

Revisiting “Schumacker”: Source, Residence and Citizenship in the ECJ Case Law on Direct Taxation

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Abstract

ECJ case law on direct taxation has been very important in the development of the international dimension of direct tax systems of EU Member States. Through the application of the non-discrimination principle and the requirements of the fundamental freedoms, some of the basic structures of the implementation of income tax systems have been revised to accommodate to the needs of the single market. However, the requirements of the EU single market are fundamentally incompatible with the assumptions that have served to build the criteria under which modern income tax systems have been developed (worldwide income taxation, residence vs source, unlimited vs limited tax liability, credit vs exemption, tax treaties).

The Court tried to reconcile the requirements of both systems (EU Law and income taxation) in the Schumacker case, which can be considered a landmark modern case, despite the fact that it simply implicitly introduced some of the latest developments of ECJ case law on direct taxation. Since then, the Court has been moving to a broader consideration of the fundamental freedoms and then reconsidered them under the need of a certain reequilibrium between the rights derived from EU Law and the recognition of the financial interest of EU Member States.

By doing so, the ECJ used the interpretation of EU Law to refine some of the basic trends of cross border income taxation, both referred to limited and unlimited tax liability requirements and to the measures devoted to alleviate the negative aspects derived from the interaction of the exercise of the tax jurisdiction by two or more EU Member States simultaneously.

EU Law was then seen as a mechanism to improve the deficiencies raised by the corresponding and subsequent rules and mechanisms formulated by international tax law to deal with problems generated to and by cross-border income situations.

But more recently the EU law seems to be more in favour of other criteria that serve to balance the position between EU Law rights granted to citizens and companies and financial interests of Member States, mainly with the recognition of the

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'balanced allocation of taxing rights' and 'avoidance of double tax advantages', or the need to prevent 'risks of tax avoidance' as justification criteria à la Schumacker. This landmark case reaffirms then its prominence again in the verification of which evolution has suffered the ECJ case law on direct taxation and whether this evolution may determine the predictability of new case law based on sound and consistent principles or on allocation criteria of taxing rights. The present article analyzes to what extent the ECJ has tried to evolved such a line of reasoning through the formulation of the symmetry criteria.

Based on the findings and considering the relevance of the outcome of the case in the Schumacker decision, the article proposes to analyze to which extent EU Law has to stick to traditional objectives and outcomes of international tax law – alleviation of international double taxation, allocation of taxing rights, prevention of cross-border tax evasion – when dealing with fundamental freedom's requirements or, on the contrary, has to look for criteria more consistent with the integration required by a single market and a further budgetary and fiscal consolidated situation. In that sense, the consideration of the requirements of the ability to pay principle will be analyzed to see whether they can serve to promote it as an EU Law principle that guides the formulation of consistent and coherent ECJ case law on direct tax matters.

1. Schumacker: A Landmark Modern Case Revisited

16 years after the formulation of the *Schumacker* case (hereinafter, *Schumacker*), and 25 years after the first case on direct taxation, the *Avoir Fiscal* case, it is possible to recognize the relevance and important implications of these landmark cases. *Schumacker*, together with *Avoir Fiscal*, represented an important step towards the recognition of the role of citizens and companies before domestic income tax provisions, and despite international tax treaty provisions and standards, in the consolidation of the single market. Despite unanimity requirements for further fiscal integration and lack of harmonization measures in direct taxation, these cases opened up the possibility to confront direct tax matters – taxing rules and provisions, schemes, structures and assumptions – with the requirements of EU Law, initially from the fundamental (economic) freedoms, but after its consolidation in the foundational treaties and the enlargement of the EU Law objectives, with the rights and principles recognized to EU citizens.

The *Schumacker* case also showed the existence of potential points of conflict between domestic and international income tax systems of the EU Member States (with their complexity) and the neutrality requirements of the single market, encouraging both taxpayers and the Commission to search for potential incompatibilities that were expanding since.

However, *Schumacker* is also a *modern* case, to the extent that the Court confronted the income tax rule in question with EU law requirements in a very balanced position, trying to accommodate and integrate EU law requirements, on the one hand, and direct requirements and tax treaty considerations on the other, generating

at the time of the decision serious criticism from both sides, both EU law specialists and international tax specialists².

