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Real Estate Professional for Rentals

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Why designate myself as a real estate professional?

Ok- let's presume that you have a rental loss. How does it affect your tax return? Rental income is typically considered passive, meaning that you are not directly earning the income as you would with a job. Passive losses may be deducted from non-passive income such as wages, but there are limits. Passive loss limits for married taxpayers max out at $25,000, and that number decreases as your gross income increases.

Specifically, passive loss reduces $1 for every $2 over $100,000 adjusted gross income and by $150,000 (for married couples) the passive loss deduction is $0. Bummer. Not all is lost however. If your rental losses are capped or disallowed because of passive loss limits, the portion exceeding the passive loss limit is carried forward, aggregated for each year and may be deducted in the year of disposal (sale).

Passive loss limits for single filers or for married persons who live apart for the entire tax year is $12,500. If you live with your spouse for any part of the year yet file a married, filing separate tax return the passive loss limit is $0. Not good.

There is another angle to all this- if you are a real estate professional and you materially participate, you can claim 100% of your losses and you are not capped by passive loss limits. This makes sense since your rental income is no longer passive if it is your livelihood or at least a large portion of your livelihood.

What is the definition of real estate professional?

To be a real estate professional, an individual must spend the majority of his or her time in real property businesses which include development or redevelopment, construction or reconstruction, acquisition or conversion, rental, management or operation, leasing and / or brokerage.

In addition, more than half of the personal services performed in all businesses and activities during the year must be performed in real estate activities. If you have another full-time job in which you work 40 hours a week, you will need to work more than 40 hours per week in your real estate business. That can truly be a hard sell to the IRS.

Second, your hours worked in the real estate activity must be more than 750 hours. Any work performed as an investor cannot be counted. Taxpayers are required under Income Tax Regulations Section 1.469-5T(f)(4) to provide proof of services performed **and** the hours attributable to those services.

One spouse alone must meet both tests (more than 50% and 750 hours). This is different than the material participation tests where the hours spent by a spouse do count. Also, services performed as an employee do not count unless the employee is at least a 5% owner.

If you own multiple rental properties each will be considered a separate entity and you must satisfy the above requirements on **each property independently** unless an election is made to treat all those interests as a single activity. This election is simply a statement that is attached to your tax return. And under Revenue Procedure 2010-13, you can make the election retroactively (typically requires amending a tax return just for the election).

These tests are applied annually. So, a rental property owner may qualify as a real estate professional in some years but not in others. And if your spouse qualifies as a real estate professional (for example, a licensed realtor) but you do all the work for the rentals, that satisfies the test (assuming a married, filing joint tax return is filed).

The IRS's Audit Techniques Guide (ATG) directs auditors to check the occupation block on tax returns to see if taxpayers report real estate professional or something else. This alone will not disqualify you, but it goes to your state of mind. The ATG also tells auditors to review all activities including K-1s from partnerships and W-2s to assess how much time is spent on other activities.

Wait! There's more.

Once you qualify as a real estate professional, you must **materially participate** in the operation of your business (rental properties). This is where it gets tricky. See below.

How do I record the hours spent as a real estate professional?

Taxpayers are required under Income Tax Regulations Section 1.469-5T(f)(4) to provide proof of services performed **and** the hours attributable to those services. Here is a snippet regarding proof for material participation, and the same process can be used for substantiating real estate professional hours-

> The extent of an individual's participation in an activity may be established by any reasonable means. Contemporaneous daily time reports, logs, or similar documents are not required if the extent of such participation may be established by other reasonable means. Reasonable means for purposes of this paragraph may include but are not limited to the identification of services performed over a period of time and the approximate number of hours spent performing such services during such period, based on appointment books, calendars, or narrative summaries.

