OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 26 February 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 26 February 2020

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FINANCE AND CONSTITUTION COMMITTEE

5th Meeting 2020, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Murdo Fraser (Mid Scotland and Fife) (Con)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Tom Arthur (Renfrewshire South) (SNP)
*Neil Bibby (West Scotland) (Lab)
*Alexander Burnett (Aberdeenshire West) (Con)
*Donald Cameron (Highlands and Islands) (Con)
*Angela Constance (Almond Valley) (SNP)
*Patrick Harvie (Glasgow) (Green)
*John Mason (Glasgow Shettleston) (SNP)
*Alex Rowley (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ewan Cameron-Nielsen (Scottish Government)
Ben Macpherson (Minister for Public Finance and Migration)
James McLellan (Scottish Government)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 26 February 2020

[The Convener opened the meeting at 10:00]

Interests

The Convener (Bruce Crawford): Good morning, and welcome to the fifth meeting in 2020 of the Finance and Constitution Committee. The first item on our agenda relates to changes in the membership of the committee. We have two new members attending. I warmly welcome them and invite them to declare any relevant interests.

Donald Cameron (Highlands and Islands) (Con): Thank you, convener. I refer to my entry in the register of members' interests for anything that may be relevant to the work of the committee.

George Adam (Paisley) (SNP): I have no relevant interests.

The Convener: I thank Gordon MacDonald for his service on the committee, which I am sure everyone appreciated.

Deputy Convener

10:01

The Convener: The second item on our agenda is to choose a new deputy convener. Before we do so, I put on record my thanks to Adam Tomkins for fulfilling that position over the past few years. His dedication to the role and the constructive way in which he approached the committee's work were much appreciated, particularly by me as convener.

The committee's next task is to choose a new deputy convener. At the beginning of this session of Parliament, it was agreed that only members of the Scottish Conservative and Unionist Party are eligible for nomination as the deputy convener of the committee, and I understand that Murdo Fraser is the party's nominee for the post.

Murdo Fraser was chosen as deputy convener.

The Convener: I am glad to say that that was unanimous.

Murdo Fraser (Mid Scotland and Fife) (Con): That is a relief.

The Convener: Congratulations on your appointment.

Murdo Fraser: Thank you.

Subordinate Legislation

Revenue Scotland and Tax Powers Act 2014 Amendment Regulations 2020 [Draft]

10:02

The Convener: The third item on our agenda is to take evidence on the amendment regulations from Ben Macpherson, who is the Minister for Public Finance and Migration; and Ewan Cameron-Nielsen, who is a team leader in the Scottish Government's fully devolved taxes policy unit. This is the first meeting of the committee that Mr Macpherson has attended in his new portfolio. I welcome him to his role and congratulate him on his appointment. Would you like to make an opening statement, Mr Macpherson?

The Minister for Public Finance and Migration (Ben Macpherson): Thank you, convener. I, too, congratulate the new deputy convener on his appointment. I am looking forward to working together with the committee for the common good of Scotland in my new role. For clarity, I point out that, as my entry in the register of members' interests states, I am on the roll of Scottish solicitors, although I am not a member of the Law Society of Scotland.

The Revenue Scotland and Tax Powers Act 2014, which for the remainder of this opening statement I will refer to as "the act", enables Revenue Scotland to apply penalties where a person fails to submit their tax return by the due date, which is known as the filing date. In a standard house purchase, for example, the filing date is 30 days after the transaction has completed. The available data suggests that the overwhelming majority of taxpayers submit their LBTT—land and buildings transaction tax—returns on time.

However, where that is not the case, the act provides for penalties to be charged at four separate points, all of which seek to encourage compliance and ensure that taxpayers submit their tax returns on time, or failing that, as quickly as possible. First, an initial £100 penalty is charged if a return is not made by the filing date. Secondly, if the failure to make a return continues for a further three months, daily penalties apply at £10 per day for up to 90 days, which is a total of £900. It is to those daily penalties that the regulations relate. Thirdly and fourthly, the act provides for tax-geared penalties where returns are more than six months and more than 12 months late.

