

Hico Products Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-02-1983

Reported in : (1984)(16)ELT344TriDel

Appellant : Hico Products

Respondent : Collector of Central Excise

Judgement :

1. The captioned appeal arises out of and is directed against the order dated 11-3-1983 passed by the Collector of Central Excise (Appeals) by which he rejected the appeal against the Order-in-Original No. V (15A) 4-28/82/4491 dated 13-7-1982 passed by the Assistant Collector of Central Excise, Bombay.

2. The facts of the case, relevant and material for the present appeal, briefly stated, are as follows : - (i) The appellants (to be referred as HICO, for short) manufacture, among other things, some silicone-based products under the name of Katrang SI 40 etc. These products were being classified under Item No. 68 of the Central Excise Tariff Schedule (CET). In the wake of the 1982 Budget changes, the Department sought to tax these products under Item No. 15A(1) CET; (ii) However, HICO maintained that the products, being silicone emulsions, were still classifiable under Item 68 CET and accordingly filed classification list in respect of these products; (iii) On 19-6-1981, the Supdt. of Central Excise issued a notice to HICO stating that Katrang - SI HA merit classification under Item 15A(1) CET after 28-2-1982; that HICO had contravened Rules 173B and 173C of the Central Excise Rules (to be referred as "Rules" hereafter) and asking HICO to

show cause why the differential duty amounting to Rs. 3,04,127.26 (basic) and Rs. 20,631.75 (Special) should not be demanded from them; (iv) In adjudication, the Assistant Collector held that the subject goods which were admittedly silicone emulsions liable to duty under Item 15A(1) CET; (v) The appeal against this order was rejected by the Collector (Appeals); (vi) It is against this order of the Collector the HICO is now before us.

3. Pending hearing and disposal of the appeal, the Tribunal had stayed enforcement of the demand against HICO subject to the execution of a bank guarantee to the satisfaction of the Revenue.

4. In the appeal before us, the following salient contentions and submissions have been put forth : - (i) The subject silicone emulsions are made by mixing imported silicone oil, duty-paid emulsifier and water; (ii) The subject products do not come into existence by a chemical reaction or synthesis but, as stated above, by mixing imported silicone oil [which pays additional duty of Customs equal to the excise duty under item 15A(1) CET] with water and additives such as emulsifier; (iii) The above process does not amount to "manufacture" attracting excise duty by the combined operation of Section 2(f) and Section 3 of the Central Excises & Salt Act (Act, for short); (iv) The analogy of Board's Tariff Advice MF(DR & I) No. 93/1/78-CX-3 dated 24-10-1979 applies and lends support to the above contention that there is no "manufacture"; (v) Even if it is held there is "manufacture", the subject products fall under the same Item 15A under which silicone oil is excisable and so they cannot be charged to duty a second time under the said Item; (vi) The silicone emulsions are physically and chemically distinguishable from silicone resins. The emulsions are not however, covered by the expression "artificial or synthetic resins and plastic materials". The expression "other materials" will take in only goods exemplified by hardened proteins, natural resin and other high polymers. Silicone emulsions do not fall into this group.

Therefore, they do not fall under Item 15A(1) CET; (vii) Item 15A(1) CET covers, in so far as resins are concerned, only such resins having the characteristics of plasticity. Reliance is placed in this connection on the CEGAT decision in Tamil Nadu Electricity Board v. Collector of Customs, Madras -1983 E.L.T. 174.

Explanation II to Chapter 39 of the Customs Tariff Act, 1975 (on which 15A CET is based) on the above aspect covers the Chapter as a whole and is not restricted to artificial resins.

(i) the subject goods do not attract duty since the process adopted does not amount to 'manufacture' ; of 5. The appeal was heard on 3-11-1983. The learned counsel for HICO made the following submissions : (i) The levy of additional duty of customs on the imported silicone oils with reference to Item 15A CET was not disputed. The imported oil merely underwent a change in form from liquid to emulsion. The process of emulsifying the oil did not amount to a process of 'manufacture' and the resultant product, silicone emulsion, did not attract excise duty again under Item 15A(i) CET. (ii) Even if it was felt that there was 'manufacture', the emulsion was not leviable to duty a second time.

