

BEFORE THE APPELLATE AUTHORITY
(Constituted under the Chartered Accountants Act, 1949)

APPEAL NO. 10/ICAI/2018

IN THE MATTER OF:

Ishaq Esmail Lakkadghat

...Appellant

Versus

Income Tax officer, 11(3)-1 Mumbai

...Respondents No. 1

**The Disciplinary Committee, Institute
of Chartered Accountants of India (ICAI)**

...Respondents No. 2

CORAM:

Hon'ble Mr. Justice M.C. Garg
Hon'ble Mr. Sunil Goyal
Hon'ble Mr. Kamlesh S. Vikamsey
Hon'ble Mr. Praveen Garg
Hon'ble Dr. Navrang Saini

Chairperson
Member
Member
Member
Member

PRESENT:

For the Appellant:

Nil

For the Respondents:

Mr. Ravinder Agarwal, Advocate along-with Mr. Suneel Kumar, Assistant Secretary and Ms. A. Aruna Sarma, Senior Executive Officer, Disciplinary Directorate, ICAI

ORDER

Date: 27.08.2018

1. Being aggrieved by the Report dated 14th October, 2015 and Order dated 27th May, 2017 (Impugned Order), passed by the Disciplinary Committee of the Institute of Chartered Accountants of India under Section 21B (3) of the Chartered Accountants Act, 1949 read with Rule 19 (1) of the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007, CA. Ishaq Esmail Lakkadghat (M. No. 120260), a practicing Chartered Accountant, Appellant herein, has filed this appeal against the Institute of Chartered Accountants of India and others, challenging the impugned order, whereby, the Disciplinary Committee holding him guilty under Clauses (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 awarded punishment of removal of name of the Appellant

from the Register of Members for a period of one year. The said Clause (7) of Part-I of the Second Schedule of the Act reads as under:

"Second Schedule:

PART-I: Professional misconduct in relation to chartered accountants in practice

A chartered accountant in practice shall be deemed to be guilty of Professional Misconduct, if he –

- (7) does not exercise due diligence, or is grossly negligent in the conduct of his professional duties;*

2. The brief facts of the instant appeal, as narrated in the aforesaid Report of the Disciplinary Committee of the Institute of Chartered Accountants of India, are as under:

2.1 *Shri S. D. Darde, ITO Mumbai (hereinafter referred to as the "Complainant") has filed complaint in his individual capacity dated 22nd March, 2010 against CA. Ishaq Esmail Lakkadghat, Mumbai (hereinafter referred to as the 'Respondent').*

2.2 *The Complainant in his complaint has alleged that as per Tax Audit Report of Dr. Mohd. Usmaan Shaikha (hereinafter referred as the Assessee) dated 25th October, 2007, Col No. 17 h (B), amount admissible u/s 40A (3) read with rule 6DD and computation thereof is mentioned as NIL while completing scrutiny assessment for AY 2007-08, it is seen that the assessee has made payment of consultancy charges amounting to Rs.5, 45,715/- to various Doctor which exceeds Rs.20, 000/-. The assessee has made this payment in cash which is exceeding Rs.20, 000/- and no tax has been deducted which is required u/s 194J of the Income Tax Act, 1961. These facts have not been mentioned in the Tax Audit Report certified by the Respondent.*

2.3 *A survey was conducted u/s 133A on 30th September, 2009. A statement on Oath of the assessee was recorded, wherein the assessee has agreed of the payment made in cash to various Doctors amounting to Rs.1,91,50,669/- for A.Y. 2008-09 and Rs.2,13,77,220/- for A.Y. 2009-10. No TDS has been deducted which is required u/s 194 J of the Income Tax Act, 1961.*

3. Accordingly, this complaint was taken up for investigation by the Director (Discipline), who vide Order dated 17th December, 2013, found the Appellant 'Prima Facie' Guilty of the professional misconduct falling within the meaning of aforesaid Clause (7) of Part I of the Second Schedule to the Chartered Accountants Act, 1949.