Second, logs cannot be retro-created. So, you must have been maintaining your logs as you performed the real estate activities. During an audit or examination if you mention things like "I jotted activities down on my log and then went back and tallied the hours in preparation for this audit" you will probably lose. You need to have maintained the written account of your hours from the beginning. Here is the case law reference- The regulations do not allow a postevent "ballpark guesstimate" in **Moss v. Commissioner, 135 T.C. 365, 369 (2010).**

Third, on-call hours do not count, you must "perform" an activity. The tax court has ruled that waiting for the phone to ring in case a maintenance or emergency call comes in does not count. Here's the snippet from **Tax Court Summary 2012-20 (Kutney)** under footnote 7-

> Petitioners also contend that Mr. Kutney's ownership and management of the rental properties was a "truly full day activity" that required him to be available all day every day and that these on-call hours should count towards the 750-hour requirement. We disagree with this contention. Sec. 469(c)(7) applies where the taxpayer "performs more than 750 hours of services" rather than where the taxpayer is merely on call to perform services. Sec. 469(c)(7)(B)(ii); see also Moss v. Commissioner, 135 T.C. 365, 370 (2010); sec. 1.469-9(b)(4), Income Tax Regs.

Are rental activities always passive activities?

Generally Yes. A rental activity is a passive activity even if you materially participated in that activity, unless you materially participated as a real estate professional. An activity is a rental activity if tangible property (real or personal) is used by customers or held for use by customers and the gross income from the activity represents amounts paid mainly for the use of the property. It does not matter whether the use is under a lease, a service contract, or some other arrangement.

There are several exceptions to rental activities, such as hotels. See **IRS Publication 925**.

What is active participation versus material participation?

For rental properties, the issue is nearly moot since active participation relates only to rental real estate activities and is a less stringent standard than material participation. As long as a taxpayer participates in management decisions in a bona fide sense, he actively participated in the real estate rental activity. Activities include new tenant approval, rental terms, repairs, capital expenditures, etc.

According to the IRS Audit Techniques Guide there is not a specific hour requirement. Even if you use a management company, you will be considered active if you are involved with the operation of your rental. However, the taxpayer must be exercising independent judgment and not simply ratifying decisions made by a manager or management company. In addition, the taxpayer must have at least a 10% interest in the rental activity.

To recap for married taxpayers, passive activities such a rentals or investment partnerships have a loss limit of $25,000 in offsetting non-passive income such as W-2 wages or other earnings. And it is reduced $1 for every $2 over $100,000 in adjusted gross income. Any disallowed passive loss is carried forward until you dispose of the property or investment. For example, you make $120,000 at your regular job and have $30,000 in rental losses. Your passive loss deduction is $15,000 ($25,000 minus $10,000) and the remaining $15,000 is carried forward.

So active participation only matters for those taxpayers who are not limited on their passive losses. In other words, if you do not exceed the passive loss limits you only need to demonstrate active participation. However, to avoid the passive loss limitations of $25,000, a taxpayer must be considered a real estate professional **who also materially participates** in the rental activity.

The rules for material participation are considerably more stringent, and will be discussed next.

What are the general tests for material participation?

Ok. Here we go. This is where the IRS is starting to crack down on what they deem gaming the system by self-determined real estate professionals.

There are several requirements for material participation, and satisfaction of any one test will allow you to be considered materially participating. We'll discuss each one in turn, and refer to notes from the IRS Audit Techniques Guide (ATG) for each test including case law when applicable.

1. *You participated in the activity for more than 500 hours.*

   ATG Notes: If the taxpayer participates more than 500 hours during the year in a business, income or loss from the activity will be non-passive. Participation of both spouses is counted, but not participation of the children or employees. Participation in operations must be **regular, continuous, and substantial**. The examiner should determine whether the quantity of time documented is reasonable in light of other obligations.

   ATG Notes Specific to Real Estate Pros: Rental activities, by nature, normally do not require significant day-to-day involvement, i.e. they are not time intensive. For many taxpayers using any kind of outside management, the only material participation test available is the 500 hour test- the other tests will not apply. In many circumstances, an individual rental activity will not require 500 hours of participation, nor will the taxpayer have sufficient time available to spend 500 hours on each individual rental real estate activity.

   Examination Techniques: Review W-2s and other non-passive activities. Does it seem likely that the taxpayer could spend 500 hours on the activity in light of other employment obligations? Ask questions on taxpayer material participation activity time early in the examination. Establish time the taxpayer spends on all activities during the initial interview if possible. Determine the location of each activity. If located far from the taxpayer's residence, how likely is the taxpayer to have spent substantial time on the activity?

   Tax Court: Despite the IRS's ATG notes, the Court in **Tax Court Memo 1998-17 (Pohoksi)** implied that they would entertain proof that the taxpayer substantially participated as compared to the participation of a property management company. This is a satisfaction of test #2.

