

# Issues in Software & App based business

## Indirect Tax Perspective

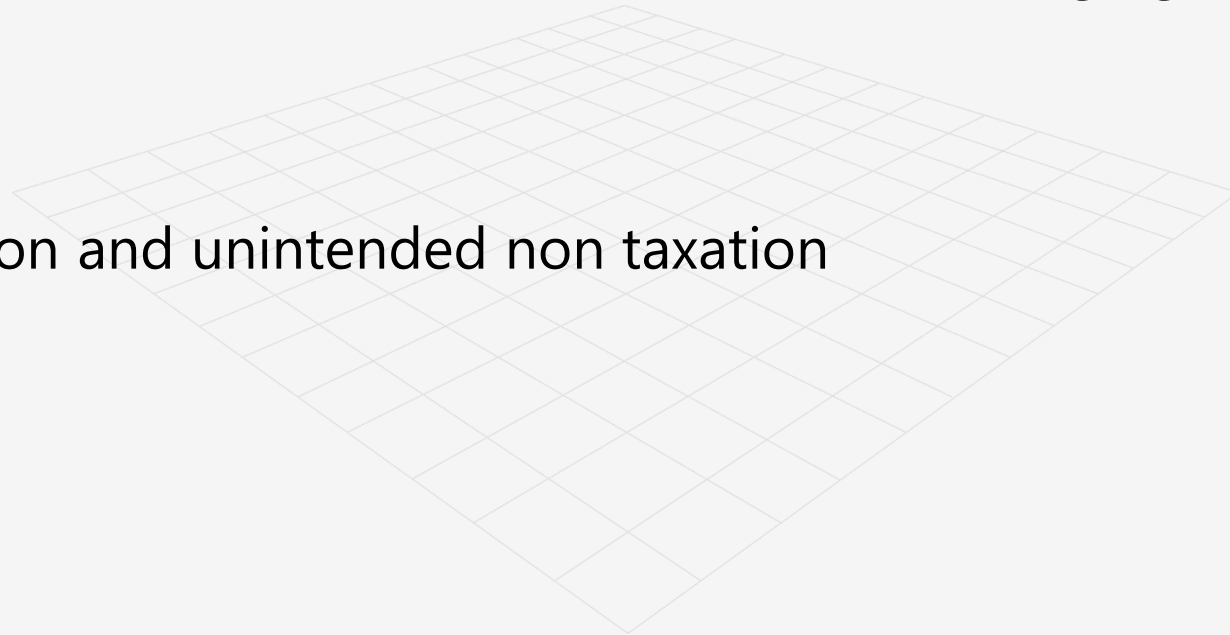
Webinar for The Chamber of Tax Consultants, Hyderabad study group

CA Alok Agarwal

# Taxation of Digital Economy - Challenges

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- No physical presence of the supplier in the tax Jurisdiction
- International commitments tax treaties/agreement
- Traditional rules of taxation does not fit in to new emerging technology business models
- Double taxation and unintended non taxation



