Judgement In Disciplinary Matter

In the High Court of Gujarat at Ahmedabad
D.H. WAGHELA AND D.A. MEHTA, JJ.

Chartered Accountant Reference No. 1 of 2003/DOD 11.11.2003

In the matter of the Council of the Institute of Chartered Accountants of India New Delhi

Vs.

Shri Mukesh R. Shah, Chartered Accountant

D.A. Mehta J,

1. This is a Reference Made by the Council of the Institute of Chartered Accountants of India being the petitioner under Section 21(5) of the Chartered Accountants Act, 1949 (the Act). The Reference is in respect of Shri Mukesh R. Shah, Chartered Accountant (Respondent) in the matter of recommendation of the petitioner made in the 228th Meeting held at New Delhi from 18th to 20th October, 2002.
2. Shri S.K. Agarwal, Commissioner of Income Tax, Ahemedabad (the complainant) made the following allegations/charges against the respondent :

   "1.1 He had fabricated and filed challans for advance tax in respect of certain clients and relatives and then filed their returns of Income showing nominal income so as to claim refund against advance tax paid. On investigation it was found by the Inocme Tax Department that the Respondent had changed the amount of advance tax paid in copies of challans that are retained by the assessee and sent to the Department alongwith the return. The returns also, in many cases, were verified by him. The address given in the returns was his own so that the refund vouchers could reach him and he had, in fact, encashed these vouchers by opening bank accounts in the names of the assesses. He is said to have admitted having committed this forgery etc. thereby defrauding the exchequer to the tune of Rs. 15 lakhs. As per FIR filed by the Income Tax Officer, the Respondent was arrested and was remanded first to police custody till 6th May, 1993 and thereafter to judicial custody till 20th May, 1993.

   1.2 The charges, if proved, would render the Respondent guilty of "other misconduct" under Section 21 read with Section 22 of the Chartered Accountants Act, 1949".

3. As per the provisions of the Act and the Regulations framed thereunder, the petitioner forwarded on 16.12.1993, a copy of the complaint inviting the respondent to file his written statement. No written statement was submitted by the respondent despite protracted correspondence between the petitioner and the respondent and ultimately the petitioner at its meeting held in December, 1998 at New Delhi, considered the complaint and the documents annexed thereto so as to record a prima facie opinion that the respondent was guilty of professional misconduct and/or other misconduct and accordingly referred the case to the Disciplinary Committee constituted under the Act for necessary inquiry.
4. The Disciplinary Committee held various hearings commencing from 29.4.1999 and ending on 23.5.2001. After perusing the documents on record, examination of the witnesses and considering the submissions made on behalf of the complainant as well as the respondent the Disciplinary Committee submitted its report dated 3.2.2002. The Disciplinary Committee was of the opinion that a fraud had been perpetrated on the Income Tax Department, Ahmedabad and that the respondent was responsible for the said fraud; that in committing this fraud and various other acts as alleged, the respondent had adopted a course of conduct unbecoming of a professional. The respondent was therefore found guilty of "other misconduct" under Sections 22 read with 21 of the Act.
5. The report of the Disciplinary Committee was forwarded both to the complainant and the respondent by the petitioner on 17.8.2002 and the parties were informed that the said report would come up for consideration at one of its forthcoming meetings. The parties were also informed to forward their written representations, if any, as also, if they so desired, to appear

before the petitioner Council either in person or through a representative and make oral submissions. On 26.8.2002 the parties were informed that the meeting of the Council would be held on 13.9.2002 to consider the report of the Disciplinary Committee. The respondent submitted written representation dated 4.9.2002. On 11.9.2002, a letter was faxed by the respondent wherein adjournment was sought for a period of 3 to 4 weeks on the ground of illness of his wife. The Council accepted request for adjournment and on 27.9.2002 the parties were informed that the report of the Disciplinary Committee shall be considered on 20.10.2002. The respondent made submissions in writing vide letters dated 10.10.2002 & 11.10.2002. On 18.10.2002 a letter was faxed to the Council, which was received by the Council on 19.10.2002, whereby the respondent again sought adjournment on the ground of the illness of his wife. The Council considered the aforesaid letter dated 18.10.2002 and after noting the fact that on identical ground adjournment had already been granted earlier and in absence of supporting medical reports as well as in view of the fact that the complainant had intimated their appearance along with their Counsel, the petitioner Council did not think it fit to grant the adjournment as prayed for. In fact on 19.10.2002, the complainant represented by one Mr. Yogendra Dube, Assistant Commissioner of Income Tax along with authorized representative Shri Umedsing Bhati, Chartered Accountant, appeared before the petitioner Council and made oral submissions. The petitioner Council, after considering the entire record, the report of the Disciplinary Committee and written submissions dated 4.9.2002, 10.10.2002, 11.10.2002 and letter dated 18.10.2002 of the respondent, decided to accept the report of the Disciplinary Committee. The petitioner council held that the conduct of the respondent was most unethical and unprofessional and it was decided to recommend the severest of the severe punishment to the respondent, viz., removal of the name of the petitioner permanently from the register of Members. It is this Reference, containing the aforesaid recommendation, which has been placed before this Court to pass necessary orders in terms of Section 21(6) of the Act.

6. Accordingly on 20.1.2003 this Court had issued notice for final hearing. Thereafter, when the matter was listed for final hearing on 8.9.2003 as there was no appearance on behalf of the respondent when the matter was called out, it was directed that fresh notice for final hearing be issued only to the respondent. Accordingly, fresh notice was duly served and the respondent has appeared in person. Mr. S.N. Soparkar, learned Senior Counsel has appeared on behalf of the petitioner Council.

7. Mr. Soparkar, learned Advocate appearing on behalf of the petitioner invited the attention of the Court to the documentary evidence on record and submitted that the respondent was guilty of misconduct within the meaning of the term "*other misconduct*" as provided in Section 21 read with Section 22 of the Act. It was submitted that the recommendation of the petitioner Council be accepted and the petitioner Council be permitted to remove the name of the respondent from the Register of Members.

8. The respondent, appearing in person, contended that the entire proceedings conducted by the petitioner Council were bad in law as the same were vitiated due to violation of principles of natural justice, that various incriminating documents stated to have been annexed with the complaint had not been supplied; that the Council had not heard the respondent before recording its prima facie opinion and referring the case to the Disciplinary Committee. It was further submitted that the reliance by the Disciplinary Committee and the petitioner Council on various statements (including the statement dated 21.4.1993) of the respondent were not supported by any evidence and the retraction made by the respondent before the complainant on 8.6.1993 had not been taken into consideration. It was further submitted that both the Disciplinary Committee and the Council had totally overlooked various written submissions, running into more than 800 pages and other documentary evidence. That the request of the respondent for adjournment on valid grounds had been rejected without any proper reason. That the respondent had also requested for holding de novo inquiry as provided in the regulation when the constitution of the Disciplinary Committee underwent a change but the said request had also been rejected by the Disciplinary Committee without any valid reason. That the findings and conclusions of the Disciplinary Committee as accepted by the Council were totally erroneous and against the legal position. That the Disciplinary Committee ought to have accepted the request for keeping the disciplinary proceedings in abeyance till finalization of pending criminal case

against the respondent, as otherwise the same would cause prejudice to the case of the respondent. That the report of the Disciplinary Committee be quashed and set aside; in the alternative, the report be quashed and set aside and the proceedings be restored to the Disciplinary Committee. Finally, an alternative prayer was made that if at all the respondent was found to be guilty, the High Court should not accept the recommendation of permanent removal of the respondent's name from the register of members and the respondent be visited with minimum punishment as provided under Section 21(6)(b) or Section 21(6)(c) of the Act by taking a sympathetic and liberal view. In support of the last alternative prayer it was submitted that the revenue had not been put to any monetary loss and a sum of Rs. 21.98 lacs had already been recovered with interest and there was no wrongful gain to the respondent. It was also submitted that considering the age of the respondent, his wife and children as well as the old age of his parents the respondent be not meted out the punishment as recommended by the petitioner Council.

9. In support of the various contentions it was submitted that though the complainant had averred that fraud had been committed, in relation to 168 cases regarding fraudulent encashment of refund, the complainant had tendered evidence only in four cases and no investigations were carried out in the balance cases. It was also submitted that the complainant had failed to bring home the charge that the respondent had claimed or received or utilized the alleged refund money even in a single case in absence of any direct and cogent evidence. That the entire case of the complainant and the report of the Disciplinary Committee as accepted by the Council was based on the so called admission of guilt without appreciating that the said admission had been retracted by the respondent and it was specifically clarified that the admission had been obtained under threat, compulsion and coercion. That admission of guilt did not amount to admission of proof of guilt and both the complainant and the Council had failed to establish and prove the guilt of the respondent. Various judgements of different High Courts and the Supreme Court of India as well as orders of the Council were pressed into service in support of the submission that disciplinary proceeding had been carried out in violation of principles of natural justice.

