



2. The gist of the complaints against the Respondent was that he was involved in his capacity as the general manager of Bizman Accounting ("**Bizman**") as a branch of Bizman Consulting Limited ("**Bizman Consulting**") and as a sole proprietorship having two different Business Registration numbers respectively to offer audit services which Bizman was not licensed to do because Bizman was not a corporate practice of the HKICPA at the relevant time. Furthermore, the Respondent procured Bizman to send out unsolicited promotional materials setting out fees charged for professional and other services in contravention of the Code of Ethics for Professional Accountants (June 2010 Revision) (the "**Code**"). The Complainant subsequently discovered that the Respondent was both a shareholder and director of Bizman Consulting which was also not a corporate practice of the HKICPA at the relevant time.

### **The Complaints**

3. The complaints against the Respondent as set out in the Complainant's letter (referred to in paragraph 1 above) are as follows:-

#### 1<sup>st</sup> Complaint

Section 34(1)(a)(vi) of the Professional Accountants Ordinance (Cap. 50) (the "**PAO**") applies to Mr. Lam in that he failed or neglected to observe, maintain or otherwise apply a professional standard namely section 150 "Professional Behaviour" of the Code by allowing Bizman, to provide, offer to provide or hold itself out as providing audit services.

#### 2<sup>nd</sup> Complaint

Section 34(1)(a)(vi) of the PAO applies to Mr. Lam in that he failed or neglected to observe, maintain or otherwise apply a professional standard namely section 450 "Practice Promotion" of the Code by permitting the unsolicited direct mailing of promotional materials and by allowing those promotional materials to contain reference to fees charged for the professional and other services that Bizman would provide.

## The course of the proceedings

4. The Respondent pleaded guilty to these complaints by his letter to the Complainant dated 23<sup>rd</sup> August 2012. Accordingly, the parties filed their respective submissions on sanctions and costs in November 2012 for the hearing scheduled on 13<sup>th</sup> December 2012.
5. However, after considering the submissions of the parties including the Respondent's personal circumstances as set out in his mitigation letter dated 30<sup>th</sup> November 2012, this Committee was of the view that the Respondent should provide further information on the business of Bizman and Bizman Consulting before this Committee could make an appropriate decision on the sanctions and costs to be imposed on the Respondent. Therefore the original hearing for Sanctions and Costs was adjourned to a later date. Pursuant to the directions of this Committee contained in a letter dated 4<sup>th</sup> December 2012, the Respondent made further written submissions in a letter dated 28<sup>th</sup> January 2013 ("**Further Written Submissions**"). The Complainant submitted its responses to the Further Written Submissions in a letter dated 1<sup>st</sup> February 2013. Thereafter the hearing for Sanctions and Costs was held on 9<sup>th</sup> April 2013.

## Sanctions

6. At the hearing for Sanctions and Costs held on 9<sup>th</sup> April 2013, counsel for the Complainant Mr. Donald Leo highlighted the authorities contained in the Complainant's further written submissions and reminded this Committee that it is not constrained by previous decisions but must independently consider the appropriate sanctions in the light of all the circumstances of this case. Mr. Leo referred this Committee to para.14.14 in Disciplinary and Regulatory Proceedings by Brian Harris, OBE, QC (6<sup>th</sup> Edition), which reads as follows:

*"Professional and regulatory bodies frequently review the level of their penalties in light of experience and of changes in the commercial and regulatory environments. The fact that a disciplinary tribunal changes its approach to a particular type of conduct resulting in penalties more severe than have previously been the norm is no ground for complaint when it gives rise to a heavier penalty than was the case in the past (Jobson v The Statutory Committee of the Pharmaceutical Society of Great Britain)."*

7. Mr. Leo further referred to the case of Ng Sai Hing v Commissioner of Police HCAL 15/2006, 26 January 2007, in particular, para. 44 – 45:

*“44. Mr. Lau also refers to other disciplinary cases involving the same offence that were reported in the Bulletin on Discipline Cases (“the Bulletin”). The Bulletin contained selected cases of discipline of interest and was compiled for the purposes of updating the trends in disciplinary cases and the level of awards confirmed by the FDO. It is common ground that the awards made in the reported cases are not binding on future cases. The purpose of Mr. Lau’s reference to the Bulletin is to show that for the offence in question, lesser punishments had been awarded so as to support his submission that punishment that does not result in loss of pensions is a realistic option open to the decision makers in the applicant’s case.*

*45. Several points have to be made on the relevance and use of the Bulletin. First, it is not in dispute that it is within the decision-makers’ power under the Police (Discipline) Regulations to make award that will not result in loss of pension. Second, what is appropriate award must depend on the facts of each case. Third, the Bulletin does not set out the full facts of the cases selected. Fourth, while in some of the reported cases lesser punishments were imposed, there was one case in which a senior police constable was given a dismissal. In short, no useful use can be made of the Bulletin. It does not lend force to the argument that it was unfair for the decision-makers not to consider lesser punishments.”*

Mr. Leo further pointed out to this Committee that the decision of Ng Sai Hing has been considered and affirmed by the recent Court of Appeal case of Chan Cheuk Chi v The Registrar of the Hong Kong Institute of Certified Public Accountants CACV 38/2012 (30 January 2013), which is an unsuccessful appeal against the decision of another Disciplinary Committee of the HKICPA.

8. In reply to this Committee’s query as to whether there existed any special factors in the present case which made the HKICPA deviate from its practice prior to 2012 where the HKICPA would issue letters of disapproval in most of the similar but less serious cases of breach of the Code in relation to practice promotion, Mr. Leo submitted that the previous cases involved single breach of the Code whereas this case involved multiple breaches. Another aggravating factor of

this case was that the Respondent did not hold a practising certificate at the relevant time but was a non-practising member of the HKICPA.

