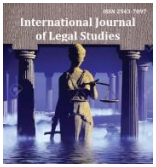

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METHODS OF PREVENTING DOUBLE TAXATION IN THE AREA OF PERSONAL INCOME TAXATION INCLUDING THE RULES OF FREE MOVEMENT OF WORKERS

METODY UNIKANIA PODÓWJNEGO OPODATKOWANIA Z UWZGLĘDNIENIEM ZASADY SWOBODY PRZEPŁYWU PRACOWNIKÓW

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Abstract:
In European Union countries, income from hired labor is taxed in the country in which the work is done. Regardless of this, taxpayers who are subject to unlimited tax liability in Poland are obliged to settle this income also in Poland. To avoid double taxation of the same income, double taxation conventions are concluded between countries. They provide for two methods of avoiding double taxation: the exclusion method with progression and the method of proportional deduction (credit, tax credit). Certain double taxation conventions concluded by Poland, exempt from taxation in Poland the income from hired work performed in another country (taxed in the country in which the work was performed). These incomes are taken into account in the annual settlement submitted in Poland only when the taxpayer also achieved income subject to taxation in Poland on general principles. Income from work abroad, exempted from taxation under a bilateral agreement, is then used to determine the interest rate, which will then be applied to the taxation of income in Poland.

Keywords: double taxation avoidance agreements, exclusion with progression, the method of proportional deduction

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Streszczenie:
W krajach Unii Europejskiej dochody z pracy najemnej podlegają opodatkowaniu w kraju, w którym praca jest wykonywana. Niezależnie od tego podatnicy, którzy podlegają nieograniczonemu obowiązkowi podatkowemu w Polsce, są zobowiązani do rozliczenia tych dochodów również w Polsce. Aby uniknąć podwójnego opodatkowania tych samych dochodów między państwami są zawierane umowy o unikaniu podwójnego opodatkowania. Przewidują one dwie metody unikania podwójnego opodatkowania: metodę wyłączenia z progresją oraz metodę proporcjonalnego odliczenia (zaliczenia, kredytu podatkowego). Niektóre umowy o unikaniu podwójnego opodatkowania zawarte przez Polskę, zwalniają z opodatkowania w Polsce dochody z pracy najemnej wykonywanej w innym kraju (opodatkowane w kraju, w którym praca była wykonywana). Dochody te są brane pod uwagę w rozliczeniu rocznym składanym w Polsce jedynie w sytuacji, gdy podatnik osiągnął również dochody podlegające w Polsce opodatkowaniu na zasadach ogólnych. Dochody z pracy za granicą, zwolnione z opodatkowania na mocy umowy dwustronnej, służą wówczas do ustalenia stopy procentowej, która następnie zostanie zastosowana do opodatkowania dochodów w Polsce.
Słowa kluczowe: umowy o unikaniu podwójnego opodatkowania, wyłącznie z progresją, metoda proporcjonalnego odliczania

Statement of the problem in general outlook and its connection with important scientific and practical tasks.

The development of international relations causes a phenomenon consisting of the fact that a person with a place of residence or registered seat in one country, obtains income from revenue sources located abroad. Generally, each state wants to tax all incomes obtained by a person with a place of residence or registered seat in its territory, regardless of the location of revenue sources, as well as incomes from sources located in its territory, regardless of the place of residence or registered seat of a person obtaining them. As a result, we could have a phenomenon of double taxation of the same income. To avoid this unfavorable event, countries conclude agreements on avoidance of double taxation. Both people with unlimited and limited tax obligation may experience double taxation of income, namely in a country in which their revenue sources are located. Thus in international tax law (and especially in bilateral agreements on avoiding double taxation), the so-called methods of avoiding double taxation are of special importance. They are based on two principles, that is the principle of residence and the principle of the source. As not all types of income are taxed on the basis of one of these principles, in the remaining scope the so-called methods of avoiding double taxation are used. International agreements on

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avoiding double taxation are subject to ratification, in accordance with regulations binding the states – parties to those agreements. These agreements are given priority over the act in case of a potential clash between provisions of the act and provisions of the agreement.

