CECB Carnahan, Evans, Cantwell & Brown, P.C.

on the Subject

April 2010

IRS Issues New Optional Guidance On Processing Offers In Compromise in the Economic Downturn

by Frank C. Carnahan

An offer in compromise ("OIC") is an agreement between the IRS and the taxpayer to settle a tax liability for less than full payment, and is authorized by Internal Revenue Code §7122. Tax obligations that can be compromised include any civil or criminal case, including interest and penalties. The regulations provide some guidance, but much is left to IRS discretion. The offer amount must equal or exceed taxpayer's "reasonable collection potential", and must exceed zero. The minimum offer amount based on "doubt as to collectability" is: 1) the net realizable value in assets (quick sale value reasonably expected from an asset, typically if sold 90 days or less), minus secured debt with priority over a filed IRS Notice of Federal Tax Lien (credits cards are unsecured debt and do not count), PLUS, 2) the present value (not actual monthly payments) of potential installment payments (based on income less "necessary living expenses" for 48 to 60 months, or the remainder of statute of limitation on collection if less). Actual installment payments are generally NOT part of the offer, which is typically "cash payment in full".

The IRS Small Business/Self-Employed Division (SB/SE) recently released three interim optional guides recognizing how the current economic downturn impacts OICs:

- An additional review must be initiated before rejection of an OIC if the difference between taxpayer's offer and IRS determined "reasonable collection potential" is solely attributable to a disagreement on real property equity.
- Taxpayers are not required to include a 20% payment or periodic payments to change an accepted offer. No specific form is required (e.g., Form 656), but the proposal must be in writing. IRS employees are to review updated financial information and supporting documents and negotiate based on taxpayer's current financial situation, recognizing how quickly circumstances change in the current economy.
- Although IRS procedures require any OIC without Form 656-A, low income fee waiver, be returned as not processable, the OIC will be processed if the offer meets IRS Low Income Guidelines. ■

Your Borrower Is In Bankruptcy: What About the Guarantors? Are They Still Obligated To Pay?

by John L. Waite III

Generally, the discharge of a borrower's debt obligation under bankruptcy law will not impact a creditor's right to pursue non-debtor obligors, such as guarantors. There is an exception where a confirmed plan of reorganization includes a provision that releases such co-obligors from liability. See 11 U.S.C. § 524 which generally preserves the liability of guarantors and co-debtors after discharge.

In some cases, a debtor (a/k/a borrower) may seek to include release provisions within a Chapter 11 Plan that require creditors to release the debtor's insiders, plan funders, and certain interested parties from further obligations upon confirmation of the plan. Many times this can include the debtor's guarantors of the underlying obligations set forth in the debtor's bankruptcy schedules, essentially leaving a creditor without the ability to pursue the borrower or guarantors for payment except as allowed under the confirmed bankruptcy plan.

However, such use of a Chapter 11 Plan is not universally recognized. There is a split of authority regarding whether the bankruptcy code allows for non-debtor obligors to be released from their respective obligations when they are not a debtor under the bankruptcy code. Currently, there are three judicial interpretations. The first is recognized by the Second, Fourth and District of Columbia Circuits that allow for the release of third parties from co-debts. These Circuits recognize that an appropriate release provision within a confirmed Chapter 11 Plan, regardless of whether or not there was consent by the impacted creditor, acts as a permanent injunction against that creditor pursuing the third party for the amounts owed pursuant to the underlying obligation.

The second interpretation, followed by the Seventh Circuit, recognizes and permits third party releases but only involving those creditors who vote for the Plan and specifically consent to the release.

Finally, the Fifth and Ninth Circuits strictly prohibit any third party releases within a Chapter 11 Plan regardless of notice and/or consent.

The Eighth Circuit does not appear to have a written opinion on this subject, but there is a case from Arkansas that may provide some guidance. See *In re Sanders*, 81 BR 496 (Bankr.W.D. Ark. 1987) where a non-debtor guarantor was able to enforce a confirmed Chapter 11 Plan's release of the guaranty even though the confirmed Plan was never consummated and no payments were made to the creditor that was impacted by the release of its guarantee. ■

in this issue

Roth IRA Conversion: New Opportunity for Higher Income Taxpayers Beginning in 2010

by Jennifer K. Huckfeldt

Beginning in 2010, taxpayers are permitted to convert traditional IRAs to Roth IRAs without regard to their income level or filing status. Following is a brief summary of this opportunity:

Conversion Requirements. Prior to 2010, an individual with modified adjusted gross income exceeding $100,000, or with a filing status of married filing separately, was not permitted to convert a traditional IRA to a Roth IRA. These two requirements have been removed as of January 2010. Thus, for 2010 and future years, all taxpayers will be permitted to convert traditional IRAs into Roth IRAs.

