Federal Court of Appeal | Cour d'appel fédérale

Date: 20220706

Docket: A-302-20

Citation: 2022 FCA 125

CORAM: **PELLETIER J.A.**
WEBB J.A.
RIVOALEN J.A.

BETWEEN:

ST. BENEDICT CATHOLIC SECONDARY SCHOOL TRUST

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard by online video conference hosted by the registry on March 23, 2022.

Judgment delivered at Ottawa, Ontario, on July 6, 2022.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: PELLETIER J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The issue in this appeal is whether a taxpayer, having claimed certain amounts as capital cost allowance (CCA) in its tax returns for a number of years (which claims resulted in a non-capital loss in each taxation year), can later (after the periods of time for carrying forward such losses have expired) change the amounts so claimed in those years.

[2] The Tax Court of Canada found that the taxpayer could not change the amount of CCA that had been claimed in the earlier years (2020 TCC 109).

[3] For the reasons that follow, I would dismiss this appeal.

I. Background

[4] The St. Benedict Catholic Secondary School Trust (the Trust) had a leasehold interest in the St. Benedict Catholic Secondary School and surrounding land (a Class 13 property). The Trust claimed CCA in filing its tax returns for its 1997 to 2003 taxation years. For each of these years, the amount claimed as CCA either resulted in or increased the amount of the non-capital loss realized by the Trust.

[5] In computing its taxable income for its 2014, 2015 and 2016 taxation years, the Trust included a claim for the non-capital losses incurred from 1997 to 2003. The Trust was reassessed to deny the claim for these losses on the basis that the time period within which the losses could be carried forward had expired.

[6] In filing its notice of objection to these reassessments, the Trust no longer claimed that it could carry these non-capital losses forward to 2014, 2015 and 2016. Rather, the Trust claimed that it had realized a terminal loss in 2017 when it disposed of its leasehold interest in the property for $1. While the Minister of National Revenue (the Minister) agrees that a terminal loss was incurred in 2017, it is the amount of this terminal loss that is in dispute. The terminal

loss realized in 2017 could be carried back to the taxation years in issue (2014, 2015 and 2016) under paragraph 111(1)(*a*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act).

[7] The Trust is claiming that it has a terminal loss based on its determination that the amount that should be used as its undepreciated capital cost (UCC) of the property of the particular class was $3,491,900. However, the Minister claims that the UCC of the property of that class for the purposes of determining the terminal loss was only $679,683.

[8] The difference between the two positions is that the Minister calculated the UCC on the basis that the CCA that was claimed by the Trust in filing its tax returns for 1997 to 2003 reduced the UCC of the property of that class. The Trust, on the other hand, now seeks to change the amount of CCA that it claimed for its 1997 to 2003 taxation years. The Trust seeks to reduce the amount of CCA that it claimed for these taxation years on the basis that the revised amounts, as submitted, would still result in no tax being payable for each of these years.

[9] It appears from the Statement of Agreed Facts that was submitted by the parties to the Tax Court that the Trust was attempting to change the amount claimed as CCA for its taxation years 1997 to 2003 and also for its taxation year 2010. The Tax Court Judge, however, focused only on the proposed adjustments for 1997 to 2003 (paragraphs 16 and 17 of his reasons). There are no separate submissions by either party to this appeal on the proposed adjustment for 2010. Therefore, these reasons will also focus on the proposed adjustments for 1997 to 2003.

II. Decision of the Tax Court

[10] The Tax Court Judge focused on the definitions of UCC and total depreciation allowed as provided in subsection 13(21) of the Act. When the Trust claimed CCA in filing its tax returns for 1997 to 2003, the amount claimed reduced the UCC of the property of the applicable class (Class 13). When it sold the Class 13 property in 2017, the UCC was the amount as determined by the Minister.

[11] The Tax Court Judge distinguished the cases upon which the Trust relied as support for its argument that it could subsequently change the amount of CCA claimed for 1997 to 2003. The Tax Court Judge found that, in his view, Parliament did not intend that the Trust could now unilaterally change the amounts that it had claimed as a discretionary deduction in computing its income for 1997 to 2003. The Tax Court Judge noted, in paragraph 17 of his reasons: "[w]hat the taxpayer proposes appears to me to be unilateral retroactive tax planning".

