



TC04934

Appeal number: TC/2015/03226

NATIONAL INSURANCE CONTRIBUTIONS – late payment of contributions – whether agreement that late payments would count for benefit – accuracy of official records – whether contributor in ignorance or error and failing to exercise due care and diligence – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID TAYLOR

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE J GORDON REID QC FCI Arb
IAN SHEARER**

**Sitting in public at George House, 126 George Street, Edinburgh on
8 February 2016**

The Appellant in person

Lesley Crawford, Officer of HMRC, for the Respondents

DECISION

Introduction

5 1. This is an appeal against HMRC's decision dated 1 April 2015, that certain Class 2 National Insurance Contributions due between April 1979 and April 1983 were paid out of time through a failure on the part of the appellant (Mr Taylor) to exercise due care and diligence with the consequence that those payments did not count for the purpose of calculating his state retirement pension which he has received
10 since about 2009. Mr Taylor has argued that the late payments should count towards his pension.

15 2. Mr Taylor represented himself and gave evidence. He was accompanied by his brother, James, who helpfully contributed to the proceedings from time to time but did not give evidence. The Respondents (HMRC) were represented by Lesley Crawford, an HMRC officer. She led the evidence of Mrs Linda Gordon, also an HMRC officer, who had dealt with the dispute in recent years, although Mrs Crawford signed the decision dated 1 April 2015. Mrs Gordon provided a comprehensive written statement, which she supplemented in evidence. While she was asked a few questions by Mr Taylor and by the Tribunal, her evidence passed
20 largely unchallenged.

3. A bundle of documents containing correspondence and some records was produced along with a bundle of authorities.

Statutory Background

25 4. This is not in dispute or in doubt. As a self-employed earner, Mr Taylor was liable to pay weekly Class 2 contributions.¹ If they were paid late and after the due date, they were treated as *not* paid for the purpose of entitlement to contributory benefit, here the state retirement pension; the due date was (for contribution weeks between 1979 and 1983) two years after the year in which liability arose.²

30 5. That two year period was extended to six years with effect from 6 April 1983. Thus, even although Class 2 NICs were not paid weekly and were being paid late, as long as those late payments were made by the due date (2 years and subsequently 6 years) they were still treated as paid and counted towards entitlement to contributory benefit such as the state retirement pension.

35 6. However, late payments made after the due date may be treated as having been paid timeously if it is *shown to the satisfaction of HMRC* that the failure is

¹ Social Security Act 1975 ss 2(1) & 7(1); superseded by the Social Security Contributions and Benefits Act 1992; see s11(1)

² Social Security (Contributions) Regulations 1975 reg 33(2); Social Security (Contributions) Regulations 1979, reg 38(2)

attributable to ignorance or error and that ignorance or error was *not* due to a failure by the contributor to *exercise due care and diligence*.³

7. The decision appealed against is a decision prescribed under Regulation 155A(1)(j) of the Social Security (Contributions) Regulations 2001 for the purposes
5 of s8(1)(m) of the Social Security (Transfer of Functions etc) Act 1999. S11(2)(b) of the 1999 Act (as amended by the Transfer of Tribunal Functions and Revenue and Customs Appeal Order 2009, Schedule 1 paragraph 270), gives the right to appeal to this tribunal against such a decision. Paragraph 62 of the 2009 Order incorporates
10 ss49A to 49I of the Taxes Management Act 1970 into the Social Security Contributions (Decisions and Appeals) Regulations 1999, with various modifications which we need not consider.

8. Over the years, responsibility for National Insurance contributions has been vested in various government departments including the Department for Health and Social Security, the Department for Social Security, the Contributions Agency, the
15 Inland Revenue and HMRC. We shall refer to these bodies, other than HMRC, as the Department. It is also convenient to note here that the HMRC witness, Linda Gordon, has worked for all these bodies in the course of her career since 1986, which throughout has involved National Insurance contributions work and procedures.