Nevertheless, as a result of the case, *Schumacker* showed the possibility to confront many other domestic and international income tax provisions with EU Law, and encouraged the process of search for incompatibilities, in a process of expansion of international taxation rules unprecedented and unforeseeable at that time, in which the balanced position offered by *Schumacker* was not necessarily respected or was even changed. New ways of confronting tax rules with supranational principles appeared, which were more expansive than the approach followed in the traditional non-discrimination clauses in tax treaties³. The compatibility analysis allowed the verification of new cases of discrimination, indirect discrimination, inbound but also outbound restrictions, and even *au rebours* discrimination situations, with the sole exception of pure domestic situations and disparities. At the time, little acceptance of justification arguments and reasons of public interest presented by the Member States generated a great consolidation of the fundamental freedoms in front of income tax systems of the Member States.

1.1 Time to revisit *Schumacker*: Reasons

However, few reasons suggest a revisitation of the *equilibrium* proposed in *Schumacker* and a reconsideration of the results achieved in the evolution of the ECJ case law on direct tax matters.

In the first place, the lack of recognition of the effects of the implementation measures proposed by the Member States to regain consistency between EU law requirements and income tax provisions as a result of the exercise of the full competence of the Member States in direct tax matters. Putting all the efforts of the consolidation of the single market in the ECJ case law in front of the Member States competence in direct tax matters and their ability to amend direct tax law accordingly, is a very weak tool to achieve the consolidated results. As the evolution of the thin capitalization rules in some EU countries and the integration systems between individual income tax law and corporate income tax law show⁴,

² Wattel, “Home neutrality in an Internal Market”, *European Taxation* (1996), p. 159-162; Avery Jones, “Carry on Discriminating”, *European Taxation* (1996), p. 46-49; Knobbe-Keuk, “ECJ bans discrimination against non-residents”, *Intertax* (1995), p. 234-239; Vanistendael, “The consequences of Schumacker and Wielockx: two steps forward in the tax procession of Echternach”, *CMLR* 33/1996, p. 255.296; Rädler, “An analysis of the European Court of Justice’s Schumacker decision”, *Tax Notes International* (1995), p. 1683-1689; Keelling, “Some observations on Finanzamt Köln-Altstadt v. Roland Schumacker”, *EC Tax Journal* (1995-96), p. 135-144; Farmer, “EC Law and National Rules on Direct Taxation: a Phoney War?”, *EC Tax Review* (1998), p. 13-29.

³ Mason, “Tax Discrimination and Capital Neutrality”, *2 World Tax Journal* (2010); Vanistendael, “Taxation and Non-Discrimination. A Reconsideration of Withholding Taxes in the OECD”, *2 World Tax Journal* 2010; Ault, /Sasseville, “Taxation and Non-Discrimination: A Reconsideration”, *2 World Tax Journal* (2010).

⁴ After the decisions of the EUCJ on the subject, such as Lankhorst-Hohorst, Thin-Cap, or Verkooijen, Manninen and Meilicke.

the impact of EU case law on the evolution of income tax systems in Europe resulted in more generalized restrictions, instead of abolishing them thanks to the consolidation of the ECJ case law on requirements of fundamental freedoms over income tax laws.

In the second place, the ECJ case law on direct tax matters suffered a great criticism by the specialized tax literature for having an apparent lack of clear tax policy objectives⁵. The *quo vadis* argument shows the lack of clear identification of single market objectives that enable, at the same time, the development of sound income tax policies both at EU and at a (coordinated) national level, thus making difficult for the ECJ to elaborate sound and consistent parameters of interpretative guidance.

In the third place, the ECJ case law is slowly turning down its previous jurisprudence with new lines of argumentation: on the one hand, with greater consideration for ‘EU law entitlement’ analysis, in order to clarify implications of EU Law on third-country relationships and delimitation of scope of the free movement of capital in front of other fundamental freedoms; on the other, stressing the comparability analysis, as in *Schumacker*, and verifying a restriction ‘compatibility analysis’, like in *X-Holding*; finally, with the acceptance of *new* justification criteria, such as the ‘need to maintain a balanced allocation of taxing rights’, the ‘avoidance of double tax advantages’, or the need to prevent risks ‘of tax avoidance’, with a greater – but insufficient – role given to the proportionality principle, to the extent that it recognizes limits to EU Law interpretation, because ‘less restrictive measures require harmonisation’ (*X Holding*, p. 58). This evolution of the ECJ case law on direct tax matters reopens the discussion of the ‘where do we go’ argument, as the ECJ is showing clear limitations to the other day ‘judicial activism’ in front of a more ‘self-restraint position’.

