

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

DISCIPLINE COMMITTEE

IN THE MATTER OF: Charges against **STEPHEN H. MARCUS, CA**, a member of the Institute, under **Rules 201.1 and 205** of the Rules of Professional Conduct, as amended.

TO: Mr. Stephen H. Marcus
53 Fanshawe Drive
Richmond Hill, ON L4B 1P7

AND TO: The Professional Conduct Committee, ICAO

REASONS
(Decision and Order made January 29, 2009)

1. This panel of the Discipline Committee of the Institute of Chartered Accountants of Ontario met on January 28 and 29, 2009, to hear charges of professional misconduct brought by the Professional Conduct Committee against Stephen H. Marcus, a member of the Institute.
2. Mr. Paul Farley appeared on behalf of the Professional Conduct Committee, and was accompanied by Ms. Karen Ho James, CA, the investigator appointed by the Professional Conduct Committee in this matter. Mr. Marcus attended, and was represented by counsel, Mr. James Lane.
3. The decision of the panel was made known at the conclusion of the hearing on January 29, 2009, and the written Decision and Order sent to the parties on January 30, 2009. These reasons, given pursuant to Bylaw 574, contain the charges, the decision, the order, and the reasons of the panel for its decision and order.

CHARGES

4. Prior to the taking of Mr. Marcus' plea, the Professional Conduct Committee moved to amend the charges before the Discipline Committee to conform to the evidence to be heard. Mr. Marcus, through his counsel, did not object to the amendments, and the panel ordered they be made. The following charges, as amended at the hearing, were laid against Mr. Marcus by the Professional Conduct Committee on October 27, 2008:

1. THAT, the said Stephen Marcus, in or about the period August 2000 through May 2008, failed to conduct himself in a manner which will maintain the good reputation of the profession and its ability to serve the public interest, in that he charged GST on invoices which he presented to MF Associates Professional Corporation and to clients and did not remit the GST collected in the approximate amount of \$44,000 to CRA; contrary to Rule 201.1 of the rules of

professional conduct.

2. THAT, the said Stephen Marcus, in or about the period January 1, 2002¹ through December 31, 2007, signed or associated himself with tax returns which he filed with CRA that he knew were false or misleading for each of the years 2004⁰ through 2006 inclusive, contrary to Rule 205 of the rules of professional conduct, in that he underreported his income;
 - a) for 2001 in the amount of approximately ~~\$41,000~~; 29,000
 - b) for 2002 in the amount of approximately ~~\$39,000~~; 38,000
 - c) for 2003 in the amount of approximately ~~\$58,000~~; 51,000
 - d) for 2004 in the amount of approximately ~~\$81,000~~; 88,000
 - e) for 2005 in the amount of approximately ~~\$86,000~~; 69,000
 - f) for 2006 in the amount of approximately ~~\$59,000~~; 63,000
 - g) *for 2000 in the amount of approximately \$41,000.*

PLEA

5. Mr. Marcus entered a plea of guilty to the charges, as amended, and acknowledged that he understood that, on the basis of the plea of guilty and on that basis alone, he could be found guilty of the charges.

EVIDENCE

6. The evidence in this matter was presented by way of an Agreed Statement of Facts (Exhibit 2) and an accompanying Document Book (Exhibit 3). Neither party called any further evidence.

7. Briefly, the facts established by the evidence and accepted by the panel are as set out in this and the following paragraph. Mr. Marcus, commencing in August 2000, worked on a *per diem* basis for MF & Associates Professional Corporation (MF), while also maintaining his own client base. From August 2000 to May 2008, Mr. Marcus charged MF and his clients GST without being registered for GST. He provided an inactive GST number that had been used by his former partnership. During this period of time, he collected \$45,771 and did not remit any of the money to the government, but rather converted it to his own use.

8. MF discovered the problem in May 2008, and Mr. Marcus was confronted and terminated, and a complaint was made to the Institute. As a result of the Institute's investigation, and Mr. Marcus' voluntary disclosure to CRA, it was determined that Mr. Marcus had underreported his income for each of the years 2000 to 2006 by the amounts set out in the charges. He had done so to ensure his annual income remained below \$30,000, the threshold for registering for GST, so as to avoid raising any suspicions or questions by CRA. The net income he reported not only underreported his gross income but also his expenses, which he scaled down to be more in keeping with the reduced income. For those years, the total amount of income not reported was

\$379,515, and the tax evaded was \$106,429.

