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EXPATRIATE NEWSLETTER

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BELGIUM

BELGIAN ADMINISTRATION TAKES NEW POSITION IN THE SOCIAL SECURITY TREATMENT OF EQUITY INCENTIVE PLANS

Nowadays a lot of companies compensate at least a portion of their employees with equity incentives such as restricted stock and restricted stock units. Recently, the Belgian administration took a new position concerning the social security contributions that will have an impact on a lot of equity incentive plans.

PREVIOUS POSITION

According to the administration's previous position, the equity incentives were subject to Belgian social security contributions if the incentives were granted by the Belgian employer. If the incentives were granted by a foreign company, the administration still considered them as being granted by the Belgian company if the latter actively intervened in the stock allocation process or if the costs related to the equity incentive plan were charged by the foreign entity to the Belgian company.

Very often, these conditions weren't met. Foreign companies often didn't charge the costs related to the plan to the Belgian company. As a result, in many cases the equity incentives were not subject to Belgian social security contributions.

NEW POSITION

In the instructions to employers, the Belgian administration changed its position. As of now, the equity incentives will be subject to Belgian social security contributions if they are granted for services provided by an employee in the context of his/her employment contract or if they are related to the employee's function with his/her employer.

As a result of this new position equity incentives will almost always be subject to Belgian social security contributions for employers and employees. This will result in an extra cost for the employer of 25%.

Another outcome of this new position is that the equity incentives will also have to be included in the base for calculation of the holiday pay on the variable wage. This will result in an extra cost of more than 15% for employers.

Considering the new position of the Belgian administration, foreign companies who want to implement an equity incentive plan for Belgian employees are well advised to consider these extra costs.

It is important to note that the above mentioned is not a change in Belgian legislation but a change in position of the Belgian administration. One can raise the question of whether this new interpretation of the law by the social security administration is still in line with the text of the law itself. However, until this position has been successfully challenged before a Belgian court it is advised to follow it.

On a final note, it is important to mention that the Belgian government is also working on a new legislative proposal concerning the withholding taxes. Income taxes must be withheld by the Belgian employing company if the local employer grants the awards or is involved in the administration of the plan. In the government's legislative proposal, the equity incentives granted to Belgian employees by foreign companies will also most likely become subject to Belgian withholding taxes. Details of these grants will have to be reported in the monthly wage income tax return and annual summary statements. This proposal however is not yet final.

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EDITOR'S LETTER

The BDO Expatriate Newsletter provides a brief overview of issues affecting international assignees, predominantly, but not exclusively, from a tax and social security perspective.

This newsletter brings together individual country updates over recent months. As you will appreciate, the wealth of changes across multiple jurisdictions is significant so to provide easily digestible information we have kept it to the key developments that are likely to affect your business and international assignees.

For more detailed information on any of the issues or how BDO can help, please contact me or the country contributors direct.

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The articles contained in this newsletter have been prepared for your general information only and should not be acted or relied upon without first seeking appropriate professional advice for your circumstances.

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UK: 2018 BUDGET

OFF-PAYROLL RULES EXTENDED TO THE PRIVATE SECTOR

HMRC has been placing greater scrutiny on off-payroll rules (IR35) and the way it affects those that are employed through Personal Service Companies (PSCs).

This initially impacted the public sector and there is an expected extension of these rules to the private sector, taking effect in April 2020.

KEY POINTS:

- The new rules will require businesses to assess whether IR35 applies to any contracts it has with any PSCs, whether directly hired or via other third parties. If it does then a tax deduction from any payments made under the contract will be necessary and the business will also suffer Employers NIC and Apprentice levy costs (if applicable) on the payments. A potential 14.3% increase in operating costs, and both worker and engager will be impacted
- A consultation will be launched next year and whilst we have yet to see whether the public sector rules will be modified before being introduced into the private sector, we don't anticipate significant change
- It's a common misconception that IR35 automatically applies but this will depend on the fact pattern for each contract. HMRC has on-line tools that can assist in an IR35 review but our experience is that a more in-depth look is often required to establish the precise impact on your business.

