



THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA
(Set up by an Act of Parliament)

[PR/153/2021/DD/192/2021/BOD/677/2023]

ORDER UNDER SECTION 21A (3) OF THE CHARTERED ACCOUNTANTS ACT, 1949 READ WITH RULE 15(1) OF THE CHARTERED ACCOUNTANTS (PROCEDURE OF INVESTIGATIONS OF PROFESSIONAL AND OTHER MISCONDUCT AND CONDUCT OF CASES) RULES, 2007

In the matter of:

CA. Manoj Kumar Jain (M.No. 075666)
R-10/B-2, Sector 10, Raj Nagar,
Ghaziabad-201002.

.... Complainant

-Vs-

CA. Amit Agrawal (M.No. 075802)
Partner, M/s Amit S Agarwal & Co.,
Chartered Accountants
C/o Goel Khad Bhandar, Near Gopi Chowk, Badaun,
Uttar Pradesh – 243601.

.... Respondent

[PR/153/2021/DD/192/2021/BOD/677/2023]

MEMBERS PRESENT (In person):

CA. Rajendra Kumar P, Presiding Officer
Ms. Dolly Chakrabarty (IAAS, ret'd.), Government Nominee
CA. Priti Savla, Member

Date of Hearing and passing Order: 11th January 2024

1. The Board of Discipline vide its Findings dated **28th December 2023** was of the view that **CA. Amit Agrawal (M.No. 075802)** is **GUILTY** of Professional Misconduct falling within the meaning of Item (8) and (9) of Part I of the First Schedule to the Chartered Accountants Act, 1949.
2. An action under Section 21A (3) of the Chartered Accountants Act, 1949 was contemplated against **CA. Amit Agrawal** and communication dated **4th January 2024** was addressed to him thereby granting him an opportunity of being heard on **11th January 2024** which was exercised by him by being present before the Board through video conferencing. He confirmed the receipt of the Findings of the Board. He requested the Board to take a lenient view in the case as it was unintentional and it was a sole instance of misconduct in his professional career of around 30 years.
3. Thus, upon consideration of the facts of the case, the consequent misconduct of **CA. Amit Agrawal (M.No. 075802)** and keeping in view his representation before it, the Board decided to impose a Fine of **Rs.35,000/- (Rs. Thirty Five Thousand only)** upon him.

Sd/-

CA. Rajendra Kumar P
(Presiding Officer)

Sd/-

Ms. Dolly Chakrabarty (IAAS, ret'd.)
(Government Nominee)

Sd/-

CA. Priti Savla
(Member)

वही प्रतिलिपि होने के लिए प्रमाणित /
Certified to be true copy

[Signature]
निशा शर्मा / Nisha Sharma

वरिष्ठ कार्यकारी अधिकारी / Sr. Executive Officer
अनुशासनोपकरण निदेशालय / Disciplinary Directorate
इंस्टीट्यूट ऑफ चार्टर्ड एकाउंटेंट्स ऑफ इंडिया
The Institute of Chartered Accountants of India
आईसीआईएआई भवन, विश्वनाथ नगर, शाहदरा, दिल्ली-110032
ICAI Bhawan, Vishwanath Nagar, Shahdara, Delhi-110032

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CONFIDENTIAL

BOARD OF DISCIPLINE

Constituted under Section 21A of the Chartered Accountants Act 1949

Findings under Rule 14(9) of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007

File No. : [PR-153/21/DD-192/2021/BOD/677/2023]

CORAM (present in person):

CA. Rajendra Kumar P, Presiding Officer

Ms. Dolly Chakrabarty (IAAS, retd.), Government Nominee

In the matter of:

CA. Manoj Kumar Jain (M. No. 075666)

Chartered Accountants

C-1, 1st Floor, RDC, Raj Nagar,

Ghaziabad – 201002.

.....Complainant

Versus

CA. Amit Agarwal (M. No.075802)

Partner, M/s Amit S. Agarwal & Co.,

Chartered Accountants

C/o Goel Khad Bhandar, Near Gopi Chowk, Badaun,

Uttar Pradesh– 243601.

