FEDERAL INCOME TAX—"TAX HOME" DOCTRINE AFFIRMED; TAXPAYER ON OVERSEAS TOUR OF DUTY NOT ALLOWED TO DEDUCT COST OF MEALS AS AN "AWAY FROM HOME" TRAVEL EXPENSE. *Commissioner v. Stidger* (U.S. 1967).

On October 1, 1957, Marine Captain Howe A. Stidger was transferred to Iwakuni, Japan. Since dependents were prohibited from accompanying Marine Corps personnel to Japan, Stidger's wife and children remained in California. On his 1958 tax return, the taxpayer claimed a deduction of $650 representing the cost of meals for ten months spent at Iwakuni. This deduction was disallowed by the Commissioner of Internal Revenue on the grounds that it did not meet the requirements of Section 162(a)(2) of the Internal Revenue Code of 1954 (travel expenses while away from home).[1] The Commissioner viewed petitioner's duty station in Iwakuni as his "home" during the ten months in question, and concluded, therefore, that the taxpayer had not been "away from home" when he had incurred the expenses for meals. The Tax Court affirmed the Commissioner's decision.[2] On appeal, the Ninth Circuit reversed, rejecting the Commissioner's definition of home, and holding that "home" is the taxpayer's place of residence and not his place of business.[3] The Supreme Court, in a six to three decision, *held*, reversed: The taxpayer's home for tax purposes was his military post of duty. *Commissioner v. Stidger*, 386 U.S. 287 (1967).

The holding of the Supreme Court was based on three grounds: (1) a long-standing interpretation by the Commissioner, receiving judicial approval, that one's "tax home" is his place of business; (2) acquiescence by Congress in this "tax home" doctrine; and (3) intent of Congress to relieve fully, by special allowances, the burden of added expense to military personnel.[4]

Prior to 1920, the Commissioner took the position that only actual transportation expenses were deductible as travel expenses,[5]

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1 INT. REV. CODE of 1954, § 162. TRADE OR BUSINESS EXPENSES.

(a) *In general.*

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

. . . .

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish and extravagant under the circumstances) while away from home in the pursuit of a trade or business . . . .

2 Howe A. Stidger, 40 T.C. 896 (1963).

3 Stidger v. Commissioner, 355 F.2d 294 (9th Cir. 1965).

4 386 U.S. 287, 296 (1967).

5 *See* S. 1048, 1 CUM. BULL. 101 (1919). Transportation expenses did not include

and that those expenses for meals and lodging incident to travel were not deductible.[6] In 1920, the Commissioner expanded the deduction to include food and lodging expenses, while away from home, to the extent that they exceeded the taxpayer's normal household expenses for housing and feeding his family.[7] Congress reacted to this restrictive interpretation by inserting the words "including the *entire amount* expended for meals and lodging while away from home" to broaden the travel expense provision of the 1918 Revenue Act.[8] Additionally, the Commissioner interpreted "home" as one's place of business under this amendment.

The Tax Court approved the Commissioner's interpretation in the case of *Mort L. Bixler*[9]—an itinerant fair manager who, the court held, was not away from home while incurring expenses at his remote place of business. The court rationalized the "tax home" doctrine as an implementation of the concept that one cannot choose to live far from his work and deduct the resulting expenses.[10]

A majority of the circuit courts concur on the "tax home" doctrine.[11] However, judicial doubt and disagreement as to the applica-

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commuting to and from one's place of business on the grounds that these were personal expenses to be borne by the taxpayer. The definition of a tax deductible travel expense therefore excluded any travel expense unless incurred while away from one's place of business and in the pursuit of that trade or business.

[6] Treas. Reg. 45, § 292, T.D. 2831, 21 TREAS. DEC. INT. REV. 241 (1919). "If the trip is on business, the railroad fares become business instead of personal expenses, but the meals and lodging continue to be living expenses and are not deductible in computing net income."

