

[PR/G/225/2017/DD/220/2017/BOD/554/2020]

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/G/225/2017/DD/220/2017/BOD/554/2020]

CORAM (Present in Person):

CA. Rajendra Kumar P, Presiding Officer

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

CA. Priti Savla, Member

In the matter of:

Shri Amit Kumar Singh

Office of Assistant Director, IncomeTax (INV), Unit-6

Aayakar Bhawan Annexe Building,

P-13, Chowringhee Square, 4th Floor,

Room No.: 4/11,

Kolkata-700069.

.....Complainant

Versus

CA. Subhash Kumar Banka (M. No. 055427)

71 BRB Basu Road,

5th Floor, Room No. A 523, Bagree Market,

Kolkata-700001.

.....Respondent

DATE OF FINAL HEARING : 28th July 2023

PARTIES PRESENT(in person):

Counsel for the Respondent : CA. A. P. Singh

FINDINGS:

CHARGE(s) ALLEGED:

- 1.1 The Respondent had formed various paper/shell entities for the sole purpose of providing of pre-arranged accommodation entries.
- 1.2 The Respondent was involved in financial irregularities by providing of pre-arranged accommodation entries of share capital, share premium and unsecured loans.



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- 1.3 The Respondent had facilitated evasion of taxes by various beneficiaries of pre-arranged accommodation entries through the companies controlled and managed by him.

BRIEF OF PROCEEDINGS HELD:

2.

S.No.	Date of Hearing(s)	Status of hearing (s)
1	3 rd May, 2023	Adjourned on account of non-appearance on the part of the Complainant Department.
2	28 th July, 2023	Heard and concluded.

BRIEF SUBMISSIONS OF THE RESPONDENT:

3. The Respondent in his written submissions, inter-alia, stated as under:
- 3.1 The constitution of two benches of the Board of Discipline was ultra vires the provisions of the Chartered Accountants Act and the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. In Section 21A, there is no clause that allows the ICAI to constitute more than one Board of Discipline. The two Benches of the BOD itself did not have any legal basis of existence. Therefore, the entire procedure and proceedings conducted by ICAI are bad in law.
- 3.2 The Complainant did not signify under which specific Charges of a specific part of which schedule to the Act was the Respondent being charged, but ultimately this matter came to be referred to the BOD simply because the Director (Discipline) hand-picked a clause from the First Schedule and held the Respondent to be guilty under the same.
- 3.3 The Respondent cannot be held guilty under Item (2) of Part IV of First Schedule of the Chartered Accountants Act, 1949 because it requires opinion of the Council of ICAI that the Respondent had brought disrepute to the profession. However, in the present case, no opinion of Council has been provided to the Respondent.
- 3.4 The Statement recorded in the office of the Income Tax Department, based on which this enquiry was initiated and has continued till date, was recorded on 17th April 2015. The complaint against the Respondent was however filed on 19th July 2017. The Respondent has not been provided with details of any other information or documents that may have been collected or obtained by the Income Tax Department during the intervening period of 26 months between the recording of the so-called statement and the filing of the complaint.
- 3.5 The statement of the Respondent was recorded in the office of the Income Tax Department on the very same day when he was summoned. Infact, the Summon was also issued on that very date. The Statement was recorded by an Officer of Unit 2(3). The Complaint has been filed by Shri Amit Kumar Singh of Unit (6) of the Investigation wing of the Income Tax Department in Kolkata. How and why an enquiry of Unit 2 was carried forward by an Officer of Unit 6 after a gap of 26 months has never been explained.



- 3.6 Para 4 of the PFO of February 2019 states that the Complainant Department had conducted Search operations at Cygnus group on 22 December 2014. However, no Statement of any individual recorded either during the course of such search operations, or subsequent investigations following such search operations, has ever been produced to the Respondent or brought on record. The entire case is built up on the so-called statement of the Respondent recorded in the office of the Income Tax Department in April 2015. The Director (Discipline) has also based his conclusions only on the so-called statement of the Respondent without even attempting to verify whether there is any corroborative evidence in support of the allegations made by the Complainant, and the assertions of the Respondent in his so-called Statement.
- 3.7 The recording of the so-called statement of the Respondent in the office of the Income Tax Department was under coercion, threat and undue pressure. He retracted from his said Statement on the date he visited the office of the Income Tax Department in April 2015 and the same was also filed with the Income Tax Department. The Respondent is not in a position to produce a copy of the receipt of the retraction or a copy of the Affidavit as all records in his office were burnt in a fire that took place in the building where his office was situated on 16th September 2018. Proof of filing FIR in the said context is also provided.
- 3.8 The Complainant Department has not come with clean hands before the Institute in filing this complaint, as the fact of retraction of the Statement of the Respondent was not informed by it to the Institute.
- 3.9 The proceedings were initiated in the Court under section 277A of the Income Tax Act by the same Complainant Department and by the same Officer. That particular matter in the Court of law has come to an end. The Complainant Department and the same complaining Officer did not even consider it appropriate to answer to the various summons from the Court and to produce any evidence in support of the allegations against the Respondent. The allegations against the Respondent in the Court were identical with the allegations before the Institute in the instant matter. The final Order of the Court is attached.
- 3.10 The Complainant has not produced any evidence of any accommodation entries having been provided or managed by the Respondent. The Complainant Department has also not produced any proof of having added any income in the hands of the Respondent for having earned commission on arranging of such entries. The Complainant Department has also not produced any proof of having added back any income in the companies listed in question number 11 in the so-called Statement of the Respondent.