10. Mr.Soparkar, learned Senior Counsel, appearing on behalf of the petitioner Council submitted that the respondent had failed to file any written statement of defence before the Disciplinary Committee and despite the said lapse, the Disciplinary Committee had taken into consideration various written representations as being statement of defence. That full and proper opportunity had been accorded to the respondent, but the respondent had failed to avail of such opportunity. It was also submitted that the grievance of the respondent that the Disciplinary Committee had not summoned all the necessary witnesses for examination, nor directed the complainant to produce the witnesses was a grievance without any basis. The attention of the Court was invited to the finding in paragraph 30 of the report of the Disciplinary Committee wherein the Disciplinary Committee had taken note of the fact that the respondent had made a request that "all departmental employees who were in service at that point of time" be called as witnesses. It was submitted that the Disciplinary Committee had specifically dealt with the said request of the respondent. In relation to the contention regarding holding of de novo inquiry as provided by Regulation 15(5) of the Regulations it was submitted that any party to the inquiry may make such demand and thereafter it was for the Disciplinary Committee to decide whether such a de novo inquiry was required or not, was justified or not, or was warranted or not, on the facts and circumstances of each case. In this connection, attention was invited to the fact that at the first meeting of the Disciplinary Committee on 29.4.1999, as could be seen from the minutes recorded, no substantial progress had been made in the proceedings and the Disciplinary Committee had only directed the parties to submit further details. Thereafter, from the said date viz. 29.4.1999 till 12.4.2001 no proceeding had been conducted by the Disciplinary Committee which would cause any prejudice to the case of the respondent, so as to warrant a demand for de novo inquiry.

11. As regards the contention about refusal of adjournment it was submitted that the petitioner had not shown any resultant prejudice being caused to the petitioner. In relation to the grievance of the petitioner that the Disciplinary Committee had failed to consider the retraction it was pointed out that the Disciplinary Committee had dealt with the said issue specifically vide paragraphs 153 to 155 of its report. Finally, it was submitted by Mr. Soparkar that the Act and the Regulations provided a complete machinery

whereunder a professional Chartered Accountant who is charged with professional and/or other misconduct is given full and adequate opportunity to meet with the charges leveled against him and the entire case is handled by a group of professional peers. That in such circumstances, the Court should normally accept the recommendation of the professional body unless and until it transpires from the record that there has been a grave miscarriage of justice as a result of the professional body either ignoring the relevant evidence on record or taking into consideration any irrelevant material, either wholly or partly. That in the present case such a situation was absent and the High Court should accept the recommendation made by the petitioner Council. Various decisions were cited in support of the aforesaid propositions.

12. There is no dispute between the parties that a fraud was perpetrated on the Income Tax Department whereby either at the stage of filing of the returns of income or after the stage of filing of such returns the figures in the counter-foil of challans showing payment of self assessment tax were manipulated/ forged and refund claim was made on the basis of such fake challans. That such refunds were obtained from the Income Tax Department, credited in various Bank Accounts and monies withdrawn from such Bank Accounts. The only dispute between the parties, viz. complainant and the respondent is : Whether the respondent is liable for the fraud. The respondent denies the same outright. The Disciplinary Committee and the petitioner Council have found the respondent guilty by coming to the conclusion that the entire exercise was carried out by the respondent or at his behest and his conduct is unbecoming of a professional within the meaning of the term "other misconduct" under Section 21 read with Section 22 of the Act.

13. A brief resume of the relevant provisions of the Act and the Regulations framed thereunder.

13.1 The Chartered Accountants Act, 1949 (the Act) has been brought on Statute Book with the object of developing and establishing a system in which the Accountants will, in autonomous association of themselves, largely assume responsibilities involved in the discharge of their public duties by securing maintenance of the requisite standards of professional qualifications, discipline and conduct. That the control of the Central Government shall be confined to a very few specified matters. Preamble of the Act makes it clear that it is expedient to make provision for the regulation of profession of Chartered Accountants. Section 2(1)(e) of the Act defines `Institute' to mean the Institute of Chartered Accountants of India constituted under the Act. Section 3 provides for incorporation of the Institute and takes within its fold all persons whose names are entered in the Register under the provisions of the Act so as to constitute a body corporate with perpetual succession and common seal. Section 9 of the Act provides for constitution of the Council of the Institute which will manage the affairs of the Institute and discharge the functions assigned to it under the Act. Section 15 of the Act lays down the functions of the council and under sub-section (2) of Section 15 of the Act in particular without prejudice to the generality of the foregoing power under Sub-section (1) – the duties of the Council shall include various items denoted from (a) to (1). Section 17 of the Act empowers the Council to constitute from amongst its members the Standing Committees namely (i) Executive Committee, (ii) Examination Committee, (iii) Disciplinary Committee. Sub-section (3) of Section 17 specifies the composition of each of such Standing Committees, namely, the President and the Vice-President, ex officio, and three other members of the Council elected by the Council; but the proviso under sub-section (3) specifies that out of such three other members of the Council, elected by the Council, two shall be elected by Council and the third shall be nominated by the Central Government, from amongst the persons nominated to the Council by Central Government under Section 9 of the Act. Therefore, the legislature has advisedely, to remove the charge of bias, provided by virtue of Sections 9 and 17(3) of the Act, nomination of certain members by Central Government.

13.2 Chapter V of the Act deals with `MISCONDUCT'. Section 21 provides for procedure in inquiries relating to misconduct of members of Institute. Sub-section (1) of Section 21 states that Council shall refer a case to the Disciplinary Committee where the Council is in receipt of information or is in receipt of a complaint and is or prima facie opinion that any member of the Institute in regard to whom the information or

complaint has been received, has been guilty of any professional or `other misconduct'. Upon such reference being made the Disciplinary Committee shall hold inquiry in the manner prescribed and shall report the result of the inquiry to the Council. Sub-section (2) of Section 21 provides that if the Council on receipt of such report finds that the member is not guilty of any professional or other misconduct it shall record such a finding accordingly and direct the proceeding to be filed or the complaint to be dismissed. Sub-section (3) of Section 17 of the Act lays down that upon receipt of the report of the Disciplinary Committee if the Council finds the member guilty of any professional or other misconduct, it shall record the finding accordingly and shall proceed in the manner laid down in the succeeding sub-sections. Sub-section (4) of Section 21 of the Act specifies that where the Council finds a member guilty of professional misconduct specified in First Schedule, the Council shall afford an opportunity of hearing to the Member before an order is passed against such member and the orders that may be passed shall be any one of the following :-

[a] reprimand the member;

[b] remove the name of the member from the Register for such period not exceeding five years, as the Council thinks fit.

13.3 It is further provided by way of Proviso thereunder that where the Council thinks it fit that the case is one in which the name of the member ought to be removed from the Register either permanently or for a period exceeding five years, no order under clause (a) or clause (b) referred above shall be made, but the case shall be forwarded with the recommendation of the Council to the High Court. Similarly under sub-clause (5) of Section 21 of the Act, where the Council finds a member guilty of misconduct other than misconduct as is referred to in sub-section (4), the Council shall forward the case to the High Court with the recommendation of the Council.

14. Upon receipt of a case either under Section 21(4) or 21(5) of the Act, the High Court, after calling upon the parties specified in sub-section (6) of Section 21 of the Act, may make any of the following orders, namely

"(a) direct that the proceeding be filed, or dismiss the complaint, as the case may be;

(b) reprimand the member;

(c) remove him from membership of the Institute either permanently or for such period, as the High Court thinks fit;

(d) refer the case to the Council for further inquiry and report."

Section 22 of the Act defines 'professional misconduct'. However, as stated by the Apex Court in case of Council of the Institute of Chartered Accountants Vs. B. Mukherjea, AIR 1958 SC 72.

"The misconduct alleged on the part of a chartered accountant may not attract any of the provisions in the schedule and may not therefore be regarded as falling within the first part of S.22; but as the definition given by S.22 itself purports to be an inclusive definition and as the section itself in its latter portion specifically preserves the larger powers and jurisdiction conferred upon the Council to hold inquiries under the S.21 sub-s.(1), it would not be right to hold that such disciplinary jurisdiction can be invoked only in respect of conduct falling specifically and expressly within the inclusive definition given by S.22. Section 8, sub-ss.(v) and (vi) also support the argument that disciplinary jurisdiction can be exercised against chartered accountants even in respect of conduct which may not fall expressly within the inclusive definition contained in S.22.

Hence, if a member of the Institute is found, prima facie, guilty of conduct which, in the opinion of the Council, renders him unfit to be a member of the Institute, even though such conduct may not attract any of the provisions of the schedule, it would still be open to the Council to hold an inquiry against the member in respect of such conduct and a finding against him in such an inquiry would justify appropriate action being taken by the High Court….."

