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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision : 03.09.2025*

\+ ITA 370/2025

PRINCIPAL COMMISSIONER OF INCOME TAX - 4 DELHI

.....Appellant

Through: Mr. Abhishek Maratha, Sr. Standing Counsel, Mr. Apoorv Agarwal, Mr. Parth Samwal, Jr. SCs, Ms Nupur Sharma, Mr. Gaurav Singh, Mr. Bhanukaran Singh Jodha, Ms Muskaan Goel, Mr. Himanshu Gaur and Mr. Nischay Purohit Advs.

versus

MITSUBISHI CORPORATION (INDIA) PVT LTD

.....Respondent

Through: Mr. Mayank Nagi, Adv.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MR. JUSTICE VINOD KUMAR

V. KAMESWAR RAO , J. (ORAL)

CM APPL. 54672/2025, CM APPL. 54673/2025

1. For the reasons stated in the applications, the delay of 29 days in filing and 914 days in re-filing the appeal, is condoned.

2. Accordingly, the applications are disposed of.

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3. This appeal is filed under Section 260A of The Income Tax Act, 1961 (the Act) lays a challenge to the order dated 12.08.2022 in ITA No. 9364/DEL/2019 passed by Income Tax Appellate Tribunal (the Tribunal).

The issue is relatable to Section 40A(i) of the Act for the Assessment Years (AY) 2016-17. The Tribunal in paragraph 8 has stated as under :

> *"8. We have carefully perused the order of this Tribunal. This Tribunal has also considered this issue in ITA No.5184/Del/2017 for A.Y.2013-14. The relevant findings read as under:-*
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> > *"16. Following the decision rendered by coordinate Bench of the Tribunal in assessee's own case in AY 2010/11 and the decision rendered by Hon'ble High Court in CIT vs. Herbalife International India (P.) Ltd., wherein the assessee was an intervener, we are of the considered view that AO/DRP have erred in disallowing of Rs.30,41,71,07,047 regarding purchases made by the assessee from its AEs u/s 40(A)(i) as section 40A(i) is not applicable to the assessee due to non-discrimination clause under DTAA and due to the fact that AEs do not have a permanent PE in Indian. So, the issue is determined in favour of the assessee. Consequently, the appeal filed by the assessee is hereby allowed."*

4. The appellant/ Revenue has proposed the following substantial questions of law:

> *"A. Whether on facts and in the circumstances of the case and also prevailing law, the Hon'ble Tribunal has erred in deleting the disallowance made u/s 40(a)(i) of Rs. 11,85,35,823/- and holding that the provisions of Section 40(a)(i) of the Act cannot be applied in view of the provisions of the DTAA?*
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> *B. Whether on facts and in the circumstances of the case and also prevailing law, the Hon'ble Tribunal has erred in not*

appreciating the mandate of Section 195 of the Act especially in view of the law laid down by the Hon'ble Supreme Court in the case of Transmission Corporation Of A.P. Ltd. And Am-. Versus Commissioner Of Income Tax, A.P. reported in [AIR 1999 SUPREME COURT 3036]?

C. Whether on facts and in the circumstances of the case and also prevailing law, the Hon'ble Tribunal has gravely erred in reversing the findings of the Assessing Officer/DRP that the assessee's foreign AEs have a PE in India?

D. Whether on facts and in the circumstances of the case and also prevailing law, the Hon'ble Tribunal has failed to appreciate that the decision in Herbalife International India Pvt. Ltd. Versus Commissioner of Income Tax dated 13.05.2026 in ITA No 7/2007 was rendered by this Hon'ble Court in the context of the Un-amended Section 40(A)(i) of the Act and hence not applicable for the relevant period?"

5. Learned counsel for appellant states that the issue in hand is covered by the majority view in the case of ***The Commissioner of Income Tax II vs. Mitsubishi Corporation (India) Pvt. Ltd.*** i.e. in respect of the assessee herein for the Assessment Year 2006-07 being ITA 180/2014. In this regard we may refer to paragraph 13.1 onwards of the judgement of the third Judge to whom reference was made, in the following manner :

"13.1 The AO had ordered disallowances qua payments made by the respondent/assessee concerning purchases from its seven (07) group companies. The disallowance of the expenditure incurred for purchases made was triggered as TAS had not been deducted by the respondent/assessee. The AO took recourse to the

provisions of Section 40(a)(i) of the Act.

