THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL REGISTRY AT KAMPALA

APPLICATION NO. 107 OF 2023

TRANSLINK UGANDA LIMITED..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY..... RESPONDENT

RULING

BEFORE: MS. CRYSTAL KABAJWARA, MR. SIRAJ ALI, MS. KABAKUMBA MASIKO

This ruling is in respect of an application challenging an administrative additional assessment issued by the Respondent against the Applicant concerning withholding tax on the payment of legal fees to a non-resident person.

1. Background facts

The Applicant is a company dealing in the importation and wholesale of fast-moving consumer goods from South Africa, Japan, South Korea, China and Kenya, among others.

The Respondent carried out a comprehensive audit of the Applicant's tax records and established that the Applicant did not declare withholding tax on payments for the supply of domestic and international legal services by Blaser Mills LLP (Blaser Mills), a law firm based in the UK and Atigo & Company Advocates, a firm based in Uganda respectively.

The legal fees were for services rendered by Blaser Mills to the Applicant in relation to arbitration proceedings in the UK where the Applicant was represented by Blaser Mills.

The Respondent issued the Applicant with a withholding tax assessment of Shs. 290,301, 481 for failure to account for withholding tax in accordance with section 78 of the Income

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Tax Act (ITA) and Article 13 of the UK – Uganda Double Taxation Agreement (UK – Uganda DTA).

The Applicant objected to the assessment on the grounds that the Respondent failed to properly apply the relevant provisions of the UK - Uganda DTA. The Applicant contends that the services rendered by Blaser Mills fall under Article 15 of the UK DTA which exempts the payments from Ugandan taxation.

Therefore, the dispute before the Tribunal is whether the legal fees paid to Blaser Mills are exempt from withholding tax in Uganda under the provisions of the UK – Uganda DTA.

2. Representation

The Applicant was represented by Mr. Nabende Jonathan and Mr. Kassim Muwonge while the Respondent was represented by Mr. Amanya Mushambi, Ms. Doreen Amutuhaire and Ms. Tracy Ahumuza.

3. The issues for determination

The issue for determination by the Tribunal is whether the Applicant is liable to pay the withholding tax assessed.

This being entirely a question of law, the parties filed written submissions and no evidence was led.

4. Submissions of the Applicant

The Applicant submitted that the resolution of the question requires interpretation of Articles 13 and 15 of the double Taxation Treaty.

The Applicant argued that the interpretation of tax treaties does not follow the canons of interpretation of tax statutes. Treaties are interpreted in accordance with the Vienna Convention on the Law Treaties, 1969 (VCLT), where the overriding principle that is contained in Article 31(1) requires treaties to be interpreted in good faith and in the accordance to the ordinary meaning to be given to the treaty in the context of its object and purpose.

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The Applicant cited ***Airtel Uganda Limited v. Uganda Revenue Authority, TAT Application No. 10 of 2019*** wherein it was stated:

"One of the principles of the construction of international agreements is that they should be read in good faith. The principle of good faith "jus mund" requires parties "to deal honestly and fairly with each other and to refrain from taking unfair advantage" in international agreements. This is as opposed as to giving a literal meaning to a statue enacted...".

The Applicant also submitted that the matter will be settled by giving the wording of the two provisions their ordinary meaning as required by Article 31 of the VCLT.

The Applicant argued that the activities of lawyers fall within the meaning of "professional services" as used in Article 15 of the UK DTA. Therefore, the activities do not fall within the ambit of "technical services" under Article 13.

The Applicant also submitted that the provisions of the DTA must be read together and not in isolation. Article 15 is subject to the provisions of Article 13 and when read together, Article 15 exempts legal services from withholding tax unless the legal service provider has a fixed base in Uganda.

The Applicant went ahead to submit that the UK-Uganda DTA is based on the OCED Model Tax Convention whose commentary can function as a secondary tool for the interpretation of the DTA.

