Tax Notes

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DEATH, TAXES, AND FHSAS

— *Peter Tomlinson, B.A., LL.B., Wolters Kluwer Canada*

A first home savings account ("FHSA") is a registered plan that allows prospective first-time home buyers to save for their first home tax-free (up to the specified limits). You can open an FHSA starting April 1, 2023, through an FHSA issuer, such as a bank, credit union, or a trust or insurance company. FHSAs can be used to invest in stocks, ETFs, options, and more, just like a TFSA or RRSP. Annual contributions can be deducted from your income for the year of the contribution or a future year, similar to RRSP contributions. Investments grow tax-free within the account and qualifying withdrawals are free from tax.

FHSA participation room in the year you open your first FHSA is $8,000. The lifetime FHSA limit is $40,000. The annual limit is $8,000, but you can carry forward up to $8,000 of your contribution room to a subsequent tax year. You can continue to contribute until you've reached the lifetime limit, or 15 years after the account's initial opening.

While it's still early in the FHSA's tenure, complications may arise where a holder passes away before withdrawing the funds. This raises several issues, not least of which is what happens to the deposits and the tax implications of the holder's death.

Contributions, Transfers, and Withdrawals

Any contributions, withdrawals, or transfers made to/from the deceased holder's FHSA *before* the death of the holder are treated normally. However, as you would expect, no contributions or transfers can be made to the deceased holder's FHSA after their date of death. Distributions from the deceased holder's FHSA can only be made to (or on behalf of) designated beneficiaries, or if no beneficiaries have been designated, to the estate of the deceased holder.

Generally, the deceased is not required to include any amounts in their income in respect of the fair market value ("FMV") of all the property held in their FHSA at the time of death, but under certain circumstances, there may be an inclusion in the income of the estate.

Furthermore, if the deceased holder had an excess FHSA amount at the time of their death, special rules may apply. If the survivor becomes the FHSA successor holder of the deceased individual, and the latter had an "excess FHSA amount" (i.e., overcontributions to their FHSA) immediately before death, section 207.022 of the *Income Tax Act* (Canada) may treat the survivor as having made an FHSA contribution at the start of the month following the death. The amount of the deemed contribution is the amount by which the excess FHSA amount exceeds the fair market value of all properties held in the deceased individual's FHSAs of which the survivor was not the successor holder. A portion of the individual's excess FHSA amount continues to be held in a tax-advantaged FHSA and, to the extent the survivor does not have sufficient FHSA contribution room to absorb the amount, the survivor will be subject to the 1% per month tax imposed under section 207.021.

Tax Consequences to Beneficiaries

After the death of the holder, the possible tax consequences will vary depending on the type of beneficiary. The type of beneficiary will depend on designations made in the deceased holder's FHSA contract, designations made in the deceased holder's will, if there is one, and provincial or territorial succession legislation.

The types of beneficiaries[1] of an FHSA who can be designated in the FHSA contract or the deceased's will are:

- a survivor who has been designated as the successor holder and is a qualifying individual;
- a survivor who has been designated as the successor holder but is not a qualifying individual;
- a survivor who has been designated as a beneficiary but not as the successor holder; or
- beneficiaries other than survivors.

A qualifying individual is a person:

- at least 18 years of age;
- not more than 71 years of age on December 31 of the year in question;
- a resident of Canada; and
- a first-time home buyer.

Another important consideration is the exempt period. The exempt period begins when the holder dies and ends at the end of the first calendar year that begins after the holder's death, or when the trust ceases to exist, if earlier. E.g., if a holder dies on April 1, 2023, the exempt period could continue until December 31, 2024.

[1] Only the holder of an FHSA can change a prior beneficiary designation for the FHSA, and to do that they need to contact their FHSA issuer.

The FHSA will lose its status as an FHSA at the end of the exempt period. The tax treatment of any income earned in the deceased holder's account after the exempt period depends on the type of FHSA it was: depositary,[2] trusteed,[3] or insured FHSA.[4] You will not be permitted to make a tax-deferred transfer after the exempt period ends. If there is property remaining in the FHSA at the end of the exempt period, you must include the FMV of any property in the FHSA you are entitled to as income on your income tax return for that year.