Analysis of latest research where the solution of the problem was initiated.
Agreements do not violate tax privileges that diplomatic or consular staff are entitled to on the basis of general principles of international law or provisions of particular agreements. Polish legislation, like in other EU countries, exempts from income tax the income obtained abroad by diplomatic and consular staff and by other people enjoying diplomatic and consular privileges and immunities on the basis of international agreements or commonly acknowledged customs, as well as members of their families who make up households with them.
The amount of income obtained abroad definitely influences the amount of tax paid in Poland. Double taxation is prevented on the basis of international agreements Poland is a party to, and if there are no such agreements, these matters are regulated by legislation determining income taxes paid by individuals. The following methods of avoiding double taxation have been developed:

1. Method of unlimited exclusion (full exclusion).
2. Method of exclusion with progression (tax exemption).
3. Method of tax credit (method of calculating tax paid abroad).
4. Tax on estimated income.

Method of unlimited exclusion (full exclusion) means that the state of taxpayer's registered seat exempts from tax the income which, in line with an international agreement, may be taxed in the source state. As a result, incomes generated in another country are excluded from taxation in the country of the taxpayer's registered seat.
Method of exclusion with progression (tax exemption) assumes that incomes excluded from taxation in the state of the registered seat are accumulated with incomes subject to taxation in this country in order to determine tax rate on these incomes. For determining the rate of due tax on income obtained in the country in which there is the place of residence or registered seat, we use the relevant rate for the whole income, that is joint with income obtained in another country. In Polish tax law, procedures regarding this are regulated by Article 27 paragraph 5 of the Act on personal income tax, according to which we should take the following steps:

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- add income exempted from tax to taxed income and calculate due tax from the sum, using the scale,
- the percentage rate of this tax is established,
- the determined percentage rate is applied to taxed income.

Aims of paper. **Methods.**
Social sciences use the examination of documents (legal acts and judgments of administrative courts), comparative methods (expert opinions, legal opinions, analyzes resulting from linguistic, grammatical and historical interpretation) and case studies. The result of cognitive research is new theorems or theories. On the other hand, the results of research for the needs of business practice determine whether and if the existing theorems and theories on methods of avoiding double taxation are useful for solving specific problems that arise in everyday business operations and taxpayers in the common European market. In other words, they serve to refine and fragmentary verification of existing theorems and theories. Induction was used as the main research method. It consists in deriving general conclusions or establishing regularity based on the analysis of empirically identified phenomena and processes. This is a type of inference based on details about the general properties of the phenomenon or object. The use of this method requires the assumption that only facts can form the basis for scientific inference. These facts are real situations (economic and legal). Inductive methods include various types of legal acts, analyzes, expert opinions and scientific documents used in social research.

Exposition of main material of research with complete substantiation of obtained scientific results. **Discussion.**
If the Polish taxpayer obtains income abroad that cannot be exempted from tax in Poland, we can apply the method of tax credit (deducting tax paid abroad). Such legal regulations take place when the agreement on avoiding double taxation does not release particular income from tax in a given state and at the same time this income is subject to taxation at the source state. This method consists of combining income from sources abroad with income obtained at home. Due tax is calculated on the total sum of income and then we deduct the amount of tax already paid in another country from it. This deduction, though, cannot exceed the part of calculated tax before deduction which proportionally relates to the income obtained in another country. In Polish law article 27 paragraph 6 of the act on personal income tax regulates this as

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well as article 20 of the act on corporate income tax. The above methods can be applied to tax incomes of taxpayers who are subject to unlimited tax obligation in Poland. The entities that are subject to limited tax obligation according to tax acts are only obliged to pay in Poland only tax on income obtained in our country. Similar solutions are used by all the other member states of the Community. With tax on estimated income, the income from foreign sources is taxed at the source state and the state in which the taxpayer's place of residence and/or registered seats are. Decreasing taxation level, the state of the place of residence (registered seat) burdens taxpayer's incomes with a tax on estimated income (preferential rates).