The Applicant also submitted that Article 15 extends to law firms and is not limited to individual lawyers despite the use of the articles "he" and "his". The Applicant argued that restricting the provision to individuals serves no logical basis as partnerships, including limited liability partnerships are taxed on individual partner basis. Further, differentiating between individuals and non-individuals would contravene the principle of non-discrimination.

5. Submissions of the Respondent

The Respondent submitted that guidance on the interpretation of the UK – Uganda DTA should be derived from the OECD Model Tax Convention commentaries to enable the Tribunal arrive at a logical and reasonable decision.

The Respondent further submitted that it is a principle of treaty interpretation that a treaty must be interpreted as a whole as per Article 31 of the VCLT. The Respondent also submitted that in treaty interpretation, recourse may be had to supplementary means of interpretation including preparatory work of the treaty and the circumstances of its conclusion (Art. 32 of the VCLT).

The Respondent argued that the payment to Blaser Mills was for technical services under Art. 13 (1) of the UK – Uganda DTA. The Respondent further argued that technical fees are defined under the article to mean:

"Payments of any kind to any person, other than an employee of the person making the payments, in consideration for any services of a technical, managerial or consultancy nature."

The Respondent further submitted that the provisions of Art. 13 (1) of the DTA do not apply if the beneficial owner of the technical fees carries on a business in Uganda through a permanent establishment or performs in Uganda personal services from a fixed base situated in Uganda. In such cases, the provisions of Article 7 or Article 15 as the case may be shall apply.

The Respondent also submitted that Article 15 covers independent personal services rendered by an individual and not an entity or body corporate.

The Respondent cited Article 15 which provides as follows:

"Subject to the provisions of Article 13, income derived by a resident of a contracting state in respect of professional services or other activities of an independent character shall be taxable only in that state except in the following circumstances, when the income may also be taxed in the other Contracting State:

(a) If he has a fixed base regularly available to him in the other contracting state for purposes of performing his activities…"

The Respondent argued that the phrase "subject to the provisions of Article 13" means that for a transaction to be dealt with under Article 15, it must fall outside the scope of Article 13.

The Respondent further argued that Article 15 is applicable to professional services rendered by individuals and not to firms such as Blaser Mills.

The Respondent prayed that the Tribunal finds the payments subject to Article 13 and not 15.

The Applicant made submissions in rejoinder wherein they reiterated their arguments in their earlier submission.

6. The determination of the Tribunal

Having read the submissions of the parties, this is the decision of the Tribunal.

The contention revolves around the UK-Uganda, and particularly the withholding tax treatment of legal fees paid to a non-resident law firm. Whilst the Applicant contends that the relevant provision is Article 15 which deals with professional services, the Respondent contends that the relevant provision is Article 13 which deals with technical services.

Therefore, the million-dollar question is – are they payments a fee for technical services or are they a fee for independent personal services.

The good news is that there are a few things that the parties agree on:

(i) That subject to the DTA, the payment to Blaser Mills LLP is taxable under section 78 of the ITA;
(ii) That the recipient, Blaser Mills LLP is a resident of the UK and thereby entitled benefit from the treaty;
(iii) A treaty must be construed as a whole and in good faith as per the provisions of the VCLT; and
(iv) Commentaries to the OECD Model Convention and the UN Model Convention are useful guides for interpreting the provisions of the DTA.

Regarding point (iv), it should be noted that the UK – Uganda DTA is based on the OECD Model Tax Convention. Therefore, for purposes of supplementary interpretation, the Tribunal shall restrict itself to the commentaries to the OECD Model Convention.

We now turn to the articles in contention.

Article 13 – technical fees

The Article provides as follows:

1. *Technical fees arising in a Contracting State which are derived by a resident of the other Contracting State may be taxed in that other State.*
2. *However, such technical fees may also be taxed in the Contracting State in which they arise, and according to the law of that State; but where the beneficial owner of such technical fees is a resident of the other Contracting State the tax so charged shall not exceed 15% of the gross amount of the technical fees.*
3. *The term "technical fees" as used in this Article means payments of any kind to any person, other than to an employee of the person making the payments, in consideration for any services of a technical, managerial or consultancy nature.*
4. *The provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the technical fees, being a resident of a Contracting State, carries on business in the other Contracting State in which the technical fees arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the technical fees are effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 15, as the case may be, shall apply.*

The following can be deduced from the above provision:

(i) The DTA grants the UK priority to tax technical fees arising from Uganda, derived by a resident of the UK (Blaser Mills).

