

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/218/2017-DD/256/2017/BOD/446/2018]

CORAM (Present in Person):

**CA. Prasanna Kumar D., Presiding Officer
Ms. Dolly Chakrabarty (IAAS, Retd.), Government Nominee
CA. (Dr.) Raj Chawla, Member**

In the matter of:

**Ms. Priyanka Dhar, IRS,
DDIT (Inv), Unit-3(3),
3rd Floor, Aayakar Bhawan Annexe,
P-13, Chowringhee Square,
Kolkata – 700 069**

.....Complainant

Versus

**CA. Raj Kumar Kothari (M.No.055208)
32, Ezra Street,
South Block, Todi Corner,
4th Floor, Suit 403,
Kolkata – 700 001**

.....Respondent

**DATE OF FINAL HEARING : 29th December, 2022
PLACE OF FINAL HEARING : New Delhi**

PARTIES PRESENT(through video conferencing):

**Respondent : CA. Raj Kumar Kothari
Counsel for the Respondent : CA. A.P. Singh
Counsel for the Complainant : Adv Arabinda Biswas**

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FINDINGS:

BRIEF BACKGROUND OF THE CASE:

1. The Complainant alleged that the Respondent acted as director in following companies which are shell companies which were used by the Respondent for providing accommodation entries to beneficiaries in lieu of commission in the form of bogus share capital, unsecured loan, sale of share etc.
 - i) M/s Maheshwari Merchants Pvt. Ltd.;
 - ii) M/s Divya Electronics Pvt. Ltd.;
 - iii) M/s Potential Electricals and Electronics Pvt. Ltd.;
 - iv) M/s A.K. Constructions Pvt. Ltd.;
 - v) M/s Vivek Barter Pvt. Ltd.;
 - vi) M/s Paritosh Electricals Pvt. Ltd.;
 - vii) M/s Rajshree Developer Entrepreneurs Pvt. Ltd.;
 - viii) M/s New Assam Roadways Pvt. Ltd.;
 - ix) M/s Zigma Electricals Pvt. Ltd.;
 - x) M/s VivekTracomPvt. Ltd.;
 - xi) M/s Bhiksu Barter Pvt. Ltd. and
 - xii) M/s Allbright Viniyog & NirmanPvt. Ltd.

CHARGE ALLEGED:

2. The Complainant alleged that the Respondent acted as an entry operator by providing accommodation entries in the form of bogus share capital, unsecured loan, sale of shares etc. The Respondent willfully made or caused entries which were false and known to be false and not true and thereby indulged in falsification of books of accounts or documents for various beneficiaries.

The Board on consideration of the Prima Facie Opinion formed by the Director (Discipline) was of the view that the Companies involved are bogus and KYC of directors of these Companies needs to be confirmed as in para 9.3(c) the Respondent confirmed that he and his wife are directors in these companies. Accordingly, the Board did not agree with the prima facie opinion of the Director that the Respondent is NOT GUILTY of Other Misconduct falling within the meaning of Clause (2) of Part-IV of First Schedule to

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the Chartered Accountants Act, 1949 read with Section 22 of the said Act and decided to proceed under Chapter IV of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007.

3. **BRIEF OF PROCEEDINGS HELD:**

- a) At the time of hearing held in the case on 16th August 2019, the Respondent along with his Counsel was present before the Board in person. The Respondent was put on oath. 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 his Counsel made detailed oral submissions on the charges alleged against the Respondent. The Respondent was examined by the Board. On consideration of the documents and submissions on record, the Board decided to adjourn the proceedings in the case with the direction to the Respondent to provide the following:
- i. Bank Statements of the companies during the period of allegation.
 - ii. Assessment order of these Companies.
 - iii. Basis of valuation of shares sold to M/s Paritosh Electricals Pvt. Ltd.

Since there was no representation from the Complainant Department during the hearing, the Board also directed the office to write to Chairman, CBDT about non-appearance of any officer from the Complainant Department and request for arranging of their appearance at the time of next hearing. Thereafter, the Respondent vide communication dated 12th September 2019 submitted his reply.