(iii) The imported silicone oil was covered by Explanation I[to Item No. 15A CET as a poly-condensation product produced by chemical synthesis. What was produced by HICO was not a poly-condensation product produced by chemical synthesis. HICO merely mixed the imported silicone oil with an emulsifier and water to produce silicone emulsion.

(iv) The ratio of the decision of the Supreme Court in the Dunlop case reported in AIR 1977 S.C. 597 and that of the Tribunal in the case of Golden Paper reported in 1983 E.L.T. 1123 applied to the present case. The said ratio of these decisions would apply to the present appeal notwithstanding the fact that the starting material in the present case was imported.

(v) The additional duty of customs levied on imported silicone oil was with reference to Item No. 15A of the CET and, therefore, silicone emulsion made out of the imported oil would not be chargeable to duty again under the same Item.

(vi) The test report at page 97 of the paper book would show that samples were found to be in the form of white liquid, an aqueous emulsion of complex organic silicone compound. An emulsion was nothing but a dispersion of one liquid in another. It was a mechanical mixture not involving any chemical reaction.

(vii) Apart from the case law cited earlier, the ratio of the Supreme Court decision in the case of Tungabhadra Industries reported in AIR 1961 S.C. 412 applied to the situation in the present case.

(viii) Without prejudice to the aforesaid contentions, if it was held that there was a process of manufacture, Item 68 alone would apply to the resultant silicone emulsion.

6. Appearing on behalf of the Revenue, the learned Senior Departmental Representative made the following submissions : (i) The subject product had always been classified under Item No. 68 CET. It would not, therefore, be open to HICO to now contend that there was no "manufacture" whatsoever involved in the production of silicone emulsion and that even Item No. 68 would not apply.

(ii) The contention that there was no manufacture, was not correct.

If the Tariff Item specifically included a product, there could be no question whether there was manufacture leading to the said product. Reliance was placed in this connection on the Delhi High Court decision in 1980 E.L.T. 735.

(iii) Item 15A(i) CET read with Explanation III specifically covered emulsion. The question of 'manufacture' was, therefore, irrelevant.

(iv) The contention that additional duty of customs was the same thing as excise duty was not correct. It would not be correct to say that goods which had paid additional duty of customs had paid excise duty.

(v) Multi-stage excise levy was not barred by law. Reference was made to 1983 E.C.R. 552-D. Rule 56A applied to Item No. 15A, Therefore, the rigours of multi-stage levy were mitigated.

(vi) Production of emulsion from oil was a process of manufacture.

Reference was made in this connection to the book "Polymer Science & Technology Vol. 12 page 557". Silicone emulsion was a product distinct from silicone oil in its name, character and use.

(vii) The ratio of the Supreme Court decision in the Tungabhadra Industries case would not apply to the present case since that decision pertained to a sales-tax matter and the sales-tax law was not part materia with Central Excise Law.

(viii) Explanation II to Item No. 15A CET was independent of the Explanation III. Unless poly-condensation came into being, Explanation III did not come into play.

7. In reply, Shri Taraporewala said that Explanation II and Explanation III to Item 15A CET should be read together. Explanation II was not attracted in the present case. The ratio of the Tribunal decision in 1983 E.C.R. 552D on zinc calots would not apply in the present case.

9. HICO imported Silicone oil which was levied with additional duty of Customs with reference to Item No. 15A CET. There is no dispute about this. The said duty-paid imported silicone oil was intimately mixed with excise duty-paid emulsifier and water by HICO in their factory. It is nobody's case that there was any chemical reaction or synthesis in this process. The resultant product was silicone emulsion known by different nomenclature.

(b) does the resultant emulsion fall for classification under Item 15A (1), CET and is chargeable to excise duty under that item 11. For a proper appreciation of the issues involved, it is expedient to reproduce the relevant portions of Item No. 15A CET. "15A. Artificial or synthetic resins and plastic materials, and other materials and articles specified below- (1) Condensation, polycondensation and polyaddition products, whether or not modified or polymerised, and whether or not linear (for example, pheno-plasts, amiuo-plasts, alkyds, polyallylesters and other unsaturated polyesters, silicones); polymerisation and co-polymerisation products (for example, polyethylene, polytetrahaloethylenes, polyiso-butylene, polystyrene, polyvinyl chloride, polyvinyl acetate, polyvinyl chloroacetate, and other polyvinyl derivatives, polyacrylic and poly-methacrylic derivatives, coumaroneindene resins) ; regenerated cellulose ; cellulose nitrate, cellulose acetate and other cellulose esters, cellulose ethers and other chemical derivatives of cellulose, plasticised or not (for example, collodions, celluloid); vulcanised fibre ; hardened proteins (for example, hardened casein and hardened gelatin); natural resins modified by fusion (run gums); artificial resins obtained by esterification of natural resins or of

