

The Association of Chartered Certified Accountants

Referral by Investigating Officer to the Assessor pursuant to Disciplinary Regulation 4(1)

In accordance with ACCA's Disciplinary Regulations, the Investigating Officer has considered the complaints against the following Member of ACCA and accordingly refers the complaint to the Assessor for consideration.

Details of Member

Full name:	JOHN SMITH
Registered address:	1 Acacia Avenue London N31
Date of admission as	Associate: 17.03.1988 Fellow: 17.03.1993
Membership number:	0123456
Occupation and business address:	Sole Practitioner John Smith & Co 1 Acacia Avenue London N31
Current holder of a practising certificate:	YES, with audit qualification
Current holder of an insolvency licence (UK only):	NO
Regulated for a range of investment business activities (UK)	NO

1. The Assessor is requested to consider whether, on the basis of the evidence contained in this Report, Mr John Smith is liable to disciplinary action:

ALLEGATION 1

- a) Pursuant to bye-law 8(a)(i) Mr Smith is guilty of misconduct by reason of failing to give advice to Mrs Brown with regard to the implications of her instructions to keep her US and UK sources separate and the consequences of doing so, contrary to the Fundamental Principle of Competence and Due Care (as applicable in 2016/2017).

or

- b) Pursuant to bye-law 8(a)(iii), Mr Smith has breached the Fundamental Principle of Competence and Due Care (as applicable in 2016/2017) in failing to give advice to Mrs Brown regarding the implications and consequence of her instructions in keeping her US and UK sources separate.

ALLEGATION 2

- a) Pursuant to bye-law 8(a)(i) Mr Smith is guilty of misconduct as a result of failing to act diligently in the provision of professional services to Mrs Brown and/or HM Revenue and Customs ("HMRC"), contrary to the Fundamental Principle of Professional Competence and Due Care (as applicable in 2018/2019).

or

- b) Pursuant to byelaw 8(a) (iii), Mr Smith has breached the Fundamental Principle of Professional Competence and Due Care (as applicable in 2018/2019) by failing to act diligently in the provision of professional services to Mrs Brown and/or HMRC.

2. The Assessor is requested to consider the Report and determine whether a case to answer has been made out against the member. The Assessor reserves the right to adduce additional evidence if he/she so determines.

If the Assessor determines that a case to answer is made out, the Assessor is invited to decide which of the following courses of action should be taken:

- a) the case should be referred to the Disciplinary Committee and, if so, what allegations should be proceeded with

or

- b) the case should rest on the Member's file.

In addition, the Assessor may refer a case to the Admissions and Licensing Committee.

3. A copy of this referral has already been sent to the Member to seek any final comment or submission, prior to consideration by the Assessor.

Byelaws

8(a) *A member, relevant firm or registered student shall, subject to byelaw 11, be liable to disciplinary action if:*

- (i) *he or it, in the course of carrying out his or its professional duties or otherwise, has been guilty of misconduct; ...*
- (iii) *he or it has committed any breach of these byelaws or of any regulations made under them in respect of which he or it is bound; ...*

8(c) *For the purposes of byelaw 8(a), misconduct includes (but is not confined to) any act or default likely to bring discredit to the member, relevant firm or registered student in question.*

Fundamental Principles

Professional Competence and Due Care

130.1 The principle of professional competence and due care imposes the following obligations on all professional accountants:

(a) To maintain professional knowledge and skill at the level required to ensure that clients or employers receive competent professional service; and

(b) To act diligently in accordance with applicable technical and professional standards when providing professional services.

130.2 Competent professional service requires the exercise of sound judgment in applying professional knowledge and skill in the performance of such service. Professional competence may be divided into two separate phases:

- (a) Attainment of professional competence; and*
- (b) Maintenance of professional competence.*

130.3 The maintenance of professional competence requires a continuing awareness and an understanding of relevant technical, professional and business developments. Continuing professional development enables a professional accountant to develop

and maintain the capabilities to perform competently within the professional environment.

130.4 Diligence encompasses the responsibility to act in accordance with the requirements of an assignment, carefully, thoroughly and on a timely basis.

130.5 A professional accountant shall take reasonable steps to ensure that those working under the professional accountant's authority in a professional capacity have appropriate training and supervision.