4. Thereafter the matter was examined by the Disciplinary Committee and after examination of the complaint, written submissions, all written and oral evidence, further replies and after hearing the parties, the Disciplinary Committee gave the following findings:-

4.1 As regard the allegation relating to the failure to report contravention of provision of Section 194J, the Respondent stated that since the Doctors did not provide any professional service to the Hospital, the provisions of Section 194J would not be attracted. In this regard, on perusal of Profit & Loss Account of the Hospital vis-à-vis working papers of the Respondent, it has been noted that consultancy charges were shown as expenses in the Profit & Loss Account of the Hospital. On being enquired from the Respondent about the same, he stated that as per the judgment passed by the Special Bench in case of "Merilyn Shipping and Transports-vs ACIT, Section 40 (a) (ia) is applicable only to the amounts of expenditure which are payable as on 31st March of every year and it cannot be invoked to disallow the amounts which have been actually paid during the previous year, without deduction of tax at source. Further, all payments were made to the respective doctors before 31st March, 2007. As per his belief, the payment made to the Doctors by way of reimbursement of the fees does not fall under the TDS Act and even if it falls, these payments would not be disallowable u/s 194J of the Income Tax Act.

4.2 In this regard, the Committee is of the view that it is for the assessee to reply on any judgment for making deduction of TDS on payment of consultancy fees u/s 194J. As per provision of the Income Tax Act, 1961 and Guidance notes on Tax Audit issued by the Institute, the Auditor is required to report as to whether any amount is inadmissible under Section 40 (a) the Income Tax Act, 1961. If the Assessee did not deduct TDS based on a judgment given in a particular case, the Respondent being a Statutory Tax Auditor was required to disclose the same in his report so as to enable the Income Tax Department to know the reason as to why TDS was not deducted by the Assessee u/s 194J of the Income Tax, 1961.

4.3 Since the Respondent failed to make proper disclosure as required by the Guidance note on tax audit, the Respondent is held guilty of Professional Misconduct falling within the meaning of Clause (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949.

5. Based on the above, the Disciplinary Committee found the Respondent, the Appellant herein, guilty of professional misconduct falling within the meaning of aforesaid Clause (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 and awarded the punishment as mentioned in Para (1) of this Order *supra*.

6. On the date fixed for hearing of the matter, the Appellant did not appear before us due to illness of his mother. Nor any Counsel appeared on behalf of the Appellant. However, vide letter dated 30th July, 2018, the Appellant filed his written arguments/submissions before us and requested that the same may be considered and the Appeal be heard by the Authority. No request for adjournment was made. Hence, we considered the same and proceeded to decide the appeal finally.

7. The first ground of appeal pertains to condone the delay in filing the appeal. The Appellant has mentioned that he was not aware of the process of filing of an appeal and sought guidance from the Institute of Chartered Accountants of India

to file the appeal and thereafter the appeal was filed. He also filed documents before us to this effect in support of his submissions. After considering the bonafide of the contention, the delay was condoned by the Authority and the Appellant was allowed to proceed with appeal.

8. The only issue in other grounds of appeal with us is that the Appellant who carried the audit u/s 44AB of the Income tax Act, 1961 of Dr. Usman Shaikh Prop, Faujiya Hospital, for the year ended on 31st March, 2007, did not report about non deduction of the tax u/s 194J of the Income tax Act, 1961, from professional charges amounting to Rs. 5,45,715/- paid by the said hospital to various doctors.
9. The facts in this case are very brief and are admitted. The Appellant submitted his report for the above audit vide report dated 23rd October, 2007 in Form No. 3CB of the Income Tax Rules, attaching therewith a further statement of particulars in Form No. 3CD of the Income tax Rules. As per clause 27(b) (i) of the Form 3CD there is a specific requirement to report :

“(i) Tax deductible and not deducted at all
(ii) Shortfall on account of lesser deduction
(iii) -----”

10. Mr. Ravinder Agarwal, the Learned Counsel appearing on behalf of the Institute of Chartered Accountants of India vehemently supported the Impugned Order. He also pointed out that against these columns; no figure has been mentioned whereas, as per the law, the Appellant should have mentioned here, the figure of consultation charges paid to doctors from whom no tax was deducted. Therefore, he has failed to do so and that is why, he is rightly guilty of the violation of Clause (7) of Part-I of Second Schedule.

