* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CHAT A. REF. 1 OF 2010**

Date of Hearing: 10.1.2011
% Date of Decision 28.2.2012

COUNCIL OF THE INSTITUTE OF
CHARTERED ACCOUNTANTS OF INDIA. …..PETITIONER
Through: Mr. Rakesh Aggarwal, Advocate.

Versus

AJAY KUMAR GUPTA …..RESPONDENT
Through: Mr. Sandeep Sethi, Sr. Advocate with Mr. Dilip Singh, Advocate.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE

1. This is a reference case under Section 21 (5) of the Chartered Accountants Act, 1949 (hereinafter referred to as 'the Act') in respect of respondent who is a Chartered Accountant practicing in Delhi. Inquiry was held by the Council of the Institute of Chartered Accountants of India (hereinafter referred to as 'the petitioner') on the allegations contained in a complaint submitted by the Commissioner of Income Tax, New Delhi. The Disciplinary Committee found that the allegations were

substantiated and proved. This report was considered by the Council of the petitioner in its 287th Meeting of the Council held on 17th to 19th April, 2009. The Council considered the report of the Disciplinary Committee alongwith the written representation dated 8th April, 2009 received from the complainant as well as written representation dated 13th April, 2009 received from the respondent. After considering the report, the Council decided to accept the report thereby holding the respondent guilty of professional misconduct falling within the meaning of Clause (7) of Part- I of the Second Schedule under Section 22 read with Section 21 of the Chartered Accountants Act, 1949. It has accordingly recommended to this Court that the name of the respondent be removed from the Register of Members for a period of three years. This is how we are called upon to deal with this reference.

2. The facts which emerge from the record are that the Commissioner of Income Tax, New Delhi (hereinafter referred to as 'the complainant') sent a complaint dated 7th November, 2002 in which following allegations were made by him:-

> "Shri Subhash Chand Jain is Proprietor of M/s Jain Sons Exports India (hereinafter referred to as the "Firm"). He is being assessed by ACIT, Circle 19(1), New Delhi. During the course of

assessment proceedings for A.Y. 98-99, the Assessing Officer has noted that Shri Subhash Chand Jain's export turnover was ₹ 82,51,043/- and his export profit was ₹ 18,32,985/- In the normal course of things, the assessee should have paid tax on this amount either by way of advance tax or self assessment tax. But in this case, the assessee has claimed deduction under Section 80HHC to the tune of 100% of profit i.e. ₹ 18,32,985/-. For the aforesaid purpose, the assessee has filed a certificate as required under Section 80HHC (4) and 80HHC(4A) in the Form No. 10CCAC. The said certificate has been issued by the Respondent on 20.6.1998. It has been certified vide para 2 9a) of the said certificate that the deduction to be claimed by the assessee under sub-Section (i) of Section 80HHC of the I.T. Act, 1961 in respect of A.Y.1998-99 is ₹ 18,32,985/- which has been determined on the basis of said proceeds received by the assessee in convertible foreign exchange.

On further verification, it was noted that this claim was totally false. As per Annexure C of the balance sheet filed by the assessee with the return of income for A.y. 1998-99, sundry debtors stood at ₹ 82,51,043/- which represents the debit balance on account of total export sale allegedly made. The entire sale was allegedly made only to one part M/s White House General Traders (U.A.E.) which has remained outstanding and was accordingly shown in the balance sheet by way of sundry debtors. The export sale amount outstanding on 31.3.1998 was not realized within 6 months or before the filing of the return. As a matter of act, the assessing officer has recorded the statement of Shri Subhash Chander Jain on 0ath on 5.4.2002 and in answer to Q.No. 19, Shri Jain has categorically stated that no export proceeds relating to the export consignment has been received in India till date and suit for

recovery has been filed with Delhi High Court. The respondent has furnished a wrong and bogus certificate whereby he has helped the assessee in obtaining wrongful tax deduction of ₹18,32,985/-."

A copy of the aforesaid complaint was sent to the respondent with covering letter dated 10th March, 2003. The respondent submitted his written statement dated 17th April, 2003. This was forwarded to the complainant who gave its rejoinder duly verified on 20th April, 2003. Comments on this rejoinder were also invited from the respondent who gave the comments on 3rd January, 2005. Thereafter the matter was considered by the Council in its 252nd Meeting held on 6-8th July, 2005 and it decided to refer the case to the Disciplinary Committee for inquiry. The Disciplinary Committee examined the complainant as well as the respondent and allowed both of them to make their submissions. It submitted its report dated 3rd February, 2008 giving the opinion that the respondent was guilty of professional misconduct. This report was sent to both the parties who made their written representations and after considering the entire material, the report of the Disciplinary Committee was accepted.

