

CONFIDENTIAL

DISCIPLINARY COMMITTEE [BENCH – II (2023-2024)]

[Constituted under Section 21B of the Chartered Accountants Act, 1949]

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

File No.: [PR-140/2018-DD/164/2018/DC/1490/2021]

In the matter of:

**Shri Rajesh Malik, Noida,
MD, Carnoustie Management India Pvt Ltd
Plot No. 19A, Sector 16A,
Film City, Noida,
U.P. -201301**

.... Complainant

Versus

**CA. Saurabh Agrawal (M. No. 507497)
M/s Agrawal Saurabh & Associates,
Chartered Accountants,
Tara Complex, First Floor,
Sharma Market, Opp. ESI Hospital,
Sector 22, Noida,
U.P. -201301**

.....Respondent

MEMBERS PRESENT:

**CA. Ranjeet Kumar Agarwal, Presiding Officer(In person)
Smt. Rani Nair, I.R.S. (Retd.), Government Nominee (In person)
Shri. Arun Kumar, I.R.S. (Retd.), Government Nominee (In person)
CA. Sanjay Kumar Agarwal, Member (In person)**

DATE OF FINAL HEARING: 18.08.2023 (through physical/video conferencing mode)

PARTIES PRESENT :

**COMPLAINANT: Not Present
RESPONDENT: CA. Saurabh Agrawal (Through VC)**

BACKGROUND OF THE CASE: -

1. The background of the case is as under:
 - a. The Complainant has filed Form-I dated 23rd May 2018 against the Respondent who has been the Statutory Auditor of M/s CBS International Projects Private Limited (hereinafter referred to as '**Company/CBS**') since the financial year 2015-16.
 - b. The abovementioned Company had taken a loan of Rs. 34,04,80,365/- (Rupees Thirty-four crores four lakhs eighty thousand three hundred and sixty-five only) from the Complainant Company M/s Carnoustie Management India Pvt Ltd (hereinafter referred to as '**Complainant's Company/CMIPL**') in Financial Year 2007-08.
 - c. This loan was shown as 'Long Term Borrowings' in the balance sheet of the Company from FY 2007-08 to 2015-16 as an inter-corporate deposit.
 - d. However, in 2016-17, the same was shown under Trade Payables instead of 'Long Term Borrowing'.
 - e. Hence, this change in the classification of the loan was made without knowledge of the Complainant.

CHARGES IN BRIEF: -

2. The Committee noted that the charge against the Respondent is that being the Statutory Auditor of the Company, failed to report in his audit report for F.Y. 2016-17 regarding the change of classification of loan of Rs. 34,04,80,365/- taken by the Company from the Complainant's Company.
3. The Committee noted that the Respondent in his reply at the stage of PFO had, inter-alia, mentioned as under:
 - (i) That Complainant's Company (CMIPL) was earlier the parent of the Company (CBS) which was audited by the Respondent.
 - (ii) That the Company (CBS) was purchased by his client (Mr. Sanjay Rastogi) through a share purchase agreement (SPA) dated 13th August

2015. There was no reference of the loan agreement (between CMIPL and CBS) in the SPA.

- (iii) During the audit of financial statements of the Company (CBS) for the Financial Year 2016-17, he went through the intrinsic nature of transactions. He found that there was no loan agreement available with the Company and no interest was charged by the Complainant's Company since beginning.
- (iv) As regards the copy of the loan agreement produced by the Complainant, he submitted that loan agreement had been challenged by the Company before NCLT (National Company Law Tribunal).
- (v) That no debit notes were raised by the Complainant's Company with respect to interest. Thus, there was no reason to continue to classify such an item as 'Long Term Borrowing' in the books of account as identified during the Financial Year 2016-17.
- (vi) That unsecured loan / inter- corporate deposits can be taken through account payee cheque / demand draft / banking channel as mandated under section 269SS of the Income Tax Act 1961.
- (vii) Further, the account of Complainant Company was just a running account.
- (viii) That a letter dated 30th August 2016 was sent to the Complainant by his client (Mr. Sanjay Rastogi) stating it as 'Creditor', which was never objected to by the Complainant till date.
- (ix) The alleged change in classification was the correction of the incorrect classification made in previous years.
- (x) In respect of such a change in classification in the financial statements during the FY 2016-17, a detailed note has been provided in the financial statements vide point no 4.1 (Para 4) as '*Previous Year figures have been regrouped / re-casted wherever considered necessary to match current year classification.*'

