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1999 TaxPub(DT) 0700 (Mad-HC) : (1999) 237 ITR 0208 : (1999) 103 TAXMAN 0257

K. Bhagavatheeswaran v. Institute of Chartered Accountants of India & Anr.

W. P. Nos. 5925 and 5926 of 1989 and W. M. P. Nos. 8677 and 8678 of 1989.

Decided on July 13, 1998

Counsel : S. Elant Bharathi for C. V Mahalingam *for the petitioner*, S. Sampath Kumar *for respondent No. 1*, None appeared *for respondent No. 2*.

JUDGMENT

Y. VENKATACHALAM J. - Since the parties to both these writs and also the point involved herein are common, both these writ petitions were taken up together and are disposed of by this common order with the consent of the parties concerned.

Invoking article 226 of the Constitution of India, the petitioner herein has filed W. P. No. 5925 of 1989, seeking for a writ of certiorari to call for the records of the first respondent in Notification No. 1-CA(7)/3/89, dated January 13, 19891, and to quash the same and he has filed W. P. No. 5926 of 1989, seeking for a writ of certiorari to call for the records of the first respondent in Notification No. 1-CA(7)/158/87, dated May 25, 19871, and to quash the same.

In support of the writ petitions, the petitioner herein has filed separate affidavits wherein he has narrated all the facts and circumstances that forced him to file these writ petitions and prayed that the writ petitions may be ordered as prayed for. Per contra, on behalf of the first respondent separate counter-affidavits have been filed rebutting all the material allegations levelled against them one after the other and ultimately they have requested this court to dismiss the writ petitions for want of merit.

Heard the arguments advanced by learned counsel appearing for the writ petitioners and also those of learned counsel appearing for the first respondent. I have also perused the contents of the affidavits and the counter-affidavits together with all the relevant material documents available on record in the form of typed set of papers. 1 have also taken into consideration the various points raised by learned counsel appearing for the respective parties during the course of their arguments.

In such circumstances, the common point that arises for consideration in these writ petitions is, as to whether there are any valid grounds to allow these writ petitions or not.

Having seen the entire records in these cases the following are the admitted facts. The petitioner herein is a member of the first respondent and he became a member of the said Institute in or about 1952 and since then he has been practising as a chartered accountant and at present he is a partner of Suri and Co., a reputed and old firm of chartered accountants which was started as early as 1938 in the city of Madras. The profession of chartered accountants is governed by the Chartered Accountants Act, 1949 (hereinafter called "the Act"). The said Act in its preamble states that it was an Act intended for making regulations for the profession of chartered accountants. The object of the Act is said to be achieved by establishment by statute of a professional body called the Institute of Chartered Accountants of India. The Act provides that all the persons whose names are entered at the commencement of the Act and all other persons who may thereafter have their names

entered in the register would constitute a body corporate which would be called the Institute of Chartered Accountants of India. Electorate consisting of constituencies of members have been formed from which elections are held and 24 members are elected to form an inner body called the Council. Powers to carry out the objects of the Act are vested with the said Council who could make regulations from time to time subject to the approval of the Central Government. The Central Government also has the power to direct the said Council to make regulations and a power of suspending the regulations made by the Council. No member of the Institute would be entitled to practise in India or elsewhere unless he has obtained from the Council a certificate of practice. An application is provided for the consideration of the Council for the grant of the certificate of practice and the certificate so issued would be valid only if certain conditions are adhered to including the payment of an annual fee.