Last but not least, the ECJ is showing a progressive recognition, acceptance and assumption of the international tax treaty framework and standards derived from the common practice of Member States as it appears framed in the soft-law of the OECD Model Convention, despite the initial recognition of the primacy of EU Law over tax treaties being signed by Member States. This may place a significant consolidation and further acceptance of the role of tax treaties signed by EU Member States along with the requirements of the single market, despite the fact that some consequences derived from its straight application could be considered, in principle, incompatible with the EU Law requirements, thus raising important effects and considerations.

From these reasons, the objectives of the present article are to underline the lessons that modern ECJ case law can learn from *Schumacker* in order to achieve greater reconciliation between EU Law and international treaty standards, with a reconsideration of the ‘discriminatory effects’ provided by international tax standards and treaties, reinforcing the criteria of comparability-lack of comparability

⁵ Graetz/Warren, “Income Tax Discrimination and the Political and Economic Integration of Europe”, 115 *Yale Law Journal* (2006), p. 1186 et seq; Hellerstein/Kofler/Mason, “Constitutional Constraints on Corporate Tax Integration”, 62 *Tax Law Review*(2008), p. 1-66.

between resident and non-resident taxpayers, and reconsidering the necessary re-balance of the justification criteria, with a proposal of the recognition of the ability to pay as an EU law principle to play a role as a mechanism to obtain consistency of the ECJ case law both from a constitutional and from a tax policy dimensions.

1.2 Schumacker: Reconciliation between EU Law and International Taxation Schemes

Schumacker can be considered a landmark modern case for many reasons. First of all, it is a landmark case because *Schumacker* tries to reconcile EU law, on the one hand, and international tax treaty standards, on the other. As has been pointed out by the tax literature, the requirements of EU Law fundamental freedoms may hardly be compatible with the systems developed internationally for taxing cross border income, and thus, there is a need to conform compatibility paths. By doing so, the ECJ clearly reconsiders discrimination issues in international tax matters but also according to EU Law standards.

In this reconciliation, the *Schumacker* case considers that, as a matter of principle, resident and non-resident individual taxpayers are not considered to be comparable from an EU Law point of view but, considering the circumstances, it may be the other way round. This happens, according to the *Schumacker* doctrine, when the non-resident taxpayer obtains the major part of his taxable income from an activity performed in the State of employment, *with the result* that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances.

The verification of the comparability analysis avoids to mention explicitly the necessary elements of proportionality, but they are obviously taken into consideration, as in this case there is a ‘lack of objective difference between the situations of the two situations such as to justify a different treatment in that regard’. In that sense, *Schumacker* confirmed the parameters being used in the previous case *Avoir fiscal* case (p. 20): ‘there are no objective differences between their positions as regard to the detailed rules and conditions regarding to that taxation which could justify different treatment’. In doing so, the ECJ recognizes that resident and non-resident taxpayers may not necessarily be in comparable situations and, generally speaking they will not be, but the outcome may be different comparing the legal and factual framework that applies to both terms of the comparison from an EU Law perspective in some specific circumstances.

That may explain why the ECJ considers, in *X Holding*, that permanent establishments and non-resident subsidiaries are not comparable from the head office or the parent State perspective, considering that one is subject to taxation and the other is not. As we will analyze, the Court reshapes again the EU Law requirements so as to enable the integration of EU Law requirements and the parameters governing income tax systems. In *X Holding* what was at stake was the worse treatment of foreign subsidiaries compared to foreign permanent establishments; despite the fact that, generally speaking, what normally receives worse treatment in the state of res-

idence of the head office/parent (primary establishment) is a secondary establishment (permanent establishment) located abroad, as compared to a secondary establishment (foreign controlled subsidiary), since the first is taxable in the country of residence of the parent/head office company at the time the profits are generated or the income is attributed to the permanent establishment, while the profits of the subsidiary are not attributed to the parent at that time, but at the moment of effective distribution of profits to the parent – deferral rule –, unless a direct and immediate attribution applies i.e., CFC rules.