9. We also note amending legislation contained in the National Insurance Contributions Act 2015; it does not appear to affect this Decision.
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Facts

10. Mr Taylor was born on 25 May 1944. He is 71 years old. He has spent most of his working life carrying on a variety of activities as a self-employed man, with occasional periods of employment in between. He has been a farmer, a hotelier, a gun
25 maker and gun dealer and an inventor. He has had a particular interest in gun sports. He taught shooting and represented a number of well-known gun makers and gun dealers over the years. He had a distinguished career as a sportsman in the field of clay pigeon shooting winning a number of world, United Kingdom and Scottish titles.

11. Throughout much of his working life Mr Taylor engaged the services of an
30 accountant who prepared and submitted accounts and tax returns for him in the usual way.

12. In about April 1985, Mr Taylor notified the Department that he had been self-employed since 29 April 1979. Until then, the Department would not have known and did not know that between April 1979 and April 1985 Mr Taylor had failed to pay
35 Class 2 NICs as a self-employed earner.

13. Mr Taylor and his then accountant, attended a meeting at the Department's offices at Castle Terrace/Lady Lawson Street, Edinburgh in about May 1985. At that

³ See Social Security (Contributions) Regulations 1975, and 1979, regulations 36, and 41 respectively and Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001, regulation 6.

meeting, which was short, lasting only about 20 minutes, Mr Taylor and his accountant explained or confirmed that Mr Taylor accepted that he had failed to pay Class 2 NICs since April 1979 when, after a period as a paid employee, he had again become self-employed.

5 14. Mr Taylor does not recollect signing or receiving any document at the meeting, although he concedes that he may have done so. He accepts he may have signed a cheque in part payment of arrears. Arrangements were made to pay the balance of arrears by instalments. These amounted to £616.20 which he paid between June 1985 and March 1986.

10 15. He left the meeting content, with the understanding that the question of arrears had been resolved, and that, on payment of his arrears, his state retirement pension would be protected. How he came to be of that understanding is not clear. It is not even clear whether the reason for the arrears was discussed.

15 16. Any official record of that meeting or what transpired has long since been destroyed. Such records are normally only held for a maximum of three years. Mr Taylor no longer has any business records relating to 1975-1985.

17. Mr Taylor candidly now attributes his failure to pay Class 2 NICs timeously between 1979 and 1985 to forgetfulness on his part and bad housekeeping during a period when he was also very busy. How this occurred when he had an accountant during those years preparing his accounts and tax returns is unexplained.⁴ He says, and we accept, that at that time he knew the difference between employment and self-employment, having had previous experience of complying with the relevant procedures for NICs for both types of employment.

18. The arrears were duly paid. Mr Taylor kept a record of their payment on a DHSS payment card. After the arrears were paid, the Department's National Insurance records relating to Mr Taylor must have been updated as they showed that the arrears had been paid but that Class 2 NICs for the tax years 1979/80, 1980/81, 1981/82 and 1982/83 were treated as *not* paid, for the purposes of contributory benefit as the arrears had been paid *outwith* the prescribed statutory time limits. They *were* treated as paid in the tax years 1983/84 and 1984/85 for the purposes of contributory benefit as they were paid *within* the prescribed statutory time limits.

19. Mr Taylor attained 65 years of age on 25 May 2009. On or about 19 May 2009, his accountant wrote to HMRC NIC Contribution Office asking them to check their records on the basis that Mr Taylor had been advised by the Pension Service that he was only entitled to 73% of his basic state retirement pension. Correspondence ensued for some time and then appeared to peter out. In that correspondence, HMRC provided full details of their records relating to Mr Taylor.

⁴ The unfortunately vague evidence here can be contrasted with the apparently cogent evidence in *Murphy v HMRC* [2014] UKFTT 734 (TC), where in a short, crisp decision, the result favoured the taxpayer.

20. By letter to Mr Taylor dated 9 July 2010, HMRC explained that for the 1979/80 to 1982/83 tax years he had paid Class 2 NICs too late to be counted towards benefit entitlement. It was further explained that payment in respect of the tax year 1983/84 and 1984/85 did qualify for pension purposes. The letter proceeded to explain the then current practice and to summarise the law in general terms.

