MERGER OF CORPORATIONS:
INCIDENT TO MERGER:
TAXES:

A foreign corporation having absorbed a domestic corporation of this State by merger must pay the full privilege tax on its increased capital and surplus, if any, arising out of such merger, of such foreign corporation as is represented by the increased value of its property and business transacted in this State. Such corporation is not entitled to a credit on such tax or taxes paid by the domestic corporation upon its original incorporation.

January 23, 1950

FILED
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Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Attention: Honorable W. Randall Smart.

Dear Secretary Toberman:

This will acknowledge your letter requesting the opinion of this department, whether additional privilege taxes or fees must be paid to the State from the surviving foreign corporation in case of a merger by a domestic corporation and a foreign corporation, where, by reason of such merger, the proportion of the stated capital and surplus of such merged or surviving corporation as represented by a greater amount in value of property located and business transacted in the State of Missouri, has been increased since its qualification or domestication or domestication taxes or fees. Your letter also submits the question whether the surviving foreign corporation in such merger is entitled to a credit for incorporation tax paid by the domestic merging corporation upon the assessment of the tax due on the increase of capital stock and surplus of the foreign corporation by reason of the merger.

Your letter requesting this opinion is as follows:

"Under date of June 15, 1948, this department sent a statement to the above corporation in the amount of $5,355.00 representing tax due on increase of corporate interest in the State of Missouri. The highest amount of corporate interest in this state upon which this corporation has paid a tax is $11,500,000 and, under date of June 10 an affidavit was filed by this corporation showing the corporate interest had increased to $22,208,292. (This figure representing the value of the property of the corporation located in the State of Missouri."

"The above corporation, the Gas Service Company, a foreign corporation qualified to do business in this state March 11, 1926, is refusing to pay this additional tax contending that the increase in Missouri arises from the results of a merger of the Kansas City Gas Company, a domestic corporation, with the Gas Service Company in 1946 and that the increase in corporate interest of the foreign corporation was due largely to the taking over of the property of the Kansas City Gas Company and that in determining the tax in the matter that we should give credit for the amount of corporation tax paid by the domestic corporation-Kansas City Gas Company.

"We are enclosing copy of letters received from the Gas Service Company as of June 16 and August 25, also copy of our work-sheet and copy of affidavit filed by the Gas Service Company.

"We have taken the position that in the absence of any provision in the statute that a tax should be paid upon any increase of the corporate interest in this state regardless of what source it may have originated. We would therefore appreciate your opinion as to our position in this matter at your earliest convenience.

"In connection with the above opinion, we would also like that you give us your opinion concerning the tax to be assessed where there are two or more domestic corporations merging under our present corporation code. Should this department take into consideration the tax theretofore paid by constituent corporations or consider the tax paid only by surviving corporation?"

You also submit with your letter correspondence with counsel for the Gas Service Company, the corporation surviving said merger, in which it appears that the Kansas City Gas Company, a domestic corporation, has merged its corporate business

property, franchise and affairs with the Gas Service Company, a foreign corporation, which thereby became the owner of the property of the domestic corporation. Your letter indicates that on June 15, 1948, your department delivered to the Gas Service Company, the surviving corporation, incident to the increase in its said property values, a statement demanding the sum of $5,355.00 as a privilege or license tax or fee, due because of an increase in its capital and surplus by reason of said merger amounting to $10,708,292.00, said sum having been computed on the basis of the value and amount of such capital and surplus, as is required with respect to computing an organization tax or fee of domestic corporations organized under or subject to the General and Business Corporation Act of Missouri, Laws of Missouri, 1945, page 711, l.c. 713, Section 113.

The Gas Service Company is resisting the payment of said tax because, as it says, it should have credit for the incorporation taxes originally paid by the merging corporation, and taking the position that under Section 4997.70, 1943, pages 448, 449, 450, the surviving or merged corporation is immune from the payment of the tax demanded since, as they contend, said Section 4997.70 grants the surviving corporation immunity and exemption from the payment of such tax to that extent. The letter of counsel for the surviving corporation, paragraph 2 of page 1, states the following:

> "If this had been an ordinary increase of capitalization, I would understand the situation perfectly; but am unable to reconcile this additional tax when the same results from a merger of the Kansas City Gas Company with this company. * * *."