At the time of the *Schumacker* case, the need to find balanced allocation criteria was not explicitly taken into account by the Court of Justice but, obviously, as can be seen, the allocation criteria was considered in behind the considerations made by the Court, both at the comparability level and in considering the justification criteria.

That is why, some cases later we may find that the statements made in *Schumacker* and in *Avoir Fiscal* are ‘reconsidered’ regarding the comparability between permanent establishments and resident companies. They are comparable as far as the State in question has jurisdiction to tax the profits being attributed. Therefore, the ECJ does not consider or reconsider why the attribution of income is made one way or the other, simply accepting the mechanisms being used by Member States to attribute income to the different institutions – being these a resident taxpayer, a permanent establishment or a non-resident company –.

The same conclusion is valid regarding the justification criteria. Despite the fact that after *Schumacker* the acceptance of justification criteria was clearly reduced and significantly denied, since the *Marks & Spencer* case it is possible to verify a truly reconsideration of the justification criteria making specific the considerations that could be implicitly found in the *Schumacker* case. As we will consider in the present analysis, this reconsideration gives floor to incorporate the ability to pay principle as an EU principle, which will allow a proper and sometimes different understanding of the case law and its possible evolution.

2. Point of Departure

International taxation is based on certain assumptions that, in some cases, the ECJ has demonstrated not to produce a consistent result. These general assumptions are most of the times reflected in specific rules of the tax systems of States, and from that are taken as a basis for the explanation, formulation and development of treaty models and international standards that affect the taxation of cross-border income and the development of rules distributing the tax jurisdiction among States that enter into a tax treaty or allocating cross-border income among different jurisdictions and taxpayers.

Among these basic assumptions the relevant ones are:

Income taxation systems are based on the distinction between limited and unlimited tax liability. Unlimited or comprehensive tax liability is – normally – based on residence of the taxpayer and gives rise to a worldwide income taxation, taxing all the income obtained by – or personally attributable to – the taxpayer on

a *net* basis⁶. Limited tax liability on the other hand is based on territorial taxation of the income limited to the income source-based in the territory of the State making the claim. The basis for taxation is generally the gross income and not the profit.

Since the basis for taxation is different in both cases, international tax rules consider that resident and non-resident taxpayers are not generally comparable and, therefore, different tax rules may apply to both groups of taxpayers without raising illegitimacy concerns. Despite the fact that some limited source State neutrality is accepted on international grounds, as the limited non-discrimination clauses on article 24 OECD MC show,⁷ the result of its consideration is neither directly nor indirectly influenced by the action of the residence state. In front of that, not only source/inbound situations have been analyzed by the ECJ but also residence state and outbound situations are included and protected by EU Law.

Moreover, treaty entitlement is limited to resident taxpayers preventing non-resident taxpayers – although established in that State – to benefit from the treaty network of the State of establishment. The lack of consideration of certain secondary establishments as persons for the purposes of the treaty – permanent establishments – prevent the enlargement of treaty entitlement and the application of different tax distributive rules contained in the tax treaty network of the state of location of the PE to triangular cases involving permanent establishments.

Finally, as international tax rules take a static approach, movers are not properly reflected and may suffer unfair tax situations. From that perspective, the possible effects of exit taxes or the consequences of the loss of the resident status are neither specifically dealt nor considered by tax treaties – or broadly speaking by Treaty Models –, on the assumption that residence State are granted the *residual* tax jurisdiction to tax any income arising to the resident persons covered by the treaty⁸.

Some of these assumptions have been necessarily reconsidered by the action of the ECJ case law, starting from *Schumacker*.

The distinction between limited and unlimited taxation is a relative and sometimes wrong one. *Limited taxation* may be *de facto* unlimited taxation of all the income attributable to a certain taxpayer. That was specifically shown by the facts in *Schumacker*, leading to a reconsideration of the *comparability status* between resident and non-resident taxpayers. On the other hand, most of the cases unlimited taxation of a certain taxpayer is equivalent to the taxation of the source-based income

⁶ As a general lecture on the topic see Vogel, “Worldwide vs source taxation of income: a review and re-evaluation of arguments”, *Intertax* (1988), p. 216-229; Rohatgi, *Basic International Taxation*, 2nd Ed. (2007), London.

