DEPARTMENT OF ADMINISTRATIVE AND FINANCIAL SERVICES
BUREAU OF REVENUE SERVICES, INCOME/ESTATE TAX DIVISION

Rule No. 801 (18-125 CMR 801)

APPORTIONMENT OF TAX AND INCOME

2/01 - 3/08

Summary: The purpose of this rule is to explain the apportionment of income of corporations as required by 36 M.R.S.A. §5102(8). The rule also explains the calculation of an apportionment percentage by other taxpayers when such taxpayers are required to use the income apportionment method set out in 36 M.R.S.A., Chapter 821, §§5210-11. For example, the rule applies to S corporation shareholders, partners, estates and trusts, and to nonresident individuals who have income from business activity both within and without Maine. *See* 36 M.R.S.A. §5142(6).

Outline of Contents:

.01 Definitions.
.02 Unitary Business.
.03 Apportionment.
.04 Taxability in Another State.
.05 Consistency.
.06 Property Factor.
.07 Payroll Factor.
.08 Sales Factor.
.09 Corporate Partners
.10 Variations

.01 Definitions:

A. Assessor. "Assessor" means the State Tax Assessor or any designated agent.

B. Bureau. "Bureau" means the Bureau of Revenue Services, also known as Maine Revenue Services, and formerly known as the Bureau of Taxation.

C. Domicile. "Domicile" means the principal place from which the business activities of a taxpayer are directed or managed. If it is not possible to determine the principal place from which the business activities of a taxpayer are directed or managed, the state of the taxpayer's incorporation is considered its state of domicile.

D. Office. "Office" means a permanent or temporary location where a business entity makes sales or holds itself out to the public as conducting business. The office of a business's sales representative is generally not an "office" of the business for purposes of this rule if the representative does not publicly hold him- or herself out as doing business on behalf of the business at that location, either by publishing the home address as the business's own address or through other actions.

E. State. "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or a political subdivision thereof. *See* 36 M.R.S.A. §5210(6)).

F. Total time. "Total time" means the total number of days. Any portion of a day is counted as an entire day.

.02 Unitary Business.

"Unitary business" means a business activity characterized by unity of ownership, functional integration, centralization of management and economies of scale. The activities of a corporation or group of affiliated corporations constitute a unitary business if those activities are integrated with, dependent upon and contributive to each other and to the operations of the corporation or group as a whole. The presence of any of the following factors creates a strong presumption that the activities of the corporation or group constitute a single trade or business:

A. All activities are in the same general line or type of business;

B. The activities constitute different steps in a vertically-structured enterprise; or

C. The corporation or group is characterized by strong centralized management, including but not limited to centralized departments for such functions as financing, purchasing, advertising and research.

.03 Apportionment. If the business activity of a taxpayer occurs both within and without Maine, and if by reason of such activity the taxpayer is taxable in another state, the portion of the net income (or net loss) derived from sources within Maine is determined by apportionment in accordance with 36 M.R.S.A. §§5210-11 and the provisions of this rule.

Prorating Deductions. In most cases, an allowable deduction of a taxpayer will relate to apportionable income. In some cases, an allowable deduction may relate to both apportionable income and to income that Maine is prohibited from taxing by the laws or Constitution of the United States, or by the Constitution of Maine. *See* 36 M.R.S.A. §5200-A(2)(A) and (F). In such cases, the deduction must be prorated between apportionable income and exempt income in a manner that fairly distributes the deduction among the classes of income to which it is applicable.

.04 Taxability in Another State.

A. In General. A taxpayer's income from business activity is taxable in another state if the taxpayer, by reason of such activity, is taxable in that state within the meaning of 36 M.R.S.A. §5211(2).

A taxpayer is taxable in another state if:

(1) By reason of business activity in another state, the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax (*see* ¶(B) below); or

(2) By reason of such activity, the other state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether or not the state actually imposes such a tax on the taxpayer (*see* ¶(D) below).