Counsel for the surviving corporation apparently confuses the question of the paying of tax on the increase of its stock by a domestic corporation, upon an amendment of its Articles of Incorporation, according to the terms of Section 113, page 713, Laws of Missouri, 1945, and the payment of a privilege tax by a foreign corporation upon the increase of its capital and surplus, if and when increased as required by Section 106, Laws of Missouri, 1945, pages 707, 708. The surviving corporation here is a foreign corporation. With the "ordinary" increase of its capitalization, neither this State, nor its officers, have any concern or authority whatever. That is a matter to be determined entirely, in

the case of a foreign corporation, by the statutes of its domiciliary State. Our said Section 113 does require a tax to be paid by a domestic corporation both when it is incorporated and upon the increase of its capital, if any, according to the percentage of money value of the stock of such corporation, but there is no question of an incorporation tax or a tax because of any increase of the capital of the domestic corporation here. It ceased to exist under paragraph (b) of sub-section .70 of Section 4997, Laws of Missouri, 1943, l.c. 449, when the merger was effected. Our said Section 106 does require the payment of a privilege tax by a foreign corporation on the increase of its capital and surplus according to the value of its property employed in carrying on its business in this State regardless of the source of the increase, but that has nothing to do with a tax required of domestic corporations. So, the provisions of each statute, the one dealing with a corporation tax and a tax on the increase of the actual capital stock of domestic corporations, the other dealing with a privilege tax on the increase of the stock and surplus of the foreign corporation represented by the value of its property are so fundamentally different, that it seems it would be difficult indeed to so confuse them.

The provisions of Section 113, page 713, Laws of Missouri, 1945, and Section 106, pages 707, 708 of the same Session Acts, respectively, determine, we believe, the controversy which is the subject of the request for this opinion.

Said Section 113, provides the procedure which shall be followed upon the incorporation of a domestic corporation, respecting the amount and payment of the incorporation tax and fee upon becoming a corporate body, and upon the increase of its authorized shares.

Said Section 113 in so providing, is, in part, as follows:

> "Section 113. Corporation tax or fee.--No corporation shall be organized under the general and business corporation act of Missouri unless the persons named as incorporators shall at or before the filing of the articles of incorporation pay to the Director of Revenue $50.00 for the first $30,000.00 or less of the authorized shares of such corporation and a further sum of $5.00 for each additional $10,000.00 of its authorized shares, and no increase in the

> authorized shares of such corporation shall be valid or effectual until such corporation shall have paid the Director of Revenue $5.00 for each $10,000.00 or less of such increase in the authorized shares of such corporation, and it shall be the duty of said corporation to file a duplicate receipt of the Director of Revenue for the payments herein required to be made with the Secretary of State for the filing of articles of incorporation; * * *."

Said Section 106, pages 707, 708 of said Session Acts, 1945, requires every foreign corporation authorized to transact business in this State to file an affidavit by its president or other officer named, upon request by the Secretary of State, showing the capital and surplus of such corporation represented by its property and business transacted in this State, showing the value of its property, and whether or not its stated capital and surplus has increased since its incorporation or domestication, or since its last report, in order to determine the amount of domestication taxes, or fees that may be due the State. That part of said Section 106 so providing is as follows:

> "It shall be the duty of every foreign corporation to cause an affidavit of its president or one of its vice-presidents to be filed when requested by the Secretary of State showing the proportion of the stated capital and surplus of said corporation which is represented by its property located and business tranacted in this State and showing the value of the corporation's property located in this State at any time after its qualification or domestication so that it can be determined whether or not the proportion of its stated capital and surplus which is represented by its property located and business transacted in this State or the value of the corporation's property located in this State has been increased since its qualification or domestication or since its last report. In case it is shown that the proportion of the stated capital and surplus of such corporation which is represented by its property located and business transacted in this State (which shall in no event be less than the value of the corporation's property located in this State) has increased since its qualification

> or domestication, or since its last report and the payment of qualification or domestication taxes or fees above the greatest amount upon which the domestication tax or fees have heretofore been paid, it shall be required to pay domestication taxes or fees on all such increases as is required with respect to an organization tax or fee of corporations organized under or subject to this Act when increasing its authorized shares."

