JMP Advisors®

TAX MATTERS

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DID YOU KNOW?

On 13 October 2026, the CBDT notified the Protocol signed on 7 March 2024 amending the India-Mauritius DTAA w.e.f. 10 August 2026. The Protocol amends the treaty preamble to state that the treaty is not intended to create opportunities for non-taxation or reduced taxation through tax evasion, tax avoidance or treaty shopping. It has also inserted a new Article 27B "Entitlement to Benefits" under which treaty benefits can be denied where obtaining such benefits was one of the principal purposes of an arrangement or transaction, unless it is established that granting that benefit was in accordance with the object and purpose of this DTAA.

We would like to take this opportunity to announce that JMP Advisors has recently been awarded **'Tax Advisory Expert of the Year in India - 2027' at the 'Corporate INTL Global Awards'** for its outstanding services. We are proud to receive this accolade and endeavour to continue providing high-quality services to our clients!

The team at JMP Advisors is pleased to bring to you a gist of some of the significant developments in the direct tax space during October 2026:

- **Reassessment cannot survive where the very foundation of reopening is found to be untenable**

  - LG Electronics India Private Limited vs ACIT[1]

  LG Electronics India Pvt. Ltd. ('LG India') is a wholly owned subsidiary of LG Electronics Korea ('LG Korea'). It had entered into transactions with LG Korea and other non-resident associated enterprises ('AEs') for the purchase of raw materials, finished goods and capital goods.

  A survey under Section 133A of the Income-tax Act, 1961 ('the Act') was conducted at LG India's premises on 24 June 2010. On the basis of documents impounded and statements of certain expatriate employees, the Revenue formed the view that LG Korea and the other AEs had a Permanent Establishment ('PE') in India. Based on this allegation, proceedings were initiated against LG Korea and its related entities to tax the income allegedly attributable to such PE.

  The Revenue alleged that the expatriate employees were performing key functions in India on behalf of LG Korea. Therefore, a portion of the profits of LG Korea was attributable to the alleged PE in India. Based on this the Revenue further contended that remittances made by LG India to the non-resident entities were chargeable to tax in India. Consequently, these remittances were liable for withholding tax under Section 195 of the Act.

  Accordingly, proceedings under Section 201 of the Act were initiated against LG India on the ground that it had failed to deduct tax at source under Section 195 of the Act while making remittances to the non-resident entities. The Revenue also initiated reassessment proceedings under Section 147 of the Act by issuing notices under Section 148 of the Act for FYs 2005-06, 2006-07 and 2007-08 and proposed disallowance of the corresponding expenditure under Section 40(a)(i) of the Act for alleged failure to withhold tax.

  Aggrieved by the reassessment notices, LG India filed writ petitions before the Delhi High Court ('HC') challenging the validity of the reassessment proceedings. However, the HC rejected the assessee's contention that the reassessment notices were barred by limitation, holding that there was no disclosure regarding the alleged PE of LG Korea in India. Accordingly, the Delhi HC declined to interfere with the reassessment notices and permitted the reassessment proceedings to continue.

  Aggrieved by the decision of Delhi HC, LG India filed an appeal before the Supreme Court ('SC').

  While the appeal was pending before the SC, the Delhi Income Tax Appellate Tribunal ('ITAT'), in parallel proceedings under Section 201 of the Act, held that LG India could not be treated as an assessee-in-default and that no obligation existed to deduct tax at source under Section 195. The ITAT noted that the Revenue's case was founded on the activities of expatriate employees deputed by LG Korea to India, on whose salary tax had already been withheld under Section 192. The Tribunal further observed that the basis for attribution of income to the PE is on a notional basis and LG India has not made any direct payment to LG Korea towards the salary cost of expatriate employees. Accordingly, it held that Section 195 was not attracted and no liability could be imposed on LG India under Section 201.

[1] TS-1629-SC-2026

Relying upon the said ITAT order, LG India contended before the SC that the very basis on which the reassessment proceedings had been initiated, namely the alleged failure to deduct tax at source resulting in disallowance under Section 40(a)(i), no longer survived. Since the reassessment proceedings were founded on the assumption that LG India was liable to withhold tax under Section 195 on payments made to the non-resident entities, the ITAT's finding that no such withholding obligation existed, effectively nullified the basis of the reassessment.

