TAXATION OF PROFITS FROM OPERATIONS WITH "VIRTUAL ASSETS" – LEGAL ANALYSIS OF THE DRAFT LAW ON CHANGES IN THE TAX CODE OF UKRAINE

Serhii Hrytsai
Ph.D. in Law, Associate Professor,
Associate Professor at the Department of Sectoral Law and General Legal Disciplines,
Institute of Law and Social Relations of the Open International University
of Human Development "Ukraine", Ukraine
e-mail: frick165487@gmail.com, orcid.org/0000-0003-0051-6149

Summary

The article provides a legal analysis of the Draft Law No. 7150 dated 13.03.2022 on Amendments to the Tax Code of Ukraine related to the adoption of the Law of Ukraine "On Virtual Assets" No. 2074-IX dated 17.02.2022. It is aimed at developing mechanisms for taxation of profits from transactions with "virtual assets", which are more commonly known as cryptocurrencies. From the point of view of tax legislation regulation of these phenomena, a public law entity is certainly tempted to introduce a new payment and/or a special tax regime into the tax legislation. This, of course, would be quite beneficial from the point of view of the efficiency of realization of budgetary obligations of any country, but the occurrence of such a situation may increase the tax burden. This will be an objective reason for the logical migration of "virtual" business, which is very mobile, to other countries with a more attractive tax regime. The purpose of this article is to define the tax concept chosen by Ukraine as laid down in the legal provisions of Draft Law No. 7150. The results of the study indicate that Ukraine has chosen a conservative approach to the choice of the taxation system for virtual assets. It is envisaged to apply the existing types of taxes and provisions of the Tax Code of Ukraine to the taxation of the circulation of virtual assets, i.e. without introducing special taxes exclusively for the taxation of virtual assets. This is a global trend in the formation of tax policy towards cryptocurrencies.

Key words: cryptocurrency, bitcoin, electronic money, non-cash money, money surrogate.

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1. Introduction

The beginning of the cryptocurrency era was marked by the appearance in 2008 of one of the most famous of its counterparts, which does not lose popularity to this day – Bitcoin. This phenomenon has smoothly moved from a number of private hobbies to full-fledged entrepreneurial activity, which gives rise to considerations in various circles and on various platforms regarding the possibility and necessity of legal regulation of the tax consequences of relations arising in connection with the use of virtual currencies. In recent years, more and more countries have been adhering to such a tax and legal direction, to one degree or another.

Regarding the phenomena that arise and actively function in the field of digital economy, in terms of regulation by tax legislation, a public legal entity, such as the state, of course, is "tempted" to introduce a new payment and/or a special tax regime into tax regulations, which would certainly be quite beneficial in terms of the effectiveness of the implementation of budget

obligations of any country. But the emergence of such a situation may increase the tax burden, which will be an objective reason for the logical migration of "virtual" business, which is very mobile, to other countries with a more attractive tax regime for operations with cryptocurrency *("U NKCPFR Rozkryly Detali Koncepciji Opodatkuvannja Kryptovaljut", 2023).*

Taking into account the possibility of loss or outflow of the cryptocurrency industry from the jurisdiction of countries, as evidenced by international experience, so far most countries are following a conservative path – using existing types of taxes and tax regimes for taxation of cryptocurrency transactions *(Chainalysis, 2021).*

Ukraine will be able to be ahead of other countries in the field of virtual assets – the Deputy Minister of Digital Transformation for IT Development is convinced of this *(Mincyfra spiljno z kryptospiljnotoju prezentuvaly strateghiju rozvytku rynku virtualjnykh aktyviv, 2021)*. What way has Ukraine chosen in this matter at least at the current stage? We will try to find out by analyzing the text of the Draft Law No. 7150 "On Amendments to the Tax Code of Ukraine regarding the taxation of transactions with virtual assets" (hereinafter – the Draft Law 7150) *(Proekt Zakonu Pro vnesennja zmin do Podatkovogho kodeksu Ukrajiny shhodo opodatkuvannja operacij z virtualjnymy aktyvamy, 2022).*