21. In a letter dated 16 July 2010 in reply, Mr Taylor's accountant noted that at the meeting in May 1985 Mr Taylor was *advised of the amount required to bring his National Insurance contribution record up to date and protect his entitlement to his State Pension.*

22. There was further contact between Mr Taylor and HMRC in early 2013. The result was that Mr Taylor was invited to make additional voluntary contributions to enhance his state retirement pension. It appears that he did not do so.

23. There was further contact between Mr Taylor and HMRC in 2014. HMRC sent him a lengthy letter, dated 22 May 2014, setting out full information about his National Insurance record and related matters, including a summary of the relevant legislation and the question of *ignorance and error* and *due care and diligence*. In November 2014, Mr Taylor enquired how he could appeal against the views of HMRC. In response, HMRC issued a formal decision on 10 December 2014.

24. The critical part of the decision letter was

Your failure to pay the Class 2 National Insurance contributions for the period from 29 April 1979 to 5 April 1983 within the prescribed period was attributable to your ignorance or error, however, that ignorance or error was due to a failure on your part to exercise due care and diligence, therefore, they are treated as not having been paid for the purposes of any contributory benefits

25. Mr Taylor sought a review of the December 2014 decision. The decision was upheld but re-issued on 1 April 2015 in essentially the same terms, but correcting a typographical error. Mr Taylor appealed to this tribunal against that decision in May 2015.

HMRC Records relating to Mr Taylor

26. These show *inter alia* the following:-

27. His NI contribution record for 1970/71 to 1975/76 disclosed no payments.

28. He was an employed person during the 1976/77 and 1977/78 tax years.

29. He had arrears of Class 2 NICs for the period 29 April 1979 to 5 April 1980, and from 12 April 1981 to 9 April 1983. The records do not show these contributions as having been made within the due dates.

30. He registered his self-employment in about April 1985. In the course of that month, he set up a direct debit for payment of National Insurance contributions.

31. HMRC's computerised form RD18 shows that arrears of Class 2 NICs, for the tax years 1979/80, 1980/81, 1981/82 and 1982/83 were recorded as being treated as *not* paid for the purposes of entitlement to contributory benefit. These years were marked LX on the record. By contrast, the arrears of Class 2 NICs for the tax years 1983/84 and 1984/85 *were* treated as paid for the purposes of entitlement to contributory benefit, as although late ie not paid weekly, they were nevertheless paid within the statutory time limit.

32. The arrears were allocated to the tax years 1980/81, 1983/84 and 1984/85. This was beneficial to Mr Taylor as it meant that the arrears allocated to the tax years 1983/84 and 1984/85 were thus *not* paid *after* the due date, and so were treated as paid (on time) for the purposes of entitlement to contributory benefit. They thus counted towards his state retirement pension.

Mr Taylor's records

33. Mr Taylor's only record, an official Department MF49 payment card shows that he began making payment of arrears in June 1985. The record shows that he paid £116.20 on 7 June 1985 and payments in August, September, November 1985 (2) and on 17 March 1986 of £100 making, in total, £616.20.

34. The accountant acting for Mr Taylor in the 1970s and 1980s and who attended the meeting in 1985 has died (we think, some considerable time before 2009). Mr Taylor has no records or correspondence relating to the 1985 meeting or its outcome apart from the payment card referred to in the preceding paragraph. He has no recollection of seeing or receiving any written confirmation from his former accountant or the Department either of what transpired at the meeting or its outcome. He has not troubled the firm of solicitors who employed his accountant in 1985 to ascertain whether they have retained any relevant records for that year. It seems unlikely that they would have done so.

Normal Practice

35. In about 1985, on receipt of intimation of self-employment, the local National Insurance Officer would arrange a meeting to establish the ability of the individual in question to pay the arrears, where, as here, the intimation was that self-employment had begun some years previously. The individual would provide details of his financial circumstances using a standard form which would be completed and signed by the individual. The form in use in 1985 (form CF449) contained a statement that the person completing and signing the form had *had explained to me the effect that non-payment of contributions may have on my future benefits, and the time limits for payment of contributions*; and that he had received *inter alia* a copy of Leaflet NI48. He would be given various Department leaflets including Leaflet NI48.