B. When a Taxpayer is Subject to a Tax under 36 M.R.S.A. §5211(2). A taxpayer is subject to one of the taxes specified in 36 M.R.S.A. §5211(2) in another state if the taxpayer carries on activities in that state and the state imposes such a tax on the taxpayer. A taxpayer who asserts that it is subject to one of the specified taxes in another state must furnish to the State Tax Assessor, upon the Assessor's request, evidence to support that assertion. The Assessor may request that such evidence include proof that the taxpayer has filed the requisite tax return in the other state and has paid any taxes imposed under the law of the other state.

C. Effect of Voluntary Tax Payment. A taxpayer is not subject to one of the taxes specified in §5211(2) in another state if the taxpayer voluntarily files and pays one or more of the specified taxes when not required to do so by the laws of that state or pays a minimal fee for qualification, organization or for the privilege of doing business in that state, but (a) does not actually engage in business activity in that state, or (b) does actually engage in some business activity not sufficient for nexus and the minimal fee bears no relationship to the volume of the taxpayer's business activity within that state.

D. When a State or Foreign Country has Jurisdiction to Subject a Taxpayer to a Net Income Tax. The second test under §5211(2) applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax by reason of such activity under the Constitution and statutes of the United States. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provisions of Public Law 86-272 (15 U.S.C.A. §§381-385). The determination of whether a foreign country or a political subdivision thereof has jurisdiction to subject the taxpayer to a net income tax is made as though the jurisdictional standards applicable to a state of the United States, including P.L. 86-272, apply in that country. If jurisdiction is otherwise present, that country or political subdivision thereof is not considered to lack jurisdiction by reason of the provisions of a treaty between it and the United States.

E. Producing exempt income. A taxpayer is not "taxable in another state" for purposes of §5211(2) merely because the only activities the taxpayer conducts in that other state are activities pertaining to the production of income that the state of Maine is prohibited from taxing by the laws or Constitution of the United States or by the Constitution of Maine.

.05 Consistency.

A. Year-to-year consistency. The taxpayer must disclose in its Maine return the nature and extent of any inconsistency between that return and its Maine returns for prior years with respect to the composition of its unitary business, the classification of income, the prorating of deductions to business and constitutionally exempt income, and the determination of property, payroll, and sales apportionment factors.

B. State-to-state consistency. If the returns filed by a taxpayer for all states to which the taxpayer reports are not uniform in the composition of its unitary business, the

classification of income, the prorating of deductions to business and constitutionally exempt income, and the determination of property, payroll, and sales apportionment factors, the taxpayer must disclose in its Maine return the nature and extent of the variance.

.06 Property Factor. The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in Maine during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period. 36 M.R.S.A. §5211(9).

A. Real and Tangible Personal Property. The term "real and tangible personal property" includes land, buildings, machinery, stocks of goods, equipment, and other real and tangible personal property but does not include coin or currency.

B. Property Used During the Taxable Year. Property is included in the property factor if it is actually used or is available for or capable of being used during the tax period by the taxpayer. Property held in reserve or standby facilities or property held as a reserve source of materials must be included in the factor. For example, a plant temporarily idle or raw material reserves not currently being processed are includable in the factor. Property or equipment under construction during the tax period (except inventoriable goods in process) must be excluded from the factor until such property is actually used by the taxpayer. If the property is partially used by the taxpayer while under construction, the value of the property to the extent used must be included in the property factor. Property used by the taxpayer must remain in the property factor until its permanent withdrawal is established by an identifiable event such as its sale, or the lapse of an extended period of time (normally, five years) during which the property is held for sale.

C. Property in transit/Mobile property. Property in transit between locations of the taxpayer to which it belongs is considered to be located at the destination for purposes of the property factor. Property in transit between a buyer and seller that is included by a taxpayer in the denominator of its property factor in accordance with its regular accounting practices must be included in the numerator according to the state of destination. The value of mobile or movable property, such as construction equipment, trucks, or leased electronic equipment that is located both within and without this State during the taxable year, is determined for purposes of the numerator of the property factor on the basis of total time within Maine during the taxable year. Automobiles assigned to traveling employees are included in the numerator of the factor of the state to which the employee's compensation is assigned under the payroll factor.