15. Section 30 of the Act grants power to the Council to make regulations which shall be published by Notification in the Gazette of India, and Section 30B of the Act provides that every regulation made under the Act shall be laid before each House of Parliament. Thus, Chartered Accountants Regulations 1988 have been duly framed by virtue of the aforesaid power and have the force of a statute.

16. The Chartered Accountants Regulations, 1988 (the Regulations) provide for various procedural requirements in relation to Members, Examinations, Article

Clerks and Audit Clerks, etc. Regulation 12 which falls in Chapter II (dealing with MEMBERS) pertains to complaints and enquiries relating to misconduct of members. Regulation 12(1) provides that a complaint against a member under Section 21 of the Act shall be investigated and all other inquiries relating to the misconduct alleged shall be held by the Disciplinary Committee. Sub-regulation (2) and (3) provide for the modality and the form in which the complaint shall be made, while sub-regulation (4) provides for payment of the requisite fees accompanying the complaint. In case of failure to comply with the requirements of sub-regulations (2), (3) or (4) the Secretary is required to return the complaint as provided in sub-regulation (5). A copy of the complaint is required to be sent by the Secretary to the member against whom such a complaint is made, ordinarily within a period of 60 days. Sub-regulation (7) provides that written statement of defence shall be forwarded to the Secretary by the member against whom such complaint is made within a period of 14 days from the date of service of the copy of the complaint under sub-regulation (6). The written statement is then forwarded by the Secretary to the complainant and the complainant is entitled to forward in triplicate, his rejoinder to the written statement within a period of 14 days from the receipt of the written statement. On receipt of such rejoinder from the complainant a copy thereof is to be forwarded to the member and the member is entitled to offer his comments again within a period of 14 days from the date of service of the copy of the rejoinder. Thereafter, papers are placed before the President and upon consideration of the complaint, written statement, rejoinder and the comments thereon it will be open to the President to call for such additional particulars or documents from either of the parties, if it is considered to be expedient. Otherwise, or after receipt of such additional particulars or documents, the papers are placed before the Council, and where the Council is, prima-facie of the opinion that the member is guilty of professional and/or other misconduct, the Council shall cause an inquiry to be made in the matter by the Disciplinary Committee. It is also open to the Council to arrive at a prima facie opinion that the member is not guilty of the misconduct alleged in the complaint and in such an eventuality the complaint shall be filed and both the parties be informed accordingly. It is pertinent to note that sub-regulation (12) provides for the mode of service of notice and the procedure to be adopted in case of notice being returned unserved.

17. Regulation 15 deals with the Procedure in inquiry before the Disciplinary Committee. Sub-regulation (3) of Regulation 15 permits the member to exercise his right of defence himself or through a legal practitioner or any other member. Sub-regulation (4) of Regulation 15 provides for the power to the Disciplinary Committee to regulate its procedure in such manner as it considers just and expedient. At the same time sub-regulation (5) of Regulation 15 stipulates that where during the course of an enquiry there occurs a change in the membership of the Disciplinary Committee for any reason whatsoever, any party to the enquiry may demand that the enquiry be held `de-novo' and upon such demand being made, the Disciplinary Committee may for sufficient cause and for reasons to be recorded in writing order that the enquiry shall be held `de-novo'.

18. Regulation 16 provides for the Report of the Disciplinary Committee which is to be submitted to the Council. In a case where the Disciplinary Committee finds the delinquent member guilty of the misconduct alleged against him a copy of the report of the Disciplinary Committee shall be furnished to such member and he shall be given an opportunity of making representation in writing to the Council. The Council is empowered to order a further inquiry if it finds it necessary after taking into consideration the report of the Disciplinary Committee and the representation in writing of the delinquent member and upon such further inquiry by Disciplinary Committee a further report shall be submitted by the Disciplinary Committee. Thereupon, the Council after considering the report and the further report, if any, along with the representation in writing of the respondent record its findings. However, Proviso to sub-regulation (4) of Regulation 16 places embargo on the Council not to record a contrary finding to the report of the Disciplinary Committee in a case where Disciplinary Committee does not find the delinquent member guilty of the misconduct with which he is charged. Finding of the Council has to be communicated to the complainant and the respondent.

19. Regulation 17 provides for Procedure in a hearing before the Council. As per sub-regulation (1) of Regulation 17, if the Council, in light of its finding arrives at an opinion that an order under Section 21(4) of the Act is required to be passed, the Council shall

furnish to the delinquent member a copy of its findings and give him notice calling upon him to appear before the Council on specified date, or in the alternative, if no personal hearing is requested send within a specified time such representation in writing in connection with the order that may be passed against him under section 21(4) of the Act. Sub-regulation (2) of Regulation 17 specifically provides for the scope of hearing or the written representation and lays down that the same shall be restricted to the order to be passed under Section 21(4) of the Act. It will be open to the Council after hearing the delinquent member or after considering his representation to pass such orders as the Council thinks fit, and such order passed by the Council is required to be communicated to the complainant and the delinquent member.

20 A Chartered Accountant is statutorily required to undertake and carry out various functions as statutorily prescribed under the Companies Act, 1956. Part VI of the Companies Act deals with management and administration. Chapter I in the said part relates to general provisions and there are separate heads regarding accounts and audit. Section 226(1) of the Companies Act specifically prescribes that a person shall not be qualified for appointment as auditor of a company unless he is a Chartered Accountant within the meaning of the Act. There are various other provisions which prescribe the powers and duties of the Auditors as well as the responsibilities. These provisions are indicative of the extent a Chartered Accountant is looked upon by the society, with special reference to the corporate world, as being competent to discharge various statutory duties and responsibilities as a qualified professional.

21. Similarly under the Income Tax Act, 1961 Section 288 stipulates as to who can appear as authorized representative of an assessee under the said Act. Section 288(2) (iv) states that an Accountant can be an authorized representative. The Explanation below the said sub-section specifies that in this Section, namely Section 288 of the said Act, `Accountant' means a chartered accountant within the meaning of the Act. The Income Tax Act stipulates compulsory audit of accounts in relation to various categories of assesses for different purposes. Section 12A of the said Act stipulates that the accounts have to be audited by a Chartered Accountant in case of a trust or institution seeking registration. Similarly Section 44AB of the said Act provides for audit of accounts of certain persons carrying on business or profession. There are various provisions permitting deductions in respect of certain incomes under Chapter VI-A of the said Act wherein it is necessary to obtain a separate audit report in relation to the specified deduction under a particular provision. Section 142(2A) of the Income Tax Act empowers the assessing officer to obtain a special audit report from a Chartered Accountant nominated by the Chief Commissioner or Commissioner. It is not necessary to refer to the various provisions in detail, suffice it to state that the revenue authorities rely upon the integrity of a Chartered Accountant to assist the tax authorities in finalizing assessment on the basis of the audit report submitted by such Chartered Accountant. The decision rendered by the Delhi High Court in the case of *Additional Commissioner of Income Tax Vs. Jay Engineering Works Ltd., (1978) 113 ITR 389* indicates the extent to which the income tax authorities can place reliance upon a report submitted by the auditor.

> *"It is quite competent for the income-tax authorities not only to accept the auditors' report, but also to draw the proper inference from the same. The income-tax authorities can, therefore, come to the conclusion that, since the auditors were required by the statute to find out if the deductions claimed by the assesses in their balance-sheets and profit and loss accounts were supported by the relevant entries in their account books, the auditors must have done so and must have found that the account books supported the claims for deductions.*
>
> *Where the original account books of the assessee had been destroyed in a fire it was held that the Appellate Tribunal, in allowing a deduction, could rely upon other material mainly consisting of the auditors' reports from which it could be inferred that the deductions were properly supported by the relevant entries in the account books".*

22. Thus, the aforesaid position in law clearly demonstrates faith that various government departments have in the professional qualification, competency and integrity of a Chartered Accountant and hence the various statutory duties and responsibilities cast upon a Chartered Accountant under various provisions of the Act. There are other statutes like Co-operative Societies Act , Bombay Public Trust Act, etc. where also the importance of the report of the Chartered Accountant has been statutorily recognized and accepted. It is in the aforesaid context that the conduct of the respondent has to be tested and appreciated in the context of evidence placed on record.

23. Before determining the establishment of guilt or otherwise of the respondent it is necessary to deal with one of the basic contentions as regards violation of principles of natural justice. The law in relation to granting of reasonable opportunity and the principles of natural justice is by now well settled and the Apex Court has to say as under on the said subject.

24. In the case of *Sohan Lal Gupta Vs. Smt. Asha Devi Gupta, (2003) 7 SCC 492,* the Apex Court has succinctly reiterated and enunciated the law relating to grant of reasonable opportunity of hearing and its scope, extent, and nature, and principles of natural justice in the following terms :

REASONABLE OPPORTUNITY.

"20. There cannot be any dispute with regard to the proposition of law that the parties would be entitled to a reasonable opportunity of putting their case – Montrose Cannel Foods Ltd. V. Eric Wells (Merchants) Ltd. [1965] 1 Lloyd's Report 597. A reasonable opportunity would mean that a party must be given an opportunity to explain his arguments before the Tribunal and to adduce evidence in support of his case….."