4. The Director (Discipline) in his Prima Facie Opinion dated 16th June 2020 noted as under:

- a. The Complainant has provided the copy of the loan agreement entered into between M/s Carnoustie Management Pvt Ltd (i.e. the Complainant's Company) and M/s CBS International Projects Pvt Ltd (i.e. the Company)

on 11th May 2007. Though the Respondent has mentioned in his Written Statement that only the photocopy of the loan agreement is available with the Complainant and the original loan agreement has not been given by the Complainant and the same has been challenged by the Company before NCLT, yet, it needs to be mentioned that if any document has been produced by either party then the same cannot be ignored in any manner while dealing with the case more so when this amount was continuing in the balance sheet of the Company over the years i.e., since year 2007.

- b. That in the loan agreement, in relation to payment of interest on the total loan amount it is mentioned that interest becomes payable from the beginning of the Financial Year following the moratorium period or upon demand by CMPL, whichever is later. Thus, in the extant matter, if the Complainant's Company has not asked the Company for the payment of interest, then the Respondent cannot take defence of non-payment of interest for the re-classification of the transaction as the determination of charging of interest was at the sole option of the Complainant's Company as per the provisions of the loan agreement.
- c. That letter dated 30th August 2016, was sent for information of the Complainant's Company regarding the change in the registered office of the Company.
- d. That the Respondent has also stated that there was no mention / reference of such a loan agreement in the share purchase agreement dated 13th August 2015. However, it is viewed that the mere absence of any clause / reference of the loan agreement does not vitiate the loan agreement previously entered in between the Company and the Complainant's Company.
- e. Further, it is also noted that the same transaction was shown as 'Long Term Borrowings' in the balance sheet of the Company during FY 2015-16 for which the same Respondent acted as Statutory Auditor of the Company. It is also noted that the same amounted to 24.12% of its total balance sheet size of Rs. 141,18,61,692/- during the FY 2015-16.
- f. Thus, it is also not clear as to how Respondent could verify such a material amount during the audit of FY 2015-16 without examining the loan

agreement if it was not in existence at all and why he did not qualify his audit report for Financial Year 2015-16 in this regard.

- g. That the Respondent has also not provided a copy of any decision taken by the management of the Company or copy of any board resolution in relation to a change of classification of loan amount from 'Long Term Borrowings' i.e. Non-Current Liabilities to 'Trade Payables' i.e. Current Liabilities in accordance with the relevant provisions of the Companies Act 2013.
- h. That total loan amount of Rs. 34,61,57,965/- due to Complainant's Company, consists of 19.52% of its total balance sheet size, which is itself a material amount. On perusal of note that has been provided in the financial statements vide point no 4.1 (Para 4) regarding change of classification of loan, it is viewed that in respect of such material transaction, which consists of approx 20% of the total balance sheet size during the FY 2016-17, the disclosure given by the Respondent in the Notes to Accounts section is not proper and inadequate and detailed note and reasons should have been given for such reclassification.
5. Accordingly, the Director (Discipline) in terms of Rule 9 of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007, held the Respondent Prima-facie Guilty of Professional Misconduct falling within the meaning of Items (5), (6), (7) & (8) of Part I of the Second Schedule to the Chartered Accountants Act, 1949. The said items in the Schedule to the Act states as under:

Item (5) of Part I of the Second Schedule:

"A chartered accountant in practice shall be deemed to be guilty of professional misconduct, if he-

(5): fails to disclose a material fact known to him which is not disclosed in a financial statement, but disclosure of which is necessary in making such financial statement where he is concerned with that financial statement in a professional capacity;

Item (6) of Part I of the Second Schedule:

(6): Fails to report a material misstatement known to him to appear in a financial statement with which he is concerned in a professional capacity;

Item (7) of Part II of the Second Schedule:

(7): does not exercise due diligence, or is grossly negligent in the conduct of his professional duties;

Item (8) of Part II of the Second Schedule:

(8): fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion.”