D. Valuation (owned property). Property owned by the taxpayer is valued at its original cost. "Original cost" means the basis of the property for federal income tax purposes (prior to any federal adjustments) at the time of acquisition by the taxpayer and adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange, abandonment, etc. However, capitalized intangible drilling and development costs are included in the factor whether or not they have been expensed for either federal or state tax purposes. If the original cost cannot be ascertained, the property must be included in the factor at its fair market value as of the date of its acquisition by the taxpayer.

Generally, the average value of property owned by the taxpayer is determined by averaging the values at the beginning and ending of the tax period. However, the State Tax Assessor may require or allow averaging of monthly values if substantial fluctuations in the values of the property exist during the taxable year or if property is acquired after the beginning of the taxable year or disposed of before the end of the taxable year.

E. Valuation (rented property). Property rented by the taxpayer is valued at 8 times the net annual rental rate. Subrentals are not deducted.

If property is used at no charge or rented for a rate other than a reasonable market rate, the property must be included in the property factor on the basis of a reasonable market rental rate.

The "annual rental rate" is the amount paid as rent for the property for a twelve-month period. Where property is rented for less than a twelve-month period, the net rent paid for the actual period of rental constitutes the "annual rental rate" for the tax period. However, where a taxpayer has rented property for a term of 12 or more months and the current tax period covers a period of less than 12 months, the net rent paid for the short tax period must be annualized. If the rental term is for less than 12 months, the rent must not be annualized beyond its term. Rent will not be annualized because of the uncertain duration when the rental term is on a month-to-month basis.

"Rent" is the actual sum of money or other consideration payable directly or indirectly, by the taxpayer or for its benefit for the use of the property and includes:

(1) Any amount payable for the use of real or tangible personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise;

(2) Any amount payable as additional rent or in lieu of rents, such as interest, taxes, insurance, repairs or any other items required to be paid by the terms of the lease or other arrangement but does not include amounts paid as service charges, such as utilities, janitor services, etc. If a payment includes rent and other charges unsegregated, the amount of rent must be determined by consideration of the relative values of the rent and the other items.

"Rent" does not include incidental day-to-day expenses such as hotel or motel accommodations, daily rental of automobiles, etc. "Rent" does not include royalties based on extraction of natural resources, whether represented by delivery or purchase. For this purpose, a royalty includes any consideration conveyed or credited to a holder of an interest in property which constitutes a sharing of current or future production of natural resources from such property, irrespective of the method of payment or how such consideration may be characterized, whether as a royalty, advance royalty, rental or otherwise.

Leasehold improvements are treated as property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or of whether the improvements revert to the lessor upon expiration of the lease.

.07 Payroll Factor. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation, and the

denominator of which is the total compensation paid everywhere during the tax period. 36 M.R.S.A. §5211(12).

A. Effect of Accounting Method. If the taxpayer has adopted the accrual method of accounting, all compensation properly accrued will be deemed to have been paid. However, compensation may be included in the payroll factor by use of the cash method if the taxpayer is required to report such compensation under that method for unemployment compensation purposes.

B. Base of Operations. "Base of Operations" means the taxpayer's place of business from which an employee customarily begins work or to which the employee customarily returns at some other time to receive instructions, direction, and supervision from the taxpayer or communications from customers or other persons, to replenish stock or other materials, to repair equipment, or to perform any other function necessary to the exercise of the employee's trade or profession.