It is significant to note that various enactments such as the Companies Act, 1956, the Income-tax Act, 1961, and the Banking Regulation Act, 1949, provide that only chartered accountants have a specified role to play in companies and other organisations. It is also important to note that the intention of the Act is to provide for a rigorous test and exemplary qualification to enter into the sphere of the profession of accountants actively and once a person acquires such qualifications he would be entitled to follow a profession which is exclusive and special on its own merit. It is no doubt true that it is a highly respected profession with absolute integrity. According to the petitioner herein, in such circumstances, years of hard work and knowledge are required to qualify as a member of the Institute and once a person acquires the said qualifications, he would be free to engage himself in the profession without any kind of restriction except for a conduct amounting to dishonesty as it is understood in the ordinary course of the sense of the word and also a conduct which deserves condemnation. It is also significant to note that a chartered accountant is expected to function honestly and not to conduct himself in a manner inviting public criticism and to function with dignity and also that the Act and the Rules made thereunder would be entitled to bring restrictions or provisions only for the purpose of attaining the aforesaid professional standards. It is relevant to mention that compulsory audit of the books of account and other records of companies incorporated under the Companies Act, and also of all other persons whose turnover is in excess of Rs. 40 lakhs under the Income-tax Act is provided under which the work of audit is authorised to be performed only by a chartered accountant alone and not by anybody else. Further, by the Finance Act of 1984, a new section namely, section 44AB to the Income-tax Act, 1961, was introduced by which certain classes of assessees such as a businessman with a turnover of more than Rs. 40 lakhs and a person carrying on a profession with a gross receipt of Rs. 10 lakhs a year were required to get their accounts audited by a chartered accountant and get a report from him. The said section was said to have effect on and from April 1, 1985, and the said provision is popularly called "compulsory tax audit".

Section 22 of the Act defines professional misconduct as follows :

Your the purposes of the Act, the expression 'professional misconduct' shall be deemed to include any act or omission specified in any of the Schedules, but nothing in this section shall be construed to limit or abridge in any way the power conferred or the duty cast on the Council under sub-section (1) of section 21 to inquire into the conduct of any member of the Institute under any other circumstances."

A reading of the sad section would reveal that it is an inclusive section and not an exhaustive one and that discretion is vested in the Council to inquire into the conduct of any member of the Institute under any circumstances. The First Schedule, Part 1, defines what is professional misconduct in relation to chartered accountants in practice. Part II of the First Schedule sets out professional misconduct in relation to members of the Institute in service and Part Ill sets out professional misconduct in relation to members of the Institute in

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general. The Second Schedule, Part I, provides for professional misconduct in relation to chartered accountants in practice requiring action by a High Court and Part 11 sets out professional misconduct in relation to members of the Institute generally requiring action by the High Court. In exercise of the powers contained in Schedule 11 set out above, the Council has been issuing notifications. One such notification is the impugned notification in W. P. No. 5925 of 1989, dated January 13, 1989. The said notification states that a member of the Institute in practice shall be deemed to be guilty of professional misconduct if he accepts in a financial year more than the specified number of tax audit assignments under section 44AB of the Income-tax Act, 196 1. The specified number is stated as 30 audits in a financial year whether in respect of corporate or non-corporate assessees. Separate provision has been made for a partnership of chartered accountants. According to the said notification, if a chartered accountant had already accepted assignments in excess of the specified assignments, he should intimate his inability to conduct tax audits in excess of the specified number of the concerned assessees. This notification is under challenge in W. P. No. 5925 of 1989.

The impugned notification in W. P. No. 5926 of 1989 is the notification dated May 25, 1987. By the said notification, the Council of the first respondent has classified partnerships of chartered accountants in the following manner :

(a) A firm consisting of four or more partners but less than eight partners with at least one partner holding a certificate of practice for five years or more ; or

(b) A firm consisting of eight or more partners with at least one partner holding a certificate of practice for five years or more and the said notification further provides that if the abovesaid firm accepts or carries out any audit work involving receipt of audit fees (excluding reimbursement of expenses, if any) for such work of an amount less than the amount which have been set out in the notification itself, the same would be deemed to be professional misconduct.

The said notification states that in a city with a population of two million and above, a firm having eight or more partners would not be entitled to charge a fee of less than Rs. 3,000 per audit per annum. Similarly in the case of cities and towns having population less than two million, the fee should not be less than Rs. 2,000 per audit per annum. A provision has been added to the said notification that the aforesaid restrictions would not apply to certain categories of audit referring to charitable institutions, clubs, statutory audit, branches of banks and similar organisations. The said notification is said to be effective for all audits relating to accounting period beginning from August 14, 1987. According to the petitioner, he is aggrieved by the said impugned notification as it affects his right to carry on his profession as a chartered accountant and as a partner of a firm of chartered accountants. The above said notification is under challenge in W. P. No. 5926 of 1989.

