

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO
THE CHARTERED ACCOUNTANTS ACT, 2010

DISCIPLINE COMMITTEE

IN THE MATTER OF: Allegations against **LARRY SILVERBERG**, a suspended member of the Institute, under **Rules 201.1 and 205** of the Rules of Professional Conduct, as amended.

TO: Mr. Larry Silverberg

AND TO: The Professional Conduct Committee, ICAO

REASONS
(Decision and Order made May 9, 2012)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario met on May 9, 2012 to hear allegations of professional misconduct brought by the Professional Conduct Committee against Larry Silverberg, a suspended member of the Institute.
2. Ms. Alexandra Hersak appeared on behalf of the Professional Conduct Committee (PCC). Mr. Silverberg attended without counsel. He confirmed that he knew that he had the right to attend with counsel and waived that right. Mr. Robert Peck attended the hearing as counsel to the Discipline Committee.
3. The decision of the tribunal was made known at the conclusion of the hearing on May 9, 2012, and the written Decision and Order sent to the parties on May 11, 2012. These reasons, given pursuant to Rule 20.04 of the Rules of Practice and Procedure, include the allegations, the decision, the order, and the reasons of the tribunal for its decision and order.

Allegations

4. The following allegations were laid against Mr. Silverberg by the Professional Conduct Committee on February 8, 2012:
 1. THAT, the said Larry Silverberg, in or about the period August 1, 2001 through December 31, 2007, while engaged as the accountant for "DH" and/or his company "HISI," failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, contrary to Rule 201.1 of the Rules of Professional Conduct, in that he misappropriated from "DH" and/or "HISI" funds in the approximate amount of \$33,308.
 2. THAT, the said Larry Silverberg, in or about the period January 1, 2003 through December 31, 2007, while engaged as the accountant for "DH" and/or his company "HISI," associated himself with statements which he knew were false or misleading contrary to Rule 205 of the Rules of Professional Conduct in that:
 - a. he prepared notice to reader financial statements for "HISI" for the years ended December 31 2003, 2004, 2005 and 2006 which included fictitious income and balance sheet financial information; and
 - b. he prepared income tax returns for "DH" and "HISI" for the years 2003, 2004, 2005, and 2006 which contained fictitious financial information.

3. THAT, the said Larry Silverberg, in or about the period June 1, 2006 through May 31, 2010, while engaged as the accountant for "MH" and/or his company "MHI," failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, contrary to Rule 201.1 of the Rules of Professional Conduct, in that he misappropriated from "MH" and/or "MHI" funds in the approximate amount of \$146,325.
4. THAT, the said Larry Silverberg, in or about the period January 1, 2005 through December 31, 2010, while engaged as the accountant for "MH" and/or his company "MHI," associated himself with statements which he knew were false or misleading contrary to Rule 205 of the Rules of Professional Conduct in that:
 - a. he prepared notice to reader financial statements for "MHI" for the years ended December 31 2005, 2006, 2007, 2008 and 2009 which included fictitious income and balance sheet financial information; and
 - b. he prepared income tax returns for "MH" and "MHI" for the years 2005, 2006, 2007, 2008 and 2009 which contained fictitious financial information.

Plea

5. Mr. Silverberg entered a plea of guilty to the allegations.

Evidence

6. Ms. Hersak made an opening statement. She advised the panel that the case for the PCC would be presented by way of an Agreed Statement of Facts and a Document Brief. She then filed the Agreed Statement of Facts (Exhibit 5) and the Document Brief (Exhibit 6). The Agreed Statement of Facts (agreed statement) was signed by Mr. Silverberg on his own behalf and by Ms. Hersak on behalf of the PCC.

7. In presenting the case for the PCC, Ms. Hersak reviewed the agreed statement and made reference to the relevant documents in the Document Brief. No other evidence was called on behalf of the PCC.

8. Ms. Hersak submitted that the evidence was clear, cogent and convincing and, as Mr. Silverberg acknowledged, both in the Agreed Statement of Facts and by his plea of guilty, he should be found guilty. Mr. Silverberg made no submissions.

The relevant facts

9. Ms. Hersak advised that the PCC had brought a motion for preliminary suspension of Mr. Silverberg's membership before a tribunal of the Discipline Committee. The motion was granted and Mr. Silverberg's membership and public accounting licence were suspended in February 2012.