resinic acids (ester gums); chemical derivatives of natural rubber (for example, chlorinated rubber, rubber hydrochloride, oxidised rubber, cyclised rubber) ; other high polymers, artificial resins and artificial plastic materials, including alginic acid, its salts and esters ; linoxyn." Explanation II.-In sub-item (1), "condensation, polycondensatic poly-addition, polymerisation and co-polymerisation products" are to be taken to apply only to goods of a kind produced by chemical synthesis answering to one of the following descriptions :- (c) resols, liquid polyisobutylene, and similar artificial polycondensation or polymerisation products.

Explanation III.-Sub-item (1) is to be taken to apply to materials in the following forms only :- (a) liquid or pasty (including emulsions, dispersions and solutions); (b) blocks, lumps, powders (including moulding powders), granules, flakes and similar bulk forms ; 12. At the outset, it needs to be mentioned that the words used in Item 15A, CET have to be interpreted with reference to their technical or scientific meaning and not popular meaning. This has been clearly laid down by the Bombay High Court in the case of Chemicals and Fibres India Ltd. v. Union of India and Ors.-1982 E.L.T. 917 (Bom.).

13. Now, "silicones" is specified in terms in Item 15A(1), CET. The scope of Item 15A., as the very opening words indicate, is not limited to artificial or synthetic resins and plastic materials but it also takes in "other materials and articles specified" in the item.

Therefore, the "silicone" in Item 15 A(l) is not limited to silicone resins but any product answering to the description : "silicone". HICO has contended that only silicone resins having plasticity are covered within the scope of Item 15A(1), CET. For this, they rely on the Tribunal's decision in 1983 E.L.T. 134. In that case, the tariff item that came in for interpretation was Item 15A as it existed prior to the 1982 budget. During the period relevant to the case, the opening words of Item 15A read as follows :- "15A. Artificial or synthetic resins and plastic materials and cellulose esters and ethers, and articles thereof-" It is clear, therefore, that the said tariff entry took in -apart from cellulose esters and ethers-only specified resins and plastic materials. The resinous or plastic nature was a *sin qua non* for classification of a product under Item 15A. Such is not the case after the 1982

budget change. The item takes in-besides artificial or synthetic resins and plastic materials the "other materials and articles" specified in the Item. It is easily seen that with reference to such products ("other materials and articles"), what has to be seen is not their resinous or plastic nature but whether the products answer to any one or more of the generic or specific nomenclatures used in the Item. The ratio of the Tribunal's decision in 1983 E.L.T. 134 does not, therefore, apply to the facts of the present case.

14. Now, "silicones" is a generic term. The "Condensed Chemical Dictionary" by Hawley's 10th Edition has this to say on silicones : "Silicone (organosiloxane). Any of a large group of siloxane polymers based on a structure consisting of alternate silicone and oxygen atoms with various organic radicals attached to the silicone ;" XXX "Forms : Fluids, powders, emulsions, solution resins, pastes, elastomers". Thus, silicone resins, silicone oils, silicone emulsions all come within the generic term "silicone".

15. Now, would silicone emulsion, were it to be manufactured indigenously from silicone oil, again indigenously manufactured, attract duty under Item 15A(1) CET There is no dispute about the fact that silicone oil is a product of chemical synthesis. It is a polymerisation product. Explanation II to Item 15A(i) CET (see para 11 supra) squarely comes into play. Thus silicone oil would attract duty under the said item as a polymerisation product, answering to the description 'silicone'. Suppose, it is produced in an integrated factory where silicone oil is not cleared as such but after it is converted into silicone emulsion. Explanation III (see para 11 supra) provides that Item 15A(1) CET is to be taken to apply to materials in certain specified forms only and one such form is "liquid or pasty (including emulsions, dispersions and solutions) (underlining ours). We thus see that silicone oils in emulsion form fall for classification under Item 15A(1) CET by virtue of the combined operation of Explanations II & III. It is not correct to contend that one explanation should be read independently of the other. There can be no manner of doubt that both are to be read together.