Advantages of Roth IRAs. Roth IRAs vary from traditional IRAs in three main ways:

- Contributions to Roth IRAs are not deductible from gross income.
- Qualified distributions from Roth IRAs are tax-free.
- There are no minimum distribution rules applicable to Roth IRAs during the owner's lifetime.

Thus, while Roth IRAs do not share the advantage of traditional deductible IRAs in allowing the taxpayer to recognize a *current* income tax savings, they allow for future income tax savings, as all contributions, growth and earnings will be distributed income tax free as long as the distribution is a "qualified distribution". In general, a distribution will be treated as a "qualified distribution" if (i) it is made after the account owner has attained age 59½ and more than five (5) years after the account owner has first made a contribution to any Roth IRA, or (ii) it is made after the account owner's death. In comparison, with a traditional deductible IRA while the growth and earnings are permitted to *grow* tax free, upon distribution, all previously non-taxed amounts are included in the recipient's income and taxed at ordinary income rates. Furthermore, the minimum distribution rules do not apply to Roth IRAs during the account owner's lifetime, so the taxpayer is not required to take distributions from the Roth IRA during life. Thus, to the extent the taxpayer does not need the funds, the funds can remain in the account growing income tax free and be passed on to the taxpayer's beneficiaries at death. Note, the taxpayer's beneficiaries *will* be subject to the minimum distribution rules.

Tax Effects of Conversion. In a conversion from a traditional to a Roth IRA, the amount converted in excess of the taxpayer's basis in the IRA is included in the taxpayer's income and taxed as ordinary income. For a traditional IRA where all amounts contributed have been deducted from income, 100% of the IRA converted would be included in the taxpayer's income *(note: to the extent non-deductible contributions have been made to the IRA, such previously taxed amounts would not be subject to tax on conversion)*. However, there is a special rule that applies for conversions in 2010 (unless the taxpayer elects out of the rule):

- None of the converted amount is included in income in 2010.
- One-half (½) of the income from the conversion is included in 2011.
- One-half (½) of the income from the conversion is included in 2012.

The taxpayer can elect out of this treatment if it is more advantageous to tax 100% of the converted amount subject to income tax in 2010. Again, this special rule only applies for 2010. So while under current law conversion is permitted in years subsequent to 2010, this special delayed taxation rule will not apply. Thus, if a taxpayer converts an IRA in 2011, 100% of the converted amount that is subject to taxation would be included in the taxpayer's 2011 income.

Note: If a taxpayer makes a Roth Conversion in 2010, and later the account plummets in value or for some other reason the conversion becomes less advantageous for the taxpayer, the conversion can be "undone" if completed prior to the timely filing of the individual's income tax return (including extensions).

Facts to Consider When Determining Advantage of Conversion. The determination of whether a taxpayer should consider converting part or all of their traditional IRA to a Roth IRA rests on many factors. Those factors that tend to favor conversion include:

- Current marginal tax rate lower than anticipated future marginal tax rate.
- Ability to pay tax on the conversion from sources other than the IRA.
- Expected growth in IRA assets.
- Significant period of time before funds are needed.
- Taxpayers with a desire to reduce the size of their estates for estate tax purposes *(income tax on the conversion is removed from gross estate and heirs receive funds on which income taxes have already been paid).*

Contributions to a Roth IRA. Although the income limits on the ability to convert a traditional IRA to a Roth IRA have been removed for tax years beginning in 2010, the limitations remain regarding the adjusted gross income limits (AGI) permitted for contributions to a Roth IRA. The limits are subject to change each year in accordance with inflation rates, and for 2010 are as follows:

- **Married Taxpayers Filing Jointly:** For 2010, the maximum AGI for contribution is $177,000 (with a phase out of the maximum allowable contribution beginning at $167,000).
- **Single Taxpayers:** The phase out begins at AGI of $105,000 and is totally phased out when the AGI is equal to $120,000.