2. Literature review and output conditions

The Parliament of Ukraine adopted on 17.02.2022 the Law of Ukraine "On Virtual Assets" No. 2074-IX (hereinafter – Law 2074) *(Pro virtualjni aktyvy, 2022).* Which was signed on 15.03.2022 by the President of Ukraine, after taking into account the changes, according to his earlier proposals (*Propozyciji Prezydenta Ukrajiny do Zakonu "Pro virtualjni aktyvy," 2020)*. According to clause 1 of Section VI "Final and Transitional Provisions" of Law 2074, the law itself will come into force: a). from the date of entry into force of the law of Ukraine on amendments to the Tax Code of Ukraine *(Podatkovyj kodeks Ukrajiny, 2010),* on the peculiarities of taxation of transactions with virtual assets; b). introduction of the State Register of service providers related to the turnover of virtual assets, which is additionally specified in Paragraph 2 of Section VI of the Final and Transitional Provisions, as a limitation in the possibility of applying sanctions provided for in Article 23 of Law 2074. In order to implement the provisions of Paragraph 1 of Section VI of the Law 2074 and in order to enact it (*Porivnjaljna tablycja do Proektu #7150 Zakonu Ukrajiny "Pro vnesennja zmin do Podatkovogho kodeksu Ukrajiny, shhodo opodatkuvannja operacij z virtualjnymy aktyvamy", 2022)*, Draft Law No. 7150 was registered in the Parliament of Ukraine on 13.03.2022.

Since the adoption of the Law 2074 by the Parliament of Ukraine on February 17, 2022 and until the period of 2023, significant events have taken place. They have significantly affected the plans of the Parliament of Ukraine to launch mandatory amendments to the Tax Code of Ukraine provided for in the Draft Law 7150 and simultaneously enact Law 2074 starting from October 1, 2022.

Among such influential events is the fact that on June 23, 2022, Ukraine became a candidate for membership in the European Union *(European Council Conclusions on Ukraine, the Membership Applications of Ukraine, the Republic of Moldova and Georgia, Western Balkans and External Relations, 23 June 2022*, *2022)*. At the same time, the European Union has significantly updated the Crypto Asset Market Regulation (MiCA) *(Digital Finance, 2022)*. Therefore, the relevant Law 2074 regulating virtual assets needs to be adapted to existing European regulatory mechanisms, including the Markets in Crypto Assets Regulation (MiCA).

European regulators first mentioned the need to regulate crypto asset markets (hereinafter referred to as Markets in Crypto-Assets Regulation or MiCA) shortly after Facebook launched Libra stablecoin. The French finance minister said a few minutes after the project's launch that Libra would never become a sovereign currency and would require reliable consumer protection. The bankruptcies of FTX, Terra, and Celsius Network have strengthened the authorities' resolve. Europe has determined that existing legislation cannot be applied to most crypto assets and their providers. Therefore, a new one was created to regulate crypto and the activities of crypto companies (*Jaki zakony budutj dijaty dlja jevropejsjkykh kryptovaljutnykh kompanij cherez rik?, 2023).*

The Council adopted its negotiating mandate on the Markets in Crypto Assets Regulation (MiCA) on November 24, 2021. Negotiations between the co-legislators began on March 31, 2022 and ended with an interim agreement reached on October 05, 2022. *(Digital Finance, 2022).* On October 5, 2022, EU lawmakers approved the text of the Markets in Crypto Assets Regulation (MiCA) bill *(Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-Assets, and Amending Directive (Eu) 2019/1937, 2022)*, which will become the basis for cryptocurrency regulation in the European Union. And on October 10, members of the European Parliament's Committee on Economic and Monetary Affairs adopted a draft law on cryptocurrency regulation, thus supporting the MiCA regulation and all relevant provisions.

The European MiCA Regulation should be the basis for the new version of the Law of Ukraine "On Virtual Assets".

3. Purpose of the Article

The goal is to conduct a legal analysis of the tax concept chosen by Ukraine, laid down in the legal norms of the Draft Law 7150, which may in the future become regulators of the process of taxation of virtual assets, which have a more common name – cryptocurrency.

4. Methods

When conducting the research, the following were used: general scientific research methods – deduction and induction, synthesis and analysis, scientific abstraction, systematic approach; especially – legal methods of knowledge – formally legal; legal forecasting, retrospective, and comparative legal method; methodological substantiation of the essence, nature, and structure of the terminology, which is the object of research.

