his order that by not taking the element of shrinkage of the grey fabrics into account, the appellants have not paid duty on the value of the actual quantity of grey cloth, gone into the manufacture of each Sq. metre of processed fabrics which constitutes the intrinsic value as held by the Hon'ble Apex Court. The appellants are contesting that the duty is paid on the sale price of the processed fabrics which includes profit element of supplier of grey fabrics. No doubt the appellants are not required to pay duty on the sale price which includes the profit element of the supplier of grey fabrics, but that in itself does not mean that the price at which the duty is paid includes the intrinsic value of the grey fabrics. It is clearly held in the Order-in-original and is also not in dispute that the duty is paid on the value of per Sq. metre of grey fabrics for the quantity actually returned including job charges/profit element and since the quantity actually given back to the supplier was always less than that of original receipt of the grey fabrics in Sq. metres, there is under-valuation to the extent of the value of the grey fabrics lost due to shrinkage. For example, if the grey fabrics supplier has supplied 100 sq. metre of grey fabrics, he got back only 96 or 95 sq.

metres of fabrics after processing due to 4-5% of shrinkage loss. The duty is paid on the sale price of this 95-96 sq. metres which may also include profit of the trader. The profit margin of the trader may not be required to be added to the assessable value of finished goods but the duty has to be paid by taking into account the full intrinsic value of the grey fabrics supplied i.e. 100 sq. mts. The Hon'ble Supreme Court in their judgment in Ujagar Prints v. Union of India , have also observed, "When goods owned by one person are manufactured by another the information is required relating to the price at which the said manufacturer is selling the said goods and the person so authorised agrees to discharge all the liabilities under the said Act and the rule made there under. The price at which he is selling the goods must be the value of the grey-cloth or fabric plus the value of the job work done plus the manufacturing profit and the manufacturing expenses but not any other subsequent profit or expenses.

It is necessary to include the processor's expenses, costs and charges plus profit, but it is not necessary to include the trader's profits who get the fabrics processed, because those would be post-manufacturing profits.

11. As we can see from the above observations of the Supreme Court, the sale price of the raw material supplier is not relevant for the purpose of assessment for duty of the processed fabrics. In this judgment, the reference is to the price at which the manufacturer i.e. the job worker or processor is selling the goods. The conclusion arrived at by the learned Member (J) in her above order is entirely based on the fact that the appellants have been paying duty on their selling price declared by the supplier of the grey fabrics; that when the cost of the grey fabrics per metre has been taken into account by the trader and when the profits' have been arrived at by him after taking the various factors into consideration, it cannot be said that the said shrinkage has not been taken into account by him while arriving at the profit. I do not agree with this view. I would observe that the price at which the processed fabrics are sold by the raw material supplier is not relevant to the issue. It is the price at which the job worker i.e. the appellant, is selling the goods, is relevant for the purpose of duty and that must be the intrinsic value of the grey cloth plus value of the job work done plus the manufacturing profits and manufacturing expenses as mandated by the Hon'ble Supreme Court. Since

admittedly the duty is not paid as per this formula, the appellants must pay the duty including the element of shrinkage of grey fabrics. However, they would be entitled to the abatement on the profit element, if any, of the raw material supplier included in the assessable value. I am also of the view that by not paying the duty as per the judgment of the Hon'ble Supreme Court, the appellants have suppressed the material facts from the department and extended period for the purpose of demand of duty is rightly invoked against them. They are also liable to penalty. To work out the exact amount of differential duty liability on the appellants and the amount of penalty to be imposed on them, I would remand the matter to the original authority. The appellants shall furnish to the adjudicating authority all the relevant data (including the profit margin, if any, of their raw material suppliers) supported by evidence within two months of the receipt of this order and thereafter the said authority shall adjudicate the case de novo on affording a reasonable opportunity of hearing to them.