In that context, the regulations that are before the committee amend section 161 of the act to provide that a daily penalty can be charged by Revenue Scotland through a single penalty assessment notice.

Committee members will be aware that the regulations were introduced in response to a decision by the Upper Tribunal for Scotland that was published last July, which related to a scenario in which Revenue Scotland did not know that a return was due until it was submitted. In that case, the Upper Tribunal noted that, for the daily penalties to be valid, the legislation required two separate notices—a notice of liability and a notice of assessment—to be issued. It concluded that a single penalty assessment notice, as used by Revenue Scotland for daily penalties, was not sufficient for those purposes, although the information contained in the single notice was sufficient in terms of what each notice required.

Critically, however, the tribunal noted that requiring Revenue Scotland to issue two separate notices would

"serve no useful function in the case of many LBTT penalties for late returns and, where it is unnecessary, would be potentially confusing for the taxpayer and could involve him or her in making a redundant, additional appeal."

The tribunal went on to note that, if the difficulties were sufficiently serious, a change to the penalty provisions might be required. We agree with that view, and we introduced the legislation accordingly.

The sole purpose of the regulations is to enable Revenue Scotland to issue a single penalty notice when a return is sufficiently late for daily penalties to apply. The regulations will not change the obligations that are placed on taxpayers nor the number of penalties that can be charged.

Finally, it may be helpful to the committee to note that there are two relevant overall scenarios in which daily penalties are charged. One is a scenario in which Revenue Scotland knows that a tax return is due; the other scenario is one in which it does not.

The first scenario applies when a taxpayer is due to submit a return associated with the three-yearly review of the tax position for non-residential leases. In that situation, Revenue Scotland will know that a return is due because of the effective date of the initial transaction that is contained within the original tax return. As set out in its letter to the committee, Revenue Scotland issues a series of communications to taxpayers in advance of the date on which a return is required and subsequently. All are clear about the daily penalty provisions. Critically, those processes will continue in the future, regardless of the legislation.

Under the second scenario, in which Revenue Scotland is not aware that a return is due, as is the case with the majority of LBTT transactions, it is, of course, not possible to issue a warning letter in advance of the return being made. Although that is the case, the LBTT legislation is clear on the requirement for a tax return to be submitted, and the act is equally clear on the circumstances in which penalties will apply. As such, taxpayers and their agents should be aware of the requirements that are placed on them and the consequences of failing to meet those requirements. It is important to remember that the data indicates that the overwhelming majority of taxpayers submit their returns on time.

Although I recognise that stakeholders have expressed concerns about the use of daily penalties more generally, the changes in the Scottish statutory instrument respond directly to a suggestion that was made by the Upper Tribunal judge, and they have been introduced to avoid potential confusion to the taxpayer.

I hope that that is a helpful summary. I am happy to take questions from the committee.

The Convener: Thank you, minister. Obviously, we are aware of the context. You have talked about the consequences of someone not submitting a return. The Law Society of Scotland picked up on that in its suggestion that daily penalties are not appropriate for situations in which

"Revenue Scotland do not know that a transaction has happened, and a return is required until the return is submitted."

Therefore, it thinks that such penalties might not affect behaviour in the way that the Government might expect. What is your reaction to that?

Ben Macpherson: I am grateful for the contribution from the Law Society of Scotland. It is important to emphasise that the instrument is a technical amendment that takes account of the comments of the Upper Tribunal judge and seeks to respond to them in order to bring clarity to the legislation as it is and avoid potential confusion for the taxpayer with regard to the duplication of notices and the potential for the duplication of appeals.

Penalty arrangements, including daily penalties, play an important role in encouraging taxpayers to submit their tax returns on time. As I said in my opening statement, although I recognise and am willing to consider the broader points that have been made about the appropriateness of daily penalties in the LBTT regime, that would be a much bigger piece of work. It would require much more significant consideration and consultation, and a much more significant change to the penalty arrangements which were agreed by the Parliament previously. I am open to considering that, but the significance of the regulations today is to make the primary legislation as clear as possible, and to respond to the outcome of the tribunal.