- b) At its meeting held on 25th September 2019, the Board considered the submissions made by the Complainant and Respondent's counsel and also the documents available on record. After consideration, the Board directed the Complainant to share following documents/information to the office:
- i) Who were the beneficiaries from such transaction and assessment order for financial year 2012-13 to 2013-14 of such beneficiaries
 - ii) What was the relation of the Respondent with beneficiary company(ies)

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iii) Status of retraction filed by the Respondent.

c) Thereafter at its meeting held on 13th December 2022, the Board noted that the Counsel for the Complainant Department and the Respondent along with his Counsel were present before it through video conferencing. Since there was a change in the composition of the Board since the last hearing, the Board gave an opportunity to the parties to the case as to whether they would like to have a De-Novo enquiry or continue from the last proceedings to which the Counsel for the Respondent stated that he would like to have a fresh hearing in the case. Accordingly, the charges alleged against the Respondent were read. The Counsel for the Respondent made his detailed submissions before the Board. The Counsel for the Complainant Department also made his submissions in support of the allegations alleged against the Respondent.

Upon consideration of the submissions and documents on record the Board adjourned the hearing in the case with the direction to the Complainant Department to provide the following:

- i) Who were the beneficiaries from such transaction and Assessment Order for Financial Year 2012-13 to 2013-14 of such beneficiaries.
- ii) What was the relation of the Respondent with beneficiary company(ies).
- iii) Status of retraction filed by the Respondent.

d) Thereafter at its meeting held on 29th December 2022, the Board noted that the Representative of the Complainant Department and the Respondent along with his Counsel were present before it through video conferencing. The Complainant Department was directed to submit documents which they failed to provide. Thereafter, the Counsel for the Respondent and the Representative of the Complainant Department made their respective submissions before the Board. On consideration of the documents and submissions on record, the Board concluded the proceedings in the case. However, the decision on the conduct of the Respondent was kept reserved by the Board. At its meeting held



on 3rd February 2023, the Board on consideration of the documents and submissions on record decided on the conduct of the Respondent.

BRIEF SUBMISSIONS OF THE RESPONDENT:

4. The Respondent in his written submissions, inter-alia, stated as under,
- a) The Director Discipline shall submit before the Board of Discipline all information and complaints where he is of the opinion that there is no prima facie case and the Board of Discipline may, if it agrees with the opinion of the Director (Discipline), close the matter or in case of disagreement, may advise the Director (Discipline) to further investigate the matter.
 - b) The Section specifically mentions that the council "shall" constitute "a" Board of Discipline, which means that the council shall only constitute the one Board of discipline. Further having two Board of Discipline at any given point of time, becomes invalid, unconstitutional and goes outside of the purview of what is envisaged in the law prescribed under Section 21A of the Chartered Accountants Act, 1949.
 - c) The Respondent brings to notice the fact that in FY 2018-19, the ICAI had two Board of Discipline which is illegal and unconstitutional. The said fact has been mentioned in the annual report of ICAI for 2018-19, wherein it has been clearly stated that there were two Board of Disciplines. The report specifically states as follows: "Five benches i.e. TWO benches of Board of Disciplines and THREE benches of Disciplinary Committee have been constituted for expeditious disposal of pending disciplinary cases under enquiry."
 - d) The Director Discipline has improved the complaint by removing reference of charges of professional misconduct under the Chartered Accountants Act, as included by the Complainant in Form-I, and replacing them by a separate charge introduced by him at his own will. This process is not recognized by law.
 - e) The Director Discipline has held the respondent to be guilty under Clause 2 of part IV of the First Schedule; but it is not understood why and how the DD proceeded without giving the Respondent an opportunity to defend himself in respect of such a charge. This is against the principles of natural justice and enquiry thus needs to be closed forthwith.

B-82

- f) The Board of Discipline has decided to hold the Respondent guilty within the meaning of clause 2 of part IV of the first schedule without the Respondent having filed his written statement in respect of the charge for which the undersigned has been held guilty. The Respondent was charged with entirely different charges of professional misconduct. The objections of the Respondent had been totally ignored and not considered by the Board. In doing so, the Board acted beyond its jurisdiction. The non-adherence of the prescribed procedures under the rules governing the disciplinary proceedings has been further confounded by the Board of Discipline. The matter needs to be closed forthwith in the interest of justice.
- g) The DD has held the Respondent guilty of other misconduct under clause 2 of part IV of the First schedule. He has done that without any notice to the Respondent, and in any case has acted beyond his jurisdiction. His actions are indefensible from the standpoint of natural justice and the prescribed rules. Further the Complainant had charged the respondent of professional misconduct under clauses 6&7 of part 1 of the second schedule. The two schedules are different and the cases that pertain to the charges contained in each schedule are heard by different bodies. Matters relating to charges under the first schedule are heard by the Board of Discipline whereas the matters relating to charges under second schedule, or both schedules, are heard by Disciplinary committee. The composition of the two bodies is different. By shifting the charge, the DD and the Board of Discipline have caused a complaint that was made under the charges of second schedule, and required to be heard by the Disciplinary Committee if the Respondent was found Prima Facie guilty, be heard by the Board of Discipline on the erroneous process having been followed in an unjustified manner. Such an act on behalf of the DD and the Board of Discipline renders the PFO bad in law.
- h) No proof or evidence was submitted by the Complainant; the Board of Discipline has totally ignored this vital fact: the complainant had adduced no proof or evidence at the time of making the Complaint, and further did not provide any proof or evidence even when another opportunity was provided to him. The Complainant has only provided the copy of the statement recorded on