Companies also need to be mindful of the fact that these rules will not only potentially impact those individuals that they engage with in the UK; it may also affect those that come from overseas or are contracted outside the UK.

HOW CAN BDO HELP?

BDOs experience in the public sector has helped us develop a 3-stage strategy to minimise the impact of the new IR35 rules:

1. Help identify what contracts may be at risk
2. Assess both the potential financial and operational impact on your business
3. Implement changes that will minimise the impact of the new rules and build a robust compliance structure for the future

SHORT-TERM BUSINESS VISITORS

As of April 2020, the administrative burden for employers in relation to certain short-term business visitors will be reduced. The Government has announced that it will widen eligibility for the Short Term Business Visitor's Pay as You Earn special arrangements and extend the deadline for reporting and paying tax.

- **For more details about the 2018 Budget, visit our Budget Hub: https://www.bdo.co.uk/en-gb/budget**

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AUSTRALIA

PROPOSED OVERHAUL OF TAX RESIDENCY RULES FOR INDIVIDUALS

Tax residency has long been an area of confusion for people entering and departing Australia, even more so since the increase in global mobility in the modern working environment.

Australia's tax residency rules have remained unchanged since 1936, and most residency cases now rely heavily on case law to guide determinations. This situation was made more complex with the restriction of the foreign services exemption from 1 July 2009, which provided a tax exemption for foreign service income where the foreign service period exceeded 91 days. Prior to 2009 the question of tax residency was not so important where the individual's foreign income was mainly from the foreign service.

The current rules to determine residency comprise of four tests that depend not solely on time spent in Australia, but the nature and substance of the individual's connections to Australia.

The current four tests are:

1 THE RESIDES TEST

This a rather subjective test that takes into account a holistic review of the individual's circumstances and gives weight to various factors such as:

- Intention and purpose of their presence in Australia
- Family and economic ties
- Location and maintenance of assets; and
- Social and living arrangements.

2 THE DOMICILE TEST

If the individual does not 'reside' in Australia according to the first test, but is nonetheless domiciled in Australia e.g. domicile of origin (usually the place the person's father has his permanent home) or their domicile of choice, they are still considered a resident of Australia for tax purposes unless their 'permanent place of abode' is outside of Australia.

3 THE 183-DAY TEST

An individual is assumed to be a tax resident if they are physically present in Australia for 183 days or more and their 'usual place of abode' is not outside of Australia.

4 THE SUPERANNUATION TEST

An individual is an Australian resident if they are a member of certain Government public service superannuation funds. The test also extends to treat the spouse and children under 16 as residents.

The current rules often prove difficult to navigate and the contradictory judgements in the AAT and courts provides inconsistent guidance as to what factors should be given more weight than others. Recent case law has also placed significant emphasis on the concept of 'permanent place of abode' and has thrown doubt on situations that most would previously have considered fairly straight forward.

The Board of Taxation in Australia has made suggestions to the Government to overhaul the old rules in favour of a less complex system. Simplification will improve certainty, reduce compliance costs and remove a potential barrier from Australia's attractiveness as an investment location.

The Board has looked at other residency systems around the world, including the OECD standards, in designing the proposed new rules.

They have also addressed potential concerns regarding a person being a 'resident of nowhere' and are considering only allowing the change in status from resident to non-resident if the individual can demonstrate that they have established residency elsewhere.

If the proposed residency rules are legislated, it is intended that there will be clear outcomes for the majority of individuals, and a structured process to determine the more complex cases, resulting in a decreased need to apply for private rulings.

Public comments were invited during September-October 2018, after which the Government will consider the Board's recommendations. BDO Australia will provide an update if any changes to the rules are legislated.

The Board has proposed the following two test system:

1 PRIMARY TEST

This test will automatically determine the residency status of the majority of individuals. The test is designed to provide a bright-line for individuals to be able to conclusively determine their residency status, based on time spent in Australia. The day-count system will likely differ depending on whether the individual is inbound or outbound.