10. The relevant facts in this case were not in dispute. Mr. Silverberg has been a sole practitioner in Markham since 1992. He prepares personal and corporate tax returns, accounting work and Notice to Reader. He personally reviews all statements and returns prepared by non-CA staff before they are released or e-filed. Mr. Silverberg does not conduct audits and has not performed review engagements for over five years.

11. The matters came to the attention of the PCC as a result of two independent complaints made by two former clients of Mr. Silverberg. The complaints arose following CRA audits which resulted in significant reassessments for both clients. Both complainants had alleged that they had

been directed by Mr. Silverberg to write cheques to numbered companies for payment of tax, although it appeared those tax payments had not been made.

DH and HISI

12. DH retained Mr. Silverberg to prepare income tax returns for himself, and financial statements and corporate returns for his company HISI, for 2001 to 2006. He did not have a letter outlining the terms of the engagement with DH and HISI.

13. DH provided Mr. Silverberg with annual summary sheets of expenses and revenues commencing in 2001. DH did not have any tax slips to provide to Mr. Silverberg. Mr. Silverberg prepared Notice to Reader financial statements and income tax returns for HISI and income tax returns for DH, without requesting corporate bank statements or any other source documents.

14. In addition to payment for accounting and tax services, Mr. Silverberg asked DH to write cheques to one of two numbered companies, representing that these payments were for income taxes and that no additional tax liability would be owed after each numbered company payment was made. Mr. Silverberg controlled the numbered companies and has never prepared tax returns for them. Between August 2001 and December 2007, DH made payments to the numbered companies of over \$33,000. Mr. Silverberg did not remit these amounts to CRA on behalf of DH.

15. The only cheques written from the bank accounts of the numbered companies have been payable to Mr. Silverberg personally. At the time of the PCC investigation, the balances in the accounts were nominal and all the funds had been disbursed to Mr. Silverberg.

16. Throughout the relevant period, DH received assessment notices from CRA indicating that taxes payable were nil. The personal tax returns of DH were understated for the years 2003-2006 because Mr. Silverberg used fictitious figures as part of a tax shelter plan in order to minimize tax for the client. In 2008, CRA conducted a payroll audit of HISI and the company was reassessed for over \$20,000. CRA calculated the CPP reassessments based on actual draws taken by DH by examining HISI's bank statements. CRA did not reassess DH's personal tax returns as part of the audit.

MH and MHI

17. MH retained Mr. Silverberg to prepare income tax returns for MH and his wife, and financial statements and corporation tax returns for his company MHI for the 2004-2009 fiscal year ends. Mr. Silverberg did not have a letter outlining the terms of the engagement with MH and MHI.

18. MH complained to the ICAO following a CRA audit of his personal and corporate tax returns which resulted in approximately \$746,000 of reassessments for the period of 2006-2009.

19. MH had provided Mr. Silverberg with annual summary sheets of his revenues and expenses, along with personal pension and investment income tax slips and corporate investment income tax slips for MHI. Mr. Silverberg used the summary sheets and tax slips to prepare Notice to Reader financial statements and income tax returns for MHI and personal income tax returns for MH. MH was not asked for corporate bank statements or any other source documents.

20. In addition to payment for accounting and tax services, Mr. Silverberg asked MH to write cheques to one of two numbered companies, representing that these payments were for income taxes and that no additional tax liability would be owed after each numbered company payment was made. Mr. Silverberg controlled the numbered companies and has never prepared tax returns for them. Between June 2006 and April 2010, MH made payments to the numbered companies totalling over \$146,000. Mr. Silverberg did not remit these amounts to CRA on behalf of MH or MHI.

21. The only cheques written from the bank accounts of the numbered companies have been payable to Mr. Silverberg personally. At the time of the PCC investigation, the balances in the accounts were nominal and all the funds had been disbursed to Mr. Silverberg.

22. Throughout the relevant period, MH received annual Notices of Assessment from CRA indicating that the taxes payable were nil. CRA began an audit of MHI in 2010 for 2008 and 2009 which then expanded to include 2006 and 2007, and the personal tax returns of MH. In total, the amounts owed by MH and MHI were over \$746,000. The personal tax returns of MH were understated because Mr. Silverberg used fictitious figures as part of a tax shelter plan in order to minimize tax for the client.