Survivors

If you are a spouse or common-law partner of the deceased holder immediately before their death, you are a "survivor" of the deceased holder. If you are a survivor, you may have been designated as the successor holder or a beneficiary in the FHSA contract or in the deceased holder's will.

If you are a **survivor who was designated as the successor holder of the FHSA and you are a qualifying individual at the time of the holder's death**, you will become the new holder of the FHSA immediately after the death of the holder.

As the successor holder of the FHSA, you will be subject to the normal FHSA rules. You will be considered to have entered into a new qualifying arrangement in respect of the FHSA unless the full balance of the FHSA is:

- directly transferred on a tax-deferred basis to your RRSPs or RRIFs by the end of the exempt period; or
- received by you as a taxable distribution by the end of the exempt period.

If you are considered to have entered into a new qualifying arrangement in respect of the FHSA, you will be considered to have opened the FHSA on the date you became the successor holder. If you choose to directly transfer the property to your RRSPs or RRIFs, you must fill out Form RC722, *Transfer from an FHSA to an FHSA, RRSP or RRIF After the Death of the Holder*, and give it to your RRSP issuer or RRIF carrier.

Any amounts you receive as a taxable distribution from the FHSA will have to be included as income for the year received. These amounts will be subject to income tax withholding and can be claimed on your income tax and benefit return as a credit towards any tax owing for the year received.

If you are a **survivor who was designated as the successor holder of the FHSA but you are not a qualifying individual** at the time of the FHSA holder's death, you cannot become the new holder of the FHSA. You will be required to withdraw or transfer all of the property of the FHSA by the end of the exempt period by either:

- a direct transfer on a tax-deferred basis to your RRSPs or RRIFs; or
- a taxable distribution.

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[2] Any income earned in the deceased holder's depositary account after the exempt period and paid to the designated beneficiaries should be reported in accordance with normal taxation rules.

[3] Any income earned in the deceased holder's trust after the exempt period and paid to the designated beneficiaries will be reported by the trust. Only the part of the income earned in this period that is not taxable to the trust is reported by the beneficiary. A beneficiary will not have to pay tax on any part of the amount they received, to the extent that the funds can reasonably be regarded as having been included in the trust's income.

[4] Any income earned in the deceased holder's insured product after the exempt period and paid to the designated beneficiaries is reported as income.

If you are a **survivor who has been designated as a beneficiary but not the successor holder** in the deceased holder's FHSA contract or in the deceased holder's will, you cannot become the new holder of the FHSA. During the exempt period, you can do the following with the portion of the property of the FHSA you are entitled to:

- make a direct transfer on a tax-deferred basis to your FHSA, RRSP, or RRIF; or
- receive a taxable distribution.

Where there are **no designated beneficiaries** in the deceased holder's FHSA contract or in the deceased's will, the amounts from the FHSA will be distributed to the deceased holder's estate and treated as income of the estate. However, if you have a beneficial interest in the deceased holder's estate, you and the legal representative of the estate may choose to do the following:

- where amounts were transferred from the estate to your FHSAs, RRSPs, or RRIFs, you and the legal representative can jointly designate that the transfer is deemed to be made from the FHSA (not the estate) so that the transfer will be tax-deferred with no immediate tax consequences (if the normal transfer conditions are met); or
- where amounts were paid from the estate directly to you, you and the legal representative can jointly designate that the payment is deemed to be made from the FHSA (not the estate) so that the payment will be a taxable distribution to you (not the estate).[5]

To complete the joint designation, you and the legal representative must fill out Form RC724, *Joint Designation for a Deemed Transfer or Distribution from an FHSA after the Death of the Holder*. In order to make a joint designation, the property from the FHSA must be distributed to the estate before the end of the exempt period.

Beneficiaries Other Than Survivors

The holder of an FHSA can designate any person or qualified donee (for example, a registered charity) as a beneficiary of their FHSA. If you are a beneficiary (other than a survivor) of a deceased holder's FHSA, any amounts you receive from the FHSA during the exempt period must be included as income for the year received. A beneficiary (other than a survivor) is not eligible for any tax-deferred transfers.

No Designated Beneficiaries

Where there are no designated beneficiaries in the FHSA contract or in the deceased holder's will, the amounts from the FHSA will be paid to the estate. These amounts will be deemed included in income by the deceased holder's estate.

