

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 1956

DISCIPLINE COMMITTEE

IN THE MATTER OF: Charges against **JOEL DAVID MENAKER, CA** a member of the Institute, under **Rule 202 and 302.2** of the Rules of Professional Conduct, as amended.

TO: Mr. Joel D. Menaker, CA
Arthur Gelgoot & Associates LLP
1075 Bay Street, Suite 505
TORONTO, ON M5S 2B1

AND TO: The Professional Conduct Committee, ICAO

REASONS

(Decision And Order Made November 30, 2005)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario met on November 30, 2005 to hear charges of professional misconduct against Joel D. Menaker, a member of the Institute.
2. Ms. Barbara Glendinning appeared on behalf of the Professional Conduct Committee, and was accompanied by Ms. Kelly Khalilieh, CA, the investigator appointed by the Professional Conduct Committee. Mr. Menaker was not in attendance. Mr. Howard Crosner attended on his behalf as both counsel and agent.
3. The decision of the panel was made known to the parties at the conclusion of the hearing on November 30, 2005, and the written Decision and Order sent to them on December 15, 2005. These reasons, given pursuant to Bylaw 574, include the charge, the decision, the order, and the reasons of the panel for its decision and order.

CHARGES

4. The following charges were laid by the Professional Conduct Committee against Mr. Menaker on August 2, 2005:
 1. THAT the said Joel David Menaker, in or about the period December 31, 1997 to February 13, 2004, while engaged as the accountant for "B. Limited" and Mrs. B.F., failed to perform his professional services with integrity and due care, in that he failed to file Goods and Services Tax Returns within the required time frame for "B. Limited" for the years ended December 31, 1997, through December 31, 2002, having been engaged to do so, contrary to Rule 202 of the rules of professional conduct.

2. THAT the said Joel David Menaker, in or about the period August 20, 2004 to July 19, 2005, having received a letter dated August 20, 2004 from the successor accounting firm, Soberman LLP, failed to respond promptly to that communication, contrary to Rule 302.2 of the rules of professional conduct.

5. At the outset of the hearing, the Professional Conduct Committee withdrew Charge No. 2.

PRELIMINARY MATTER

6. Prior to proceeding further with the hearing, the panel considered whether it should do so in the absence of Mr. Menaker. After hearing submissions and reviewing the documents filed as Exhibits to that point, the panel was satisfied that Mr. Menaker was aware of the hearing date, was unable to attend for unanticipated personal reasons and had instructed his counsel to proceed in his absence.

PLEA

7. On behalf of his client, Mr. Crosner entered a plea of guilty to Charge No. 1. Mr. Crosner informed the panel that he had discussed the effect of such a plea with Mr. Menaker and that Mr. Menaker understood that, on the basis of the plea of guilty and on that basis alone, Mr. Menaker could be found guilty of the charge. Mr. Crosner confirmed that his instructions were to enter the plea of guilty.

EVIDENCE

8. The evidence in this matter was presented by way of an Agreed Statement of Facts (Exhibit 5) and an accompanying Document Brief (Exhibit 6). Neither party called any further evidence.

9. The panel finds the evidence as contained in the Exhibits is clear, cogent and convincing, and that it supports the allegations of misconduct as set out in the charges. In particular, the panel finds that Mr. Menaker failed to file the GST Returns as he was engaged to do.

DECISION

10. After deliberation, the panel was satisfied that the allegations set out in the charge have been proven and that the nature and extent of the departure from the required standard of practice are so significant as to constitute professional misconduct. The panel found Mr. Menaker guilty of the charge. The Chair read the following decision:

THAT, having seen and considered the evidence, including the agreed statement of facts, filed, Charge No. 2 having been withdrawn by the Professional Conduct Committee at the hearing, and having heard the plea of guilty to Charge No. 1 entered on Mr. Menaker's behalf by his counsel, and having determined to proceed with the hearing in the absence of Mr. Menaker, pursuant to Bylaw 560, being satisfied that he had proper notice of the hearing, the Discipline Committee finds Joel David Menaker guilty of Charge No. 1.

REASONS FOR THE DECISION

11. The evidence discloses that Mr. Menaker has provided professional services to the client identified in the charge for thirty years. Since 1997, he has had complete responsibility for the account, which has always included preparing and filing corporate and personal tax returns and GST remittances. Even after receiving notices indicating that the GST returns for the client were overdue, Mr. Menaker failed to take any action to bring the accounts into good standing. As a result the client was not only assessed the overdue amounts, but interest and penalties. The amounts were garnished from the client's personal account.

12. The client placed great reliance on Mr. Menaker to act as a careful and competent chartered accountant in fulfilling the engagement to her. His failure to do so was significant and pervasive and clearly constitutes professional misconduct.

SANCTION

13. The Professional Conduct Committee submitted that a sanction of: a written reprimand; a fine in the amount of \$5,000; professional development; the usual publicity; and costs of \$5,000 would serve to both rehabilitate the member and to further the principles of general and specific deterrence.