36. The individual being interviewed would normally be told that he was liable for arrears whether or not payment of the arrears would count towards entitlement to contributory benefit. An arrangement to pay arrears by instalments would have been

entered into where appropriate. Once paid, the Department's Statement of Account would be updated.

37. It is not known whether these procedures were carried out in relation to Mr Taylor in 1985. There is nothing in the departmental records to suggest that normal practice was not followed.

38. Leaflet NI48, entitled *Unpaid and late paid contributions*, which was available in 1985, stated, on page 4, *inter alia* that *If you are self-employed and have not been granted exception you are liable to pay Class 2 contributions although they may be too late to count for benefit, and the Department will take any action it considers necessary to obtain payment.* The leaflet earlier explains that *exception* related to low earnings.

39. At page 7, the leaflet explains the time limits in relation to the state pension and Class 2 contributions for periods before 6 April 1983 (they must be paid before the end of the second tax year after the one in which they were due) and for periods after that date (they must be paid before the end of the sixth tax year after the one in which they were due).

Grounds of Appeal

40. In his Grounds of Appeal, Mr Taylor acknowledges that he *missed NI contributions from 29 April 1979 to 5 April 1983.* These were made good, so that he would be in receipt of a full state retirement pension when the time came.

41. Neither he nor his representatives were informed that these payments would have no impact on his state retirement pension.

42. He acknowledged that his failure to pay the contributions on time was due to his error or ignorance. However, he says that these payments were made to meet his legal obligations. He requests HMRC to *meet their side of the arrangement* by paying his full state retirement pension entitlement.

43. From the documents produced, it is clear that Mr Taylor also argues that had the prescribed periods and the effect of payment been made clear to him, he would not have paid. That he did pay, he says, is evidence of his good intent and HMRC are wrong not to take into account the late payments when calculating the amount of his state retirement pension.

44. We should also record that the Notice of Appeal was a few weeks late. HMRC did not mention it and we took the view that it was plainly just that the appeal should proceed, as it has done. Any procedural non-compliance is therefore waived.

Submissions

45. Mr Taylor added very little to the summary of his grounds of appeal which we have set out above. His basic position was that, at the meeting in 1985, he was led to believe that the failure to pay his Class 2 contributions had been resolved, and if he

paid the arrears (which he subsequently did) they would count towards his state retirement pension. The HMRC records were incomplete and wrong.

46. HMRC submitted that although there are no records of what transpired at the meeting, it can be concluded, having regard to the practice and procedures then in operation, that Mr Taylor would have been informed that he was liable to pay the arrears and would have been requested to pay them whether or not they would count towards entitlement to contributory benefit. The records showed that the arrears were *not* treated as paid for the purposes of entitlement to contributory benefit except for the years 1983/84 and 1984/85 where the payments of arrears *were* made before the due date and were therefore treated as paid for those purposes.

47. From 1979 when he became self-employed until 1985 he made an error in not paying his Class 2 NICs as a result of not acting with due care and diligence. The decision to treat part of the arrears as *not* paid for the purposes of entitlement to contributory benefit was correct.

15 **Discussion and Decision**

48. In spite of the terms of the grounds of appeal, the basis of the appeal appears to be that the Department, at the meeting in May 1985, agreed that if the arrears of Class 2 NICs were paid they would be treated as counting towards entitlement to contributory benefit. Accordingly, so the argument runs, the Departmental records were inaccurate and the appeal should be allowed.

49. This ground depends firstly on what happened at the meeting in May 1985, secondly whether what occurred is sufficient to justify concluding that the Departmental records are inaccurate, and thirdly, whether, if so, the appeal must be allowed. The onus lies on Mr Taylor to establish that the appeal should be allowed.

50. Establishing on the balance of probabilities what happened at a short meeting some 30 years ago where there are no records of what then transpired is a difficult task. Mr Taylor was present at the meeting but his recollection before us was vague and uncertain. We accept that he was genuinely doing his best to tell the truth and not to *re-construct* what may or may not have happened. For that reason, he candidly said that he could not remember signing any document but may have done so.

51. We are prepared to accept that he genuinely believed that the question of arrears was resolved by him agreeing to pay them off by instalments, which he did. We are also prepared to accept that he genuinely believed that he left that meeting believing that by paying the arrears in instalments his pension would be protected.