"21. What would constitute a reasonable opportunity of putting case as also qualification of the right has been stated in `Russel on Arbitration', 22nd Edition, paragraphs 5-053 and 5-054 which are in the following terms:

`5.053. A reasonable opportunity of putting case. Each party must be given a reasonable opportunity to present his own case. This means he must be given an opportunity to explain his arguments to the Tribunal and to adduce evidence in support of his case. Failure to comply with this requirement may render the award subject to challenge under Section 68 of the Arbitration Act, 1996. It is also a ground for refusing enforcement of the resulting award under the New York Convention.

5-054. Qualification of the right. The need to allow a party a reasonable opportunity to present his case can give rise to difficulties. To what extent can the Tribunal intervene where, for example, a party's submissions or evidence is needlessly long, repetitive, focuses on irrelevant issues or is sought to be made over an extended period of time? What if a party ignores procedural deadlines imposed by the Tribunal but maintains he still has points to put before it in support of his case? Inevitably each situation has to be dealt with in its own context but the following general consideration should be taken into account'.

22. There cannot, therefore, be any doubt that a party does not have an unfettered right. The arbitrator cannot only ask a party to comply with procedural orders and directions including those imposing limits as to time and content of submissions and evidence but also the arbitrator has a right of managing the hearing. In 'Russell on Arbitration', 22nd Edition the law is stated thus :

`5-057 Managing the hearing. Similarly, a Tribunal cannot be expected to sit through extended oral hearing listening to long winded submissions on irrelevant matters. The Tribunal is entitled, and under section 33 is obliged and encouraged, to avoid the unnecessary delay and expense that would be caused by such an approach. The Tribunal should take a grip on the proceedings and indicate to the parties those areas on which it particularly wishes to be addressed and those which it does not consider relevant to the real issues in dispute. If a party fails to heed such guidance, the Tribunal might seek to focus the proceedings by allocating the remaining hearing time between the parties. This the Tribunal is entitled to do, provided it will allow a reasonable time for both parties to put forward their argument and evidence."

"23. For constituting a reasonable opportunity, the following conditions are required to be observed :

1. *Each party must have notice that the hearing is to take place.*
2. *Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses.*
3. *Each party must have the opportunity to be present throughout the hearing.*
4. *Each party must have reasonable opportunity to present evidence and argument in support of his own case.*
5. *Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.*
6. *The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument."*

PRINCIPLES OF NATURAL JUSTICE.

"29. The principles of natural justice, it is trite, cannot be put in a straight jacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby. In Chairman, Board of Mining Examination & Chief Inspector of Mines V. Ramjee [1977] 2 SCC 256, this Court held :

`Natural Justice is no unruly horse, no lurking land mine,

nor a judicial cure all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative reliefs and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt that is the conscience of the matter'. (p.262)

[See also Union of India V.Anand Kumar Pandey [1994]5 SCC 663, and R.S. Dass V. Union of India [1986] Supp. SCC 617.

30. In Anand Kumar Pandey's case (supra), this Court again reiterated that the rules of natural justice cannot be put in a straight jacket and applicability thereof would depend upon the facts and circumstances relating to each particular given situation.

31. In M.C. Mehta V. Union of India [1999] 6 SCC 237, this Court held that in a case of natural justice upon admitted or indisputable factual position, only one conclusion is possible, a writ of certiorari may be issued.

32. In State of U.P. V. Harendra Arora [2001] 6 SCC 392, this Court followed, interalia, Managing Director, ECIL V.B. Karunakar [1993] 4 SCC 727 and State Bank of Patiala Vs. S.K. Sharma [1996] 3 SCC 364 and held that an order passed in a disciplinary proceeding cannot ipso facto be quashed merely because a copy of the enquiry report has not been furnished to the delinquent officer, but he is obliged to show that by non-furnishing of such a report he has been prejudiced, would apply even to cases where there is requirement of furnishing a copy of enquiry report under the statutory rules.

33. In Aligarh Muslim University V. Mansoor Ali Khan [2000] 7 SCC 529, it was held :

`24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In K.L. Tripathi V. State Bank of India [1984] 1 SCC 43 Sabyasachi Mukharji. J. (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting Wade's Administrative Law (5th Edn., pp. 472-75), as follows (SCC p.58 para 31):

'It is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent…… There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject-matter to be dealt with, and so forth'.

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in State Bank of Patiala V. S.K. Sharma [1996] 3 SCC 364. In that case, the principle of `prejudice' has been further elaborated. The same principle has been reiterated again in Rajendra Singh V. State of M.P. [1996] 5 SCC 460 (p.539).

34. In U.P. Awas Evam Vikas Parishad V. Gyan Devi [1995] 2 SCC 326, the Constitution Bench Observed:

In other words the right conferred under section 50(2) of the L.A. Act carries with it the right to be given adequate notice by the Collector as well as the reference court before whom the acquisition proceedings are pending of the date on which the matter of determination of the amount of compensation will be taken up. Service of such a notice, being necessary for effectuating the right conferred on the local authority under section 50(2) of the L.A. Act, can, therefore, be regarded as an integral part of the said right and the failure to give such a notice would result in denial of the said right unless it can be shown that the local authority had knowledge about the pendency of the acquisition proceedings before the Collector or the reference court and has not suffered any prejudice on account of failure to give such notice' [Emphasis supplied].

35. In Graphitte India Ltd. V. Durgapur Projects Ltd. [1999] 7 SCC 645, it has been held that the principles of natural justice can be waived.

36. In `Administrative Law' 8th Edn., by William Wade and Christopher Forsyth at page 491, it has been stated :

`At the other end of the spectrum of power, public authorities themselves are now given the benefit of natural justice, as illustrated at the end of this section. Basically the principle is confined by no frontiers.

On the other hand it must be a flexible principle. The judges, anxious as always to preserve some freedom of manoeuvre, emphasise that it is not possible to lay down rigid rules as to when the principles of natural justice are to apply; nor as to their scope and extent. Everything depends on the subject matter. Their application, resting as it does upon statutory implication, must always be in conformity with the scheme of

the Act and with the subject matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice.

37. In Khaitan (India) Ltd. V. Union of India Cal. LT 1999(2) HC 478, one of us said :

`The concept of principles of natural justice has undergone a radical change. It is not in every case, that the High Courts would entertain a writ application only on the ground that violation of principles of natural justice has been alleged. The Apex Court, in State Bank of Patiala V.S.K. Sharma reported in 1996(3) SCC 364 has clearly held that a person complaining about the violation of the principles of natural justice must show causation of a prejudice against him by reason of such violation. The Apex Court has held that the principles of natural justice, may be said to have been violated which require an intervention when no hearing, no opportunity or no notice has been given. Reference in this connection may also be made to Managing Director, E.C.I.L. V.B. Karmarkar, reported in AIR 1994 SC 1076. The question as to the effect of non-grant of enough opportunity to the learned counsel for the appellant by the commission to meet the allegations made in the supplementary affidavit requires investigation. As to what extent the appellant has suffered would be a question which would fall for a decision of a High Court. Where such a disputed question arises, in the considered opinion of this Court, a writ application will not be entertained only because violation of natural justice has been alleged and more so, in a case of this nature where such a contention can also be raised before the Highest Court of India. A distinction has to be borne in mind between a forum of appeal which is presided by an Administrative Body and the Apex Court as an appellate court.

38. The principles of natural justice, it is trite, must not be stretched too far."

25. Therefore, applying the aforesaid principles to the facts of the case the contention of the respondent may be examined. It is necessary to bear in mind that Regulation 11 of the Regulations does not provide for any hearing to either party at the stage when the Council records its prima facie opinion as to whether the respondent is guilty or not. In fact the said stage is only for the purpose of ascertaining as to whether, on the facts and in the circumstances of the case, the Council is required to cause an inquiry to be made in the matter by the Disciplinary Committee. The respondent does not suffer from any prejudice at this stage, because the respondent has already been granted opportunity to file his defence by way of written statement; to offer his comments on the rejoinder of the complainant and hence the respondent cannot be heard to have a grievance that no opportunity of hearing was granted to the respondent at the point of time when the Council formed a prima facie opinion. This position becomes absolutely clear when one considers provisions of Regulation 11[ii] of the Regulations whereunder if the Council forms a prima facie opinion that the respondent is not guilty of any professional or other misconduct the complaint shall be filed. Thus, the entire stage of formation of prima facie opinion is a tentative stage.

26. The contention regarding Disciplinary Committee and/or Council not granting adjournment as prayed for requires to be stated only to be rejected. As can be seen from the report of the Disciplinary Committee as well as recording of minutes, it is apparent that the respondent has not only been given full, proper and reasonable opportunity but more than that. As an illustration, the sequence of events in which the written statement was called for from the respondent and the number of opportunities the respondent was granted may be considered.