At the outset, this court considers the facts of W. P. No. 5926 of 1989. In this matter, the impugned notification is challenged by the petitioner as unconstitutional and illegal on the ground that the same affects the fundamental right of the petitioner to carry on a profession offending article 19(1)(g) of the Constitution. It is contended by the petitioner that there is no reasonable classification nor any reasonableness in the restriction brought by the notification in deeming a misconduct by fixing a limit to the fees to be charged by chartered accountants and also that there is no nexus between the purpose of the Act and the notification issued which deems professional misconduct. In the facts and circumstances of this case, this court is of the view that there is every force in the said contention of the petitioner for the following reasons. Charging of fees by a professional can never be considered unprofessional more particularly when he is likely to charge a fees which is reasonable. It has to be remembered that the main object of the Act is to regulate the conduct of the Members of the Institute in

carrying out their professional duties. Professional misconduct is a concept which is understood as meaning something irregular or one committed by a professional in relation to his duties which will amount to dishonesty or an act lowering the dignity of the profession. What a professional would consider it proper to charge as fee in a particular case is a matter of discretion of the individual professional concerned and the same cannot be fixed or controlled by enlarging the definition of professional misconduct. As rightly contended by the petitioner herein, in this case by an enlargement of the definition of professional misconduct, an artificial meaning is given by which restrictions are brought on the right of a chartered accountant in practice to charge a fee as to what he may consider to be appropriate. Further, the notification has no purpose nor meaning in prescribing a rate of fee to be charged in accordance with the population of an area and the number of partners a firm may possess. Further, as rightly contended by learned counsel for the petitioner, the notification has lost sight of the fact that a professional fee is chargeable only in relation to the work done and does not have any bearing to any population or the number of partners. By reason of the notification, chartered accountants similar to the petitioner are forced to charge an amount which may be even inappropriate to the work that they might have attended to. It is also significant to note that the notification has not taken into account that even in respect of clients who are long standing, there may arise occasions only to attend to a work of audit which may not involve much labour. Even in such cases the chartered accountant is to charge a fee which cannot be proper. If such a situation arises, naturally the petitioner and the firm in which he is a partner is bound to lose a large number of clients. That apart the notification also leads to severe discrimination among the members in practice of the Institute. Merely because a partner has five years of experience every one of the partners was prevented from charging a fees which is justifiable ; whereas the other chartered accountants who are not partners in a firm and who have put in five years are allowed to charge any fee without any restriction. Therefore, for all the aforesaid reasons, this court is of the clear opinion that the notification severely affects the fundamental right of the members of the Institute forming partnerships which is based upon mutual trust and confidence and that, therefore, the same is arbitrary and also that the definition adopted in the notification to deem a professional misconduct on the failure to charge a minimum fee has no bearing nor meaning with respect to the achievement of regulating the conduct of Members. Hence, the impugned notification in W. P. No. 5926 of 1989, is liable to be quashed.

Now, coming to the other W. P. No. 5925 of 1989, the impugned notification is being challenged by the petitioner as unconstitutional and illegal on the grounds that the impugned notification affects the fundamental right of the petitioner to carry on a profession offending article 19(1)(g) of the Constitution and also that there is no reasonable classification nor any reasonableness in the restriction brought by the notification in deeming a misconduct by fixing a limit to the acceptance of a number of tax audit assignments. It is also significant to note that there is no nexus between the purpose of the Act and the notification issued which deems professional misconduct. Accepting a legitimate professional engagement by a professional can never be considered unprofessional and be made a misconduct. Further, the main object of the Act is to regulate the conduct of the members of the Institute in carrying out their professional duties. Willingness to carry out his professional work cannot be enlarged into professional misconduct by adopting an artificial device of placing a restriction on the volume of work. A professional has a fundamental right to choose his own volume of work. No other profession has any such restriction. It has to be remembered that a high degree of professional competence is required and heavy responsibilities are placed on chartered accountants under the several enactments. Only a chartered accountant is capable of issuing a certificate that is required under the Income-tax Act. Under the Companies Act also only a chartered accountant is empowered to issue a certificate. Further, it has also been admitted even by the respondents that years of hard work and knowledge are required to qualify as a member of the Institute. That being so, once a person acquires the said qualifications, he would be free to engage himself in the