.....Respondent

DATE OF FINAL HEARING : 23rd August 2023

PARTIES PRESENT:

Counsel for the Complainant: : CA. Sandeep Manaktala (through video conferencing)

Respondent : CA. Amit Agrawal (through video conferencing)

Counsel for the Respondent : CA. Ankit Maheswari (in person)

FINDINGS:

BRIEF BACKGROUND OF THE CASE:

1. The Complainant was the partner of M/s Manoj Santosh & Co., Chartered Accountants and they were appointed as statutory auditors of M/s Gutgutia Cements Limited (hereinafter referred to as Company) from 01.04.2015 to 31.03.2020. Their appointment for Financial Year 2019-20 was ratified in the AGM which was held on 30th September

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2019. However, the Respondent signed the audit report of the Company for the Financial Year 2019-20 on 15th December 2020.

CHARGES ALLEGED:

The Complainant alleged against the Respondent as under:

- 2.1 The Respondent accepted his appointment as the Statutory Auditor of the Company for the Financial Year 2019-20 without first communicating with the previous auditor (i.e., Complainant) in writing as required in Item (8) of Part I of First Schedule to the Chartered Accountants Act, 1949.
- 2.2 The Respondent carried out the audit work for Financial Year 2019-20 and signed the audit report of the Company without verifying the provision of Section 139 and 140 of the Companies Act, 2013 and Rule 7(1) of Companies (Audit and Auditors) Rules 2014. The Complainant's firm was neither removed as statutory auditor of the Company nor tendered any resignation. The Respondent has not ensured the compliance of provisions of Companies Act 2013, and the conditions prescribed under Rule 4(1) of the Companies (Audit and Auditors) Rules 2014. Thus, the Respondent violated the provision of Item (9) of First schedule of Part 1 of Chartered Accountant Act 1949.
- 2.3 The Respondent colluded with the management of the Company to become the statutory auditor of the company for the year 2019-20 and contravened the proviso of Item (6) of First schedule Part I of the Chartered Accountant Act 1949. The Respondent secured work through collusion with the management of the company and deliberately chose not to adhere the Code of Ethics.

The Board noted that the Director (Discipline) in his Prima Facie Opinion held the Respondent prima facie Guilty of Professional Misconduct falling within the meaning of Item (8) and (9) of Part I of the First Schedule to the Chartered Accountants Act, 1949 and the said view had been accepted by the Board. Accordingly, the conduct of the Respondent was examined in respect of Professional Misconduct falling within the meaning of Item (8) and (9) of Part I of the First Schedule to the Chartered Accountants Act, 1949 with respect to the charge specified at para 2.1 and 2.2 above only.

BRIEF OF PROCEEDINGS HELD:

3.

Date of Hearing(s)	Status of Hearing(s)
21 st July, 2023	Adjourned at the request of the Complainant.
23 rd August, 2023	Heard and concluded.

BRIEF SUBMISSIONS OF THE RESPONDENT:

4. The Respondent in his defense, inter-alia, stated as under:-

- 4.1 The Respondent affirmatively asserts that their appointment as the auditor of the company was conducted in accordance with the provisions delineated under Section 139 of the Companies Act 2013. All requisite documentation mandated by Rule 4(1) of the Companies (Audit & Auditors) Rules, 2014, was duly submitted to the Company's Board prior to said appointment. The Respondent acknowledges a pre-existing acquaintanceship with the Complainant, which was marred by personal grievances. Consequently, the Complainant exhibited non-cooperation in furnishing the NOC. Given the absence of any discernible red flags and the absence of outstanding audit fees, the Respondent deemed the account settlement to be in order. Furthermore, the Respondent's acceptance of the appointment was facilitated by the absence of adverse communication from the Complainant.
- 4.2 Prior to accepting the appointment, the Respondent diligently pursued avenues to establish effective communication with the Complainant. Recognizing the importance of adherence to proper procedures, the Respondent made numerous conscientious efforts, engaging in multiple phone calls and actively seeking meetings with the Complainant. These actions were undertaken in a genuine attempt to fulfill the necessary requirement of communication.
- 4.3 The Respondent proactively transmitted the No Objection Certificate (NOC) to one of the employees of the company. While the Respondent diligently endeavored to obtain a signed copy of the NOC from the Complainant, it regrettably proved unattainable. The Respondent had every intention of promptly communicating this situation to the

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Director(Discipline). However, due to unforeseen circumstances, the Respondent was unable to convey this crucial piece of information. To strengthen their case and substantiate their assertions, the Respondent is fully prepared to present the aforementioned company employee as a credible witness. This witness will testify to the fact that the Respondent did, indeed, engage in written communication on behalf of the Respondent. Their testimony will serve to confirm the earnest efforts made by the Respondent in fulfilling their responsibilities and complying with the necessary written communication requirement.