13.2 Insofar as the income received by the respondent/assessee against services rendered by it for acting as an intermediary between the ultimate customer and the group companies was concerned, that was subjected to transfer pricing adjustment. This aspect is not the subject matter of the instant appeal. The Tribunal has, in fact, remitted this issue to the TPO/AO for fresh consideration.

13.3 It was neither the stand of the appellant/revenue nor was any finding of fact arrived at by the AO that the transactions entered into between the respondent/assessee and its seven (07) group companies were "composite transactions". In other words, the suggestion that an element of taxable income was embedded in the transactions executed between the respondent/assessee and its seven (07) group companies does not emerge from the record. The AO ordered disallowance under Section 40(a)(i) of the Act concerning payments made by the respondent/assessee to its group companies on the ground that they were chargeable to tax in India. The conclusion reached by the AO about the taxability of the payments made by the respondent/assessee in India was based on the rationale that since MC Japan had acquiesced to the jurisdiction of the appellant/revenue [as it had a LO located in India, which was treated as its PE], the business model of the remaining group companies being identical, they would stand on the same footing. In other words, the AO concluded that all seven (07) group companies had PE in India.

13.4 Thus, the AO, having regard to the provisions of Explanation 2 appended to Section 195 of the Act (which was inserted in the Act via FA 2012, albeit with effect from 01.04.1962) concluded that payments made by the respondent/assessee to its group companies were chargeable to tax in India and hence, the disallowance under Section 40(a)(i) of the Act could be ordered for

failure to deduct TAS.

14. As noted hereinabove, the respondent/assessee insofar as the following entities are concerned, i.e., MC (Japan); Metal One Corporation (Japan); Tubular (USA); Petro (Japan) and Miteni (Japan), has assailed the disallowance ordered by the AO, not on the ground that the payments made are not chargeable to tax in India, but on the basis that equal treatment was not accorded, as envisaged in Articles 24(3) and 26(3) of DTAAs entered into by India with Japan and USA.

15. As indicated above, before 01.04.2005, payments specified in Clause (i) of Section 40(a) made outside India or to a non-resident could not be deducted while computing the income chargeable to tax under the head "profits and gains from business and profession" unless TAS was deducted or after the deduction the amount was made over, i.e., paid. Inter alia, the payments specified in Clause (i) of Section 40(a) concern interest [not being interest on a loan issued for public subscription before the 1st day of April, 1938], royalty, fees for technical services or other sums chargeable under the Act.

15.1 The rigour of the said provision, as it obtained prior to 01.04.2005, did not apply to the aforementioned specified payments made to residents. FA 2004 brought about an amendment in Section 40(a), whereby the resident was also brought within its sway, albeit with respect to payments specified in Clause (ia). The payments adverted to in Clause (ia) were the following:

> *"any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work)"*

15.2 Thus, although parity had been brought about with regard to the power of the AO to deny deduction where

TAS was not deducted against payments made outside India or to non-residents and residents, it was limited to certain payments. As is evident upon perusal of Clause (ia) of Section 40(a), it did not bring payments made towards purchases to residentvendors within its net. Therefore, the respondent/assessee argued that even after the amendment in Section 40(a) w.e.f. 01.04.2005, unequal treatment, i.e., discrimination, obtained with regard to payments made against purchases to resident-vendors. The expenditure incurred on payments made to resident-vendors against purchases could thus, be taken into account while computing income chargeable under the head "profits and gains of business or profession". This disparity was removed by FA 2014, albeit w.e.f. from 01.04.2015, when the ambit of disallowance was enlarged by bringing any sum payable to a resident within the four corners of Clause (ia) of Section 40(a).

16. There can be no cavil with the proposition advanced on behalf of the respondent/assessee that since the provision of Article 24(3)/26(3) of the India-Japan and India-USA DTAAs respectively are more beneficial, it is entitled to rely upon the same, in support of its stand that the disallowance had been rightly deleted by the Tribunal. Section 90(2) of the Act makes it abundantly clear that, "Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India…for granting relief of tax, or....avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee." [See Union of India v. Azadi Bachao Andolan]

17. The argument advanced on behalf of the appellant/revenue that since provisions of Article 9 of the respective DTAAs apply, the equal treatment/non-discrimination clause incorporated in Article 24(3)/26(3) would have no application to my mind, is untenable for the following reason:

17.1 Article 9 captures transactions that an assessee may enter with an AE, which may result in a transfer pricing adjustment. In the instant case, the transfer pricing adjustment impacted the payments received by the respondent/assessee against services rendered by it to its group companies. This aspect was concededly not the subject matter of the disallowance ordered under Section 40(a) of the Act. The disallowance under the said provision was confined to payments made by the respondent/assessee against purchases required to conform to the equal treatment clause or the non-discrimination Clause contained in Article 24(3)/26(3). Perhaps for this reason, the AO did not take recourse to the provisions of Article 9 of the respective DTAAs.