OBSERVATIONS OF THE BOARD:

4. On perusal of the documents and submissions on record, the Board observed that the Respondent raised certain technical objections with regard to the admissibility of the case and decided to deal with them before arriving at its Findings.
- 4.1 As far as the objection of the Respondent as to constitution of two Benches of the Board is concerned, the Board viewed that two Benches of the Board of Discipline were constituted with an avowed object to accelerate the disposal of disciplinary cases and the administrative Ministry i.e. Ministry of Corporate Affairs had also nominated the

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members as required under Section 21A (1)(b) to the Board of Discipline. On a conjoint reading of the provisions of the General Clauses Act, 1897 (which explicitly states that the words in singular shall include the plural, and vice versa) with the provisions of the Section 21A (1) of the Chartered Accountants Act, 1949(as amended),it is clear that the Council is empowered to constitute more than one Board of Discipline. The Benches so constituted carried out its functions inter-alia by conducting hearings and awarding punishments in disciplinary cases falling within their respective jurisdictions during the relevant period. Besides, the Respondent failed to place any material to show that the constitution of two benches caused any prejudice to him. Also, the Board of Discipline was of the view that it is not the appropriate forum to challenge the constitution of its two Benches.

4.2 As regards the objection of the Respondent regarding the opinion of the Council as stipulated in Item (2) of Part IV of the First Schedule, the Board relied on para 17 and 18 of the Order dated 18th October 2018 passed by the Hon'ble Appellate Authority in the Appeal no. 12/ICAI/2017 and 14/ICAI/2017 - Anil Kumar Aggarwal Vs. The Institute of Chartered Accountants of India and others and Radhey Shyam Bansal Vs. The Institute of Chartered Accountants of India and others as under:

"17.It is pertinent to note here that this Authority has already dealt with and decided this issue in the Appeals earlier namely Gyan Prakash Agarwal (Appeal No. 08/ICAI/2014), Rajiv Maheshwari (Appeal No. 05/ICAI/2014) and Sameer Kumar Singh Vs. ICAI (Appeal No. 07/ICAI/2014) and has held as under:- "15. Based on the above and by taking note of the written submissions made on behalf of the Institute of Company Secretaries of India, the Institute of Cost Accountants of India and the Institute of Chartered Accountants of India containing the detailed Page 9 of 14 analysis of the issue in question, we are of the considered view that the proper and correct interpretation which can be given to Clause (2) of Part-IV of the First Schedule to the respective Acts, in the light of the principles laid down and having regard to the case laws of various courts and further considering the basic objects, reasons and purpose of the amendment brought in the statutes as quoted above is that, 'Prima facie Opinion (PFO)' formed by the Director (Discipline) in all such complaints / information cases serves the purpose for proceeding further for taking disciplinary action against the errant members as in terms of the amended mechanism for conduct of cases, it is the Director (Discipline) who has to form the first Prima Facie Opinion



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for the disciplinary proceedings to be initiated. Therefore, the opinion of council as is mentioned in the Clause (2) of Part-IV of the First Schedule to the Act has to be given a purposive meaning and has to be read in consonance with the letter and scheme of the enactment.

18. In our considered view, the same shall mutatis mutandis apply in both these Appeals and accordingly, we find no merit in this ground. Thus, we hereby reject this ground of Appeal as taken by the Appellants.”.

Hence, the issue had already been decided by the Hon'ble Appellate Authority, and therefore, there is no merit in the argument of the Respondent in this regard.

4.3 As regard the objection of the Respondent that specific clause of the misconduct had not been defined by the Complainant, the Board was of the view that it is trite that a Complainant is required as per law to state the allegations which are to form a factual foundation for an Adjudicating Authority to exercise jurisdiction and even if an incorrect provision of law/no clauses is mentioned by the Complainant in FORM I, that alone cannot be a ground to dismiss a complaint if otherwise the Authority has the jurisdiction to entertain the complaint.

Further, though the provision of Rule 3 is couched in a “mandatory form” by use of words such as “shall” and appear to be mandating a procedure that must be necessarily followed. However, mere use of language which suggest or purports to suggest a “mandate” may not alone be sufficient to regard a procedural rule to be mandatory to the extent that its non-compliance could vitiate the entire proceeding.

While coming to the said view the Board took into view the following observations of the Hon'ble Supreme Court in the matter of Uday Shankar Triyar v. Ram Kalewar Prasad Singh and Anr. (Reported in AIR 2006 SC 269) as under:

“ Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice,

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should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use."

