**KYVS and Tax Practitioners Board [2015] AATA 1027 (17 December 2015)**

Division: **TAXATION AND COMMERCIAL DIVISION**

File Number: **2015/6047**

Re: **KYVS**

 APPLICANT

And: **TAX PRACTITIONERS BOARD**

 RESPONDENT

**DECISION**

Tribunal **Deputy President S A Forgie**

Date **17 December 2015**

Place **Melbourne**

The Tribunal decides to:

1. dismiss the applicant’s application for review of a decision by the Taxation Practitioners Board dated 28 April 2015 because:
2. there is no enactment providing that applications may be made to the Tribunal for review of the decision made by the Taxation Practitioners Board; and

(2) consequently, the Tribunal does not have power to review that decision.

..........[sgd]..…………………….

**Deputy President**

**CATCHWORDS – *PRACTICE AND PROCEDURE*** *– jurisdiction –applicant sought review of decision made on complaint regarding alleged fraudulent conduct in 1980s – no enactment permitting an application to be lodged for review of that decision – no jurisdiction to review decision.*

**LEGISLATION**

*Administrative Appeals Tribunal Act 1975 ss 25(1)(a), 42A(4) and 43(2A)*

*Tax Agent Services Act 2009 s 60-5, 60-15 and 70-10*

*Freedom of Information Act 1982 s 4, 49 and 51A*

*Privacy Act 1988 s 6(1)*

**CASES**

*Commissioner of Taxation v Osborne* [*2003] FCA 387; (1990) 26 FCR 63; 74 ALD 407;
37 AAR 169*

**OTHER MATERIAL**

**REASONS FOR DECISION**

1. On 19 November 2015, KYVS applied for review of a decision made by the Taxation Practitioners Board (Board) regarding a complaint he had made about a person whom he alleged had fraudulently lodged taxation returns in relation to a Family Trust in the 1980s. I will call that person “XY”. KYVS wanted to have the taxation documents returned to him so that he could lodge amended returns. The Board had decided that it did not have jurisdiction to deal with the allegation as it could only deal with breaches of the Code of Professional Conduct as it applied to professional conduct occurring after 1 March 2010 and had no power to require the return of documents. It also noted that KYVS had concerns that XY might have been defrauding the Australian Taxation Office (ATO). KYVS took umbrage at the Board’s decision noting that, while he had concerns about XY’s activities in relation to the ATO, he had never suggested that XY might currently be defrauding the ATO. He sought review of the Board’s decision in order to correct that statement. I have decided that the Tribunal does not have jurisdiction to review either that statement or the Board’s decision as a whole. I gave my reasons for reaching that conclusion at the conclusion of the hearing I held to consider jurisdiction.

2. KYVS has asked for written reasons for my decision as he is entitled to do under s 43(2A) of the *Administrative Appeals Tribunal Act 1975* (AAT Act). The written reasons must comply with s 43(2B) of that legislation and so may be “*more elaborate*”[[1]](#footnote-1) than those given orally.

3. Section 25(1)(a) of the AAT Act provides that an enactment may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by that enactment. The *Tax Agent Services Act 2009* (TAS Act) is such an enactment. It is the enactment under which the Board is established.[[2]](#footnote-2) Section 60-15 sets out the Board’s functions which are:

“*(a) to administer the system for the registration of \*registered tax agents, BAS agents and tax (financial) advisers; and*

*(b) to investigate:*

*(i) applications for registration;*

*(ii) conduct that may breach this Act; and*

*(c) to impose sanctions for non-compliance with the \*Code of Professional Conduct; and*

*(d) to issue, by legislative instrument, guidelines to assist in achieving the functions mentioned in paragraphs (a), (b) and (c); and*

*(e) such other functions as are conferred on the Board by this Act, the regulations or any other law of the Commonwealth; and*

*(f) to do anything incidental or conducive to the performance of its functions.*”

4. Consistent with those functions, the TAS Act gives the Board specific powers to consider applications for registration as a registered tax agent or BAS agent and to make a range of decisions including granting or refusing applications, imposing conditions on registration and terminating or suspending registration. Section 70-10 identifies specific decisions that may be made by the Board and that are reviewable by the Tribunal. They are:

“*(a) a decision under section 20-25:*

1. *to reject an application for registration (including renewal of registration); or*
2. *to specify a condition to which registration is subject;*

*(c) a decision under section 20-40 to refuse to vary a condition to which registration is subject;*

*(d) a decision under subsection 20-50(1) not to determine a shorter period for making a renewal application;*

*(e) a decision under Subdivision 30-B or 40-A to terminate registration;*

*(f) a decision under section 30-20 to make an order or to specify a time period in respect of an order;*

*(g) a decision under section 30-25 to suspend registration (including a decision as to the length of the suspension);*

*(ga) a decision under Subdivision 40-A not to terminate registration;*

*(h) a decision under section 40-25 to determine a period during which an application for registration may not be made;*

*(i) a decision under subsection 60-125(4) to extend the period of time within which an investigation is to be completed.*

5. A decision made on a complaint about the actions of a person who acted for another in the 1980s is not a decision that is referred to in s 70-10. Therefore, the Tribunal has no power to review the Board’s decision. The consequence of the Tribunal’s not having power is that I must dismiss the application. My power to do so is implicit in the AAT Act but I am also given express power to do so under s 42A(4), which provides:

“*The Tribunal may dismiss an application without proceeding to review the decision if the Tribunal is satisfied that the decision is not reviewable by the Tribunal.*”

6. I suggested to KYVS that he might consider asking the Board to amend or annotate its record of decision dated 28 April 2015 by making a request to that effect under Part V of the *Freedom of Information Act 1982* (FOI Act). In order to make that request, he would first have to request the document under the FOI Act. He could apply for an amendment of the information about the allegation under s 49 or for an annotation under s 51A of the FOI Act. I would not presume to give any opinion as to whether he would be successful in his application. In order to be successful, the Board would need first to accept that a statement that he had made an allegation about XY was personal information about him. The expression “*personal information*” is defined in s 4(1) of the FOI Act and so in s 6(1) of the *Privacy Act 1988*.[[3]](#footnote-3) He would then need to address the matters set out in ss 49 and 51A of the FOI Act. On behalf of the Board, Mr Matheson offered to assist KYVS by sending him a summary of the procedural steps he needs to take should he decide to make a request under Part V of the FOI Act.

I certify that the six preceding paragraphs are a true copy of the reasons for the decision herein of

Deputy President S A Forgie,

Signed: ………......................[sgd]........................................

Administrative Assistant

Date of Hearing 17 December 2015

Date of Oral Decision 17 December 2015

Date of Written Reasons 4 January 2016

For the Applicant self represented

Support person for the Applicant Dr P Condliffe

Solicitor for the Respondent Mr J Matheson

Observer for Respondent by telephone Ms J Mills

1. *Commissioner of Taxation v Osborne* [2003] FCA 387; (1990) 26 FCR 63; 74 ALD 407; 37 AAR 169 at [33]; 65; 415; 598 per Pincus J, with whom Spender and French JJ agreed. [↑](#footnote-ref-1)
2. TAS Act; s 60-5 [↑](#footnote-ref-2)
3. “**personal information** *means information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not.*” [↑](#footnote-ref-3)