



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

PR-06/2019/DD/47/2019/BOD/552/2020

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. Ashok Kumar (M.No. 096168), Punjab

...Complainant

-Vs.-

CA. Vivek Garg (M. No. 527195), Punjab

...Respondent

[PR-06/2019/DD/47/2019/BOD/552/2020]

MEMBERS PRESENT:

CA. Prasanna Kumar D., Presiding Officer

(In person)

Mrs. Rani Nair, (IRS, Retd.), Government Nominee (Through video conferencing)

Date of Final Hearing: 9th February, 2022

1. The Board of Discipline vide Report dated 10th January, 2022 held that CA. Vivek Garg (M. No. 527195) is guilty of Professional Misconduct falling within the meaning of Item (8) of Part I of 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. Vivek Garg and communication dated 2nd February, 2022 was addressed to him thereby granting him an opportunity of being heard in person and/or to make written representation before the Board on 9th February, 2022.

3. CA. Vivek Garg appeared before the Board on 9th February, 2022 through video conferencing and made his oral representation thereat. CA. Vivek Garg in his representation stated that he had no ill-intention while accepting appointment as Statutory Auditor of M/s. Hortitech Foods Pvt. Ltd. (Company) for the Financial Year 2016-17 and further requested for leniency in the matter.

4. The Board has carefully gone through the facts of the case and also the oral representation of CA. Vivek Garg.

5. As per the Findings of the Board as contained in its report, although the Respondent has brought on record copy of the letter dated 14th August 2017 through which he allegedly communicated with the Complainant prior to the acceptance of statutory audit of the company for the Financial Year 2016-17, however, CA. Vivek Garg failed to bring on record any positive evidence of delivery of such communication to the Complainant. Thus, it has already been conclusively held that CA. Vivek Garg



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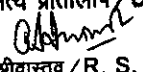
is Guilty of Professional Misconduct falling within the meaning of Item (8) of Part I of the First Schedule to the Chartered Accountants Act, 1949.

6. Upon consideration of the facts of the case, the consequent misconduct of **CA. Vivek Garg (M. No. 527195)** and keeping in view his oral representation before it, **the Board decided to Reprimand CA. Vivek Garg (M. No. 527195).**

Sd/-
CA. PRASANNA KUMAR D.
(PRESIDING OFFICER)

Date: 11th February, 2022

प्रमाणित सत्य प्रतिलिपि / Certified true copy


आर. एस. श्रीवास्तव / R. S. Srivastava
सहायक सचिव / Assistant Secretary
अनुशासनात्मक निदेशालय / Disciplinary Directorate
इंस्टिट्यूट ऑफ चार्टर्ड एकाउंटेंट्स ऑफ इंडिया
The Institute of Chartered Accountants of India
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ICAI Bhawan, Vishwas Nagar, Shadra, Delhi-110032

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-06/2019/DD/47/2019/BOD/552/2020]

CORAM: (through Video Conferencing)

CA. Prasanna Kumar D., Presiding Officer
Mrs. Rani Nair (IRS, Retd.), Government Nominee
CA. Satish Kumar Gupta, Member

In the matter of:

CA. Ashok Kumar (M.No. 096168),
H. No. 1005, Sector 68,
Mohali,
Punjab- 160062

....Complainant

-Vs.-

CA. Vivek Garg (M. No. 527195)
House No. 73, Bazar No. 3,
Street No. 3, Mittal Street,
Ferozepur Cantt.,
Punjab-152001

....Respondent

DATE OF FINAL HEARING : 28th September, 2021
PLACE OF HEARING : Through Video Conferencing

PARTIES PRESENT (Through video conferencing):

Complainant : CA. Ashok Kumar
Respondent : CA. Vivek Garg

Findings:

Charge alleged:

1. The Respondent was appointed as the auditor of M/s. Hortitech Foods Pvt. Ltd. (hereinafter referred to as "the Company") for the Financial Year 2016-17. The Complainant alleged that the Respondent conducted the said statutory audit of the Company without sending a letter of communication seeking no objections from the Complainant being its previous auditor. The Complainant submitted copy of the Financial Statement of the Company for the Financial Year 2016-17 audited by the Respondent as on 1st September, 2017 to support his claim.