Accepting the assessee's contentions, the SC observed as under:

- Reassessment proceedings were initiated solely on the basis that LG India had failed to deduct tax at source on payments made to non-residents and that the related expenditure was liable to disallowance under Section 40(a)(i).
- In a separate proceeding under Section 201, the ITAT held that no obligation existed to deduct tax at source under Section 195 of the Act and that LG India could not be treated as an assessee-in-default. The said appellate orders were not challenged by the Revenue, since it had low tax effect.
- Once the basis for invoking Section 201 of the Act failed, the consequential disallowance under Section 40(a)(i) of the Act also could not survive.
- Where the reason recorded for reopening is found to be unsustainable, the Revenue cannot rely upon other grounds during reassessment proceedings to establish escapement of income.

Accordingly, the SC held that once the very basis on which the reassessment proceedings were initiated ceases to exist, the reassessment proceedings could not be sustained and allowed the appeal.

JMP Insights *- The ruling reiterates that disallowance under Section 40(a)(i) can be made only where tax was deductible under Section 195. Since no withholding tax obligation existed on the payment to the non-resident, the basis for the Section 40(a)(i) disallowance and the related reassessment proceedings failed.*

➢ Tax-efficient bonus-stripping transactions do not trigger GAAR in absence of misuse or lack of commercial substance

- EKGE Retail LLP v. ACIT[2]

EKGE Retail LLP ('the taxpayer') carried on retail apparel business under the 'Mebaz' brand. During FY 2017-18, the taxpayer transferred the Mebaz business as a going concern to Vedant Fashions Private Limited under a slump sale arrangement for a total consideration of INR 2.10 billion. After reducing the net worth of the undertaking of approximately INR 0.34 billion determined in accordance with Section 50B of the Income-tax Act, 1961, the transaction resulted in a long-term capital gain ('LTCG') of approximately INR 1.76 billion.

Out of the slump sale consideration, approximately INR 0.59 billion was utilised towards discharge of liabilities. The taxpayer thereafter engaged a leading financial institution for deployment of the surplus funds, pursuant to which approximately INR 1.30 billion was invested across various financial instruments. Of this amount, nearly INR 0.5 billion was invested in shares of listed companies, while approximately INR 0.8 billion was invested in bonds and units of debt mutual funds. Certain investee companies subsequently declared bonus issues.

[2] EKGE Retail LLP TS-1668-HC-2026(TEL)

Acting on professional investment advice, the taxpayer sold a portion of the original shareholding after the bonus allotment, while continuing to hold a substantial part of its investments. Because of the bonus issue and the First-In-First-Out mechanism prescribed under the Act, the taxpayer incurred a short-term capital loss ('STCL') of approximately INR 0.49 billion, which was set off against the LTCG earned out of slump sale in accordance with Section 70(2) of the Act.

Following search and seizure proceedings conducted in the taxpayer's group, the Revenue examined the aforesaid transactions and alleged that the equity investments had been structured with the primary objective of generating losses capable of being set off against the slump sale gains. Accordingly, proceedings were initiated under the General Anti-Avoidance Rule ('GAAR') provisions contained in Chapter X-A of the Act and the matter was referred to the GAAR Approving Panel under Section 144BA(6).

The Panel concluded that the transactions constituted an Impermissible Avoidance Arrangement ('IAA') under Section 96 of the Act. Aggrieved by the directions, the taxpayer filed a writ petition to the Telangana HC.

The Telangana HC's observations were as under:

i. Under Sections 95 and 96 of the Act, an arrangement can be regarded as an IAA only where obtaining a tax benefit is its main purpose and the arrangement satisfies at least one of the conditions prescribed under Section 96, such as misuse or abuse of the Act, lack of commercial substance or absence of a bona fide purpose.

ii. The purchase and sale of shares were carried out through recognised stock exchanges at prevailing market prices and represented genuine investment transactions undertaken on an arm's-length basis. Since the gains and losses were driven by market forces, they could not be regarded as pre-ordained or artificial.

iii. The taxpayer had invested the slump sale proceeds as part of a broader investment strategy after evaluating various investment opportunities and continued to hold a substantial portion of the investments even after the bonus issues, indicating the presence of a genuine commercial objective and negating Revenue's allegation that the transactions were undertaken solely to generate tax losses.

iv. The tax benefit claimed by the taxpayer merely arose from the operation of the statutory provisions governing computation and set-off of capital losses under Section 70(2). A benefit flowing from an express provision of the Act cannot, by itself, be regarded as misuse or abuse of the law for purposes of GAAR.

