



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

[PR/161/2020/DD/184/2020/BOD/682/2023]

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 Somani (M.No. 076198)

Proprietor, M/S Ashok Kumar Somani & Associates,
Chartered Accountants
35, Subhash Nagar,
Chittorgarh-312001.

... Complainant

-Vs-

CA. Nilesh Jain (M.No. 403858)

Proprietor, M/S Nilesh Jain & Company,
Chartered Accountants
4a, First Floor, Janakpuri, MP Setu Marg
Chittorgarh-312001.

... Respondent

[PR/161/2020/DD/184/2020/BOD/682/2023]

MEMBERS PRESENT (in person):

CA. Rajendra Kumar P, Presiding Officer

Ms. Dolly Chakrabarty (IAAS, ret'd.), Government Nominee

CA. Priti Savla, Member

Date of Hearing and passing Order: 11th January 2024

1. The Board of Discipline vide its Findings dated 28th December 2023 was of the view that **CA. Nilesh Jain (M.No. 403858)** 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.

2. An action under Section 21A (3) of the Chartered Accountants Act, 1949 was contemplated against CA. Nilesh Jain and communication dated 4th January 2024 was addressed to him thereby granting him an opportunity of being heard on 11th January 2024. The Respondent vide email dated 9th January 2024 informed that he had appointed and authorized Sh. Abhishek Sethiya, Sh. Ravi Prakash and Sh. Siddhant Sekhri, Advocates to represent him before it through video conferencing. The Board held that since there is no specific stipulation as regard representation through an authorized representative in Rule 15 of The Chartered Accountants (Procedure of Investigations of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 and no fresh grounds can be adduced at this stage, representation through authorized representative is not permitted. Accordingly, only the Respondent appeared before the Board through video conferencing. He confirmed receipt of the Findings of the Board. He also made a written representation on the Findings of the Board vide email dated 10th January 2024. In his oral representation, he, inter-alia, stated that the records were not available with the Complainant since inception, unethical demands were raised to the auditee by the Complainant, he had communicated with the Complainant through email and that no audit fees was pending due to which he accepted the audit.

3. Thus, upon consideration of the facts of the case, the consequent misconduct of **CA. Nilesh Jain (M.No. 403858)** and keeping in view his representation before it, **the Board took a lenient view in the case as it was the sole misconduct on his part and thus, decided to impose a Fine of Rs.25,000/- (Rs. Twenty Five Thousand only) upon him.**

Sd/-

CA. Rajendra Kumar P
(Presiding Officer)

Sd/-

Ms. Dolly Chakrabarty (IAAS, ret'd.)
(Government Nominee)

सही प्रतिलिपि होने के लिए जमा किया
Certified to be true copy

बिना नाथ शिवाड़ी / Bishwa Nath Tiwari
आयुक्तकारी अधिकारी / Executive Officer
अनुशासनशास्त्रक निदेशालय / Disciplinary Directorate
इन्स्टीट्यूट ऑफ चार्टर्ड अकाउंटेंट्स ऑफ इंडिया
The Institute of Chartered Accountants of India
आर्वासीएआरडी भवन, विजय नगर, शाहदरा, दिल्ली-110032
ICAI Bherwin, Vijaya Nagar, Shahdara, Delhi-110032

Sd/-

CA. Priti Savla
(Member)

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/161/2020/DD/184/2020/BOD/682/2023]

CORAM: (Present in Person)

CA. Rajendra Kumar P, Presiding Officer

Ms. Dolly Chakrabarty, IAAS, rettd., Government Nominee

CA. Priti Savla, Member

In the matter of:

CA. Ashok Kumar Somani (M.No. 076198)

Proprietor, M/s Ashok Kumar Somani & Associates,

Chartered Accountants

35, Subhash Nagar,

Chittorgarh- 312001.

.....Complainant

Versus

CA. Nilesh Jain (M.No. 403858)

Proprietor, M/s Nilesh Jain & Company,

Chartered Accountants

4A, First Floor, Janakpuri, MP Setu Marg,

Chittorgarh- 312001.