130.6 Where appropriate, a professional accountant shall make clients, employers or other users of the accountant's professional services aware of the limitations inherent in the services.

Relevant Parties

Mr John Smith – Complainee
Mrs Avril Brown - Complainant
Mr Alexie Alei – Senior Investigations Officer, ACCA
Ms Joanne Choong - Senior Investigations Officer, ACCA
Ms Susan Dark -Area Complaints Manager, HMRC
Miss Mary Duft – HMRC
Mr Adam White – Mrs Brown's partner
Mr Dean Gregory - Senior Investigations Officer, ACCA
Mrs Nawal Houghton - Conciliations Manager, ACCA
Mr D Marks – Compliance Unit, HMRC

Background

4. Mr Smith was engaged by Mrs Brown as her accountant on 16 January 2014. Mr Smith was recommended to Mrs Brown by a mutual contact, now deceased, as she required advice on overseas funds. Mr Smith is the sole proprietor of John Smith & Co. John Smith & Co was appointed to deal with Mrs Brown's accounting and taxation affairs.

PART ONE – ALLEGATION ONE

Particulars of Allegation

ALLEGATION 1(A)

5. ***Pursuant to bye-law 8(a)(i) Mr Smith is guilty of misconduct by reason of failing to give advice to Mrs Brown with regard to the implications of her instructions to keep her US and UK sources separate and the consequences of doing so, contrary to the Fundamental Principle of Competence and Due Care (as applicable in 2016/2017).***

6. On 13 January 2020, HMRC wrote to Mrs Brown informing her that her original tax returns (prepared by Mr Smith) for the years 2016-2017 and 2017-2018 were incorrectly declared. It was stated that by failing to ensure that her US income was declared on her tax return, and incorrectly declaring her capital gain, Mrs Brown had been negligent and committed an offence under S95 TMA 1970.
7. Mrs. Brown claims that she had been advised by Mr. Smith that if she received money in the US and if the money was not remitted to the UK, it was not subject to UK tax but to that of US tax laws. Hence her income from the US was not declared on her tax returns, which were prepared by Mr Smith.
8. Mrs Brown's US income referred to in paragraph 6 above comprises of her: (i) US pension; (ii) rental income; and (iii) capital gains from the US, discussed in turn below.

(i) US Pension Income

9. Mrs Brown also stated that she was advised by Mr Smith that her pension from the US need not be declared. Mrs Brown stated that she told Mr Smith that she started receiving her US pension on her 65th birthday in October 2014.
10. As this pension was not remitted to the UK, Mrs Brown, on Mr Smith's advice in paragraph 7 above, laboured under the misapprehension that it was not subject to UK tax.

(ii) Rental income in the US

11. By letter dated 13 January 2020, HMRC wrote to Mrs Brown to inform her that as she was resident and domiciled in the UK it was necessary for her to declare the rental income from a property abroad even if it was at a loss.
12. In the document detailing her US and UK assets dated 11 July 2014, Mrs Brown stated: *"I need to know if the US Accountant takes this into account or if you as my UK Accountant need to know this and to say tax is paid in the US ..."* This clearly shows that she was seeking Mr Smith's advice as to whether she was liable to pay tax in the UK.

(iii) Capital Gain in the US

13. In the same letter from HMRC of 13 January 2019, Mrs. Brown was informed by HMRC that as she was ordinarily resident and domiciled in the UK in the year 2016-2017 she was required to pay Capital Gains Tax on the gain that she made in the USA whether or not the money was remitted to the UK. Mrs Brown's property at 1302 Bush Drive, Phoenix, Arizona 85048 was sold on 21 March 2016.