(ii) The DTA reserves a residual taxing right for Uganda subject to certain conditions, namely, that the tax shall not exceed 15% where the beneficial owner of the fees is a resident of the UK.

(iii) The use of the word "may" in the provision as opposed to "shall" indicates that Article 13 is a permissive provision which grants both states some degree of discretion.

(iv) Where the beneficial owner of the technical fees has a permanent establishment in Uganda or performs in Uganda, independent personal services from a fixed base situated in Uganda, the fees shall be taxable under Article 7 (in case of a permanent establishment) or under Article 15 (where the services are independent personal services provided from a fixed base.

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The provision also defines the term "technical fees" and we shall come to that later. For now, it is reasonable to conclude that whilst Blaser Mills is a resident of the UK, they neither have a permanent establishment in Uganda hence Article 7 does not apply, nor are they providing independent personal services from a fixed base in Uganda. Therefore, the provision of Art. 15 (1) (a) will not apply. For clarity and the avoidance of doubt, it should be noted that the presence of a fixed base is one of the exceptions to the general rule in Article 15 concerning the taxation of professional or independent personal services under Article 15 (1) (a). To this extend, Article 15 is subject to Article 13 in as far as the non-resident has a fixed base in Uganda. We shall return to this later.

We must now seek to understand the meaning of the term "technical fee".

What is a "technical fee"?

The term is defined in Article 13 (3) to mean:

"*payments of any kind to any person, other than to an employee of the person making the payments, in consideration for any services of a technical, managerial or consultancy nature".*

As the term is defined in the DTA, there is no need to look at the definition in domestic law. This is as per the provisions of Article 2 of the UK – Uganda DTA provides that:

"any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of this Convention."

In the present case, the term is defined in the treaty. Where both the domestic law and the treaty define the term, the definition in the treaty takes precedence. This is as per Section 88 of the ITA which provides that terms of an international agreement prevail over the provisions of the Act.

The definition of a technical fee in Article 13 (3) is broad in as far as it related to payments for services that are of a technical, managerial or consultancy nature. This requires us to define the term "technical service", "managerial service" and "consultancy services".

Should the legal services provided by Blaser Mills be found to fall under any of the above three definitions, it would then bring them within scope of Article 13 of the DTA.

Technical service

The DTA does not define what a technical service is, and neither does the ITA. Therefore, we must now turn to supplementary aids of treaty interpretation.

To this end, we have relied on the definition of technical services contained in the 2010 commentaries to the OECD Model Tax Convention.

It should be noted at this point that the UK-Uganda DTA came into force in 1992, which is prior to the 2010 commentaries. However, the commentaries for the 1963 Model Convention which preceded the DTA do not shed light on the term "technical service".

The courts have held that later commentaries can be relied upon to guide the interpretation of prior treaties. In the Canadian case of ***HM the Queen v Prevost Inc 2009 DTC 5721, 2009 FCA 57,*** it was held:

"The worldwide recognition of the provisions of the Model Convention and their incorporation into a majority of bilateral conventions have made the commentaries on the provisions of the OECD Model a widely accepted guide to the interpretation and application of the provisions of existing bilateral conventions...the same may be said of later commentaries when they represent a fair interpretation of the words of the Model Convention and do not conflict with the commentaries in existence at the time a specific treaty was entered and when, neither treaty partner has registered an objection to the new commentaries.

The 2010 commentary discusses "Technical Fees" under ***Part 5*** of the analysis concerning ***Treaty Characterisation Issues Arising from E-Commerce".***

Specifically, the analysis of "technical fees" begins by stating the commonly used definition of the term, which is the same as that which is stated in Art. 13 (3) of the UK – Uganda DTA. The same definition is stated in Paragraph 34 of the Commentary on Technical Fees as follows:

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Analysis and conclusions

33. The Committee examined how various e-commerce payments would be treated under alternative treaty provisions that allow source taxation of "technical fees".