5. Results of the study

1. Definition and legal regulation of virtual assets. State regulation of the market of virtual assets – implementation by the state in the person of the National Commission for Securities and the Stock Market (hereinafter – the NCSSM) *(Regulations on the National Commission for Securities and the Stock Market, 2011)* and the National Bank of Ukraine (hereinafter – the NBU) *(About the National Bank of Ukraine, 1999)* comprehensive measures to organize, control, supervise the market of virtual assets, regulate the rules of operation of service providers related to the turnover of virtual assets, as well as measures to prevent and counter abuse and violations in the market of virtual assets (Paragraph 1 of Article 16 Law 2074).

State regulation in the sphere of circulation of secured virtual assets secured by currency values (SVA(CV)), within its competencies, is carried out by the National Bank of Ukraine.

State regulation in the sphere of virtual assets turnover, except for SVA(CV), in particular regarding secured virtual assets secured by security or a derivative financial instrument (SVA(FI)), within its competencies, is carried out by the National Securities and Stock Commission market.

Law 2074 forms its division of virtual assets, which is not similar to the generally accepted one in the community related to the crypto industry:

- *virtual asset* – an intangible good that is the object of civil rights, has a value and is expressed by a set of data in electronic form. The existence and liquidity of a virtual asset are ensured by the system of ensuring the turnover of virtual assets. A virtual asset can testify to property rights, in particular, rights of claim to other objects of civil rights (Paragraph 1of paragraph 1 article 1 of Law 2074); Virtual assets are intangible assets, and the specifics of their turnover are determined by the Civil Code of Ukraine and this Law. Virtual assets can be unsecured or secured. (Paragraph 1 of Article 4 of the Law of 2074);
- *a secured virtual asset* – a virtual asset that certifies property rights, in particular, the right of claim to other objects of civil rights (clause 3 clause 1 article 1 of Law 2074); Secured virtual assets certify property rights, in particular, rights of claim to other objects of civil rights (Paragraph 3 of Article 4 of the Law of 2074);
- *unsecured virtual asset* – a virtual asset that does not certify any property or non-property rights (Paragraph 6 of Paragraph 1, article 1 of Law 2074); Unsecured virtual assets do not prove property rights. (Paragraph 2 of Article 4 of the Law of 2074);

In turn, a secured virtual asset, as a financial virtual asset, forms two separate directions of its internal distribution, into secured by currency values and secured by securities or a derivative financial instrument (Paragraph 6 of Article 4 of the Law of 2074):

- a secured virtual asset secured by currency values issued by a resident of Ukraine (hereinafter – SVA(CV);
- a secured virtual asset issued by a resident of Ukraine, secured by security or a derivative financial instrument (hereinafter – SVA(FI).

2. Providers of services for the turnover of virtual assets. Business entities of all forms of ownership have the right to operate as a provider of services related to the turnover of virtual assets, subject to compliance with the requirements specified by Law 2074 (Paragraph 1 of Article 18 of Law 2074).

The activity of service providers related to the turnover of virtual assets is allowed only on the condition of obtaining a permit for the provision of services related to the turnover of virtual assets of the appropriate type, defined by Law 2074 (Paragraph 2 of Article 18 of Law 2074).

Business entities are allowed to conduct more than one type of activity as a provider of services related to the turnover of virtual assets, subject to obtaining a permit for the provision of each relevant type of service related to the turnover of virtual assets (Paragraph 3 of Article 18 of Law 2074).

Providers of services related to the turnover of virtual assets are exclusively business entities – legal entities that conduct one or more of the following types of activities in the interests of third parties: 1). storage or administration of virtual assets or virtual asset keys; 2). exchange of virtual assets; 3). transfer of virtual assets; provision of intermediary services related to virtual assets (Paragraph 8 of Paragraph 1 Article 1 of the Law 2074);

The service provider can be a foreign legal entity that is a participant in the virtual assets market, under the law of a foreign state, conducts activities as a service provider in the manner and under the conditions determined by the National Commission for Securities and the Stock Market, taking into account the requirements and restrictions determined by this Law (Paragraph 6 Article 9 of Law 2074).