The Plan

23. Mr. Silverberg had remitted financial statements and tax returns containing unsupported deductions to CRA, unbeknownst to his clients, as a part of a tax shelter plan. Mr. Silverberg acknowledged that the plan, which began in 2001, was not technically sound or supportable, and not well thought out. Mr. Silverberg stated that the author of the plan was SS but that Mr. Silverberg was responsible for carrying out the plan. Mr. Silverberg was unable to provide the investigator with a written agreement between himself and SS or evidence that he made payments to SS in respect of the plan.

24. To implement the plan, Mr. Silverberg would book fictitious management fee expenses or costs of sales on Notice to Reader financial statements of HISI and MHI in order to reduce his clients' tax liability to nil. Mr. Silverberg used fictitious financial information for HISI for the years 2003-2006 and MHI for the years 2005-2009. Instead of utilizing the corporate bank statements of either HISI or MHI to calculate the amount of shareholder draws taken from the companies, Mr. Silverberg inserted a fictitious number on the personal tax returns to fully utilize the clients' personal exemptions and credits.

25. Mr. Silverberg determined the clients' business income on the T1 personal return by working backwards and "plugging" balances. These amounts were then reported on the clients' return but income amounts were not reported that would trigger additional tax to be paid by the client. Each year, Mr. Silverberg calculated an approximate "tax amount" which he directed DH and MH to pay by cheque to his numbered companies. This amount was the fictitious management fee, less reported income, multiplied by the marginal tax rate of the client. Mr. Silverberg used fictitious financial information in preparing personal income tax returns for DH for the years 2003-2006 and MH for the years 2005-2009.

Finding

26. The tribunal accepted the uncontradicted evidence that Mr. Silverberg did misappropriate funds from the clients and associated himself with statements which he knew were false and misleading.

Decision

27. The evidence in this matter is clear, cogent and convincing. The allegations have been proven and establish the member is guilty of professional misconduct. After deliberating, the tribunal made the following decision:

THAT having heard the plea of guilty to Allegation Nos. 1, 2, 3 and 4, and having seen and considered the evidence, including the Agreed Statement of Facts, filed, the Discipline Committee finds Larry Silverberg guilty of the allegations.

Sanction

28. Ms. Hersak did not call any additional evidence with respect to sanction. Mr. Silverberg submitted that he had compensated both DH and MH for the CRA reassessments and penalties. Mr. Silverberg stated that he has suffered financial hardship and requested that any fines and costs be minimized.

29. Ms. Hersak, on behalf of the PCC, submitted that an appropriate sanction in this matter would be: a written reprimand; a fine in the amount of \$25,000; revocation of membership and public accounting licence; and full publicity including newspaper publication. The PCC also sought an order for the costs of the investigation and hearing on a partial indemnity basis. Ms. Hersak filed a Costs Outline (Exhibit 7) which showed that the costs of the investigation and hearing were approximately \$42,000. The PCC was seeking an order for recovery of 50% of the costs in the amount of \$20,000. Ms. Hersak said the PCC had no objection to a time period of 18 to 24 months for Mr. Silverberg to pay the fine and costs.

30. Ms. Hersak submitted that the proposed sanctions would satisfy the principles of sentencing: specific and general deterrence. Protection of the public is paramount and publicity will advise the public that Mr. Silverberg is no longer a CA. Mr. Silverberg's dishonest actions devalue other CAs and the public trust has been betrayed. Ms. Hersak noted that there were two separate complaints, from two unrelated clients, and that there may be others who need to be made aware of Mr. Silverberg's actions.

31. Ms. Hersak stated that both clients, who have now retained other CAs, had provided information to Mr. Silverberg and were unaware until they were audited that Mr. Silverberg had provided false information to CRA. Ms. Hersak submitted that the sanctions requested reflect the seriousness of Mr. Silverberg's betrayal of trust and his absence of integrity.

32. Ms. Hersak indicated that the aggravating factors included the misappropriation of a significant amount of money from more than one client for numerous transactions over a period of many years. Each time, Mr. Silverberg could have considered whether what he was doing was right or wrong and his actions only stopped when the clients were alerted by CRA. Subsequent to the issue being raised by one client, Mr. Silverberg continued the plan and still requested cheques from his other client.