Accordingly, the Telangana HC held that Revenue had failed to establish the existence of an IAA under Chapter X-A of the Act and set aside the directions issued by the GAAR Approving Panel.

JMP Insights – *The ruling reiterates that GAAR cannot be invoked merely because a transaction results in a tax-efficient outcome. The Revenue must establish both that obtaining a tax benefit was the main purpose of the arrangement and that the arrangement satisfies at least one of the conditions prescribed under Section 96 of the Act. The decision reinforces the principle that a tax benefit arising from the legitimate operation of specific provisions of the Act, including capital loss set-off provisions, cannot by itself amount to tax avoidance.*

- **Profit element in inter-office service charges earned by Indian branch not taxable under Article 7(3) of India-USA DTAA**

  - JP Morgan Chase Bank N.A. v. ADIT[3]

  JP Morgan Chase Bank N.A. ('the taxpayer')[4], a tax resident of the United States, carried on banking operations in India through its Mumbai branch, constituting a Permanent Establishment under the India-USA Double Taxation Avoidance Agreement ('DTAA'). During the financial year ('FY') 2001-02, the taxpayer undertook various transactions with its Head Office ('HO') and overseas branches, including correspondent banking and investor services. The assessment proceedings also involved disputes relating to transfer pricing adjustments in respect of such services, allowability of salary expenditure pertaining to the Chief Executive Officer of the Indian branch, allocation of HO and hub expenditure and taxation of inter-office service charges.

  One of the key issues before the Tribunal concerned the taxability of the surplus arising from correspondent banking and investor services rendered by the Indian branch to its HO and overseas offices. The Indian branch had recorded revenue of approximately INR 93.77 million against corresponding expenditure of approximately INR 85.25 million, resulting in a surplus of approximately INR 8.52 million. While computing its taxable income, the taxpayer excluded the aforesaid surplus by invoking the reciprocal provisions of Article 7(3) of the DTAA, contending that charges raised by a PE on its HO or other offices of the same enterprise for specific services performed were not required to be considered in determining the profits attributable to the PE. The taxpayer had, however, separately offered to tax net interest income of approximately INR 4.04 million arising from offshore placements with overseas branches, having regard to the specific exception applicable to banking enterprises under Article 7(3).

  The CIT(A) held that the correspondent banking and investor services constituted substantive commercial activities performed by the Indian branch, resulting in identifiable economic benefits to the overseas offices. Accordingly, the CIT(A) concluded that the surplus arising from such activities represented business profits attributable to the Indian PE under Article 7(2) of the DTAA.

  The CIT(A) further observed that the exclusion contemplated under Article 7(3) could not be interpreted independently of the other provisions of Article 7 and held that the reciprocal clause dealing with charges raised by a PE on other establishments of the same enterprise could not be invoked in the manner suggested by the taxpayer. On this basis, the addition of INR 8.52 million was sustained.

  The CIT(A) also upheld certain transfer pricing adjustments and expenditure-related disallowances, while granting relief on selected issues, resulting in cross appeals before the Mumbai Tribunal by both the taxpayer and the Revenue. The Mumbai Tribunal's observations were as under:

  The CIT(A) further observed that the exclusion contemplated under Article 7(3) could not be interpreted independently of the other provisions of Article 7 and held that the reciprocal clause dealing with charges raised by a PE on other establishments of the same enterprise could not be invoked in the manner suggested by the taxpayer. On this basis, the addition of INR 8.52 million was sustained.

[3] TS-1734-ITAT-2026(Mum)

[4] The ruling also includes other issues. However, we have discussed only the critical issue of inter-office service charge.

