

CONFIDENTIAL

DISCIPLINARY COMMITTEE [BENCH-III (2018-19)]

**[Constituted under section 21B of the Chartered Accountants
(Amendment) Act, 1949]**

**Findings under Rule 18(17) and Rule 19(2) of the Chartered
Accountants (Procedure of Investigations of Professional and Other
Misconduct and Conduct of Cases) Rules, 2007**

PPR/P/11/2014/DD/9/INF/2014-DC/696/2017

In the matter of:

CA. Sushil Kumar Sharma,
Shambhu Talkies Road,
Nai Basti,
KATNI-483501 (M.P.)

---Respondent

Members Present:

CA. Naveen N.D. Gupta, Presiding Officer
Shri Ajay Mittal, IAS (Retd.), Member (Govt. Nominee)
Ms. Anita Kapur, Member (Govt. nominee)
CA. Shyam Lal Agarwal, Member
CA. Sanjay Kumar Agarwal, Member

Date of Final Hearing: 12th November, 2018

Place of Final Hearing: New Delhi

PARTIES PRESENT

Respondent: CA Sushil Kumar Sharma

Counsel for the Respondent: CA. Deepak Kumar Sharma

Allegations of the Informant:

1. A letter dated 13th September, 2013 along with related documents was received from Ms. Meenakshi Dubey, Manager, Reserve Bank of India, Bhopal (hereinafter referred to as "RBI") containing allegations against CA. Sushil Kumar Sharma (hereinafter referred to as the "Respondent"). It was alleged that the Respondent had failed to submit the Exception Report to RBI despite the fact that from the Financial Statement of M/s. M.G.S. Finvest Pvt. Ltd. (hereinafter referred to as the "Company") for the Financial Year 2010-11 as audited by the Respondent, it was observed that the Company had not created Statutory Reserve Fund and 20% of the profit was not transferred to the Statutory Reserve Fund as per the requirement of Section 45-IC of the Reserve Bank of India Act, 1934.

Proceedings:

2. At the time of hearing held on 21st May, 2018, the then Committee noted the presence of the Respondent along with his authorized Counsel. The Respondent was put on oath. Thereafter, the then Committee asked the Respondent as to whether he wished the charges to be read out or these could be taken as read. The Respondent stated that he was aware of the allegations raised against him and the same may be taken as read. On being asked as to whether he pleaded guilty to the charges, the Respondent pleaded not guilty and opted to defend the case. The Counsel for the Respondent, thereafter, made his submissions on the allegations. The then Committee further examined the matter in view of the information available and considered the submissions made by the Counsel present alongwith the Respondent. Based on the documents available on record and after considering the oral and written submissions made by the Respondent before it, the then Committee directed the Office to seek certain Clarification/opinion from Auditing and Assurance Standard Board of ICAI with reference to Section 45-IC of the Reserve Bank of India Act, 1934. The Committee also directed that a letter be written to the RBI to seek the details of action taken against the Company in respect of reported non-compliance. In pursuance to further directions given by the Committee from time to time the following information was sought from the Respondent as well:




- (a) Whether the Company in question had declared any dividend in the year under examination or thereafter without creating special reserve as required under section 45-IC of the Reserve Bank of India Act, 1934.
- (b) In case, dividend was not declared, the period when such Reserve was first created and the period(s) against the profit of which it was created with the copy of balance sheet concerned highlighting the profits against which reserve was created and provide the name of the auditor of the Company for the period(s) concerned.
- (c) If the dividend was declared subsequently in (b) case above, then how much dividend was declared and whether special reserve was created only against the profits of that particular year or against the entire surplus accumulated till then and to furnish details thereof as in (b) above.
- (d) Whether RBI had taken any action against the company in question and if so the details thereof.

3. At the time of hearing held on 12th November, 2018, the Committee noted that the documents/information as sought from the Respondent had been received and the Counsel for the Respondent was present to appear before the Committee. The Committee, thereafter, informed the Counsel that since the composition of the Committee had undergone a change, an option of de-novo hearing in the matter was available to him. The Counsel stated that since substantial defence both in writing and orally had been submitted by him at the previous hearing, the hearing in the matter may be proceeded from the stage where it was left. The Committee agreed to the same and based on the documents available on record, the oral and written submissions made by the Respondent, the Committee concluded the hearing in the matter.