Murdo Fraser: Good morning, minister. I remind members of my entry in the register of members' interests: I am a member of the Law Society of Scotland.

In relation to the minister's point about the two-stage process, the Law Society has pointed out in its letter that the

"provisions within the Revenue Scotland and Tax Powers Act 2014 provide for ... a two-stage process",

but

"The Regulations seek to remove this two stage process".

What is the policy motivation behind moving away from what is in the 2014 act?

Ben Macpherson: It makes it more consistent with other elements of the LBTT regime, which do not require a similar process. Also, as I said, it is about responding to the tribunal outcome, in order to avoid the confusion that there was in that case, with the risk of duplication of issuing a penalty notice and, thereafter, a potential for duplication of appeal.

In these regulations, we seek to refine the clarity of the process for taxpayers, in order to make sure that it is as clear as possible in response to the outcome of the tribunal.

Murdo Fraser: The Law Society suggests in its letter that

"the focus of a penalty regime should be to influence taxpayer behaviour rather than raise revenue."

Is it simply a revenue-raising measure?

Ben Macpherson: No, it is about providing as effective a regime as possible, so that the taxpayer is clear on the situation in different scenarios; making sure that there is consistency in how the legislation is implemented for LBTT as a whole; and responding appropriately to the outcome of the tribunal.

Murdo Fraser: Thank you.

Alexander Burnett (Aberdeenshire West) (Con): In its letter, Revenue Scotland refers to Adam Smith's "Wealth of Nations" and the principles of taxation as well as how the legislation applies to the principles of "certainty" and "efficiency". However, another principle is fairness. The Law Society, in its letter, talks about disproportionate penalties. What does the minister think? How fair is it to pay a fine when no tax is due?

Ben Macpherson: The Law Society's letter speaks both to the outcome of the tribunal and to the wider question of daily penalties. There is a wider point around the appropriateness of daily penalties within the LBTT regime. As I said, that would require much more significant consideration and consultation, and a much more significant change to the penalty arrangements agreed by the Parliament. If the committee has further thoughts and wants to undertake further analysis on that point, that is something to consider, but the legislation before us today is about how we make the scenario as clear and as effective as possible in response to the outcome of the Upper Tribunal.

Alexander Burnett: Just to confirm, is the minister saying that, in future, the Government will introduce legislation so that, if no tax is due, no penalties will be due?

Ben Macpherson: For clarity, I am not committing to that at this point. I am saying that the Law Society has raised a wider point that both the Government and the committee may want to consider in due course.

Alexander Burnett: Thank you.

10:15

The Convener: The reverse of that argument from the Law Society of Scotland is true as well: were there no penalties, people would have an incentive to not pay their tax, so we need to keep the balance right.

Patrick Harvie (Glasgow) (Green): I hope that if future consideration is given to the latter point, the question will be whether the penalty is proportionate to the responsibility of the taxpayer to submit a return: there would not be a way to make it proportionate to a zero tax liability, because that would mean that no penalty is applied at all. It should be proportionate to the taxpayer's clear, legal responsibility to submit a return.

Can I check that I understand the issue of daily penalties? Those only kick in some time after an initial £100 penalty has been administered, so even if the tax authority was not previously aware that a return was due to be submitted, the taxpayer already knows that they have done something wrong by the time a daily penalty becomes due.

Ben Macpherson: That is correct. There is, first of all, a process to follow for the taxpayer and particularly for the agent acting on their behalf, who has an awareness of the legislation that is passed by the Parliament. The system should be clear that the LBTT return is required to be made within 30 days of the filing date. If a return has not been submitted at that point, the £100 penalty is administered; thereafter, the daily penalties kick in after a period of three or, in effect, four months—a substantial timeframe for opportunities—

Patrick Harvie: There is a grace period, after which taxpayers know that the daily penalty is due. That penalty has the effect of incentivising the taxpayer to submit their return—unlike what the Law Society of Scotland argues.