[7] T.D. 3101, 3 CUM. BULL. 191 (1920). The taxpayer had to substantiate the deduction by attaching the following mass of paperwork to his income tax return: (1) the nature of the business in which engaged; (2) number of days away from home during the calendar year on account of business; (3) number of members in taxpayer's family dependent on him for support; (4) average monthly expense incident to meals and lodging for the entire family, including taxpayer himself when at home; (5) average monthly expense incident to meals and lodging when at home if taxpayer has no family; (6) total amount of expenses incident to meals and lodging while absent from home on business during tax year; (7) total amount of excess expenditures incident to meals and lodging while traveling on business and claimed as a deduction; and (8) total amount of other expenses incident to travel and claimed as a deduction.

[8] Revenue Act of 1921, ch. 136 § 214(a), 42 Stat. 239 ("traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business").

[9] 5 B.T.A. 1181 (1927).

[10] *Id.* at 1184. The Commissioner concurred in a revenue ruling clearly applying the "tax home" doctrine to all taxpayers. VII-2 CUM. BULL. 128 (1928).

[11] Commissioner v. Stidger, 386 U.S. 287, 291 n.11 (1967). *See also* 4A J. MERTENS, LAW OF FEDERAL INCOME TAXATION, § 25, 337 (1966) [hereinafter cited as MERTENS]. The Second, Third, Fourth, Seventh and Eighth Circuits have approved the Commissioner's interpretation. The Fifth, Sixth, and Ninth generally disagree, while the First and Tenth Circuits have not passed on the question.

tion of the doctrine is far from inconsiderable. In *Walter F. Brown*,[12] the Tax Court decided that only one of two places of business could be considered the taxpayer's "tax home"; thus, one's home for tax purposes was his *principal* place of business. Another inroad into the "tax home" doctrine was formulated by the Second Circuit in *Coburn v. Commissioner*.[13] The court held that even if New York actor Charles Coburn had spent a majority of the taxable year in California making movies, California would not be considered his "tax home" if the duration of the employment had been only *temporary*.

The Commissioner has strictly limited the scope of the word temporary,[14] so that the "tax home" moves from the taxpayer's principal place of employment to his new place of employment if the period spent away from the former can be termed *indefinite*.[15] This temporary-indefinite test is essentially an aid in determining the location of the taxpayer's principal place of business. A finding by the Commissioner that a change of one's place of business is temporary does not affect the taxpayer's principal place of business. If the change is deemed of *indefinite* duration, however, the principal place of business is moved to the taxpayer's new place of employment, thus preventing him from being away from his "tax home," and thereby precluding the "away from home" deduction.

Captain Stidger, at the Tax Court level, contended that, since his tenure at Iwakuni had only been for 15 months, the absence from his "tax home" had been temporary.[16] Both the Tax Court and the

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12 13 B.T.A. 832 (1928).

13 138 F.2d 763 (2d Cir. 1943).

14 *See* James R. Whitaker, 24 T.C. 750, 753 (1955), where the taxpayer had to leave his family and go to Thule, Greenland, for 222 days to work on a secret army project. In throwing out the contention that his employment was temporary, the Tax Court stated: "The employment of petitioner in Thule, Greenland may have lacked permanence but . . . it was not the kind of employment to be considered temporary in nature." *See also* Floyd Garlock, 34 T.C. 611, 616 (1960). Here a construction worker who relied on issuance of a weekly temporary work permit actually worked for two years away from his residence. The Tax Court in disallowing the deduction stated: "Petitioner's employment may have lacked real permanence but the mere absence of permanence does not necessarily imply that degree of temporariness which would allow deductibility of traveling expenses."

15 *See* Harvey v. Commissioner, 283 F.2d 491 (9th Cir. 1960) (where the taxpayer was reassigned to a job 117 miles from his residence, and remained there over a year without knowing how long the change would be in effect); M. J. Carrol, 20 T.C. 382 (1953) (where the taxpayer left his family in Ohio to work for the War Department as a tax and banking consultant to the South Korean government for a year).

16 40 T.C. at 899.

