Customs and excise quarterly update

May 2019

In this update we report on (1) changes to customs authorisations following a no-deal Brexit; (2) making declarations using traditional simplified procedures; and (3) the Pubs Code Adjudicator's guidance on accounting for duty paid on alcohol and volumes of unsaleable draught products.

We also comment on three recent cases relating to (1) the granting of an interim injunction by the High Court pending the outcome of the taxpayer's appeal to the First-tier Tribunal; (2) revocation of a taxpayer's status as a registered dealer in controlled oils; and (3) the variation of directions when an appeal to the Court of Appeal was pending in a case concerning the Alcohol Wholesalers Registration Scheme.

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Changes to customs authorisations following a no-deal Brexit

On 6 March 2019, HMRC published guidance on how leaving the EU without a deal on 31 October 2019 will affect existing authorisations to use special and simplified customs procedures or other facilitations. more›

Using transitional simplified procedures to make declarations

On 22 March 2019, HMRC published guidance on submitting declarations when importing to the UK from the EU using transitional simplified procedures. more›

Pubs Code Adjudicator publishes guidance on accounting for duty paid on alcohol and volumes of unsaleable draught products

On 10 April 2019, the Pubs Code Adjudicator published a summary of the responses it has received to the consultation which opened on 2 November 2018 on statutory guidance to ensure that pub owning businesses adopt an accurate and consistent approach to accounting for both the duty paid on alcohol supplied under a tied tenancy and the volume of draught beer and cider that will be saleable after allowing for waste. more›

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Q Ltd – interim injunction continued pending appeal

In *Q Ltd v HMRC*, in considering the balance of risk, the High Court continued an interim injunction pending the outcome of the taxpayer's appeal to the First-tier Tribunal (FTT). more›

Any comments or queries?

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Behzad Fuels Ltd – Upper Tribunal erred in law in directing HMRC to review its decision to revoke RDCO status

In *HMRC v Behzad Fuels (UK) Ltd*, the Court of Appeal has held that the Upper Tribunal (UT) partly erred in directing HMRC to review its decision to revoke the taxpayer's' status as a registered dealer in controlled oils (RDCO) on the basis that the taxpayer was not involved in laundering fuel. **more›**

Gardner Shaw – directions subject to a pending appeal should not have been varied

In *Gardner Shaw UK Ltd and others v HMRC*, the Upper Tribunal (UT) has held that the First-tier Tribunal (FTT) should not have varied directions which the FTT had previously issued, when they had been the subject of an unsuccessful appeal to the UT and when an appeal to the Court of Appeal was pending. **more›**

News

Changes to customs authorisations following a no-deal Brexit

On 6 March 2019, HMRC published guidance on how leaving the EU without a deal on 31 October 2019 will affect existing authorisations to use special and simplified customs procedures or other facilitations. If the UK does leave the EU without a deal businesses will need to check whether their current authorisations still apply.

If HMRC has authorised your business to place goods into a customs special procedure in the UK, this authorisation will remain valid in the UK after the UK leaves the EU, which means you can continue importing goods into the UK and suspending customs duties and import VAT.

Authorisation will remain valid in the UK if HMRC has authorised the placement of goods into a customs special procedure, including moving those goods into the EU.

If the UK leaves the EU without a deal, a business will not be able to receive goods under that authorisation in the UK if it is named on an authorisation issued by another EU customs authority allowing it to place goods into a customs special procedure in the UK.

Unless a business has had overdue tax returns or not paid tax or duties in the past, it is unlikely it will be required to provide a guarantee to cover its customs duty and import VAT in order to get full authorisation.

Authorisations issued by HMRC for transit simplifications and customs freight simplified procedures to make simplified declarations for goods imported from EU and non-EU countries, can still be used once the UK leaves the EU.

A copy of the guidance can be viewed here.

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Using transitional simplified procedures to make declarations

On 22 March 2019, HMRC published guidance on submitting declarations when importing to the UK from the EU using transitional simplified procedures.

There are two stages to making a declaration:

1. submission of a simplified frontier declaration to clear the goods from the border if importing controlled goods (or make an entry in the business' own records if importing standard goods); and
2. submission of a supplementary declaration for all goods.