# Journey of Digital taxation – Pre GST

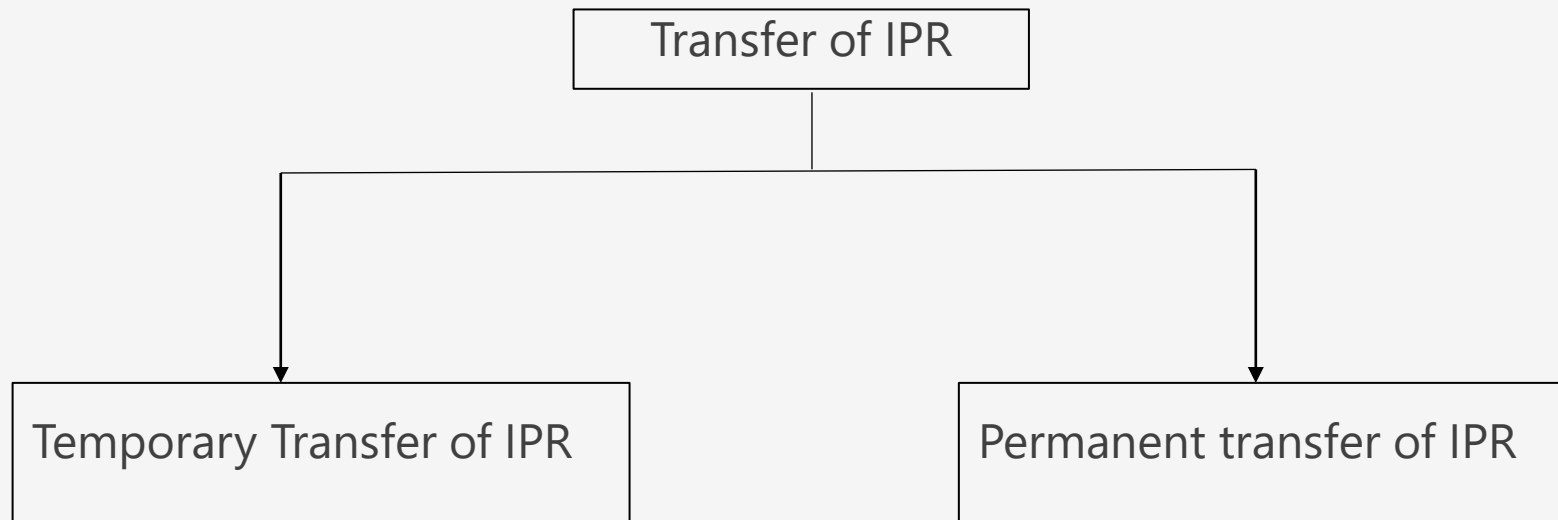
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- Software – Package Software leviable to VAT & Customised Software leviable to Service Tax
- Advent of taxation of OIDAR service: Taxable **w.e.f. 16.07.2001** under Service Tax Regime
- **w.e.f 01.07.2012** – Negative list regime
  - ✓ RULE 9. Place of provision of specified services. The place of provision of following services shall be the location of the service provider:
    - (b) Online Information and Database Access Retrieval Services
- Paradigm Shift in taxation of OIDAR Service **w.e.f. 1.12.2016**
  - ✓ Service providers providing OIDAR services to Non Assessee Online Recipient responsible for payment of tax. Intermediaries located outside India is deemed to be service provider in certain cases

# Software as a Intellectual Property Right (IPR)

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- Software is a intellectual property(which can be classified as a Service or Goods) as per the Copyright Act, 1957
- As per Para C of schedule II of CGST Act: Temporary transfer or permitting the use or enjoyment of any Intellectual Property Right (IPR) is 'supply of service'



# Taxation of Software

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- The term "Computer Software" is not defined under the GST law.
- However, according to the FAQs issued by the Government relating to IT/ITES sector:

"In terms of Schedule II of the CGST Act 2017, development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software and temporary transfer or permitting the use or enjoyment of any intellectual property right are treated as services.

But, if a pre-developed or pre-designed software is supplied in any medium/storage (commonly bought off-the-shelf) or made available through the use of encryption keys, the same is treated as a supply of goods classifiable under heading 8523"

# IN RE: SOLIZE INDIA TECHNOLOGIES PVT. LTD. – dt. April 23, 2020

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- **Ruling:** Supply of software (which is not designed or developed specifically for any customer, i.e., without customisation) amounts to supply of goods under the GST law.
- The term "information technology software" is not defined in the CGST Act. However, it is defined under Chapters 49 and 85 to the Customs Tariff Act. Which applies to interpretation of Notification No.1/2017-Central Tax (Rate).
- The terms "information technology software" / "computer software" find multiple references under the GST Tariff:
  - 8523 80 20 - Information technology software
  - 997331 - Licensing services for the right to use computer software and databases
  - 998434 - Software downloads
  - 99831 - Information technology services
  - 4907 00 30 - Documents of title conveying the right to use Information Technology software
  - 4911 99 10 - Hard copy (printed) of computer software