Bilateral agreements on avoiding double taxation use the above methods. Different methods are often used with reference to various types of income obtained in another country. Therefore each individual case should be thoroughly examined on the basis of provisions of a relevant international agreement. From the subject perspective, the model of OECD convention can be applied to persons whose residence or registered seat is in either of agreeing states. By persons, we understand an individual with citizenship of an agreeing state and a legal person, personal partnership, association established on the basis of the legislation of the agreeing state.

The OECD Convention model and international agreements based on it and signed by Poland concerning (a) some types in income obtained in another country, stipulates that such income is subject to taxation only in the state of the taxpayer's residence or registered seat. In this case, double taxation does not take place. When establishing the taxpayer's residence or registered seat, the internal law of a particular country prevails. The conventions and international agreements indicate some collision rules that allow granting the status of an individual and a legal person in a situation when such persons are considered residents in both agreeing countries at the same time.

In case of individuals collision rules may concern the following situations:

- an individual has a place of residence in the country in which they have the permanent place of residence;
- if an individual has a permanent place of residence in both agreeing countries, the location of their life interests center is of vital importance;
- if we cannot decide where an individual's center of life interests is located or when an individual does not have a place of residence in any agreeing state, for tax purposes we choose the place in which such person usually stays;

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- if an individual does not stay in any agreeing state or stays in both of them, their citizenship determines this for tax purposes;
- If we cannot apply any of these four principles, the place of an individual's residence is established by both parties – states in mutual agreement.

With reference to legal persons we adopt two collision rules:

- if a legal person has its registered seat in both agreeing states, it is assumed that it has the seat in the country in which its actual board resides (place of taking most current decisions concerning management);
- if the actual place of the board residence cannot be established, the governments of agreeing countries establish this together.

With reference to (b) remaining income (in the country of residence or registered seat, agreements stipulate:

1. Method of tax exemption (exclusion with progression), applied to personal incomes, as corporations pay their income tax according to a flat rate (without progression), or;
2. Method of tax credit (method of deducting tax paid abroad), in a higher amount than tax corresponding proportionally to income, obtained abroad.
3. Method of proportional deduction, where deduction in the home country cannot exceed this part of the tax that falls proportionally on income obtained in a foreign country.

The method of the tax credit can be used when agreements allow the possibility of taxing a given income in both countries, that is in the country in which income is generated and in the country with the place of residence or registered seat of a person obtaining this income. We should remember that agreements usually contain a regulation that a given income "may" be taxed in a given state, which does not mean giving the freedom to choose in which country the income will be taxed. It means that the other country has the right to tax such income if, according to its legislation, such income is taxable.

In a situation when an agreement stipulates taxation of income in the location of revenue sources, namely abroad, and application of the method of tax exemption (exclusion with progression), such income is exempted from taxation in Poland (or another EU country), but when taxing individuals who obtain other incomes in Poland, relevant regulations of tax legislation of a given country are used, adjusted to the method of exclusion with progression (Article 27 paragraph 5 of the Act on personal income tax). This means that we combine the income from revenue sources

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abroad and income obtained in Poland (another EU country). Agreements using the method of tax exemption (exclusion with progression), with reference to some incomes, state that a given income is subject to taxation only in one country. It is usually the country of the taxpayer's residence or registered seat. This concerns income from international transport, retirement pensions and from other sources listed there.
Method of proportional deduction of tax consists in the fact that we add income obtained abroad to income obtained in Poland (or another EU country) and calculate income tax on the total amount of income, using the tax scale valid in Poland (or another EU country). Then we deduct the amount of tax paid abroad from the tax calculated in this way. The method is used in the taxation of individuals when there is no agreement with a given state and the principle of mutuality does not apply (Article 27 paragraph 6 of the Act on personal income tax).
The obligation of declaring foreign incomes in Poland relates to cases when income obtained from revenue source abroad, in accordance with an agreement made with this state:

- is subject to taxation only in the state which is the place of residence, as in case of retirement and disability pensions, or
- is subject to taxation in this state and the agreement stipulates avoidance of double taxation using the method of exclusion with progression, but the taxpayer also obtains income from revenue sources located in Poland;
- is subject to taxation in this country, but the agreement stipulates avoidance of double taxation using the method of proportional deduction of tax paid abroad. Therefore such income is not subject to the exemption in Poland both in case it is the only income of a taxpayer and when the taxpayer has other sources of income in Poland. The tax paid abroad is deducted from tax due in Poland.

The convention and agreements on avoidance of double taxation indicate principles of taxing incomes, taking into account their sources. Such principles are to eliminate double taxation in international relations. They boil down to the following rules:

- property incomes can be taxed only in the country in which property is located;
- company profits are subject to taxation in one agreeing state. When an enterprise from one agreeing state conducts its activities on the territory of the other state through the branch located there, profits of this branch can be taxed in the state in which it is located;

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- the dividend may be taxed simultaneously in the country in which its receiver has their residence or registered seat and in the country in which the company paying it has its registered seat;
- interests may be taxed both in the country of residence or registered seat of interest beneficiary or in the country in which interests are generated;
- license fees originating in one state and receivable by a person whose residence or registered seat is in the other state can be taxed only in the other state;
- capital gains obtained by a person with residence or registered seat in one state and coming from the transfer of ownership of immovable property located in the other state can be taxed in the other state;
- capital gains from transferring ownership of movable assets being part of company assets, which the company from one state owns in the other state, as well as gains from transferring ownership of movable assets belonging to permanent contribution which the person residing in one state has at its disposal in the other state in order to perform a liberal profession, are subject to taxation in the other country;
- capital gains from ownership of other than movable and immovable property, we take into account the country in which the person transferring property has a place of residence or registered seat;
- income from hired labor and liberal professions, obtained by a person whose residence or registered seat in one agreeing state can be taxed only in this state;
- taxation of immovable property belonging to a person whose residence or registered seat is in the agreeing state and located in the other state – it is assumed that tax is collected by the state in which property is located;
- movable property being part of the branch possessed by an enterprise from an agreeing state in the other agreeing state can be taxed in the other state.

Conclusions.

Free movement of workers is a fundamental principle of the Treaty enshrined in Article 45 of the Treaty on the Functioning of the European Union and developed by EU secondary legislation and the Case-law of the Court of Justice. EU citizens are entitled to (Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers; Article 45 of the Treaty on the Functioning of the European Union (TFEU); Regulation (EU)

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492/2011 of 5 April 2011 on freedom of movement for workers within the Union, codifying Regulation (EEC) 1612/68 and its succes
sive modifications (Council Regulations 312/76 and 2434/92, and Article 38(1) of Directive 2004/38/EC); Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ No L 158, 30 April 2004);Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community (OJ No L 209, 25 July 1998):

- look for a job in another EU country;
- work there without needing a work permit;
- reside there for that purpose;
- stay there even after employment has finished;
- enjoy equal treatment with nationals in access to employment, working conditions and all other social and tax advantages.

The **EEC Treaty** had the objective, as regards workers, of creating a common labor market, which meant the free movement of labor within the Community and the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. Under Article 45 of the Treaty on the functioning of the EU (ex Article 39 TEC), freedom of movement of workers entails the right, subject to limitations justified on grounds of public policy, public security or public health to accept offers of employment actually made, **to move freely** within the territory of Member States for this purpose, **to stay** in a Member State for the purpose of employment and **to remain** in the territory of that Member State after having been employed in it. The Community legislation that materialized those principles was completed in 1968 and, thus, freedom of movement of workers was achieved, from the legal point of view, at the same time as the customs union. This freedom was extended to all the workers in the European Economic Area in 1994.