16. What is the situation if silicone oil is cleared on payment of duty and then converted into emulsion The learned counsel for HICO contends that there is no

"manufacture" involved in the process of conversion and that even if it is held that there is 'manufacture', the resultant emulsion cannot be charged to duty again under the same Item 15A(1) CET. For this, he has relied on the Dunlop case, AIR 1977 S.C.597 and the Golden Paper Udyog case, 1913 E.L.T. 1123.

17. The encyclopaedia of Polymer Science and Technology (Vol. 12 page 557) has this to say on the production of silicone emulsions : - "Silicone emulsions are generally made from standard fluids, emulsifying agents, water, and, in some cases, finely divided solids which apparently act as carriers for the silicone, increasing the exposed silicone interfacial area and consequently the effectiveness of the emulsion as a surfactant. All classes of emulsifiers can be used : anionic, cationic, and nonionic. In most cases, a water-in-oil dispersion is prepared first by passing a mixture of silicone fluid, emulsifier, some water, and solid dispersent (if used) through a high-shear blending device such as a colloid mill or homogenizer. The resulting paste is then dispersed in a larger amount of water with vigorous agitation. The final product is a silicone-in-water emulsion, even though the silicone fluid may constitute up to 70% of the product composition. Most silicone emulsions, as sold, contain 10-70% silicone, but are usually diluted to much lower concentrations before use." It may be seen that the process is not a simple one of mixing the ingredients but one involving the use of a high shear blending device such as a colloidal mill or homogenizer. During the hearing, Shri Taraporewala referred to extracts from the book "EMULSIONS-Theory and Practice" by PAUL BECHER published by Reinhold Publishing Corporation, New York. In Chapter 1 of the said book, various definitions of "emulsion" are given. After considering their merits and demerits, the author observes : "A useful synthesis of the above quotations may be made as follows : - An emulsion is a heterogeneous system, consisting of at least one immiscible liquid intimately dispersed in another in the form of droplets, whose diameter, in general, exceeds 0.1 μ . Such systems possess a minimal stability, which may be accentuated by such additives as surface-active agents, finely divided solids, etc." However, more to the point is the book "Encyclopaedia of Polymer Science and Technology", relied upon by Shri Jain, which states at p.

557 : "Commercial silicone emulsions are pourable systems of low to moderate viscosity, with good shelf stability and resistance to phase separation." It is thus apparent that silicone emulsion is not a simple mixture of silicone oil, water and emulsifier. It is a fine, stable, intimate dispersion of silicone oil in water with the aid of an emulsifier.

18. Silicone emulsion, thus, is not the same thing as silicone oil. The emulsions again to refer to page 557 of the Encyclopaedia of Polymer Science and Technology" are for use primarily as anti-foating agents and as release agents. "The features which make the use of emulsions desirable include non-flammability, compatibility with aqueous systems, ease of dilution, and effectiveness of these highly dispersed forms of silicone in applications where surface properties are important". When "emulsions" are, by virtue of Explanations II and III of Item 15A(1), CET, brought specifically within the ambit of the said Item, there is no scope for the argument that the process of conversion of silicone oil into silicone emulsion is not "manufacture" within the meaning of Section 2(f) of the Act read with Sec. 3 ibid (see 1980 E.L.T. 735).

19. The learned Counsel for HICO referred to the Supreme Court decision in the DUNLOP case-AIR 1977 S.C. 597-and submitted that there was no estoppel in law from seeking a different classification on a subsequent occasion if the law so permits, even though the party might have accepted a classification under a particular item of the tariff on an earlier occasion. We agree that this is so. This point is relevant only in the context of Shri Jain's submission that since HICO acquiesced in classification of the subject goods under Item 68 CET, it was not open to them to now argue that there was no "manufacture" at all involved in the conversion of silicone oil into silicone emulsion. We reject this contention of the learned SDR.20. Shri Taraporewala also relied upon the Tribunal's decision in the Golden Paper Udyog case-1983 E.L.T. 1123. In this case, the Tribunal was interpreting Item No. 17(2) of the CET (as it stood at the material time) which did not, in specific words, mention biturnenised kraft paper in the entry. The situation in the present case is not analogous.