C. Compensation. The term "compensation" means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services. Payments made to an independent contractor or any other person not properly classifiable as an employee are excluded. Only amounts paid directly to employees are included in the payroll factor. Amounts considered paid directly include the value of board, rent, housing, lodging, and other benefits or services furnished to an employee by the taxpayer in return for personal services provided that such amounts constitute income to the recipient under the Internal Revenue Code. In the case of employees not subject to the Internal Revenue Code, e.g., those employed in foreign countries, the determination of whether such benefits or services would constitute income to the employees is made as though such employees were subject to the Internal Revenue Code. Employer contributions under a qualified cash or deferred arrangement as defined in Internal Revenue Code §401(k) and employer contributions to nonqualified deferred compensation plans are generally included in the payroll factor.

D. Employee. "Employee" means any officer of a corporation, or any individual who would be considered an employee under the common law rules governing the employer-employee relationship. Generally, an individual is considered to be an employee if the individual is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the Federal Insurance Contributions Act. This presumption may be overcome by evidence provided by a taxpayer that an individual who is included as an employee for purposes of the Insurance Contributions Act would not be an employee of the taxpayer under the usual common-law rules.

E. Independent Contractor. "Independent contractor" means any individual who performs services for a taxpayer but who is not an employee of the taxpayer, and who is not otherwise subject to the supervision or control of the taxpayer in the performance of the services.

F. Payroll in states in which taxpayer is not taxable. Compensation paid to employees whose services are performed entirely in a state where the taxpayer is immune from taxation, for example, by P.L. 86-272, is included in the denominator of the payroll factor.

.08 Sales Factor. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this State during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period. 36 M.R.S.A. §5211(14).

A. Generally. "Sales" means all gross receipts of the taxpayer. "Sales" includes federal and state excise taxes (including sales taxes) if those taxes are passed on to the buyer or included as part of the selling price of the product. Interest income, service charges, carrying charges or time-price differentials incidental to a sale must be included as sales in the state to which the sale is attributable, regardless of the place where the accounting records are maintained or the location of the contract or other evidence of indebtedness. The following are rules for determining "sales" in various situations:

(1) In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, "sales" includes all gross receipts from the sales of such goods or products (or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period) held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business.

(2) In the case of cost-plus-fixed-fee contracts, such as the operation of a government-owned plant for a fee, "sales" includes the entire reimbursed cost plus the fee.

(3) In the case of a taxpayer engaged in providing services, such as the operation of an advertising agency or the performance of equipment service contracts or research and development contracts, "sales" includes the gross receipts from the performance of such services, including fees, commissions, and similar items.

(4) In the case of a taxpayer engaged in renting real or tangible property, "sales" includes the gross receipts from the rental, lease, or licensing the use of the property.

(5) In the case of a taxpayer engaged in the sale, assignment, or licensing of intangible personal property such as patents and copyrights, "sales" includes the gross receipts therefrom.

(6) If a taxpayer derives receipts from the sale of equipment used in its business, those receipts constitute sales. For example, a truck express company owns a fleet of trucks and sells its trucks under a regular replacement program. The gross receipts from the sales of the trucks are included in the sales factor.

(7) Sales includes income from capitalized leases to the extent that the income from such leases is included in the federal gross income of the taxpayer.

B. Gross Receipts. "Gross receipts" means the gross amounts realized (the sum of money and the fair market value of other property or services received) on the sale or exchange of property, the performance of services, or the use of property or capital (including rents, fees, royalties, interest and dividends) in a transaction that produces income, in which the income or loss is recognized (or would be recognized if the transaction were in the United States) under the Internal Revenue Code. Amounts

realized on the sale or exchange of property are not reduced for the cost of goods sold or the basis of property sold. Gross receipts do not include, for example, such items as:

(1) Repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;

(2) The principal amount received under a repurchase agreement or other transaction properly characterized as a loan;

(3) Proceeds from issuance of the taxpayer's own stock or from sale of treasury stock;

(4) Damages and other amounts received as the result of litigation;

(5) Property acquired by an agent on behalf of another;

(6) Tax refunds and other benefit recoveries;

(7) Pension reversions;

(8) Contributions to capital (except for sales of securities by securities dealers);

(9) Income from forgiveness of indebtedness; or

(10) Amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code.

