

# Determination of the Disciplinary Tribunal of Chartered Accountants Australia and New Zealand 16 October 2019

<b>Case Number:</b>	D-1206
<b>Member:</b>	Philip John Shugg FCA of Victoria
<b>Hearing Date:</b>	26 September 2019
<b>Tribunal:</b>	David Fairlie (Chair and lay member of Tribunal) Linda Hadfield FCA Kathryn Brown CA
<b>Representation:</b>	Michael Bradley for the Professional Conduct Committee (PCC) The Member neither appeared nor was represented
<b>Case description:</b>	<ol style="list-style-type: none"><li>1. Member failed to comply with reasonable and lawful directions of an officer or organ of CA ANZ.</li><li>2. Member failed to observe a proper standard of professional care, skill or competence in the course of carrying out his professional duties.</li><li>3. Member bankrupt.</li><li>4. Member committed a breach of By-Law 40(3.2) in not notifying his bankruptcy.</li><li>5. Member's conduct brings or may bring discredit upon him, Chartered Accountants ANZ and the profession of accountancy.</li></ol>

## **1. CONTACT WITH THE MEMBER**

The Member did not attend the hearing of the Disciplinary Tribunal.

On 9 July 2019 by letter sent by email to his address recorded on the General Register, the PCC informed the Member that he had been referred to the Disciplinary Tribunal for hearing and that, if the Disciplinary Tribunal decided that he had breached the By-Laws, the PCC would request that the Tribunal terminate the Member's membership.

The Member was subsequently served with the Notice of Disciplinary Action and notified of the hearing date and time under cover of letter dated 19 August 2019 also sent by email and prepaid Express Post to his addresses recorded on the General Register. The Member was subsequently contacted by the Tribunal Secretary on 29 August and 13 September by email, voicemail and prepaid Express Post. The Member did not respond to those communications.

The Tribunal was satisfied that the Member had notice of the hearing and that the Tribunal would be considering the matters contained in the Notice of Disciplinary Action and, if established, whether to impose a sanction on the Member on 26 September 2019, and accordingly determined that the hearing should proceed in the absence of the Member.

## **2. DECISIONS**

### **2.1 DECISION ABOUT THE PCC'S ALLEGATIONS WHICH ARE SET OUT IN FULL IN SCHEDULE 1**

At a hearing of the Disciplinary Tribunal not attended by the Member, the Tribunal found the PCC had established the allegations.

### **2.2 DECISION ABOUT SANCTIONS**

The Tribunal considered that the appropriate sanction in these circumstances was to terminate the Member's membership and remove the Member's name from the Registers on which it appears.

### **2.3 DECISION ABOUT COSTS SANCTION**

The Tribunal determined that the Member pay to Chartered Accountants ANZ the sum of \$11,631 for the full costs and expenses of the proceedings (By-Law 40(10.12)(k)). No GST is payable.

### **2.4 DECISION ABOUT PUBLICATION**

In accordance with By-Laws 40(12.3) and 40(12.4), the Tribunal directed that:

- its decision with reasons, mentioning the Member's name and locality, be published on the website of Chartered Accountants ANZ (the **Published Decision**)
- a notice mentioning the Member's name and locality with a web address for the Published Decision be published in the Chartered Accountants ANZ digital and print magazine "Acuity".

### **2.5 NOTIFICATION TO OTHER BODIES**

In accordance with By-Law 40(10.16), the Tribunal determined to notify its decision to the Tax Practitioners Board.

### 3. RIGHT OF APPEAL

The Member may, within 21 days after the notification of the written decision with reasons to the Member of this Tribunal's decision, appeal in writing to the Appeals Tribunal of Chartered Accountants ANZ against the decision (By-Law 40(11.1)).

The PCC may, within 21 days after notification of the written decision with reasons to the PCC of this Tribunal's decision, appeal in writing to the Appeals Tribunal of Chartered Accountants ANZ against the decision (By-Law 40(11.2)).

The date of effect of this decision is the day immediately after the expiry of the period during which an appeal may be notified, if no appeal has been notified within that period (By-Law 40(10.18)).

### 4. BACKGROUND

- In approximately 2004 the Member's clients (the **Complainants**) engaged the Member in relation to their taxation affairs.
  - In 2007 the Member set up a self managed superannuation fund for the Complainants (the **Complainant's SMSF**).
  - In June 2016 the Complainants appointed a new financial planner to manage their SMSF.
  - On 20 December 2016 Chartered Accountants ANZ received a complaint in relation to the Member's "*work as accountant and financial planner*" which also included the management and auditing of the Complainant's SMSF since 2007 (the **Complaint**). The Complainants had also lodged complaints with the Financial Ombudsman Service (**FOS**) based on the same subject matter as the Complaint.
  - Following completion of the FOS enquiries, the PCC commenced investigation of the Complaint. As part of that investigation, the PCC convened a Case Conference so that the issues and any additional evidence could be further considered, including the allegations that the Member:
    - contributed to gross delays
    - was in a position of conflict
    - failed to observe a proper standard of professional care, skill or competence in the course of carrying out his professional duties
    - did not behave in a professional manner.
- The Member did not attend the Case Conference
- The PCC, after investigating the Complaint and conducting its own investigation, referred the Member to the Disciplinary Tribunal alleging that he had breached:
    - By-Law 40(2.1)(i) by not responding to Chartered Accountants ANZ and not complying with the direction of the PCC to attend a Case Conference
    - By-Law 40(2.1)(a) by breaching the fundamental principle of objectivity and multiple sections of APES 110 - *Code of Ethics for Professional Accountants (APES 110)*
    - By-Law 40(2.1)(j) by becoming bankrupt
    - By-Law 40(2.1)(h) by not complying with his obligations to notify his bankruptcy under By-Law 40(3.2)
    - By-Law 40(2.1)(k) in that his conduct brought discredit on the Member, Chartered Accountants ANZ and the profession of accountancy.