⁷ Mason, “Tax Discrimination and Capital Neutrality”, 2 *World Tax Journal* (2010); Vanistendael, “Taxation and Non-Discrimination. A Reconsideration of Withholding Taxes in the OECD”, 2 *World Tax Journal* (2010); Ault/Sasseville, “Taxation and Non-Discrimination: A Reconsideration”, 2 *World Tax Journal* (2010); Cockfield/Arnold, “What Can Trade Teach Tax? Examining Reform Options for Art. 24 (Non-Discrimination) of the OECD Model”, 2 *World Tax Journal* (2010).

⁸ Wheeler, “The Missing Keystone of Income Tax Treaties”, 2 *World Tax Journal* (2011), p. 247-367.

of such taxpayer in the territory of the State claiming its tax jurisdiction. This is the case when the resident taxpayer does not receive any cross-border income or when no cross-border income becomes directly attributable to the taxpayer as a result of the domestic tax rules of the State of residence. Therefore, in these cases the lack of comparability between the groups of taxpayers (subject to limited and unlimited taxation) has been reconsidered, especially as the ECJ has done, in contradictory situations where the situations were comparable from an objective point of view (tax being required and personal scope and extent of the tax similar).

On the other hand, ECJ demonstrates that tax treaties provide for insufficient measures and mechanisms to curbe unfair taxation. Most of the time, tax treaties limit their scope to the implementation of measures devoted to alleviate international (juridical) double taxation. But neither all international double taxation situations are dealt with in a tax treaty, nor the application of a tax treaty implies that the international double taxation is finally eliminated or at least alleviated as, on the one hand, non-discrimination clauses have a limited scope and, on the other, implementation of tax treaty measures largely depends on the procedures and mechanisms unilaterally prescribed and, finally, as dispute resolution mechanisms are not in place or are neither mandatory nor effective.

The ECJ has shown that some of the assumptions which have been used to build the actual scaffolding of the international taxation violate the requirements of the single market and their corresponding fundamental freedoms, thus enlarging the possibilities of analysis of fair taxation from a supranational perspective. However, the ECJ has developed this process with a clear recognition of some basis of taxation and some inherent jurisdictional parameters which are also recognized in the Treaty of the Functioning of the European Union.

Among these parameters, the most relevant are:

- a. States can tax differently resident and non-resident taxpayers as a consequence of the principle of territoriality. To such an extent, that article 65.1 TFEU recognizes that as a general principle Member States retain the right to apply provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place where their capital is invested. Therefore, generally speaking, from an income tax perspective, resident and non-resident taxpayers are not in the same situation and domestic and foreign source income can be differently treated.
- b. The ECJ recognizes the right of Member States to determine and select the allocation criteria for exercising their tax jurisdiction and also the right to distribute these taxing rights through tax treaties, regardless of the freedom at stake (*Lidl* – freedom of establishment –, *Van Hilten* – free movement of capital –, *Gilly* – free movement of workers –). Moreover, Member States may take into account the OECD MC criteria in such selection and distribution, which is considered to be reasonable (*Lidl*, p. 22).
- c. In cases of more burdensome taxation derived from parallel exercise of tax jurisdiction – situations not dealt with by the ECJ – it is impossible to verify and determine which state breaks EU Law. The ECJ still limits the compatibility

analysis to a single state *verification*, despite the fact that in some cases it opts to use an overall *approach* instead of a single state approach to confirm or refuse comparability or justification criteria.

- d. Member States may freely select and define the criteria that precise the meaning of residence and nationality, the selection of the source of the income and whether States may extend their tax jurisdiction on foreign income (*Cadbury*).
- e. Despite the fact that the determination of the jurisdiction criteria and its distribution among States belongs to the competences of the Member States, the exercise of such jurisdiction and corresponding distribution must be made in a consistent way with EU Law requirements. Despite the fact that it is sometimes hard to distinguish the situations that belong to the proper determination/distribution and the situations that are reflect of the exercise of such determination and distribution, the ECJ is progressively recognizing the validity of international standards, specially those that derive from the consensus achieved through the development of the OECD Model Tax Convention and its commentaries.
- f. Moreover, it is important to consider that the ECJ establishes an interpretation of the EU Law meaning taking into account concepts and criteria – territoriality, residence, source, exemption method, credit method,... – that, initially, have no *EU Law meaning*. On the contrary, the ECJ assumes the meaning that is given by the domestic or treaty tax law that results applicable in the specific case object of discussion.