The supplementary declaration for controlled goods must be submitted by the fourth working day of the month after the goods have arrived into the UK and the simplified frontier is accepted, or by the fourth working day of the month following the arrival of standard goods into the UK.

Controlled goods include those which must have a license to import, or excise goods such as alcohol and tobacco which have additional duties on them.

A copy of the guidance can be viewed here.

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Pubs Code Adjudicator publishes guidance on accounting for duty paid on alcohol and volumes of unsaleable draught products

On 10 April 2019, the Pubs Code Adjudicator published a summary of the responses it has received to the consultation which opened on 2 November 2018 on statutory guidance to ensure that pub owning businesses adopt an accurate and consistent approach to accounting for both the duty paid on alcohol supplied under a tied tenancy and the volume of draught beer and cider that will be saleable after allowing for waste.

The Pub Codes Adjudicator confirmed that it is important for tied pub tenants to have information on the volume on which duty has been paid before they enter into a tied agreement. Under the Pubs Code, this information must be provided to new tenants in the form of a Pubs Code profit and loss statement.

Two new paragraphs have been added to the initial guidance which deal with pub-owning businesses which have to rely on information from third party suppliers which is not under their direct control.

A copy of the guidance can be viewed here.

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Case reports

Q Ltd – interim injunction continued pending appeal

In *Q Ltd v HMRC*[1], in considering the balance of risk, the High Court continued an interim injunction pending the outcome of the taxpayer's appeal to the First-tier Tribunal (FTT).

Background

Q Ltd (the taxpayer) was an HMRC authorised warehousekeeper (AW), which enabled it to store goods on which full excise duty had not been paid. A condition of AW approval is that certain measures are in place under Excise Notice 196 (EN196) to identify potential fraud risks.

In 2017, HMRC revoked the taxpayer's duty representative status on the basis that it was not a fit and proper person to hold such authorisation. The taxpayer brought judicial review (JR) proceedings on the grounds that EN196 imposed duties on AWs which HMRC should itself be carrying out and EN196 was a breach of EU law. Permission to apply for JR was refused and that refusal was appealed to the Court of Appeal. The Court of Appeal granted permission to appeal and the JR continued in the Court of Appeal. Whilst the JR proceeded, the taxpayer applied to HMRC for temporary registration as a duty representative. The application was refused and the taxpayer appealed to the FTT.

In December 2018, HMRC revoked the taxpayer's AW status, resulting in an appeal to the FTT and the instant application for injunctive relief to prevent HMRC's decision from taking effect. The High Court granted an interim injunction on 27 December 2018. In January 2019, the taxpayer applied to HMRC for temporary AW registration. This application was refused and the taxpayer appealed to the FTT. The instant decision concerns the return hearing for a continued injunction to allow the taxpayer to accept duty suspended goods into its warehouse pending the outcome of its appeal to the FTT.

High Court judgment

The parties agreed that the High Court has jurisdiction to grant an injunction pending the outcome of an FTT appeal[2] and that, as a matter of domestic law, an interim injunction cannot be granted in support of an appeal to the FTT. The High Court could not therefore grant an injunction on the basis of domestic law. However, the parties agreed that *ABC Ltd v HMRC*[3] established that in accordance with Article 6, European Convention of Human Rights (ECHR), where in an appeal before the FTT the FTT is unable to provide an appellant with a remedy before it is forced out of business, an injunction can be granted.

The parties disagreed as to whether the taxpayer's evidence was sufficiently compelling to demonstrate that the appeal would be effective. As confirmed in *ABC*, documentary financial evidence and a statement from an independent professional who does more than simply reformulate the taxpayer's stated opinion are required. Only if the evidence is satisfactory will the Court consider the balance of convenience and decide whether to provide a remedy to ensure the effectiveness of an appeal. The taxpayer claimed that two-thirds of its customers were affected by the AW status revocation and it estimated reputational damage and lost business in the region of 40–60%.

HMRC argued that the taxpayer's evidence was speculative and did not prove that the taxpayer would go out of business.

1. [2019] EWHC 712 (QB).
2. See section 37 Senior Courts Act 1981.
3. [2017] EWCA Civ 956.