11. The only defence taken by the Appellant before the Disciplinary Committee, which was reiterated before us, is that in such cases the Assessee (client) was not liable to make any TDS u/s 194J of the Income tax Act, 1961 and hence there is no negligence in non-reporting the same. He further

explained his contention that sometimes due to unavoidable reasons/circumstances, the Assessee (client) has collected Doctors Consultation Fees on behalf of those Doctors and the same has been paid back/returned to the doctors immediately. It was further explained that these are the payments made to the doctors and are not in any way expenses of the Assessee (client) and hence question of TDS does not arise.

12. Further, the Appellant has prayed that as he was passed Chartered Accountancy only in 2005, he was very new in the profession and it is possible that he did not understand the proper interpretation of Section 194J of the Income Tax Act 1961. Therefore he prayed that his mistake may be condoned and lenient view may be taken.

13. We have heard all the parties, examined all documents, evidences produced and pleadings on records. We have also examined the written submissions made by Appellant before us as well as before the Disciplinary Committee of the Institute.

14. It is very clear from the facts on record, which have been elaborated in detail in the order of Director (Discipline) and in the Impugned Report of the Disciplinary Committee that an Auditor was required to report instances where tax was deductible by the auditee but not deducted by him. The CBDT vide Notification No. 208/2006 dated 10th August, 2006 had widened reporting requirements of Form 3CD. This Form came into effect for all audit reports signed on or after 10th August 2006. Admittedly in this matter the audit was carried out for the year ended on 31.3.2007 and audit report of the same was signed on 23.10.2007. Thus, it was the duty of the Appellant to report such transactions in the Form 3CD, which he failed to do.

15. Even the contention of the Appellant that the payment which was made to Doctors are not expenses of the assessee, was found to be incorrect as the Profit & Loss Account of the said auditee for the year ended on 31st March, 2007 shows consultancy charges of Rs 6,54,380/- appearing in the expenses side. Thus, it is incorrect to say that these are not expenses of the assessee.

16. We have considered the submissions of the Appellant about being new in the profession and not being able to understand properly the ambit of section 194J of the Income Tax Act. However, it is a fact that he completely ignored the new reporting requirements imposed by the CBDT from 10th August, 2006, as detailed above. Therefore, we agree with the findings of the Disciplinary Committee that under the circumstances as present in the matter, the Appellant did not exercise due diligence in carrying out his professional duties, which is expected from him. Accordingly, we concur with the finding of Disciplinary Committee holding him guilty under the aforesaid Clause (7) of Part-I of the Second Schedule to the Chartered Accountants Act, 1949 and upheld the same.

17. We have also observed that in the Impugned Order, there is reference of Section 40(a) (ia) of the Income Tax Act, 1961 while discussing the said default under section 194J as well as in terms of the requirements of Guidance Note on Tax Audit. However, no specific finding has been given on the same in this regard in the Order passed by the Disciplinary Committee of the Institute.

18. Additionally, on examination of the complaint, we found that there was no complaint by the complainant about not reporting of transactions falling under Section 40(a) (ia) of the Income Tax Act, 1961, and also no show cause was given to the Appellant in this regard. No specific charge was framed on this.

19. Under the above circumstances, as no specific finding has been given by the Disciplinary Committee on this count, we understand that the same was mentioned for discussion only and the same is not relevant for the purpose of examining final decision of the Disciplinary Committee on the issue of the said default of non-reporting of transactions on which TDS was not deducted u/s 194J as complained by the complainant. Accordingly, we are not giving any finding on the issue.

20. As regards to the issue of quantum of punishment, the Appellant prayed for taking lenient view and explained that he was very new in the profession and he might not have been fully aware of the recent amendments in the law, and he also pleaded that the default was for a very small quantum.

21. Looking to all the facts involved and the fact that the Appellant fully co-operated in all proceedings at every level of enquiry, we feel that the "ends of justice" would meet, if the Appellant is awarded punishment to "Reprimand". We, accordingly modify the Impugned Order of the Disciplinary Committee to this extent. Though, further, we direct the Appellant to be more cautious in future while dealing with such situations.

22. The Appeal is disposed of accordingly. Interim orders, if any, are vacated.
No order as to costs.

Justice M. C. Garg
Chairperson

Sunil Goyal
Member

Kamlesh S. Vikamsey
Member

Praveen Garg
Member

Dr. Navrang Saini
Member