Proceedings held:

2. During the proceedings held on 28th September 2021, the Board noted that the Complainant and the Respondent were present before it through video conferencing, were put on oath and they confirmed that they have read and understood the contents of the modalities and protocols of e-hearing and follow them. The charges alleged against the Respondent were treated as read with the concurrence of both the parties. Thereafter, on being asked by the Board as to whether the Respondent pleaded guilty in respect of the charges alleged against him, he replied in negative and made detailed oral submissions before the Board. The Complainant also made his counter oral submissions to substantiate the charges alleged against the Respondent. The Respondent was examined by the Board.

Upon consideration of the documents and submissions on record, the Board decided to conclude the proceedings in the case with the direction to the parties to provide the following within 7 days and also share the same with the other party to the case:

- a. To the Complainant: Clarification regarding the entire transaction with respect to payment of Rs. 2 lakhs and Rs.1 lakh.
- b. To the Respondent: Proof of payment of audit fees of Rs. 33,000/- to the Complainant.

Accordingly, the decision on the conduct of the Respondent was kept reserved by the Board.

3. In compliance of the above directions of the Board, the Complainant vide email dated 01/10/2021 submitted his response and also enclosed copy of the statement of his bank account maintained with SBI. A brief of his submissions is as under:-
 - a. The Complainant had given loan of Rs. 2,00,000/- from his SBI Savings Account no. 10704604931 vide cheque no.110678 dated 02/07/2016 in the name of M/s Ess Aar Trading Co. of which Mr. Mohit Dhuper is Proprietor.
 - b. The Complainant received Rs. 1,00,000/- back on 11/05/2017 via bank transfer against his loan dues from M/s Ess Aar Trading Co. from an account which does not

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belong to M/s Hortitech Foods Pvt. Ltd. The Complainant submitted that he has no idea how the borrower has treated these loan entries in his books of accounts as he does not have access to the books of accounts of M/s Ess Aar Trading Co.

- c. The statement of account submitted by the Respondent wherein entry of Rs. 1,00,000/- is reflected does not show the name of account holder and the account statement is not signed by banker.
- d. The Complainant has not received any payment against audit fee from M/s Hortitech Foods Pvt. Ltd.
- e. The Complainant further reiterated that he has not received any communication from the Respondent regarding NOC which is a professional misconduct as per ICAI and the issue is being diverted by touching the point of loan given to M/s Ess Aar Trading Co. which is not the issue of the extant complaint.
- f. The Complainant also submitted copy of statement of his account maintained with SBI Bank bearing account number 00000031096005019 for the period 01/04/2016 to 30/09/2021 wherein debit entry of Rs. 2,00,000/- dated 02/07/2016 with description "TO CLEARING-ANB ESS AAR TRADING CO-110678" was reflected.

3.1 In compliance of the above directions of the Board, the Respondent vide email dated 01/10/2021 submitted the following:

- (a) copy of ledger accounts maintained in the books of M/s Hortitech Foods Pvt. Ltd. i.e. Audit Fee Payable for the period 01/04/2017 to 31/05/2017, Mohit Dupar for the period 01/04/2017 to 31/05/2017.
- (b) Transactions Inquiry sheet for the period April 2017 to June 2017.
- (c) Undertaking on the letter head of the Company dated 30/08/2017 that no dues towards the Complainant as previous auditors of the Company are pending.

3.2 The aforesaid responses of the Complainant and the Respondent were also exchanged with the other party to the case and the Respondent vide his letter dated 02/10/2021 duly countered the additional submissions of the Complainant. The Complainant vide his letter dated 02/10/2021 in furtherance to the submissions of the Respondent submitted that he received Rs. 1,00,000/- back on 11/05/2017 via bank transfer against his loan dues from M/s Ess Aar Trading Co. in his saving account while audit fee was due from M/s Hortitech Foods Pvt Ltd to M/s Ashok Abnash & Associates. None of the parties i.e. the Company and the Auditor were involved in any financial transaction. The Complainant further submitted that all the documents produced by the Respondent seem to be fake and created like courier receipt, Tally data.