52. However, how he came to reach that understanding and whether it evidences some sort of concession or agreement by the Department is another matter.

53. It is plain that at the meeting Mr Taylor was liable to make payment of the arrears whether, on payment, they counted or did not count for the purposes of entitlement to contributory benefit. They could only be counted if Mr Taylor accepted that the failure was due to ignorance or error and satisfied the Department

that he had exercised due care and diligence. He said, as we have found, that his failure to pay by the due dates was attributable to forgetfulness and bad housekeeping at a time when he was very busy. He did not appear to blame his accountant for not raising the issue of Class 2 NICs in the course of preparing accounts and returns
5 between 1979 and 1984 or 1985. The question of whether, in spite of the failure to pay the arrears, Mr Taylor exercised due care and diligence did not seem to arise at all at the meeting and Mr Taylor did not raise it with us at the hearing.

54. Mr Taylor has said that if he had known that payment of the arrears would not count towards his pension he would not have contacted the Department and would not
10 have paid the arrears. That seems to us, with respect, to proceed upon a misunderstanding. There can be no dispute that Mr Taylor was liable to pay albeit late, although there might have been some question about prescription (time-bar) for the earlier years. However, if he did not pay then there would be nothing to be treated as paid for the purposes of entitlement to contributory benefit.

15 55. Mr Taylor's only chance of securing that the arrears would be treated as paid would be to establish that, in spite of his failure, he took due care and diligence, but that does not seem to have been raised at the meeting in 1985. There is therefore no reason why a Departmental official would simply conclude, without any reason or plausible explanation, that due care and diligence had been exercised by Mr Taylor,
20 and treat the arrears when paid as counting towards contributory entitlement.

56. On the evidence, we cannot be satisfied that the Department somehow bound itself to treat the arrears as paid or somehow found that due care and diligence had been established but omitted to correct their records. We start with the presumption
25 that, in the absence of clear evidence to the contrary, the then normal practice would have been carried out; and that the records showing failure to pay Class 2 NICs timeously as *not* paid for contributory benefit entitlement purposes, are accurate.

57. It seems somewhat unlikely, though possible, that normal practice would be departed from and the arrears treated as paid for the purposes of contributory
30 entitlement without considering and accepting that Mr Taylor had exercised due care and diligence.

58. We would require some cogent evidence to rebut the presumption to enable us to find, on the balance of probabilities, that there was such an agreement or that the Department was satisfied that due care and diligence had been exercised and that the Department's records were inaccurate. No such evidence has been produced.

35 59. We do not therefore accept that it has been established that the Department agreed and by so agreeing bound itself to treat the arrears of Class 2 NICs for the tax years 1979/80 to 1982/83 as counting towards contributory benefit entitlement. Nor can it be concluded that the Department was or must have been satisfied that due care and diligence had been exercised.

40 60. In reaching its decision in December 2014 and again in April 2015, HMRC came to essentially the same view, largely on the basis of historical record. On the

basis of the information available to them, they were entitled to do so. Having considered the same documents and heard the evidence, we reach the same conclusion.

5 61. Moreover, the usual issue which arises in this type of appeal simply did not arise at all. HMRC had no evidence before it from which it could be satisfied that, notwithstanding the non-payment of Class 2 NICs timeously between 1979 and 1985, it was not due to the failure on the part of Mr Taylor to exercise due care and diligence. Having considered the same documents and heard the evidence, we reach the same conclusion. Forgetfulness, bad housekeeping and pressure of work do not
10 establish due care and diligence. Mr Taylor accepts, as we have found, that he had previous experience and understanding of complying with the procedure for Class 2 NICs.

15 62. When these decisions were made and reviewed, there was no information before HMRC which would have enabled them to conclude that the failure to pay the Class 2 NICs for the period between 1979 and 1983 by the due dates was attributable to anything other than error or ignorance on the part of Mr Taylor. His error or ignorance was the only conclusion they could reasonably have arrived at. Nor was there any information available to HMRC on the basis of which they could have concluded that Mr Taylor acted with due care and diligence. No particular
20 circumstances bearing on the question of due care and diligence were drawn to the attention of HMRC, or to the Department in 1985, by Mr Taylor or anyone on his behalf. That he failed to exercise due care and diligence between 1979 and 1983, was the only conclusion HMRC could reasonably have arrived at.