Note: for 2009 and 2010, the maximum amount that can be contributed to a Roth IRA is $5,000 and taxpayers who will attain at least age 50 during the calendar year are permitted an additional "catch-up" contribution equal to $1,000. Also note, that unlike traditional IRAs, a taxpayer can continue to contribute to a Roth IRA after age 70½ if the taxpayer has employment income and is within the income limits.

The foregoing is only a brief overview of matters to consider and the rules that apply to Roth IRA conversions. If you have any questions or want to discuss the opportunity further, please feel free to contact us. ■

Firm News

Joseph D. "Chip" Sheppard III Receives AV Rating from Martindale-Hubbell

Carnahan, Evans, Cantwell & Brown, P.C. ("CECB") is pleased to announce that Joseph D. "Chip" Sheppard III has received an AV Rating from Martindale-Hubbell. The AV Preeminent Rating includes Mr. Sheppard in a select group of attorneys who are recognized, by their peers, at the highest level of professional excellence for their legal ability and professional ethical standards. Chip joins several other attorney's at CECB who have been AV Rated.

Employee Misclassification in the Spotlight as a Way to Reduce the Tax Gap

by Frank C. Carnahan

Missouri Tax Collection

If the employer and worker both know all the facts, there is typically little money to be saved in misclassifying a worker. An independent contractor will usually demand more compensation than an employee because they bear the burden of the employer's share of social security and a business risk. The employer also risks a large employment tax and fringe benefit liability if it incorrectly classifies the worker. Classification also impacts the requirement to provide worker's compensation insurance and the companion limit on an employer's liability for work worker injuries it provides. The Missouri Division of Employment Security seems to focus on who can best afford the risk of unemployment, and generally finds the employer better able to bear that risk. It is more likely than the IRS or Department of Revenue to find a worker is an employee, and consequently that unemployment contributions are owed.

The Government Accountability Office (GAO) and Congressional Research Service (CRS) have released reports and recommendations on employer misclassification of workers as independent contractors. A recently introduced bill would revamp so-called "Section 530" relief, and starting in February 2010, the IRS is conducting annual employment tax audits of 2,000 selected U.S. companies. The CRS reported that the last IRS estimate in 1984 was that 15% of employers misclassified 3.4 million workers as independent contractors rather than as employees causing an estimated total loss of $1.6 billion in taxes. The IRS audits will include the first such IRS study conducted since 1984. The audits are intended to help reduce the size of the tax gap, i.e., the difference between the tax the IRS estimates is due and the amount actually paid by taxpayers.

The GAO report included 19 specific recommendations for reducing employee misclassification, including:

- narrowing the definition of "a long-standing recognized practice of a significant segment of the industry" so fewer firms qualify for penalty relief under the §530 of the Revenue Act of '78 reasonable basis standard;
- require service recipients to withhold taxes for independent contractors if the IRS cannot verify their TIN, or it has determined they are not fully tax compliant;
- require universal tax withholding for payments made to independent contractors using relatively low tax rates (e.g., 1% to 5% of payment amounts);
- require each independent contractor to apply for a separate business tax number;
- require service recipients to withhold taxes from payments made to independent contractors who request withholding in writing;
- require service recipients to submit Forms SS-8 for all newly retained independent contractors

Rep. James McDermott (D-WA) has again introduced legislation (H.R. 3408, 7/30/09) called the "Taxpayer Responsibility, Accountability, and Consistency Act of 2009", primarily focusing on §530 of the Revenue Act of 1978. The legislation would make it more difficult for employers to receive protection under §530, and increase information reporting penalties. Section 530 protects employers from employment tax assessments even though they incorrectly categorized a worker as an independent contractor if they have: 1) a reasonable basis (judicial precedent, IRS rulings, a past IRS audit, or industry practice supports the classification), 2) have consistently treated the workers in question as independent contractors, and 3) have not classified the workers as employees on any required federal tax returns, including information returns.