In some cases, it is not necessary to obtain a permit to carry out activities related to the turnover of virtual assets, and in some cases, it is necessary to additionally have an appropriate license:

- Issuance of a permit for the provision of services related to the turnover of SVA (FI) – in the cases and procedures established by the NCSSM, professional participants of the capital markets have the right to conduct the relevant type of activity of the provider of services related to the turnover of virtual assets, without obtaining permits provided for by Law 2074 (Paragraph 17 of Article 19 of Law 2074);
- issuance of a permit for the provision of services related to the turnover of virtual assets of SVA(CV) – a). a provider of services related to the turnover of virtual assets, which is a bank, has the right to provide services related to the turnover of SVA(CV) based on a banking license and permission to provide services related to the turnover of virtual assets; b). a provider of services related to the turnover of virtual assets, which is a non-banking financial institution, has the right to provide services related to the turnover of SVA(CV) based on a license of the NBU to carry out currency operations and a permit to provide services related to turnover of virtual assets (Paragraph 16 of Article 19 of Law 2074).

The supervision of the activities of service providers related to the turnover of foreign financial institutions, which are banks, and branches of foreign banks, is carried out by the procedure defined by the Law of Ukraine "On Banks and Banking Activities" *(Pro banky i bankivsjku dijaljnistj, 2000)*. Supervision of the activities of service providers related to the turnover of SVA(CV), which are non-banking financial institutions, is carried out by the procedure established by the Law of Ukraine "On Financial Services and State Regulation of Financial Services Markets" *(Pro finansovi poslughy ta derzhavne reghuljuvannja rynkiv finansovykh poslugh, 2001)* (Paragraph 2 of Article 17 of Law 2074).

Only a financial institution can be a provider of services related to the turnover of SVA(CV) (Paragraph 7 of Article 9 of Section III of the Law of 2074).

Virtual asset exchange services are activities related to the exchange of virtual assets for other virtual assets and currency values, carried out for third parties and/or on behalf of and in the interests of third parties.

Providers of virtual asset exchange services have the right to provide virtual asset exchange services exclusively for other virtual assets or the national currency (hryvnia), and in cases determined by the National Bank of Ukraine – for other currency values (Paragraph 2 of Article 11 of Law 2074).

Thus, the realization of virtual assets in the legal field of Ukraine is possible only through an intermediary, namely a provider of services for the circulation of virtual assets: a). in the direct sale procedure, – which has permission to provide intermediary services related to virtual assets; b). during the exchange procedure – which has permission to provide operations for the exchange of virtual assets for other virtual assets and currency values.

3. Terminology proposed by Law No. 7150 to the Tax Code of Ukraine in connection with the adoption of the Law of Ukraine "On Virtual Assets".

Following Project 7150 of amendments to the Tax Code of Ukraine (hereinafter – TC), new concepts will be introduced in Article 14 of Section I "General Provisions", in particular:

virtual asset (Article 14 Paragraph 14.1.33 TC), secured virtual asset (Article 14 Paragraph 14.1.61 TC), unsecured virtual asset (Article 14 Paragraph 14.1.62 TC), provider of services related to the turnover of virtual assets (Article 14 Paragraph 14.1.192 TC), services related with the turnover of virtual assets (Article 14 Paragraph 14.1.184 TC), a provider of services related to the turnover of virtual assets (Article 14 Paragraph 14.1.192 TC) – which are used in the meaning given in the Law of Ukraine "On Virtual assets".

In addition, there are also new definitions that relate exclusively to the specifics of the regulation of tax relations in Ukraine and are inherent in the Tax Code of Ukraine:

profit from transactions with virtual assets for the purposes of Chapter IV of this Code – income in the form of a positive difference between the income received by the taxpayer from operations with virtual assets and the costs of their acquisition (Article 14 Paragraph 14.1.196-1 TC);

use of a secured virtual asset – termination of the right of ownership of the secured virtual asset by transfer to the owner of the secured virtual asset of the property right that was secured by it (Article 14 Paragraph 14.1.25 TC);

goods – tangible and intangible assets, including land plots, land shares (units), as well as securities and derivatives used in any operations, except for their issue (issue) and *repayment, and virtual assets used in any operations, except operations on their release (emission) and use* (Article 14 Paragraph 14.1.244 TC).

