

Proceedings No: D050110C

IN THE MATTER OF complaint made  
under section 34(1)(a) of the Professional  
Accountants Ordinance (Cap.50)

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BETWEEN

The Registrar of  
the Hong Kong Institute of Certified  
Public Accountants

Complainant

AND

Au Chun Fai, Jeffery

Respondent

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**REASONS ON LIABILITY**

1. In these proceedings, the Complainant alleges that in breach of section 34(1)(a)(viii) of the Professional Accountants Ordinance (Cap 50) ("PAO") the Respondent was guilty of professional misconduct in knowingly entering into an arrangement with a person who was not a certified public accountant, a Mr. Y, for the transfer of the beneficial ownership of the "A" share in a HJ CPA Limited to Mr. Y.
2. At the hearing held on 10th May 2010, the Complainant was represented by a Mr. Donald Leo and the Respondent was absent.
3. Having considered the submissions of the Complainant and evidence of Mr. Mark Side, clerk to the Disciplinary Committee ("the Committee") and Miss Jennifer Tsang, assistant to Mr. Mark Side, the Committee held that the Respondent had been given adequate notice of the hearing and proceeded with the hearing in his absence.

## **BACKGROUND**

4. H J CPA Limited was first registered under the PAO as a corporate practice on 3rd October 2000. Between 1st January 2003 and 30th October 2004, the corporate practice had two shares issued; one referred to as "A" share and the other "B" share.
5. In accordance with the required practice, the Articles of Association of H J CPA Limited provided that the "A" share shall be held by a certified public accountant:-

*"... no person shall be eligible to become or remain a legal and/or beneficial owner of the "A" share unless he is*

*(i) a natural person;*

*(ii) a member of the Society who holds a current practicing certificate; and*

*(iii) not prohibited from qualifying or acting as a director under the Ordinance. "*

6. On 1st January 2003, the Respondent acquired the "A" share of H J CPA Limited from another certified practicing accountant; he also became the Managing Director of the company. The "B" share was held by a Miss C in trust for the Respondent.
7. By a declaration made by the Respondent to the Institute on 8th December 2003, the Respondent confirmed that H J CPA Limited had *"satisfied the [Institute's] Corporate Practice (Registration) Rules and the [Institute's] Corporate Practice's (Professional Indemnity) Rules relating to the registration of a Corporate Practice"*.
8. The Corporate Practices (Registration) Rules ("CPRR") are rules made by the Council of the Institute pursuant to sections 17, 18 and 51 of the PAO. Rules 4- 6 provide as follows:-
  - "4. A corporate application may be granted registration only if -*
    - (a) it is a company limited by shares and formed and registered under the Companies Ordinance;*
    - (b) all the shareholders are directors and all the directors are shareholders of the corporate applicant;*

- (c) *subject to the Rule 5 below,*
- (i) *every shareholder and every director of the corporate applicant is a certified public accountant;*
  - (ii) *all the shareholders are the ultimate beneficial owners of shares that they hold in the corporate applicant.*

5. *To enable a sole practicing member to register as a corporate practice under the PAO and to comply with the legal requirements of the Companies Ordinance to have two directors and two subscribers of shares, a sole practicing member corporate applicant may appoint as the second director any other individual person, whether a certified public accountant or not, who is eligible under the Companies Ordinance and permitted by the Council under section 28D(5) (a) of the PAO provided that the sole practicing member shall at all times be the managing director of the sole practicing members corporate applicant, and that not more than one share may be registered in the name of the second director under the terms of these Rules who shall hold such share in trust for the sole practicing member.*
6. *Every corporate practice, its directors and shareholders shall at all times observe the Institute's By-laws, Professional Standards and other Rules and any of them as may be amended from time to time which apply to all certified public accountants (the Institute's Rules). In relation to a sole practicing member corporate practice, the sole practicing member shall be responsible for ensuring that the non-member director is familiar with all relevant requirements of the Rules, and for procuring his/her compliance with those Rules. He shall be responsible for and accountable to the Institute for the conduct of the corporate practice, and shall be liable to disciplinary action for any failure by the corporate practice or by the non-member director to comply with the Institute's Rules. "*
9. On 30th October 2004, the Respondent resigned as a director of H J CPA Limited and 10th December 2004, H J CPA Limited was deregistered as a corporate practice on its own application for deregistration by reason of cessation of business.

10. However, by a letter to the Institute dated 29th March 2005 Miss C informed the Institute that the Respondent was in fact holding the "A" share in trust for Mr. Y and that Mr. Y was the true beneficial owner of that "A" share. In support of her complaint, Miss C produced a copy of a Declaration of Trust executed by the Respondent in favour of Mr. Y dated 1st January 2003, a Sold Note signed by the Respondent, an unsigned Bought Note and an Instrument of Transfer signed by the Respondent as the transferor.
11. On the Institute's enquiry, by two letters respectively dated 12th November 2005 and 10th April 2007, the Respondent gave the following explanations to the signed Declaration of Trust and Sold Note:-

12th November 2005

*"I joined HJA as business development manager in January 2002 with the employment letter signed (Appendix 1) until I resigned from the post starting from 1 January 2003 (testimony given by Y per Appendix 2). Since A decided to leave HJA at the same time such that Y offered me to take up A's positions as the new HJ practicing director and continue to operate HJ as the audit arm of HJA. In the meantime, Y also requested me to sign a declaration of trust in favour of him and the corresponding bought/sold note in same manner as A although he understands that he cannot be the beneficial owner of "A" share of HJ who must be a CPA.*