14. The Professional Conduct Committee noted that Mr. Menaker did not act despite notices of the overdue GST, that his client's bank account was garnished and that Mr. Menaker has a previous disciplinary finding for similar conduct. In mitigation she noted that Mr. Menaker had cooperated fully with the Institute, had shown remorse by the plea of guilty, and had suffered a series of unfortunate personal and health circumstances.

15. Mr. Crosner, on behalf of Mr. Menaker, joined with the Professional Conduct Committee's submission on sanction. By way of further mitigation, he brought to the attention of the panel the fact that Mr. Menaker had foregone his fee of \$5,000 from the client, and had paid her a further \$10,000, which amounts completely offset the penalties and interest on the overdue GST payments. Mr. Crosner indicated that Mr. Menaker has been practising for thirty years and had overcome a number of professional difficulties not of his making.

16. The panel was concerned that, even when Mr. Menaker did file the GST returns he still did not inform his client she had to write cheques to cover the remittances. Mr. Crosner indicated this was due to personal circumstances of Mr. Menaker. The panel expressed a further concern that those circumstances still existed and wondered whether Mr. Menaker was at risk to re-offend. Mr. Crosner answered this by informing the panel that Mr. Menaker is planning to wind down his practice, due to his health problems.

ORDER

17. After consideration, the panel made the following order:

IT IS ORDERED in respect of the charge:

1. THAT Mr. Menaker be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Menaker be and he is hereby fined the sum of \$5,000, to be remitted to the Institute within one (1) year from the date this Decision and Order

becomes final under the bylaws.

3. THAT Mr. Menaker be and he is hereby charged costs fixed at \$5,000, to be remitted to the Institute within one (1) year from the date this Decision and Order becomes final under the bylaws.

4. THAT Mr. Menaker be and he is hereby required to complete, by paying for and attending in its entirety, by December 31, 2006, the professional development course *Staying Out of Trouble*, made available through the Institute, or, in the event the course becomes unavailable, the successor course which takes its place.

5. THAT notice of this Decision and Order, disclosing Mr. Menaker's name, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the Discipline Committee:

- (a) to the Public Accountants Council for the Province of Ontario;
- (b) to the Canadian Institute of Chartered Accountants; and
- (c) by publication in *CheckMark*.

6. THAT in the event Mr. Menaker fails to comply with the requirements of this Order, he shall thereupon be suspended from the rights and privileges of membership in the Institute until such time as he does comply, provided that he complies within three (3) months from the date of his suspension, and in the event he does not comply within this three (3) month period, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above, and in a newspaper distributed in the geographic area of Mr. Menaker's current or former practice, employment and/or residence.

REASONS FOR THE ORDER

Reprimand

18. The panel orders Mr. Menaker be reprimanded in writing by the Chair of the panel to make it clear to Mr. Menaker that his conduct fell well below the acceptable standard and cannot be tolerated.

Fine

19. The panel finds that a fine in the amount of \$5,000 is sufficient to meet the principles of general and specific deterrence. In determining the amount the panel has considered Mr. Menaker's discipline history, as well as the restitution made and remorse shown.

Costs

20. It is appropriate that the member charged, as opposed to the membership as a whole, bear a portion of the costs of the investigations and prosecution occasioned by his misconduct. The Professional Conduct Committee filed an outline of Costs (Exhibit 8) and, while the panel is sceptical of the necessity of all the costs incurred and listed, it finds the joint submission to be well within the appropriate range and therefore accepts that the quantum of costs ordered

should be \$5,000.

Professional Development

21. Of significant concern to the panel is Mr. Menaker's ability, on an ongoing basis, to manage his practice appropriately and in a manner which protects both the public and the reputation of the profession. The requirement that he attend professional development is intended to address that concern and reduce the risk of future deficiencies.

Notice

22. Publishing names of members found guilty of professional misconduct is often the single most significant sanction that may be administered for general deterrence, education of the membership at large, and protection of the public. The panel therefore orders the publication of the proceeding in *CheckMark* and orders that notice be given to the Public Accountants Council for the Province of Ontario and to the Canadian Institute of Chartered Accountants.

Expulsion for Failing to Comply

23. To encourage compliance with discipline orders in cases in which the member is not expelled outright, orders of a panel generally specify expulsion with newspaper notification to the public as an ultimate consequence for non-compliance. The panel so orders in this hearing.

24. In closing, the panel would like to express its belief that Mr. Menaker, and the public, would benefit from assistance with his practice, and urges Mr. Menaker to enter into an arrangement whereby his files would be monitored by his partner to assist in and ensure the completion of tasks.

DATED AT TORONTO THIS 24TH DAY OF FEBRUARY, 2006
BY ORDER OF THE DISCIPLINE COMMITTEE

H. B. BERNSTEIN, CA – CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

L. G. BOURGON, CA
B. D. LOVE, CA
A. D. NICHOLS, FCA
D. O. STIER, CA
P. MCBURNEY (Public Representative)