Before the traditional assumptions and rules on international tax law, EU Law standards provide for the establishment of home State neutrality conditions, both in terms of *market equality* (non-discrimination) and *market access* (interdiction of unjustified restrictions), which, after the generalization of the citizenship rights has become a *jurisdiction access*. *Shumacker*, and to a certain extent also the subsequent case law, tries to reach an equilibrium between EU law requirements and international standards on which direct tax systems of EU Member States are based.

In front of that position, a natural conclusion would be to consider that EU Law, as far as the fundamental freedom requirements are concerned, is more in line with a system that precludes a territorial tax neutrality, which for some tax literature it may be more in line with the so-called territorial tax approach to income taxation⁹.

In our opinion, however, it remains difficult to accept such an approach, based on the following considerations: first, on a far from clear concept of territoriality; second, on an inconsistent and diverse consideration of *territoriality* by European income tax systems; third, on a different role to be assumed by territoriality from a EU law justification point of view, especially in terms of symmetry, which turns difficult to predict the evolution of the jurisprudence and its proper understanding;

⁹ Wattel, “Corporate tax jurisdiction in the EU with respect to the branches and subsidiaries; dislocation distinguished from discrimination and disparity; a plea for territoriality”, EC Tax Review (2003), p. 194-202.

finally, because worldwide income taxation has been accepted and expressly declared to be in conformity with EU Law.

One of the main concerns is to consider to which extent the assumptions and basic standards and functions associated to residence, source and nationality in international taxation can be maintained or must be reconsidered in the light of the jurisprudence of the ECJ in direct tax matters.

For this purpose, it is necessary to analyze how source taxing rights have been encompassed and accommodated by the ECJ and, afterwards, how residence State jurisdictional rights have been modulated by EU Law requirements and to which extent international assumptions and rules applicable and required to that State can be maintained under EU Law requirements.

3. Territoriality: Tax Meanings and EU law implications

A first previous remark refers to the meaning of territoriality and the way it is used by the ECJ. It has been declared that single market requirements suggest an income tax approach more in line with the requirements of territoriality¹⁰ and, therefore, income tax systems of the EU countries should accommodate to that parameter. In fact, the territoriality of the tax systems was recognized as a justified criterion to maintain different set of rules between resident and non-resident taxpayers under single market requirements. In *Futura*, the ECJ stated that a system which is in conformity with the fiscal principle of territoriality cannot be regarded as entailing any open or covert discrimination prohibited by the Treaty (p. 22). In doing so, the ECJ considers as such a system that, as regards resident taxpayer has not limited the basis of assessment to income tax and it is not being limited to their Luxembourg (territorial) activities (p. 20); while as regards non-resident taxpayers, the basis of assessment is made only from profits and losses arising from their Luxembourg activities (p. 21).

From that perspective, the ECJ is progressively incorporating a new understanding of the territoriality criteria and their requirements, more in line with an implicit recognition of the symmetry requirement for the income tax systems.

The diverse use of the territoriality concept and parameter in income taxation derives from a polysemous acceptance of the term territoriality as regards income tax matters. Generally speaking, international tax literature refers to territoriality with the following different understandings:

- a. The limited geographical area of application and enforcement of tax rules.
- b. The use of the territory as a criterion for source income delimitation, being similar to the exercise of limited jurisdiction for income tax purposes (limited tax liability).
- c. The use of the territorial implications on income taxes to justify different treatment between resident and non-resident taxpayers, as a trend of the general

¹⁰ Kemmeren, “CCCTB and Exemption Method for PEs and Major Shareholdings” in Lang/Pistone/Schuch/Staringer, “Common Consolidated Corporate Tax Base”, Wien (2008), p. 653-704; Kemmeren, “Principle of Origin in Tax Conventions, A Rethinking of Models”, Tilburg (2001).



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