34. Whilst these provisions may be drafted differently, they often include the following definition:

The term 'technical fees' as used in this Article means payments of any kind to any person, other than to an employee of the person making the payments, in consideration for any service of a technical, managerial or consultancy nature."

Therefore, the above definition is a replica of the definition in Article 13 (3) of the UK – Uganda DTA. It is therefore reasonable to rely on the analysis of "technical fees" under the commentary in ascertaining the meaning of technical fees under the UK -Uganda DTA.

Therefore, what does the 2010 commentary say about "technical services" when used in light of Article 13 (3) of the DTA? It says the following in paragraph 36:

"Services are of technical nature when special skills or knowledge related to a technical field are required for the provision of such services. Whilst techniques related to applied science or craftsmanship would generally correspond to such special skills or knowledge, the provision of knowledge acquired in fields such as arts or human sciences would generally not (the services of restoring an old art work is an example of an exception to this general rule). As an illustration, whilst the provisions of engineering services would be of a technical nature, the services of a psychologist would not."

The above statement suggests that knowledge acquired in fields such as arts or human sciences does not amount to technical services as technical services envisage applied sciences.

In the present case, the services in question are of a legal nature. Such services are not an applied science and by implication, are not a technical service.

In addition, courts have addressed themselves to the term "technical fees". In the case of ***Buro Happold Ltd v Deputy Commissioner of Income Tax, ITA No. 7111/MUM/2017***, the Indian Income Tax Appellate Tribunal addressed whether consulting fees paid to Buro Happold, a UK entity, qualified as "Fees for Technical Services" (FTS) under Article 13 of the UK-India DTA. Buro Happold argued that the services rendered were consulting and did not "make available" any technical knowledge to the client in India, as required for FTS classification under Article 13.

The Tribunal ruled in favor of Buro Happold, concluding that the consulting services did not involve transferring any technical knowledge or skills that would enable the Indian client to use them independently in the future.

The above decision indicates that the mere provision of consultancy services does not constitute a technical service as the latter envisages a transfer of knowledge and know-how to the client for future use.

In the present case, Blaser Mills provided legal services in the UK involving representing the Applicant in arbitration proceedings. There is no evidence that the services rendered involved a transfer of knowledge, skills or know-how to the Applicant.

As the definition of "technical fees" also includes payments for services that are managerial and consultancy in nature, we must also establish the meaning of the terms "managerial services" and "consultancy services".

Managerial services

The UK – Uganda DTA does not define the term "managerial services" and neither does the ITA.

(Note: Section 77 of the ITA defines the term "management charge" but does not define a "management service". The section provides that "management charge" means any payment made to any person, other than a payment of employment income, as consideration for any managerial services, however calculated.)

Therefore, we must, once again, turn to the 2010 commentary.

The same commentary, under para. 40, goes on to discuss managerial services. It states:

"Services of a managerial nature are services rendered in performing management functions. The Committee did not attempt to give a definition of management for that purpose but noted that this term should receive its normal business meaning."

The payment to Blaser Mills was for legal services provided by the firm in relation to legal proceedings in the UK whereby the Applicant was represented by Blaser Mills. They did not relate to the management of the business of the Applicant. It is therefore reasonable to conclude that the services rendered by Blaser Mills were not of a managerial nature.

Consultancy services

Similarly, The UK – Uganda DTA does not define the term "consultancy service" and neither does the ITA. We must once again rely on the 2010 commentary which states under Para. 42 as follows:

" iii) Consultancy services

42. "Consultancy services" refer to services constituting in the provision of advice by someone, such as a professional, who has special qualifications allowing him to do so. It was recognised that this type of services overlapped the categories of technical and managerial services to the extent that the latter types of services could well be provided by a consultant."