SUBMISSIONS OF THE RESPONDENT ON PRIMA-FACIE OPINION

6. The Committee noted that the Respondent in his written statement dated 02nd August, 2021 had, inter-alia, mentioned as under:-
- (i) CBS was incorporated on 29th March 2007 and on the date of the loan agreement i.e. 11th May 2007, CMIPL was not a shareholder of CBS. However, in the loan agreement produced on record by the Complainant it is mentioned that on the date of loan agreement CBS was subsidiary of CMIPL.
 - (ii) That in November 2016, CBS had shifted its registered office from Mumbai to Delhi and in this process, Mr. Sanjay Rastogi (client) identified that there was some amount shown by CMIPL which was basically an investment made by CMIPL in the form of third party payment for and on behalf of CBS.
 - (iii) That Client did reclassification from loan to trade payable during FY 2016-17. CBS management told the Respondent that CBS had not taken any loan from CMIPL. During the shifting of the registered office from Mumbai to Delhi, CBS showed CMIPL as a creditor, which was not objected to by CMIPL.
 - (iv) He found that the neither the Loan Agreement was existed nor produced before CBS/Respondent by the Complainant. That loan agreement

produced on record by the Complainant did not have any wording/attachment in Share Purchase Agreement, Balance Sheet of CBS and even in the balance sheet of CMIPL since the beginning.

- (v) Mr. Sanjay Rastogi (client) filed an FIR about purported forged loan agreement between CMIPL and CBS and after investigation, the Police filed a charge sheet in this connection confirming Complainant as Guilty in forging of the loan agreement.
- (vi) Mr. Rajesh Malik (CMIPL group) applied for quashing the FIR which was rejected by Allahabad High Court and various bailable and non-bailable warrants were also issued by Learned Magistrate, District and Sessions Court, Gautam Budh Nagar against the Complainant in this connection.
- (vii) CMIPL filed a complaint against the Respondent before the Disciplinary Directorate on the ground that its amount has been reclassified as Trade payables from loans and the right of the Complainant to be a financial creditor is thus hampered as aggrieved by the Complainant.
- (viii) That the change in classification was not intended to defeat the object of CMIPL as financial creditor in any manner. Reclassification was done by the management of CBS and not by the Respondent. Reclassification never hampers the right of CMIPL as financial creditor.
- (ix) That the Complainant had not established the genuineness of the purported loan agreement till date before NCLT/NCLAT/Allahabad High Court/Noida Police/Noida District Court/EOW/Handwriting Experts to name a few.
- (x) That neither CBS nor CMIPL had brought such a loan agreement into his notice during the audit for FY 2016-17, and it only came into existence during IBC proceedings during FY 2018-19.
- (xi) That CBS had submitted before NCLT/NCLAT ((National Company Law Tribunal/ National Company Law Appellate Tribunal)) that amount of CMIPL was nothing but investment which could not be fetched because the CBS project was not started from 2007-2015 by CMIPL.
- (xii) That CMIPL filed a petition before NCLT u/s 7 of IBC as financial creditor of CBS however both NCLT and NCLAT had reached on conclusion that

- the loan agreement was not genuine and the matter was decided against CMIPL by NCLT/NCLAT not being a financial creditor of CBS.
- (xiii) That NCLT observed that the original loan agreement has not been placed on record and the petitioner/the Complainant did not provide an adequate explanation as to how, under what circumstances and since when loan document was given to the CBS.
- (xiv) That two handwriting expert opinions have been furnished before NCLT by CBS to prove that loan agreement was forged and thus NCLT dismissed the petition of CMIPL as financial creditor of CBS.
- (xv) Thereafter, CMIPL filed an appeal before NCLAT against the order of NCLT. NCLAT also dismissed appeal of CMIPL.
- (xvi) MCA has also closed the complaints filed by CMIPL on ground of accounting fraud against CBS.
- (xvii) That the Respondent could not find any suitable clause in CARO/Independent Audit Report where he could mention regarding reclassification done by CBS. There may be an unintentional error, but nothing was deliberate still he seeks pardon on the subject matter.
- (xviii) That forged loan agreement cannot be taken as base to frame opinion as frauds vitiates everything.
- (xix) The Respondent submitted CBS letters filed before NCLT/ NCLAT on affidavit which have more evidentiary value rather than a management representation letter.
- (xx) That the transactions between CMIPL and CBS were neither in the nature of capital not loan nor provisions that is why these are reclassified as trade payables under creditors.