The Court was satisfied that the taxpayer had adequately demonstrated that it would lose significant business, but it had failed to provide reliable evidence of the financial value of such loss. There was also no explanation as to why the taxpayer could not change its client base so as not to rely on AW status. As such, the revocation would not be so fundamentally disastrous so as to leave the taxpayer unable to carry on business before its appeal to the FTT was heard. The application for injunctive relief in reliance on *ABC* and Article 6 ECHR was refused.

The taxpayer further argued that the JR proceedings challenged the incompatibility of EN196 with EU law. Additionally, EN196 implements EU Directive 2008/118/EC. The taxpayer relied on *Factortame*[4], which confirmed that an injunction can be granted as an effective remedy for infringements of EU law. *Factortame* applied the *American Cyanamid*[5] principles in considering an injunction, namely: (i) whether there was a serious issue to be tried; (ii) whether there would be an adequate remedy in damages if an injunction was granted; and, (iii) the balance of convenience.

The Court was satisfied that the injunction threshold had been met. Although the Court could not comment on the strength of the EU law arguments, the granting of permission in the JR proceedings by the Court of Appeal meant that the Court of Appeal considered the taxpayer's arguments to be sufficiently meritorious so as to justify the granting of permission. The EU law incompatibility argument was not so fanciful or weak that the *Factortame* threshold was not met.

Having considered all of the circumstances, the Court decided that injunctive relief should be continued. There was no doubt that the inability to receive duty suspended goods would cause significant commercial damage to the taxpayer. Additionally, the appeal against the refusal to grant temporary authorisation was to be heard by the FTT shortly after the injunctive relief hearing and therefore the period of potential risk for HMRC would be limited.

Comment

The judgment is a helpful reminder of the test in which interim relief can be granted when there are on-going proceedings, particularly where interim relief cannot be granted as a matter of domestic law.

The decision also provides useful guidance on the nature and extent of the evidence required in order for injunctive relief to be granted pursuant to *ABC* where an appeal is pending. It also highlights the importance of the *American Cyanamid* principles in determining whether injunctive relief should be granted.

A link to this judgment is not currently available.

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4. *Factortame v Secretary of state for Transport, ex parte Factortame & Ors* (No 2) [1991] AC 603.
5. *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

Behzad Fuels Ltd – Upper Tribunal erred in law in directing HMRC to review its decision to revoke RDCO status

In *HMRC v Behzad Fuels (UK) Ltd*[6], the Court of Appeal has held that the Upper Tribunal (UT) partly erred in directing HMRC to review its decision to revoke the taxpayer's status as a registered dealer in controlled oils (RDCO) on the basis that the taxpayer was not involved in laundering fuel. However, the UT was correct to direct that the review was to be undertaken by reference to HMRC policy in force at the time of its original decision.

Background

Behzad Fuels Ltd (the taxpayer) was a bulk supplier of diesel with an RDCO licence. In June 2009, it received a customer complaint that the fuel it supplied was not roadworthy. The taxpayer asked HMRC to test the fuel which was found to be contaminated with red diesel. The relevant vehicle was seized pending a fee-based 'restoration agreement' that all traces of red diesel were to be removed within 24 hours of release. Following release, HMRC re-tested the fuel and found further traces of red diesel. The vehicle was seized for a second time pending a further fee-based restoration agreement. The agreement warned the taxpayer of HMRC's 'three strikes' policy when seizing vehicles.

The taxpayer asked HMRC to return the fee it had paid, on the basis that it had emptied the running tank to the extent physically possible and the red diesel remaining was simply residual particles which were contaminating the tank. HMRC refused this request.

On 4 March 2013, further tests were carried out by HMRC and red diesel was detected in the storage and running tanks of four vehicles. A bleaching agent, the result of a former employee's unauthorised experiments on biodiesel purification, was also discovered. HMRC issued a Seizure Information Notice, seizing the vehicles on 5 March 2013. The fuel was liable to forfeiture.

The taxpayer requested restoration of the vehicles. This request was refused and the decision was upheld on review on 15 July 2013 (the Restoration Decision). The discovery of the bleaching agent suggested laundering, even though the red diesel was minimal and an expert determined that it was probably due to an error, or poor practice, rather than by a determined effort to lauder fuel to make a profit. The Restoration Decision was appealed to the First-tier Tribunal (FTT).

