

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/198/2017-DD/200/2017/BOD/459/2018]

CORAM (Present in Person):

CA. Rajendra Kumar P, Presiding Officer
Ms. Dolly Chakrabarty (IAAS, Retd.), Government Nominee
CA. Priti Savla, Member

In the matter of:

Shri Abhishek Mishra,
DDIT (Investigation),
On behalf of Directorate of Income Tax (Investigation)
Unit 1(2), 4th Floor, Aayakar Bhawan Annexe,
P-13, Chowringhee Square,
Kolkata 700069.

.....Complainant

Versus

CA. Bijay Kumar Agrawal (M.No. 055653)
127, Netaji Subhash Road,
5th Floor, Rom No.5/4
Kolkata 700 001.

.....Respondent

DATE OF FINAL HEARING : 28th July, 2023
PLACE OF FINAL HEARING : Kolkata

PARTIES PRESENT (in person):

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

FINDINGS:

CHARGE ALLEGED:

1. The Respondent assisted in raising bogus share application /share premium through various shell companies controlled and managed by Mahabir Danwar Jewellers Group in



connivance with the city based accommodation entry operators (Mr. Ankit Bagri) for the financial years ranging from 2006-07 to 2012-13 resulting in evasion of taxes on large scale.

BRIEF OF PROCEEDINGS HELD:

2.

S. No.	Dates of Hearing(s)	Status of Hearing(s)	Compliance of direction, if any, given by the Board
1.	31 st May, 2019	Hearing adjourned on account of non-representation from the Complainant Department.	-----
2.	16 th August, 2019	<p>Part-heard and adjourned with the direction to Office and the Respondent to provide the following documents/information:</p> <p>From the Respondent:</p> <p>(i) Any involvement of the Respondent in the following companies:</p> <p>(a) M/s A B Polypacks Private Limited.</p> <p>(b) M/s Shree Hanuman Minerals Private Limited.</p> <p>(c) M/s Shree Trading Company.</p> <p>(d) M/s Krishna Gopal Ore and Minerals Private Limited.</p> <p>(ii) Any relation of the Respondent with the companies mentioned on page no. C17 to C36 of the annexure to Prima facie opinion.</p> <p>(iii) DIN no. of the Respondent.</p> <p>To the office:</p> <p>(i) After having DIN no. of the Respondent, to check from ROC whether the Respondent is Director in these Companies.</p> <p>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</p>	<p>In compliance, the Respondent vide letter dated 31st August, 2019 submitted as under:-</p> <ul style="list-style-type: none"> • DIN no of the Respondent is 02432755. • The Respondent has served as a Director on the Board of only one Company-namely Jupiter Hotel India Private Limited (Formerly, Freshio Bar & Restaurant (P) Ltd.) from 24.07.2015 to 16.03.2019. • The Respondent has never been a Director or an Auditor of any of the Companies or other business entities included in the PFO. • The Respondent has been the auditor for the business entities of Mahabir Group, more specifically for Mahabir Danwar Jewellers (P)

		hearing.	Limited, Mahabir Jewellers (P) Limited and KIK Jewells (P) Limited since incorporation.
3.	25 th September, 2019	<p>Part-heard and adjourned with the direction to the Complainant Department and Respondent to provide the following documents/information:</p> <p>Complainant Department:</p> <p>(i) Who were the beneficiaries from such transaction and assessment order for financial year 2006-07 to 2012-13 of such beneficiaries.</p> <p>(ii) Assessment order of the Respondent for financial year 2006-07 to 2013-14.</p> <p>(iii) Statement on oath of Mr. Ankit Bagri.</p> <p>(iv) Assessment order of M/s Mahabir Group of Companies for financial year 2006-07 to 2012- 13.</p> <p>(v) Relation of Respondent with companies mentioned on C-8 onwards of Prima facie opinion.</p> <p>Respondent:</p> <p>i) Assessment Order of the Respondent.</p>	No response received.
4.	13 th December, 2022	<p>Part-heard and adjourned with the direction to the Complainant Department and Respondent to provide the following documents/information:</p> <p>Complainant Department:</p> <p>i) Authorization letter in terms of the provision of Rule 3(2) read with Rule 3(5) of the Chartered Accountants Rules, 2007, by an officer holding a post not below the rank of Joint Secretary or equivalent of the Department.</p> <p>ii) Who were the beneficiaries from such transaction and assessment order for financial year 2006-07 to 2012-13 of such beneficiaries.</p>	No response received.