# OIDAR under GST

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**Section 2 (17) of the IGST Act** - “online information and database access or retrieval services” means services whose delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply essentially automated and involving **minimal human intervention** and impossible to ensure in the absence of information technology and includes electronic services such as,

- i. advertising on the internet;
- ii. providing cloud services;
- iii. provision of e books, movie, music, **software and other intangibles** through telecommunication networks or internet;
- iv. providing data or information, retrievable or otherwise, to any person in electronic form through a computer network;
- v. online supplies of digital content (movies, television shows, music and the like);
- vi. digital data storage; and
- vii. online gaming;

# Place of Supply - Section 13 of IGST Act

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Situation	Place of Supply of services
Online Information Database Access or Retrieval services	Location of recipient of service

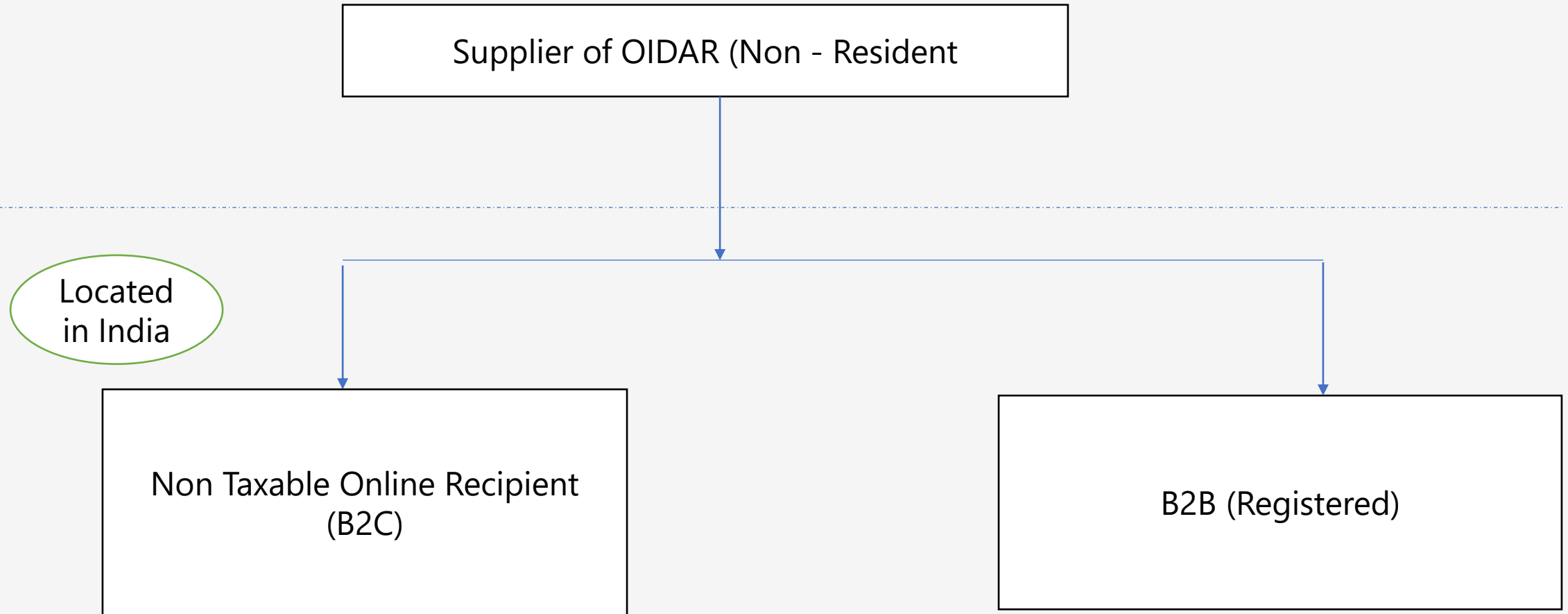
**Location of Service recipient will be deemed to be in India if any of the following two non contradictory conditions fulfilled:**