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02/03/2016, but the contents of that statement cannot be relied upon as the same has been retracted. Under the circumstances, there is no reason whatsoever to justify holding the Respondent Prima Facie Guilty of misconduct.

- i) The Respondent provided the copy of the following:-
- i. Bank Statements of the companies mentioned therein.
 - ii. Assessment order of the companies mentioned therein.
 - iii. The book value Certificate of M/s Paritosh Electricals Pvt. Ltd. as certified by auditors M/s. Agarwal Arun & Associates.
 - iv. The Equity shares were issued at Book value Certified by Auditors and not at high premium as alleged by the DDIT (inv).

OBSERVATIONS OF THE BOARD:

5. 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.
6. 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 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. Furthermore, the Respondent who had participated in the earlier hearing(s) and submitted to the jurisdiction of the Board of Discipline without raising any objection subsequently cannot question the validity/legality of constitution of the said Board of Discipline. The challenge made by



the Respondent as to the constitution of more than one Board of Discipline is not bonafide and a clear after thought. Also, the Board of Discipline was of the view that it is not the appropriate forum to challenge the constitution of its two Benches.

7. As regard the objection of the Respondent that the Director(Discipline) has shifted the charge, the Board was of the view 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/wrong 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 ShanakarTriyar v. RamKalewar 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, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use.

Thus, the incorrect 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

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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 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 requires 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 Complainant do not fall within any specified clauses of professional misconduct, the same may however be a case of "other misconduct" and the ICAI would be within jurisdiction to proceed further on the

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allegations. Therefore, incorrect mentioning of clauses pertaining to "misconduct" does not in any manner vitiate the proceedings.

8. As regard the charge alleged, the Board noted the Complainant Department had recorded a Statement of the Respondent on Oath before DDIT (Inv.), Unit(2), Kolkata in connection with an enquiry conducted by Directorate of Income Tax (Investigation), Kolkata under section 131 of the Income Tax Act, 1961 on 02.03.2016. Furthermore, the Respondent retracted the above statement after 10 days by filing affidavit before First Class Magistrate of Kolkata. The Respondent in the said affidavit submitted that:

- a) On 02/03/2016 two officers of Income Tax Department along with two policemen entered into his office. They asked him rudely to accompany them to Investigation wing of Income Tax Department. Their senior officer Mr. Pankaj Diwedi told him over phone to immediately come to Income Tax Office with his men otherwise he would send orders for search/survey operation in his office.
- b) When he reached Investigation wing, he was told by Mr. Pankaj Diwedi that his statement would be recorded immediately and hence he issued and immediately served notice under section 131 of the Income tax Act in the name of various companies under which he was director.
- c) That he was surprised that when his response to some questions was not recorded and he was forced to admit that he was involved in providing accommodation entries to Banktesh Group through the Companies in which he was a Director.
- d) That officer who was recording his statement along with other officers sitting beside him were creating continuous pressure upon him by passing various comments relating to ruining his professional career, assessment of companies by reopening u/s 148 of Income Tax Act, bringing his family on road etc.
- e) He was further warned that if he retracts his statement he would face dire consequences and he was so mentally upset that for about 10 days he could not decide as to what he should do.
- f) That after gaining some courage, he has decided to retract his statement made on 02/03/2016 before DDIT, Unit 2(2), Kolkata by swearing this affidavit.