12. Since there is a difference of opinion between the two Members constituting the Bench, the following question is referred to the third Hon'ble Member for resolving the dispute in terms of CEGAT Order No.6/95 dated 10.11.1995: Whether the appeal should be allowed as held by the learned Member (J) or it may be remanded to the original authority as per the directions and terms contained in the order of the learned Member (T).(Archana Wadhwa) (K.K. Bhatia)

13. In this appeal at the instance of the assessee challenge is against the order in original No. 6/Ch.55/Commissioner/CE/Cal-IV/ADJN/2000 dated 31.10.2000 passed by the Commissioner of Central Excise, Calcutta. The assessee is engaged in the manufacture of unprocessed and processed man-made fabrics. It is also doing the work of processing of man-made fabrics brought by other parties. Processing of grey fabrics includes bleaching and dyeing. When processed fabrics were returned to the parties, duty was being paid on the value of the grey fabrics thus returned calculated on the basis of value per sq. metre including job charges, profit element etc.

14. Show cause notice dated 5.10.1996 was issued to the assessee alleging that there was under valuation since the loss of material due to 4% to 5% of shrinkage during the processing was not being taken into consideration while valuing the

processed fabrics. A demand of short levy of excise duty to the extent of Rs. 46,90,896/- was raised under Section 11A(1) read with Rule 9(2) along with proposal for imposition of penalty under Section (sic) 173Q. Under the impugned order the Commissioner confirmed the demand of duty and imposed a penalty of Rupees Twenty five lakhs. Aggrieved by the above the assessee has filed the present appeal. The Commissioner has taken the view that the assessee has not taken the intrinsic value of the processed fabric as required in the judgment of the Supreme Court in the case of Ujagar Prints and . The value of the grey cloth required for the manufacture of each metre of processed fabrics is to be taken into account in addition to the Job charges and job worker's profit element. The assessee has taken into account only the value of each metre of grey cloth for each metre of processed fabrics ignoring the fact that there was a shrinkage in the course of processing. The Commissioner has given an illustration as to how the shrinkage will affect the value in the following manner: Suppose a trader supplies 100 metres of grey fabrics costing Rs. 46 per metre, to a processor for processing. In the course of processing there is, say, a shrinkage of 5 metres and only 95 metres of processed fabrics emerges. Then while doing the costing of the processed fabric, if the cost of grey fabric is taken @ Rs. 46 per metre, then the value of the grey fabrics totalling Rs. 95 46 = Rs. 4370/- is only accounted for. Since the cost of the grey fabrics was actually Rs. 46 100 = Rs. 4,600/-, this implies that a value of Rs. 230/- of the grey fabrics has not been taken into consideration while doing the cost of the processed fabrics. This value difference is the value of the shrinkage which has to be either separately added in the costing or extrapolated into the cost of the grey fabrics.

15. After referring to bills/invoices the Commissioner found that the sale price of processed cloth has been arrived at by adding the following ingredients: The above would show that loss or shrinkage has not been taken into consideration at all. Therefore, the Commissioner came to the conclusion that there was under valuation. It was also held that there was deliberate withholding of information by the assessee with intent to evade Central Excise duty by resorting to under valuation and therefore the larger period of limitation was rightly invoked.

16. In the present appeal the assessee would contend that it had paid duty on the selling price of the processed cloth as declared by the party which had entrusted the grey fabric with the assessee for processing. According to the assessee it has acted strictly in consonance with the dictum of the Supreme Court in *Ujagar Prints v. UOI* 1989 (39) ELT 493 : 1989 (21) ECR 1 (SC) : ECR C 1347 SC. The assessee points out that price declared would take in even the profit of the trader which is not liable to be included in the value as per the above decision. Therefore, the value adopted by the assessee is if at all on the highside and there is no under valuation. It is further contended that the departmental authorities were well aware of the method of valuation followed by the assessee and therefore there is no justification in invoking longer period of limitation alleging suppression with intent to evade duty on the part of the assessee.