- Location of address presented by the recipient through internet is in India
- Credit card or debit card which the recipient uses to pay is issued in India
- Billing address of the recipient of services is in India
- IP address of the device used by the recipient is in India
- Bank of the recipient's account used for payment is maintained in India
- Country code of the subscriber identity module card used by the recipient of services is of India
- Location of the fixed land line through which the service is received by the recipient is in India



# Sec 14 of IGST – OIDAR

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## Sec 14 of IGST – OIDAR

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An intermediary located outside India, arranges or facilitates the supply of OIDAR services, from the service provider to the non-taxable online recipient -then the intermediary will be deemed to be the recipient of such services and further supplying such services to non-taxable online recipient

e.g. Google Play store / Apple Store

But if the intermediary satisfies the following conditions then it will not be considered as a recipient –

- The invoice issued by the intermediary clearly identifies the service and its supplier in non-taxable territory
- The intermediary neither collects or processes payment in any manner nor is responsible for the payment between the non-taxable online recipient and the supplier of such services
- The intermediary does not authorize delivery
- The general terms and conditions of the supply are set by the service provider and not by the intermediary

# GST on RCM - Import of Service

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GST on import of service is exempt only if following conditions are satisfied -

1. Supplier is located in a non-taxable territory
2. Recipient is Central Government, State Government, Union territory, a local authority, a governmental authority or an individual
3. Purpose of service is OTHER THAN commerce, industry or any other business or profession
4. Service is not in the nature of Online Information and Database Access and retrieval services (OIDAR)

# Case Study 1: OIDAR Services - Play store

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“Decisions – Choose your Story” (Developer: Games2Win, Location: Mumbai) is a game app hosted on Google Play store. It is available for free download, contains ads and offers in-app purchases. According to the company, 96% of the revenue is received from ads and 4% of the revenue is from in app purchases.

1. What is the GST treatment in the hands of Games2Win if:
  - (a) If the end customer is in India
  - (b) If the end customer is out side India
  
2. In case of (1) above, if the customer is located outside India, whether it will be treated as export of service? If yes, can we export with payment of duty and apply for refund or without payment under LUT and apply for refund of input taxes?
  
3. As per the company, it is not mandatory for customer to provide his location. In this case, can the company treat the entire receipts as exports treating Google as the recipient of service and being amount received in foreign currency?
  
4. Will your answer be different if Games2Win is located outside India and customer is in India?

## Case Study 2: Online Test

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AED Inc USA is engaged in conducting online exams and providing administrative solutions to students. The company provides electronic software to enable students to take the online test on electronic platform.

Three types of test administrative solutions are provided:

### **TEST TYPE –1**

Tests are self-administered by the students and are wholly digital. Test contains only Multiple choice questions. Tests are not required to be taken from the test centres. Scores are provided by electronic software based on a computer-based algorithm and student gets result in electronic format immediately on completion of the test. The entire test experience is electronic.

### **TEST TYPE –2**

The student is required to go to test centre, where an administrator will verify the identity of the candidate and validate test registration. Test administrator will assign a computer to student.

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During test, the candidate is monitored by the invigilator. Once test is completed, the scores are provided by computer-based algorithm on the electronic software and student gets result on completion of test. The test administrator shares the student's printed unofficial score report. In addition to this, the entire process is recorded by cameras as a video and such video recording of the test-taker's testing session is reviewed by a test security official to validate any testing issues.

### **TEST TYPE –3**

Type 3 is similar to Type 2, however difference is that these tests contain mixture of Multiple choice questions and analytical writing assessment section i.e. essay-based questions. The student is able to see final score for Multiple choice questions and indicative score for essay-based question marked by computer-based algorithm. However, the essay-based questions are then sent to a human-evaluator in USA for assessment and final scoring. In addition to physical presence and supervision of invigilator, human intervention is also required for evaluation and scoring of essay.

(Ref: NCS PEARSON INC, In re- AAR Karnataka)

## Case Study 3: IT Infrastructure support

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Philips Electronics Ltd. entered into agreements with their overseas group entity in the Poland under which they avail certain IT infrastructure services. The overseas entity inter alia provides network connectivity, ERP sharing, email services and information or communication among various entities. Some of these services are of the nature of "Calendaring and Scheduling Directory, Philips e-mail, file back up etc. All these infrastructure services are in the nature of providing intra connectivity between Philips locations worldwide.

