

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2009-404-005397

BETWEEN JACQUELINE JIAO, HSUEH W HUANG
& SHOU-CHEN CHIAO
Appellant

AND THE COMMISSIONER OF INLAND
REVENUE
Respondent

Hearing: 15 September 2009

Appearances: J E Dorbu for Appellant
R Roff for Respondent

Judgment: 15 September 2009

ORAL JUDGMENT OF VENNING J

Solicitors: Crown Law Office, Wellington
Murdoch Price, Auckland
Copy to: J E Dorbu, Auckland

Introduction

[1] By notice of appeal filed in this Court on 24 August 2009 the appellants seek to appeal from a decision of the Taxation Review Authority delivered on 5 August 2009 refusing to recall an earlier judgment in that Authority delivered on 14 May 2009. The Commissioner takes a preliminary point. The Commissioner submits there is no jurisdiction for the appeal. He seeks to have it struck out.

Background

[2] The substantive proceedings before the Taxation Review authority were heard at Auckland on 27 and 28 January 2009. In a decision delivered on 14 May 2009 the Authority delivered a decision determining the appellants' challenge against them.

[3] On 25 May the appellants by memorandum, sought to have the Taxation Review Authority recall the judgment of 14 May. The application for recall was opposed. Affidavits were exchanged. The parties agreed the application for recall would be dealt with on the papers. The Judge delivered a decision on 5 August declining the appellants' application for recall.

Issue

[4] The issue for the Court is whether the decision declining the application for recall delivered on 5 August 2009 was one from which the appellant has a right of appeal.

Decision

[5] The start point must be the relevant statutory provision which is s 26A of the Taxation Review Authorities Act 1994. Counsel accept that is the relevant section as the substantive proceedings involved a challenge by the appellants to the Commissioner's assessment.

[6] Section 26A provides for a right of appeal as follows:

- (1) Unless subsection (2) applies, the determination by an Authority of a challenge may be appealed to the High Court if—
 - (a) The amount of tax involved in the appeal is \$2000 or more; or
 - (b) The amount of net loss involved in the appeal is \$4000 or more.

Counsel accept subs (2) does not apply.

[7] The Act is silent on the procedure to be adopted in relation to such an appeal. As a consequence the High Court Rules apply: r 20.1.

[8] Ms Roff relies on the Court of Appeal decision of *M & J Wetherill Company Ltd v Taxation Review Authority* (2004) 21 NZTC 18,924 (CA) to submit that no right of appeal exists under s 26A from the decision to decline the recall application as such an application is, she says, in the nature of an interlocutory application rather than a final determination.

[9] In *Wetherill* the Court of Appeal held that no right of appeal existed under s 26 of the Taxation Review Authority from interlocutory decisions of the Taxation Review Authority. The Court concluded that the reference in s 26 of the Act to determination suggested the decision appealed from must be final. The Court concluded that there was no right of appeal on interlocutory matters provided by s 26(1).

[10] While the section considered by the Court of Appeal in *Wetherill* was a different section to that before the Court in the present case, there is no material difference in the relevant part of the wording. Section 26(1) referred to “The determination of an Authority on any objection”. Section 26A(1) refers to “the determination by an Authority of a challenge”. In both cases the right of appeal is from the determination of the Authority on the substantive matter in issue, in s 26 the objection, and in s 26A, the challenge.

[11] Mr Dorbu submitted that the decision of *Wetherill* could be distinguished on a number of grounds. First, he submitted that *Wetherill* was restricted to consideration of interlocutory applications in the course of the substantive proceedings and before a substantive decision had issued whereas the application to recall was made after the decision. Mr Dorbu was correct that the *Wetherill* decision dealt with an interlocutory decision in the course of the proceedings. But the issue is not the timing of the application, but whether the right of appeal provided in s 26A is restricted to the determination of the objection (or the challenge in this case) as the Court of Appeal considered it was in *Wetherill* or whether it could apply to the decision to decline to recall in this case.

[12] The challenge has been determined by the Authority. It was determined by the decision on 14 May. The application for recall and the decision on that application was not “a” or “the” determination of a challenge to the Commissioner’s assessment.

[13] The application for recall is in the nature of an interlocutory application. The application was made, as noted, by way of memorandum and was dealt with on the papers. It followed the substantive determination in May. If not formally an interlocutory application then it was certainly in the nature of an interlocutory application. Counsel referred to the provisions of the District Court Rules 1992, and noted the definition in the interpretation section which provided for interlocutory applications. Counsel agreed that the District Court Rules apply when the Taxation Review Authority Regulations 1994 are silent as to procedure. The interlocutory application is defined as means an application to the Court in any proceeding for an order or a direction relating to a matter of procedure or for some relief ancillary to that claimed in a pleading and includes an application for rehearing and an application to review an order made or a direction given on any interlocutory application.

[14] While an application for recall is not expressly referred to in the definition of interlocutory application it is essentially a matter of procedure or in the nature of an application for rehearing. The fact that it comes after the substantive decision rather than before it, is in my judgment immaterial. In any event the issue is determined by

the wording of the relevant statutory provision. The right of appeal only lies from the determination by an Authority of a challenge. As noted, that determination was on 14 May 2009. The application for recall was not a determination of a challenge. That determination had been earlier.

[15] In *Wetherill* the Court of Appeal went on to note that a number of other reasons supported the decision that an appeal did not lie from an interlocutory application. It noted that it would be unlikely Parliament intended to allow an extended period to prepare cases for appeal on interlocutory decisions. That would enable objection hearings to be stonewalled for considerable periods. Equally it is unlikely that where a statutory right of appeal is provided Parliament would have permitted an application for recall, which if unsuccessful would then permit an appeal from that decision, some time after the substantive determination itself and otherwise outside the appeal period.

[16] In litigation generally and in taxation matters in particular there is a need for finality. It is for that purpose that the right of appeal is restricted to the determination of the substantive challenge.

[17] Mr Dorbu also sought to distinguish the *Wetherill* case on the basis that the nature of the application for recall was essentially substantive in that, in his words, it “finalised the position” unlike an interlocutory application. I am unable to accept that submission. The challenge was finalised by the substantive determination of 14 May 2009. It was not finalised by the recall application.

[18] Mr Dorbu submitted that, if necessary, the appeal could be amended to be directed at the substantive decision of 14 May and an application made for leave to extend the time. I am not prepared to deal with that matter on the basis of an oral application. If there is jurisdiction for leave to appeal the substantive May decision out of time that must be for another day. It would require an application for leave to appeal accompanied by an affidavit. The Commissioner would have the right to oppose such application on its merits if, indeed, there is jurisdiction for such an application. That must be a matter for another day.

Result

[19] For those reasons it follows that I accept the submission advanced on behalf of the Commissioner that there is no jurisdiction for this appeal as there is no right of appeal against the decision of the Taxation Review Authority to decline the application for recall. It was not a determination of the challenge.

[20] The appeal is dismissed.

Costs

[21] Costs should follow the event. There will be costs to the Commissioner on a 2B basis for steps taken in relation to the appeal and for today's hearing which, given the appearance this morning and this afternoon, is close to half a day.

Venning J