18. As regards the transactions entered into by the respondent/assessee with the remaining two entities, i.e., MC Metal (Thailand) and Metal One (Singapore), the respondent/assessee does not press the argument of equal treatment as the DTAAs entered into by India with Thailand and Singapore do not contain an equal treatment/non-discrimination clause.

18.1 In this behalf, the respondent/assessee has contended and, in my view correctly, that since the two companies referred to above, i.e., MC Metal Thailand and Metal One Singapore, do not have a PE in India, the payments made to them are not chargeable to tax in India. Articles 7 of the IndiaThailand and India-Singapore DTAAs, respectively, provide complete clarity in that behalf. The AO, via convoluted logic, has concluded that since MC (Japan) had a LO in India, on account of the similarity of business models, it ought to be concluded that these two companies, amongst other companies, also had PE in India. On the other hand, the Tribunal has returned a finding that MC Metal Thailand and Metal One Singapore do not have a PE in India. The following paragraph from the Tribunal's order, being relevant, is extracted hereafter:

"9.7 In the above decision the Tribunal has

concluded that Metal One Corporation does not have a PE in India. The Assessing Officer on the analogy that the functions of Metal One Asia Pte. Ltd. Thailand are similar to that of Metal One Corporation, drew an inference that Metal One Asia Pt. Ltd. have a PE in India. Similar inference has been drawn in the case of MC. Tubular Inc. USA, Petro Diamond Corp. Japan and Miteni Japan. As the ITAT had, in the case of Metal One Corporation held that the entity does not have a PE in India, on the facts and circumstances of the case, the ratio applies to all other entities other than Mitsubishi Corporation, Japan. We are informed that, for none of the entities, other than Metal One Corporation, Japan the Revenue authorities have passed any order holding that those entities have a PE in India. We find that the AO drew an inference that these entities have a PE in India while examining the provisions of S.195 and S.40(a)(ia) in the case of the assessee but, the department has not passed any order holding that these entities have a PE in India. Thus the income of these entities are not taxed in India. Under these circumstances we have to necessarily hold that the payments made for purchases from these entities are not taxable in India as these entities have not held as having a PE in India and hence the provisions of S.195 are not attracted and consequently the disallowances made u/s 40(a)(ia) of the Act are bad in law. In the result this ground of the assessee is allowed."

19. Given this position, as correctly argued on behalf of the respondent/assessee, it was not obliged to deduct TAS from payments made to MC Metal (Thailand) and Metal One (Singapore). Chargeability to tax is the

paramount condition for triggering the obligation to deduct TAS. The plain language of sub-section (1) of Section 195 brings this aspect of the matter to the fore. The said section reads as follows:

> *"195. (1) Any person responsible for paying to a non-resident, not being a in section 194LB or section 194LC) [or section 194LD] or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :*
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> ***Provided** that in the case of interest payable by the Government or a public sector bank within the meaning of Clause (23D) of section 10 or a public financial institution within the meaning of that Clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :*
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> ***Provided further** that no such deduction shall be made in respect of any dividends referred to in section 115-O.*
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> *Explanation 1.—For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.*
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> *Explanation 2.—For the removal of doubts, it*

is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

(i) a residence or place of business or business connection in India; or

(ii) any other presence in any manner whatsoever in India."