Additionally, on 5 November 2013, the presence of laundered fuel led to the revocation of the taxpayer's RDCO licence and vehicle seizure (the Revocation Decision). This decision was upheld on review on 18 February 2014 and the taxpayer appealed to the FTT.

FTT decision

Restoration Decision (the First FTT Decision)

The FTT held that HMRC did not sufficiently consider contemporaneous evidence regarding the contamination of the vehicles to reasonably make the Restoration Decision. HMRC were directed to review the Restoration Decision taking account of the explanations for the presence of the bleaching agent and the proportionality of restoring the vehicles for a fee. HMRC issued a revised restoration decision which maintained the restoration refusal (the Second Restoration Decision). The taxpayer appealed this decision to the FTT.

6. [2019] EWCA Civ 319.

The Second Restoration Decision and the Revocation Decision (the Second FTT Decision)
The FTT dismissed the appeal against the Second Restoration Decision. HMRC had not acted unreasonably in using the 'three strikes' policy, of which the taxpayer was aware. Despite considering whether the 2009 incidents were one event and the seizures were self-referred, the FTT concluded that the taxpayer had received clear warnings and yet not all traces of red diesel had been removed. Although the FTT accepted that the self-referral had not been considered by HMRC, such consideration would not have changed HMRC's decision.

The FTT also dismissed the appeal against the Revocation Decision. It was reasonable for the holder of an RDCO license to be expected to uphold higher standards. Despite taking account of irrelevant factual issues, the large quantities of laundered fuel justified HMRC's decision. No review of the decision was directed by the FTT as it considered that HMRC would reach the same decision if such a review was undertaken.

The taxpayer appealed this decision to the UT.

UT decision
The UT allowed the taxpayer's appeal.

The Second Restoration Decision
The UT held that the 'three strikes' policy did not cover non-deliberate, inadvertent misuse of controlled oil. HMRC's strict policy could not have led to a proper consideration of proportionality. Additionally, it was possible that the 2009 events could be one seizure and there had been no consideration of whether the fuel in all four vehicles came from the same source. In the view of the UT, if proportionality, in conjunction with negligent or inadvertent behaviour, had been considered, HMRC may have arrived at a different decision. As such, the FTT erred in refusing a further review of the Second Restoration Decision.

The Revocation Decision
The UT noted that (i) the FTT refused a further review because in its view large quantities of laundered fuel on the premises demonstrated a breakdown in company procedures and due diligence which did not warrant RDCO status; and, (ii) HMRC had not considered that it's policy does not cover non-deliberate misuse of controlled oils. In the view of the UT, consideration of irrelevant factors would not have led to the same conclusion. HMRC had not considered proportionality. As such, the FTT erred in refusing a further review of the Revocation Decision.

The errors of law were so significant that the UT directed the Second Restoration Decision and the Revocation Decision be set aside. HMRC was directed to carry out a further review of the decisions taking account of the subsequent findings of fact and proportionality.

HMRC appealed to the Court of Appeal.

Court of Appeal judgment
The Court of Appeal allowed HMRC's appeal in part.

HMRC appealed on the grounds that the UT had erred in law in:

1. directing that the review of the Revocation Decision be carried out with reference to the policy in force at the time of the original decision, rather than the current policy; and
2. holding that HMRC must review the Second Restoration Decision and the Revocation Decision on the basis that the taxpayer was not involved in laundering fuel, where there had been no such finding of fact.

The Court considered it prudent to consider ground 2 before turning to ground 1.

Ground 2
HMRC contended the taxpayer had insufficiently explained the presence of laundered oil. To review on the basis that no fuel laundering took place risked HMRC considering the taxpayer as "fit and proper", even if it was not satisfied of such fact. The Second FTT Decision was correct to not reach a positive conclusion regarding the taxpayer's involvement in laundering oil as it was not persuaded of the taxpayer's guilt either way.

HMRC also argued that the burden of proof had been reversed. The onus was on the taxpayer to prove HMRC could not reasonably have reached its original decisions and that appropriate policies and procedures were in place. No evidence had been provided that the taxpayer was not involved in laundering at the time.