Supreme Court answered this contention by referring to the taxpayer's military orders, which had called the transfer a *permanent* change of duty. Both courts also relied on *Bercaw v. Commissioner*,[17] where an Army officer had attempted to deduct his food and lodging expenses while away from his residence. The deduction was disallowed because the expenses had been incurred at his permanent duty station which had been his "home" for tax purposes.[18]

The Ninth Circuit, in rejecting the "tax home" doctrine, has discarded the temporary-indefinite test.[19] In *Harvey v. Commissioner*,[20] the taxpayer's new job had been by its nature indefinite in duration. Application of the temporary-indefinite test caused Harvey's "tax home" to shift from its former location, near his residence, to his new job site, located some 117 miles away. Since the taxpayer had not been "away from home," the deductions for meals, lodging, and travel were denied. The Ninth Circuit concluded that it was unreasonable to expect an employee on an indefinite assignment to move his residence to his new place of business, unless there was a reasonable expectation on his part that he would be working at that location for a "long period of time."[21] In *Stidger*, the Ninth Circuit clearly

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17 165 F.2d 521 (4th Cir. 1948).

18 Rev. Rul. 55-571, 1955-2 CUM. BULL. 44. This ruling restated the rule of *Bercaw*, that a military man's permanent duty station is his "home" for tax purposes. It considered a naval officer's permanent duty station to be the home port of the officer's ship, thereby allowing a deduction while away from the home port, but still on board the officer's duty station, his ship. Stidger thought of his own situation at Iwakuni as "directly analogous to that of a naval officer on a ship at sea for an extended period of time." The Commissioner distinguished Stidger from the naval officer by using the home port logic, and in oral argument stated that, at any rate, the Commissioner was reexamining his stand toward naval officers. 386 U.S. at 296 n.22. In November, 1967, the Commissioner issued a ruling that an officer assigned to permanent duty aboard a ship with regular living and eating accomodations, has his "home" aboard that ship for tax purposes, thereby removing the inconsistent treatment complained of in *Stidger*. REV. RUL. 67-438, 1967 INT. REV. BULL. No. 1967-50 at 8.

19 *See* Wallace v. Commissioner, 144 F.2d 407 (9th Cir. 1944). There, a resident of San Francisco was allowed to deduct the expenses for meals and lodging while making movies in Hollywood. The Ninth Circuit stated:

> [T]he Tax Court . . . has, we think, invaded the domain of Congress in construing the term "home" as used in the statute under consideration as meaning the taxpayer's place of business, "employment or the post or station at which he is employed."

Id. at 410.

20 283 F.2d 491 (9th Cir. 1960).

21 *Id.* at 495. What constitutes a "long period of time" would vary with the facts and circumstances of each case. In a subsequent case, consistent with *Wallace* and *Harvey*, the Ninth Circuit has decided that a taxpayer's inability to live near his job (Atomic Energy Commission test site) was a valid ground for a deduction of the resulting cost of his transportation, food and lodging. Wright v. Hartsell, 305 F.2d 221 (9th Cir. 1962). Since the purpose of the "away from home" clause is to remedy the duplicitous expenses of a business and residential home, the lack of the latter is

rejected the Commissioner's rule that "home" meant "principal place of business," holding that home should mean the taxpayer's residence, with the requirement that the taxpayer move as close to his place of employment as possible.[22] The Supreme Court's opinion in *Stidger* did not refer to the rationale behind the Ninth Circuit's rejection of the "tax home" doctrine. Instead the Court gave great weight to the fact that in *Stidger*, and earlier in *Bercaw*, the taxpayer had undergone a *permanent* change in his place of employment. Thus a direct affirmation of the *temporary-indefinite* rule was avoided.

The *Stidger* Court apparently also relied on congressional acquiescence in the "tax home" doctrine.[23] In *George W. Lindsay*,[24] the Tax Court had held the District of Columbia to be a Congressman's "tax home." Subsequently, Congress amended the travel-expense section of the Code in 1952 to make a Congressman's home, for the purpose of the travel deduction, the place of residence in his congressional district.[25] Since "Congress did not respond to this ruling by amending the statutory language generally to provide that 'home' was intended to be synonymous with 'residence' but instead merely carved out an exception to cover the special travel expense problems inherent in

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sufficient to deny the deduction. James v. United States, 308 F.2d 204 (9th Cir. 1962).