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		<p>iii) Assessment order of the Respondent for financial year 2006-07 to 2013-14.</p> <p>iv. Statement on oath of Mr. Ankit Bagri.</p> <p>v) Assessment order of M/s Mahabir Group of Companies for financial year 2006-07 to 2012- 13.</p> <p>vi) Relation of Respondent with companies mentioned on C-8 onwards of Prima facie opinion.</p> <p>Respondent:</p> <p>i) Assessment order of the Respondent.</p>	
5.	06 th January 2023	<p>Part-heard and adjourned with the direction to the Complainant Department to provide the following documents/information:</p> <p>Complainant Department:</p> <p>i. Since there had been a change in the Officer who had filed the complaint in Form-I against CA. Bijay Kumar Agrawal and a new Officer was now representing before the Board on behalf of the Income Tax Department, a specific Authorization as provided under Rule 3(2) read with Rule 3(5) of the Chartered Accountants(Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules 2007 be provided.</p> <p>ii. Who were the beneficiaries from such transaction and Assessment Order for Financial Year 2006-07 to 2012-13 of such beneficiaries.</p> <p>iii. Assessment Order of the Respondent for Financial Year 2006-07 to 2013-14.</p> <p>iv. Statement on Oath of Mr. Ankit Bagri.</p> <p>v. Assessment Order of M/s Mahabir Group of Companies for Financial Year 2006-07 to 2012- 13.</p> <p>vi. Relation of the Respondent with companies mentioned on C-8 onwards of Prima Facie Opinion.</p>	No response received.



6.	4 th May, 2023	Adjourned due to non-appearance of the parties to the case.	-----
7.	28 th July, 2023	Heard and concluded.	-----

BRIEF SUBMISSIONS OF THE RESPONDENT:

The Respondent in his defence, inter-alia, submitted as under:-

- 3.1 The Director(Discipline) is required, and expected, that in arriving at the Prima Facie opinion, he should apply his mind to the facts of the case, the technicalities regarding the various procedures as required under the Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules 2007 Rules and the provisions of the law governing the disciplinary mechanism of ICAI.
- 3.2 The entire Prima Facie opinion is an example of a document where the Director(Discipline) has chosen to ignore the submissions of the Respondent, has looked away from the mandatory procedures required to be followed in the matter of an investigation against a member of the Institute, and patently appears to have been guided by his premeditated mind in holding the Respondent to be guilty. It is incredible that the Director(Discipline) has neither considered the submissions, nor provided the documents requested, nor noticed the blatant disregard of the legally prescribed procedures; he has acted beyond his jurisdiction, and has made his conclusions by defying the principles of natural justice, much against the prescribed Rules.
- 3.3 The Respondent has been held to be prima facie guilty of other misconduct falling within the meaning of Clause 2 of Part IV of the First Schedule. The complainant had not even alleged that the Respondent was guilty under this charge. The above said clause clearly states that the Respondent can be held guilty only if there is an opinion of the Council. The Respondent has not been provided any opinion of the Council. Without such an opinion, no member of ICAI can be held guilty under this clause. The word "Council" has been defined under the Chartered Accountants Act, and it means nothing more or less than the Council of the Institute. There is no decision of the Council or a notification by the Government of India by which the any such powers of the Council are delegated to the Director(Discipline). Accordingly, without even looking into the merits of the issues the Director(Discipline) has erred in applying this clause for holding the Respondent guilty for other misconduct since there is no opinion of the Council in this regard.