It is, therefore, apparent that the provisions of Sections 113 and 106, Laws of Missouri, 1945, place foreign corporations and domestic corporations upon an equal basis, with respect to the incorporation tax or fees to be paid by a domestic corporation upon its incorporation and upon the increase of its authorized shares, and upon privilege taxes required to be paid by foreign corporations authorized to carry on business in this State by requiring the same percentage and ratio of incorporation or increase of stock fee or tax per thousand dollars of the capital stock or increase thereof of a domestic corporation to be paid as is required per thousand dollars upon the increase of the capital stock and surplus representing the value of property located in this State of a foreign corporation doing business in this State, since its last report and the payment of qualification or domestication taxes or fees.

The State may deny foreign corporations the privilege of coming into the State altogether if the State so desires, and they may only come into this State upon such terms and under such regulations and control as the State prescribes. Our Supreme Court has so held in many cases. This is the holding of the Court in State ex rel. vs. Vandiver, 222 Mo. 206, l.c. 230, where the Court said:

> "As above stated, the Legislature may not only impose such conditions upon foreign corporations coming into the State as it may deem proper, but it may also exclude them entirely from the State. * * *."

This is the universal rule in all other States so far as we have been able to learn.

14 A., C.J. under the title of "Corporations", l.c. 1244, 1245, states on this subject the following:

> "* * * Subject to constitutional limitations, a state has the right to entirely prohibit foreign corporations from doing business within the state. Having the right to prohibit foreign corporations from doing business in a state at all, it is within the power of the state to prohibit the transaction of business by the foreign corporation within the state except upon compliance with such terms or conditions and subject to such restrictions as the state may in its discretion see fit to impose, * * *."
>
> (Citing cases from forty-one States of the Union.)

It may be true, as said, that the Kansas City Gas Company, the domestic corporation, paid its corporate organization tax as required by the statutes of this State in force prior to, and commensurate in their terms with our present Section 113, Laws of Missouri, 1945, page 713, but even so, when the domestic corporation merged with the foreign corporation, the domestic corporation ceased to exist, its property became the property of the surviving foreign corporation, and there was no immunity or privilege of exemption by law moving to the Gas Service Company to relieve it from paying the tax on the increase in value of its property in this State or allow a credit thereon by reason of the merger because the merging domestic corporation had paid its incorporation tax at the time of its incorporation. The statute requiring the payment of its organization tax and stock increase tax by the domestic corporation according to the percentage of its capital and surplus in dollar value as is defined in said Section 113 is only the yardstick by which may be measured the amount of tax or fee due the State from the foreign surviving corporation, because of increase in value of its capital and surplus under said Section 106 because of the merger. The two statutes do not conflict one with the other. On the contrary, they complement each other in supplying equal protection of the law to both domestic corporations, and foreign corporations authorized to do business in this State, respecting the incorporation taxes and privilege taxes required of them, respectively.

Our Supreme Court has defined the purposes for which said Sections 113 and 106 were enacted by the Legislature, and has construed their meaning and effect with respect to the power of the State to require privilege taxes to be paid each year by a foreign corporation and incorporation taxes in the first instance to be paid by domestic corporations upon their organization

and stock increase fees, if any, later. The Court discussed and construed these two sections in State ex rel. Lee Co., Inc., vs. Bell, Secretary of State, 195 S.W. (2d) 492. The case was a mandamus proceeding to compel the Secretary of State to file a duly authenticated amendment of the Articles of Incorporation of the H.D. Lee Co., Inc., increasing its corporate existence for fifty years from December 31, 1944. The relator, the Lee Company, was a Kansas corporation, incorporated December 31, 1894, for a term of fifty years. In 1916 the Kansas corporation was issued a certificate of authority to transact business in Missouri. It filed, prior to the suit, the certificate of the State of Kansas permitting it to extend, and extending, its corporate existence on January 22, 1944. It tendered an authenticated copy of the Kansas certificate to our Secretary of State with the regular filing fee. The Secretary of State refused to file the amendment to its Articles extending its corporate duration issued by the State of Kansas, on the ground that relator should again pay the same domestication fee or tax based on the capital represented, required for a foreign corporation to obtain an original certificate of authority to transact business in this state. The Lee case is based on a different state of facts than those being considered here, but the provisions and effect, respectively, of each of our said Sections 113 and 106 are discussed and construed in the case, and the holding of the Court, in that case, because of the terms of Sections 113 and 106, points out how and in what amount taxes, or fees, must be paid by a domestic corporation upon its incorporation and on the increase of its stock, and the taxes or fees to be paid by foreign corporations on the increase of their capital and surplus, according to the value of their property located in this State. The Court pointed out in the case and held that a foreign corporation must pay the additional tax on increase of capital and surplus provided for in said Section 106, according to the value of the increased capital and surplus in the same percentage and ratio of tax on such increase as is provided in said Section 113 to be paid by domestic corporations on their capital upon their incorporation and on increase of their stock. The Court, l.c. 494, 495, so holding, said:

> "In 1885, when charters of companies organized under the 1866 Laws were about to expire, the legislature had provided authority for continuing corporate duration but required payment again of the same amount of tax as upon original organization. Laws 1885, p. 80, Sec. 2509, R.S. 1889, Sec. 5031, R.S. 1939, Mo. R.S.A. This section

> continued without amendment until repealed by the 1943 Act. Sections 55-58 of the 1943 Code, Secs. 4997.55-4997.58, Mo. R.S.A., now authorize a domestic corporation to change its period of duration by amending its articles of incorporation without payment again of the original organization tax. However, it must pay an additional tax upon any increase of its corporate stock (Section 114, 1943, Act, Sec. 4997.113, Mo. R.S.A.); and foreign corporations are likewise required to pay such an additional tax upon any increase in the proportion of its stock represented by property located and business transacted in this state by Sec. 106, 1943 Act, Section 4997.106, Mo. R.S.A. We think that the reasonable construction of those provisions is to authorize all corporations to extend duration by the same charter amendment method. Thus foreign and domestic corporations have been placed on the same basis by the 1943 Act both as to payment of tax upon beginning business, and upon increase of capital, and as to not being required to pay an additional tax upon extension of duration. * * *."

We are considering here the question of merger under the terms of said Sections 4997.62 to 4997.71, Laws of Missouri, 1943, page 410, l.c. 451, whereby the domestic corporation was engrafted into the life and existence of the foreign corporation, the accomplishment of which means that the domestic corporation ceased to exist. The result was, and is, to endow the surviving foreign corporation with the property of the domestic corporation and to increase the capital and surplus of the surviving corporation in the sum of $10,708,292.00. These figures are taken from the affidavit made by the said foreign corporation itself and filed with the Secretary of State, June 14, 1948, wherein it is shown that the then total value of all of the property of said foreign corporation located in Missouri was $22,208,292.34, and that the highest amount of the value of all of the property of said corporation upon which a privilege tax had theretofore been paid was $11,500,000.00, therefore making the said $10,708,292.00 represent the amount of the increase of its capital and surplus in this State since its qualification, domestication or last report.

The statutes of States providing for the consolidation or merger of corporations, the decisions of the high courts of

the States where such statutes are in force and have been construed, and text-writers alike require and hold that all statutory taxes incident to a consolidation or a merger must be paid. 19 C.J.S., page 1382, on the subject states:

> "Filing fees and organization taxes imposed by statutes must be paid, regardless of whether the statutes relate specifically to consolidation or merely to the formation of new corporations. This is true even though the new corporation retains the name of one of the old ones, and even though each constituent corporation has paid the proper fees and taxes on its own incorporation. * * *."

Many of the States have statutes authorizing the consolidation and merger of corporations. We have hereinabove given the citations of our statutes covering the subject. These statutes are the expression of the established public policy of this State on those subjects. Corporations, with respect to consolidation or merger, do not control the statutes. The statutes control them, and effect must be given in a merger, or consolidation, as the case may be, to the legislative intent, with respect to all incidents attending the merger or consolidation.