Even one Tax Court judge, in a 1963 decision, adopted the basic idea behind the Ninth Circuit stand:

> It is now axiomatic that the "away from home" provision of the statute is to mitigate the burden of the taxpayer forced by his business or employment to pay the expenses of maintaining two places of abode.

Leo M. Verner, 39 T.C. 749, 754 (1963).

22 355 F.2d at 299-300.

23 The opinion appears somewhat ambiguous at this point. Chief Justice Warren, writing for the majority, stated that:

> [I]t is not necessary for us to decide here whether this congressional action (or inaction) constitutes approval and adoption of the Commissioner's interpretation of "home" in all its myriad applications since, in the context of the military taxpayer, the Commissioner's position has a firmer foundation.

386 U.S. at 292.

Although not deciding *approval and adoption* of the tax home doctrine by Congress, Chief Justice Warren, in summing up the reasons for reversing the Ninth Circuit, did conclude that Congress had *knowledge* of the interpretation. This implies congressional acquiescence which was the point the Commissioner was trying to make.

24 34 B.T.A. 840 (1936).

25 In 1952 Congress, passed the Legislative Branch Appropriations Act ch. 598, 66 Stat. 464, 467 (1952), containing an amendment (section 23(a)(1)(A)) to the Internal Revenue Code of 1939. This amendment exists today in section 162(a) of the 1954 Code immediately following the "away from home" clause:

> For purposes of the preceding sentence, *the place of residence* of a Member of Congress . . . within the State, congressional district, Territory, or possession which he represents in Congress *shall be considered his home*, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3000.

INT. REV. CODE of 1954, § 162(a) (emphasis added).

service as a national legislator,"[26] the Supreme Court in the instant case accepted the Commissioner's view that the amendment, enacted with knowledge of the Commissioner's interpretation, was congressional acquisescence in that interpretation. The validity of this argument is questionable. The legislative history of the amendment indicates that the "tax home" doctrine was understood by Congress to be a judicial discrimination against Congressmen,[27] and that the amendment was not carving out an exception, but rectifying an existing injustice to Congressmen;[28] now Congressmen would be able to deduct their away-from-home expenses in the same manner as other taxpayers.[29] Actually, the Commissioner in *Lindsay* was consistently applying the rule to Congressmen, which was, and still is, applicable to all other taxpayers, namely, that one's place of business is his "home" for tax purposes. The congressional amendment, therefore, did not correct a discrimination but created one.

The last ground relied upon in *Stidger*, for disallowing the tax-

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26 386 U.S. at 291.

27 The proposed change was known as the McCormack Amendment. Representative McCormack, the prime mover behind it's passage, obviously thought the Tax Court had "invaded the domain of Congress" (*see* note 19 *supra*) when he referred to *Lindsay* on the House floor:

> The Tax Court has held that the home of a Member of Congress for tax purposes is the District of Columbia on the theory that this is the business location, post or station of Members of Congress. On this reasoning—*which is judicial legislation if I have even seen it*—the expenses of a Member of Congress while attending a session of Congress were held not to be deductible.

98 CONG. REC. 5280 (1952) (remarks of Representative McCormack) (emphasis added). *See* I J. SEIDMAN, SEIDMAN'S LEGISLATIVE HISTORY OF FED. INC. AND EXCESS PROFITS TAX LAWS, 1953-1939 1300 (1954) [hereinafter cited as SEIDMANS].

28 Representative McCormack read from a General Counsel Memorandum, G.C.M. 23672, 1943 CUM. BULL. 66, to illustrate that ordinary taxpayers can render services to the Government on a "substantially continuous" basis without having their "tax home" changed to Washington, D.C. He neglected to point out, however, that this memorandum referred only to "dollar-a-year" men, individuals who donated their services to the Government during World War II and were consequently given a tax "break" by allowing a deduction of their food and lodging expenses while working in Washington.