[12] As a result, the Tax Court Judge dismissed the Trust's appeal.

III. Issue and Standard of Review

[13] The issue in this appeal is whether, for the purposes of determining the terminal loss realized in 2017, the UCC is:

(a) the amount determined by deducting the amounts claimed by the Trust as CCA when it filed its tax returns for 1997 to 2003; or

(b) the amount now proposed by the Trust as the revised amount of CCA for its 1997 to 2003 taxation years.

[14] Since this is a question of law, the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33).

IV. Relevant Statutory Provisions

[15] A terminal loss is deductible under subsection 20(16) of the Act:

(16) Notwithstanding paragraphs 18(1)(*a*), 18(1)(*b*) and 18(1)(*h*), where at the end of a taxation year,	(16) Malgré les alinéas 18(1)*a*), *b*) et *h*), lorsque, à la fin d'une année d'imposition :
(*a*) the total of all amounts used to determine A to D.1 in the definition undepreciated capital cost in subsection 13(21) in respect of a taxpayer's depreciable property of a particular class exceeds the total of all amounts used to determine E to K in that definition in respect of that property, and	*a*) d'une part, le total des montants entrant dans le calcul des éléments A à D.1 de la formule figurant à la définition de fraction non amortie du coût en capital au paragraphe 13(21) excède le total des montants entrant dans le calcul des éléments E à K de la même formule, au titre des biens amortissables d'une catégorie prescrite d'un contribuable;
(*b*) the taxpayer no longer owns any property of that class,	*b*) d'autre part, le contribuable ne possède plus de biens de cette catégorie,
in computing the taxpayer's income for the year	dans le calcul de son revenu pour l'année :
(*c*) there shall be deducted the amount of the excess determined under paragraph 20(16)(*a*), and	*c*) il doit déduire l'excédent déterminé en vertu de l'alinéa *a*);

(*d*) no amount shall be deducted for the year under paragraph 20(1)(*a*) in respect of property of that class.	*d*) il ne peut déduire aucun montant pour l'année en vertu de l'alinéa (1)*a*) à l'égard des biens de cette catégorie.

[16] UCC is defined in subsection 13(21) of the Act as a formula ((A + B + C + D + D.1) - (E + E.1 + F + G + H + I + J + K)). To determine the UCC in this matter, it is only necessary to refer to three components – A, E and F. There is no dispute concerning the amount to be used for A or F. The only component of this formula that is in dispute in this appeal is the amount determined for E. The relevant parts of the definition of UCC are as follows:

undepreciated capital cost to a taxpayer of depreciable property of a prescribed class as of any time means the amount determined by the formula	***fraction non amortie du coût en capital*** S'agissant de la fraction non amortie du coût en capital existant à un moment donné pour un contribuable, relativement à des biens amortissables d'une catégorie prescrite, le montant calculé selon la formule suivante :
(A + B + C + D + D.1) - (E + E.1 + F + G + H + I + J + K)	(A + B + C + D + D.1) - (E + E.1 + F + G + H + I + J + K)
Where	où :
…	[…]
A is the total of all amounts each of which is the capital cost to the taxpayer of a depreciable property of the class acquired before that time,	**A** représente le total des sommes dont chacune est le coût en capital que le contribuable a supporté pour chaque bien amortissable de cette catégorie acquis avant ce moment;
…	[…]
E is the total depreciation allowed to the taxpayer for property of the class before that time…	**E** l'amortissement total accordé au contribuable relativement aux biens de cette catégorie avant ce moment…

F is the total of all amounts each of which is an amount in respect of a disposition before that time of property … of the taxpayer of the class, and is the lesser of	**F** le total des sommes dont chacune est, pour une disposition, avant ce moment, de biens … de cette catégorie dont le contribuable est propriétaire, la moins élevée des sommes suivantes :
(*a*) the proceeds of disposition of the property minus any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition, and	*a*) le produit de disposition des biens moins les dépenses engagées ou effectuées en vue de la disposition;
(*b*) the capital cost to the taxpayer of the property,	*b*) le coût en capital que ce contribuable a supporté pour les biens;

[17] The total depreciation allowed to a taxpayer is defined in subsection 13(21) of the Act.