2. *Your participation was substantially all the participation in the activity of all individuals for the tax year, including the participation of individuals who did not own any interest in the activity.*

   ATG Notes: Stated simply, if the taxpayer does most of the work, income or loss will be non-passive. The involvement in the activity of an employee or non-owner could cause the taxpayer to fail this test. There is no specific number of hours associated with this test. In addition, the term "substantially" is not defined in the regulations.

   Tax Court: Noted that the taxpayer did not introduce evidence of the hours spent by a property management company. The Court implied that they would entertain proof that the taxpayer substantially participated as compared to the participation of a third party (in this case a management company). **Tax Court Memo 1998-17 (Pohoski)** stated the second test was not satisfied when taxpayers failed "to put forth some indication of the actual time spent by" third-party non-owners in activities on the property.

3. *You participated in the activity for more than 100 hours during the tax year, and you participated at least as much as any other individual (including individuals who did not own any interest in the activity) for the year.*

   ATG Notes: If a taxpayer participates in an activity for more than 100 hours and no other individual participates more than the taxpayer (including any employee or non-owner), income or losses from the activity are non-passive.

   Examination Techniques: Be alert to employees who are managing the activity, indicating the taxpayer deducting the losses may not be materially participating (particularly on Form 1040 Schedules C and F). When reviewing taxpayer hours, watch for "investor" activities (Income Tax Regs Section 1.469-5T(f)(2)(ii)). The taxpayer must be involved in the activity's day-to-day management or operations. Hours spent toward reviewing financial statements, preparing analysis for personal use, and monitoring the activity in a non-managerial capacity do not count.

4. *The activity is a significant participation activity (SPA), and you participated in all significant participation activities for more than 500 hours. A significant participation activity is any trade or business activity in which you participated for more than 100 hours during the year and in which you did not materially participate under any of the material participation tests, other than this test.*

   ATG Notes: The term significant participation activity is unique to Income Tax Regs Section 1.469-5T. If the sum of the taxpayer's time in all SPAs is more than 500 hours for the year, then income or losses from the businesses are non-passive. For each SPA, the regulations require: The taxpayer to participate more than 100 hours during the year. The activity must be a business, i.e. it **cannot be a rental or investment activity**. The business must be a passive activity. Thus, if the taxpayer works more than 500 hours in the business, it is not a SPA as 500 hours is one of the qualifying tests for material participation. Similarly, if the taxpayer does most of the work in the business, it cannot be a SPA as Income Tax Regs Section 1.469-5T(a)(2) holds that performing substantially all the work qualifies for material participation.

5. *You materially participated in the activity for any 5 (whether or not consecutive) of the 10 immediately preceding tax years.*

   ATG Notes: An activity is non-passive if the taxpayer would have been treated as materially participating in any 5 of the previous 10 years (whether or not consecutive). This test usually applies when a taxpayer "retires from material participation" but maintains an ownership interest in the activity.

   Examination Techniques: Even if the taxpayer performs no services for a business currently, the examiner should inquire about involvement in prior years and review the returns to see if income or losses were treated as non-passive.

6. *The activity is a personal service activity in which you materially participated for any 3 (whether or not consecutive) preceding tax years. An activity is a personal service activity if it involves the performance of personal services in the fields of health (including veterinary services), law, engineering, architecture, accounting, actuarial science, performing arts, consulting, or any other trade or business in which capital is not a material income-producing factor.*

   ATG Notes: None.

   Examination Techniques: None.

   Tax Court: As far as we can tell, this test has not been used in tax court involving real estate professionals and rental properties.

   Some real estate investors and tax strategists have argued that operating rental properties is a personal service. We disagree. The personal services listed in this test are traditional service professions where you would have clients. Of course an argument could be made that tenants are clients, but the one hiccup is the rental property itself. The personal service would not exist if it wasn't for the building, therefore capital is a material income-producing factor (income comes from rents, rents come from tenants, tenants live in buildings, buildings require capital for acquisition).

7. *Based on all the facts and circumstances, you participated in the activity on a regular, continuous, and substantial basis during the year.*

   ATG Notes: The facts and circumstances test may apply if none of the other tests are met. This test does not apply unless the taxpayer worked more than 100 hours a year. Furthermore, the taxpayer's time spent managing will not count if: Any person received compensation for managing the activity and any person spent more hours than the taxpayer managing the activity.