3. Notice of this reference was sent to the respondent who filed counter affidavit, the respondent has denied the charges and submitted

that the recommendations of the Disciplinary Committee be not accepted as the findings are not correct. Without prejudice to this contention, it is submitted that the respondent has been in practice for the last 21 years and he has served the profession with integrity. There is no single incident of professional misconduct or negligence. Even in the instant case, he could not put up his defence properly because he had suffered severe paralytic attack and the clients/assessee had taken away the file. It is thus pleaded that in any case, a lenient view should be taken in the matter.

RE: THE CHARGE:

4. From the complaint of the CIT, it becomes clear that the respondent was handling the case of one Sh.Subhash Chander Jain, proprietor of Ms/ Jain Sons Exports India (hereinafter referred to as the assessee) before the ACIT, Circle 19 (1), New Delhi (hereinafter referred to as the Assessing Officer). The assessee had claimed deduction under Section 80HHC of the Income Tax Act. Such a deduction is available to the assessee from export income and deduction to the extent of 100 per cent of the profit can be claimed. The assessee had claimed 100 per cent of profit as deduction i.e. Rs. 18,32,985/-. In

order to claim this deduction, the provisions of Section 80HHC of the Act required that a certificate be filed in form 10CCAC which is to be issued by the Chartered Accountant certifying that the export have in fact been made. This certificate was given by the respondent as Chartered Accountant which was submitted before the Assessing Officer. The claim of the assessee was found to be false as against the alleged export the amount remained outstanding and was not realized. Though, as per the certificate given by the respondent, the amount had been realized. This would clearly show that certificate furnished by the respondent was wrong and bogus.

5. The submission of the learned Senior Counsel appearing for the respondent was that the CIT had formed his opinion that the certificate was false on the basis of answer to the Question No.19 given by the assessee. This question and answer thereto is as under:

> "19. Question: You have claimed deductions u/s 80 HHC of the IT Act, 1961 for ₹ 18.32 lacs as per the form No.10 CCAC Certificate attached with the return of Income for the asst. year 1998-99. As per this certificate the foreign exchange is said to have been received in India on the basis of which the deduction under Section 80HHC has been determined. However, as per your reply to Q. No. 7 no export proceeds relating to the export consignment has been received in India till date.

Please explain.
Ans: Sale proceeds have not been received and the suit for recovery have been filed in Delhi High Court."

6. It was argued that on the basis of answer to one question such an opinion could not have been formed when the assessee was asked 17 questions. He argued that the complainant deliberately withheld the complete questionnaire and answer thereto and since that document was not furnished, it amounted to denial of proper opportunity. He also argued that insofar as the respondent is concerned, he had issued the certificate dated 20th June, 1998 after taking every precaution and due care and had sent all the documents duly signed by the assessee. The copies of these documents could not be filed by him on record as the complete file was taken away by the assessee when the respondent was struggling for his life after the severe paralytic attach.

7. The aforesaid explanation of the respondent does not inspire any confidence. The relevant documents and the information was supplied to the respondent. The entire controversy was about the certificate issued by the respondent certifying that the exports were duly made and payments had been received by the assessee against those exports. It

has been established on record that no such payment was received. Not only the assessee accepted this fact when he was confronted with this aspect during the assessment proceedings whereby the claim of deduction under Section 80HHC of the Act was rejected. Once it is established that no payment was received against the export, certificate issued by the respondent was false. It is a bogey raised by the respondent that he has verified all the documents and only then issued the certificate. We fail to understand what kinds of documents were shown by the assessee to the respondent on the basis of which the respondent felt satisfied. Thus, we are of the opinion that there was a clinching evidence to prove the charge.

8. We may refer to a Division Bench judgment of this Court in ***Council of Institute of Chartered Accountants of India*** *Vs* ***B. Ram Goel , 2****001 (57) DRJ (DB)* wherein the Court explained the meaning of professional misconduct, defined in Section 22 of the Act as under:-

> "Professional misconduct" has been defined in Section 22 of the Act. Intendment and object of the Act is to maintain standard of the profession at a high level, and consequently a code of conduct has been prescribed. Misconduct implies failure to act honestly and reasonably either according to the ordinary and natural standard, or according to the standard of a particular profession. Chartered