The taxpayer contended that the UT did not exceed its statutory powers or err in law in directing HMRC to review its decisions. The Second FTT Decision had considered the taxpayer's involvement in laundering fuel and had deliberately stopped short of making any positive finding. Any further review by HMRC had to be carried out on the basis that the taxpayer was not involved in laundering fuel.

The Court of Appeal considered the Second Restoration Decision and the Revocation Decision separately.

The Second Restoration Decision
The Court reiterated the decision had to be one that HMRC "could not reasonably [have] arrived at". The question of proportionality, with regard to FTT findings of fact, was to be considered. The Court did not understand what justification there could be for requiring the review to proceed on the basis of no taxpayer involvement in laundering fuel. The FTT had deliberately left the question open, unable to reach a firm view. In the view of the Court, fairness required the further review to start from the same inconclusive position and HMRC should be at liberty to consider fresh evidence, without being obliged to assume from the outset that the taxpayer was not involved in laundering fuel.

The Court did not accept HMRC's submission regarding reversal of the burden of proof. The appropriate test is satisfaction that the decision could not reasonably have been arrived at. As such, the Court held the UT erred in law and there was no good reason for not conducting a review on the basis of the FTT's stance in the Second FTT Decision.

The Revocation Decision
The Court held the same conclusion must apply to the Revocation Decision. HMRC must be allowed to make decisions by considering and evaluating evidence regarding the taxpayer's involvement in laundering fuel. It was not for the UT to direct HMRC to go behind the FTT findings of fact.

Ground 1
HMRC contended that it made no sense to conduct a review by reference to policy no longer in force as it would mean the taxpayer would be judged by a different standard to other traders.

In the view of the Court, the UT was correct to direct that the further review be based on HMRC policy in force at the time of the original decision. The general principle is that a review decision should be conducted by reference to the facts and law as they existed at the time. The UT only had jurisdiction to require HMRC to conduct a review of the original decision, not to conduct a review in light of circumstances and policy in force at the date that the further review is carried out. It was only fair that the taxpayer should be judged by the same standards as applied at the time of the original decision.

As such, the Court allowed HMRC's appeal on ground 2, but dismissed the appeal on ground 1.

Comment
This judgment provides useful guidance on the application of the FTT's fact finding and confirms that the FTT cannot assert facts which have not been found, as the basis for review.

The judgment also confirms that if HMRC is directed to review and/or remake an original decision, it is to be done so on the basis of the legislation, policy or guidance, that was in force at the time of the original decision.

A copy of the judgment can be found here.

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Gardner Shaw – directions subject to a pending appeal should not have been varied

In *Gardner Shaw UK Ltd and others v HMRC*[7], the Upper Tribunal (UT) has held that the First-tier Tribunal (FTT) should not have varied directions which the FTT had previously issued, when they had been the subject of an unsuccessful appeal to the UT and when an appeal to the Court of Appeal was pending.

7. [2018] UKUT 419 (TCC).

Background

The circumstances of the underlying substantive appeals are set out in the decision of the UT in *HMRC v Smart Price Midlands Limited*[8] and it is not necessary to set them out here. They concern the introduction of the Alcohol Wholesalers Registration Scheme (AWRS) with effect from 1 April 2016. The underlying appeals by the appellants are against HMRC's decision, in each case, that they are not fit and proper persons to carry on the controlled activity of wholesale trade in duty-paid alcohol.

Between November 2016 and May 2017, the FTT issued directions in respect of the substantive appeals which included a requirement that HMRC send a list of all documents which were considered by the relevant HMRC officer when reaching his decision. The directions included a provision that any party could apply at any time 'for the directions to be amended, suspended or set aside'.

HMRC applied to the FTT to vary the disclosure direction, seeking an order for standard disclosure i.e. an order that it only disclose those documents on which it intended to rely or that it intended to produce at the substantive appeal hearing.

HMRC's application was refused. The FTT was of the view that the case was one in which it was exercising a supervisory jurisdiction over decisions made by HMRC, and concluded that a more extensive order for disclosure was necessary for the fair hearing of the substantive appeals. Accordingly, any confidential material considered by the decision-maker should be included in HMRC's list of documents. HMRC could then apply, on a case by case basis, to exclude any confidential material from disclosure.