Issue of Domiciliary

14. Mr Smith's advice in paragraph 7 above would have been correct if Mr Smith had made the right assumption that Mrs Brown was resident but not domiciled in the UK.
15. It was by an e-mail dated 14 March 2018, that Mr Smith advised Mrs Brown that she will "...only be liable to taxes in the UK on income from your overseas assets/investments to the extent that proceeds are remitted to the UK. This is on the assumption that you are resident in the UK but not domiciled". It is in this e-mail that Mr Smith addresses the issue of domiciliary and stated: "*I am assuming here that your country of birth and therefore your domicile is the US.*"
16. Mrs Brown stated that it was never implied that the US was her country of origin. It is alleged that at their first meeting, Mr. Smith was informed by Mrs. Brown that she had been born on Duke's Hill, about a mile from where she lives and that her family had lived in South London for generations. She informed him that she had visited the United States of America when she was 19 years old and returned to the US again when she was 21 when she married a British citizen who was under contract to an American firm, that she became a US citizen because both of her children were born in the US and her husband was working for the US Government on security and defence work which necessitated his becoming a US citizen. She also informed Mr Smith that she spent about 18 years in the US and came back to the UK about 31 years ago. He was advised that Mrs Brown was entitled to both UK and US citizenship. Mrs Brown stated that her partner, Mr Adam White was a party to that discussion.
17. Even though Mr Smith was appointed as Mrs Brown's accountant in January 2014, the term 'domiciliary' was explained to Mrs Brown only 4 years after John Smith & Co was appointed. He assumed that she was domiciled in the US without confirming this with her, even though he had by then, completed her tax returns for the years 2016-2017 and 2017-2018.
18. Mr Smith does not have any documentary evidence to confirm that Mrs Brown had informed him that she was US domiciled. Mrs Brown's briefing notes dated 11 July 2014 do not address the issue of her domiciliary. He failed to confirm this issue with Mrs Brown when he was initially engaged as her accountant. He became aware that he had made the wrong assumption in the e-mail from Mrs Brown dated 24 April 2018 in response to his e-mail of 14 March 2018.
19. It is submitted that Mr Smith was aware that Mrs Brown received income from the US as he was told by Mrs Brown that she keeps "*everything in the US completely separate from the UK*" yet he failed to advise her of the implications of her instructions and the consequences in doing so.
20. Further, irrespective of whether she was advised by any other person, Mr Smith should have advised her on the correct treatment of income from the US as he was

engaged to deal with her accounting and tax affairs. Mrs Brown stated, *"I had no idea what was allowable which is why I appointed an accountant to compile the returns."*

21. The situation was aggravated by the fact that Mr Smith made an incorrect and unreasonable assumption that Mrs Brown was domiciled in the US having failed to confirm this with her. It is submitted that his failure in doing so and resultant acts, i.e. incorrectly or omitting to advise Mrs Brown that her US income was not to be kept separately from her UK income and to be declared in her tax returns, Mr Smith did not perform his work with due skill, care and diligence expected of him as a member of ACCA to such an extent that it brings discredit to ACCA and the accountancy profession. As a result, Mrs Brown was instructed to pay £13,148.72 to HMRC for incorrect calculations made by Mr Smith, interest and penalties.

ALLEGATION 1(B):

22. ***Pursuant to bye-law 8(a)(iii), Mr Smith has breached the Fundamental Principle of Competence and Due Care (as applicable in 2016/2017) in failing to give advice to Mrs Brown regarding the implications and consequence of her instructions in keeping her US and UK sources separate.***
23. If it is accepted that there has been a breach of byelaw 8(a) (ii) by virtue of the facts detailed in paragraphs 6 to 21 above, byelaw 8(a) (iii) is automatically engaged.

MR SMITH'S CASE

ALLEGATION 1

Issue of domiciliary

24. Mr Smith stated that he was given a typed note on Mrs Brown's income and expenses at the time when she instructed him. Mr Smith stated that nowhere in that document did Mrs Brown state that she was born in the UK. Mr Smith stated that he could not recall whether the question was asked as to where Mrs Brown was domiciled. He does not have any notes on file to confirm this. Mr Smith claimed that it was only on 24 April 2018 that he was made aware for the first time that Mrs Brown was born in the UK.
25. Mr Smith stated that from the first day that they met, Mrs Brown had always contended that she knew an Inland Revenue Inspector who had advised her that she did not need to declare her income from the US here in the UK. This and given that she resided in the US led him to believe that she was not domiciled in the UK. Further, he stated: *"Indeed as late as 4 February 2018 in her email to me...she not only stated more than once that she was an American citizen but also stated quite categorically that she keeps 'everything in the US completely separate from the UK' She further emphasises that her pension is paid into a US bank account and 'not transferred/remitted to the UK.'"*

26. In his statement dated 11 November 2020, Mr Smith stated that when he met Mrs Brown on 11 July 2014 at her home, *“Only Ms Brown and I were present at that meeting and as far as I was aware there was no one else present in the house”*. Further, *“I was not introduced to Ms Brown’s partner, Adam White, until sometime after my initial meeting with Ms Brown. He has never present when Ms Brown and I discussed her affairs and I got the impression that she did not involve him in her business affairs at all...”*.