33. Ms. Hersak indicated that the mitigating factors included that Mr. Silverberg did admit his wrongdoing to the investigator and the PCC. He advised early on that he would plead guilty, and signing the Agreed Statement of Facts has shortened the proceedings since witnesses did not have to appear at the hearing. Mr. Silverberg's membership has been under suspension on an interim basis and he has paid the cost of the newspaper publicity.

34. Ms. Hersak distributed a case brief containing *Quick, Doutre, Sitter* and *McWilliams*, pointing out relevant items in each case included in the brief.

Order

35. After deliberating, the tribunal made the following order:

IT IS ORDERED in respect of the allegations:

1. THAT Mr. Silverberg be reprimanded in writing by the Chair of the hearing.

2. THAT Mr. Silverberg be and he is hereby fined the sum of \$25,000 to be remitted to the Institute within twenty four (24) months from the date this Decision and Order is made.
3. THAT Mr. Silverberg's membership in the Institute and his public accounting licence be and are hereby revoked.
4. THAT notice of this Decision and Order, disclosing Mr. Silverberg's name, be given after this Decision and Order is made:
 - (a) to all members of the Institute;
 - (b) to the Public Accountants Council for the Province of Ontario;
 - (c) to all provincial institutes/Ordre;
 and shall be made available to the public.
5. THAT notice of the revocation of membership and public accounting licence, disclosing Mr. Silverberg's name, be given by publication on the Institute's website and in the *Toronto Star*. All costs associated with the publication shall be borne by Mr. Silverberg and shall be in addition to any other costs ordered by the committee.
6. THAT Mr. Silverberg surrender his certificate of membership in the Institute and public accounting licence to the Discipline Committee Secretary within ten (10) days from the date this Decision and Order is made.

IT IS FURTHER ORDERED:

7. THAT Mr. Silverberg be and he is hereby charged costs fixed at \$20,000 to be remitted to the Institute within twenty four (24) months from the date this Decision and Order is made.

Reasons for Sanction

36. The misappropriation of client funds is an offence that strikes at the very heart of the chartered accountancy profession. The so-called tax shelter scheme was clearly not supported by tax law. Client funds were obtained, for a number of years, under false pretenses and then converted to Mr. Silverberg's own use. In effect he stole his clients' money leaving them with the impression that their taxes had been paid. Such conduct cannot be tolerated. It reflects badly on the whole profession and has the potential to destroy public trust in the integrity of every member of the profession. Accordingly, as a matter of general deterrence for the profession and public confidence in the profession the tribunal concluded that revocation was required.

37. The principles of general and specific deterrence require that a member who conducts himself or herself as Mr. Silverberg did, in addition to membership revocation, must face a financial penalty. The tribunal felt the aggravating factors of misappropriating client funds that were requested by Mr. Silverberg to fund his clients' income taxes, filing false tax returns for several years and thus creating significant potential liabilities for his clients with the Canada Revenue Agency called for a significant fine. Accordingly, the tribunal concluded that a fine of \$25,000 was appropriate, meeting both the principles of specific and general deterrence.

38. The tribunal was aware of two mitigating factors. Mr. Silverberg made full restitution to the clients. He also cooperated with the Professional Conduct Committee, entered a plea of guilty and proceeded by way of an Agreed Statement of Facts. Even if the weight given to these factors was not limited by the realization that the clients had a strong legal claim against him and that the

Professional Conduct Committee could have proven the allegations, restitution and cooperation do not mitigate the egregious misconduct in this case, nor do they change the fact that an unequivocal message – revocation and a significant fine - must be sent to the profession and to the public.

39. The tribunal was of the view that a reprimand is necessary to stress the unacceptability of his conduct as a chartered accountant.

40. Mr. Silverberg cooperated with the investigation, signed the agreed statement of facts and pleaded guilty to all allegations which helped control the costs. However, two complaints had to be investigated and the misconduct took place over several years. The recovery of 50% of the costs at \$20,000 was appropriate in the circumstances.

DATED AT TORONTO THIS 18TH DAY OF SEPTEMBER, 2012
BY ORDER OF THE DISCIPLINE COMMITTEE

A handwritten signature in black ink, appearing to read 'S.F. Dineley', with a large, stylized initial 'D'.

S.F. DINELEY, FCA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE TRIBUNAL:

B.G. ALLENDORF, CA

B. SOLWAY (PUBLIC REPRESENTATIVE)

H.G. TARADAY, CA