4. Thereafter, the Board at its meeting held on 25th November, 2021 decided on the conduct of the Respondent on the basis of the submissions and documents on record.

It is pertinent to note that Complainant during enquiry also alleged that Respondent accepted an appointment as auditor of the company without first ascertaining from it whether the requirements of Section 225 of the Companies Act, 1956 (Section 139 and Section 140 of the Companies Act, 2013) in respect of such appointment has been

complied with. The Board, however, examined the conduct of the Respondent with respect to Item (8) of Part I of First Schedule to the Chartered Accountants Act 1949, as the complaint in Form 'I' contained allegations with respect to Item (8) of Part I of First Schedule only and not with respect to Item (9) of Part I of First Schedule.

Observations and Findings of the Board:

5. The Board on consideration of the submissions and documents on record observed as under:-
- 5.1 The Board noted that the Complainant brought on record copy of the Financial Statement of the Company for the F.Y. 2016-17 duly audited by the Respondent as on 1st September 2017. The Complainant further submitted copy of the Financial Statement of the Company (earlier known as M/s. SSR Automobile Parts Private Limited) for the F.Y. 2015-16 duly audited by the Complainant.
- 5.2 The Board noted that the Respondent took the following defences to prove his innocence in the extant case:-
- a. The Respondent communicated with the Complainant vide letter dated 14th August 2017 and also brought on record copy of such communication which was sent through courier to the Complainant as evidenced from the copy of courier receipt dated 14/08/2017 addressed to the Complainant Firm.
 - b. When no response was received from the Complainant within a period of 15 days, a confirmation regarding any pending dues to the previous auditors was sought from M/s. Hortitech Foods Pvt. Ltd. (formerly known as M/s. SSR Automobiles Parts Private Limited) so as to make sure all pending dues towards previous auditors are clear before acceptance of appointment by the Respondent.
 - c. The Respondent submitted copy of bank statement showing a payment dated 11/05/2017 made to the Complainant Firm and Undertaking issued by the Company with respect to No Pending Dues towards previous auditors (Complainant/Complainant Firm) of the Company.
- 5.3 The Board further noted that the Respondent vide his letter dated 31/08/2020, inter-alia, submitted as under:-
- a. As per Clause (8) of Part I of First Schedule to the Chartered Accountants Act, 1949 a communication in writing is required to be sent to previous auditor and if no response is received within a reasonable time audit can be accepted. The Respondent has followed the said provision in its letter and spirit and sent the communication to the Complainant regarding his appointment. The onus to reply back falls on the previous auditor and if the same is not received within a reasonable time, the Respondent can proceed with the acceptance of appointment as per the provisions of Clause (8) of Part I of First Schedule. There is no requirement under ICAI rules and guidelines to secure NOC from previous auditor before acceptance of audit, only communication to previous auditor is required.

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- b. Earlier in the complaint letter dated 21/12/2018, the Complainant made an allegation that no NOC was obtained from him. But after Respondent's reply dated 28/02/2019, where the Respondent submitted copy of communication letter and proof of dispatch, the Complainant took a recourse in his letter dated 22/03/2019 and stated in point no. 1 "No letter was sent to me at any time regarding NOC" whereas non-communication by Respondent was never a part of allegations made by Complainant in his original complaint.
- c. The Complainant has also made statement in his letter dated 22/03/2019 in point no. 1 "Moreover as per ICAI guidelines only registered or speed post is valid mode of communication for the said purpose" and even this statement of the Complainant does not hold valid as there is no such provision as per Clause (8) of Part I of First Schedule to the CA Act that the communication in writing should be sent to previous auditor only through registered or speed post. Council has only recommended one of the modes as "Registered Acknowledgment due or by hand against a written acknowledgment" through which communication can be sent to previous auditor. But it is nowhere mentioned that this is the only valid mode.
- d. The Complainant has also claimed that the courier slip is fake for which the Respondent submitted the coloured photocopy of the courier slip and stated that online tracking facility for any docket no. is available only for a limited period of time which may vary from courier company to company, therefore if current online tracking status of courier slip submitted by Respondent is showing as invalid does not prove in anyway that the slip is fake. The Respondent in this regard also submitted copy of courier slip of another courier company with different docket numbers alongwith the screenshot of current online tracking status to support his claim.
- e. Further, the Complainant has himself submitted two contradictory statements as per his letter dated 22/03/2019:

As per Point No. 1: "No letter was sent to me at any time regarding NOC"

As per Point No. 2: "Fee is one reason of not issuing NOC there may be other reasons as well as per ICAI guidelines for not issuing NOC"

Both points are contradictory in nature, as per point no. 2 other reasons are only known to the Complainant and thus, it is clear evidence that Complainant was in receipt of Respondent's communication letter but wished not to reply for reasons only known to him and now the Complainant is misusing the provisions of Chartered Accountants Act, 1949.

- f. Although non-payment of fees is not an allegation made by Complainant but since he has stated in his letter dated 22/03/2019 "If my fee is clear than how CA Vivek Garg has signed the balance sheet as on 31.03.2017 showing audit fee payable Rs. 47500/- as on 31.03.2017. It clearly shows that CA Vivek Garg wants to misguide the Institute and has given false information in his letter dated 28.02.2019". The Respondent in this regard clarified that as per his earlier submission dated

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28/02/2019, the Respondent has never stated that the payment of pending fee was made to Complainant before 31/03/2017, the payment was made on 11/05/2017 i.e. not before 31/03/2017 so audit fee would obviously remain payable as on 31/03/2017 as per Balance Sheet signed by Respondent.

- 5.4 The Respondent vide his letter dated 21/09/2021 reiterated his submissions and further submitted as under:-
- a. Mr. Mohit Dhupar who is the Managing Director of the company visited Respondent's office to appoint the Respondent as statutory auditor of his company in month of August, 2017
 - b. The Respondent sent the communication letter on 14.08.2017 via courier to the Complainant before accepting the audit. When no response was received from the Complainant within 15 days, the Respondent initiated the process of accepting the audit.
 - c. During this time Mr. Mohit was also not able to contact the Complainant. On 2nd September, 2017, Mr. Mohit came to Respondent's office to inform that he is able to get in touch with the Complainant. Mr. Mohit even connected the Respondent also with the Complainant and let the Respondent speak with the Complainant over phone on 2nd Sep 2017 wherein the Respondent requested the Complainant to send soft copy of Balance Sheet as on 31.03.2016 and Tally Data. While the Complainant and the Respondent were talking, the Complainant immediately sent the soft copy of Balance Sheet to Mr. Mohit at that time only (Copy of Email received from the Complainant on 2nd Sep 2017 attached). This proves that the Complainant was very well aware of appointment of the Respondent as Statutory Auditors but didn't raise any concern.
 - d. Then suddenly after almost 1 year, the Respondent received a phone call from the Complainant in the month of September, 2018 when he claimed that "*I have not obtained NOC from him*" before accepting the statutory audit of "*Hortitech Foods Pvt Ltd*" and the Complainant asked the Respondent to recover 2 lakhs from Mr. Mohit Dhupar as the same was financed to Mr. Mohit Dhupar by the Complainant. The Complainant further added that if the Respondent could not recover from Mr. Mohit then he has to give him from his pocket.
 - e. The Respondent told the Complainant that he has sent him a communication letter before accepting the audit but the Complainant said that sending a letter is not sufficient and NOC is required to be obtained. Considering the Complainant as senior and to co-operate with a senior professional member of ICAI, the Respondent requested the Complainant to allow some time to speak to Mr. Mohit about the pending dues.
 - f. On Respondent's request the Complainant waited for some time but when the Respondent could not recover his dues from Mr. Mohit, the Complainant finally filed a complaint against the Respondent with ICAI on 21.12.2018 and claims that "*I have not obtained NOC from him before accepting audit*".
 - g. After the Respondent's first reply letter dated 28.02.2019, the Complainant in his letter dated 22.03.2019 changed his allegation from "Not Obtaining NOC from him"