profession without any kind of restriction except for a conduct amounting to dishonesty as it is understood in the ordinary course of the sense of the word and also a conduct which deserves condemnation. The Act and the Rules made thereunder would be entitled to bring restrictions or provisions only for the purpose of attaining the aforesaid professional standards. Whereas it is significant to note that by reason of the notification, the choice of a chartered accountant to opt for his own client is considerably abridged and restricted, the proviso to the notification is also quite meaningless in relation to the restrictions placed. There is no justification at all for such restrictions. That apart, as rightly contended by the petitioner herein, no reason can be attributed for restricting the number of audits as contained in the notification. The classification adopted itself is quite wrong and artificial. If it is the function to restrict the volume of work so as to achieve purity and quality of work, the classification should be in accordance with the volume of work and not in accordance with the number of audits. A single audit work itself would be so voluminous that it may occupy a major portion of a chartered accountant's time. On the other hand, there may be cases where numerous audits can be completed even on a shorter time. In the latter instance, there cannot be any restriction regarding the number of audits. Therefore, the classification is an infringement into the efficiency of chartered accountants who are in a position to attend to a number of audits. As rightly pointed out by learned counsel for the petitioner it may also result in anomalous situations in the sense that if an auditor is able to complete the entire audit work as restricted now, then he may also he unemployed for the rest of the year.

Per contra, Mr. Sampathkumar, learned senior counsel for the first respondent, would submit that the first respondent is authorised to frame regulations and that power not being questioned, the circular prescribing the total number of tax audit assignments in a financial year to be undertaken, being reasonable and imposed in the larger interests of practising auditors, should not be interfered with. It is also his contention that for assuring quality in tax audit assignments and also to bring about an equitable distribution of work, as a large number of junior practitioners get frustrated for want of assignments and are tempted to abandon the profession and seek employment elsewhere, the Institute thought it necessary to restrict the number of tax audits to 30. According to him, these tax audits which are compulsory under the statute, consume quite a considerable time and if an auditor were to sincerely discharge his duties, he can do only 30 tax audits in a year and the Institute of Chartered Accountants being in the best position to decide on that question, had restricted the number of tax audit assignments to 30 in a financial year.

It is significant to note that the time taken for audit by an able chartered accountant may be far less than the time taken by another chartered accountant of restricted ability. All the auditors cannot be placed on an equal footing and an assumption cannot be made that an auditor would be able to fulfil his obligations only up to 30 tax audit assignments under section 44AB of the Income-tax Act, per financial year. It is not known on what basis or on what statistics it is contended by the respondents that only 30 tax assignments can be undertaken by a chartered accountant. What applies to an individual chartered accountant would equally apply to a partner of a firm in whose case-also, the restriction is 30 tax audit assignments per financial year. The Act does not contemplate distribution of available work to all the chartered accountants on the rolls of the Institute, nor does it impose an obligation on the Institute to provide work for a young and aspiring chartered accountant. That is an area in which the respective chartered accountant has to look after himself.

Therefore, for all the aforesaid reasons, in both these writs, the fixation is arbitrary and unreasonable and the same is in violation of article 14 of the Constitution. In both the cases, there is discrimination and that would vitiate the respective notifications. Further, it is significant to note that the auditors had been accepting the assignments without any restriction whatsoever in the past years and all these years, no such restriction regarding the number of assignments to be undertaken was thought of. So also, for all these years the

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chartered accountants were free agents who could negotiate and settle their fees with their respective clients and that is an area in which the Institute has never been interfering. Therefore, 1 am of the opinion that such restrictions placed by the first respondent in respect of the number of audit assignments and also the fees structure apart from being discriminatory, are also unreasonable.

Learned senior counsel for the first respondent, Mr. Sampath Kumar, in support of his case relied on an order passed by the Madhya Pradesh High Court in Misc. Petition No. 4202 of 1992 (Arun Grover v. Institute of Chartered Accountants of India [1998] 93 Comp Cas 618). But, in view of the observations made in para. 13 (see page 216 supra) of this order, 1 am of the clear view that the above order relied on by learned senior counsel appearing for the first respondent is not helpful to them in this case.

Therefore, for all the aforesaid reasons and in the facts and circumstances of these cases and in the light of my above discussions with regard to the various aspects of this case, I am of the clear view that the petitioner herein has clearly made out a case in his favour that the impugned notifications in these cases are unconstitutional, arbitrary and illegal, and that, therefore, the same are liable to be quashed. Thus, both the writ petitions succeed and they deserve to be allowed.

In the result, both the writ petitions are allowed. No costs. Consequently, the impugned notifications in both these writ petitions are hereby quashed. W. M. P. Nos. 8677 and 8678 of 1989 are dismissed as not necessary.