DECISION

9. The evidence in this matter is clear, cogent, compelling, and uncontradicted. The misconduct as charged has been proven. After deliberating, the panel made the following decision:

THAT, having heard the plea of guilty to charge Nos. 1 and 2, as amended, and having seen and considered the evidence, including the agreed statement of facts, filed, the Discipline Committee finds Mr. Stephen H. Marcus guilty of charge Nos. 1 and 2 as amended.

SANCTION

10. The Professional Conduct Committee called no evidence on sanction. The member testified, and called two other witnesses, his wife and Dr. Jennifer Steadman. The evidence of all the witnesses established that Mr. Marcus has been suffering from significant health problems since childhood, and that these problems were only diagnosed in the past year.

11. Mr. Marcus testified that the misconduct was self-destructive; at the time he was committing the offences, he knew he would be caught. However, he also testified that he would have continued had he not been found out.

12. Mr. Farley, on behalf of the Professional Conduct Committee, submitted that an appropriate sanction in this matter would be: a written reprimand; a fine in the amount of \$25,000; and expulsion from membership with full publicity, including notice in the *The Toronto Star* and *The Globe and Mail*. He also sought costs in the amount of \$15,000, and filed a Costs Outline (Exhibit 9).

13. Mr. Farley characterized Mr. Marcus' actions as the most egregious conduct possible, noting that dishonesty affects the reputation of the profession and every member in it. He set out a number of aggravating factors in this matter: the quantum of the GST diverted was significant; the quantum of the tax evaded was likewise significant; the fraud took place over a period of eight years; the member did not stop of his own accord; when confronted he denied wrongdoing; and there has been no restitution.

14. Mr. Farley also noted a number of factors in mitigation: Mr. Marcus cooperated with the investigation; he pleaded guilty at an early opportunity; he has now sought help; and he made a voluntary disclosure to the tax authorities.

15. Despite any mitigating factors, Mr. Farley submitted that expulsion was required to ensure that public trust in the profession was not destroyed, and to send the message that dishonest conduct on the part of a member would not be tolerated. He urged the panel to consider the principle of general deterrence to be paramount.

16. Mr. Lane, on behalf of Mr. Marcus, submitted that his client's misconduct was intertwined with a severe and then-undiagnosed illness, and urged the panel to consider a sanction which would enable Mr. Marcus to be rehabilitated and remain within the profession. Rather than expulsion, he submitted a suspension was appropriate. While he took no issue with the imposition

of a fine or the payment of costs, he asked the panel to consider Mr. Marcus' financial circumstances, and submitted a fine of \$2,500 and costs in the same amount would be appropriate. He also submitted that an order that Mr. Marcus continue treatment and medication and provide a medical report in a year would assist in his rehabilitation.

17. Mr. Lane submitted that the willful evasion of tax was not misappropriation and that, while a serious offence, did not inevitably have to lead to expulsion. He presented a number of cases to the panel in support of this position. He asked the panel to bear in mind that Mr. Marcus did not take money from his employer or from clients, and that no one other than Mr. Marcus himself has been harmed as a result of his actions. The conduct did not imperil the public.

18. With respect to Mr. Marcus' illness, Mr. Lane submitted that the evidence had not been proffered as a cause or excuse for the conduct, but was relevant to the panel's consideration of the importance and likely success of rehabilitation. He further submitted that Mr. Marcus' serious efforts to address his illness, once he became aware of it, should be considered as mitigation.

ORDER

19. After deliberating, the panel made the following order:

IT IS ORDERED in respect of the charges:

1. THAT Mr. Marcus be reprimanded in writing by the chair of the hearing.
2. THAT Mr. Marcus be and he is hereby fined the sum of \$5,000 to be remitted to the Institute within twenty-four (24) months from the date this Decision and Order becomes final under the bylaws.
3. THAT Mr. Marcus be and he is hereby expelled from membership in the Institute.
4. THAT the public accounting licence of Mr. Marcus be and it is hereby revoked.
5. THAT notice of this Decision and Order, disclosing Mr. Marcus' 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 all members of the Institute;
 - (b) to the Public Accountants Council for the Province of Ontario; and
 - (c) to all provincial institutes/Ordre,
 and shall be made available to the public.
6. THAT notice of the expulsion and revocation of Mr. Marcus' public accounting licence, disclosing his 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. Marcus and shall be in addition to any other costs ordered by the committee.
7. THAT Mr. Marcus 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 becomes final under the bylaws.