   Examination Techniques: Taxpayers may argue the facts and circumstances test when they fail the others. However, due to the stringent limitations, few taxpayers can meet the facts and circumstances standard. If there is paid on-site management, the facts and circumstances test cannot be used.

If you owned an activity as a limited partner, you generally are not treated as materially participating in the activity. However, you are treated as materially participating in the activity if you met test #1, #5 or #6 described above. You can also see **Tax Court Summary 2012-91 (Chambers)** for some real snoozer material.

Are there specific material participation tests for real estate professionals?

Not really. The general seven tests above are the main factors, but the IRS Audit Technique Guide (ATG) specifically calls out material participation for real estate professionals. Here is the word-for-word copy of that section-

A real estate professional may deduct rental real estate losses only to the extent he or she materially participates in each rental activity. Unless the taxpayer elected to group his rentals as a single activity, each rental is treated as a separate activity. Under the material participation rules, the time of both spouses is counted. The material participation test then applies separately to each individual rental real estate activity. If the taxpayer materially participates in an activity, net income or loss from that activity is non-passive. If the taxpayer does not materially participate, despite being a real estate professional, the rental is passive and losses (or income) go on Form 8582.

A taxpayer, who does most of the work in a rental, meets test #2 for material participation in Income Tax Regs Section 1.469-5T(a)(2). However, if there is on-site management, it may be difficult for the taxpayer to materially participate because:

- Rental activities, by nature, normally do not require significant day-to-day involvement, i.e. they are not time intensive.
- For many taxpayers using any kind of outside management, the only material participation test available is the 500 hour test. In many situations, the other tests will not apply.
- In many circumstances, an individual rental activity will not require 500 hours of participation, nor will the taxpayer have sufficient time available to spend 500 hours on each individual rental real estate activity.

Examination Techniques:

- During the initial interview, question the taxpayer regarding time spent in all activities (personal, business, civic, family, hobbies, etc).
- Request and closely examine the taxpayer's documentation of time utilized for material participation in each activity.
- Look for time spent by others in the activity. Indicators: commissions, management fees, expenses for cleaning, maintenance, repairs, etc.

The notes from the ATG are extremely helpful since it allows the taxpayer to narrow what the IRS is looking for. Knowing someone else's argument or perspective ahead of time is essential for audit success. See **What are some of the IRS tricks to deny my real estate professional designation?** below for more insight on how the IRS approaches real estate professionals and material participation.

You can also download the ATG at **www.watsoncpagroup.com/ATG-PAL.pdf**

If I meet the 750 hour test, don't I also meet the 500 hour material participation test?

No. This is a common misconception, and there are some scenarios that can get you in trouble.

For example, many license real estate agents can easily prove the 750 hour test for being a real estate professional. However, they do not spend enough time on their own personal rental properties or rental activities, and therefore cannot prove material participation.

While married couples can combine their hours to demonstrate material participation they cannot do the same for real estate professional. In other words, you and your spouse spent 500 hours combined working on your rentals. You still need to show **either yourself or your spouse** spending 750 hours in a real estate activity, and have over 50% of the overall time being spent on the real estate activity.

What activities count and don't count?

In general, any work you do in connection with an activity in which you own an interest is treated as participation in the activity. Some of the activities that count towards your hourly requirements include collecting rent, bookkeeping, advertising, maintaining legal compliance, safety reviews, inspections, decorating, tenant approval, contractor supervision, procuring insurance, paying taxes, and actual hands-on maintenance.

There are some activities that do not count.

Travel: While you can deduct mileage and expenses for your travels to and from your rentals, the time spent traveling is considering commuting and therefore does not count towards your hourly thresholds. However, there is an IRS position asserted in **Tax Court Memo 2012-83 (Trzeciak)** allowing you to count the time spent traveling if you are also claiming a home office that is used regularly and exclusively for your real estate activities.

There is also some case law saying No. In **Tax Court Summary 2003-130 (Truskowsky)** unless a taxpayer can prove day-to-day managerial involvement, then travel time is considered commuting, which is personal in nature, and therefore does not qualify. This is a fairly grey area and more discussion is required.