The CIT(A) also upheld certain transfer pricing adjustments and expenditure-related disallowances, while granting relief on selected issues, resulting in cross appeals before the Mumbai Tribunal by both the taxpayer and the Revenue. The Mumbai ITAT's observations were as under:

i. The Tribunal observed that Article 7(2) of the DTAA provides for the attribution of profits to a PE by treating it as a distinct and independent enterprise dealing with its HO and other establishments on an arm's length basis. However, the said provision expressly operates subject to Article 7(3). Accordingly, the general principle of profit attribution under Article 7(2) must be applied subject to the specific restrictions prescribed under Article 7(3).

ii. On examining Article 7(3), the Tribunal noted that the provision specifically regulates certain dealings between a PE and other establishments of the same enterprise. It provides that no deduction shall be allowed for specified inter-office payments, otherwise than towards reimbursement of actual expenses, including royalties, fees, commissions and other charges for specific services performed for management. The provision further contains a reciprocal clause under which no account shall be taken of corresponding amounts charged by the PE to its HO or other offices for such services, subject to the exceptions expressly provided therein.

iii. The Tribunal disagreed with the CIT(A)'s interpretation that the reciprocal clause commencing with the expression 'Likewise' could operate only where the preceding provision relating to payments made by the PE was attracted. It held that the expression 'Likewise' signifies parity in the treatment of specified inter-office dealings and does not make the operation of the reciprocal provision conditional upon an actual disallowance under the preceding limb.

iv. The Tribunal further observed that the commercial nature of the services performed by the Indian branch and the economic benefits derived by the overseas offices could not, by themselves, justify disregarding the specific provisions of Article 7(3). The DTAA expressly refers to charges for specific services performed and does not restrict the reciprocal exclusion merely to general administrative or incidental services. Accordingly, the commercial nature of the services could not override the express treaty language.

v. The Tribunal noted that the disputed charges arose exclusively from correspondent banking and investor services rendered by the Indian branch to its HO and other overseas offices, being establishments of the same banking enterprise. The transactions did not involve services rendered to independent third parties. It also took note of the fact that the taxpayer had separately offered the net interest income arising from offshore placements with overseas branches to tax, recognising the specific exception applicable to banking enterprises under Article 7(3).

In view of the above, the Tribunal held that the surplus of approximately INR 8.52 million arising from correspondent banking and investor services rendered by the Indian branch to its HO and overseas offices was covered by the reciprocal provisions of Article 7(3) of the DTAA. Accordingly, the said amount was not required to be included in the profits attributable to the Indian PE. The Tribunal, therefore, set aside the order of the CIT(A) on this issue and directed the

Assessing Officer to exclude the aforesaid amount from the taxable income of the taxpayer.

JMP Insights – *The ruling provides important clarity on the interplay between Articles 7(2) and 7(3) of the DTAA, particularly in relation to the attribution of profits arising from transactions between different establishments of the same enterprise. The Tribunal has reiterated that the general principles governing attribution of profits to a PE under Article 7(2) are expressly subject to the specific provisions of Article 7(3). Consequently, charges raised by a PE on its HO or other offices for specific services performed must be examined considering the reciprocal exclusion prescribed under Article 7(3), even where such services involve substantive commercial activities and generate identifiable economic value.*

Further, the Tribunal's interpretation of the expression 'Likewise' clarifies that the reciprocal provision governing charges raised by a PE operates independently and is not conditional upon an actual disallowance arising under the preceding limb of Article 7(3).

- **Indirect Transfer of Shares of an Indian Company Not Taxable under the India-Ireland DTAA**

  - Fireeye Ireland Limited vs ACIT (International Taxation)[5]

Fireeye Ireland Limited ('taxpayer')[6] is a company incorporated in Ireland and a tax resident of Ireland. It is part of the FireEye Group. It had operations in Ireland with more than 150 employees. The taxpayer has no physical presence in India.

During FY 2021-22, as part of an internal restructuring of the group, the taxpayer sold its ownership in various entities to Mandiant Ireland Limited ('MIL'), another group company. One of the entities transferred was FireEye International LLC ('FE LLC'), a US entity, which in turn owned Mandiant Cybersecurity Private Limited ('MCPL'), an Indian subsidiary. It also had Income from sale of software and related services.

In the return of income, the taxpayer disclosed the capital gains from transfer of ownership in FE LLC as not taxable in India under Article 13(6) of the India-Ireland DTAA ('DTAA').