The Board's preferred model is as follows:

Scenario	Description
Previously a resident of Australia	An individual that was previously a resident of Australia is a non-resident if they spend less than X number of days in Australia in any 12-month period.
Previously not a resident of Australia	An individual that has never been a resident of Australia is a non-resident if they spend less than Y number of days in Australia in any 12-month period (where Y is greater than the X number of days required for those previously a resident).
Working overseas	An individual that works full-time overseas is a non-resident if they spend less than a certain number of days working, or a larger number of days in total, in Australia in any 12-month period.

2 SECONDARY TEST

This test will be used for more complex situations and will take into account the individual circumstances. It may also apply differently to inbound and outbound individuals. The proposed test will have a clearer weighting system for the relevant factors to ensure greater certainty in determining residency than under the current rules.

The Board considered the following factors crucial to determining residency:

Factor	Description
Time spent in Australia	This factor is satisfied if a certain amount of time is spent in Australia, as per the primary test.
Immigration status	The factor is satisfied if the individual is an Australian or permanent resident.
Personal relationships	This factor is satisfied if the individual's family is largely located in Australia.
Accommodation	This factor is satisfied if the individual has readily accessible accommodation (rented or owned) that they use regularly.
Economic ties	This factor is satisfied if the individual has substantial economic ties to Australia, such as employment, business interests, assets etc.

The Board has proposed that:

- If the individual was previously a resident of Australia, X number of factors must be satisfied; or
- If the individual was not previously a resident of Australia, Y number of factors must be satisfied.

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CANADA

EMPLOYER PAYROLL CONSIDERATIONS FOR SHORT-TERM ASSIGNMENTS TO CANADA

Companies now prefer to send their employees on short-term assignments due to the increased costs associated with long-term assignments. A short-term assignment could be anything less than one year and the movement of those employees into a jurisdiction like Canada can create a myriad of potential payroll tax issues for the foreign employer.

With the increased number of employees on short-term assignments into Canada, foreign employers must be diligent in maintaining visibility and documentation of their employees. The prolonged presence in foreign jurisdictions, such as Canada, may create potential corporate tax issues.

Within the current political climate in many countries, it is in vogue to ensure that foreign employers and/or non-resident employees are compliant with the country's tax rules and regulations. The Canada Revenue Agency (CRA) are continuing to increase their enforcement of the tax law by increasing their audits. This increased audit activity, by extension, creates, what is referred to as the 'spillover' effect. This spillover occurs where, through the audit of a Canadian company, the auditor identifies a 'potential' new company to audit. It is usually at this time where the foreign company is identified and a payroll audit begins.

We have outlined below the issues that the foreign employer must consider with their short-term employees as it relates to Canadian payroll tax requirements (along with the penalties for non-compliance), so that the foreign employer is compliant with the Canadian tax law regardless of whether or not the spillover audit occurs.

PAYROLL TAX WITHHOLDING

The following must be taken into account:

- Compliance with Canadian payroll tax withholding, regardless of whether the employee's salary is paid in Canada or the home country
- Withhold and remit Canadian income tax and source deductions (Canadian Pension Plan (CPP) and Employment Insurance (EI)) from its employees performing services in Canada
- Make similar contributions for CPP and EI on behalf of each employee
- Determine their requirement to remit additional provincial payroll taxes as this is dependent on which province the services are being rendered in.

It is important to note that in most cases, the non-resident employee, through the utilisation of an existing tax treaty, may not even be taxable in Canada. Regardless of that ultimate outcome, Canadian tax law requires that the foreign employer withhold the appropriate income tax and source deductions.

However, these withholding requirements could certainly create undue delay and additional costs for their Canadian based projects. As a result, there are certain processes that, if followed, may remove the foreign employer's need to 'pay' these particular taxes, which we have described below.