27. The complaint dated 29.6.1993 was sent to the respondent under letter dated 16.12.1993 calling for his written statement. As no written statement was received a reminder was sent on 31.3.1994 calling for written statement latest by 20.4.1994. On 20.4.1994 the respondent wrote to the Institute that letter dated 16.12.1993 had not been received and the same may be sent to the respondent. On 6.5.1994 the respondent was sent a copy of the earlier letter dated 16.12.1993 with annexures and the respondent was requested to send written statement before 31.5.1994. On 28.5.1994, the respondent sought adjournment till 31.8.1994. The same was granted vide letter dated 25.7.1994. Again on 26.8.1994 the respondent sought time till 28.2.1995 and the same was granted till 10.3.1995 and the respondent was informed that no further extension of time shall be granted. However, once again on 5.3.1995 the respondent sought further time and also stated that some of the papers furnished to the respondent were illegible copies and hence it was not possible to file written statement by 10.3.1995.

On 23.5.1995 the respondent was sent one more set of annexures along with typed copies of alleged illegible documents. On 9.6.1995 the respondent repeated his objections expressing his inability to file written statement. Thereafter, correspondence ensued between the Institute and the complainant for supply of further typed copies. Such typed copies were sent under letter dated 6.9.1995 from the Institute to the respondent and the respondent was requested to file written statement on or before 28.9.1995. On 22.9.1995 the respondent once again sought time. Thereafter, once again correspondence ensued between the Institute and the complainant for supply of certain other documents and ultimately such documents were forwarded to the respondent by the Institute under letter dated 23.9.1997. The respondent was directed to file written statement by 8.10.1997. Despite the aforesaid exchange of correspondence the respondent did not furnish his written statement. Therefore, as can be seen from the chronology of the aforesaid events on the complaint dated 29.6.1993, the respondent was granted extension of time and adequate opportunities to file written statement right upto 8.10.1997. It is pertinent to note that the papers and the records were considered by the Council only at its meeting held in December, 1998. Therefore, the respondent, if he had chosen to avail of opportunity, could have submitted his written statement even after the deadline of 8.10.1997.That he did not choose to do so speaks volumes as to the attitude of the respondent to procrastinate and prolong the inquiry so as to seek benefit from the delay. This has been specifically taken note of and recorded by the Disciplinary Committee in the context of the request made by the respondent regarding non availability of certain witnesses and documents due to passage of time. Hence, in this set of circumstances, it is not possible to accept the submission that there was violation of principles of natural justice in as much as respondent cannot successfully contend that he was not accorded reasonable opportunity.

28. In relation to contention regarding failure of the Disciplinary Committee/Council to grant full and proper opportunity to defend, it is necessary to record that the respondent has failed to appreciate the distinction between granting of opportunity and availing of the same. In a case where the respondent is accorded sufficient number of opportunities but failed to avail of the same this is what is stated by the Apex Court in the case of *Vikas Deshpande Vs. Bar Council of India and others, AIR 2003 SC 308.*

"12. We do not find any substance in the submission made by the appellant that he could not be proceeded ex parte. It is evident from the perusal of the record that there are four acknowledgements on the record which show that the appellant had been duly served four times and in spite of the notices having been served on the appellant he did not choose to appear before the Disciplinary Committee at any point of time. The Disciplinary Committee had no other option but to hear the matter…."

29. In the Case of Sohanlal Gupta Vs. Asha Devi Gupta and others, (2003) 7 SCC 492, the Supreme Court States :

"Even otherwise, a party has no absolute right to insist on his convenience being consulted in every respect. The matter is within the discretion of the arbitrator and the Court will intervene only in the event of positive abuse. (See Montrose Canned Foods Ltd. (1965) 1 L loyd's Rep.597). If a party, after being given proper notice, chooses not to appear, then the proceedings may properly continue in his absence. (See British Oil and Cake Mills Ltd. Vs. Horace Battin & Co. Ltd. (1922) 13 LIL Rep. 443).

xxx xxx xxx

"Each party complaining violation of natural justice will have to prove the misconduct of the Arbitration Tribunal in Denial of justice to them. The appellant must show that he was otherwise unable to present his case which would mean that the matters were outside his control and not because of his own failure to take advantage of an opportunity duly accorded to him. (See Minmetals Germany GmbH V. Ferco Steel Ltd. (1999) 1 All E.R. (Comm) 315)"

30. Even during the course of hearing before the Disciplinary Committee as can be seen from the record, the respondent sought adjournment time and again on various grounds and, to say the least, the Disciplinary Committee has been extremely charitable in granting adjournments. It is not necessary to deal with various applications for adjournments and the reasons stated therein. Suffice it to state that paragraphs 12 to 33 of the report of the Disciplinary Committee deal with this aspect of the matter and there is no good reason to interfere with the findings recorded on this issue, as the same have been arrived at after taking into consideration the evidence and material on record and in light of the settled legal position.

31. While dealing with the merits of the matter, the Disciplinary Committee has recorded the case of the complainant that a fraud had been committed in as many as 168 cases, but for the purpose of the present proceeding, the complainant had restricted itself to 4 major tax payers in whose case the fraud could be established. It was submitted on behalf of the complainant before the Disciplinary Committee that the proceedings in regard to the others had been initiated and were pending trial in Criminal Courts but detailed evidence in this regard was not being produced before the Disciplinary Committee so as to avoid burdening the record of the said Committee because methodology and the modus operandi in regard to claim of fake refunds in all the cases was almost identical.

32. An admission is a statement, oral or written, suggesting an inference as to any fact in issue made by a party to any proceeding. It is a statement of fact which waives or dispenses with the production of evidence by conceding that the fact asserted by the opponent is true. In other words, admission is confession or voluntary acknowledgement, made by a party as to the existence of certain facts which are in issue or relevant to an issue. The predominant characteristic of an admission, which is a type of evidence, consists of its binding character. Thus, an admission is of evidentiary value only to the extent that its maker has personal knowledge of the matters admitted to. It is immaterial as to whom or before whom the admission is made, but it will operate as a foundation of the rights of the parties once making of admission is established. The effect of admission is that it constitutes a substantive piece of evidence in the case and, for that reason, can be relied upon for proving the truth of the facts incorporated in an admission. Once it is found that admission is clear, certain and definite and not ambiguous, vague or confused, it will have the value and effect of shifting of the onus of proving to the contrary on the party making admission, with the result that it casts an imperative duty on such party to explain the admission. In the absence of a satisfactory explanation it is presumed to be true. In other words, an admission, if clearly and unequivocally made, is the best evidence against the party making it and, though not conclusive, shifts the onus on to the maker as it must necessarily be presumed to be true and until the presumption is rebutted the fact admitted must be taken to be established. Admission is the best evidence that an opposite party can rely upon. Though it is not conclusive, it is decisive of the matter unless it is successfully withdrawn or proved to be erroneous. The Supreme Court in the case of **Nagubai Ammal & Others Vs. V.B. Shama Rao & Ors. AIR 1956 SC 593,** held that what a party himself admits to be true may reasonably be presumed to be so. But before this rule can be invoked, it must be shown that there is a clear and unambiguous statement by the opponent, that such an admission will be conclusive unless explained. It is also well settled that the effect of admission depends upon the circumstances in which it was made and it can be evidenced against the maker unless he explains under what circumstances he made such admission. Normally the term 'admission' is used in civil cases whereas the term 'confession' is used in criminal cases as acknowledgment of guilt. However, this distinction is not maintained in the Evidence Act, 1872 and Sections 17 to 22 are applicable both to Civil as well as Criminal cases._

33. An admission made in ignorance of legal rights or under duress cannot bind the maker of the admission. Admission may be oral or may be contained in documents e.g. letter, depositions, affidavits, plaints, written statements, deeds, receipts, horoscope etc. Thus, the letters written by a person can be treated as evidence against him. Similarly incriminating statement, not amounting to confession but made against his own interest can be treated as an admission.