..... Respondent

DATE OF FINAL HEARING : 7th November 2023

PARTIES PRESENT(in person):

Complainant : CA. Ashok Kumar Somani

Respondent : CA. Nilesh Jain

Counsel for the Respondent : CA. Neerav Doshi

FINDINGS:

BRIEF BACKGROUND OF THE CASE:

1. The Complainant was appointed as Statutory auditor/Tax auditor of the following firms for FY 2017-18 and reappointed for 2018-19 and onwards: 

- a. M/s Sanwaliya Tractor Agency
- b. M/s Sanwaliya filing Station
- c. M/s Sanwaliya Motors Private Limited

The Complainant has claimed that he completed the audits for Financial Year 2018-19 and found some serious irregularities in the books of accounts of all the above firms and informed the firm to rectify the mistakes in the books of accounts so that the audits could be finalized. The Complainant made repeated phone calls to the firm; however, the firm did not reply. Thereafter, the Complainant wrote an email dated 22.10.2019 to the firm regarding corrections, explanations and informed them he will issue qualified report on 31.10.2019 as this was the last date to submit the report.

CHARGE(s) ALLEGED:

2.1 The Respondent accepted the appointment as the Statutory Auditor/Tax auditor of all the above firms/Company for the F.Y. 2018-19 without first communicating with the previous auditor (I.e. Complainant) in writing as required in Item (8) of Part-I of the First Schedule to the Chartered Accountants Act, 1949.

2.2 The Respondent did not examine the books of accounts of the party and issued a clean report within 2 days wherein parties' turnover is above 15 crores and 3 crores approx. that proves that he has failed to obtain sufficient information which was necessary for expressing an opinion and the Respondent did not exercise due diligence and was gross negligent in his professional duties as he had issued a clean report.

The Board noted that the Director (Discipline) in his Prima Facie Opinion held the Respondent Guilty only in respect of the charge specified at para 2.1 above and the said view had been accepted by the Board. Accordingly, the conduct of the Respondent was examined only in respect of the charge specified at para 2.1 above.

BRIEF OF PROCEEDINGS HELD:

3.

S.No.	Date of Hearing(s)	Status of hearing(s)
1.	7 th November 2023	Heard and concluded.

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BRIEF SUBMISSIONS OF THE PARTIES TO THE CASE:

(a) Respondent:

4. The Respondent in his defense, inter-alia, stated as under:

4.1 The Complainant expressly mentioned in his rejoinder that he had received an email from the Respondent on 29th October 2019 at 3.08 p.m. and the Complainant replied at 5.22 p.m. on the very same day. It does constitute positive evidence of the fact that the communication addressed to the outgoing auditor by the incoming auditor reached his hands and the confirmation of the receipt of this email constitute positive evidence of the delivery of the communication to the Complainant.

4.2 The Hon'ble Supreme Court of India has delivered various Judgements wherein email is considered as a valid communication. The Respondent referred to the following notable Judgements of the Hon'ble Supreme Court of India in support of his objection to the Opinion: -

- (a) In the case of Central Electricity Regulatory Commission vs. National Hydroelectric Power Corporation Limited (2010) 1 SCC 72, the Apex Court recognized email communication as a valid and effective form of communication if it satisfies the requirements of Section 4 of the Information Technology Act, 2000. This section states that if any law requires information or any other matter to be in writing, typewritten, or printed form, then such requirement shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form.
- (b) In the case of Trimex International FZE Limited vs. Vedanta Aluminium Limited (2010) 3 SCC 1, the Supreme Court held that the service of legal notices by email is valid if the sender can establish that the email was sent from a valid email address, and that the recipient has received the email and acknowledged it.
- (c) In the case of Institute of Chartered Accountants of India vs. L.K. Ratna and Others (1986), the Hon'ble Supreme Court of India held that the Code of Ethics of the ICAI is not above the law of the land. The Court observed that the Code of Ethics is intended to regulate the conduct of Chartered Accountants in their professional capacity and to ensure that they maintain high standards of integrity and professionalism. However, it cannot override the legal obligations that arise from

applicable laws and Regulations. Therefore, it can be concluded that the decisions of the Hon'ble Supreme Court of India take precedence over the Code of Ethics issued by the ICAI.