- 3.4 The Director(Discipline) has formed his PFO without the Respondent having been given an opportunity to file his written statement in respect of the charge for which the Respondent has been held guilty. The Respondent was charged with entirely different issues of professional misconduct, and had raised his objections about the same vide three communications referred above. The objections of the Respondent had been totally ignored and not considered by the Director(Discipline). In doing so, the Director(Discipline) has displayed his biased, prejudice and his pre-determined mind. Denial of the right to submit his written statement is thus denial of right to present the defence by the Respondent. The actions of the Director(Discipline) render the entire inquiry bad in law.
- 3.5 The Director(Discipline) had acted beyond his jurisdiction in assigning Clause 2 of Part IV of the First Schedule as a charge for professional misconduct by the Respondent. The Respondent would believe that in accordance with the Rules, the PFO of the Director(Discipline) would have been presented to the Board of Discipline. It would have been in the fitness of things that the Board of Discipline would have noted that the charges made by the Complainant were contained in the Second Schedule, the contentions of the Respondent in this regard were thoroughly disregarded and ignored by the Director(Discipline) and the Director had proceeded to hold the Respondent guilty under a Clause listed in the First Schedule.
- 3.6 The Complainant had levied such charges on the Respondent which are a part of the Second Schedule to the Chartered Accountants Act. All case relating to charges contained in the First Schedule are required to be referred to the Board of Discipline and those contained in the Second Schedule are referred to the Disciplinary Committee in accordance with the disciplinary mechanism of ICAI. The composition of the Board of Discipline and the Disciplinary Committee is entirely different. The Director(Discipline) has not only expanded the complaint, acted in a manner that defies natural justice, not given an opportunity to the Respondent to present his defence, not paid heed or even remotely considered the vital/crucial/critical objections constantly raised by the Respondent, he has further not applied his mind in this case at all and merely relied on certain documents provided to him without even bothering to read through the same.
- 3.7 The use of the word "reluctance" by the Director(Discipline) is out of place considering the facts and circumstances of the case. The Respondent had provided his response to communication from ICAI and listed the arguments to demonstrate that no case of professional misconduct can be made out against him based on generalized statements contained in the Complainant and in the absence of any corroborative evidence/proof.



- 3.8 The circumstances and the manner in which the statements have been recorded on 19th June 2014 clearly prove that the said statements cannot be relied upon, and cannot constitute any admissible evidence in support of the allegations. The Complainant has not produced any corroborative proof/evidence of the Respondent's role with respect to the allegations. The Director(Discipline) has required such evidence/proof to be submitted by the Complainant, but the same was never provided by him. The Complainant has specifically stated in the allegations that the Respondent formed various paper/shell entities for the sole purpose of providing accommodation entries, and was thus involved in such financial irregularities and had further facilitated evasion of taxes by various beneficiaries, but there is not an iota of proof/evidence to substantiate the allegations made by the Complainant.
- 3.9 The Director(Discipline) has relied on evidence which was not even included in the list of evidence provided by the Complainant. The Director(Discipline) had moved to the stage of forming his PFO having grossly erred in evaluating the circumstances of this case. The Director(Discipline) has admitted that one of the reasons for his conclusion is that the Respondent had failed to submit his written statement. Whereas this constitutes the reasoning for the Director(Discipline) to hold the Respondent guilty, it is a fact that the Director(Discipline) had not read the communications of the Respondent and has acted in a mechanical manner, having been biased and prejudice through the enquiry.
- 3.10 The Director(Discipline) has arrived at his conclusion without even considering that there was no proof/evidence beyond reasonable doubt against the Respondent relating to the allegations. The Director(Discipline) has held the Respondent to be guilty of Other Misconduct under Clause 2 of Part IV of the First Schedule whereas the Complainant had charged the Respondent with Clauses 6 & 7 of Part I of the Second Schedule for Professional Misconduct.
- 3.11 All matters of Professional Misconduct against members of the institute are required to be inquired and investigated in compliance with the contents of Chapter V of the Chartered Accountants Act and the Chartered Accountants (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007. The Respondent drew attention to Section 21A of the Chartered Accountants Act, 1949 and Section 21B of the Chartered Accountants Act, 1949. Section 21A of Chartered Accountants Act, 1949. The Section specifically mentions that the Council "shall" constitute "a" Board of Discipline, which means that the Council shall only constitute 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. Similar provision