17. The learned Member (Judicial) accepted the contention put forward by the assessee on the issue of under valuation. It was held that in as much as the assessable value has been arrived at on the basis of the declaration of the selling price by the supplier of grey cloth which has not been found to be incorrect, the ratio of the clarificatory order of the Supreme Court in *Ujagar Prints v. UOI* 1989 (39) ELT 493 : 1989 (21) ECR 1 (SC) : ECR C 1347 SC would clearly apply to the facts of the case and therefore, the impugned order has to be set aside. The learned Member (Judicial) did not express any view on the issue of limitation and wrong quantification of the demand. On the other hand, the learned Member (Technical) took the view that all the three decisions of the Supreme Court in *Ujagar Prints'* Case are to the effect that it is the intrinsic value of the grey fabric that has to be taken for the purpose of assessable value and therefore the loss due to shrinkage during the process is a relevant factor to be taken into consideration. It is further observed that admittedly duty is paid on the value of per sq. metre of grey fabrics for the quantity actually returned including job charges/profit element and since the quantity actually given back to the supplier was always less than that of the original receipt of the grey fabrics in sq. metres there is under valuation to the extent of value of the grey fabrics lost due to shrinkage. Placing reliance on the observations of the Supreme Court in *Ujagar Prints'* case the learned Member (Technical) holds that the price at which processed fabrics are sold by the raw material supplier is not relevant to the issue.

It is the price at which the job worker i.e., the appellant is selling the goods is relevant for the purpose of duty and that must be the intrinsic value of the grey cloth plus value of the job work done plus the manufacturing profits and manufacturing expenses. The appellant is held entitled to abatement on the profit element if any of the raw material supplier included in the assessable value. It was then held that the appellant had suppressed material facts from the Department and the extended period of limitation was rightly invoked. The matter was then remanded for working out the exact amount of differential duty liability of the appellant and the amount of penalty to be imposed on them.

18. In the light of the above difference of opinion between the two Members the following question is referred to the 3rd Member: Whether the appeal should be allowed as held by the learned Member (J) or it may be remanded to the original authority as per the terms contained in the order of the Learned Member (T).

19. It is not disputed before me by either party that the issue, arising in this case has to be decided within the parameters provided by the three decisions of the Supreme Court in *Ujagar Prints*. Both sides are relying on the above decisions in support of its respective contentions. Therefore, one has to examine the ratio of the above three decisions in the matter of arriving at the assessable value of the grey fabrics at the time of return of the goods after completing the process. The questions that came up for consideration of a Bench of two Judges of the Supreme Court in were- (1) whether the process of bleaching, dyeing, printing, mercerising etc. carried on by a processor on job work basis in respect of grey fabrics and man-made fabrics belonging to the customer and entrusted him for processing amount to 'manufacture' within the meaning of the Central Excises & Salt Act as it stood prior to its amendment by the Central Excise and Salt and Additional Duty of Excise (Amendment) Act, 1980 so as to levy of excise duty on the processed fabrics and whether, in any event, after the Amendment Act, these processes amount to manufacture and excise duty is leviable on the processed fabrics.

(2) If the processed fabrics are assessable to excise duty what is the value on the basis of which they are liable to be assessed.

After discussing the two issues in the light of the earlier decision of the Supreme Court in *Empire Industries Ltd. v. UOI* the Bench referred the petitions and appeals to a Larger Bench of 5 Judges.

20. The matter was heard by the Larger Bench and the judgment is the one . The Larger Bench affirmed the view taken in *Empire Industries'* case that grey fabric after undergoing the various process of bleaching, dyeing, sizing, printing, finishing etc.

emerges as a commercially different commodity with its own price structure, Customs and other commercial incidence and that there was in that sense a 'manufacture' within the meaning of Section 2(f) even as unamended by Central Excise and Salt Additional Duty of Excise (Amendment) Act, 1980. On the question of computation of the assessable value of the processed grey fabric, it was held as follows: The assessable value would, therefore, include the value of grey cloth in the hands of the processors plus the value of the job work done plus manufacturing profits and manufacturing expenses whatever would be included in the price at the factory gate. The correct assessable value must be the value of the fabric at the factory gate, that is to say, the value at which the manufactured goods leave the factory and enter the main stream.