19.1 This is also the dicta of the judgment rendered by the Supreme Court in GE India Technology, as is evident from a perusal of the following extract:

"7. Under Section 195 (1), the tax has to be deducted at source from interest (other than interest on securities) or any other sum (not being salaries) chargeable under the Income-tax Act in the case of non residents only and not in the case of residents. Failure to deduct the tax under this section may disentitle the payer to any allowance apart from prosecution under section 276B. Thus, Section 195 imposes a statutory obligation on any person responsible for paying to a non resident, any interest (not being interest on securities) or any other sum (not being dividend) chargeable under the provisions of the Income-tax Act, to deduct Income-tax; at the rates in force unless he is able to pay income-tax thereon as an agent. The most important expression in Section 195(1) consists of the words "chargeable under the provisions of the Act". A person paying interest or any other sum to a nonresident is not liable to deduct tax if such sum is not chargeable to tax under the Income-tax Act. For instance, where there is no obligation on

the part of the payer and no right to receive the sum by the recipient and that the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the Income-tax Act. It may be noted that Section 195 contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which has an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under

an obligation to deduct TAS in respect of such composite payments. The obligation to deduct TAS is, however, limited to 'the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. This obligation being limited to the appropriate proportion of income flows from the words used in Section 195(1), namely, ―chargeable under the provisions of the Act‖. It is for this reason that vide Circular No. 728 dated 30-10-1995 that the CBDT has clarified that the tax deductor can take into consideration the effect of DTAA in respect of payment of royalties and technical fees while deducting TAS. It may also be noted that Section 195(1) is in identical terms with Section 18(3B) of the 1922 Act The application of Section 195 (2) presupposes that the person responsible for making the payment to the non-resident is in no doubt that tax is payable in respect of some part of the amount to be remitted to a non-resident but is not sure as to what should be the portion so taxable or is not sure as to the

amount of tax to be deducted. In such a situation, he is required to make an application to the ITO (TDS) for determining the amount. It is only when these conditions are satisfied and an application is made to the ITO (TDS) that the question of making an order under Section 195 (2) will arise. While deciding the scope of Section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the
underlying principle of Section 195…

8. If the contention of the Department that the moment there is remittance the obligation to deduct TAS arises is to be accepted then we are obliterating the words "chargeable under the provisions of the Act" in section 195(1). The said expression in section 195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. The payer is bound to deduct TAS only if the tax is assessable in India. If tax is not as assessable, there is no question of TAS being deducted.

9. One more aspect needs to be highlighted. Section 195 falls in Chapter XVII which deals with collection and recovery. Chapter XVII-B deals with deduction at source by the payer. On analysis of various provisions of Chapter XVII one finds use of different expressions, however, the expression ―sum chargeable under the provisions of the Act‖ is used only in Section 195. Therefore, section 195 has to be read in conformity with the charging provisions, i.e., sections 4, 5 and 9. This reasoning flows from the words ―sum chargeable under the provisions of the Act‖ in

section 195(1). The fact that the revenue has not obtained any information per se cannot be a ground to construe section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read section 195, as

suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if, the Contention of the Department was accepted it would must obliteration of the expression "sum chargeable under the provisions of the Act" from section 195(1) Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the Income-tax Act. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the moneys deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the income- tax Act by which a payer can obtain refund. Section 237 read with section 199 implies that only the recipient of the sum, i.e., the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all payments. The payer, therefore, has to deduct and pay tax, even if the so called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum

chargeable under the Act. The interpretation of the Department, therefore, not only requires the words "chargeable under the provisions of the Act to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax As stated hereinabove, Section 195(1) uses the expression —sum chargeable under the provisions of the Act. We need to give weightage to those words. Further, section 195 uses the word "payer" and not the word "assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfil the statutory obligation under Section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default. The abovementioned contention of the Department is based on an apprehension which is ill founded. The payer is also an assessee under the ordinary provisions of the Income tax Act. When the payer remits an amount to a non resident out of India he claims deduction or allowances under the Income-tax Act for the said sum as an —expenditure‖. Under section 40(a) inserted vide Finance Act, 1988 with effect from 1-4-1989, payment in respect of royalty, fees for technical services or other sums chargeable under the Income-tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the Income-tax Act. This provision

ensures effective compliance of section 195 of the Income-tax Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the Income-tax Act. In a given case where the payer is an assessee he will definitely claim deduction under the Income-tax Act for such remittance and on inquiry if the Assessing Officer finds that the sums remitted outside India comes within the definition of royalty or fees for technical service or other sums chargeable under the Income-tax Act then it would be open to the Assessing Officer to disallow such claim for deduction."