The new legislation would repeal §530 and replace it with new rules that would only apply prospectively to services rendered more than one year after the date the legislation is enacted. It provides the "reasonable basis" standard would be met only if:

- The employer classified the worker as an independent contractor based on a: 1) written determination that addresses the employment status of either the worker in question, or another individual holding a substantially similar position with the employer; or 2) concluded employment tax examination of the worker, or another individual holding a substantially similar position with the employer, that did not conclude that the worker should be treated as an employee; and
- The employer (or a predecessor) has not treated any other individual holding a substantially similar position as an employee for employment tax purposes for any period beginning after Dec. 31, 1977.

Employers would not be able to rely on an examination commenced, or a written determination issued, if: (a) the controlling facts and circumstances that formed the basis of a determination of employment status have changed or were misrepresented by the taxpayer, or (b) IRS subsequently issues contrary guidance related to the determination of employment status that has a bearing on the facts and circumstances that formed the basis of the determination of employment status. The IRS would issue its determination of worker status no later than 90 days after the filing of a petition with respect to employment status in any industry where employment is transient, casual, or seasonal (e.g., construction).

The IRS audits are expected to focus on five employment tax issues: 1) worker classification (employee vs. independent contractor); 2) fringe benefits; 3) officer's compensation; 4) reimbursed expenses; and 5) non-filers.

The IRS primarily enforces worker classification compliance through employer examinations, but offers settlements through which eligible employers under examination can reduce taxes they might owe if they maintain proper classification of their workers in the future.

The IRS has long used the "20 factors" set out in Rev. Rul. 87-41, centering largely on "control," including how paid (by the job or hourly), if there is a continuing relationship, who furnishes tools, etc. (see: http://carnahanlaw.com/payroll/20factors.html). In approximately 1996 the IRS regrouped the factors into three broad categories (see http://carnahanlaw.com/payroll/20factorupdate.html):

1) Behavioral Control – focusing on whether there is a right to direct or control how the work is done;
2) Financial Control – focusing on whether there is a right to direct or control how the business aspects of the worker's activities are conducted, and if there is significant investment and risk of loss; and
3) Relationship of the Parties – focusing on how the parties perceive their relationship and their intent.

The ruling stated that the factors did not weigh equally and were weighted differently in different cases, leaving lots of uncertainty. The updated three categories still leave room to argue about the correct classification. ■

Missouri Tax Shorts

by Frank C. Carnahan

Sellers to Government and Exempt Entities Must Pay Sales Tax on Purchases

The Missouri Supreme Court issued a ruling in *ICC Management, Inc. v. Director of Revenue*, 290 S.W.3d 699 (Mo. banc 2009), that impacts sellers' use of the resale exclusion, which applies to all affected transactions occurring after September 1, 2009, the date the decision became final.

Taxpayer provided nontaxable services to counties and municipalities in Missouri, and claimed that tangible personal property it purchased to perform those services was resold to the local governments, which are excluded from the sales tax, and was therefore not subject to tax. The Court held that the sale to the local governments was not a sale at retail because it was not subject to tax, and consequently, ICC could not claim the sale for resale exclusion and must pay tax on its purchases.

The Court relied primarily on two cases: *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36 (Mo. banc 1996), and *Westwood Country Club v. Director of Revenue*, 6 S.W3d 885 (Mo. banc 1999). In *Greenbriar Hills*, the Court held that a private country club that only sold meals to its members and guests did not have to collect and remit tax on the sales of those meals because the statute only imposed tax on places "in which rooms, meals or drinks are regularly sold to the public." Meals sold only to members and guests were excluded from the taxing statute. In *Westwood*, another private country club claimed it did not have to pay tax on its purchases of food used to sell meals to its members and guests because they were sales for resale. The Court held that because the sales of meals were excluded from tax, they did not constitute sales at retail. Because the sale for resale exclusion is contained in the definition of sale at retail, a transaction that is not a sale at retail cannot be a sale for resale. As the Court noted, *Westwood* invoked the principle of avoiding double taxation "to avoid being taxed even once." 6 S.W.3d at 888.

The ICC court expressly adopted the *Westwood* rationale: "This rationale is directly applicable here. ICC's supply of the food and other consumables to the inmates will not be taxed due to application of the governmental sales exemption. As in *Westwood*, this disqualifies ICC from claiming the resale exemption, because the rationale for that exemption – the avoidance of double taxation – does not apply. Indeed, if ICC were correct in its argument that its purchases of consumables are not subject to tax because they will be served to inmates, but that its sales are not subject to tax because of the governmental tax exemption, then no tax would be imposed on the purchase, use or sale of these consumables at all. The purpose of the exemption is not to provide a special benefit to ICC that is not enjoyed by other taxpayers. As in *Westwood*, the taxpayer must pay a tax on its purchase of consumables where, as here, its resale of the consumables is not taxable."