The rule of construction announced and followed by the Supreme Court of this State respecting the payment of such fees and taxes to the State as a privilege or service tax, or fee, is that the statute providing for such taxes or fees is to be strictly construed in favor of the State, that is to say, in favor of the payment of such taxes or fees to the State. This subject was before our Supreme Court in the case of Kansas City Railways Co. vs. Public Service Commission, 273 Mo. 173. That was a proceeding on certiorari from the Circuit Court of Cole County, involving the question of the payment by the Kansas City Railways Co. of fees to the Commission for services performed by the Commission provided for by Section 21 of the Public Service Commission Act, Laws of Missouri, 1913, page 567, for the performance of public duties by the Commission. The appellant Railways Co., resisted payment of the fees for the reason, as it claimed, the case was covered by a certain proviso of the statute in the nature of an exemption, (quoted in the opinion, l.c. 176) and because of which proviso no fees were chargeable. The Court held that the fees were chargeable and that the Railways Co. must pay. The Court in so deciding, and in holding that a statute providing for such fees to be paid to the State is to be strictly construed in favor of the State, l.c. 183, 184, said:

> "Appellant lays great stress upon the proposition that this statute, Section 21, must be construed strictly against the allowance of fees because strict construction is applied by the courts to statutes relating to fees. But the cases cited are all cases where a public officer charges fees, paid by the state or by some person, for his individual benefit. Here it is not the State which is paying, nor an individual who is receiving, the fees. The fees are payable to the State, and, by the express terms of section 21, go into the State Treasury to the credit of the General Revenue Fund. It is a tax, the proceeds of which are devoted to general public purposes. Appellant claims its property, the bonds, are exempt from this taxation. Statutory clauses, exempting certain property from the operation of statutes which are general in their application, imposing taxes, are strictly construed in favor of the State. (B.P.O.E. v. Koeln, 262 Mo. 444; State ex rel. v. Johnston, 214 Mo. 656.)"

The procedure contained in said Sections 106 and 113, is the only method the State may follow in dealing with foreign corporations to place them, once addmitted into the State, upon an equal basis with domestic corporations on the matter of a privilege tax for continuing annual authority from the State to carry on the business in the State for which they are incorporated in the foreign State. The tax so required is a privilege tax. It is not, and could not be, a property tax, lest it fall within the prohibition of the Constitution against double taxation, for, of course, corporations, both domestic and foreign, pay their property taxes under other statutes.

The Supreme Court of New York had before it for construction in the case of People ex rel. vs. Rice, 11 N.Y.S. 249, a statute of that State on consolidation of corporations, with respect to whether the new corporation, created as the result of the consolidation of two corporations, was required to pay a new incorporation tax. The new corporation was refusing to pay new incorporation fees or taxes on the ground that both corporations had paid incorporation taxes in full, as required by the statutes, at the date of the original incorporation of each of them. The facts as stated in the opinion of the Court were

that two corporations, the New York Phonograph Company and the Metropolitan Phonograph Company, were organized under the Manufacturing Act of 1848 and its amendments, the former for fifty years from October 4, 1888; the latter for fifty years from February 5, 1889. Each paid, on its organization, the tax upon its capital required by the statutes of the State of New York. Some years later they consolidated under the authority of the statutes of the State under the name of New York Phonograph Company, using the former corporate name of one of the consolidated companies. The consolidating companies, as and for the new corporation, when the consolidation should take effect, presented to the Secretary of State the requisite papers to be filed as provided for by the statute. The Secretary of State refused to file them on the ground that the tax required by the statute on the capital of the company to be formed had not been paid. The consolidating corporations filed mandamus to compel the filing. The application for mandamus was denied by the lower court and the relator appealed. The decision is not lengthy, if the reader desires to investigate, but too long to quote in full here. We shall, however, quote excerpts from the decision pertinent to the point being considered and which express the judgment of the Court. The Court held that the new corporation to be known as the consolidated corporation must pay the full amount of incorporation tax required by the statute upon the organization of a new corporation even though each of the corporations so consolidated had paid such tax on its own previous incorporation. The Court, in so holding, l.c. 250, 251, said:

> "* * * The right of the consolidated body to be a corporation comes from the law of the state permitting the consolidation. Without such law the two companies could not consolidate. And that law, calling the consolidated body 'the new company,' specifies, in section 4, the corporate powers which it shall have. It is too plain for argument that, without such law, an agreement of consolidation would not create any body having corporate powers, but would be invalid. Hence it must be that the corporation is formed (or to be formed) under a general law of the state. But it is urged that the two consolidating corporations were corporate bodies, in full and vigorous life, entitled to their franchises which they had obtained from the state, and for which they had paid a tax,