If you did not claim a home office, you should assert that position on your tax returns right away. Home office suggests regular and exclusive use, and coupled with proof and day-to-day participation, travel time can be successfully argued.

Research: A lot of investors claiming real estate professional status attempt to fill in the holes of their hourly requirements and day-to-day involvement by suggesting research into other investment properties. While this sounds legitimate, the IRS and Tax Court has denied this position as investor activities and not real estate activities. Find something else to put on your time sheet- cut some grass, hunt and peck your QuickBooks entries, but don't log Zillow hours.

Investor: You do not treat the work you do in your capacity as an investor in an activity as participation unless you are directly involved in the day-to-day management or operations of the activity. Work you do as an investor includes:

- Studying and reviewing financial statements or reports on operations of the activity,
- Preparing or compiling summaries or analyses of the finances or operations of the activity for your own use, and
- Monitoring the finances or operations of the activity in a non- managerial capacity.

  Note that these activities are acceptable as long as you can demonstrate a day-to-day involvement with the activity. This is critical since it is presumptuous of the IRS to consider rental activities not requiring day-to-day involvement.

Spouse Participation: Remember, your material participation in an activity includes your spouse's material participation. This applies even if your spouse did not own any interest in the activity and you and your spouse do not file a joint return for the year. Note the word material- you will need to demonstrate that your spouse's time was material to the rental activity or operation.

There are several other horror stories, if you will, about investors and real estate professionals being denied time spent on various activities that seem real estate related. Some of those stories appear to hinge on the auditor, how they interact with the auditor, and simply bad information.

Do I need to group my rental activities together?

Yes. Otherwise you will need to prove 750-hour rule for real estate professional for each property, including the proof of material participation in each property. That's tough. The election is simply a statement that is attached to your tax return. And under Revenue Procedure 2010-13, you can make the election retroactively (typically requires amending a tax return just for the election).

Disallowed losses prior to grouping your rental activities together are suspended if you also claim the real estate professional designation with material participation. Unbundling is required during a sale of a property to deduct the disallowed and suspended losses.

Grouping also helps taxpayers obtain the 10% interest requirement in the activity for active participation.

Lastly, with the new Medicare surcharges being attached to passive incomes, grouping your activities into one activity while materially participating as a real estate professional allows you to sidestep this tax.

Are there downsides to the real estate professional designation?

Yes. But the downsides are obscure.

If you have other passive income you might want to keep your rental losses passive to offset this income. For example, you are an investor in an investment partnership that loses money and you have rental properties which make good money. If you consider yourself a real estate professional for your rentals, that income is no longer passive and will now be considered earned income. Your tax deduction from your investment partnership losses will be limited according to passive loss limits when deducted against earned income.

Typically most real estate professionals group their rentals together to eliminate the hourly requirement per property. However, if you had disallowed losses in prior years, you need to unbundle your grouping if you want to deduct those losses in the year of sale or disposal. This is a minor issue, and it requires a bit of mental gymnastics, but it should not dissuade you from electing real estate professional status and grouping your rentals.

What are some of the IRS tricks to deny my real estate professional designation?

The IRS asks auditors to consider several indicators which suggest the taxpayer did not materially participate. Some of the issues are-

Location: The distance between you and your rentals can suggest how much participation could be performed. Naturally, the further the distance the more unlikely a real estate professional could materially participate according to IRS guidelines. While this is not a hard and fast deal-killer, it must be mitigated during an audit.

Other Activities: You have a W-2 wage job requiring full-time hours for which you receive significant compensation. Or, you have numerous other investments, rentals, business activities, or hobbies that absorb significant amounts of time.

Third Parties: There is paid on-site management, foreman, supervisor and / or employees who provide day-to-day oversight and care of the operations, including property management companies.

Impact: The majority of the hours claimed are for work that does not materially impact operations. Or, would business operations continue uninterrupted if you did not perform the services claimed.

Health: The taxpayer is elderly or has health issues.

This does not mean you will instantly be denied if you meet one of the above indicators. We suggest using it as way to use the IRS language along with your defense. For example, you need to argue “that business operations would be severely impacted if I stopped performing my real estate activities.” Or, “While I use a property management company, they are only used to collect monthly rent and periodic maintenance. I perform the day to day operations of advertising, accounting, reviewing financials, ensuring safety and law compliance, etc.”