- 4.4 In circumstances where the previous auditor is uncooperative and the expectation of receiving communication from them is unlikely, combined with the existing delay in the audit timelines, the Respondent opted to evaluate any potential concerns before accepting the appointment, instead of continuously following up with the Complainant. Consequently, the Respondent proceeded with the assignment. The failure to communicate in writing with the previous auditor prior to accepting the audit assignment constitutes a procedural oversight. Such an oversight does not compromise the principles articulated in the Code of Ethics. It assumes the character of an inconsequential procedural error.
- 4.5 The Respondent affirmed that the audited accounts of the company for FY 2019-20 were attested on 15th December 2020. While signing the audit report, the Respondent adhered to the provisions specified under Section 143 of The Companies Act 2013, which distinctly delineates the powers and duties of auditors. Furthermore, the signing of the audit report does not necessitate compliance with the provisions of Section 139 and Section 140 of The Companies Act 2013, as these sections primarily pertain to the appointment and removal of the auditor and are unrelated to the act of signing the audit report. The Respondent, serving as an incoming auditor, has not violated the provisions stated under Section 139 (Appointment of Auditors), Section 140 (Removal of Auditor), and Section 141 (Eligibility, Qualifications, and Disqualification of Auditors) as mandated by the Companies Act 2013.
- 4.6 The company made the Respondent's appointment as the auditor for FY 2019-20 during a Board Meeting held on 6th October 2020, and the letter of appointment was issued to the Respondent on 6th October 2020. Prior to providing his consent, the Respondent

diligently reviewed the provisions outlined in Section 141 concerning the qualifications for being appointed as an auditor in the company, and also adhered to the requirements pertaining to the appointment of auditors as stipulated under Section 139 of The Companies Act 2013. Subsequently, the Respondent submitted his consent to serve as the statutory auditor of the company.

- 4.7 The Complainant was appointed as the statutory auditor of the company for the period of 5 years from FY 2014-15 to FY 2019-20. On the 15th July 2020, during a convened meeting of the Board of Directors, a resolution was duly adopted to grant access to the accounts to the statutory auditor, specifically the Complainant involved in this matter. Subsequently, on 11th August 2020, during another convened Board meeting, concerns were raised regarding the non-responsiveness of the current auditor to the company's request, leading to potential delays in the approval of the books of accounts within the predetermined timelines. Following continuous efforts made by the Complainant to engage the auditor, it was decided in the Board meeting held on the 6th October 2020, that due to the non-cooperative and unprofessional conduct exhibited by the current auditor, the shareholders passed a special resolution to refrain from reappointing said auditor. During the same Board meeting, the shareholders resolved to address the vacancy of the statutory auditor by appointing the Respondent to assume the role and responsibilities of the statutory auditor.
- 4.8 The Complainant, as the incumbent auditor, displayed a failure to fulfill their responsibilities and satisfactorily complete the audit of the company's accounts for the financial year 2019-20. The Complainant's inability to meet the necessary obligations led to a situation where their professional duties remained unfulfilled. Consequently, in light of these critical deficiencies and the detrimental impact on the company's financial reporting process, a judicious determination was made to undertake a change in the auditor.
- 4.9 During the AGM held in September, a decision was made to remove the auditor for the FY 2019-20. However, the Complainant asserts that he neither resigned from his position as auditor nor received any notice of removal from the company. It is also emphasized by the Complainant that it is the default of the Respondent that he did not ensure compliance with the provisions of Section 140 of the Act. It is to be noted that this is

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beyond the scope of the Respondent's duties to ensure the company's compliance with the prescribed procedures for the removal of an auditor prior to the expiry of their tenure. If the company has failed to comply with the provisions of Section 140, the company would be deemed in default and could be subject to penalties under Section 147(1) of the Companies Act 2013.

OBSERVATIONS OF THE BOARD:

- 5.1 As regard the first charge that the Respondent accepted appointment as the Statutory Auditor of the Company for the Financial Year 2019-2020 without first communicating in writing with the previous auditor i.e., Complainant, the Board took into view the requirement of Item (8) of Part I of the First Schedule to the Chartered Accountants Act, 1949 which provides as under:

"A Chartered Accountant in practice shall be deemed to be guilty of Professional Misconduct, if he-

Accepts a position as auditor previously held by another chartered accountant or a certified auditor who has been issued certificate under the Restricted Certificate Rules, 1932 without first communicating with him in writing."