19.2. The reliance on the judgment rendered by the Supreme Court in Transmission Corporation of AP Ltd. v. CIT is misplaced, as that was a case involving a composite transaction where the trading receipt was embedded with a component of income. This is evident upon perusing the following extracts from G.E. India Technology, whereby the said aspect has been discussed:

—Applicability of the judgment in the case of Transmission Corporation (supra) 10. In Transmission Corpn. of AP Ltd.'s case (supra) a non- resident had entered into a composite contract with the resident party making the payments. The said composite contract not only comprised supply of plant, machinery and equipment in India, but also comprised the installation and commissioning of the same in India. It was admitted that the erection and commissioning of plant and machinery in India gave rise to income taxable in India. It was, therefore, clear even to the payer that payments required to be made by him to the non-resident included an

element of income which was exigible to tax in India. The only issue raised in that case was whether TDS was applicable only to pure income payments and not to composite payments which had an element of income embedded or incorporated in them. The controversy before us in this batch of cases is, therefore, quite different. In Transmission Corpn. of AP Ltd.'s case (supra) it was held that TAS was liable to be deducted by the payer on the gross amount if such payment included in it an amount which was exigible to tax in India. It was held that if the payer wanted to deduct TAS not on the gross amount but on the lesser amount, on the footing that only a portion of the payment made represented "income chargeable to tax in India", then it was necessary for him to make an application under Section 195(2) of the Act to the ITO (TDS) and obtain his permission for deducting TAS at lesser amount. Thus, it was held by this Court that if the payer had a doubt as to the amount to be deducted as TAS he could approach the ITO (TDS) to compute the amount which was liable to be deducted at source. In our view, Section 195(2) is based on the "principle of proportionality". The said sub-section gets attracted only in cases where the payment made is a composite payment in which a certain proportion of payment has an element of "income" chargeable to tax in India. It is in this context that the Supreme Court stated, "If no such application is filed, income-tax on such sum is to be deducted and it is the statutory obligation of the person responsible for paying such „sum" to deduct tax thereon before making payment. He has to discharge

the obligation to TDS". If one reads the observation of the Supreme Court, the words "such sum" clearly indicate that the observation refers to a case of composite payment where the payer has a doubt regarding the inclusion of an amount in such payment which is exigible to tax in India. In our view, the above observations of this Court in Transmission Corpn. of AP Ltd.'s case (supra) which is put in italics has been completely, with respect, misunderstood by the Karnataka High Court to mean that it is not open for the payer to contend that if the amount paid by him to the non-resident is not at all "chargeable to tax in India", then no TAS is required to be deducted from such payment. This interpretation of the High Court completely loses sight of the plain words of Section 195(1) which in clear terms lays down that tax at source is deductible only from "sums chargeable" under the provisions of the IT Act, i.e., chargeable under sections 4, 5 and 9 of the IT Act."

20. This brings me to the other aspect of the matter: whether the second question could have been reformulated. The observations of J Singh in this behalf are as follows:

—64. Question 2, however, is modified to read as under: Whether the ITAT was in error in reversing the findings of the DRP with respect to the existence of PEs as well as a business connection in India?

65. The AO had clearly come to the conclusion that the non-resident entities had a PE as well as a business connection in India. This Court holds that MC admittedly has a PE. The other entities also do have a business connection in India. The question is thus,

answered in the affirmative i.e. in favour of the Revenue and against the Assessee."

21. In my view, the learned Judge could not have reformulated the question after the pronouncement of the judgment. As indicated above, the respondent/assessee could have taken recourse to the DTAAs qua the reformulated question since the provisions contained therein were more beneficial. [See Section 90(2) of the Act.] Therefore, the business connection test had no relevance once it was established that MC Metal (Thailand) and Metal One (Singapore) did not have a PE in India.

22. In my opinion, all three questions, as outlined in the order dated 29.04.17 read with the order dated 17.11.2017, have to be answered in favour of the assessee and against the revenue."

6. In view of the above position, the issue(s) which arises for consideration in this appeal is covered by the majority view in the case of ***The Commissioner of Income Tax II vs. Mitsubishi Corporation (India) Pvt. Ltd.*** ITA 180/2014 i.e. in respect of the assessee herein.

7. If that be so, the proposed substantial questions of law do not arise for consideration in these appeal. The appeal is dismissed against the Revenue and in favour of the assessee.

V. KAMESWAR RAO, J

VINOD KUMAR, J

SEPTEMBER 03, 2025
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