Closing FHSAs After Death

After the death of the FHSA holder, all FHSAs should be closed by the end of the exempt period. Contact the FHSA issuer to close the account. Also, the issuer should generally be able to assist with the process of transferring the account to any beneficiaries. If the account is not closed by the end of the exempt period, the account will cease to be an FHSA. If there is property remaining at the end of the exempt period, each beneficiary of the FHSA must include in their income the proportion of the FMV of all the remaining property in the FHSA to which that beneficiary is entitled.

[5] This deemed payment must be included as income on your income tax return for the year received.

CURRENT ITEMS OF INTEREST

Draft Regulations Released

On September 2, the Government of Canada released for comment a draft of the *Regulations Respecting the Application of the Online News Act, the Duty to Notify and the Request for Exemptions*. The regulations are drafted pursuant to Bill C-18, *An Act respecting online communications platforms that make news content available to persons in Canada*, which received Royal Assent on June 22, 2023.The comment period is open until October 2, 2023, 11:59 pm EST. Visit www.gazette.gc.ca/rp-pr/p1/2023/2023-09-02/html/reg1-eng.html to review the draft regulations.

Publications: Interest Rates, Payroll Deduction Formulas, and Mandatory Disclosure Rules

On September 7, the CRA announced the prescribed annual interest rates that will apply to any amounts owed to the CRA and to any amounts owed by the CRA to individuals and corporations. These rates will be in effect from October 1, 2023, to December 31, 2023. To see the rates, visit: www.canada.ca/en/revenue-agency/services/tax/prescribed-interest-rates/2023-q4.html.

On September 5, Appendix 2 of the *T4127-JUL Payroll Deductions Formulas — 118th Edition — Effective July 1*, 2023 was updated in order to provide additional information to users ahead of the implementation of the second additional CPP contributions in January 2024. To access the most recent version, see www.canada.ca/en/revenue-agency/services/forms-publications/payroll/t4127-payroll-deductions-formulas/t4127-jul.html.

On September 6, *Mandatory disclosure rules — Guidance* was updated. Visit www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/mandatory-disclosure-rules-overview/guidance-document.html to review the most recent document.

Interest and Penalty Relief for Areas Impacted by BC and NWT Wildfires

On August 31, the CRA announced there will be no penalties or interest for businesses located in certain postal codes[1] affected by wildfires in British Columbia and the Northwest Territories for late filing of all T2 and GST/HST returns, instalments, or balances that would normally have been due between August 15, 2023, and October 16, 2023, provided these returns and payments are submitted by October 16, 2023.

Other individuals, businesses, and first responders may be unable to meet their tax obligations as usual due to circumstances beyond their control. In these cases, they can submit a request for relief of penalties and interest charged to their account. For more information, go to canada.ca/penalty-interest-relief.

Taxpayers who expect to receive CRA benefits and credit cheques by mail may experience a delay. Anyone who is unable to access their benefit or credit cheques and requires immediate assistance can contact the CRA at 1-800-959-8281. If you have a debt and require assistance during this time, collection officers are available to assist by contacting the Debt Management Call Centre at 1-888-863-8657. In the event your books and records have been destroyed as a result of an adverse event, call the CRA at 1-800-959-8281 for individual enquiries, 1-800-959-5525 for business enquiries, or 1-800-267-2384 for registered charities enquiries.

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[1] For a list of eligible postal codes, visit: www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/postal-codes-communities-wildfires.html.

Guidance on the Common Reporting Standard — Part XIX of the *Income Tax Act*

The following revisions to the guidance document were published on August 23, 2023:

- a financial account held by a reportable person who has died is not considered a financial account in the year the financial institution is informed of the death (Chapter 5); and
- treatment of new First Home Savings Account ("FHSA") (Chapter 5).

To review the changes and the guide, visit www.canada.ca/en/revenue-agency/services/tax/international-non-residents/enhanced-financial-account-information-reporting/reporting-sharing-financial-account-information-other-jurisdictions/guidance-on-common-reporting-standard-part-income-tax-act.html.