Nowadays, all persons residing legally in a Member State have equal rights of movement and residence in the other States of the Union. Therefore, a directive replaced a range of complex legislation relating to different categories of beneficiaries, including salaried and non-salaried workers (Regulation 492/2011 and Directive 2004/38). For periods of residence of longer than three months, Member States may only require Union citizens to register with the competent authorities in the place of residence. The worker can continue to reside, in the country in which he

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or she has settled after the termination of his or her employment. In fact, the worker and his or her family members who have resided in a host Member State during a continuous period of five years have a right of permanent residence in that State. The members of the family enjoy the right of residence even after the worker's death. A directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, provided in Article 19 of the Treaty on the functioning of the EU (ex Article 13 TEC), seeks to prohibit discrimination throughout the European Union in different areas such as employment, education, social security, health care and access to goods and services (Directive 2000/43). It defines the concepts of direct and indirect discrimination, gives right of redress to victims of discrimination, imposes an obligation on the employer to prove that the principle of equal treatment has not been breached, and offers protection against harassment and victimization in all the Member States.

The EC/EU has set up a general framework for combating discrimination on grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment (Directive 2000/78). This prohibition of discrimination applies also to nationals of third countries but does not cover differences of treatment based on nationality, race or ethnic origin, because Directive 2000/43 already provides protection against such discrimination in the field of employment and occupation. An important body of European law prohibits discrimination against women as regards access to employment, vocational training and promotion, and working conditions.

Public statements by an employer to the effect that he will not recruit people of a certain racial or ethnic origin constitute direct discrimination in the sense of Directive 2000/43. The Court of Justice has consistently held that the rules on equal treatment prohibit not only overt discrimination but also **any form of concealed discrimination**, which is based on various distinction criteria but has the same effect (Case 65/81 and Case 137/840. However, discrimination exists only where different rules are applied to comparable situations or the same rule is applied to different situations. For instance, where direct taxes are concerned, the Court has ruled that the provisions of the free movement of workers do not in principle preclude the application of national rules under which a non-resident working as an employed person in a Member State is taxed more heavily on his income than a resident in the same employment (Case C-279/93). Sickness cannot as such be regarded as a ground in addi-

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tion to those in relation to which Directive 2000/78 prohibits discrimination (Case C-13/05).

The principle of the free movement of workers applies equally to nationals of third countries, who stay lawfully in a Member State. Indeed, according to a Judgment of the Court of Justice, a firm established in a member country, which employs lawfully and habitually non-member country nationals, may detach them in another Member State in order to provide services (Case C-43/93). The principle of free movement applies also to all cases of posting of workers taking place in the framework of a transnational provision of services. Thus, workers posted to another Member State by their employers enjoy at least the terms and conditions compulsory in the host Member State (Directive 96/71).

Article 45 § 4 of the TFEU excludes employment in the **national public service** from the principle of the free movement of workers. However, according to the Commission and the Court of Justice, this exception from the general principle of free movement does not concern jobs, which, even if they are funded by the State, are not public service as such, e.g. bodies responsible for administering commercial services, public health care services, teaching in State educational establishments and research for non-military purposes in public establishments (See Case C-187/96). Moreover, according to the Court of Justice, given the fundamental character of the principles of free movement and of equal treatment, the derogations based on Article 39.4 (new Article 45 § 4 TFEU) should not exceed the aims of this exception to the rule (Case 152/73) and should not contravene the principle of non-discrimination (Case C-187/96).