It is, therefore, necessary to reiterate that the value for the assessment under Section 4 of the Act will not be the processing charge alone but the intrinsic value of the processed fabrics which is the price at which the fabrics are sold for the first time in the wholesale market.

It was also held that the selling profit of the trader who subsequently sells the fabrics cannot be made part of the assessable value.

21. In the clarificatory order reported in 1989 (39) ELT 493 : 1989 (21) ECR 1 (SC) : ECR C 1347 SC the Supreme Court observed that the assessable value of the processed fabric would be the value of grey cloth in the hands of processor plus the value of the job work done plus manufacturing profit and manufacturing expenses which will either be included in the price at the factory gate or deemed to be the price at the factory gate for its processed fabric. The factory gate means the

deemed factory gate as if the processed fabric was sold by the processor. The illustration given in the reference order is quoted in this clarificatory order which reads as follows: If the value of the grey-cloth in the hands of the processor is Rs. 20/- and the value of the job work done is Rs. 5/- and the manufacturing expenses and expenses for the processing be Rs. 5/-, then in such a case the value would be Rs. 30/-, being the value of the grey cloth plus the value of the job work done plus manufacturing profit and expenses. That would be correct assessable value.

If the trader, who entrusts cotton or man-made fabric to the processor for processing on job work basis, would give a declaration to the processor as to what would be the price at which he would be selling the processed goods in the market, that would be taken by the excise authorities as the assessable-value of the processed fabric and excise duty would be charged to the processor on that basis provided that the declaration as to the price at which he would be selling the processed goods in the market, would include only the price or deemed price at which the processed fabric would leave the processor's factory plus his profit.

The contention of the assessee which was found favour with the Member (Judicial) is that in view of the above observation of the Supreme Court the assessable value of the processed grey fabric leaving his factory shall be computed on the basis of the declaration given to the processor by the trader regarding his selling price and that when such a declaration is given, it is not open to the Revenue to fix the assessable value by the costing method.

22. I do not find any merit in the above contention since the observation of the Supreme Court as quoted above would make it clear that the selling price as declared by the trader would include only the price or deemed price at which the processed fabric would leave the factory plus his profit. Therefore, the price of the fabric at the point of its leaving the processor's factory is a relevant factor.

While computing the deemed price at the processor's factory gate the value of the grey cloth handed over to the processor has necessarily to be taken into consideration. This is clear from the illustration given in the reference order and which was again quoted in the clarificatory order of the Supreme Court. If wastage during the process has to be fixed at 5% it requires 100 sq. metre of grey fabric for

removing 95 sq. metre of processed grey fabric at the factory gate. Admittedly, this aspect has not been taken into consideration by the assessee while adopting the assessable value. On the other hand, it had derived at the assessable value by multiplying the price of processed grey fabric per metre by the total quantity moving out of the factory after the process. Therefore, I agree with the view taken by the Member (Technical) that what is relevant for the purpose of duty is the intrinsic value of grey cloth plus the value of job work and manufacturing profits, expenses etc. The assessee will be entitled to abatement on the profit element, if any, of the raw material supplier included in the assessable value.

23. Since the legal position regarding the computation of assessable value has been made clear by the Supreme Court much before the period in question, it has to be taken that the assessee with full knowledge of its obligation to pay duty on the deemed sale at its factory gate was guilty of wilful suppression of the fact that there would be shrinkage in the course of process and that it has calculated the assessable value without taking into account such shrinkage with intent to evade Central Excise duty. The authorities are, therefore, justified in invoking the longer period of limitation.

24. I agree with the order passed by the Member (Technical) that the case has to be remanded to the original authority to work out the exact amount of differential duty liability on the appellant and the amount of penalty to be imposed on them. Dt. 18.3.2001 (Justice K.K. Usha) In view of the majority opinion, the appeal is remanded to the original authority to work out the exact amount of differential duty liability on the appellants and the amount of penalty to be imposed on them.

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