EXEMPTIONS FROM WITHHOLDING REQUIREMENTS

CANADA PENSION PLAN

Canada has entered into many Totalisation Agreements with foreign countries. It is imperative to review the Totalisation Agreement that exists between your country and Canada. Should the agreement exist, there is normally a requirement to obtain a Certificate of Coverage (CoC). The CoC should remove the requirement of the short-term non-resident employee to contribute to a Canada Pension Plan (CPP) and should, at the same time, remove the corporate requirement. In some cases, where a CoC is not obtained, Canada would generally require continued deductions both at employee and employer levels.

EMPLOYMENT INSURANCE

Although each Totalisation Agreement may delve into the subject of other benefits like Employment Insurance (EI), there is no formal and separate country-to-country agreement in existence and the potential still may exist for a required Canadian EI payroll deduction. Consequently, we would recommend that in addition to verifying the Totalisation Agreement that you will need to determine whether your country has an EI style deduction/contribution vehicle similar to that of Canada's. With the understanding that the short-term non-resident employee continues to contribute, then it may be possible that no deduction related to EI will be required from the employee and employer.

INCOME TAX

As previously mentioned, the short-term non-resident employee may be exempt from Canadian income tax under a tax treaty that Canada has with the employee's home country. This particular position must be disclosed and approved by CRA in advance of the short-term non-resident employee's first pay, otherwise the payroll and source deductions are required at that time.

In order to obtain approval from CRA, the short-term employee must file Form R102-R, Regulation 102 Waiver Application, within at least thirty days prior to providing service in Canada. Only at such time that the approved waiver has been received by the foreign employer, then and only then will the foreign employer be able to cease withholding and remittance for income tax.

NON-RESIDENT CERTIFICATION PROGRAMME

With continued feedback from the professional community representing these foreign employers and, by extension the employees, the CRA revisited their waiver application process in order to expedite the approval process and to reduce paperwork. Consequently, the Non-Resident Employer Certification program was set in place.

Once the foreign employer application has been accepted into the Program, the CRA will remove the foreign employer's obligation for income tax withholdings for those employees who are considered 'qualifying non-resident employees'. In addition, there is a requirement of the non-resident employer to continually track their employees and their days of presence in Canada. Where the non-resident employees' stay in Canada exceeds specific thresholds, the individual employee may then have to apply for a separate tax waiver. In some limited instances, it is possible that there will not be a requirement for any income tax withholding, no Form T4, Statement of Remuneration Paid, nor any Canadian income tax filing by the employee.

It is important to note that that acceptance into the Non-Resident Employer Certification program assists with the waivers of the income tax, it may remove the requirement to issue T4 slips along with the requirement for the non-resident employee to have to file a Canadian tax return. However, acceptance into this program does not impact the requirements related to the source deductions (i.e. CPP/EI) previously addressed.

OTHER PAYROLL MATTERS

T4 STATEMENT OF REMUNERATION PAID

As the short-term non-resident employee is performing services in Canada, the foreign employer will be required to issue a Form T4, Statement of Remuneration Paid slip. This document will report the employment income and related income and source deductions from the calendar year. The T4 Information Return (T4 Summary and all related T4s) must be filed to the CRA prior to the end of February following the year of assessment.

TD1-PERSONAL TAX CREDITS RETURN (AND RELATED PROVINCIAL DOCUMENT)

Short-term non-resident employees are required to complete this document, prior to the commencement of services in Canada and return to their employer to identify the applicable credits and to assist in the determination of the income tax to be withheld, should the individual not have received a waiver.

SOCIAL INSURANCE NUMBER

In order to file the applicable forms mentioned above (e.g. T4, Tax Waivers etc.), where the short-term non-resident employee has arrived in Canada on a valid work permit, the foreign employer should instruct the individual to obtain a valid Canadian Social Insurance number.

POTENTIAL PAYROLL PENALTIES

Where the foreign employer has failed to comply with the Canadian required payroll withholding, the penalties are steep as shown below:

Failure to deduct

- 10% on the total CPP/EI and Income Tax that the corporation failed to deduct
- 20% on the total CPP/EI and Income Tax that the corporation failed to deduct under gross negligence.