34. One Mr. R.C. Bhati, the then Income Tax Officer, Ward No. 8 of Ahmedabad was examined by the Disciplinary Committee. It is deposed by Mr. Bhati that he had become suspicious because persons purportedly showing income in the range of Rs.20,000/- to as Rs.30,000/ had been making payments of Income Tax as self assessment tax in the month of March of a large amount ranging from Rs.10,000/- to Rs.15,000/-. That in the normal course of events the assessee would generally know by month of March when the financial year is likely to end, as to what his estimated income would be and on such meager income it would not be necessary to pay self assessment tax of such a large amount. That various such refund cases had arisen and this led him to make further detailed inquiry which evidently unearthed the fraud perpetrated on

the department. Mr. Bhati has further deposed that in case of one Mrs. Kokilaben Shah, challan showed the amount of self assessment tax at Rs.11,011/- while the bank scroll reflected a sum of Rs.11/- as paid by the said lady. That refund order had been issued to the said assessee, on the basis of payment of Rs.11,011/-, which had duly been credited in A/c.No.1249 which was in the name of the said lady. That the Account opening form for this S/B Account showed the address of the Account Holder as No.307, Mahakant, Ashram Road, Ahmedabad which is the address of the office of the respondent. The amount of refund which was issued and credited to the said Bank Account was immediately transferred to the Bank Account of M.R. Shah & Co. That on similar facts refund in the name of Mr. Kishor Jagatiyani, Amrutlal S. Vyas and Kisan C. Sitlani (HUF) were found to be credited and identically transferred. That in all cases the Bank Accounts had been opened by the respondent, introduced by the respondent and/or his family members and as the bank records reflected the said accounts were also operated by the respondent. That in all the bank accounts the address of the account holder was shown to be either the office address or the residential address of the respondent. Mr. Bhati further deposed that he had deputed an inspector to verify as to whether any of the said assessee were available at the address stated viz. the office address of the respondent, and the report was that the premises were occupied by the respondent and none of the persons whose addresses were mentioned in the returns (office address of the respondent) were available at the said address. In the cross-examination, the suggestion on behalf of the respondent that the statements of the respondent as well as the assessee were recorded under threat/compulsion/coercion/inducement was flatly denied by Mr. Bhati. Mr. Bhati also referred to the statement of the respondent dated 21.4.1993 as well as letter dated 21.4.1993 wherein the respondent had categorically admitted the modus operandi as deposed by Mr. Bhati.

35. The Disciplinary Committee has also taken into consideration the statement of Mr. Jadeja, Investigating Officer of the Police Department in relation to the criminal case, Mr. Gopal Kumar Krishna Pillai, Income Tax Officer, HQ. III, Ahmedabad, Shri Arvind Kumar, the Assistant Commissioner of Income Tax, Investigation Wing, Ahmedabad, Shri P.M. Makwana, Income Tax Officer, Ward 8 (1) as well as various officers of the Sahyog Cooperative Bank Limited and the State Bank of India and others. The entire modus operandi has come on record through the aforesaid depositions and as recorded by the Disciplinary Committee none of the witnesses has stated anything to the contrary during the course of their respective cross-examinations.

36. On 21/4/1993, the respondent wrote to the Income Tax Officer, Ward 2 (5), Ahmedabad a letter on his letter-head. The said letter reads as under:

To,

Date: 21/4/93.

The Income Tax Officer,
Ward 2 (5)
Ahmedabad.

Dear Sir.

Reg: Refund Matters/Tax Payment A.Y. 90-91/ A.Y. 91-92 /92-93.

Sub: Request for not to issued refund order by giving credit of Taxes paid for A.Y. 92-93.

This is just to request you as follows:-

1. *That in the following case (List given below) advance tax payments made for A.Y. 92-93 are not genuine and hence credit for advance tax paid and/or any other taxes paid as per challans attached may please not be given so as to preserve the revenues interest.*
2. *We would like to bring to your kind attention that in A.Y. 90-91/91-92, refund order/s have been issued already on the basis of fake advance tax, challans attached with the returns and same have been encashed. You are, therefore, kindly requested to issue fresh challans for the amounts payable including interest till this date immediately so that same can be paid at once so as to prevent any further loss of revenue. The relevant details are under preparations and we will submit the same to you.*
3. *Your Honour may also direct the Branch Manager, Sahyog Bank, Madalpur Branch, Ahmedabad that said challan be paid out of S.B. A/c.1408 held in the name of M.R. Shah as learned ITO Ward 8 (8) Ahmedabad has already passed prohibitory order U/s.226 (3) at our request vide order dt.21/4/93 for the purpose of payment of such amounts*

wherein refund orders have been encashed as stated above. We will be glad to submit any further information for any year at our own or as may be demanded by your Honour's

4. *We once again request you to take sympathetic and liberal view and to expedite the matter. We assure our best co-operation at all the times.*

5. *We will appreciate if the penal actions are being dropped altogether and/or an appropriate relief is being granted from all the laws in force.*

Thanking you,

Yours faithfully,

Sd/-
(Mukesh R. Shah)
Chartered Accountant."

37. At the end of the letter in the bottom portion there is a list of names of 22 assesses and a note to the effect that *"information for other cases are under preparation and/or verification and same will be submitted to you later on"*. Thus, it can be seen that the respondent not only admits that in 22 cases listed below the said letter advance tax payments for assessment year 1992-93 are not genuine but credit for the same as per challans attached with returns may not be given so as to safeguard the interest of the revenue. In the second paragraph the respondent further categorically states that for assessment years 1990-1991 & 1991-92 the refund order already issued on the basis of "fake" advance tax challans attached with the returns have already been encashed and the Income Tax Officer was requested to issue fresh challans for the amounts payable including interest so as to prevent any further loss of revenue. Paragraph 3 of the said letter deals with the modality in which the amount is to be recovered by the department or paid by the respondent by stating the Bank Account Number, Name and Branch of the Bank. It is further stated that a prohibitory order under Section 226 (3) of the Income Tax Act has been passed by the Income Tax Officer, Ward 8 (8) as per request of the respondent. Thus, the entire contents and tenor of the letter leave no room for doubt that complete intention and action of the respondent was geared towards unequivocal admission of the fraud perpetrated on the Income Tax Department and the respondent was ready and willing to cooperate so as to return the amount which admittedly did not belong to him and had been obtained by fraud. Identically worded letters of even date viz. 21.4.1993 have been addressed to the Income Tax Officer of Ward 2 (3), 4 (10), 4 (8), 4 (7), 6 (3), 6 (2), 6 (1), 8 (8), 8 (7), 8 (5), 8 (3), 8 (2) and 8 (1). These letters are at pages 62 to 74 of Paper Book No. V filed before this Court.

38. On 21.4.1993 the respondent appeared before the Income Tax Officer, Ward 8 (1), Ahmedabad and gave statement on oath. The said statement in the preamble states that the respondent appeared on behalf of the following persons viz : (1) Amrutlal S. Vyas, (2) Kishor B. Jagatiyani, (3) Kisan C. Sitlani (HUF) and (4) Kokilaben H. Shah to whom summons had been issued requiring their presence on 20.4.1993. A specific question, being question no.2 was put to him as to in what capacity and in what connection the respondent was appearing and making statement on solemn affirmation. The respondent replied: *" as authorized representative on behalf of the above persons"*. It was further deposed that the authority from the four assesses shall be submitted subsequently but he was authorized to make statements on behalf of the four assesses. The respondent was further questioned as to whether the details, such as Bank Passbook, details of payment etc. as referred to in the summons issued to all the four assesses on 16.4.1993 had been brought and the answer was that no details as mentioned in the summons had been brought. Thereupon the respondent was questioned as to why the said details had not been brought and the answer of the respondent was : *"since the tax payments for assessment years 1990-1991 to 1992-93 are not genuine, the question of bringing the details called for does not arise at all. For assessment year 1989-90 returns of above assesses are not filed"*. Thereafter, by way of further questions and respective replies the entire modus operandi adopted by the respondent to defraud the revenue has been brought out and it is necessary to note that in reply to question no.9 the respondent admits in unambiguous terms that he has defrauded department and that only he is responsible for the said fraud. That the four assesses are not responsible or connected and the respondent has operated their Bank Accounts and the amounts of refund withdrawn from the said Bank Accounts have been used by the respondent. The respondent further, by way of answer to question no.11, states that he is not in a position to state the exact amount which has been obtained by him on the basis of false and fabricated

challans but approximately the same would be to the tune of Rs.15 lacs subject to verification, and that the amount may also increase after further verification. In response to question no. 13 the respondent states that he regrets having committed the fraud and declared his desire to improve himself. He further states that he will compensate the Government of India by reimbursing the sum of Rs.15 lacs plus interest thereon within one month. Thereafter, he states his Bank Account Number wherein the amount has been voluntarily deposited by him and he has voluntarily requested the Income Tax Officer, Ward 8 (8) to make attachment and/or to adjust the same against the amounts of refund encashed. The deponent at the end of the statement states :

"I once again say that this Chapter be considered very sympathetically considering my future career.

Made the above statement this 21st April 1993 consciously believing the same to be true and correct without any undue influence or coercion of whatsoever nature from anybody

I once again say that no one except myself is responsible for commission of such fraud".

39. Thus, when the statement is read as a whole it becomes apparent that the respondent has admitted the commission of fraud by way of forged/fabricated challans showing fake payments and obtained refunds, deposited the same in Bank Accounts in the names of different persons, withdrawn the amount from the said Bank Accounts and utilized the same for personal purpose. No where in the entire statement can one find any indication that the statement was obtained by any coercion or threat or inducement of any nature. This becomes amply clear when one takes into consideration the fact that the respondent had appeared in response to summons issued to four different assesses. It was not as if the respondent had been issued any summons to appear and depose before the authorities. This factor significantly points to the unequivocal direction of volition of the respondent in tendering the statement.