Action To Support Drought-Stricken Western Producers

On August 21, the Minister of Agriculture and Agri-Food announced an initial list of designated regions in British Columbia, Alberta, Saskatchewan, and Manitoba where Livestock Tax Deferral ("LTD") has been authorized for 2023 due to extreme weather conditions. LTD allows livestock producers who are forced to sell all or part of their breeding herd due to drought or excess moisture to defer a portion of their income from sales until the following tax year. The list of regions is published here: agriculture.canada.ca/en/agricultural-production/weather/livestock-tax-deferral-provision/2023-livestock-tax-deferral-prescribed-regions.

The criteria for identifying regions for LTD is forage yields of less than 50% of the long-term average caused by drought or excess moisture. Eligible regions are identified based on weather, climate, and production data, in consultation with industry and provinces. To defer income, the breeding herd must have been reduced by at least 15%.

As a preliminary list of prescribed drought and flood regions is usually completed in the early fall, designation earlier in the year helps producers make herd management decisions. The Government of Canada continues to monitor conditions across the country and will add other regions throughout the year if they meet the criteria.

Government of Canada Privacy Breach Class Action

You may have received notice of a privacy breach between March 1, 2020, and December 31, 2020, with respect to your personal or financial information while using a Government of Canada Online Account. A class action lawsuit was initiated by Todd Sweet against the Canada Revenue Agency ("CRA") and the Government of Canada (collectively, the "Defendant") alleging that the Defendant was negligent in safeguarding the confidential information of Canadians, leading to widespread privacy breaches. The Federal Court of Canada has certified the class action lawsuit against the Defendant.

If you used a Government of Canada Online Account, such as CRA's My Account, a "My Service Canada" account, or various other online government accounts in the past, this certification may affect your legal rights. For additional information, see www.newswire.ca/news-releases/notice-of-certification-government-of-canada-privacy-breach-class-action-846362802.html.

FOCUS ON CURRENT CASES

This is a regular feature examining recent cases of special interest, coordinated by Ron Dueck of Dentons Canada LLP. The contributors to this feature are from Dentons Canada LLP, Montréal, Toronto, Calgary, Edmonton, and Vancouver.

Azzopardi v. The King, 2023 DTC 1043 (Tax Court Of Canada) — Partners Are Bound By Actions (Or Inactions) Of "Designated Partner" Of Partnership

This case dealt with the question of whether the taxpayer, who was not the designated partner of a partnership, was entitled to have a say in how the CRA redetermined the losses of the limited partnership in which he was a partner.

Background

The appellant held a 0.114503% interest in the Grosvenor Services 2001 Limited Partnership (the "Partnership"), which was a film tax shelter. The Partnership computed its losses for the 2001 fiscal period to be $255,788,405, of which the appellant's share of that loss was $292,859. The appellant claimed his share of partnership losses on his 2001 income tax return and the Minister of National Revenue (the "Minister") originally assessed him as filed in May of 2002.

By notice dated March 30, 2005, the Minister determined the Partnership's loss for its 2001 fiscal period as $134,913,329 (the "Initial Determination"). Pursuant to subsection 152(1.4) of the *Income Tax Act* (the "ITA"), the Initial Determination was binding on all members of the Partnership. Further, subsection 152(1.6) binds all partners of a partnership regardless of whether any particular partner receives notice of the determination.

By notice of objection served on June 24, 2005, the designated partner of the Partnership, 1444932 Ontario Limited ("1444932"), served a notice of objection to the Initial Determination on behalf of the Partnership.

On November 15, 2011, the CRA and the Partnership settled the Partnership's objection by entering into Minutes of Settlement. By notice dated April 2, 2012, the Minister redetermined the Partnership's loss for the 2001 fiscal period as $194,876,572 (the "Redetermination") as set out in the Minutes of Settlement.

Paragraph 152(1.7)(*a*) of the ITA made the Redetermination binding on every member of the Partnership. The Minister had one year from the date on which the Redetermination became final and binding to reassess each party to give effect to the Redetermination.

By notice dated November 19, 2012, the Minister reassessed the appellant's 2001 taxation year to reflect his proportionate share of the Partnership's loss as adjusted by the Redetermination. Accordingly, his loss from the Partnership was reduced by $69,746 from $292,859 to $223,113.