29 As explained by Representative McCormack on the house floor:

> This amendment simply gives to Members of Congress that which every other person in this country has; a determination legally that our home, where we live, is our place of residence for taxpaying purposes, instead of its being the District of Columbia. It gives to us the right to deduct business expenses—that is all—in connection with the performance of our duties as Members of Congress. That is the same right that any other businessman has, and which he should have.
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> The purpose and effect of this amendment is to give to Members of Congress under the tax laws the same privileges that everybody else has.
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> There was an uncertainty as to the construction of the organic law some years ago. This amendment clarifies that. It seems to be only equity and justice that we give to ourselves what everyone else justifiably receives.

99 CONG. REC. 7003-04 (1953) (remarks of Representative McCormack). *See* SEIDMANS at 1297.

payer's deduction, did not concern the "tax home" doctrine. The Court noted that

> [u]nderlying the system of special allowances is congressional recognition of the fact that military life poses unusual financial problems. The system is designed to provide complete and direct relief from such problems as opposed to the incomplete and indirect relief which an income tax deduction affords to a civilian business traveler.[30]

The special allowance referred to was the tax-free subsistence allowance received monthly by Stidger. One of Justice Douglas' major criticisms in his strong dissent was that the petitioner received this allowance, whether he was living at home or traveling abroad. Therefore, contrary to the thoughts of the majority, "[t]here was no increase to help defray the increased expenses incurred by him while required to live away from his family."[31] The majority, however, did not depend solely on the existence of Stidger's subsistence allowance to substantiate their contention. In 1963, Congress enacted a measure designed to provide direct relief to the families of servicemen, who, due to service exigencies, were prevented from living at or near their duty station.[32] This measure was not in existence at the time Stidger was stationed in Japan, but it nevertheless lent support to the argument that Congress intended to relieve the family military man of the burden of maintaining two homes,[33] and thus intended this relief to preempt the "away from home" deduction.

Stidger, therefore, denies military personnel the traveling expense deduction while maintaining the status quo of the "tax home" doctrine as applicable to a civilian taxpayer.[34] Despite almost unani-

30 386 U.S. at 295.

31 *Id.* at 299. Strangely enough it is the Commissioner himself who has provided the clearest statement in support of Stidger's cause. "The basic allowances for subsistence and quarters are granted by law independently of whether the member is required to travel and are entirely unrelated to expenses incurred in travel." Rev. Rul. 55-572, 1955-2 CUM. BULL. 45, 46.

32 Family Separation Allowance, § 11, 37 U.S.C. 427 (1963). This measure, if in force in 1958, would have given Captain Stidger an extra $30 per month.

33 *See* S. REP. No. 387, 88th Cong., 1st Sess.; U.S. CODE CONG. & AD. NEWS, 912, 925 (1963).

34 The Supreme Court had two opportunities before *Stidger* to decide the meaning of "home." The first was Commissioner v. Flowers, 326 U.S. 465 (1946). There the Court formulated a three step test to determine deductibility of travel expenses. The expenses must be: (1) reasonable and necessary; (2) incurred while away from home; and (3) incurred in the pursuit of the taxpayer's trade or business. The Court expressly declined to define the words "away from home" but predicated the denial of the deduction on the third step, in that the taxpayer's decision to live far away from his employment was a personal one and the resultant expenses were not therefore incurred in the pursuit of his trade or business.

mous disapproval by legal writers,[35] the "tax home" doctrine causes few unfair results. As long as the time away from one's principal place of business is not shorter than overnight[36] and generally no longer than a year,[37] the taxpayer will receive the travel expense deduction. It is only when the period of absence away from one's principal place of business can be termed *indefinite* by the Commissioner that the "tax home" doctrine renders a harsh result. The more indefinite the taxpayer's period of employment away from his residence, the less likely he will want to uproot his family and move to the place of indefinite employment, even though the indefiniteness will cause the Commissioner's rule to deprive the taxpayer of a deduction. The Ninth Circuit solves the problem by determining whether, under the facts and circumstances of each case, a taxpayer should reasonably be expected to move his family to his new place of business. Yet, where is the division between a reasonable and a purely personal decision not to move? This is the question an Internal Revenue Agent is required to answer under the Ninth Circuit test.[38]

The second opportunity arose when the Court, in Peurifoy v. Commissioner, 358 U.S. 59 (1958), was faced with the Second Circuit disallowance of a deduction for construction workers. The circuit court contended that the employment was indefinite and thereby taxpayers' "tax home" traveled with them to work leaving the taxpayer no home to be away from. The Supreme Court in a short opinion affirming the decision, did not consider that a challenge to the temporary-indefinite test was before them and assumed, without deciding, the validity of both the rule and the lower court's factual determination that the employment involved was not temporary.