25 63. In our view, having regard to the facts as we have found them to be, the evidence about what happened at the meeting is *not* sufficient to justify the conclusion that the HMRC records are inaccurate insofar as they treat Mr Taylor's Class 2 NICS for the years 1979/80, 1980/81, 1981/82 and 1982/3 as *not* paid for the purposes of entitlement to contributory benefit. This answers the first and second questions referred to above in paragraph 49.

30 64. It would be surprising if vague, general and undocumented evidence of a concession or agreement some 30 years ago could overturn what appears to be disclosed by the Department's long held records (now held by HMRC) which in other respects were not challenged by Mr Taylor. We do not say that it is impossible to establish, possibly in another forum, either some form of agreement about the effect
35 of late contributions or that the departmental records are inaccurate. However, this has not been done in this appeal.

40 65. Moreover, it is by no means clear that, even if such an agreement of the sort contemplated were established, it would result in the appeal being allowed. In the light of the evidence we heard, it is difficult to see how the Department, in 1985, could ever have justified being satisfied about the *due care and diligence* test. Unless that test was met, there was no valid basis on which the late payment of contributions could be treated as paid for the purposes of contributory entitlement.

66. No question of acting in reliance on such an agreement, or issues of personal bar arise as the arrears were due anyway and Mr Taylor was apparently unaware of the departmental decision until he took matters up with HMRC shortly before he reached the age of 65 years.

5 67. The third question referred to above in paragraph 49, however, does not now arise and **the appeal must be dismissed.**

68. Finally, we record that we invited HMRC to indicate whether we had full jurisdiction to decide the merits of the appeal or whether our jurisdiction was restricted to considering whether HMRC were entitled to conclude that it had not been shown to their satisfaction that Mr Taylor's error in paying after the due date was not due to any failure on his part to exercise due care and diligence (ie a judicial review type jurisdiction).

69. We were not clear what HMRC's response was in this case. They included two decisions in the bundle. In one, *Walsh v Secy of State*⁵ the court observed that it was not for it to substitute what it would or might have done. This is the language of a judicial review type test. On the other hand, in *Adojutelegan v Clark*⁶ the distinguished Special Commissioner (Dr Avery-Jones) expressly stated that it was for him to decide whether the statutory condition was satisfied rather than whether HMRC's decision was reasonable.⁷ In *Rose v HMRC*⁸ a Special Commissioner, highly experienced in National Insurance law, decided the *due care and diligence* question as one of fact for him to determine, which he did. Both *Walsh* and *Rose* were discussed in *Hinton v HMRC*.⁹ Here, on both tests, Mr Taylor fails.

70. It is with some regret that we must dismiss this appeal, but the evidence we have heard and the law which we must apply, give us no other choice. We should also record that the HMRC officials involved in this appeal have gone to great lengths to explain matters in considerable detail to Mr Taylor in a clear, comprehensive and balanced manner.

⁵ Unreported, High Ct of Justice 28/3/94, Owen J, frequently cited in *due care and diligence* appeals.

⁶ [2004] STC SCD 524

⁷ Paragraph 5

⁸ 4/12/06 SC Dr David Williams, paragraph 48 ([2007] STC (SCD) 129. The Commissioner (as he then was) carried out a thorough analysis of the contribution record RF1, and concluded that it was accurate. In an appendix to the Decision, Dr Williams provides a valuable exposition of the working and maintenance of such records within the Department, which is noted in *HMRC v Kearney* [2010] STC 1137 paragraph 45.

⁹ [2015] UKFTT0679 (TC), 23/12/15, in which Mrs Crawford appeared for HMRC; due care and diligence was treated as a factual issue decided by the tribunal judge, Mr Peter Kempster.

71. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**J GORDON REID QC FCIarb
TRIBUNAL JUDGE**

RELEASE DATE: 2 MARCH 2016

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