Based on the above judgements, it is evident that email communication is considered as a valid form of communication by the Hon'ble Supreme Court of India, subject to certain conditions and requirements under the Information Technology Act, 2000 and any communication made through email shall be equally valid as provided in any other law or regulation for the time being in force. Methods of communication provided under the older 2009 Code of Ethics are not the exclusive ones. These were the opinion of the Council and the decisions of the Hon'ble Supreme Court of India take precedence over the Code of Ethics issued by the ICAI.

(b) Complainant:

5. The Complainant, inter-alia, made the following submissions to substantiate his case:

5.1 The Complainant has never denied that the Respondent has informed him in writing that he has been appointed as an auditor on 29/10/2019 as he has given him an email dated 29/10/2019 asking him whether he has any objection in his accepting the said appointment. The base of the complaint is his acceptance of the audit even after the Complainant's timely and genuine objections raised, that the client is approaching/appointing him because the qualified audit report is being issued by the Complainant, hence his appointment is unethical/unlawful so he should not accept the same.

5.2 If the Director(Discipline) would have scrutinized the audit reports, Balance Sheets and other supporting documents submitted by the Respondent he may have found out the irregularities. The deficiency in the working papers itself proves the contention that the audit was completed without due diligence, which must be taken care of in this situation. It appears that either the audit was done under pressure or in a negligent way.

OBSERVATIONS OF THE BOARD:

6.1 As regard the charge alleged that the Respondent accepted appointment as the Statutory Auditor/Tax auditor of all the above firms/Company for the F.Y. 2018-19 without first

communicating in writing with the previous auditor i.e., the Complainant, the Board took into view the requirement of Item (8) of Part I of the First Schedule to the Chartered Accountants Act, 1949 which provides as under:

"A Chartered Accountant in practice shall be deemed to be guilty of Professional Misconduct, if he-

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."

The Board observed that there are two essential requirements under Item (8) of Part I of the First Schedule to The Chartered Accountant Act, 1949 which are as follows:

- i. The communication should be prior to the acceptance of the appointment as auditor.
- ii. The communication should be in writing.

6.2 In the instant case, the Board noted that the Respondent firm was appointed as the auditor of M/s Sanwaliya Filling Station vide appointment letter dated 29th October 2019 for the F.Y. 2018-19. The Board further noted that following emails were exchanged between the Complainant and the Respondent in the said context:

S.No.	Date of email	From	Addressed to	Relevant content of the email communication
1.	29/10/2019	Respondent	Complainant	The Respondent sought no-objection from the Complainant regarding his appointment as auditor of M/s Shree Sanwaliya Tractor Agency (Partner: Jaswant Kumar Vijayvergia), Chittorgarh.
2.	29/10/2019	Complainant	Respondent	The Complainant informed the Respondent not to accept such an appointment as their books are

				<p>faulty & need major qualifications.</p> <p>The Complainant advised the Respondent not to accept Audit Assignment as the client is trying to shift its Audit due to the Qualified Audit Report being issued by him.</p>
3.	29/10/2019	Complainant	Respondent	<p>The Complainant advised the Respondent not to accept the audit assignment of all these 3 parties.</p>
4.	29/10/2019	Respondent	Complainant	<p>The Respondent informed the Complainant that the audit is being conducted as per Auditing and Accounting standards issued by ICAI and asked him to specially state that whether any fees for the audit service provided by him is outstanding otherwise, the Respondent understands that the Complainant does not have any objection regarding his appointment.</p>
5.	30/10/2019	Complainant	Respondent	<p>The Complainant informed the Respondent that this is not a case of NOC or NO Dues but a case of 'UNETHICALLY REMOVAL OF THE AUDITOR'. He advised the Respondent not to accept audit assignment and not to entertain</p>

				such clients otherwise he would be responsible for all legal and other consequences.
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On consideration of the aforesaid emails, the Board observed that it is clearly evident that the Complainant objected to the appointment of the Respondent as the Auditor due to certain irregularities. However, the Respondent chose not to consider the same and moved ahead and conducted the audit.