*During my directorship with HJ, two companies approached me to perform professional work. The F Ltd, once its annual returns filed by Honest Joy Secretarial Ltd. Approached me for audit, shares transfer work and arranging the employee insurance and L Ltd. once its bookkeeping work done by HJA approached me for audit and share transfer work, etc. (Appendix 3 and 4). Until 31st October 2004, being attracted by a better career development opportunity, I decided to resign from directorship of HJ and a notification letter was given to and acknowledged by Y (Appendix 5). I agreed to transfer the "A" share to another CPA, T (Appendix 6). Afterwards, a letter issued by L & Co., solicitor (Y's solicitor) was given to me claiming that I has breached the clause 11 of the employment contract and demanded me to pay a liquidated damages of HK\$200, 000.00 per file transferred (Appendix 7). However, Y then represented to me that if I provide him an apology letter and agreed to return him the fee that I received from the above two companies, the matter would be settled and he would waive all claims against me. "*

10th April 2007

*"Based on the facts and the reasons as stated above, I hereby declare that I have no intention to made any false statement nor declaration to the Institute and violated any rules of the Corporate Practices Registration Rules nor the Professional Accountants Ordinance. However, I admit that the said Declaration was signed by me by mistake due to the rush time period for completing the procedures of transferring the "A" share to me in January 2003. At the time, I was urged by Y to sign a bulk of documents including the Declaration and complete the other procedures of transfer, in order to restore HJ's business as quickly as possible. In fact, it is not my intention to use the Declaration for any fraud and deception purpose to obtain my personal gains or benefits. I was just induced by another person that the Declaration was for the benefit for the smooth transfer of "A" share to me and I was not given the sufficient time to think over the matter very clearly at that time. "*

12. After conducting its own investigation, the Registrar referred Miss C's complaint against the Respondent to the Council and the Council referred it to the present Committee under section 34(1A) of the PAO.

### **THE ISSUES**

13. The issue before the Committee is whether the Respondent was guilty of professional misconduct, in particular, whether the Respondent had made a false declaration to the Institute on 8th December 2003 or is otherwise responsible for H J CPA Limited's breach of Rules 4 and 5 of the CPRR by reason of Rule 6 of the CPRR.
14. The Complainant's case is that Mr. Y was at all material times the true beneficial owner of the "A" share of H J CPA Limited. Since Mr. Y was not a certified accountant, it was contended, the arrangement infringed Rules 4 and 5 of the CPRR.

15. The Respondent's defence was that:-

- (a) Mr. Y was not the beneficial owner of the "A" share of H J CPA Limited;
- (b) The Declaration of Trust is not enforceable and as such could not have amounted to an "arrangement" to breach Rules 4 and 5 of the CPRR; and/or
- (c) The Declaration of Trust was not intentionally executed.

### **ANALYSIS AND DISCUSSION**

16. The Committee did not receive any live viva voce evidence. The only evidence the Committee received was through a witness statement of Wong Wing Ting, Tracy ("Tracy Wong"), who is an officer of the Institute.

#### ***Was Mr. Y the beneficial owner of the "A" share of H J CPA Limited?***

17. The Committee finds the documentary evidence overwhelming. The Respondent admitted the authenticity of the Declaration of Trust, the Sold Note, the Bought Note and the Instrument of Transfer. He also accepted that he signed the Declaration of Trust and the Sold Note. The Declaration of Trust, the signed Sold Note, the unsigned Bought Note and the Instrument of Transfer all show that Mr. Y was the true beneficial owner of the "A" share.

18. The fact that the Articles of H J CPA Limited does not recognise Mr. Y's identity as its beneficial owner is, in our view, irrelevant.

19. None of the explanations provided by the Respondent in relation to the circumstances in which the Respondent signed the Declaration of Trust are, in our view, believable and we do not accept them. They are inherently inconsistent with each other and with the contemporaneous documents produced.

20. Accordingly, the Committee finds that Mr. Y was the true beneficial owner of the "A" share of H J CPA Limited.

#### ***Has H J CPA Limited breached rule 4 of the CPRR?***

21. In our view, H J CPA Limited was clearly in breach of rule 4 of the CPRR as a result of having Mr. Y as the beneficial owner of the "A" share.

***Is the Respondent guilty of professional misconduct?***

22. In our view, the Respondent is guilty of professional misconduct when he falsely declared to the Institute that H J CPA Limited had "*satisfied the [Institute's] Corporate Practice (Registration) Rules and the [Institute's] Corporate Practice's (Professional Indemnity) Rules relating to the registration of a Corporate Practice*" on 8th December 2003 when clearly H J CPA limited was in breach of rule 4 of the CPRR.
23. Further, the Respondent is also guilty of professional misconduct when he entered into an arrangement with Mr. Y to hold the "A" share in a HJ CPA Limited on trust for the benefit of Mr. Y.

**Conclusion**

24. The Committee finds the complaint against the Respondent under section 34(1)(a)(viii) of the PAO proved.
25. It remains for the Committee to decide the Order to be made following the finding against the Respondent. With this in mind, the Committee directs as follows:-
- (a) The Clerk is to fix a date for a hearing by the Committee to receive submissions from the parties on the sanctions to be imposed against the Respondent.
  - (b) The Clerk and the Complainant are to file and serve their respective bills of costs and disbursements at least 14 days before the hearing before the Committee.
  - (c) The parties are to file and serve their Skeleton Submissions together with copies of the relevant authorities and other reference documents at least five working days before the hearing before the Committee.

Dated the 19th day of August 2010.