Ewan Cameron-Nielsen (Scottish Government): It might be helpful to go back to what the minister has said about the two different scenarios: when Revenue Scotland is aware that a return is due in relation to the three-year review process, a series of communications go from Revenue Scotland to the taxpayer, in advance of the return being due, and in the subsequent period. The £100 penalty would be issued at the appropriate point, when Revenue Scotland would also flag up the date on which daily penalties would fall due. That process is in place for the taxpayer, and their agent should be aware of the arrangements.

The legislation and guidance are very clear on the penalties that would apply, should Revenue Scotland not be aware that a return is due. Until Revenue Scotland is aware that the return is due, it cannot actively issue a penalty.

Patrick Harvie: The taxpayer has a responsibility to be aware of their duty to submit a return.

Ewan Cameron-Nielsen: Yes. The legislation and the guidance from Revenue Scotland are very clear on those responsibilities.

The Convener: It looks as though there are no other questions. Item 4 is the consideration of motion S5M-20744.

Motion moved,

That the Finance and Constitution Committee recommends that the Revenue Scotland and Tax Powers Act 2014 Amendment Regulations 2020 [draft] be approved.—[*Ben Macpherson*]

Motion agreed to.

10:18

Meeting suspended.

10:19

On resuming—

Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Amendment Order 2020 (SSI 2020/24)

The Convener: For consideration of the Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Amendment Order 2020, the minister is joined by James McLellan, who is the head of the fully devolved taxes policy unit at the Scottish Government. I invite the minister to make a short opening statement before we move to questions from the committee.

Ben Macpherson: The Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Amendment Order 2020 provides for the changes to land and buildings transaction tax non-residential leases that were set out in the 2020-21 Scottish budget on 6 February.

The order introduces a new rate of 2 per cent for LBTT non-residential leases where the net present value, or NPV, of the rent that is payable under the lease is above £2 million. That measure moves LBTT into line with the three-tax-band structure for leases in the rest of the United Kingdom. It will raise an additional £10 million in 2020-21, which will be important additional revenue to help fund public services in Scotland.

We do not expect the change to have an adverse impact on the market. The Scottish Fiscal Commission's analysis suggests that any behavioural impact from the measure is likely to be small, with fewer than 10 transactions lost as a result. Some 95 per cent of transactions will be unaffected by the change, and it will apply only to leases that are entered into after the effective date. Therefore, the new rate will not apply to any further returns that are made in connection with the three-year review, assignation or termination of a lease where the effective date is between 1 April 2015 and 6 February 2020.

The latest reports on the commercial property market in Scotland suggest that, overall, the market is healthy, and the tax increase should be set in the context of other financial considerations. For example, the cost of leasing in Scotland compares very favourably against leasing in comparable cities in England. We will of course continue to monitor the impact of the tax change.

The committee will be aware that this is the first time that the provisional affirmative power has been used in full, with the order coming into effect almost immediately—on 7 February, the date after the Scottish budget was published. We have taken this approach in response to feedback from stakeholders on the changes that were made in the budget of 2019-20 and to mitigate the risk of forestalling. In its submission to the committee on the changes in the 2019-20 Scottish budget, the Law Society said:

> "We therefore suggest that it would have made more sense either to make the changes effective from Budget Day (12 December) or to make them effective from a date later than 25 January 2019 to allow taxpayers to take into account the impact on transactions."

We have listened to such feedback from stakeholders and responded accordingly.

Even with the limited period of around six weeks between the announcement of the changes in last year's budget and their coming into effect, we saw a forestalling impact, so forestalling is an important consideration. Introducing the change with near-immediate effect, as we would do in this instance, should address that risk.

I hope that that is a helpful summary of what is before us, and I look forward to taking questions on the order.

Alexander Burnett: I refer to my registered interests in property.

My first question is to get an understanding of the operation of the tax rate. To be clear, it will apply if the rental value is £2 million if the lease is for a year, £1 million if the lease is for two years, or £100,000 a year if the lease is for 20 years. Is that how it works?

Ben Macpherson: If the overall value is more than £2 million, the rate will apply.

Alexander Burnett: So if the rent is £100,000 a year and a 20-year lease has been signed, which will take the total rent to £2 million, it will apply. Is that correct?