US Pension Income

27. He also stated that *“it is obvious from the start that she did not want to declare this income and categorically stated to me that she had been advised by, I believe, and ex inspector of the HMIT that she did not have to. This is what led me to believe that she was not domiciled in the UK as it is the only way she would not have to declare her US income on her UK Tax Return.”*

PART TWO - ALLEGATION TWO

ALLEGATION 2

28. ***Pursuant to bye-law 8(a)(i) Mr Smith is guilty of misconduct as a result of failing to act diligently in the provision of professional services to Mrs Brown and/or HMRC, contrary to the Fundamental Principle of Professional Competence and Due Care (as applicable in 2018/2019).***

Correspondence with HMRC

29. John Smith & Co was appointed as Mrs Brown's agent and authorised to act on her behalf with HMRC on 2 April 2014.
30. HMRC's enquiries into Mrs Brown's tax affairs commenced with a letter sent on 25 August 2017.
31. On 1 November 2017, Mrs Brown sent Mr Smith her files which were forwarded to HMRC on 16 November 2017. This was the only letter sent by Mr Smith to HMRC, confirmed by HMRC in their letter to Mrs Brown dated 3 November 2018.
32. Mrs Brown stated that she requested guidance from Mr Smith in answering the questions from HMRC as he had prepared the tax returns. According to Mrs Brown, it was when he failed to respond that HMRC questioned Mr Smith's involvement in the enquiry process. In their letter to Mrs Brown dated 14 December 2018, HMRC stated *"Throughout this enquiry it has been unclear to me what Mr Smith's involvement is in the enquiry, as I have not been told if [sic] participating in the enquiry process or not. To ensure that [sic] has been fully informed I have copied him into every letter that I have sent you."* Mr Smith, however, believed that he was only used as a 'sounding board' as Mrs Brown communicated with HMRC directly. Mrs Brown believed otherwise.
33. As the terms of John Smith & Co's appointment was unclear, a copy of their letter of engagement was requested from both Mr Smith and Mrs Brown in order to ascertain the terms of John Smith & Co's appointment. Mr Smith stated that he was certain that Mrs Brown signed an engagement letter at the time of their appointment but could not locate a copy of it in their files. A copy of the letter of engagement was also requested from Mrs Brown but she has been unable to provide a copy of the same. A letter was, however, sent by John Smith & Co to Mrs Brown dated 16 January 2014 accepting their appointment in respect of her accounting and taxation affairs.
34. On certain occasions Mr Smith had been asked by Mrs Brown if he would respond to HMRC which appears contrary to his suggestion that he was only used as a 'sounding board'. Further, in their letter dated 16 November 2017 to HMRC, John Smith & Co had requested HMRC to refer back to them if they had any questions. In her letter dated 21 August 2018, having failed to receive any response from Mr Smith, Mrs Brown even enquired whether the corrections to her tax returns were to

be resolved by her directly together with other matters arising from HMRC. Mr Smith failed to respond to her letter. As a result, Mrs Brown had to deal with HMRC directly. He also failed to clarify his instructions as to the extent of his involvement with HMRC with Mrs Brown when he was unsure.