Failure to Remit

- When you deduct but either fail to send to CRA OR send the deduction past the due date
- 3% if the amount is one to three days late
- 5% if it is four or five days late
- 7% if it is six or seven days late
- 10% if it is more than seven days late, or if no amount is remitted.

if you are assessed this penalty more than once in a calendar year, CRA will apply a 20% penalty on the second or later failures if they were made knowingly or under circumstances of gross negligence

Information Returns

- Minimum penalty for failure to produce T4/T4 Summary is dependent on the number of forms that you are required to produce. Assuming that you are to produce between 11-50 returns –the maximum penalty would be $1,000.

BDO COMMENTS

Over the past number of years, CRA has undergone a seismic shift in their audit approach with foreign employers and their payroll obligations. The days of complying with the payroll tax law, once you reached either a volume of employees, income threshold, or the number of days of presence are in the distant past.

CRA has increased their audit reviews, and with the added spillover, is able to identify non-compliant foreign employers relatively quickly. As noted above, the penalties are severe and since the foreign employer would be non-compliant, there is relatively little opportunity to combat the penalties so the audits are quickly closed. Again, the law is clear, in the absence of a waiver, you must withhold.

We recommend that foreign employers keep the lines of communication open (i.e. HR to Corporate Tax to Tax Advisor etc.) in order to identify the issues and to mitigate any problems as soon as possible.

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ITALY

INPATRIATE TAX REGIME ALSO APPLICABLE IN THE CASE OF EMPLOYEE ASSIGNMENTS

The inpatriates tax regime set out in the legislation provides for the taxation of 50% of the employment and self-employment income derived in Italy by workers who transfer their residency to Italy, in accordance with article 2 of the Italian Income Tax code.

Specific requirements have to be met:

- Holding a university degree (Bachelor or Master)
- Having continuously carried out an employment, self-employment or enterprise activity outside of Italy over the past 24 months or having continuously carried out study activity outside of Italy over the past 24 months or more, earning a college degree or a postgraduate specialisation
- Carrying out an employment or self-employment in Italy
- The individuals must not have been residents in Italy in the five years preceding the transfer and agree to stay for at least two years
- Work should be carried out for an enterprise resident in the territory of the State or with a company that directly or indirectly controls the same undertaking.

Based on the latest Italian Tax Authority communication, the 'inpatriate' tax regime will also apply in cases where the return to Italy, after the employee's assignment abroad, is linked to a different company role with respect to the original one thanks to the skills acquired.

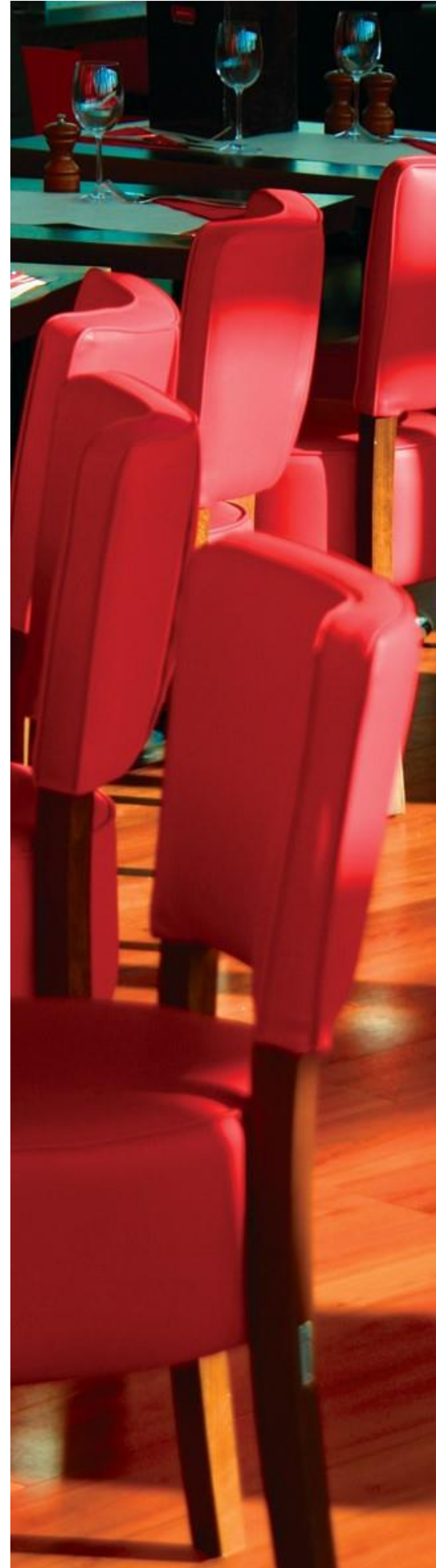
The Italian Tax Authority overcame the previous position in relation to assignments, which had been considered excluded from the facility. This will therefore impact on the tax scheme application.