James McLellan (Scottish Government): There is guidance on the Revenue Scotland website on how the calculation of the NPV works, but what you are saying is, in effect, correct. There are three stages to a calculation of whether the value of the rent is more than £2 million. The first is the NPV calculation, in which you apply a discount rate to calculate the value today—the present value—of the rent that will be paid in the future. You then look at the terms of the lease—for example, whether it is one year or two years. Finally, there is the amount of rent payable. If you do not know that at the time, an estimate is done. Those three factors combined provide the NPV.

Alexander Burnett: On transactions being lost because of behavioural response, will it not be fairly simple for people who would otherwise enter into a long lease simply to reduce it from—say—20 to 19 years, and avoid the tax that way?

Ben Macpherson: First of all, it is a sunk cost; it is not a recurring cost that will be onerous on those leasing for business in a cyclical way.

James McLellan will come in on the avoidance point.

James McLellan: We will look to monitor that. The SFC has calculated an estimate of what it thinks that the potential behavioural effects could be, which it has noted is subject to a high degree of uncertainty.

Alexander Burnett: Are you able to provide more information on the 284 transactions that will fall into the new band? I would like to know what the ratio of annual rent to length of lease is, in order to see how many could avoid the new rate.

Ben Macpherson: As officials have said, we will continue to monitor that. The analysis from the SFC is on its website, where the committee can look at it in detail. It is important to emphasise that the SFC's analysis and forecasting propose that the new rate will raise significant revenue of approximately £10 million per annum for public service provision.

Alexander Burnett: I hope that we share your confidence in the SFC's forecasts for LBTT.

John Mason (Glasgow Shettleston) (SNP): My question is on that same point, because I am struggling to understand a little bit. Mr Burnett's suggestion was that people would restructure their leases. Those transactions would not be lost; they would simply be rearranged and, therefore, less tax would be paid. However, if I understood the minister and our papers correctly, the SFC is suggesting that some transactions would be lost. That would suggest that a lease that might have gone ahead will not go ahead. Am I understanding that correctly? Is that your understanding?

Ben Macpherson: Yes, but the proportion is 10:1, in that £1 million could be lost in revenue from the leases lost, but there will be a £10 million gain from the change. The cost benefit analysis is clear. Again, it is important to emphasise that it would be a sunk cost for business at a time when Scottish commercial property is in a successful place and the market is buoyant, particularly considering all the external factors that have had an impact on the economy over the past 12 months and before.

The analysis is based on continued buoyancy and the fact that only very small amounts will be paid as a result of the change. For example, the additional tax payable on a £5 million lease would be £30,000, which represents just 0.6 per cent of the discounted rents payments. Even on a lease of £10 million, it would be £30,000, or less than 0.3 per cent. In comparison to the sums for those transactions, it is a small sunk cost in the process of the lease agreement, but there will be a significantly positive benefit in terms of revenue for public service provision.

John Mason: I accept all that and, if there is an extra £10 million, that is great, because it can go into the police or wherever. However, I am still intrigued as to what those 10 transactions—which I accept are an estimate—could be. Is it a business that might have come to Glasgow but will go to Birmingham instead; or is it a lease that might not be renewed? I accept that it is a small number, but can you give us any examples of what the transactions that we are losing might be?

Ben Macpherson: The analysis was done by the Scottish Fiscal Commission. I would not want to speak on its behalf, but officials have had direct liaison with it. In order to help you understand its analysis fully, I will ask my official to speak to that point.

James McLellan: The published analysis that the committee has seen does not break down those 10 transactions by category. We can certainly follow that up with the Scottish Fiscal Commission and come back to you.

Given the data that is available and the small number of transactions that we are talking about, I suspect that it would not be possible for the Fiscal Commission to provide that level of granularity and accuracy. We can certainly take the question away, but I suspect that the Fiscal Commission's analysis will show that it is a broad category of loss transactions that is made up by a number of the scenarios that you have set out.

10:30

The Convener: The Fiscal Commission has made a forecast. It cannot possibly know the type of company that would enter into a lease at any stage.