Correspondence with Mrs Brown

35. Mr Smith's last correspondence with Mrs Brown was on 2 April 2018.
36. In a telephone conversation with Ms Nawal Houghton on 18 April 2019, Mr Smith stated that the reason he did not respond to Mrs Brown's letters because he was not being paid by Mrs Brown. On 23 July 2020, Mr Smith confirmed to Ms Choong that the firm's usual practice was to send monthly statements to all their clients for any outstanding fees but beyond these statements, no further correspondence or reminders were sent to Mrs Brown in respect of the outstanding fees. However, Mrs Brown in her e-mail to Ms Choong dated 18 August 2020, stated that Mr Smith did not send her a statement advising that her account was not cleared. Further, she stated that at no time did she advise Mr Smith that she would not pay for his services.
37. In her letter to Mr Dean Gregory dated 12 December 2019, Mrs Brown stated that Mr Smith's reference to late payment was only on a single occasion when she paid half and put the balance on file to be paid. However, this was misfiled and was eventually paid even though it was late. *"At no time did Mr Smith send statements or receipts which if he had, this oversight would have been brought to my attention sooner."*
38. Mr Smith accepted that his failure was not having responded to Mrs Brown's letters at all. He did not respond, not even to advise her that he is not being paid to respond to her queries. Mr Smith has admitted that his behaviour was unprofessional even though this has been the only time which he has done this.
39. It is submitted that Mr Smith failed to behave with courtesy and consideration because he failed to respond to Mrs Brown and/or HMRC. As a result, Mrs Brown was left in a position where she had to deal and resolve any queries from HMRC without any assistance from Mr Smith even though the returns were prepared by him. He also failed to clarify instructions with his client when he was unsure as to the extent of his involvement with HMRC. Mr Smith lacked professionalism and his actions appear to affect the good reputation of the profession.

ALLEGATION 2(B)

40. ***Pursuant to byelaw 8(a) (iii), Mr Smith has breached the Fundamental Principle of Professional Competence and Due Care (as applicable in 2018/2019) by failing to act diligently in the provision of professional services to Mrs Brown and/or HMRC.***

41. If it is accepted that there has been a breach of byelaw 8(a) (i) by virtue of the facts detailed in paragraphs 25 to 35 above, byelaw 8(a) (iii) is automatically engaged.

ALLEGATION 2

Failure to correspond with HMRC and/or Mrs Brown

42. Apart from their first letter to HMRC, Mr Smith claims that Mrs Brown had corresponded directly with HMRC. In his e-mail to Mrs Brown dated 14 November 2017, Mr Smith stated “...I will leave it entirely up to you to deal with the Inspector directly.”
43. Mr Smith disputes that John Smith & Co was instructed to correspond with HMRC in respect of the enquiry. He stated that Mrs Brown’s approach was to send draft letters to him for his opinion before sending it off directly to HMRC. He also believed that she obtained advice from a friend whom he was led to believe was an ex Inspector of Taxes. He stated that as they were not directly involved in communications with HMRC, it was therefore impossible to respond to any queries from HMRC.
44. A confidentiality letter was signed between Mrs Brown and Mr Smith on 11 July 2014 in which Mrs Brown wanted his assurance that their discussion on that day would be treated in strict confidence.
45. Mr Smith claimed that he had supplied all information in respect of HMRC’s enquiry to Mrs Brown and any other information would have been held by her and/or her bookkeeper.
46. He stated that they refused to correspond any further with Mrs Brown when she started making accusations rather than requesting information to assist in HMRC’s enquiry.
47. In addition, Mr Smith stated “We were never unsure as to whether we were to correspond with the Revenue in respect of the enquiry. Our understanding was that Mrs Brown would communicate with the Inspector directly and indeed all her correspondence in response to the Inspector’s letters were addressed directly to the Inspector of Taxes. We were copied into these communications for information only. They were not points made to us for us to respond on her behalf. Mrs Brown was using me as a ‘sounding board’ in order to prepare her responses to the Inspector. She stated quite categorically (albeit verbally) that she cannot afford to pay my fees to deal with the enquiry.”
48. In his e-mail to Mrs Brown dated 14 November 2017, he had also stated that he “... spent an enormous amount of yet unbilled time on dealing with the enquiry into Adrian’s and now your enquiry. To date I am still owed fees for the accounts for the year ending 31 July 2015.”

49. He stated that his relationship with his client started to deteriorate when she accused him of supplying information which he did not do. Mrs Brown allegedly became very antagonistic.
50. Mr Smith stated that the only letter he did not respond to was dated 6 October 2017. As he was not dealing with HMRC he therefore did not respond to those letters.