40. Thereafter, another statement on oath was recorded on 22.4.1993 by the Income Tax Officer, Ward 8 (8). One more statement came to be recorded on 23/24-4-1993 under Section 132 (4) of the Income Tax Act. In the said statement, the respondent has once again described the modus operandi adopted by him. Vide question no.12 of the statement dated 23.4.1993 the respondent was asked to state the details in relation to page no.89 of Annexure 'A' which was one of the seized documents during the course of search and seizure carried out at the residence of the respondent. He replied : *"Page 89 of Annexure 'A' brief of my meeting with Ashok D. Shah, who is a Criminal Advocate on 19.4.1993, where I had gone to him to discuss regarding fraud case of refund order. I wanted to take his advice that I have done this and what can be the consequence".* This statement on oath assumes importance in the context of the said note on the letter head of the respondent which records the discussion the respondent had with his Advocate. Without going into the contents of the said note, suffice it to state that the respondent was already aware about the fraud committed by him and had sought legal advice as far back as on 19.4.1993. This factor has to be appreciated in the context of letter written by the respondent to the Income Tax Officer of different wards on 21.4.1993.

41. The respondent wrote letters dated 8.6.1993, 15.10.1993, 27.10.1994, 14.11.1994, 22.1.1995 and 6.3.1995 to different Income Tax Authorities including the Commissioner of Income Tax admitting his guilt, pointing out the manner in which he had returned the amount to the Income Tax Department and finally also pointing out that the department had recovered excess sum of Rs.12,219/-. In other words, it was the case of the respondent that though he was required to refund a sum of Rs.21,75,500/- to the Income Tax Department being the amount of refunds encashed by him along with interest, yet, total payment was to the extent of Rs.21,87,719/-, thus resulting in the excess payment for which he sought credit or claimed a loss. This aspect demonstrates that it was the respondent who had perpetrated the fraud, encashed the refunds, utilised the said funds and ultimately refunded the said funds with interest and sought credit for the excess amount paid over by him to the Income Tax Department. This conduct points only in one direction and that is the guilt of the respondent.

42. In the event of the respondent not being responsible for the fraud, there was no occasion for the respondent to pay over the sum to the revenue because the case of the respondent has been that though a fraud has been committed so as to obtain amounts in the nature of refund fraudulently from the Income Tax Department, the respondent is not the person who has committed such a fraudulent activity and, hence, he should not be visited

with any penal consequence. Moment the respondent agreed to return/pay the amount to the Income Tax Department it became abundantly clear that it was only he, who had enjoyed the fruits of the fraudulent transaction and when such a fraudulent practice was discovered he admittedly agreed to refund the amount and in fact refunded the amount with interest.

43. It is not necessary to refer to the various statements/charts giving details and the gross receipts by way of income tax refunds credited during various assessment years in different Bank Accounts, transferred therefrom to the Bank Account of the respondent and/or his family members and utilisation of such funds. There are also statements/charts available on record showing the names of different persons in whose names various Bank Accounts were opened and operated by the respondent. In brief : there are sufficient details to link the respondent with the fraud complained of. Once there is admission of the respondent in the form of identically worded letters dated 21.4.1993 supplying the list of cases in different wards wherein refunds have been fraudulently obtained, the contention that the complainant has led evidence in only four cases out of 168 does not merit acceptance. Even otherwise : it is the conduct of the respondent that is under scrutiny. If it amounts to misconduct – in one case or more – the number of cases becomes irrelevant. A proved misconduct remains so and there cannot be any mitigating circumstance on this count.

44. The respondent has strenuously endeavoured to build defence on the basis of retraction stated to have been made by way of communication dated 8.6.1993 addressed to the Commissioner of Income Tax, Gujarat – III, Ahmedabad as well as an affidavit dated 1.3.1995. The letter of retraction dated 8.6.1993 is a disputed piece of document in as much as the complainant does not accept that any such letter of retraction was filed, while on the other hand the respondent relies upon one acknowledgment receipt bearing No.104155, which states that one letter dated 8.6.1993 was received on 8.6.1993. The complainant states that the said letter is not a letter of retraction but a letter regarding request to sell shares seized as per Panchnama prepared at the office premises at the time of search proceedings under Section 132(1) of the Income Tax Act carried out on 23.4.1993. According to the respondent two letters, both dated 8.6.1993, regarding different subject matters were filed in the office of CIT, Gujarat – III, Ahmedabad but the dispatch clerk did not issue separate receipts and only a common receipt was issued. In this connection, the Disciplinary Committee has referred to the deposition of one Shri Gopal Kumar Krishna Pillai, Income Tax Officer, HQ-3, as well as one Mr. Vaghela, the Clerk (UDC). Mr. Pillai has in his deposition stated that letter dated 8.6.1993 under acknowledgment No.104155 had been recorded in the Inward Register at Sr.No.2278 and there was no other letter of the same date. That if two letters were filed by a person on the same date at the same time, two separate acknowledgments are issued and even if through oversight only one acknowledgement receipts had been issued the Inward Register would show separate entries which was not the case. Similarly Mr. Vaghela, the clerk testified that only a single letter dated 8.6.1993 had been received and he has also specifically stated that if two letters had been received the acknowledgement receipt would have mentioned accordingly, assuming that only one receipt had been issued or two separate acknowledgements would have been furnished.

45. In so far as the affidavit dated 1.3.1995 is concerned, the same has been forwarded under letter dated 31.7.1995 to the Income Tax Officer, Ward 8 (1) / 8 (8) and in fact from the acknowledgement receipt available on record it is apparent that the said letter has in fact been tendered on 8.11.1995. In the letter dated 31.7.1995, the respondent states that the affidavit has been filed during the course of the assessment proceeding in the case of the respondent vide letter dated 2.3.1995.

46. Without entering into the disputed arena as to whether the letter of retraction dated 8.6.1993 had been filed or not and the belated filing of affidavit dated 1.3.1995, it becomes necessary to take note of the fact that both the retractions, by way of letter and affidavit, have come about after nearly a month and half from the date of the first statement dated 21.4.1993. Both in the letter dated 8.6.1993 and the affidavit dated 1.3.1995 it is stated by the respondent that he was induced to give various statements recorded on 21.4.1993, 22.4.1993, 23.4.1993, 24.4.1993 and that too with coercion and heavy pressure/undue influence/inducement or threatening words. During the course of proceedings before the Disciplinary Committee, the officers who had recorded statements of the respondent on different dates were examined on oath, the respondent was permitted to cross examine the said officers and the

categorical statement made by the said officers that the statements were made voluntarily without any coercion etc. have not been shown to be incorrect in any manner. Though in the cross-examination a specific suggestion was made to the said officers as regards pressure or influence or threat being administered for making a statement, the same has been flatly denied and the respondent has not been able to show by any other evidence as to how and in what manner he was forced into making the said statement. As already stated hereinbefore the theory of the statement having been obtained by coercion or threat etc. does not stand when one considers that the first statement dated 21.4.1993 was made by the respondent in response to summons issued to four different assesses. The respondent had not even been called upon to appear before the authorities; the respondent admittedly did not present any authority and yet appeared out of volition, accepted that he would produce the authority and stated in no uncertain terms that he was authorized to make statement on behalf of four different assesses. It was in this statement that categorical admission to the fraudulent practice adopted by the respondent came to be described by him. The manner and mode in which the fraudulent transaction was carried out along with details of Bank Accounts etc. came to be stated. Therefore, in the aforesaid fact situation even on the assumption that letter of retraction-dated 8.6.1995 had been filed, the said letter does not carry the case of the respondent any further. It is furthermore pertinent to note that both in the letter dated 8.6.1993 and the affidavit dated 1.3.1995 is no retraction as regards the letters dated 21.4.1993 addressed by the respondent to various Income Tax Officer, in charge of different wards at Ahmedabad. Thus, even if the letter dated 8.6.1993 and the affidavit dated 1.3.1995 are accepted at their face value, the retraction if any, is restricted only to the statement made on oath and the letters dated 21.4.1993 written on the letter-head of the respondent remained on record, uncontroverted and without any demur. At the cost of repetition, it requires to be stated that, as seen from a specimen letter already reproduced hereinbefore, admission in the said letter is unambiguous in terms, unequivocal and without any reservation. It is not even the case of the respondent that the said letters were written without being aware of the correct position in law or without understanding the import of the said communication. In fact, the respondent, being as qualified as he is, cannot even take that plea.