4. The concept of taxation of virtual assets laid down in the Draft Law 7150 on amendments to the Tax Code of Ukraine.

One of the main vectors of the Draft Law 7150 is the formation in the legal field of Ukraine of a legal tax platform for the functioning of innovative technology in the digital sector of the economy, where cryptocurrencies and various crypto-assets have long been in circulation, for which the Law 2074 adopted a generalized name – virtual assets.

Draft Law 7150 provides for the definition of the procedure:

- object of taxation;
- basic requirements for financial and tax accounting of transactions with virtual assets
- declaration of relevant income from transactions with virtual assets;
- establishment of types of taxes for taxation of transactions with virtual assets;
- peculiarities of taxation of transactions with unsecured and secured virtual assets.

Draft Law 7150 also contains elements of application of the "standard regime" of taxation, namely the establishment of the obligation to pay military duty on the amount of investment income from transactions with virtual assets for individuals at the rate of 1.5%.

But in general, Draft Law 7150 provides for the introduction of the following tax incentives for the application of a "softened regime" of taxation of virtual assets:

- exemption from value added tax on transactions with virtual assets and services provided by service providers related to virtual currencies;
- establishment, for a period of 5 years, of a preferential taxation regime for investment income from transactions with virtual assets for individuals at a personal income tax rate of 5%;
- establishing, for a period of 5 years, a regime of preferential taxation of investment income from transactions with virtual assets and services provided by service providers related to virtual assets at an income tax rate of 5% (*Pojasnjuvaljna zapyska do Proektu #7150 Zakonu Ukrajiny "Pro vnesennja zmin do Podatkovogho kodeksu Ukrajiny shhodo opodatkuvannja oborotu virtualjnykh aktyviv v Ukrajini", 2022).*

The mechanism for determining the profit of legal entities is proposed by adding a number of new clauses to the Tax Code of Ukraine:

- "196-1. profit from transactions with virtual assets for the purposes of Section IV of this Code – income in the form of a positive difference between the income received by the taxpayer from transactions with virtual assets and the costs of their acquisition".
- "134.1.8. profit from transactions on sale or other alienation of virtual assets determined in accordance with Paragraph 141.9 of Article 141 of this Code."
- "141.9.4. Positive total financial result from operations on sale or other alienation of virtual assets (total amount of profits from operations on sale or other alienation of virtual assets exceeds the total amount of losses from such operations taking into account the amount of negative financial result from such operations not taken into account in previous tax (reporting) periods) is the profit from operations on sale or other alienation of virtual assets, which is taxed at the rate stipulated in Paragraph 136.8 of Article 136 of this Code, separately in accordance with the tax legislation of Ukraine."
- "136.8. The tax rate of 5 percent shall be applied to the object of taxation defined by Paragraph 134.1.8 of sub-Paragraph 134.1 of Article 134 of this Code". *(Proekt Zakonu Pro vnesennja zmin do Podatkovogho kodeksu Ukrajiny shhodo opodatkuvannja operacij z virtual-jnymy aktyvamy, 2022).*

However, it should be noted that the rate of 5% will be applied only if "… *such provider of services related to the turnover of virtual assets does not receive other income, except for income from the activities related to the provision of services related to the turnover of virtual assets and income arising from the accrual of exchange rate differences" (Proekt Zakonu Pro vnesennja zmin do Podatkovogho kodeksu Ukrajiny shhodo opodatkuvannja operacij z virtual-jnymy aktyvamy, 2022).*

The mechanism for determining the profit of individuals differs from the mechanism of legal entities, and is also proposed through the addition of a number of new paragraphs to the Tax Code of Ukraine, in particular Paragraph 170.2-1.2*:*

"The profit from transactions with virtual assets is calculated as a positive difference between the total income received by the taxpayer from the sale of virtual assets during the tax (reporting) period and the documented total expenses for the acquisition of virtual assets during the same tax (reporting) period, taking into account the loss from transactions with virtual assets not taken into account in previous tax (reporting) periods" (Proekt Zakonu Pro vnesennja zmin do Podatkovogho kodeksu Ukrajiny shhodo opodatkuvannja operacij z virtual-jnymy aktyvamy, 2022).

Similar requirements of Paragraphs 170.2-1.2 "Taxation of Profit from Operations with Virtual Assets" regarding the need for documentary evidence of expenses are contained, but already in Paragraph 170.2.2. "Investment Profit …".