Accountants' profession occupies a place of pride amongst various professions of the world. That makes observance of the professional duties and propriety more imperative. When conduct of a member of the profession is contrary to honesty, or opposed to good morals, or is unethical, it is misconduct-warranting consequences indicated in the Statute. An auditor holds a position of trust. That is why disclosure of information has been made a ground for imputing misconduct. By betrayal of the trust, the conduct becomes one which is unbecoming of the professional. Sections 126 and 129 of the Indian Evidence Act, 1872 (in short, the `Evidence Act') throws beacon light on the importance of professional communications. As observed in Mc.Kelvery's Evidence (Page 236), at common law, in very early times, a privilege war recognized as to matters between an attorney and his client, and this privilege has continued in the strictest form to the present day. The privileges mentioned in Sections 126 and 129 are designed to secure the clients confidence in the secrecy of his communication. Any breach of the confidence is a stigma not only on the individual concerned, but is also likely to have effect on credibility of the profession as a whole. That is why the anxiety of the legislature to punish the erring individual. It is to be noted that for breach of trust by a person entrusted with property or dominion over it, action under criminal law can be taken. When considered in that background, disclosure of information which would not have otherwise come within his knowledge, but for his professional appointment, without consent of his client is an act of grave professional misconduct. As observed by the Apex Court in the context of professional misconduct of an Advocate, an act which is done otherwise than with utmost good faith is unprofessional. (See Pandurang Dattatreya Khandekar Vs . The Bar Council of Maharashtra, Bombay & Ors.

> AIR1984SC110). The test of what constitutes "grossly improper conduct in the discharge of professional duties" has been laid down in many cases. In the case of a Solicitor Ex Parte the Law Society (1912) 1 KB 302, Darling, J. adopted the definition of "infamous conduct in a professional respect", on the part of a medical man as stated in Allinson Vs. General Council of Medical Education and Registration (1894) 1 QB 750, and applied to the same professional misconduct on the part of Solicitor, and observed:-
> "If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of "infamous conduct in a professional respect".
> The Privy Council approved of the definition in George Frier Grahame Vs . Attorney General, Fiji , AIR 1936 PC 224 and Apex Court in the matter of P.An. Advocate 1963CriLJ 341 has followed the same."

In the said case, the Court held that judged in the aforesaid background, the respondent in that case was clearly guilty of professional misconduct. We also form the same opinion in the present case.

RE: PENALTY

9. Mr. Sethi relied upon the aforesaid judgment in ***B. Ram Goel*** *(supra)* only to contend that in that case having regard to the

circumstances stated therein the Court had taken lenient view and had simply reprimanded the respondent. He referred to the discussion contained in para 10 of the said judgment which reads as under:

> "10. Judged in the aforesaid background, respondent was clearly guilty of professional misconduct, and has been held to be so by the Disciplinary Committee and the Council. So far as the proposed removal of the respondent's name for a period of 15 days is concerned, we feel that it appears to be slightly disproportionate considering the background highlighted above. Additionally, the occurrence took place more than a decade back. Though in all cases, long passage of time cannot be a mitigating factor, while considering the appropriate punishment to be awarded, in the peculiar circumstances of the case, reprimand to the respondent would meet the ends of justice Reference is accordingly disposed of."

10. He also referred to another judgment of this Court in ***Council of the Institute of Chartered Accountants of India*** Vs. ***D.R. Bahl***, 177 (2011) DLT 332 where again the punishment of reprimand was imposed on the ground that the complaint was of the year 1992. Another judgment on which reliance was placed was the ***Council of the Institute of Chartered Accountants of India*** Vs. ***S.N. Sachdeva***, Chat. A. Ref. 1/2002 decided on 24.1.2011 wherein the Court took the view that lapse of time was a mitigating factor and instead of debarring the

delinquent in the said case, directed him to do some social service. We would like to reproduce the following discussion from this judgment:-

> "19. In so far as instances by the respondent are concerned, we are inclined to give learned counsel for the Institute that they may not become the basis for awarding the penalty of reprimand. Each case has to be viewed at its own facts. In the present case, the respondent was already in the employment when it obtained Certificate of Practice as well. Unlike, the case of ***Arvind Kumar*** (supra) where he was already having a Certificate of practice but he while taking the employment he did not take prior permission of the Institute. Further, there was another serious charge that during this period of employment, he had failed to pay stipend to his articled clerk in violation of provisions of the Act.
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> Initially, the defence put up by him qua this charge was that after 1985, he was in part time employment with M/s IRCON and was given permission to practice. This defence has also proved as false. The documents obtained from M/s IRCON which are produced by the Institute clearly demonstrate that the respondent remained in full time employment. There is yet another charge against the respondent namely in the ''Form of Application for Empanelment as Auditor of Branches of Public Sector Banks and Statutory Central Audit and Branch Audit of Regional Rural Banks for the year 1990-91" he had given false information by stating that his main occupation was 'profession' whereas as on 1st April, 1990 when this information was sought he was in full time employment with M/s IRCON. Therefore, the respondent cannot equate his case with the examples given.
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> 20. We may reiterate that code of ethics stipulated in the Act, is essentially to command the

respect and confidence of the general public. It is highlighted by the Institute itself that is for this reasons that member is liable for disciplinary action under Section 21 of the Act and if he is found guilty of any act of professional misconduct.