The combined operation of Explanations II and III to Item 15A, CET has the effect, as we have already seen, of bringing silicone emulsions within the ambit of Item No. 15A(1) CET.²¹ There is no basis for HICO's contention that since the conversion of silicone oil into emulsion does not involve chemical synthesis, Explanation II serves to keep the emulsion out of the mischief of the tariff entry. This is a mis-reading of the Explanation. It only explains "condensation, polycondensation, polyaddition, polymerisation and co-polymerisation products". Silicone oils come within the mischief of this Explanation. And silicone oils in emulsion form come within the mischief of Explanation III. The two together bring silicone emulsions within the mischief of Item 15A(1) CET.²² HICO's argument that the expression "other materials" in Item 15A(CET) will take in only goods such as hardened proteins etc. is not relevant for the present purpose because silicones are, in terms, specified in sub-item 15A(1).

23. The learned counsel for HICO relied upon the Supreme Court decision in the *Tungabhadra Industries Ltd.* case (AIR 1961 S.C. 412) in support of the contention that the process involved in the present case did not amount to "manufacture". In the *Tungabhadra* case raw groundnut oil was converted into refined oil by removing the non-oily content of the raw oil, rendering the oil content 100 per cent. For this reason, the Court held that the refined oil continues to be groundnut oil within the meaning of the relevant Sales Tax Rules notwithstanding that such oil did not possess the characteristic colour, or taste, odour etc. of the raw groundnut oil. The relevant rules talked of "groundnut oil" without any qualifying words. The Court held that the term would take in not only raw but also refined groundnut oil. This decision, in our respectful opinion, is not relevant or applicable to the facts of the present case where we have to interpret a complicated tariff entry employing scientific or technical terminology and the entry has built-in explanations, as we have already seen. The two laws are not similar nor are the two situations. Hence, the *Tungabhadra* case ratio is of no help to HICO.²⁴ Likewise, we consider that there is no substance in HICO's contention that even if it is held that silicone emulsions fall under Item 15A(1) CET they cannot be charged to duty again under the said Item.

This contention presumably stems from the concept that there can be no double taxation on the same goods. Silicone emulsion is different from silicone oil and duty levied on the former does not amount to charging duty on silicone oil by double taxation. It may be multi-stage taxation-a regular feature of the Central Excise taxation system (see 1983 E.C.R. 552D) which also provides for devices to mitigate the rigours of such levies as, for example, Rule 56A more dure which, incidentally, is applicable to goods falling under Item 15A, CET.25. It has to be noted that, apart from the aforesaid consideration he silicone oil. in the present case, has not suffered excise duty. It was to additional duty of Customs under Section 3 of the Customs Tariff Act The quantum of such levy is of course, equal to the excise duty on the like indigenous product. That, however, does not make it an excise duty for excise duty is a duty on goods manufactured or produced in the country whereas duty of Customs, including additional duty of Customs, is a duty on goods imported into the country. There is thus, in any event, no double taxation (or multi-stage taxation) in the present case in the sense that the taring material has paid excise duty under a certain tariff entry and he Shed product, falling under the same tariff entry is charged to excise duty again.

26. Only one point remains to be considered and that is the alternation submission.of Shri Taraporewalla that if it was held that silicone emulsion was an excisable product it ought to be classified under Item 68 CET We have already considered that silicone emulsion is dutiable under Item 15A(1) CET. Hence this contention falls to the ground 15A(1) 27. Having regard to the foregoing discussions, the appeal fails and is hereby rejected.