In the present case, it is reasonable to conclude that Blaser Mills is a firm of professionals engaged in the provision of legal services. It is staffed by lawyers who have special qualifications allowing them to provide legal services. This is clearly articulated on the firm's website - https://www.blasermills.co.uk/

Therefore, it can be concluded that the services provided by Blaser Mills to the Applicant were of a consultancy nature in as far as they constitute the provision of advice by professionals.

In effect, the legal fees that were paid by the Applicant to Blaser Mills fall within the scope of Article 13.

It would be ideal if the matter ended here. However, it does not for the reason that a treaty must be read as a whole and for completeness, it is also equally important to look at the provisions of Article 15 which provides for professional services. This is because it is possible for an item of income to fall under two provisions of the treaty which then necessitates considerations of which provision should yield to the other. Moreover, in the present case, the Applicant contends that the correct provision is Article 15 and not 13.

Article 15 of the UK-Uganda DTA

Article 15 reads as follows:

"1. Subject to the provisions of Article 13, income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other Contracting State:

(a) if he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case so much of the income as is attributable to that fixed base may be taxed in that other State; or

(b) if his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any period of twelve months; in that case so much of the income as is derived from his activities performed in that other State may be taxed in that other State.

2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, architects, dentists and accountants."

The following can be deduced from the above provision:

(i) The provision grants the UK exclusive rights to tax income derived by its residents in respect of professional services or other activities of an independent character. The exclusive rights are represented by the use of the word "shall".

(ii) However, where the UK resident has a fixed base available to them in Uganda, their income may be taxed in Uganda. Therefore, the provision reserves residual taxing rights for Uganda subject to "fixed base" condition. This exception in Article 15 (1) (a) is the reason why the article is subject to the provisions of Article 13. Article 13 (4) provides that where the beneficial owner of the technical fees is performing independent personal services from a fixed base situated Uganda, such income is taxable under Article 15 – the relevant clause being (1) (a).

(iii) In the present case, we have established that Blaser Mills does not have a fixed base in Uganda. Therefore, their income is not taxable in Uganda under Article 15 (1) (a).

The term "professional services" is defined in Article 15 (2) to include the activities of lawyers. Therefore, it is reasonable to conclude that Blaser Mills is a provider of professional services which fall within the scope of Article 15.

We also established that Blaser Mills is also a provider of consultancy services which potentially brings it within scope of Article 13.

It therefore appears that on the face of it, the income derived by Blaser Mills is potentially taxable under two provisions of the DTA. However, a treaty must be read as a whole and ultimately, only one provision must be applied.

Therefore, we now must now compare the two provisions to ascertain the appropriate provision to be applied to the payment of legal fees to Blaser Mills.

1. Article 15 allocates exclusive taxing rights to the UK, in respect of income derived by its residents from the performance professional services. The use of the word "shall" in Article 15 (i) indicates an imperative command, meaning that the action is mandatory, and not permissive. The provision therefore grants the UK the exclusive right to tax this income. This contrasts with the word "may," as used in Article 13 which is a permissive provision, granting both states some level of discretion regarding the exercise of their taxing rights (refer to the analysis of Article 13 above).

   It is a principle of the interpretation of tax treaties that where an item of income falls under more than one category of income, double tax treaties resolve the conflict through ordering rules.

   The OECD, in its 2015 report, "***Addressing the Challenges of the Digital Economy"*** discusses in Chapter two, the ***"Fundamental Principles of International Taxation." Para. 2.3.2.2*** explains principles concerning ***the "allocation of taxing rights under tax treaties."***

   It states as follows:

   "... the international tax framework developed around a vast network of bilateral tax treaties following the so-called "classification and assignment of sources" method, in which different types of income are subject to different distributive rules. This schedular nature of distributive rules entails a preliminary step, whereby the income subject to conflicting claims is first classified into one of the categories of income defined by the treaty. Where an item of income falls under more than one category of income, double tax treaties resolve the

conflict through ordering rules. Once the income is characterised for treaty purposes, the treaty provides distributive rules that generally either grant one contracting state the exclusive right to exercise domestic taxing rights or grant one contracting state priority to exercise its domestic taxing right while reserving a residual taxing right to the other contracting state.