> and that the new body is only a union of the two with no new corporate rights, and therefore liable to no new tax. It is true that the two consolidating bodies were corporations in full life, until they formed (or should form) the new corporation. Then they ceased (or will cease) to exist. It was for this very purpose that they executed the agreement; the purpose to and their own existence and to form a new person. Whenever they form the new corporation, their own corporate existence ceases. The new company is not a partnership of the two old companies. It is entirely a new corporation. * * * * * It is urged by the relator that, by payment of the tax, the consolidating companies purchased the right to be corporations and therefore, that they ought not to be compelled to purchase it again. But the payment of the tax is not the purchase of a right. Under our constitution and laws, corporate rights are not special concessions by the state; but they are general privileges in the power of all citizens, and the tax is in no sense a purchase price. The companies have no greater rights when they have paid the tax than they had before. The companies which have paid the tax have no greater rights than those have which were incorporated before 1866, and therefore paid no tax. And this shows, further, that it is immaterial to the present inquiry whether, or not, the consolidating companies paid the tax. If these companies had been incorporated before 1866, and had entered into a similar agreement of conslidation, the legal question as to liability to this tax would be the same as in the present case. So, too, if one had been incorporated before, and the other after, 1866. The construction given to the law imposing the tax must be uniform. It cannot vary according as the the consolidating companies have, or have not, been required to pay the tax."

The facts in the case, the legal principles involved, and the decision of the Court make the case analogous and persuasive here.

Treating of the effect of merger of corporations as being practically synonymous with consolidation, 19 C.J.S. page 1386, has the following text which, we believe, supports our views herein expressed on this point:

> "* * * Under statutes relating to the 'merger' of corporations, a merger has been given the same effect as a consolidation usually has, namely, to bring into existence a new corporation and to destroy the constituent corporations, except to the extent and for the purpose reserved in the statute. * * *."

Further treating of the status of both the original and the consolidated or merged corporation, 19 C.J.S. page 1385, Section 1626, states the following:

> "The usual effect of a consolidation is to create a new corporation and dissolve the constituent corporation, which thereafter cannot issue stock but is not precluded from winding up its affairs. A merger in the street sense does not create a new corporation but the corporation into which the original corporations are merged continues to exist. * * *."

From the terms of our statutes hereinabove cited and quoted it conclusively appears, we believe, that upon no theory or ground whatsoever is the surviving foreign corporation in case of a merger with it by a domestic corporation entitled to any credit or exemption from paying the taxes for increase of its capital and surplus by reason of such merger. Such surviving foreign corporation must pay in full the tax imposed by this State upon any increase of corporate stock and surplus as represented by the value of its property located in this State and business transacted in this State, upon the terms and in the manner prescribed by said Section 106 in that regard, regardless of the source from which such increase may have been derived.

In your letter you submit also the question that where there are two or more domestic corporations merging under our present Corporation Code should your department take into consideration the tax theretofore paid by the constituent corporations, or consider the tax paid only by the surviving corporation. We take it that you mean by this, should the surviving

corporation be credited with any incorporation or stock increase tax paid by the merging corporations to reduce the tax to be paid by the surviving corporation on its increase of capital stock, or surplus, by reason of and pursuant to the merger. We think there would be no difference with respect to the assessment and payment of the tax where both corporations perfecting a merger are domestic corporations than where, as in the present case, one of the merging corporations is a domestic corporation and the other a foreign corporation. The surviving or merged corporation would be liable, we think, in either case of merger or consolidation for the tax due on its increase of capital stock and surplus or property value by reason of the merger. The New York case hereinabove cited and quoted was a case where the consolidating corporations were both domestic corporations of that State.

CONCLUSION

It is, therefore, the opinion of this department that, upon the merger of a domestic corporation in this State with a foreign corporation authorized to carry on business in this State, the foreign surviving corporation must pay the full privilege tax upon the increase in value of its stated capital and surplus which is represented by the value of its property located in this State and business transacted in this State since its qualification or domestication or since its last report, without any credit thereon of incorporation taxes or taxes for the increase of its capital stock previously paid by the merging domestic corporation participating in said merger. This is required whether the merging corporations both are domestic corporations or one of the merging corporations be a domestic corporation and the other a foreign corporation.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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