Missouri Tax Collection

If you owe the IRS, you often owe the Missouri Department of Revenue ("DOR") also. The DOR does not have extensive staff to pursue collection of unpaid tax. The typical DOR process is to send out a number of notices, then if not resolved, refer collection to private collection agencies (e.g., NCO Financial or GC Services) or the county prosecutor. Additionally, DOR does not have extensive procedures such as the IRS "reasonable living expense standards" to determine the appropriate monthly installment payment amount, and generally does not recognize inability to make payments. DOR's "typical" installment payment arrangement is payment in full over 12 or at most 24 months. While there is some possibility of a longer term payment plan, it is difficult to obtain.

The private collection agencies act as they do when collecting for commercial creditors. The prosecutors seem to have other preferred priorities, but will pursue tax collection matters. The prosecutors generally seem amenable to payment arrangements, and may be more flexible with the terms than the DOR. If you have some tax periods placed with the prosecutor and others periods still in the DOR inventory, you have to arrange two separate installment payment plans.

Missouri has statutory provision for offers in compromise ("OIC"), but there appear to be no standard process and DOR responds inconsistently to OICs currently.

Spouses Income Tax Returns are "combined", not "joint"

When you file a "married-joint" federal income tax return, both spouses are liable for 100% of the liability shown on the return, and for any additional liability assessed, such as on audit. The IRS can collect the entire liability for either spouse, even if the tax is a result of income or matters that one spouse did not know about when initially filing the return (e.g., unreported income assessed on later audit). Even after divorce, the IRS can collect the entire unpaid balance from either spouse, even if the judge in the divorce orders one spouse to pay the entire liability. The IRS was not a party to the divorce and is not bound by the divorce decree.

Spouses are required to file a "combined" Missouri income tax return if they file a federal joint return. However, unlike federal joint returns for husband and wife, a Missouri combined return by a husband and wife does NOT impose "joint and several" liability pursuant to R.S.Mo. §143.491. For a combined return, each spouse is only liable for their own tax on their separate income, as adjusted for their determined portions of itemized deductions or the standard deduction, and exemptions, etc.

For this purpose, "separate" income means the income from each spouse's earned income (e.g., wages), income from the spouse's separately owned property (e.g., stock), and their portion of the income on jointly owned property, such as dividends on jointly owned stock, which is divided between them and each spouses' portion listed separately for each spouse.

Request to separate Missouri tax liability

A spouse can request **innocent spouse relief** from IRS joint liability, or if not liable for the other spouses tax debt (e.g., from a separate-married return, or a return from prior to their marriage), they can request **injured spouse relief**, e.g., to obtain their portion of a tax refund on a new joint return filed with the spouse who owes tax.

Innocent spouse relief is not needed in Missouri. However, while the Missouri form on which spouses file a combined return calculates each spouse's tax liability separately, it combines the liability, takes credit for withholding, etc., and records a single liability for both spouses. The Department of Revenue ("DOR") computer system apparently does not separately track each spouse's liability. When calling the DOR, the employee may incorrectly refer to the liability as "joint", and state or infer that both spouses are liable for the total amount due. Regardless, each spouse is only liable for the tax on their separate income. You must submit a

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Federal Estate Tax Repealed: Good News?

Thomas D. Peebles

Emily J. Kembell

by Thomas D. Peebles and Emily J. Kembell

As a result of Congressional inaction, and after more than 8 years of uncertainty, federal estate and generation-skipping transfer taxes were repealed on January 1, 2010. The "repeal," however, is only in effect for one year. Perhaps more significantly, the step-up in basis rules for inherited assets were also repealed for calendar year 2010 and replaced with a modified carryover basis system. The federal gift tax remains in effect with a lifetime exemption of $1 million, although the tax rate is reduced to 35% for gifts in 2010.