28. Our Order No. 195-C of 1983, dated 14-7-1983 on the stay Application of HICO is herby vacated.

29. This is a problem, that has engaged my mind several times in the past : That is, whether a product that has been taxed because of its identity with one of the descriptions under an item or a sub-item that embraces more than one description or product, should have to pay that tax again when it becomes identifiable, because of some changes it underwent, with another description of the same Item or sub-item. [The duty. it must be stated here, is one for all the descriptions or

products, all of which are clearly interrelated or are similar, if not chemically, then at least in nature, use, class or general nomenclature]. It has always been my belief that once an article, product, substance, has been identified with a description of an item of the tariff and has paid the duty leviable under that item it cannot be taxed again with the same duty under that same item or sub-item [The grouping of descriptions by which this discussion will proceed is the smallest or most subordinate grouping, if there are such smaller groupings of sub-groupings, and the duty is to be understood as the duty on the sub-grouping" if there is one. Where there is no sub-grouping but only main group under the item, the duty is the duty for that main group or item]. This is because the group is taxable with a duty : That duty has been paid and, therefore, that liability has been discharged and so extinguished. A liability of this kind having been discharged, it cannot be revived again ; Nor does the law allow it. When the law wants to impose duties for each change of product description, it imposes different liabilities. This is done by giving different duties to different product description under different items and/or sub-items. Thus, articles made of artificial resins are grouped under another duty item from the raw resins and, therefore, even if the resin had paid duty, the finished article can, under the law, be required to pay duty again under its new product description, the duty being no longer the same one but a different one. A copper pipe can be charged to duty even if the blank from which it is made has paid duty because as a pipe it is placed in a different grouping (or sub-grouping) from copper blanks.

30. The subject here is the silicone oil which was charged countervailing duty under 15A-CET. This oil was treated with emulsifier and the Central Excise said that it should pay duty again as an emulsified oil because Item 15A-CET covers emulsions also. At first sight, there is a case for saying that since the first levy was a customs duty, there is no second levy as the Central Excise assessment is a levy in the Central Excise Act. But we cannot overlook the fact that once a product has paid the appropriate countervailing customs duty, there is no case for charging Central Excise duty under any item, except when the Central Excise office says that an excisable product has been made of or from that (imported) product.

31. The Tariff Item 15A covers resins in many forms and includes emulsions. This description or explanation only tells the World that whatever the form in which the resins are presented for assessment, if it is one of the several specified, it is liable. Resins can be removed, used, sold etc. in any of several forms, hence the tariff explanation. But this does not mean that if, say, a duty paid moulding powder is subjected to kneading or other treatment to reduce it to a paste (one of the enumerated forms) the processor will have to pay duty again. Or that when duty paid resin lumps are ground to powder (also a specified form) the grinder will have to pay duty again. I hold that the duty having been paid, that same duty need not be paid again. [But it would be a different proposition if the law itemised powder, lumps, paste etc. as each attracting duties of their own, individually, or even in groups of, say, two or three.] 32. The emulsification of the silicone oil changes nothing. An emulsion is a dispersed state of a substance in another substance, usually of a liquid in another liquid. The object is to achieve a uniformity that is as close to a solution as possible, as such a state brings about ease of application, consistency of results in the end-product, prevention of settling out and itself has obvious advantages. That is why emulsifiers are sometimes added, as and when longer storage becomes necessary. But it will not be a correct interpretation to say that emulsification of an existing resin liquid or oil is equivalent to production of a new resin in emulsion assessable, again, under ISA. Whether the levy was a countervailing duty or Central Excise duty, the principle is the same, and when we are dealing with imported goods and these goods have borne countervailing duty equal to duty of a Central Excise tariff item, it cannot again be made to pay Central Excise duty under the same Central Excise item.

33. For more reasons than one therefore, the levy of Central Excise duty on the silicone oil after emulsification was not correct. It is not, as has been argued by the appellant, that there has been no manufacture : It is because though "emulsions" are excisable under Item 15A, they are one form of several, in which the resins can be levied but not a form which, if given to a duly paid resin that was not previously an emulsion, must attract fresh 15A duty to itself. The enumeration of the different forms is only to set at rest any doubt that may arise when resins that normally are presented in one form are presented in another, or to prevent people from saying that their resin is usually a solid and when it is in emulsion or paste

etc. it does not attract duty. It attracts duty in any form but not in every one of the specified forms it may be reduced to or brought to after first payment of duty. Whether the first levy was a countervailing customs duty or a levy under Central Excise, this reasoning holds true : the goods cannot be made to pay the same duty a second time.

34. At the hearing the appellants were not able to tell the bench whether the product imported was a lubricating mixture containing silicone greases or oil. Such lubricating preparations are sometimes referred to as silicone oils, though this is not, strictly speaking, accurate.

35. The action of the lower authorities was not correct and so. their orders are set aside and the appeal is allowed!

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