BRIEF FACTS OF THE PROCEEDINGS:

7. The Committee noted that the instant case was fixed for consideration on following dates:-

S. No.	Date	Status of Hearing
1.	12.05.2023	Part Heard and Adjourned
2.	18.08.2023	Heard and concluded.

8. On the day of the first hearing held on 12th May, 2023, the Committee noted that the Complainant vide email dated 12th May 2023 sought adjournment due to non-availability of counsel. The Respondent was physically present from ICAI Bhawan New Delhi. The Respondent was administered on Oath. Thereafter, the Committee enquired from the Respondent as to whether he was aware of the charges. On the same, the Respondent replied in the affirmative and pleaded Not Guilty to the charges levelled against him. The Committee, looking into the adjournment request of the Complainant and the fact that this was the first hearing, decided to adjourn the hearing to a future date. With this, the hearing in the matter was partly heard and adjourned.
9. On the day of the final hearing held on 18th August, 2023 the Committee noted that the Complainant was not present despite notice duly served upon him and the Respondent was present in person. The Respondent presented his line of defence, mentioning that NCLT, NCLAT and the Courts have held that the Complainant is not a financial creditor. He further submitted that he had also taken an expert opinion in the matter, which is in his favour.
 - 9.1 The Committee posed certain questions to the Respondent to understand the issue involved and the role of the Respondent in the case.
 - 9.2 Thereafter, the Committee, on considering the documents on record and the oral and written submissions of the parties vis-à-vis facts of the case, decided to conclude the hearing in the matter.

FINDINGS OF THE COMMITTEE

10. The Committee noted that CMIPL had filed a petition before the National Company Law Tribunal (hereinafter referred to as “NCLT”) under Section 7 of the Insolvency and Bankruptcy Code, 2016 as a financial creditor of CBS. Subsequently, NCLT investigated and issued an order on 2nd January 2019. The order contained pertinent observations concerning the loan given by

CMIPL to CBS, specifically highlighted in paragraphs 24, 40, 41, 43, and 47 of the said order, which are as under:-

"24. It is further pointed that the respondent company was incorporated on 29.03.2007 and the alleged loan agreement was executed on 11.05.2007. It is alleged that as on 11.05.2007, the applicant was not even a shareholder of the respondent company and as such there was no occasion to refer respondent company as a subsidiary company in the loan agreement. It is accordingly argued that when the respondent company was not a subsidiary company of the petitioner on 11.05.2007, it is not clear how the loan agreement dated 11.05.2007 refers the respondent company as its subsidiary.

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40. Admittedly original of the disputed loan agreement dated 11.05.2018 (sic 11.05.2007) has not been placed on record. Normally the original loan agreement is always kept by the lender.

41. Despite serious dispute on the very existence of the loan agreement, applicant has failed to explain as to how; under what circumstances and since when the loan document was given to the borrower. Except a word of mouth, no acknowledgement or papers in this regard have been placed. Neither original loan agreement has been produced nor proper explanation is on record. It is the duty of the applicant to plead and produce evidence, we are constrained to draw adverse inference, in the absence of original loan agreement and for want of adequate explanation in this regard.

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43. It is also pertinent to note that in the loan agreement it is specifically mentioned that on the date of loan agreement respondent was a subsidiary of the applicant. However, respondent has placed on record the Annual Return of the company for the year ending 31.03.2008 to show that the company was

incorporated on 29.03.2007 and that as on 11.05.2007 i.e. on the date of the loan agreement petitioner was not a shareholder of the respondent company and the respondent was not a subsidiary of the applicant. This fact also creates doubt on the genuineness of the loan agreement.

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47. For the reasons stated above this petition fails and the same stands dismissed as not maintainable.”