Thus, non-mentioning of clauses can at the highest be treated as "technical defect." Infact, the procedure to be adopted in case of defective complaint is that the defect, if pointed out, and not cured by the Complainant, it is incumbent upon the Director (Discipline) to form a prima facie opinion of no case and recommend its closure. However, the Board of Discipline is vested with discretion to ignore the recommendation, if it deems fit, and proceed further with the matter.

The onus to formulate a prima facie opinion as to the misconduct rests with the Director (Discipline) and therefore, premised on the pleadings filed which contains the allegations and documents placed on record, it is the Director (Discipline) which has to first formulate a prima facie opinion on the alleged misconduct.

Therefore, notwithstanding the assertions as to the particular clause of misconduct by a Complainant, the Director (Discipline) shall, after perusing the material available, conclude as to existence or otherwise of the misconduct alleged. This is also apparent from the provisions of various sub clauses of Rule 9(2)(a) of the Misconduct Rules, 2007 , which require the Director(Discipline) to place the matter before the Board of Discipline , if the misconduct alleged falls within the First Schedule and before the Disciplinary Committee , if the alleged misconduct falls within the Second Schedule or both under the First and Second Schedule. This also supports the view that the sifting of the allegations to identify the clauses of misconduct is to be performed by the Disciplinary Directorate.

This issue can also be addressed from the perspective of the status of the Complainant. The requisite provision in the statute or under the Rules does not prescribe as to who can file a complaint under the provisions of the Act alleging misconduct by a member. Therefore, the Complainant can be a statutory authority, a member of the Institute who is well versed with the provisions of the Act or even a member of public who may not be familiar with the provisions of the Act. In such a scenario, to give a pedantic interpretation to the provisions of the Act and the Rules making it incumbent on a Complainant to specify clauses of misconduct would be denying the remedy otherwise available under the statute. If the allegations stated in the complaint do not fall within any specified clauses of professional misconduct, the same may however be a case of "Other Misconduct" and

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the ICAI would be within jurisdiction to proceed further on the allegations. Therefore, non-mentioning of clauses pertaining to "misconduct" does not in any manner vitiate the proceedings.

4.4 As regard the charge alleged, the Board noted that the Complainant Department had recorded a Statement of the Respondent on Oath before DDIT (Inv.), Unit-2(3), Kolkata in connection with an enquiry conducted by Directorate of Income Tax (Investigation), Kolkata under section 131 of the Income Tax Act, 1961 on 17th April 2015. The Board further noted that subsequently vide an Affidavit, the Respondent retracted from his said Statement on Oath in April 2015 only which was filed with the Complainant Department also. However, he could not produce a copy of the receipt of the retraction or a copy of the Affidavit as all records in his office were burnt in a fire that took place in the building where his office was situated on 16th September 2018. He also provided a proof of filing FIR in the said context.

4.5 The Board also noted that a copy of the written submissions of the Respondent was also shared with the Complainant Department. However, no response of the Complainant Department on the same was received.

4.6 The Board further noted that the Respondent brought on record copy of the Order dated 23rd July, 2019 passed in CS/23364 of 18 by the Ld. Metropolitan Magistrate, Kolkata on the petition of the Complainant Department wherein the Respondent was an accused wherein it was ordered as under:

"As the Complainant Amit Kumar Singh does not appear before this Court, this Court dismisses the summons case u/s 277A of the Income Tax Act and acquits the sole accused Subhash Kumar Banka u/s 256 (1) CrPC."

The Board further noted that no evidence has been brought on record to show that an appeal had been filed against the said Order and that the instant case before it was also based on the same subject matter.

4.7 Thus, on a detailed perusal of the submissions and documents on record, the Board noted that the primary evidence which the Complainant Department brought on record for the charges alleged against the Respondent is the copy of his own Statement recorded on 17th April 2015 which had been subsequently retracted by him. The Complainant Department could not bring on record any Assessment Order to show that either

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commission income had been added to the income of the Respondent on account of any accommodation entries provided by him, as alleged or addition had been there in the hands of any of the beneficiary companies. Further, despite opportunities given to the Complainant Department to substantiate the charges alleged against the Respondent, neither any representation of the Complainant Department was there during the course of hearing nor the Complainant brought on record any corroborative/conclusive evidence to substantiate the charge alleged against the Respondent that he formed various shell companies for the purpose of providing accommodation entries in lieu of commission. In view of the same, the Board held the Respondent NOT GUILTY in respect of the charge alleged.

CONCLUSION:

- 5 Thus, in conclusion, in the considered opinion of the Board, the Respondent is **NOT GUILTY** of Other Misconduct falling within the meaning of Item (2) of Part IV of the First Schedule to the Chartered Accountants Act, 1949 read with Section 22 of the said Act. Accordingly, the Board passed Order for closure of the case in terms of the provisions of Rule 15 (2) of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007.

Sd/-

CA. Rajendra Kumar P
(Presiding Officer)

Sd/-

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

Sd/-

CA. Priti Savla
(Member)

DATE: 11-01-2024

सही प्रतिलिपि होने के लिए प्रमाणित
Certified to be true copy
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