C. Sales of tangible personal property in this State. There are two rules for determining whether a sale of tangible personal property is in Maine. Under the primary (destination) rule, a sale is in Maine if the property is delivered or shipped to a purchaser (other than the United State Government) who takes possession within Maine. Under the secondary ("throwback") rule, a sale is in Maine if the property is shipped from an office, store, warehouse, factory, or other place of storage in Maine and the taxpayer is not taxable in the state where the property sold is delivered to the purchaser.

(1) **Destination sales.** Sales are in Maine if the property is delivered or shipped to a purchaser in Maine regardless of the f.o.b. point or other conditions of sale.

(a) Tangible property is delivered or shipped to a purchaser within Maine if the recipient is located in Maine, even though the property is ordered from outside Maine.

(b) Property is delivered or shipped to a purchaser in Maine if the shipment terminates in Maine, even if the purchaser subsequently transfers the property to another state.

(c) The term "purchaser within this state" includes the ultimate recipient of the property if the taxpayer, at the direction of the purchaser, delivers to or has the property shipped to the ultimate recipient within Maine.

(d) When property being shipped by a seller from the state of origin to a consignee in another state is diverted to a purchaser in Maine, the sales are in Maine

(2) **Throwback sales.** If tangible personal property is delivered or shipped to a purchaser outside of Maine and the taxpayer is not taxable in the state of the purchaser, the following rules apply:

(a) If the property is delivered or shipped from an office, store, warehouse, factory or other place of storage in Maine, the sale is in this state.

(b) If the property is sold by a salesperson who operates from an office located in this State and the property is shipped directly by a third party to the purchaser, the sale is in the state from which shipment is made, if the taxpayer is taxable in that state. If the taxpayer is not taxable in the state from which shipment is made, the sale is in Maine.

D. Sales of tangible personal property to the United States Government. Sales of tangible personal property to the United States Government are in this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state. Generally, sales by a subcontractor to a prime contractor who is the party to the contract with the United States Government do not constitute sales to the United States Government.

E. Sales other than sales of tangible personal property.

(1) Income-Producing Activity. The term "income-producing activity" applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer for the ultimate purpose of obtaining gain or profit. For income apportionment purposes, such activity does not include transactions and activities performed on behalf of a taxpayer, such as those conducted on the taxpayer's behalf by an independent contractor. Income-producing activity includes, but is not limited to:

(a) The rendering of personal services by employees or the utilization of tangible and intangible property by the taxpayer in performing a service;

(b) The sale, rental, leasing or licensing the use of, or other use of real property; and

(c) The rental, leasing, licensing the use of, or other use of tangible or intangible personal property.

(2) Costs of Performance. "Costs of performance" means direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer.

(3) Special Rules.

(a) Income earned from the sale, lease, rental or other use of real property is sourced to this state if the real property is located in this state.

(b) Income earned from the rental, lease, licensing, or other use of tangible personal property is sourced to this state if the property is located in this state. The rental, lease, licensing or other use of tangible

personal property in this state is a separate income-producing activity from the rental, lease, licensing or other use of the same property while that property is located in another state. Consequently, if property is located both within and without this state during the rental, lease or licensing period, gross receipts attributable to this state are measured by the ratio that the time the property was physically present or was used in Maine bears to the total time or use of the property everywhere during that period.

(c) Income earned from the performance of personal services is attributable to this state to the extent that such services are performed in this state. Usually, where services are performed partly within and partly without this state, the services performed in each state will constitute a separate income-producing activity. If services relating to a single item of income are performed partly within and partly without this state, the gross receipts from the performance of such services are attributable to this state only if the greater proportion of the services was performed in this state, based on costs of performance. In cases where it is impossible or impracticable to determine the costs of performance attributable to different states, the gross receipts from the performance of services attributable to this state are measured by the ratio that the time spent in performing the services in this state bears to the total time spent in performing the services everywhere. Time spent in performing services includes the amount of time expended in the performance of a contract or other obligation which gives rise to such gross receipts. Personal service not directly connected with the performance of the contract or other obligation, such as time expended in negotiating the contract, is excluded from the computations.