4. The Respondent in his written submissions had stated that the company in question had not declared any dividend since inspection nor the special reserve was created. Since no dividend was declared, no reserve fund was created. It was further submitted that the RBI neither took any action against the Company nor against its directors for non-creation of special reserve fund under section 45I-C of the Reserve Bank of India Act, 1934. The Respondent also produced on record an affidavit duly sworn by Smt. Mukta Goenka,



Director of the Company in which she confirmed that the RBI had not taken any action against the company or its Director and also not initiated any Penal proceedings and had not imposed any penalty in relation to the said non-creation of reserve u/s 45-IC of the Reserve Bank of India Act, 1934. It was further submitted that the size of the company was very small and the profit earned in the year 2010-11 was only Rs. 13,855 which got absorbed in setting off the accumulated loss. Further, assuming the interpretation of the company regarding creation of reserve fund was not correct and if the reserve had been created there was only requirement to create a reserve fund of Rs. 2771 only (20% of PAT Rs. 13,855) for the year which was very small, insignificant and immaterial figure. As the dividend can only be paid out of profit, the Company's Profit was in Negative. Furthermore, it was stated that the statutory fund was created in one other company, M/s. Trackway Securities & Finance Private Limited, which was also registered as NBFC with RBI Bhopal, where amount was material. In view of the above no Exception Report was sent to RBI.

Findings of the Committee:

6. The Committee noted that the basic charge against the Respondent was that in the Audited Financial Statement of the Company for the Financial Year 2010-11 as audited by the Respondent, 20% of the profit had not been transferred to the Statutory Reserve Fund as per the requirement of Section 45I-C of the Reserve Bank of India Act, 1934 and that the same was not reported by way of Exception report to RBI by the Respondent.
7. The Committee perused the statement of Profit and Loss Account of the Company for the year ended 31.03.2011 and it was noted that during the said year, the Company had a profit after tax of Rs 13,885 (C-10). It was noted that the Respondent had accepted that the amount of the statutory reserve was Rs. 2,771/- only which was not a material amount as per the concept of "Materiality" issued by the Accounting Standard Board of the ICAI. The Committee noted the provisions of Section 45-IC of RBI Act, 1934 in respect statutory reserve fund which states as under:

45-IC Reserve fund:-



(1) non-banking financial Company shall create a reserve fund and transfer therein a sum not less than twenty per cent of its net profit every year as disclosed in the profit and loss account and before any dividend is declared.

7. On perusal of the same, the Committee noted that the said section of the RBI Act, 1934 requires NBFC to create a reserve fund and transfer thereto a sum of not less than 20% of its net profit every year as disclosed in the profit and loss account. It was noted that the Respondent had submitted that *"even if the authorities advices to create reserve it can be created now as no dividend is declared till date and profit & loss account still has carry forward of loss"*. The Committee viewed that the extant case involved an interpretation of the provision whether the law requires transfer of prescribed percentage of net profit to reserve fund only if dividend is declared or irrespective of declaration of dividend. The Committee noted that Para 2.11 of 'Technical Guide on Audit of Non-Banking Financial Companies' issued in 2010 states as follows with respect of Reserve Fund:

"Every NBFC is required to create a Reserve Fund to which at least 20 percent of its net profits must be transferred before declaration of any dividend. The Reserve Fund can be used only for the purposes specified by the RBI from time to time. The Central Government has the power to exempt, on the recommendation of the RBI, an NBFC from this requirement provided the sum total of its statutory reserves and share premium account is not less than its paid up capital. (emphasis added)"

8. It was noted that it was a matter of interpretation whether the phrase *'before any dividend is declared'* states the point of time when the reserve fund is to be set aside in the financial statements or defines the condition to create reserve fund and it was due to difference in such interpretation and lack of clarity, that in the extant case allegation was raised against the Respondent by RBI. The Committee was of the view that a plain reading of technical guide issued by AASB also gave an impression that every NBFC was required to transfer profits to Reserve Fund only before declaration of dividend.

9. It is an admitted position that the Company had not declared any dividend during the financial year(s) in relation to which allegation was made. Accordingly, it was viewed that the

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said act was unintentional and no malafide intent on the part of the Respondent was apparent for not giving the Exception Report, as he had relied on an interpretation in a bonafide manner that transfer to reserve fund was only required when the Company declares any dividend. Thus, the Committee decided that the Respondent was not guilty of the charge as alleged in the instant case.

Conclusion:

10. In conclusion, in the opinion of the Committee, the Respondent is **NOT GUILTY** of professional misconduct falling within the meaning of Clause (7) of Part I of the Second Schedule to the Chartered Accountants Act, 1949.

11. The Committee, accordingly, passes orders for closure of this case against the Respondent.



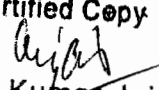
Sd/-
(CA. Naveen N.D. Gupta)
Presiding Officer

Sd/-
(Shri Ajay Mittal, IAS (Retd.)
Member (Govt. Nominee)

Sd/-
(Smt. Anita Kapur)
Member (Govt. Nominee)

Sd/-
(CA. Shyam Lal Agarwal)
Member

Sd/-
(CA. Sanjay Kumar Agarwal)
Member

Certified Copy

Ajay Kumar Jain
Deputy Secretary
Disciplinary Directorate
The Institute of Chartered Accountants of India
ICAI Bhawan, I.P. Marg, New Delhi-110 002

Date : 11th January, 2019

Place : New Delhi