Alex Rowley (Mid Scotland and Fife) (Lab): Would it be fair to say that we will not know until next year how reliable the Scottish Fiscal Commission's forecast is?

The Convener: You never know; it is a forecast. Sorry, James, would you like to respond to that question instead of me?

James McLellan: We will have outturn data at the end of the year, which we will be able to compare with the broad forecast. It will be very difficult to tease out whether those 10 transactions were lost in all that.

Alex Rowley: Mr Burnett's point is that, if we start seeing behavioural change as a result of the change, the £10 million might never come to fruition, but we will not know that until we see how the new tax rate beds in.

The Convener: Indeed—it might be more. It is a forecast.

Murdo Fraser: As an aside, minister, I was heartened by your characterisation of 0.3 per cent of the total cost as being very manageable, because that is the sum total of our budget ask to the Cabinet Secretary for Finance. I am sure that she will get that message loud and clear from you later today.

In relation to what you said about the policy objective, I take it that there is no broader policy objective, and it is simply an unadulterated revenue raiser.

Ben Macpherson: There is a policy objective to bring consistency between what we have in

Scotland and what there is in the rest of the United Kingdom. What we are proposing to do is exactly what has been done in Wales. I appreciate that in England, the rate goes up to 2 per cent where the value is more than £5 million, rather than more than £2 million.

The Scottish property market is currently highly attractive. For example, for a 25,000 square foot prime office in Glasgow, the rent is £1 million less over a 10-year lease than it is for comparable premises in Manchester. For a 5,000 square foot zone A retail unit in Edinburgh, the rent is £2.25 million less over 10 years than it is for comparable premises in Birmingham. Therefore, we have a very competitive environment up here. We believe that, in order to sustain the public service provision, which business benefits from hugely, the £10 million in additional revenue will help in the wider budget.

I emphasise again that it is not a recurring cost. It is a sunk cost: a one-off payment that is made when a lease is entered into.

Murdo Fraser: Thank you. You have now said two things this morning that hearten me, because you said that it is a policy objective of the Scottish Government to bring taxes into line with the rest of the UK, which we would like to see you follow through on.

Was a business impact assessment done, or was any consultation undertaken, prior to the measures being introduced?

Ben Macpherson: Yes. As I said in my opening statement, there was engagement with key stakeholders on how changes were made in the previous budget. There was also engagement with the Law Society of Scotland and the Institute of Chartered Accountants of Scotland on the matter.

James McLellan: The timing of the legislation and the process by which it was introduced reflect feedback that we had from stakeholders. There was no prior consultation on the changes to rates and bands, because of the forestalling risks that the minister set out at the outset. That is consistent with the approach that we have taken and the approach that has been taken across the UK to tax changes in this area.

Ben Macpherson: When I talked about the rest of the UK, I emphasised the point that there is a divergence, as the 2 per cent rate will apply on values of more than £2 million rather than £5 million. I make that point for clarity, Mr Fraser.

The Convener: Well recovered, minister.

Donald Cameron: The Law Society makes two specific points about wording. I think that you have seen its letter. Do you have any observation on those points? It says that the instrument should say “contract” not “contracts”. It also suggests making a change so that the instrument refers to contracts that have been

“concluded prior to 6 February”.

Ben Macpherson: I have not seen that submission. James, do you want to answer that?

James McLellan: We have seen the letter from the Law Society. The legislation is as drafted and there is no indication that its drafting will undermine the transitional provisions that are in place. We welcome the submission from the Law Society of Scotland and we are happy to reflect on it for future changes.

The Convener: It is good to see that a lawyer has now joined the Finance and Constitution Committee.

Murdo Fraser: Another one.

The Convener: Indeed.

As there are no further questions, we move to item 6, which is consideration of motion S5M-20926.

Motion moved,

That the Finance and Constitution Committee recommends that the Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Amendment Order 2020 (SSI 2020/24) be approved.—[*Ben Macpherson*]

Motion agreed to.

The Convener: The committee will publish a report to the Parliament setting out our position on both statutory instruments in the coming days. I thank the minister and his officials for their evidence today.

Meeting closed at 10:37.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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