.09 Corporate Partners.

A. Generally: A corporation with an interest in a partnership must include its distributive share of the partnership income, loss, or deduction in calculating its income, in accordance with the Internal Revenue Code and 36 M.R.S.A. §5102(8). The character of any item included in the distributive share is determined as if it were realized or incurred directly by the corporation. The business of the partnership is treated as the business of the corporation.

B. Taxable in Maine: A corporation that is not otherwise subject to Maine's tax jurisdiction is nevertheless taxable in Maine if it is a partner in a partnership whose activities, if conducted directly by the corporation, would subject the corporation to the Maine corporate income tax.

C. Taxable in Another State: A corporation is taxable in another state within the meaning of Section .04 if the corporation is a partner in a partnership with activities in that state that cause either the partnership or its partners to be taxable in that state under the rules described in Section .04.

D. Special Apportionment Rules: In general, if a corporate partner is taxable in another state, it must apportion its taxable net income using the apportionment percentage in 36 M.R.S.A. §5211(8). However, the following special rules apply:

(1) Property Factor. In determining the denominator of its property factor, a corporate partner must include its pro rata share of the total value of the partnership's real and tangible personal property, owned or rented, used during the partnership's taxable year. In determining the numerator of its property factor, a corporate partner must include its pro rata share of the value of such property located in Maine. To avoid duplication, however, the following adjustments must be made to the value of any property leased or rented by the corporation to the partnership or vice versa.

(a) Where a corporation rents property to the partnership, the corporation must include the original cost of the property in its property factor. The partnership must not include any portion of the value of this property in its property factor.

(b) Where the partnership rents property to the corporation, the corporation must include in its property factor the sum of (i) the original cost of the property multiplied by the corporation's percentage interest in the partnership, plus (ii) eight times the net annual rental rate of the property multiplied by the difference between 100% and the corporation's percentage interest in the partnership.

(2) Payroll Factor. In determining the denominator of its payroll factor, a corporate partner must include its pro rata share of the total compensation paid by the partnership during the partnership's taxable year. In determining the numerator of its payroll factor, a corporate partner must include its pro rata share of such compensation paid in Maine during the taxable year.

(3) Sales Factor. In determining the denominator of its sales factor, a corporate partner must include its pro rata share of the partnership's total sales during the partnership's taxable year. In determining the numerator of its sales factor, a corporate partner must include its pro rata share of such sales in Maine. To avoid duplication, however, the following sales must be eliminated from both the numerator and denominator of the sales factor:

(a) Sales by the corporation to the partnership in an amount equal to the total of such sales multiplied by the corporation's interest in the partnership; and

(b) Sales by the partnership to the corporation in an amount not to exceed the total of all sales made by the partnership multiplied by the corporation's interest in the partnership.

(4) Pro Rata Share. For purposes of this section, a corporate partner's pro rata share of partnership property, payroll and sales shall be its percentage interest in partnership profit or loss for the taxable year, as stated on the partner's Schedule K-1. However, if, under the partnership agreement, a partner's share of gain or loss from the sale of particular partnership assets is different from its profit or loss ratio stated on Schedule K-1, gross receipts from sales of such assets shall be attributed to its sales factor in the same proportion as the partner's interest in gain or loss from the sale. In the event of a termination or other change in a partner's interest during the taxable year, the partner's pro rata share of payroll and sales

must be modified to reflect partnership payroll and sales during the actual period that the partner held its interest.

.10 Variations.

Special Apportionment Formulas: In the case of certain industries such as air transportation, rail transportation, ship transportation, trucking, television, radio, motion pictures, and various types of professional athletics, this rule may not set forth appropriate procedures for determining the apportionment factors. Nothing in this rule will preclude the assessor from establishing appropriate procedures for determining the apportionment factors for each such industry, but such procedures will be applied uniformly.

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