The Board observed that there are two essential requirements under Item (8) of Part I of the First Schedule to The Chartered Accountant Act, 1949 which are as follows:

- i. The communication should be prior to the acceptance of the appointment as auditor.
- ii. The communication should be in writing.

The following Paras of the Code of Ethics- 2009 also merit consideration in this regard:

"The Council has taken the view that a mere posting of a letter under certificate of posting is not sufficient to establish communication with the retiring auditor unless there is some evidence to show that the letter has in fact reached the person communicated with. A Chartered Accountant who relies solely upon a letter posted under certificate of posting therefore does so at his own risk.

Members should therefore communicate with a retiring auditor in such a manner as to retain in their hands positive evidence of the delivery of the communication to the

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addressee. In the opinion of the Council, communication by a letter sent "Registered Acknowledgement due" or by hand against a written acknowledgement would in the normal course provide such evidence." (emphasis added)

- 5.2 The Board noted that the Respondent in his written submissions made at the prima facie stage clearly admitted that there had been no written communication held between him and the Complainant prior to the undertaking of the audit assignment. Although, it would have been appropriate for him to send a written communication, because of the peculiar circumstances of the case, it could not be done. Also, in his written submissions submitted during the course of hearing, the Respondent confirmed that he was appointed as Statutory Auditor of the company for the Financial Year 2019-20 vide Board resolution passed in the meeting held on 6th October 2020. He made numerous efforts i.e., engaging in phone calls and actively seeking meetings with the Complainant and proactively transmitted the No Objection Certificate (NOC) to one of the employees of the Company for onward submission to the Complainant. The Respondent also submitted that failure to communicate in writing with previous auditor prior to accepting the audit assignment constitutes a procedural oversight.
- 5.3 The Board further noted that the Respondent in his oral submissions made during the course of hearing stated that he gave the letter seeking the no-objection of the Complainant to the accountant of the company for onward transmission to the Complainant. However, he did not sign it. He also said that the said accountant of the company can be called as a witness to depose before the Board. In this regard, the Board was of the view that it is the duty of the incoming auditor to communicate with the previous auditor of the Company in writing before acceptance of the audit of the Company and the same cannot be passed on to the auditee. Thus, the deposition of the said employee of the company is not considered relevant in the case. Further, the Respondent could not bring on record any acknowledgement or positive evidence to prove that written communication was delivered to the Complainant being the previous auditor of the Company.
- 5.4 Thus, in the absence of the positive evidence of written communication on the part of the Respondent with the Complainant before accepting the Statutory Audit of the

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company for the Financial Year 2019-20, the Board held the Respondent guilty in respect of the charge alleged.

- 5.5 As regard the second charge that the Respondent carried out the audit for Financial Year 2019-20 and signed the audit report of the Company without verifying the provision of section 139 and 140 of the Companies Act, 2013, the Board took into view the following provisions of Sec 139(9) and 140(4) of the Companies Act 2013:-

" 139(9) of the Companies Act 2013:

Subject to the provisions of sub-section (1) and the rules made thereunder, a retiring auditor may be re-appointed at an annual general meeting, if— (a) he is not disqualified for re-appointment; (b) he has not given the company a notice in writing of his unwillingness to be re-appointed; and (c) a special resolution has not been passed at that meeting appointing some other auditor or providing expressly that he shall not be re-appointed.

Section 140(4) of the Companies Act 2013:

(i) Special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be reappointed, except where the retiring auditor has completed a consecutive tenure of five years or, as the case may be, ten years, as provided under sub-section (2) of section 139.

(ii) On receipt of notice of such a resolution, the company shall forthwith send a copy thereof to the retiring auditor."

The Board also took into view the following Guidelines provided in the Code of Ethics (Vol II) Revised 2020:-

"2.14.1.9 (ii) Clause (9) of Part I of the First Schedule to Chartered Accountants Act, 1949 provides that a member in practice shall be deemed to be guilty of professional misconduct if he accepts an appointment as auditor of a Company without first

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ascertaining from it whether the requirements of Sections 139 and 140 of the Companies Act, 2013, in respect of such appointment have been duly complied with. Under this clause it is obligatory on the incoming auditor to ascertain from the Company that the appropriate procedure in the matter of his appointment has been duly complied with so that no shareholder or retiring auditor may, at a later date, challenge the validity of such appointment.