The relevant portion of this definition is as follows:

total depreciation allowed to a taxpayer before any time for property of a prescribed class means the total of all amounts each of which is an amount deducted by the taxpayer under paragraph 20(1)(*a*) in respect of property of that class … in computing the taxpayer's income for taxation years ending before that time;	***amortissement total*** S'agissant de l'amortissement total accordé à un contribuable avant un moment donné pour les biens d'une catégorie prescrite, le total des montants dont chacun représente une déduction pour amortissement prise par le contribuable par application de l'alinéa 20(1)*a*) pour les biens de cette catégorie … dans le calcul du revenu du contribuable pour les années d'imposition se terminant avant ce moment.

[18] Paragraph 20(1)(*a*) of the Act provides a deduction for CCA in computing income:

20 (1) Notwithstanding paragraphs 18(1)(*a*), 18(1)(*b*) and 18(1)(*h*), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto	20 (1) Malgré les alinéas 18(1)*a*), *b*) et *h*), sont déductibles dans le calcul du revenu tiré par un contribuable d'une entreprise ou d'un bien pour une année d'imposition celles des sommes suivantes qui se rapportent entièrement à cette source de revenus ou la partie des sommes suivantes qu'il est raisonnable de considérer comme s'y rapportant :
(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;	*a*) la partie du coût en capital des biens supporté par le contribuable ou le montant au titre de ce coût ainsi supporté que le règlement autorise;

[19] Regulation 1100(1) of the *Income Tax Regulations*, C.R.C., c. 945, (the Regulations) provides for a deduction for CCA for Class 13 property. During the relevant taxation years this provision read, in part, as follows:

1100 (1) For the purposes of paragraphs 8(1)(*j*) and (*p*) and 20(1)(*a*) of the Act, the following deductions are allowed in computing a taxpayer's income for each taxation year:	1100 (1) Pour l'application des alinéas 8(1)*j*) et *p*) et de l'alinéa 20(1)*a*) de la Loi, un contribuable peut déduire dans le calcul de son revenu pour chaque année d'imposition des montants correspondant :
…	[…]
Class 13	Catégorie 13
(*b*) such amount as the taxpayer may claim in respect of the capital cost to the taxpayer of property of Class 13 in Schedule II, not exceeding	*b*) au montant qu'il peut réclamer au titre du coût en capital, pour lui, d'un bien de la catégorie 13 de l'annexe II, sans dépasser :
(i) where the capital cost of the property, other than property described in subparagraph	(i) dans le cas où le coût en capital du bien, sauf un bien visé aux sous-alinéas (2)*a*)(v), (vi) ou (vii),

(2)(*a*)(v), (vi) or (vii), was incurred in the taxation year and after November 12, 1981, 50 per cent of the amount for the year calculated in accordance with Schedule III, and	a été engagé au cours de l'année d'imposition et après le 12 novembre 1981, 50 pour cent du montant calculé pour l'année en conformité avec l'annexe III,
(ii) in any other case, the amount for the year calculated in accordance with Schedule III,	(ii) dans les autres cas, le montant calculé pour l'année en conformité avec l'annexe III,
and, for the purposes of this paragraph and Schedule III, the capital cost to a taxpayer of a property shall be deemed to have been incurred at the time at which the property became available for use by the taxpayer;	pour l'application du présent alinéa et de l'annexe III, le coût en capital d'un bien pour un contribuable est réputé avoir été engagé au moment où le bien est devenu prêt à être mis en service par le contribuable;

[20] Schedule III to the Regulations imposes certain limitations on the amount that may be deducted as CCA for Class 13 property.