The principle of free movement of workers cannot be hindered by the **rules of** sports associations. In the **Bosman judgment**, which revolutionized European sport customs, the Court of Justice held, indeed, that Article 48 EEC (Article 45 TFEU) applied to the collective rules adopted by private sports associations since the exercise of sport as economic activity was covered by European law (Case C-415/93). In particular, the Court held that by preventing or deterring nationals of a Member State from leaving their country of origin the transfer rules constituted an obstacle to the free movement of workers. According to the Court, the rules in question are not likely to provide encouragement and financing for small clubs training young players, since there was no guarantee that they would collect such fees and since the amount of the fees bore no relation to the costs actually incurred for the training. The Court also held that under Article 48 of the EEC treaty no rules could require clubs to field,

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for a given match, only a limited number of professional players who were nationals of other Member States, but it admitted that the nationality requirement was justified in the case of matches between the national teams of different countries. In the field of social security there exist Community rules which define the concept of cross-border worker for the purpose of determining in which Member State they are entitled to social benefits. The Community definition in the social security field covers both employed and self-employed persons. In the field of *taxation* there exist no rules at Community level regarding the definition of cross-border workers, the division of taxing rights between the Member States or the tax rules to be applied. The neighboring Member States with many persons crossing borders to work often agree with special rules for cross-border workers in their bilateral double taxation conventions.

Since these rules reflect the special situation between two Member States and are the result of negotiations between them, it follows that these rules vary from one double taxation convention to another. This applies both to the definition as such, and the division of taxing rights between the Member States concerned. Normally any special rules for cross-border workers are limited to persons who both live and work close to the border and are employed. They may even be limited to persons employed in the private sector (as opposed to the public sector).

Income earned by a cross-border worker may be taxed in one or both of the Member States concerned, depending on the tax arrangements. In the latter case, tax paid in the Member State where the work is carried out would normally be taken into account when determining the tax liability in the Member State of residence, in order to avoid double taxation. There are no rules which guarantee the cross-border worker the right to the most favorable of the tax regimes of the Member States involved (see the Gilly case, para 46. C-336/96).

The EC Treaty freedoms and the non-discrimination principle mean that the cross-border worker may not be discriminated against in his State of residence because he works in another Member State. To the extent that taxpayer is taxed in the State of residence on income from employment or self-employment exercised in another Member State, the taxpayer should therefore normally have the same right to a deduction for work-related costs or costs of a personal kind in the State of residence as if the work had been carried out there. This may be the case for instance as regards costs for traveling to and from work, social security contributions paid in the Member State of employment or self-employment, child-care fees, pension contributions, etc.

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From the point of view of the State of employment, a cross-border worker falls within the broader category of non-resident workers - non-resident meaning that they have their tax residence somewhere else. According to Article 39 EC and Article 7 of Regulation 1612/68, non-resident workers shall enjoy the same tax advantages as national workers. For tax advantages related to the personal and family situation, this rule applies as long as the situation of a non-resident worker is comparable to that of a resident worker. The Court of Justice has constantly held that residents and non-residents are not generally in the same situation. Differences in taxation between residents and non-residents may therefore not necessarily constitute discrimination. However, where a non-resident worker - including a cross-border worker - is virtually in the same situation as a resident worker, the non-resident worker may not be subject to less favorable tax rules in the State of employment than residents of that State. National rules denying the deduction of costs and expenses from a taxable income are not allowed if the costs and expenses are directly linked to the economic activity which generated the taxable income. On 21 December 1993, the Commission issued a Recommendation (94/079/EC) on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident. The recommendation proposes to the Member States a Community system for taxing income of non-resident workers. The main feature is that non-resident persons should benefit from the same tax-treatment as residents if they obtain the major part of their total income in one Member State. In such situations, the Member State of residence would be allowed to reduce the personal tax advantages correspondingly in order to avoid that personal allowances could be enjoyed twice.

Sources of law:

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6. DIRECTIVE 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community (OJ No L 209, 25 July 1998).
7. REGULATION (EU) 492/2011 of 5 April 2011 on freedom of movement for workers within the Union, codifying Regulation (EEC) 1612/68 and its successive modifications (Council Regulations 312/76 and 2434/92, and Article 38(1) of Directive 2004/38/EC).

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