21. In this backdrop, the only aspect which is to be examined is as to whether lapse of time is a mitigating factor.

22. Our observations in this behalf are that normal time-lag, particularly when the time consumed is because of the pendency of matters in the Court, should not be a ground to award lesser punishment. The Court should consider the suggestion of the Institute recommending the punishment in the light of the gravity of the charges proved against the delinquent Chartered Accountant. On that touch-stone may be, we would not have accepted the recommendation of the Institute in the instant case. However, in the peculiar facts of this case, the delay that is caused is substantial and imposition of penalty at this distance of time, may not advance the course of justice. The facts narrated above, would show that the period of employment of the respondent with IRCON, during which period the irregularities were committed by the respondent, is from 1982 to 1990. The respondent left the service of IRCON on 30th September, 1990. Thus, he is in private practice for more than twenty years now. The Institute received the complaint sometime in the year 1992 and issued notice to the respondent to explain on 24th July, 1992. No doubt, the respondent took substantial time in submitting his written statement which was filed only on 20th Mary, 1995. However, during this period, even the Institute kept-quiet and started further action only after the receipt of written statement. The Institute could have proceeded to take action if the

respondent was not submitting reply. To that extent, the Institute has contributed to delay. Thereafter, the matter was referred to the Disciplinary Committee and first meeting of the Committee was held only in February, 1998 almost three years after the submission of the Written Statement by the respondent. The respondent pleaded guilty vide his letter dated 12th March, 1998 i.e. after a month of first hearing. However, again time was taken by the Disciplinary Committee. Even when the respondent had pleaded guilty vide letter dated 12th March, 1998, the Disciplinary Committee took almost two years in submitting its Report which was sent to the respondent on 17th January, 2000. Though, reply to this was sent by the respondent in February, 2000, the Council recorded its finding in its meeting held on 9th March, 2002 thereby taking two more years to take decision. The present Reference was filed in the year 2002 which kept pending for one or the other reason in this Court. Taking all these facts cumulatively, we are of the opinion that after a gap of more than twenty years, imposition of the penalty of removal from the Register of Members the name of the respondent for a period of three months would not be proper. It would totally disturbed and disrupt the practice of the respondent which he may have established in last twenty years. We are of the view that ends of justice would be met if penalty of reprimand is imposed in the respect of misconduct falling under second schedule for the same reasons, in respect of misconduct falling under the First Schedule penalty of reprimand suffice.

23. However, we do not want to put the matter rest at that rest. As pointed above, the charges established against the respondent, to which even respondent himself plead guilty are in prevail. For a professional such kind of conduct is not accepted. Therefore, we are of the opinion that in

addition to the penalty of reprimand; the respondent should be called upon, an act of 'penance' is also required from the respondent. For this reason, we had suggested Mr. Sethi, during the course of arguments that respondent do some social service by rendering pro-bono professional services to certain Charitable Institute/NGO by auditing their accounts without fee. Mr. Sethi readily agreed to the suggestion and also made a statement at the Bar that this would be acceptable to the respondent as well. In these circumstances, we direct the respondent to undertake audit of two such organization for a period of three years without charging any professional fee. Such organizations/NGO shall be identified by the Institute and the Institute shall verify that the respondent undertake this job and perform the same satisfactorily."

11. Applying the principles laid down in the aforesaid judgments, we find that on the one hand the respondent pleads his sickness, has otherwise unblemished practice of 21 years and that the incident is old which may provide some mitigating factors in his favour, on the other hand, the misconduct is of serious nature. Submitting a false/bogus certificate to the client to enable him to make false claim of deduction under the Income Tax Act, is of serious offence. The deduction to the tune of Rs. 18,32,985/- was claimed on the strength of this certificate which would mean the tax saving of almost 6.5 lacs. The attempt was thus to dupe the tax authorities and help the assessee to avoid the tax to

that extent such a conduct has to be taken seriously.

12. After weighing the aforesaid factors on either side, we are of the view that in the present case the respondent cannot be let off merely by giving him reprimand. Some penalty needs to be imposed so that it acts as deterrent and such professional misconduct are not committed. Weighing the circumstances, we are of the opinion that the ends of justice would be subserved by removing the name of the respondent from the Register of Members for a period of six months.

13. The reference is answered and disposed of accordingly.

ACTING CHIEF JUSTICE

February 28, 2012
Skb

(RAJIV SAHAI ENDLAW)
JUDGE