The tax officer invoked Article 6 of the Multilateral Instrument ('MLI') and held the taxpayer liable to capital gains under Article 13(5) of the DTAA, resulting in an addition of approximately INR 4.98 billion. The taxpayer submitted that the said gain was not taxable as per domestic law of Ireland as income from intra-group transactions are exempt from tax in Ireland. The Revenue contended that the transfer of FE LLC constituted an indirect transfer of shares of MCPL, taxable in India under Explanation 5 to Section 9(1)(i) of the Income-tax Act, 1961 ('the Act'), as FE LLC derived substantial value from assets in India. Further, relying on the definition of "transfer" under Section 2(47) of the Act, the Revenue argued that the term "alienation" used in Article 13(5) of the DTAA should be interpreted broadly to cover the impugned transaction.

The tax officer held that Section 90 is for avoidance of double taxation and not for creating opportunities for double non-taxation. The Dispute Resolution Panel ('DRP') confirmed this interpretation of Section 90. Aggrieved, the taxpayer filed an appeal before the Delhi Income-tax Appellate Tribunal ('ITAT').

The taxpayer contended that a deeming fiction cannot be read into the DTAA in the absence of a specific provision in Article 13(5) of the DTAA.

[5] TS-1577-ITAT-2026(DEL)

[6] The ruling also includes taxability of sale of software & related services. However, we have discussed only the critical issue of taxability of Indirect Transfer.

The taxpayer relied on various decisions in support of the above contention.

Based on the facts and the material on record, the Delhi ITAT made the following observations:

'Alienation' is not synonymous with 'transfer' under Section 2(47)

The Delhi ITAT held that the term 'alienation' in Article 13(5) of DTAA must be interpreted based on the treaty itself and cannot automatically be equated with 'transfer' under Section 2(47) of the Act. As there was no ambiguity in the treaty provision, domestic law definitions and Article 3(2) of DTAA could not be used to expand its scope.

The Delhi ITAT referred to Telstra Singapore Pte. Ltd.[7], which held that unilateral amendments in domestic law cannot override DTAA provisions and observed that Article 3(2) is confined to resolving genuine ambiguities in treaty terminology.

Capital Gain not taxable in India under Article 13(6) of the DTAA

The Delhi ITAT noted that in Sofina S.A.[8], it was held that unlike Article 13(4), Article 13(5) does not use the words 'directly or indirectly' and hence does not permit a 'see through' approach. Transfer of shares of a foreign holding company cannot be regarded as transfer of shares of its Indian subsidiary. The deeming fiction in Explanation 5 to Section 9(1)(i), being a unilateral amendment to domestic law, cannot be read into the DTAA.

The Delhi ITAT further held that Article 13(5) applies to alienation of shares of a company resident in a Contracting State; since FE LLC is not a resident of India, Article 13(5) is not applicable. The gain falls under the residuary Article 13(6), under which it is taxable only in the Contracting State of which the alienator is a resident. Accordingly, the question of interpreting 'alienation' does not arise, and no recourse can be taken to Section 2(47) of the Act.

Accordingly, the indirect transfer of MCPL shares, through the sale of ownership in FE LLC to MIL is not taxable under Article 13(6) of the DTAA. The tax authorities had incorrectly interpreted Section 90(1)(b) of the Act to hold the capital gains taxable in India.

No treaty abuse established under Article 6(1) of the MLI

The Delhi ITAT held that the MLI anti-abuse provisions could not be invoked in the absence of any evidence of treaty abuse or a tax avoidance arrangement. It noted that the taxpayer was a commercially established entity with substantial operations, employees and investments in multiple group entities. The transfer formed part of a broader global restructuring involving seventeen entities. Therefore, the transaction could not be viewed narrowly as an indirect transfer of the Indian subsidiary undertaken solely to achieve benefit of double non-taxation.

Accordingly, the Delhi ITAT allowed the taxpayer's appeal and held that the gains from transfer of ownership of a company in USA are not taxable in India under the DTAA.