Firstly, the appellant argued that the Minister should not have accepted 1444932 as his representative as there was no evidence that he granted a power of attorney or any other authorization that appointed 1444932 as his representative. Furthermore, there were no documents that appointed 1444932 as his agent nor was there a Form RC59 authorizing the CRA to deal with 1444932.

Secondly, the appellant also argued that the Minister should not have taken 10 years to reassess the appellant.

Thirdly, the appellant argued that the Minister had a duty under the *Taxpayer Bill of Rights* to warn the Appellant that the Partnership was a questionable tax scheme.

Issues and Decision

The main issue was whether the designated partner of the Partnership, 1444932, had the authority to bind the appellant. Justice Spiro found that since 1444932 was the designated partner of the Partnership in an information return made under section 229 of the *Income Tax Regulations* for the Partnership's 2001 fiscal period, 1444932 did not have to obtain a power of attorney or any other authorization to bind the appellant.

This case can be contrasted with the Federal Court of Appeal's decision in *Tedesco v. Canada*, 2019 DTC 5117 (FCA) ("*Tedesco*"), where taxpayers who were partners in a limited partnership were permitted to challenge their individual reassessments after the limited partnership had discontinued its appeal. However, it is important to note that in *Tedesco* it was the limited partnership that had discontinued its appeal, and the limited partnership was not a partner of the limited partnership. If the designated partner had withdrawn its appeal in *Tedesco*, the outcome of the case likely would have been different.

Furthermore, it did not matter that the appellant was not reassessed until 10 years after the initial assessment as the Minister was within the year to give effect to the Redetermination as required by paragraph 152(1.7)(*b*) of the ITA.

Lastly, the Tax Court held that there was no suggestion by the Crown or the appellant that the Partnership was a questionable tax scheme and the Tax Court of Canada had no ability to enforce the *Taxpayer Bill of Rights*.

Conclusion

This case demonstrates that the designated partner of a partnership has the ability to bind its partners, even when it has no power of attorney or other authorization other than being a designated partner. Partnerships with designated partners should take care to do their best to inform partners of any actions taken by designated partners so partners are not surprised by their actions. Furthermore, partners of partnerships with designated partners should be aware that the actions of designated partners may bind them without their knowledge.

— *Gergely Hegedus*

Canafric Inc. v. The King, 2023 DTC 1069 (Tax Court Of Canada) — Costs Associated With Developing Pie Recipes Qualified As SR&ED Expenditures

Background

Canafric Inc. ("Canafric") operates a food manufacturing business specialized in developing frozen pies. Over the course of four years, Canafric claimed scientific research and experimental development ("SR&ED") expenditures and income tax credits ("ITCs") in respect of a number of projects they undertook to develop new or advance pre-existing recipes in response to demands from their market.

The Minister reassessed Canafric, disallowing its claimed SR&ED expenditures and the corresponding ITCs.

Issue and Decision

The Tax Court of Canada (the "Court") had to decide whether the work Canafric had undertaken to develop their products constitutes SR&ED within the meaning of subsection 248(1) of the *Income Tax Act*.

The Court relied on the following five criteria previously provided by the Federal Court of Appeal for determining whether a particular activity constitutes SR&ED:

(1) Was there a technological risk or uncertainty, which could not be removed by routine engineering or standard procedures?

(2) Did the person claiming to be doing SR&ED formulate hypotheses specifically aimed at reducing or eliminating that technological uncertainty?

(3) Did the procedure adopted accord with the total discipline of the scientific method including the formulation, testing, and modification of hypotheses?

(4) Did the process result in a technological advancement?

(5) Was a detailed record of the hypotheses tested and results kept as the work progressed?

Canafric attempted to develop recipes in order to meet market demands for their products (i.e., reducing salt and fat, increasing shelf life, maintaining product integrity during freeze/thaw process). Based on challenges to these developments, such as the lack of information available on how to achieve their goals, the Court found that the projects undertaken by Canafric posed technological uncertainty, which could not be resolved by routine engineering or standard procedures. Although Canafric was not successful in all of its developments, the elimination of those recipes which did not fulfill the requirements still constituted technological advancement. Canafric's process of responding to market demands and testing their developments was found by the Court to involve the formulation of hypotheses to reduce or eliminate technological uncertainty and the adopting of procedures that accorded with principles of the scientific method, and was not merely a "trial and error" approach.