HMRC appealed this decision to the UT. The FTT ordered a stay of the substantive appeals until after the UT's decision.

The UT rejected HMRC's appeal and HMRC applied for permission to appeal. The UT refused permission to appeal and HMRC applied to the Court of Appeal for permission to appeal.

HMRC also applied to the FTT for a further stay of the substantive appeals but that application was refused by the FTT on the basis that the potential prejudice to the taxpayers in delaying the substantive determination was considerably greater than the potential prejudice to HMRC in having to conduct a disclosure exercise that the Court of Appeal might later decide to be inappropriate.

HMRC then applied to the FTT to vary the disclosure direction to exclude 'sensitive' documents that did not support the taxpayers' case or were not adverse to HMRC's case.

FTT decision

HMRC's application was granted.

The appellants objected to the application on the basis that the disclosure direction had already been unsuccessfully appealed to the UT and was subject to a pending appeal to the Court of Appeal.

8. [2017] UKUT 465 (TCC).

HMRC argued that:

- the FTT had held the disclosure direction could apply on a case-by-case basis
- there was a change in circumstances because there was new evidence of the substantial cost to HMRC in carryout the disclosure exercise
- this was the first application to vary the directions
- the circumstances were such that the variation was in the interests of justice.

Rule 5(2) of the FTT Rules gives the FTT discretionary power to vary directions. The CPR equivalent is CPR Rule 3.1(7), which was considered in *Tibbles v SIG Plc*[9]. *Tibbles* considered the circumstances in which a court might vary or revoke a previous interim decision giving directions. Where there is no material change of circumstances and no prior misleading of the court, only a 'rare' case and something 'out of the ordinary' will lead to a rejection of the normal appeal procedure in favour of varying an interim order.

In the view of the FTT, of all the circumstances described in *Tibbles* in which it might be appropriate to vary the terms of an interim order, only the residual category of something 'rare' and 'out of the ordinary' could assist HMRC.

In allowing HMRC's application, the FTT held that it would be against the interests of justice to require HMRC to carry out the full disclosure exercise previously ordered because:

- the additional documents sought on disclosure would be irrelevant and the taxpayers were adequately protected by HMRC's acceptance that documents that supported their case would be disclosed;
- the very substantial cost that would be involved, which, since the documents were irrelevant, would inappropriately increase the costs and time incurred of all parties; and
- the disclosure exercise would take four months which would be contrary to the taxpayers' interests in having an early resolution of their appeals.

The taxpayers appealed to the UT.

UT decision

The taxpayers' appeal was allowed.

In the view of the UT, the fact that the FTT was persuaded that there was a more appropriate and better approach to disclosure, contrary to the decision of the UT, was not capable of being a reason why, exceptionally, the FTT should revisit and change its earlier direction on disclosure.

The fact that there had been an appeal to the UT was a strong reason why the disclosure direction should not be varied by the FTT. The appropriateness of the disclosure direction had already been reviewed by the UT and upheld and an appeal to the Court of Appeal was pending. The interests of justice include upholding finality of court and tribunal decisions and not undermining the appeal process.

9. [2012] EWCA Civ 518.

Furthermore, there had been no change in circumstances. HMRC's belated realisation of the cost involved in the disclosure exercise did not amount to something out of the ordinary that would justify revisiting the directions.

Although the taxpayers had an interest in having the substantive appeals determined as soon as possible, a potential delay of four months while disclosure was carried out, as the taxpayers wished it to be, could not amount to circumstances out of the ordinary that justified revisiting the order for disclosure.

Comment

The UT held that there was no basis on which a judge could reasonably conclude that this was one of the rare or out of the ordinary cases where it was appropriate for the FTT itself to vary the terms of the directions previously issued. The application for variation was, in reality, an attempt by HMRC to have a 'second bite of the cherry'.

The UT's decision serves as an important reminder that only in exceptional circumstances will it be appropriate to vary a case management decision which is the subject of a pending appeal.

A copy of the decision can be viewed here.

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