2.14.1.9(xxxiii) Where the auditor other than the retiring auditor is proposed to be appointed, the Incoming auditor should ascertain whether the provisions of Sections 139 and 140 have been complied with.

2.14.1.9(xxxiv) For the purpose of ascertaining whether the Company has complied with the provisions of Section 140 of the Companies Act the incoming auditor should verify the records of the Company in respect of the following matters:-

- a. Whether a member of the Company has given special notice of the resolution as required under Section 140(4) of the Companies Act, 2013. The notice shall be sent by members to the company not earlier than three months but at least fourteen days before the date of the meeting at which the resolution is to be moved, exclusive of the day on which the notice is given and the day of the meeting. A true copy of this notice should be obtained by the Incoming auditor.
- b. Whether this special notice has been sent to all the members, of the Company as required under Section 115 of Companies Act, 2013 at least 7 days before the date of the General Meeting.
- c. Whether this special notice has been sent to the retiring auditor forthwith as required under Section 140(4).
- d. Whether the representation received from the retiring auditor has been sent to the members of the Company as required under Section 140 (4).

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e. Whether the representation received from the retiring auditor has been considered at the general meeting and the resolution proposed by the special notice has been properly passed at the general meeting."

- 5.6 In the instant case, the Board noted that the Respondent brought on record copy of the Minutes of the Board of Directors meeting held on 6th October 2020 wherein it was resolved as under:

"RESOLVED THAT pursuant to sub-section (8) of section 139 of the Companies Act, 2013 and other applicable provisions, if any, of the Companies Act, 2013 as amended from time to time or any other law for the time being in force (including any statutory modification or amendment thereto or re-enactment thereof for the time being in force), M/s Amit S Agrawal & Co, Chartered Accountants, (Firm Registration No. 008125C), be and are hereby appointed as statutory auditors of the company to fill up the casual vacancy caused due to completion of the term of previous auditor M/s. Manoj Santosh & Company. (FRN: 006935C) (Manoj Kumar Jain) Proprietor, Chartered Accountants, up on conclusion of 24th AGM since their appointment on 30th Sep 2015 according to section 139(1) and on account of application of section 139(9) (c) due to passing of special resolution on 29-9-2020 by which M/s. Manoj Santosh & Company. (FRN: 006935C), (Manoj Kumar Jain) Proprietor, Chartered Accountants, was resolved to be not reappointed."

- 5.7 Thus, the Board noted that as per the resolution passed for the Respondent's appointment in the meeting of Board of Directors of the Company held on 06th October 2020, casual vacancy had been created on account of the completion of tenure of the Complainant and a special resolution had been passed for non-reappointment of the Complainant. However, as per the copy of ADT-1 brought on record by the Complainant, his appointment was upto FY 2019-20. Also, no resignation letter of the Complainant was available on the ROC portal in terms of the requirement of Section 140(2) of Companies Act, 2013.

- 5.8 The Board also noted that it was the case of the Complainant that neither he had resigned nor removed from the position of the Statutory Auditor of the company. Further, he did not receive any Notice from the company as required under Section 140 of the Companies Act 2003.

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5.9 Thus, the Board was of the view that the Respondent was required to ensure that whether necessary formalities as prescribed under Companies Act, 2013 have been complied with for non-reappointment of the Complainant before acceptance of audit of the Company for FY 2019-20. However, he did not bring on record documentary evidence to substantiate the same. Thus, the Board held the Respondent guilty in respect of the charge alleged.

CONCLUSION:

6. Thus, in conclusion, in the considered opinion of the Board, the Respondent is **GUILTY** of Professional Misconduct falling within the meaning of Item (8) and (9) of Part I of the First Schedule to the Chartered Accountants Act, 1949.

Sd/-

CA. Rajendra Kumar P
(Presiding Officer)

Sd/-

Ms. Dolly Chakrabarty (IAAS, rettd.)
(Government Nominee)

DATE: 28-12-2023

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मीनू गुप्ता / Meenu Gupta
वरिष्ठ कार्यकारी अधिकारी / Sr. Executive Officer
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