35 *See e.g.* Huffaker, *"Away from Home," as a Tax Concept*, N.Y.U. 22ND INST. ON FED. TAX. 869 (1964); Haddleton, *Traveling Expenses "Away From Home,"* 17 TAX L. REV. 261 (1962); Note, *A House Is Not A Tax Home*, 49 VA. L. REV. 125 (1963); 53 IOWA L. REV. 227 (1967); 20 SW. L.J. 676 (1966).

36 Rev. Rul. 63-239, 1963-2 CUM. BULL. 87. The Commissioner has applied the test that the cost of meals is a deductible expense providing the taxpayer is away from home overnight. The First, Fifth and Eighth Circuits have rejected the overnight rule and find it to be without legislative support. MERTENS §§ 25, 334, 344.

37 Rev. Rul. 60-189, 1960-1 CUM. BULL. 60, 64. "The Service will normally raise no question concerning the temporary nature of an employment or stay at a particular location if both its anticipated and actual durations are for less than one year. . . ."

38 Consider the following hypothetical:

> Taxpayer has a wife and eight children. He lives in a large but unusual house especially built for his family and it's needs. Taxpayer and his family have deep roots in their town which is also known for its fine schools. Taxpayer accepts a new job with a company located 150 miles away in the middle of a vast industrial metropolitan complex where housing is very expensive and schools are poor. Taxpayer can do part of his work in his home and, therefore, needs to go to the company office only three days a week. In such a case it might well be that taxpayer could not be "reasonably expected to move his home." Add the fact that taxpayer's wife threatens to divorce him if he insists on moving and the case is clearer. Many other similar situations can easily be imagined where, for strictly personal reasons, a man might not be expected to move. In such cases should expenses incurred on trips to the company's location be deductible?

Comment, CCH FED. TAX CURRENT LAW & PRACTICE 735 (1966).

The Supreme Court should take a middle course between the views of the Ninth Circuit and the Commissioner in determining a taxpayer's "tax home." The basic idea that home is one's principal place of business should be maintained, but the temporary-indefinite test should be rejected. The Court should determine that if the change is permanent, rather than indefinite, the principal place of business moves to the new job site. The Court's statement in *Stidger*, that there is a separate standard of permanency for the civilian and military, indicates a realization on the part of the majority that a test of permanent employment should be devised and applied to determine whether the employee's principal place of business has in fact moved. Permanency should be determined by all the facts and circumstances of the case, including: (1) whether the taxpayer can take his family with him; (2) whether he is paid a per diem allowance or otherwise reimbursed for his expenses; (3) whether the employer considers the change to be temporary or permanent; and (4) the particular type of employment of the taxpayer, as it bears on what is considered temporary or permanent employment in his particular trade or business. The presence or absence of any one of these factors would not be a conclusive determination as to a shift of the taxpayer's home. The following is an example of the temporary-*permanent* test in practice: A civilian taxpayer is transferred to a job site 100 miles from his former place of employment and his residence. The taxpayer has no idea how long the transfer will be effective. The employer pays the taxpayer per diem for a period of 16 months. The employee, during this period, makes weekly trips to see his family, which are not reimbursed by the employer. At the end of the 16 months, the employer informs the taxpayer that the change is permanent.

Under the temporary-*permanent* test, the employee's principal place of business remained, for 16 months, at his former job site. This allows exemption of the per diem under the "away from home" clause. In this situation, cessation of the per diem after only 2 months at the new job site would tend to show that the change was permanent at this point and the "tax home" would move to the new job absent proof by the employee that the transfer was in fact only temporary. This test will alleviate the hardships caused by the temporary-indefinite test, without disturbing the obvious value of the "tax home" doctrine.

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