We have already noted that whilst the legal fees earned by Blaser Mills fall under both Article 13 (technical fees) and 15 of the DTA (professional fees). Article 15 grants the UK exclusive rights to the income earned by its residents from professional services. Article 13 on the other hand grants the UK priority for technical fees while reserving a residual taxing right to Uganda.

It would be an absurd outcome for Uganda's residual taxing rights under Article 13 to take precedence over the UK's exclusive rights to tax the same item of income.

Therefore, whilst the item of income, namely the legal fees, that the Respondent seeks to tax, potentially falls under two provisions, in the present circumstances, Article 15 must yield to Article 13 in as far as Article 15 grants the UK exclusive rights to tax the income.

(i) The second and minor distinction is that the term "professional services" is explicitly defined in Article 15 (2) of the DTA. Whilst Article 13 defines the term "technical fees", it does not define what a technical service means. We have relied on supplementary aids of interpretation (as opposed to an explicitly stated definition in the treaty) to determine the meaning of the term. This indicates that the treaty partner states intended for the treatment of professional services to be specifically and explicitly dealt with. It is for this reason that Article 15 is crafted in mandatory language while Article 13 is not.

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Use of the pronoun "his" in Article 15

The Respondent has argued that the use of the pronoun suggests that the services under Article 15 are limited in scope to individuals and do not extend to legal entities or partnerships.

However, this issue was addressed by a specific 2000 ***report*** by the ***OECD***, titled ***"Issues Related to Article 14 of the OECD Model Tax Convention".*** This report analysed Article 14 (whose wording is the same as Article 15 of the UK – Uganda DTA).

On the use of the pronoun, the report states:

*"**III. Which entities fall within Article 14?***

13. The personal scope of application of Article 14 is also unclear. The main issue is whether the Article applies to individuals only or whether it is also applicable to legal persons. Another issue is to what extent it applies to partnerships.

14. It has sometimes been argued that the use of the pronoun "his", in paragraph 1 of Article 14, indicates that the Article was intended to apply to individuals only. The Committee, however, found the argument to be far from convincing as paragraph 1 of Article 4, which clearly applies to both individuals and legal persons, also uses the pronoun "his" when referring to the various criteria for full liability to tax…

17. The Committee noted that it was now more frequent for professionals to incorporate than it was when Article 14 was drafted…it could not see any justification for imposing different rules to services depending on whether they were provided by an individual (Article 14) or a legal person (Article 7)…"

Based on the above, the use of the pronoun "his" in Article 15 of the UK – Uganda DTA does not restrict the scope of the article to individuals. Its scope also extends to legal persons including partnerships.

Note: It should be noted that Article 14 was subsequently deleted from the OECD Model Tax Convention on account of the apparent conflict with Article 7, which deals with the taxation of permanent establishments.

In conclusion, we have established the following:

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(i) The legal fees paid to Blaser Mills potentially fall under two categories of income under the Uganda – UK DTA. The first category is technical fees under Article 13 and the second is professional services under Article 15.

(ii) The distributive or allocative rules grant the UK exclusive rights under Article 15 and priority under Article 13. On the other hand, Article 13 (2) only reserves a residual taxing right to Uganda.

(iii) In view of the above, it is reasonable to conclude that the UK's exclusive right to tax professional fees earned by a UK resident person takes precedence over Uganda's residual right to tax the "technical fee".

(iv) Therefore, in the circumstances, Article 15 of the UK-Uganda DTA yields to Article 13 in as far as they both concern the taxation of legal fees paid by a resident of Uganda (the Applicant) to a resident of the UK (Blaser Mills).

(v) Consequently, the Respondent does not have the right to tax the legal fees paid by the Applicant to Blaser Mills.

The application is granted and the assessments are hereby set aside. Costs are awarded to the Applicant.

Dated at Kampala this ...8th... day of ...November...2024

MS. CRYSTAL KABAJWARA	**MR. SIRAJ ALI**	**MS. KABAKUMBA MASIKO**
CHAIRPERSON	**MEMBER**	**MEMBER**

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