Conclusion

In light of the above, the evidence provided by Canafric satisfied the Court that all five criteria for an SR&ED activity were met, and its claims for SR&ED expenditures and ITCs were allowed.

— *Keaton Buchberger*

RECENT CASES

Motion for Reconsideration of Jeopardy Order Allowed

The Respondent sought reconsideration of a jeopardy order granted on March 8, 2022, in response to an *ex parte* application brought by the Minister. The order authorizes the Minister to take collection actions pursuant to paragraphs 225.1(1)(*a*) to (*g*) of the *Income Tax Act* with respect to the income tax debt of the Respondent, a sum of $7,663,570.71 for the tax years 2012, 2014, 2015, 2017, 2018, and 2019, including accrued interest.

The motion was allowed. The Minister must prove there are reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of a taxpayer would be jeopardized by a delay in its collection. The Minister must meet this onus on a balance of probabilities and is not required to show beyond all reasonable doubt that the time allowed to the taxpayer would jeopardize the Minister's debt. The central issue was whether the Minister fulfilled the initial obligation for full and frank disclosure. The Court found that the Minister did not fulfill its duty to make full and frank disclosure, in that the Minister omitted relevant information relating to three aspects of the March 2022 *ex parte* application, including factors relating to the bank accounts of the Respondent's spouse, his "unorthodox tax behaviour" and business expenses, and his lifestyle. By failing to disclose the deposits to and from the Respondent's spouse's account in the *ex parte* application, the Minister omitted information that was relevant for the Court's determination to grant the order. The Minister had a duty to be more transparent about how they arrived at their assessments, including the fact that they did not account for any business expenses whatsoever. The Minister also omitted crucial evidence relating to the "lifestyle" of the Respondent that would have gone some way to levelling the playing field in the extraordinary context of the jeopardy order application. A lack of full and frank disclosure is a stand-alone basis to set aside the jeopardy order, and the Court therefore declined to consider the other issues raised by the Respondent in this motion. The motion for reconsideration was allowed and the Order set aside. Costs in the amount of $17,179.60 were awarded to the Respondent, payable by the Minister.

MNR v. Ben-Menashe

2023 DTC 5066

Appeal From Assessment Beyond Normal Reassessment Period and Penalties Dismissed

In reassessing the Appellant for the 2006, 2007, 2008, and 2009 taxation years, the Minister added amounts to his income as shareholder appropriations totaling $512,211 and imposed gross negligence penalties. The Appellant, originally from Afghanistan, worked as a butcher in Toronto and later became the sole or part shareholder in three corporations. The Minister performed a bank deposit analysis and found discrepancies in the Appellant's returns. The Appellant did not challenge the correctness of the amounts included in his income for the taxation years in issue; he challenged the correctness of the Minister's assessment beyond the normal reassessment period as well as the correctness of the assessment of gross negligence penalties for the 2006, 2007, 2008, and 2009 taxation years.

The appeal was dismissed. The income reported by the Appellant for the 2006, 2007, 2008, and 2009 taxation years was incorrect. That is sufficient to establish that he made misrepresentations in filing his returns or in supplying any information under the *Income Tax Act* as provided by subparagraph 152(4)(*a*)(i). Furthermore, he made no inquiries at any time to confirm the appropriateness of the amounts being reported by his accountant, despite numerous meetings. These misrepresentations are attributable to neglect or carelessness, which is sufficient to support a finding that the Minister has met the burden to reassess the Appellant after the normal reassessment period for the relevant taxation years. In addressing the second issue in this appeal, the courts have consistently held that "gross negligence" arises when a taxpayer's conduct is found to fall markedly below what would be expected of a reasonable person. The Appellant's conduct represents a marked departure from what would be expected of a reasonable person in his circumstances. The Appellant cannot simply throw his hands up and say that he blindly relied on his accountant. The Minister sufficiently established that the Appellant made false statements in his returns for the 2006, 2007, 2008, and 2009 taxation years and did so under circumstances amounting to gross negligence.

Yadgar v. The King

2023 DTC 1065

TAX NOTES

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