has been inserted with regards to Section 21B Disciplinary Committee, here the proviso in the Section 218 specifically provides that more disciplinary committees can be constitute by the Council. However, no such specific proviso has been given under Section 21A. Hence, it must be noted that if at all the law makers would have intended to have more than one Board of Discipline, the same would have been included in the Act itself. This clearly shows that the constitution of more than one Board of Discipline is ultra-vires the provisions of the Chartered Accountants Act, 1949. In Financial Year 2018-2019, the Institute of Chartered Accountants of India had two Boards of Discipline which is illegal and unconstitutional. The said fact has been mentioned in the annual report of ICAI for 2018-19. It is thus evident, and the same may be verified from the records of ICAI that two Boards were existing at the time when this PFO was forwarded to it. The letter from ICAI does not even state which bench of the BOD was presented with this PFO. In any case, constitution of two Boards is beyond the powers conferred by law, and the acts/decisions of any of those Boards would be beyond jurisdiction and ultra vires the law. There are innumerable case laws which establish and settle that if any decision is delivered by a forum that has no jurisdiction and that is not lawfully constituted, the same is not sustainable. Accordingly, this matter cannot proceed any further. The PFO of the DD has not been considered by a lawfully constituted Board. The Respondent thus prays that this inquiry be closed forthwith.

OBSERVATIONS OF THE BOARD:

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 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 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 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, 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 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 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 19.06.2014, wherein he deposed as under:

Statement dated 19.06.2014:

"Q.5- What is your source of income?"

Ans. "My main source of income is from professional income earned by auditing, accounting and other chartered accountant related jobs for clients. Apart from that, time and again, I have provided accommodation entries in the form of share capital through "jama kharchi"/shell companies to various beneficiaries including my clients as per requirements."

Q.6- Please explain the nature of business done by you.

Ans. "I am in the profession of Auditing & Tax Consultancy. But time and again, I have provided and arranged accommodation entries in the form of share capital to my clients as per requirement."



Q.8- Please state the names of the companies/proprietorship firms managed/controlled by you and also state who the directors/proprietor in these concerns are.

"As far as my memory goes, around five-six companies are being controlled by me. The books of accounts of those companies are maintained in the computers in my office. I will also provide separate list of all the companies controlled by me. Here, I would also like to mention that the directors in all of those companies are dummy directors who are mostly my friends and associates who lend their name for directorship in lieu of some compensation which I provide them time again. Some of the names are as under:

- a. Anand Agarwal*
- b. Bishnu Kumar Bawri*
- c. Raj Kumar Tekriwal*
- d. Ajit Kumar Jhunjhunwala*

The other names I am unable to recall at present"

- 4.5 The Board further noted that the Respondent retracted the above Statement 19th June 2014 by filing a notarized sworn Affidavit dated 23rd June 2014 and the retraction had been filed even before filing of the instant complaint with the Disciplinary Directorate by the complainant Department.
- 4.6 The Board also noted that the Complainant Department vide letter dated 13th September 2019 informed that all the supporting documents in the case have already been sent and no new documents or evidence is available.
- 4.7 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. The Complainant Department could not bring on record any Assessment Order to show that commission income had been added to the income of the Respondent on account of any accommodation entries provided by him, as alleged. Further, despite opportunities given to the Complainant Department to substantiate the charges alleged against the Respondent, the Complainant Department could not bring on record any 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. Accordingly, 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



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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, retd.)
(Government Nominee)

Sd/-

CA. Priti Savla
(Member)

DATE: 06-12-2023

सही प्रतिलिपि होने के लिए प्रमाणित /
Certified to be true copy


नीलम पुंडीर / Naalam Pundir
वरिष्ठ कार्यकारी अधिकारी / Sr. Executive Officer
अनुशासनात्मक निदेशालय / Disciplinary Directorate
इंस्टिट्यूट ऑफ चार्टर्ड एकाउंटेंट्स ऑफ इंडिया
The Institute of Chartered Accountants of India
आईसीएआई भवन, विश्वास नगर, शाहदरा, दिल्ली-110032
ICAI Bhawan, Vishwas Nagar, Shehdra, Delhi-110032