The Tax Authority changed the position in Circular no. 17/2017, where the benefit was excluded for those individuals that were coming back to Italy after having been assigned abroad and having acquired the foreign residence for the necessary period. This is because, based on the Circular, going back to Italy was in execution of pre-existing employment contract clauses, thus was in substantial continuity with the previous assignment of workers. It is now possible to benefit from the 'inpatriate regime' where re-entry to Italy after the assignment is linked to a business role different from the original one held.

These conditions could be met in certain circumstances, for example the return to Italy is not a continuation of the previous employment in Italy; perhaps due to the individual carrying out a different role from that original held.

BDO COMMENTS

A case by case approach is needed in order to verify the correct application of the tax scheme. In fact the tax implications for both employer and employee need to be considered in cases where the favourable tax scheme are entered into.



WITHHOLDING TAX EXEMPTION ON DISTRIBUTION FROM ITALIAN REAL ESTATE FUNDS TO FOREIGN INSTITUTIONAL INVESTORS

No withholding tax is applicable for foreign collective investment undertakings (CIUs) that indirectly participate an Italian real estate funds.

Decree 351/2001 provides for a withholding tax exemption regime to Italian real estate funds profits distributed to the following foreign investors:

- Pension funds and collective investment schemes
- International entities or entities established based on international agreements ratified in Italy
- Central banks or bodies that also manage official state reserves.

The ruling n. 43/2018 deals with a fund set up under the law of the Cayman Islands which indirectly owns a speculative Italian property fund.

In the case represented to the Italian Tax Authority the foreign fund:

- Complies with the regulations of the United States
- Consists of a limited partnership organised under the law of the Cayman Islands (which is currently included in the white list).

The main element to be able to benefit from the exemption is to be considered an 'institutional investor qualification'. It Is possible to consider 'Institutional investors' as States and foreign public entities set up in 'white list' countries that are subject to forms of prudential supervision.

As the limited partnership is a company controlled by a CIU that manages the reserves of a State, the Italian real estate fund indirectly involved can be considered an 'institutional fund' thus the withholding exemption can be applied on distributions from Italian real estate funds.

This exemption regime is applied not only in the case of direct participation in the Italian real estate fund but also if the investors participate via a corporate vehicle that implements the investment. The vehicle participated in does not necessarily need to be resident in the same state as the participant.

Thus, the proceeds deriving from the indirect participation of the Cayman Islands fund in the Italian real estate fund will not be subject to withholding tax pursuant to the relevant Decree.

BDO COMMENTS

The orientation carried out by the Italian Tax Authority is very important for U.S. institutional investors carrying out, directly or indirectly, investments via Italian real estate funds.

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CURRENCY COMPARISON TABLE

The table below shows comparative exchange rates against the euro and the US dollar for the currencies mentioned in this issue, as at 19 October 2018.

Currency unit	Value in euros (EUR)	Value in US dollars (USD)
Singapore Dollar (SGD)	0.63093	0.72489
Hong Kong Dollar (HKD)	0.11098	0.12757
Indian Rupee (INR)	0.01183	0.01359

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