AND IT IS FURTHER ORDERED:

8. THAT Mr. Marcus be and he is hereby charged costs fixed at \$5,000 to be remitted to the Institute within twenty-four (24) months from the date this Decision and Order becomes final under the bylaws.

REASONS FOR SANCTION

20. Mr. Marcus engaged in a well thought out arrangement to evade taxes. Over a period of eight years, he defrauded the government of approximately \$150,000 between income tax and GST. The scheme was deliberate and long-term and an abuse of the public trust. Diverting GST and underreporting income is no less theft than stealing cash from a till. It is theft, and it is misappropriation.

21. Misappropriation demonstrates a lack of integrity and is devastating to a profession that exists on its good reputation. It cannot be countenanced by that profession, or by the public the profession serves. Therefore, except in the most rare and exceptional of circumstances, a member who misappropriates must be expelled. Given the circumstances of this offence and this offender, can Mr. Marcus remain a member of this profession? The panel has carefully considered this question and has determined the answer is no.

22. Mr. Marcus conceived the scheme on his own. No one led him to it, and no one held him to it. He knew when he conceived it, it was wrong. He knew when he executed it, it was wrong. His illness may well have impaired his judgment, but not to the extent he could not tell right from wrong. Mr. Marcus took steps to ensure his scheme would not be found out. He made a conscious decision to deceive and conceal his fraud by adjusting not only his income but his expenses so as not to raise suspicions.

23. Mr. Marcus acted as he did because he was under financial pressures. Those pressures are greater now. He poses a threat to the public, a threat to the reputation of the profession, although that threat may be lessened by the steps he has taken to address his illness. The panel remains concerned that he does not possess the necessary integrity and has not developed the necessary judgment required of every member of this profession. A period of supervised practice would not address those concerns. Neither would a period of suspension.

24. Mr. Marcus did not stop until he was stopped. He has made no restitution. The panel is cognizant that his illness makes it difficult for the panel to discern any expression of remorse, but it is equally difficult to find that remorse through his actions. For all the above reasons, Mr. Marcus must be expelled. His conduct is too egregious to be excused by continued membership. Without that membership, he cannot retain a public accounting licence.

25. A fine is likewise required to demonstrate to the public and the profession that such conduct will not be tolerated. This is a most serious offence, and the quantum of the fine must reflect that

gravity. However, the financial circumstances of the member must also be taken into account. It would not be appropriate for the panel to order a fine that it knew was beyond the means of the member, or one which would necessitate other creditors of the member going unpaid. Mr. Marcus is in a poor financial condition, and that condition is unlikely to improve in the near future. Were it not so, the quantum of the fine ordered would have been much higher.

26. Although it is not a sanction, consideration of the appropriate portion of the costs of the investigation and hearing to be borne by the member must take into account many of the same factors. The member, by his actions, caused the expense to be incurred. He, rather than the membership as a whole, should bear at least some of that expense. Again, considering Mr. Marcus' circumstances, a modest portion of those expenses has been ordered.

27. It is important that Mr. Marcus understand the nature and gravity of his conduct, and its effect on himself, the profession, and the public. For that reason, a reprimand has been ordered. It is equally important that the profession and the public understand such, and so publicity has been ordered. The Professional Conduct Committee sought notice in *The Globe and Mail*; however, taking into account the nature of Mr. Marcus' practice, notice in *The Toronto Star* is sufficient.

28. The panel is not unappreciative of the devastating nature and causes of Mr. Marcus' illness, or of the significant steps he has taken to deal with that illness. At this time, the need to protect the public and the lack of a firm assurance that Mr. Marcus can be trusted as a member of the profession require his expulsion. While the public interest must remain paramount, his continued efforts to rehabilitate himself might, in the future, address the concerns the panel has set out.

DATED AT TORONTO THIS 23RD DAY OF MARCH, 2009
BY ORDER OF THE DISCIPLINE COMMITTEE

D.W. DAFOE, FCA – DEPUTY CHAIR
DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

S.R. LOWE, CA

R.H. CARRINGTON (PUBLIC REPRESENTATIVE)