V. Analysis

[21] A terminal loss arises under subsection 20(16) of the Act when a taxpayer no longer has any assets of a particular class at the end of a taxation year and

(a) the total of the amounts that would increase the UCC of the assets of that class at that time (A + B + C + D + D.1)

is greater than

(b) the total of the amounts that would be deducted in determining the UCC of the assets of that class at that time (E + E.1 + F + G + H + I + J + K).

[22] In this particular case, the Trust realized a terminal loss in 2017 because the Trust no longer had any assets in a particular class (Class 13) and the amounts added in determining the UCC of the assets of that class (A to D.1) exceeded the total of the amounts deducted in determining the UCC of the assets of that class (E to K). The only dispute in this appeal is what is the amount to be used for E in the definition of UCC and, therefore, the amount of the terminal loss.

[23] The Crown submits that the amount to be used for E in this definition is the total of the amounts claimed by the Trust as CCA when it filed its tax returns for 1997 to 2003.

[24] The Trust submits that the amount to be used for E in this definition is the total of the amounts now proposed by the Trust as revised amounts of CCA for its 1997 to 2003 taxation years.

[25] This issue will be resolved by interpreting the relevant provisions of the Act based on a textual, contextual and purposive analysis (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at para. 10).

A. *Text*

[26] The definition of UCC in subsection 13(21) of the Act provides that E is “the total depreciation allowed to the taxpayer for property of the class before that time”. The total depreciation allowed to the taxpayer, as defined in the Act, is the total “amount deducted by the

taxpayer under paragraph 20(1)(*a*) in respect of property of that class … in computing the taxpayer's income for taxation years ending before that time".

[27] The text of the relevant provisions is clear. The amount to be used for E in the formula to determine UCC of the Class 13 property of the Trust is the total amount deducted under paragraph 20(1)(*a*) of the Act in respect of the Class 13 property in computing the Trust's income, which will include the amounts deducted for its 1997 to 2003 taxation years.

[28] The Trust submits that it has the discretion to choose what amount of CCA it may claim in any particular taxation year. This is confirmed by the wording of paragraph 20(1)(*a*) of the Act (which provides that "there may be deducted") and paragraph 1100(1)(*b*) of the Regulations (which provides that the amount allowed as a deduction is "such amount as the taxpayer may claim in respect of the capital cost to the taxpayer of property of Class 13 in Schedule II, not exceeding" certain amounts).

[29] There is no dispute that the Trust had the discretion to choose what amounts it was claiming as CCA in computing its income for 1997 to 2003, so long as each amount chosen did not exceed the maximum amount that could have been claimed in the relevant year.

[30] However, having chosen an amount for a particular taxation year, the Trust deducted that amount under paragraph 20(1)(*a*) in computing its income for that taxation year. Once the amounts for each year were chosen and the Trust filed its tax returns, which included the

amounts so deducted, those amounts became the total depreciation allowed for those years, as defined in subsection 13(21) of the Act.

B. *Context and Purpose*

[31] The Trust, in paragraphs 32 to 35 of its memorandum, submits that the language used in component E of the definition of UCC and in the definition of total depreciation allowed must be read in context. In the Trust's view, these provisions can accommodate changes made to amounts claimed as CCA and, if the amount claimed as CCA is changed, the revised amounts will then become the total depreciation allowed. However, this argument is predicated on the assumption that the taxpayer has the right under the Act to amend a tax return that had been previously filed to change the amount of CCA that was claimed for a particular year.

[32] The Trust was unable to point to any provision of the Act that would allow the Trust, in 2017, to amend its returns for 1997 to 2003. As noted by this Court in *Armstrong v. Canada (Attorney General)*, 2006 FCA 119, at paragraph 8, an amended income tax return that is submitted to the Minister after a tax return has been assessed for a particular taxation year is simply a request that the Minister reassess the particular taxpayer for that year. The Trust referred to Information Circular 84-1, which sets out the administrative policy of the Minister with respect to when an amendment to CCA claimed in a prior year would be accepted by the Minister. However, this administrative practice is not binding on this Court, nor can it amend the Act.