6.3 The Board also noted that the Respondent during the course of hearing admitted that he received the records from the client 4-5 days prior to his appointment and that he completed the audit within 2 days of his appointment. In this regard, the Board also took into view the following seriatim of dates and events:

S.No.	Date	Event
1.	24/25 th October, 2019	The Books of accounts of the Firm were handed over to the Respondent by the party/client.
2	29/10/2019	Appointment letter issued to the Respondent by the Firm
3	29/10/2019	NOC email sent by the Respondent to the Complainant
4	29/10/2019	Objection raised by the Complainant
5	31/10/2019	Audit Report issued by the Respondent in respect of the client M/s Sanwaliya Tractor Agency and M/s Sanwaliya filing Station for the FY 2018-19.

In view of the above, the Board noted that the Respondent conducted the audit and issued his audit report despite the objection raised by the Complainant.

6.4 In this regard, the Board took into view the following provided in the Code of Ethics:

"It must be pointed out that professional courtesy alone is not the major reason for requiring a member to communicate with the existing accountant who is a member of the

Institute. It is not intended, in any way, to prevent or obstruct the change. When making the enquiry from the retiring auditor, the one proposed to be appointed or already appointed should primarily find out whether there are any professional or other reasons why he should not accept the appointment. **The underlying objective is that the member may have an opportunity to know the reasons for the change in order to be able to safeguard his own interest, the legitimate interest of the public and the independence of the existing accountant.** (emphasis added)

The professional reasons for not accepting an audit would be:

- (a) Non-compliance of the provisions of Sections 139 and 140 of the Companies Act, 2013 as mentioned in Clause (9) of the Part - I of First Schedule to The Chartered Accountants Act, 1949; and
- (b) Non-payment of undisputed Audit Fees by auditees other than in case of Sick Units for carrying out the Statutory Audit under the Companies Act, 2013 or various other statutes; and
- (c) **Issuance of a qualified report.**

In the last case, however, he may accept the audit if he is satisfied that the attitude of the retiring auditor was not proper and justified. If, on the other hand, **he feels that the retiring auditor had qualified the report for good and valid reasons, he should refuse to accept the audit.** There is no rule, written or CODE OF ETHICS unwritten, which would prevent an auditor from accepting the appointment offered to him in these circumstances. However, **before accepting the audit, he should ascertain the full facts of the case. For nothing will bring the profession to disrepute so much as the knowledge amongst the public that if an auditor is found to be "inconvenient" by the client, he could readily be replaced by another who would not displease the client and this point cannot be too over-emphasised.** (emphasis added)

6.5 Thus, in view of the above, the Board observed that it is clear that though the Respondent had communicated with the Complainant prior to the acceptance of his appointment as auditor, the Complainant clearly through the return e-mail informed him to not to accept

audit assignment due to various flaws in accounts and so on. In spite of this fact, the Respondent went ahead, accepted the audit assignment for which he was appointed on 29th October 2019 and verified and filed the report on 31st October 2019 which in itself is a point towards the quality of the audit conducted by him. The Board was of the view that the intent behind seeking no-objection of the previous auditor is to safeguard the interest of the incoming auditor and the independence of the existing auditor which in the instant case had been clearly violated by the act of the Respondent. Hence, the Board held the Respondent Guilty In respect of the charge alleged.

CONCLUSION:

7. Thus, in conclusion, in the considered opinion of the Board, the Respondent 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.

Sd/-

CA. Rajendra Kumar P
(Presiding Officer)

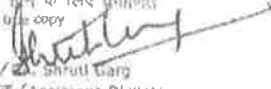
Sd/-

Ms. Dolly Chakrabarty (IAAS, retd.)
(Government Nominee)

Sd/-

CA. Priti Savla
(Member)

DATE: 28-12-2023

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Certified to be true copy

श्री श्रुति चव्वा / Shrutika Chawla
सहायक निदेशक / Assistant Director
अनुशासनशासक निदेशक / Disciplinary Director
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