

CASE SUMMARY

Commissioner's appeal to Court of Appeal successful: there is no right of appeal to a strike out by the TRA

Decision date: 05 February 2025

CSUM 25/04

Case

Commissioner of Inland Revenue [2025] NZCA 5

LEGISLATIVE REFERENCES

Taxation Review Authority Act 1994

Senior Courts Act 2016

LEGAL TERMS

Strike out.

Interlocutory decision [an interlocutory decision is a decision to manage the progress of a case before the Court prior to the substantive issues in the case being determined]

Summary

This decision is consistent with the outcome in two earlier decisions that interlocutory decisions of the TRA were not amenable to appeal (*MJ Wetherill* (2004) 21 NZTC 18,924 (CA) and *Jiao* (2009) 24 NZTC 23,763 (HC)). These cases were applied to conclude a strike out decision did not determine the Taxpayer's tax challenge. Rather it brought to challenge to an end without addressing the substantive tax issues raised by the challenge. "Determine" for the purposes of the TRA means decide the merits of the tax challenge and just the ending of a tax challenge. As a result, there was no right of appeal under the Taxation Review Authorities Act 1994 to interlocutory decisions.

Impact

This decision returns the law to the position as it was previously understood; that an interlocutory decision of the TRA does not determine a tax challenge even if it ends that tax challenge and so cannot be appealed.

Facts

Ms Kaur commenced proceeding in the TRA to challenge assessments by the CIR. Due to Ms Kaur failure to meet timetabling requirements the parties agreed that the TRA should issue “unless orders” which the TRA did with the consent of the parties. If either party failed to meet the timetable in the unless order, their pleadings would be struck out and the unless order sealed. This would have the effect that the tax challenge would be ended.

Ms Kaur failed to file her briefs of evidence with the TRA (although she did serve them on the CIR) and failed to file and serve an index of documents for an agreed common bundle. The TRA struck out her challenge on 19 October 2022 ([2022] NZTRA 3).

Because the strike out order had been sealed by the TRA, the TRA considered it was unable to revisit the order made (decision dated 9 Nov 2022 [2022] NZTRA 4). Ms Kaur lodged an appeal against the decision of the TRA. She subsequently also commenced a judicial review of the TRA’s decision in case there was no right of appeal against the TRA’s decision.

The High Court accepted there was a right of appeal (*Kaur v TRA and CIR* [2023] NZHC 2748). In deciding this, the High Court referred to s 56(4)(a) of the Senior Courts Act (that allows a decision striking out a proceedings to be appealed) to conclude there was no compelling reason the same approach should not be applied to strike out by an inferior court (such as the TRA).

Having concluded an appeal could be made, the High Court then considered whether to allow the appeal.

Noting the non-compliance was the fault of Ms Kaur’s lawyer the High Court concluded “by a fine margin” to allow the appeal to the strike out.

The High Court also treated the appeal as a *de facto* application for relief from the effect of the unless orders (although no formal application for relief had been made) and considered relief could be granted by allowing the appeal.

The High Court did not decide on the application for a judicial review.

The CIR appealed to the Court of Appeal.

Issues

1. Was there a right to appeal from a strike out decision by the TRA?
2. If such a right exists, should the appeal to the strike out on these particular facts be allowed?
3. Could the High Court treat the appeal as a *de facto* application for relief?
4. If it could not be appealed, could the TRA's strike out decision be judicially reviewed?

Decision

The Court of Appeal affirmed its earlier decision in *Wetherill* that it is not possible to appeal interlocutory decisions by the TRA, such as a strike out decision:

[35] There is no general right of appeal to the High Court from decisions of the TRA. As the courts have said before, the need for efficient administration of justice and finality in taxation matters required the right of appeal to be restricted.

...

[42] Although the interlocutory application at issue in *Wetherill* was not a strike-out application, and was of a relatively minor nature, the Court's reasoning and conclusion is clearly not so limited. **The Court considered that a right of appeal under s 26 would only arise following a final resolution of an objection on its merits. The Court's reasoning would suggest that no right of appeal arises in relation to strike-outs on procedural grounds. In such cases the taxpayer has not been unsuccessful on the merits of their objection, but rather on their failure to adhere to a timetabling direction or similar.** A right of appeal might exist, however, when an objection is struck out on the basis that it had no prospect of success. This would likely amount to a final decision on the merits and hence be appealable.

...

[45] **We agree with the Court in *Wetherill* and with the Commissioner in this case that the wider scheme of the TRAA supports the conclusion that a "determination" refers to a final resolution of an objection (or challenge) on its merits.** In addition to ss 3 and 25 (as referred to in *Wetherill*), ss 13 and 13A refer to the TRA's function as being to hear and determine objections and challenges. Sections 16 and 18 both refer to the "hearing and determination" of a proceeding or objection. Those provisions clearly suggest a determination would involve a hearing and assessment of the actual objection or challenge.³⁵

[46] Furthermore, ss 20 and 21A(2) of the TRAA both provide that if a party is neither present nor represented at the hearing of a proceeding the TRA may strike out the proceeding, determine the proceeding or adjourn the hearing. **The clear distinction between striking**

out and determining a proceeding is again consistent with the conclusion that a strike-out for procedural reasons is not a determination.

...

[51] The matter at issue in this case and the TRA cases cited above is the definition of a “determination” for purposes of the TRAA, not which interlocutory decisions are appealable as of right and which require leave under the Senior Courts Act. The relevant provisions and context of the Senior Courts Act are materially different to the TRAA. **We do not agree that the language of s 56(4) can in effect be imported into ss 26 and 26A of the TRAA to support the proposition that parties should have a right of appeal against any strike-out (or dismissal) decision of the TRA.**

...

[56] **For the above reasons we find that “determination” for the purposes of s 26A is limited to decisions that finally determine challenges on their merits. This excludes decisions that dispose of challenges other than on their merits, including by dismissal or strike-out.**

[57] The strike-out decision of the TRA on 19 October 2022 was not a decision that finally determined Ms Kaur’s challenge on the merits and was therefore not a determination for purposes of s 26A. There was accordingly no right of appeal to the High Court. The Judge therefore did not have jurisdiction to allow the appeal and the orders made must be set aside.

[Emphasis added]

The Court concluded that even if there was a right to appeal in these circumstances, the appeal should not have been allowed (at [63]).

The Court considered the High Court also erred when it treated the appeal as a *de facto* application for relief from the TRA’s sealed orders (at [64] to [65]).

The Court declined the taxpayer’s invitation to determine the judicial review proceedings and referred these back to the High Court while urging the parties to “agree a sensible and cost-effective procedure to adopt” for the judicial review (at [71]).

About this document

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