What are some of the tax court cases for real estate professionals?

Here is a snapshot of some issues the Tax Court has recently dealt with.

TC Summary 2012-94 (Wallach): Taxpayer was a real estate agent who attempted to deduct several travel expenses including Hawaii and Lake Tahoe. He attempted to claim the travel was for investment purposes by researching additional real estate, but his recordkeeping was shoddy and was denied the deduction.

TC Memo 2012-83 (Trzeciak): Taxpayer claimed that time traveling to and from rental properties added to the 750-hour and material participation requirements. IRS agent and Appeals officer said No. But it appears from the court records that perhaps the IRS would entertain travel time had the taxpayer asserted a home office deduction for rental property activities. The Tax Court was dealing with a different issue, and did not address this on point.

TC Summary 2003-130 (Truskowsky): Unless a taxpayer can prove day-to-day managerial involvement, then travel time between a taxpayer's house and the rental activity is considering commuting and therefore does not qualify towards the hourly requirements for real estate professional and material participation. Commuting according to IRC 162 is not deductible. Sorry.

TC Memo 2006-193 (Lee): In terms of recordkeeping and proving hourly involvement, the Tax Court has acknowledged that "reasonable means" is interpreted broadly. Nevertheless, a postevent "ballpark guesstimate" will not suffice. Leave it to the Tax Court to bust out some slang.

Tax Court Memo 1998-17 (Pohoski): Court stated the second test of material participation was not satisfied when taxpayers failed "to put forth some indication of the actual time spent by" third-party non-owners such as property management companies.

TC Summary 2012-30 (Manalo): To push the taxpayers over the 100-hour hurdle, petitioners introduced at trial three revised logs, including a last-minute log purporting to be a reconstruction of the hours of services Mr. Manalo performed with respect to the rental activities. The estimates in these revised logs, however, were uncorroborated and unreliable. The revised logs were prepared at various instances over a two-year period after the conclusion of IRS agent's examination and are, according to petitioners, based on emails and archived documents. Those emails and archived documents, however, were never introduced into evidence at trial. The Tax Court stated "The rule is well established that the failure of a party to introduce evidence within his possession and which, if true, would be favorable to him, gives rise to the presumption that if produced it would be unfavorable." Yuck!

TC Summary 2012-20 (Kutney): Taxpayer used hourly estimates that varied throughout trial. Tax Court considered this a postevent "ballpark guestimate" and denied the real estate professional designation.

TC Memo 1998-112 (Madler): For those rental property owners who do elect or do not need to elect the real estate professional status only need to show active participation. The active participation standard can be satisfied without regular, continuous, and substantial involvement in an activity; the standard is satisfied if the taxpayer participates in a significant and bona fide sense in making management decisions (such as approving new tenants, deciding on rental terms, approving capital expenditures) or arranging for others to provide services such as repairs.

TC Summary 2012-32 (Iovine): Taxpayer was a pilot who worked for American Airlines, and worked 812 hours according to timesheets provided. Taxpayer was not able to prove that he spent more than 812 hours on his real estate activities. More importantly he failed to make the election to treat all rental properties as a single activity.

TC Memo 2012-358 (Fitch): The spouse was a licensed real estate agent while the taxpayer (the husband) worked on the rental properties. The Tax Court found that they satisfied test #2 of the material participation tests since their participation in the rental real estate constituted substantially all of the participation. Mr. Fitch testified extensively as to the activities he performed with respect to his rental properties including advertising, bookkeeping, accounting, dealing with contractors, decorating, resolving fence disputes, making repairs, paying taxes, and procuring insurance. The petitioners' decision to occasionally hire a contractor to perform technical tasks **does not** disqualify their substantial day-to-day management of their rental properties from constituting "substantially all of the participation".

TC Summary 2012-91 (Chambers): Tax Court allows a limited partner in a partnership to count that time towards material participation. Generally limited partners on paper cannot by definition materially participate, however, the actions of the taxpayer actually suggested a general partner and not a limited partner. The taxpayer eventually lost on the 750-hour rule for real estate professional.

Please call or email us anytime with your questions and concerns. Thank you in advance, and we look forward to working with you!

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