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9. Hence, after the retraction, the earlier statement loses its value. However, the Complainant department was informed about the retraction on 20.06.2016 and has sent communication dated 24.06.2016 to the Respondent, requesting that he suggest a suitable date and time as per his convenience in the next 15 days for recording his statement. He duly replied and stated that he would be available on or after 16th August, 2016, as he would not be available before that due to pre-occupied audit work engagements. Accordingly, it is seen that another statement of the Respondent was recorded on 25.11.2016 before ACIT, Circle-34, and Kolkata, but not before DDIT (Inv.). On perusal of the same, it is noted that it reveals that:

- a. Source of loan given to M/s Eastern Trade Centre and M/s Tulsi Switchgears was refund of loans from different lonees.
- b. The reason for sale of shares of M/s Paritosh Electricals Pvt. Ltd. at very high premium was its book value which was Rs. 250/- per share.
- c. That he did not stand by the statement given to DDIT on 02.03.2016 **(Question 46 on R-12)**.
- d. He after giving on DDIT had retracted it after 10 days by submitting affidavit to 1st Class Magistrate.
- e. That he informed the Department about retraction on 20th June, 2016 **(Question 49 on R-13)**. He received reply from Department with a week and had submitted the response to same with 2-3 days.
- f. On the question as to he took more than 3 months to inform the Department he submitted that month of March is busiest for CA like him and continued till May for declaration of results in Newspaper.
- g. In respect of question no. 57 relating to which statements as per his retraction statement are incorrect, he submitted that telling his companies as Jama kharchi companies/accommodation entry providers were incorrect.

Thus, the Board noted that nothing in the statement recorded on 25.11.2016 indicates that the Respondent is engaged in the business of lodging entries, as claimed.

B-22

10. The Board also noted that the Respondent is director in 11 companies and out of those companies, Assessment order has been given in respect to certain companies as under:

- a) Paritosh Electricals Private Limited (AY 2014-15)
- b) Vivek Tracom Private Limited (AY 2014-15)
- c) DivyaElectronice Private Limited (AY 2015-16)

On perusal of the Assessment Orders of the said companies, the Board noted that in the following three companies, deemed income u/s 115 JB has increased. As per 115 JB of the Income Tax Act 1961, book profit means net profit as reflected in the statement of profit and loss account which is further increased or decreased with various items specified in the Explanation I to section 115JB of the Act.

There has been Addition of income by the Assessing Officer (FY 2014-15) in the following companies. However, it is on account of the following reasons:

- i) On account of disallowance of certain expenditure.

Name of the Companies	Deemed Taxable Income u/s 115JB (Amount in Rs.)	Deemed taxable Income as per the assessment order (Amount in Rs.)
Divya Electronics Pvt Ltd	3,83,935	5,55,622
Paritosh Electricals Pvt Ltd	2,71,007	3,92,195
Ranbhumi Marketing Pvt Ltd.	2,18,592	3,16,341

- ii) There is also a difference between the determination of the fair value of shares considered by the Assessee and the Assessing Officer of Paritosh Electricals Private Limited (AY 2014-15).

Thus, the Board noted that the Complainant department has not brought to record any assessment order to show that commission income has either been added to the income of the Respondent or bogus income has been added to the income of the beneficiary. Therefore, neither the Assessment Order of the

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Respondent nor the record show that any income had been added to the hands of the Respondent as commission income.

11. The Board noted that the sole evidence which the Complainant department has brought on record for the charges alleged against the Respondent is the copy of his own statement which had been subsequently retracted by him and the new Statement of the Respondent does not indicate any admission on the part of the Respondent as alleged. Beyond that, despite opportunities given to the Complainant Department to substantiate the charges levied against the Respondent, the Complainant Department failed to bring on record any further evidence to support the same. Accordingly, the Board was of the view that there are no conclusive evidence to prove the charge alleged against the Respondent. Accordingly, the Board held the Respondent **NOT GUILTY** in respect of the charge alleged.

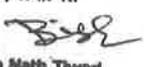
CONCLUSION:

12. 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. 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/-	Sd/-	Sd/-
CA. Prasanna Kumar D.	Ms. Dolly Chakrabarty (IAAS, retd.)	CA. (Dr.) Raj Chawla
(Presiding Officer)	(Government Nominee)	(Member)

DATE: 10th February 2023

सही प्रतिलिपि होने के लिए प्रमाणित
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बिष्व नाथ तिवारी / Bishwa Nath Tiwari
कार्यकारी अधिकारी / Executive Officer
अनुशासनगत निदेशालय / Disciplinary Directorate
इंस्टीट्यूट ऑफ चार्टर्ड एकाउंटेंट्स ऑफ इंडिया
The Institute of Chartered Accountants of India
आईसीएआई भवन, विश्वास नगर, शाहदरा, दिल्ली-110032
ICAI Bhawan, Vishwas Nagar, Shahdara, Delhi-110032