It can be stated that the legislator requires documentary evidence of expenses for the purchase of a virtual asset. However, the wording of Paragraphs 170.2.2. and 170.2-1.2. in such wording will lead to problems for individual taxpayers in the future when declaring their income, given the following:

- most transactions of individuals with virtual assets are carried out remotely on the Internet, which does not involve the execution of documents;
- even an attempt to execute any document may result in its formation, in most cases, exclusively in electronic form;
- even if the documents are received in paper form, or their semblance, they may not comply with the accepted accounting standards, which will be an obstacle to taking them into account by the tax authorities.

We propose to pay attention to the problems we have highlighted and improve, by amending Paragraphs 170.2.2. and 170.2-1, to add alternative options for the possibility of confirming the expenses of an individual for the acquisition of virtual assets.

Since there is a paragraph clarifying "For the purposes of this clause:", what exactly can be recognized as expenses in Paragraph 170.2-1. 3 "*c) the amount of currency values transferred by the taxpayer from his/her own bank account to the account of the service provider related to the turnover of virtual assets, as well as the amount of currency values transferred by such taxpayer from his/her own bank account to the account of any other persons in exchange for virtual assets (including their issuer) shall be considered as the expenses of the taxpayer from the transactions with virtual assets;*", – only deepens the problem of recognition of expenses by the taxpayer as an individual.

Based on the above provisions of the Draft Law 7150, an individual taxpayer cannot purchase currency values for cash, because such expenses will not be taken into account when calculating the tax base (profit).

The circle of persons who will be affected by the issues highlighted by us will be expanded by Paragraph 177.3.3. which will be added upon adoption of the Draft Law 7150, and will apply not only to individuals but also to individuals – entrepreneurs: "The income of an individual entrepreneur in the form of profit from transactions with virtual assets shall not be included in the income of an individual entrepreneur. Taxation of such income of an individual entrepreneur is carried out in the manner prescribed by Paragraph 170.2-1 of Article 170 of this Code".

At the end of the review of the procedure for taxation of profits from transactions with "virtual assets" proposed to us by the Draft Law 7150, we note that intermediary activities for their sale are taxed only in the part of the margin received from such sale, which is provided for by amendments to Paragraph 292.4 of the Tax Code of Ukraine: "*In case of provision of services, performance of works under contracts of assignment, commission, freight forwarding or agency agreements, the income is the amount of the received remuneration of the attorney (agent). In case of provision of services related to the turnover of virtual assets, the income is the amount of remuneration of the provider of services related to the turnover of virtual assets.»* (*Porivnjaljna tablycja do Proektu #7150 Zakonu Ukrajiny "Pro vnesennja zmin do Podatkovogho kodeksu Ukrajiny, shhodo opodatkuvannja operacij z virtualjnymy aktyvamy", 2022).* Such a legal position defined by the legislator on intermediary services for the sale of "virtual assets" is a positive factor that will serve to develop the crypto industry in Ukraine.

6. Conclusions

In general, it can be stated that Draft Law 7150 indicates the fact that conceptually Ukraine has chosen a conservative approach to the choice of the system of taxation of virtual assets (cryptocurrency). It is envisaged to apply the existing types of taxes and norms of the Tax Code of Ukraine to the taxation of the circulation of virtual assets, that is, without introducing special taxes exclusively for the taxation of virtual assets, which is identical to global trends in the formation of tax policy.

Such efforts of the state can lead to a significant increase in the country's gross domestic product in the near future. Our forecast is formed due to the fact that Draft Law 7150 is aimed at providing tax incentives to the latest technologies related to virtual assets and provides a comprehensive system of measures that will likely allow the new digital economy to flourish as a legal industry that pays taxes to the budget of its country.

However, the proposed Draft Law 7150 needs to be further improved by amending Paragraphs 170.2.2. and 170.2-1 to add alternative options for the possibility of remote confirmation of the expenses of an individual and an individual entrepreneur for the purchase of virtual assets. For example, this may be the possibility of notarization of a screenshot of a personal account, obtaining a certificate from the seller / issuer of virtual assets, etc. Also, it is necessary to pay attention to and expand the possibilities of confirming the expenses of an individual and an individual entrepreneur when paying for virtual assets not only by cashless payment, as provided for in the Draft Law 7150, but also in cash.

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