11. The Committee noted that aggrieved by the NCLT order dated 2nd January 2019, the CMIPL has filed an appeal before the National Company Law Appellate Tribunal (hereinafter referred to as “NCLAT”). Thereafter, the NCLAT passed an order dated 5th February, 2020, relevant extracts of para 20 and 23 of the said order to be read as under :-

“.....

20. The Respondent placed reports of two experts dated 29th July, 2018 and 4 August, 2018, before the Adjudicating Authority in support of the contention that the alleged Loan Agreement dated 11th May, 2007 is a forged one. The Appellant failed to explain as to why the Expert’s opinion’ is to be ignored.

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23. In view of the aforesaid fact and in absence of any genuine document, on the strength of ex-agreement of which original copy was not produced before the Adjudicating Authority, it is not desirable to hold that the Appellant is a Financial Creditor of the Respondent Company. We may mention that we have not gone into the question of limitation to decide whether the application under Section 7 of the I&B Code’ was maintainable as the Respondent having ceased to be subsidiary of the Appellant since 31st August 2015, which will be the date of default, as the aforesaid issue was not raised before the Adjudicating Authority”.

12. The Committee noted that aggrieved by the NCLAT order dated 5th February 2020, the CMIPL has filed an appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court also passed an order dated 6th August 2021 which was in line with the order of NCLAT dated 5th February 2020. The relevant extracts of the order dated 6th August 2021 of the Hon'ble Supreme court read as under:-

"1. We find no error in the order of the National Company Law Appellate Tribunal dated 05th February 2020 in Company Appeal (AT) (Insolvency) 154 of 2019.

2. The appeal is accordingly dismissed."

13. The Committee from the above noted that it is established by courts that the loan agreement dated 11th May 2007 was a forged document. Hon'ble Supreme Court has accepted the NCLAT order as it did not find any error in the order passed by NCLAT.
14. The Committee noted that for reclassification of the amount a note was given in the disclosures with the financial statements for the financial year 2016-17 which states that *'Previous Year figures have been regrouped / re-casted wherever considered necessary to match current year classification'*.
15. The Committee noted that though this reclassification never hampers the right of CMIPL as a financial creditor, yet the Respondent was required to mention reference of the same in this audit report because the amount was material, as being 19.52% of the Balance Sheet size. The Committee was of view that the Respondent was required to be more careful in future regarding disclosures made in the audit report.
16. The Committee noted that the basis of this case is a loan agreement dated 11th May 2007 brought on record by the Complainant at the time of filing of the complaint before the ICAI, which was a forged one, as concluded in order of 

NCLT, NCLAT and the Hon'ble Supreme Court. The Committee hence noted that the Complainant did not approach the Institute with clean hands.

17. The Committee, in view of the judgements of the Hon'ble Courts brought on record by the Respondent, holds him Not Guilty. **At the same time, the Committee advised that the Respondent was required to take extra caution in the conduct of his professional duties.**

CONCLUSION

18. In view of the above observations, considering the submissions of the Respondent and documents on record, the Committee held the Respondent **NOT GUILTY** of Professional Misconduct falling within the meaning of Items (5), (6), (7) and (8) of Part I of the Second Schedule to the Chartered Accountants Act, 1949.

ORDER

19. Accordingly, in terms of Rule 19 (2) of the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007, the Committee passed order for closure of this case.

Sd/-
(CA. RANJEET KUMAR AGARWAL)
PRESIDING OFFICER

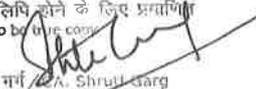
Sd/-
(MRS. RANI NAIR, I.R.S. RETD.)
GOVERNMENT NOMINEE

Sd/-
(SHRI. ARUN KUMAR, IAS, RETD.)
GOVERNMENT NOMINEE

Sd/-
(CA. SANJAY KUMAR AGARWAL)
MEMBER

DATE: 07th February, 2024

PLACE: New Delhi

सही प्रतिनिधि होने के लिए प्रमाणित
Certified to be true copy

श्री अरुण कुमार / Shri. Arun Kumar
सहायक निदेशक / Assistant Director
अनुशासनात्मक निदेशालय / Disciplinary Directorate
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