9. At the hearing the Respondent reiterated the points in his mitigation letter dated 30<sup>th</sup> November 2012 and explained his personal circumstances and financial situations to this Committee. The Respondent submitted that he now needs to take care of his 2 year old son and has no time to work. He stopped working since 6<sup>th</sup> May 2012 (the closing date of Bizman) and spent time on closing up Bizman and Bizman Consulting. He does not have other sources of income and he used his savings to maintain his living since the commencement of this disciplinary matter. However upon further questioning by this Committee, the Respondent admitted that he has set up a CPA practice since he obtained the practising certificate.
10. In reply to this Committee's query regarding his gross income in 2012, the Respondent submitted that he could not deduce the exact figure because he still had not completed the accounts of Bizman and Bizman Consulting. The Respondent gave this Committee a rough estimation of HKD420,000 as his gross income in 2012.
11. This Committee is of the view that the primary factors that this Committee should focus on are the seriousness of the proved Complaints and their impact on the reputation and good name of the profession, unless there are truly exceptional mitigating factors. This Committee is of the view that the Respondent has not been very forthcoming regarding his personal circumstances. His evidence in that regard is, to say the least, ambiguous. This Committee will simply disregard such evidence and focus on the proved Complaints.
12. In respect of the 1<sup>st</sup> Complaint, the Respondent handled all enquiries for auditing services personally, the potential clients for auditing services would be informed that Bizman acted as the arranger for audit work to be done by practising CPAs. In case of successful referrals through the Respondent, the clients would be directly contacted by the practising CPAs in the course of audit work. In a document entitled "Breakdown of Service Income" submitted by the Respondent, it was stated that Bizman received fees for audit arrangements totaling HKD69,319 for the years ended 31<sup>st</sup> December 2010 and 2011. The Respondent orally informed this Committee that the total number of such successful referrals was about 20. In respect of the 2<sup>nd</sup> Complaint, the Respondent had sent out

23,091 and 45,169 promotion leaflets through Hong Kong Post Circular Service in 2009 and 2011 respectively. In addition to promotion through Hong Kong Post Circular Service, the Respondent advertised the business of Bizman and Bizman Consulting on Bizman's website from 31 March 2011 to 10 April 2012.

13. Taking the matter in the round, this Committee is of the view that the appropriate sanctions for Complaints 1 and 2 are:-
  1. The Respondent be reprimanded;
  2. In respect of the 1<sup>st</sup> Complaint, the Respondent do pay a penalty in the amount of HK\$40,000;
  3. In respect of the 2<sup>nd</sup> Complaint, the Respondent do pay a penalty in the amount of HK\$40,000;
  4. The Respondent do pay costs to the Complainant as assessed below.
14. This Committee so orders accordingly, such orders to take effect on the 50th day of this order under section 35(1) of the PAO.

#### **Costs**

15. Pursuant to section 35(1)(iii) of the PAO, this Committee has a very wide discretion and *"may make such orders as [it] thinks fit with regards to the payment of costs and expenses of and incidental to the proceedings, whether of the Institute (including the costs and expenses of the Disciplinary Committee) or of any complainant or of the certified public accountant..."*
16. At the hearing Mr. Leo submitted a revised statement of costs which sets out the respective hourly charging rates of the staff members of HKICPA who had worked on this matter and the respective amount of time spent by them. For example his own hourly charging rate is HK\$2,000. It is noted that Mr. Leo, a barrister admitted in the year of 2000, is an in-house prosecutor under full-time employment of the HKICPA. The statement of costs also sets out the hourly rates and costs incurred by other staff of the HKICPA working on this case: Ms. Jessie Ng, a Deputy Director, Compliance, was assigned an hourly rate of HK\$1,600; Ms. Carla Tu, an Associate Director, Compliance, was assigned an hourly rate of HK\$1,200.

17. Mr. Leo explained that he was responsible for drafting the complaint document namely the complaint letter. Ms. Jessie Ng is a senior staff member of the Compliance Department and she was responsible for the overall supervision of this matter. Ms. Carla Tu was the case handler of this matter; she assisted Mr. Leo in reviewing the complaint letter and prepared the letter of admission as well as liaising with the Respondent. The Respondent made no objections as to the revised statement of costs.
18. This Committee is aware that the hourly rate of a barrister of Mr. Leo's standing, at the current market rate, may well be higher than HK\$2,000. But in the absence of any alternative figure suggested by the Complainant, it is not for this Committee to decide on another rate for Mr. Leo.
19. This Committee is of the view that the costs of the Clerk, who has provided valuable assistance to the Committee, could be treated as a disbursement item.
20. Accordingly, the Committee's ruling on the issue of costs is as follows:-
- Costs of the HKICPA's staff for the preparation of complaint documents and correspondence with the Respondent, the Committee Convenor and Clerk to the Committee from September 2012 to 8<sup>th</sup> April 2013 = HK\$28,000 (Mr. Leo spent 9 hours and his hourly rate is HK\$2,000; Ms. Ng spent 1 hour and her hourly rate is HK\$1,600; Ms. Tu spent 7 hours and her hourly rate is HK\$1,200.)
  - Costs of the HKICPA's staff to attend the hearing on sanctions and costs scheduled for 9<sup>th</sup> April 2013 = HK\$3,000
  - Costs of the Clerk to the Committee = HK\$8,520
  - Miscellaneous disbursements = HK\$1,421

Total: HK\$40,941

Such costs are to be paid on or before the day the order in paragraph 13 takes effect.

Dated 14 June 2013