[33] In support of its argument that the Trust had the right under the Act to change the amount of CCA claimed for the taxation years 1997 to 2003, in paragraph 39 of its memorandum the Trust states: “This Court recognized the distinction between retroactive tax planning and situations in which a taxpayer seeks to amend its tax return for the purpose of taking a deduction to which it has some entitlement”. The authority cited for this proposition is *Canada v. Nassau Walnut Investments Inc.* (1996), [1997] 2 F.C. 279, [1998] 1 C.T.C. 33 (C.A.) (*Nassau Walnut*).

[34] In *Nassau Walnut*, intercorporate dividends were paid by Westminster Transport Ltd. (Westminster) to Nassau Walnut Investments Inc. (Nassau Walnut) as a result of Westminster repurchasing its shares held by Nassau Walnut. In filing its tax return, Nassau Walnut reported the intercorporate dividends as tax-free intercorporate dividends. Nassau Walnut did not make the designation contemplated, at that time, by paragraph 55(5)(*f*) of the Act to treat a portion of each intercorporate dividend as a separate dividend to reflect the amount of safe income of the payor.

[35] Although the Minister reassessed Nassau Walnut on the basis that the entire amount of each dividend received by Nassau Walnut was taxable as a capital gain, the parties subsequently agreed on a reduced amount based on the fair market value of the shares. Following the receipt of the notice of reassessment, Nassau Walnut attempted to late-file the designation under paragraph 55(5)(*f*) of the Act to treat a portion of each intercorporate dividend as a separate tax-free intercorporate dividend.

[36] In *Nassau Walnut*, this Court drew a distinction between an election and a designation. In paragraph 30, this Court noted that "paragraph 55(5)(*f*) is not an election provision".

[37] In distinguishing between a designation and an election this Court stated:

> [31] In contradistinction to a designation, and as a general proposition, when an election is to be made the taxpayer must make a decision to forego one option in favour of another on the basis of an assessment of tax risks which may or may not materialize depending on uncertain events. In addition to this qualitative difference, the Act itself implicitly recognizes that a designation and an election are not one and the same. …

[38] The choice made by the Trust in deciding what amount of CCA to claim in each year is akin to an election as described above by this Court. The Trust, in filing its tax returns for 1997 to 2003, made decisions concerning the amount of CCA that it would claim in computing its income for these years. The Trust could have chosen to claim the amount of CCA that would have reduced its income to nil. But instead, the Trust chose to forego that option in favour of claiming CCA for each year that resulted in non-capital losses. The tax risk was that the losses could expire before they could be used by the Trust. If the Trust would have had sufficient income within the relevant time period to use the non-capital losses, then it would have benefited from carrying these non-capital losses forward to the year of profitability. In effect, the Trust would have been entitled to use several years of CCA to reduce its income, rather than only the CCA for the year in which it had a profit.

[39] This Court, in *Nassau Walnut*, noted that taxpayers have generally been unsuccessful in changing an election absent a specific provision of the Act permitting a taxpayer to change an election. This Court noted:

> [35] In my view, there is little doubt that the restrictive approach adopted by the courts with respect to the Act's election provisions is prompted by the possibility of taxpayers engaging in retroactive tax planning. …

[40] In my view, the comments in *Nassau Walnut* with respect to an election, and the inability of a taxpayer to change an election absent a specific provision in the Act permitting such a change, are applicable in this case. The Trust, in this case, is seeking to change the amount that it elected to claim as CCA in computing its income for 1997 to 2003.

[41] The Trust, in paragraph 53 of its memorandum, cited *Clibetre Exploration Ltd. v. Canada (Minister of National Revenue)*, 2003 FCA 16 (*Clibetre*) as "authority for adjusting discretionary deductions in nil years". In *Clibetre*, the taxpayer claimed non-capital losses arising from its mining operations for a number of years. In a subsequent year, when it was profitable, it carried forward as many of the non-capital losses as it could. However, there were a number of years for which the losses had expired. The company then attempted to reclassify expenses that it had claimed in determining the non-capital losses for the years that had expired as Canadian exploration expenses.

[42] This Court determined that there was no need to reassess the years for which there were losses in order to reclassify the amounts incurred in those years as Canadian exploration expenses. The Court found that the amounts in issue should properly have been classified as

Canadian exploration expenses and that the amount of the cumulative Canadian exploration expenses of the company was to be computed and applied as proposed by the taxpayer.