### **ISSUE**

Whether such services fall under the category of OIDAR?

(Ref: Philips Electronics India Ltd v. CCT – Bangalore CESTAT Service Tax dt 03.12.2019)

## Case Study 4: Sale of digital goods

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Amogh, located in Gurgaon is a proprietor supplying digital goods, in the subject case 'online gaming' and has not obtained GSTIN because he is of the opinion that the services rendered by him is export of e-goods

- 1) Whether "e-goods", as commercially known in the market, are "goods" as defined in the GST Acts or are they services as per GST Act?
- 2) Will IGST under reverse charge be applicable in the situation of procurement from foreign supplier?
- 3) If the customer is from India and paying the consideration in dollar, whether it will be allowed as exports or if not allowed as exports then whether GST is leviable?
- 4) If customer pays for the e goods in Indian rupees and goods delivered through CLOUD located outside India whether SGST & CGST or IGST leviable on such transactions?
- 5) In case where customer / buyer is from out of India and payment is done in dollar, it is export of goods / services and therefore neither SGST & CGST is leviable?



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6) In case buyer is from India, the goods/ services are stored in CLOUD which are the servers outside India, therefore even though payment is received in rupees, it is again export of services being services are received from distantly installed servers. Hence No CGST and or SGST is leviable?

REF:

2020 (12) TMI 786 - AUTHORITY FOR ADVANCE RULING, MAHARASHTRA

IN RE: M/S. AMOGH RAMESH BHATAWADEKAR

## Case Study 5: Supply of Online Journals

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M/S. INFORMATICS PUBLISHING LTD. states that they are in the business of supplying online journals. They have a portal called J-Gate.

Whether the supply of services in the nature of subscription to the J-Gate by the educational institutions is eligible for exemption from GST under Notification No.2/2018- Central Tax (Rate)

REF:

2019 (10) TMI 874 - AUTHORITY FOR ADVANCE RULING, KARNATAKA

IN RE: M/S. INFORMATICS PUBLISHING LTD.,

## Case Study 6: Online Books & Database access

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M/s Springer Nature Customer Service Centre GmbH a company located in Germany is in the business of supplying online scientific journals to customers all over the world including India . Such content is supplied by means of books, journals and databases. The company wishes to know:

- a) Whether it is required to charge GST on supply of OIDAR services to “only” unregistered persons in India?
- b) If response to the above is ‘No’, whether it is required to charge GST on supply of OIDAR services to individuals irrespective of their GST registration status?
- c) If service recipient is using applicant’s OIDAR services for commerce, industry or any other business or profession in India, the applicant will not be required to charge GST.
- D) The burden to prove that such services are received other than business or profession lies on whom?

REF: IN RE: M/S. SPRING NATURE CUSTOMER SERVICE CENTRE GMBH,)

## Case Study 7: CRS

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M/s. Go Airways is undertaking the activity of operating air transportation services in India. They enter into agreement with CRS/GDS companies for maintaining a database regarding their flight schedules, fares, seat availability on flights, etc., on real time basis and making this information available to IATA Agents. CRS/GDS Companies are located outside India. The airlines make payment to CRS companies based on number of bookings.

### ISSUE

- Whether the service provided by the CRS/GDS Companies is taxable under “online database access and/or retrieval service”?
- What is the implication if CRS service is received by foreign head office whose branch is in India and Indian travel agents could also access the database and use such services for ticket reservation in India

## Case Study 8: Online classes

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Premier University located in Australia is conducting a Management Programme for students located all over the world including India. The course consist of providing online live teaching sessions, answering the queries of the students through e-mail and chat, practical demonstrations, undertaking online exams and awarding diploma certificate .

They are charging a lump sum amount for the entire course. It approached you to advice:

- Whether any GST is required to be paid by them in India?
- Will the answer be different, if they are only providing study material in PDF format and giving access to pre recorded sessions and charging amount only for these two activities?

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THANK YOU