This surprising turn of events has created a great deal of uncertainty about how best to proceed with estate planning and estate administration. Although the repeal of the federal estate tax will bring tax relief to large estates whose owners are "fortunate" enough to die in 2010, these changes in the tax law make it uncertain how provisions of some existing estate planning documents may now be interpreted, and the carryover basis provisions will negatively impact a substantially larger number of taxpayers than were affected by the estate tax.

How did we arrive at this current state of affairs? In 2001, Congress enacted and President Bush signed into law the Economic Growth and Tax Relief Reconciliation Act (EGTRRA). Under that law, the maximum federal estate tax bracket was gradually reduced from 55% to 45% and the estate tax exemption was gradually increased from $675,000 to $3,500,000. The law then provided that, in calendar year 2010 only, the estate tax was "repealed." The problem is that EGTRRA is scheduled to "sunset" and cease to apply on December 31, 2010. As a result, unless changes are made, federal estate taxes are "revived" on January 1, 2011, but with an exemption of only $1 million adjusted for inflation and a top tax bracket of 55%.

When EGTRRA was passed, it was believed that Congress would act to provide some sort of certainty regarding estate tax issues before the "sunset" provisions were to apply. The House of Representatives, in fact, passed a bill in December, 2009, which would have permanently extended the $3,500,000 estate tax exemption and the top bracket of 45%. The Senate, however, failed to act.

Perhaps even more alarming than the current state of the federal estate tax is the current state of basis calculations for property owned by decedents dying in calendar year 2010. Up until January 1, 2010, the income tax basis of an asset generally was "stepped-up" to its fair market value on the date of the owner's death. As a result, all built-in capital gain was effectively eliminated for income tax purposes. For example, consider a decedent who died in 2009 owning an asset with a basis of $100,000, which had increased to a value of $250,000 at his death. The beneficiary who inherited that asset would have received a stepped-up basis of $250,000, with the result that if the beneficiary immediately sold the asset, no capital gain would be reported.

Under EGTRRA, for 2010 only, these step-up in basis rules are replaced with modified carryover basis rules. As a general rule, then, individuals inheriting assets in 2010 now also inherit the decedent's basis in those assets ("carryover" basis) rather than getting a "step-up" in basis equal to the current fair market value. As a result, upon the sale of assets inherited in 2010, any built-in gain will be taxable. In the example above, the individual would have a carryover basis in the inherited asset of $100,000 and the sale of that asset for its fair market value of $250,000 will result in a taxable capital gain of $150,000. According to some estimates, as many as ten times more families will be negatively impacted by the carryover basis rules than would have been effected by the federal estate tax, assuming a $3,500,000 exemption.

The carryover basis law currently in effect for 2010 does allow for some basis adjustment: $1.3 million in basis adjustments can be allocated among the decedent's assets and an additional $3 million in basis adjustments can be allocated to assets passing to a surviving spouse. However, in order to take advantage of these basis adjustments, taxpayers will now be forced to determine the decedent's basis in those assets (no easy proposition) and will be required to report this information and the allocation of basis adjustments to the IRS. Unfortunately, the IRS has not yet provided any sort of guidance on these reporting requirements which makes it difficult to advise clients on exactly how we will need to proceed in the administration of the estate of persons dying in 2010.

A final concern with the current state of affairs is the challenge in interpreting certain estate planning documents that include formula clauses tied to the federal estate tax. If there is no federal estate tax in 2010, how are such formula clauses supposed to apply?

To add just one more level of uncertainty, certain members of Congress now claim that they will pass new federal estate tax laws which will be retroactive to January 1, 2010. Any retroactive attempt to "repeal the repeal" will almost certainly face constitutional challenge.

What, then, are clients to do in the face of these confusing changes in the tax law? We strongly encourage clients to review their existing estate planning arrangements to ensure that they continue to meet their objectives while minimizing all taxes (estate and income). Please feel free to contact a member of the CECB Estate Planning Practice Group if you wish to schedule an appointment for an estate plan review. ■

Missouri Tax Shorts

Continued from Page 4

written request to have the liability separated as the Department of Revenue will not separate the liability based on a telephone request.

Requirement to File Amended Missouri Return after Change in Federal Return

R.S.Mo. §_143.601 requires taxpayers who amend their federal returns or whose returns are audited to file an amended Missouri return within 90 days after the adjustments or audit has been completed or accepted. ■

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