[43] Assuming that Clibetre Exploration Ltd. was a principal-business corporation (as defined in subsection 66(15) of the Act), then, as provided in subsection 66.1(2) of the Act, the amount that it could have deducted for Canadian exploration expenses would have been limited to the lesser of its cumulative Canadian exploration expenses and its income. As a result, Clibetre Exploration Ltd. would not have been able to deduct Canadian exploration expenses to the extent that such deduction would have resulted in or increased its non-capital loss. By properly characterizing the expenses as Canadian exploration expenses, the non-capital losses as previously claimed by Clibetre Exploration Ltd. were not properly determined (to the extent that such losses were attributable to the deduction for Canadian exploration expenses) and the Canadian exploration expenses (which were not deductible under the Act in the earlier years) were added to the cumulative Canadian exploration expenses. Therefore, any Canadian exploration expenses that were not deductible in the earlier years were deductible in the year in which the company realized a profit.

[44] In this appeal, there is no dispute that the amounts claimed as CCA in computing the income of the Trust for its 1997 to 2003 taxation years were properly claimed as CCA in each of these years. There is no allegation that the Trust could not have claimed the amounts that it did as CCA.

[45] The Trust also submitted that since it incurred non-capital losses in each year from 1997 to 2003, no notices of assessment were issued for these years. As noted by the Supreme Court of Canada in *Okalta Oils Ltd. v. Minister of National Revenue*, [1955] S.C.R. 824, [1955] C.T.C. 271, there is no assessment if no tax is owing for a particular taxation year. However, the amount deducted under E in the formula to determine UCC is not dependent on the Trust being assessed for a particular taxation year, but rather on the Trust deducting an amount as CCA in computing its income for that year.

[46] The Trust referred to *Canada v. Interior Savings Credit Union*, 2007 FCA 151, in which this Court confirmed, in paragraph 30, that "in the absence of a binding loss determination by the Minister pursuant to subsection 152(1.1) of the Act, it is open to a taxpayer to challenge the Minister's calculation of a loss for a particular year in an another year in which the loss impacts on the taxes assessed".

[47] However, in this appeal, the Trust is not attempting to challenge the Minister's determination of the losses claimed in any of its taxation years from 1997 to 2003 on the basis that the losses were not properly determined by the Minister. Rather, the Trust is attempting to challenge its own determination of its non-capital losses for 1997 to 2003 by changing the amount of CCA claimed as a deduction in computing its income for those years. This challenge to the amounts claimed in 1997 to 2003 is not based on any limitation in the Act that would have prevented the Trust from claiming the amount of CCA that it did. It is not based on any allegation that the Trust could not have claimed the amounts that it claimed as CCA in those years.

[48] The Trust also referred to the history of the CCA provisions. However, the history does not assist the Trust, as it simply confirms that the changes made to the CCA system granted the taxpayer the right to choose the amount of CCA to deduct in computing income in any particular year, subject to the limitations imposed on the amount that may be claimed.

[49] Parliament chose to only allow taxpayers to carry non-capital losses forward for a defined period of time (seven years for the loses incurred from 1997 to 2003). This limitation applies whether the expenses claimed (which resulted in the loss) are discretionary or mandatory. If the Trust is permitted to revise its earlier claims for CCA, this would defeat the purpose chosen by Parliament of having non-capital losses only available for a particular period of time. Having chosen to claim the amounts of CCA as it did in each of the years, the Trust must accept the consequences that flow from having made those choices. The Trust is attempting to revive non-capital losses that it cannot otherwise claim by converting these non-capital losses into a terminal loss in 2017.

VI. Conclusion

[50] As a result, I would dismiss the appeal with costs.

"Wyman W. Webb"
J.A.

"I agree
J.D. Denis Pelletier J.A."

“I agree
Marianne Rivoalen J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED NOVEMBER 2, 2020, CITATION NO. 2020 TCC 109

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DATED:	JULY 6, 2022

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