47. The respondent has placed strong reliance on the decision of Supreme Court of India in the case of *K.T.M.S.Mohammed and Another Vs. Union of India (1992) 197 ITR 196* in support of the submission that in case of retraction of statement reliance cannot be placed on such statement for the purpose of holding a person guilty for the misconduct he is charged with. It is necessary to appreciate the backdrop in which the controversy arose before the Apex Court. The appeal came to be filed in the Supreme Court against the order made by the High Court in Criminal Revision dismissing the revision and confirming the judgment of the lower Appellate Court and the Trial Court convicting and sentencing the appellants under the provisions of the Indian Penal Code and the Income Tax Act. It appears that the Enforcement Directorate, Madras raided on 19.10.1966 the premises of the appellants and recorded certain statements of the appellants. However, on 20.10.1976 both the appellants sent their retractions to the Deputy Director of Enforcement Directorate through their Advocate stating that their statements recorded on 19.10.1966 were not voluntary statements but were obtained under threat and force and the facts stated therein were not correct. It is in this context that the Apex Court observed that for the purpose of prosecuting appeals under the provisions of the Indian Penal Code and the Income Tax Act for perjury as well as other offences, statements of the appellants recorded under the Foreign Exchange Regulations Act by Enforcement Directorate could not be relied upon in absolute terms. While holding so the Apex Court enunciated the legal position in the following terms:

"We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice it to say that the core of all the decisions of this court is to the effect that the voluntary nature of any statement made either before the Customs Authorities or the officers of Enforcement Directorate under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and, if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means, that statement must be rejected brevi manu. At the same time, it is to be noted that, merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise, etc. to establish that such improper means have been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who

recorded the statement, the authority, while acting on the inculpatory statement of the maker, is not completely relieved of his obligation at least subjectively to apply its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down to this that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law that this Court, in several decisions, has ruled that, even in passing a detention order on the basis of an inculpatory statement of a detenue who has violated the provisions of the Foreign Exchange Regulation Act or the Customs Act, etc., the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order be vitiated…."

48. Therefore, this case does not assist the respondent in any manner. In fact, the legal position is reiterated when it is stated that it is only for the maker of the statement who alleges inducement, threat or promise, etc., to establish that such improper means have been adopted. Only caveat stipulated is that the Court or authority is required to apply its mind to the retraction, if any, and reject the same in writing if it is found that retraction does not dislodge the earlier admission.

49. Apart from the aforesaid, there is one more aspect of the matter. There is no explanation forthcoming as to why the letter-dated 8.6.1993 retracting statement made in April, 1993 was not filed at any earlier point of time. Similarly, the affidavit dated 1.3.1995 also comes on record at a very belated stage. There is no explanation for the delay. A retraction, so as to dislodge the admission made, should come about at the earliest point of time. It goes without saying that a retraction made after a considerable length of time, would not have the same efficacy in law as a retraction made at the earliest point of time from the day of admission. A belated retraction would fall in the category of afterthought instead of being retraction.

50. That apart, for a retraction to be effective so as to dislodge the admission made earlier in point of time, the retraction has to be supported by contemporaneous evidence and the onus is on the person making such admission and retraction. In the present case, admittedly, the respondent has not been able to show even on the basis of preponderence of probabilities that the statements recorded on different dates, and more particularly recorded on 21.4.1993, were made under coercion or threat or inducement of any nature. The Disciplinary Committee has taken note of the fact that the respondent has categorically accepted that he has no animosity against any of the officers of the department and similarly, none of the officers of the department have any personal bias, grudge or animosity against the respondent. In these circumstances, it is not possible to find any infirmity in the reasoning adopted by the Disciplinary Committee and the Council for rejecting so called retractions made on 8.6.1993 and 1.3.1995.

51. While dealing with power of Bar Council under the Bar Councils Act, 1926 it is laid down by the Apex Court *In the matter of Mr. 'P' an Advocate, AIR 1963 SC 1313,* that if it is shown that an Advocate, 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 Bar Council or a Tribunal consisting of members of the Bar to say that the Advocate has been guilty of infamous conduct in a professional respect. While observing so, the following parameters have been laid down as to what constitutes misconduct.

"Mere negligence or error of judgment on the part of an Advocate will not amount to professional misconduct. But different considerations arise where the negligence of the Advocate is gross and such gross negligence involves moral turpitude or delinquency. In dealing with this aspect of the matter, the expression "moral turpitude or delinquency" is not to receive a narrow construction. Wherever conduct proved against an Advocate is contrary to honesty, or opposed to good morals, or is unethical, it may be safely held that it involves moral turpitude. A willful and callous disregard for the interests of the client may, in a proper case, be characterized as conduct unbefitting an Advocate. Any conduct which makes a person unworthy to belong to the noble fraternity of lawyers or makes an advocate unfit to be entrusted with the responsible task of looking after the interests of the litigant, must be regarded as conduct involving moral turpitude. The Advocate-on-Record like the other members of the Bar are Officers of the Court and the purity of the administration of justice depends as much on the integrity of the judges as on the honesty of the Bar. That is why dealing with the question as to whether an Advocate has rendered himself unfit to belong to the brotherhood at the Bar, the expression "moral turpitude or delinquency" is not to be construed in an unduly narrow and restricted sense."

52. In the case of *J.S.Jadhav vs. Mustafa Haji Mohammed*

Yusuf AIR 1993 SC 1535, it is held by the Apex Court that when an Advocate withdraws a sum from the court on behalf of his client and returns only a small amount to the client, misappropriation of money belonging to the client stands established and striking off his name from rolls would be a proper punishment. It is further observed that

> *"8. Advocacy is not a craft but a calling; a profession wherein devotion to duty constitutes the hallmark. Sincerity of performance and the earnestness of endeavour are the two wings that will bare aloft the advocate to the tower of success. Given these virtues other qualifications will follow of their own account. This is the reason why legal profession is regarded to be noble one".*

These statements of law by the Apex Court in the aforesaid two cases would be equally applicable in case of a Chartered Accountant.

53. In the case of *Chandra Shekhar Soni Vs. Bar Council of Rajasthan AIR 1983 SC 1012,* the Apex Court has stated the scope of interfering in appeal in the following words:

> *"In an appeal under Section 38, the Court would not, as a general rule, interfere with the concurrent finding of fact given by the Disciplinary Committee of the Bar Council of India and of the State Bar Council unless the finding is based on no evidence or it proceeds on mere conjecture and unwarranted inferences".*

54. This court in the case of *Council of the Institute of Chartered Accountants of India V/s. P.C. Parekh [2003] 129 TAXMAN 80 (Guj.) has laid down that:*

> *"15. The High Court has been entrusted important function in context of the behaviour of the members of this noble profession in the disciplinary matters which come up before it. It has wide powers extending to removal from membership of the Institute either permanently or for a specified period. It may direct the proceedings to be filed or dismiss the complaint. This enables the court to examine the nature of misconduct alleged and the facts and circumstances brought on record in connection therewith against the delinquent. There is a serious responsibility on the Court a duty to itself, to the profession, and to the whole of the community to be careful not to accredit any person as worthy of the public confidence who cannot establish his right to that credential. However, when an important statutory body like the Council finds a member of the Institute guilty of the misconduct and forwards the case to the High Court with its recommendation under Section 21 (5) of the Act, its findings based on the material on record would ordinarily not be disturbed unless found to be unjust, unwarranted or contrary to law".*

55. Applying the aforesaid tests, it is apparent that it is not possible to state that the petitioner Council has acted in any manner which could be termed to be unjust, unwarranted or contrary to law, i.e. the findings are based on no evidence or the petitioner has proceeded on mere conjectures and unwarranted inferences.

56. In the case of *P.D. Gupta Vs. Ram Murti and Another, AIR 1998 SC 283, the Apex Court has stated in para 15 that:*

> *"Bar Council of India and State Bar Councils are statutory bodies under the Act. These bodies perform varying functions under the Act and the Rules framed there under. Bar Council of India has laid standards of professional conduct for the members. Code of conduct in the circumstances can never be exhaustive. Bar Council of India and State Bar Councils are representatives bodies of the Advocates on their rolls and are charged with responsibility of maintaining discipline amongst members and punish those who go astray from the path of rectitude set out for them. In the present case the Bar Council of India, through its disciplinary Committee, has considered all the relevant circumstances and has come to the conclusion that P.D. Gupta, advocate is guilty of misconduct and we see no reason to take a different view. We also find no ground to interfere with the punishment awarded to P.D. Gupta in the circumstances of the case".*

57. The petitioner Council is one such representative body charged with responsibility of ensuring discipline and ethical conduct amongst its members and impose appropriate punishment on members who are found to have indulged in conduct which lowers the esteem of the professionals as a class. Adopting the aforesaid approach, it is not possible to find any infirmity, either on facts or in law, in the reasoning and the findings recorded by the Disciplinary Committee and the petitioner Council by holding the respondent as being guilty of "other misconduct" under Section 21 read with Section 22 of the Act and, hence, there is no necessity to interfere with the punishment recommended. It has been proved beyond reasonable doubt, in the facts and circumstances of the case and by the evidence on record, that the respondent, and only the respondent, is guilty of "other misconduct" and hence liable to punishment under section 21 (6) (c) of the Act i.e. removal from membership of the Institute permanently.

58. The Reference is accordingly disposed of with a direction to the petitioner Council to remove the respondent from the Membership of the Institute permanently. ■