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to "Not sending letter of communication to him" and the Respondent was held as prima facie GUILTY in the Prima Facie Opinion by the Director(Discipline).

h. The Complainant is into the business of micro-financing and entered into the same financing activities with Mr. Mohit. A Court case has also been filed by the Complainant against Mr. Mohit for bounced cheques and from last 2 years the Respondent has been continuously pressurized by the Complainant to pay him the money which he could not recover from Mr. Mohit, in lieu of dropping the case which is filed against the Respondent with the ICAI.

5.5 The Board took into view the provision of Item (8) of Part I of First Schedule to the Chartered Accountants Act, 1949 which provides as under:-

"(8) 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"

5.6 The Board also took into view the commentary under Clause (8) as per Code of Ethics (Edn. Reprint May, 2009, page no. 170) and the relevant portion of the same is as hereunder:-

"The requirements of Clause (8) of Part I of the first Schedule can be considered to have been complied with only:

- (i) if there is evidence that a communication to the previous auditor had been by R.P.A.D.*
- (ii) if there was positive evidence about delivery of the communication to the previous auditor.*

In the absence of both, the member should be found to have contravened this Clause."

The Board observed that although the Respondent has brought on record copy of the letter dated 14th August 2017 through which he allegedly communicated with the Complainant prior to the acceptance of audit of the company for the Financial Year 2016-17, however, he failed to bring on record any positive evidence of delivery of such communication to the Complainant. Thus, the Board viewed that that Respondent is Guilty of the charge alleged against him.

5.7 While holding the Respondent guilty in respect of the charge alleged, the Board also held that the contradiction in the Complainant's submissions as pointed out by the Respondent at para 5.3 (e) above is not sustainable as both the statements made by the Complainant are independent and it cannot be presumed from them that the Complainant was in receipt of the letter from the Respondent seeking his no-objection.

5.8 The Board also noted that during the proceedings, the Respondent has counter alleged that Complainant was not eligible to act as auditor of the company on the following grounds:-

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- a. Regarding the loan provided by the Complainant to Mr. Mohit Dupar (Managing Director of the company) of Rs. 2,00,000/- without execution of any agreement and on interest free basis, the Respondent submitted that the said conduct is not allowed as per Clause 2.1 (Threat to Independence) of Guidance Note on Independence of Auditors, Section 290 ("Independence – Assurance Engagements") of Code of Ethics 2009 and Clause 3.2 (Safeguards to Independence) of Guidance Note on Independence of Auditors. Independence of Complainant was compromised by entering into loan transaction on 02/07/2016 by the Complainant and the Complainant should have desisted from the task on 02/07/2016. However, the Complainant signed the Balance Sheet and issued audit report of the Company on 01/09/2016.

However, the Board viewed that the extant proceedings are initiated to adjudge the conduct of the Respondent and such counter allegations levelled by the Respondent against the Complainant cannot neutralize or overweigh the parameter of extant disciplinary proceedings.

6. Having regard to the attendant circumstances, the evidence and submissions put forth by the Complainant and the Respondent, the Board is of the considered view that the Respondent has committed an act of Professional Misconduct falling within the meaning of Item (8) of Part I of First Schedule to the Chartered Accountants Act, 1949 for accepting appointment with the company without first communicating with the Complainant as discussed herein above.


Conclusion:

7. Thus, the Board of Discipline, in view of the above, is of the considered opinion that the Respondent is **Guilty** of Professional Misconduct falling within the meaning of Item (8) of Part I of First Schedule to the Chartered Accountants Act, 1949.

Sd/-

CA. PRASANNA KUMAR D.
(PRESIDING OFFICER)

Date: 10th January, 2022


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सीए. ज्योतिका ग्रोवर / CA. Jyotika Grover
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