JMP Insights *– The ruling reinforces the principle that domestic law deeming fictions cannot be imported into a tax treaty unless the treaty expressly permits such an interpretation. The Delhi ITAT rejected the Revenue's attempt to apply India's indirect transfer provisions and expand the meaning of "alienation" through domestic law concepts. The decision also underscores that the application of MLI anti-abuse provisions requires demonstrable evidence of treaty abuse and cannot be based solely on an allegation of double non-taxation.*

[7] [2024] 165 taxmann.com 85 (Delhi HC)

[8] [2020] 116 taxmann.com 706 (Mumbai ITAT)

- **Share buy back by Indian Co. from Dutch holding Co. not taxable as 'capital gains' under India-Netherlands DTAA**

- Perfetti Van Melle Holding B.V.[9]

The taxpayer is a tax resident of the Netherlands, held 99.9% equity shareholding in its subsidiary Perfetti Van Melle India Pvt. Ltd. ('PVM India'). During FY 2019-20, PVM India undertook a buy back of equity shares from the taxpayer at a consideration of INR 10 per share, which was also the acquisition cost of the shares for the taxpayer. Consequently, according to the taxpayer, no capital gains arose on the shares tendered in the buy back.

The Tax Officer contended that the buy back resulted in an increase in the economic value of the taxpayer's remaining shareholding in PVM India. Such enhancement in the value of the residual shares represented a taxable benefit accruing to the taxpayer. The fair market value of the shares was INR 298 per share as against the buy back price of INR 10 per share. Capital gains were required to be computed by considering such fair market value and the provisions of Section 46A read with Section 50CA of the Income tax Act. Accordingly, the tax officer determined notional capital gains of approximately INR 2.77 billion on the appreciation attributable to the shares that continued to be held by the taxpayer.

The taxpayer submitted that income tax can be levied only on real income that has accrued or arisen and not on hypothetical or notional appreciation in the value of an asset. It was argued that no transfer had taken place in respect of the shares that continued to be held after the buy back and, therefore, no capital gains could arise in relation to such shares. The taxpayer further submitted that the buy back consideration was equal to its acquisition cost and accordingly, no taxable gain arose. It was also contended that the transaction was covered by the specific buy back taxation regime under Sections 115QA and 10(34A) of the Act. Without prejudice, the taxpayer argued that under Article 13 of the India-Netherlands DTAA, India did not have taxing rights over the gains arising to the Dutch shareholder.

The DRP upheld the position adopted by the tax officer. The DRP accepted the Revenue's contention that the buy-back gave rise to an accretion in value that could be subjected to tax and accordingly, sustained the proposed addition.

The Delhi ITAT examined whether a notional increase in the value of the remaining shareholding could be subjected to tax in the absence of an actual transfer. The Delhi ITAT observed that capital gains arise only upon the transfer of a capital asset and that mere appreciation in value does not result in taxable income. Further, it noted that the Revenue's attempt to tax the increase in value of the remaining shares was based entirely on a hypothetical assumption and not on any actual realization of gains by the taxpayer. The Delhi ITAT also considered the applicability of the provisions governing buy back taxation and the protection available under the India-Netherlands DTAA.

While adjudicating the matter, the Delhi ITAT relied upon the decision in Huntsman Investment (Netherlands) BV v. ACIT[2], wherein it had been held that an intra-group buy back forming part of a corporate reorganization was covered by Article 13(5) of the India-Netherlands DTAA and that the resultant gains were taxable only in the Netherlands. The Delhi ITAT also examined the interplay of Sections 46A, 50CA, 10(34A) and 115QA of the Income-tax Act along with Article 13 of the India-Netherlands DTAA.

[9] TS-1604-ITAT-2026(DEL)/ITA No. 1804/Del/2023

The Delhi ITAT ruled in favour of taxpayer and held that notional appreciation in the value of shares that continue to be held by a taxpayer cannot be subjected to capital gains tax. It observed that taxation of capital gains requires an actual transfer of a capital asset and cannot be based merely on an increase in valuation. The Delhi ITAT further held that the buy-back transaction was protected under Article 13(5) of the India-Netherlands DTAA and, therefore, India did not possess the right to tax the gains arising to the Dutch shareholder. Accordingly, the addition made by the Tax officer and sustained by the DRP was deleted.

JMP Insights *– The ruling affirms the proposition that unrealized appreciation in the value of retained shares cannot be taxed as capital gains. Further, it reinstates the legal position that cross-border buy backs undertaken as part of group restructuring may qualify for treaty protection under the India-Netherlands DTAA, thereby restricting India's taxing rights over such gains.*

Should you wish to discuss any of the above issues in detail or understand the applicability to your specific situation, please feel free to reach out to us on coe@jmpadvisors.in.

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