## 5. REASONS FOR DECISION

### 5.1 ALLEGATION 1

- The PCC submitted that:
    - by letter dated 23 May 2019 the PCC informed the Member of their decision that he be referred to a Case Conference to consider the Complaint and requested that the Member provide documents and information so that the PCC could properly investigate the issues that were raised by the Complaint and the inconsistencies between what the Complainants had said and what the Member had said in response
    - on 12 June 2019 the Member advised the PCC that he had attempted to resign his membership and saw no point in attending the Case Conference. The PCC informed the Member that his intention to resign his membership had no bearing on the Case Conference and on his obligation to attend
    - the Member did not respond to the request for information and documents and did not attend the Case Conference scheduled for 20 June 2019.
  - The Tribunal determined that the allegation had been established because:
    - the correspondence contained reasonable and lawful directions made by officers or organs of Chartered Accountants ANZ. Relevantly By-Law 40(5.2) states:

For the purposes of any investigation, the Professional Conduct Committee may:

...

(b) require any Member to whom the investigation relates to provide the Professional Conduct Committee, within such period of time as the Professional Conduct Committee specifies in its notification, any documents, things or information that are in the possession or under the control of that Member that may relate to the subject matter of the investigation;

...

(e) require the Member at the Member's own cost to attend before the Professional Conduct Committee, on at least 14 days' notice to answer any questions and/or discuss the complaint or any matter arising from it; and

...
    - and By-Law 40(6.1) states:

During an investigation, the Professional Conduct Committee may decide to:

...

(d) convene a Case Conference that the Member is required to attend;

...
    - the Member failed to comply with these directions by not providing the documents required by the PCC and by failing to attend the Case Conference
- and these events constituted a breach of By-Law 40(2.1)(i).

### 5.2 ALLEGATION 2

- The Member, in a letter to the PCC dated 17 September 2018, said that he had employed an Audit Manager who was an experienced and professional auditor, and that the Member's role as signing partner was limited to a review of the file and documents. He added that he believed they had *"managed the potential conflict of interest very well"* by:
  1. *Creating separate teams of staff to actually conduct the work;*
  2. *Ensuring that work was performed in a professional manner; and*
  3. *Over time moving to 100% outsourcing of audits so that there could be no room for conflict"*.
- The PCC submitted that:
  - the Member, when carrying out both the accounting and auditing function for the Complainant's SMSF, failed to appropriately manage conflicts of interest

- by self reviewing as auditor, his accounting work for the SMSF, the Member was in breach of the fundamental principal of objectivity and sections 120.1, 120.2, 200.4, 200.5, 200.7, 200.8, 290.156, 290.168, 290.171 and 290.182 of APES 110.
- The Tribunal determined that the allegation was established because:
  - the Audit Manager was only an employee of the Member and subject to the Member's direction and control and this could not reduce the conflict of interest to an acceptable level
  - the Member had indicated in his letter to the PCC dated 17 November 2018, that over time he had intended to move *"to 100% outsourcing of audits so there could be no room for conflict"*, but this did not happen for nine years

and that this failure to observe a proper standard of professional care, skill or competence in the course of carrying out the Member's professional duties constituted a breach of By-Law 40(2.1)(a).

### 5.3 ALLEGATIONS 3 AND 4

- The PCC submitted that the Member had become bankrupt on 6 December 2018 and failed to notify Chartered Accountants ANZ within the time prescribed by the By-Laws.
- The Tribunal determined that these allegations were established because:
  - pursuant to By-Law 40(2.1)(i) members are liable to disciplinary sanctions if they suffer an Insolvency Event. The Tribunal was satisfied that the National Personal Insolvency Index extract provided to it evidenced that the Member became bankrupt on 6 December 2018
  - pursuant to By-Law 40(2.1)(h) members are liable to disciplinary sanctions if they breach the By-Laws or the Regulations. Under By-Law 40(3) a Disclosure Event occurs when a member suffers an Insolvency Event and members must:
    - notify the PCC of Disclosure Events within seven days of occurrence
    - send a written statement to the PCC within 21 days

pursuant to By-Law 40(3) and the Regulations. The Tribunal was satisfied that the Member's email sent 19 June 2019 stating *"I have been declared bankrupt"* was not sent within seven days of the event and further, that the Member had not provided a written statement, in breach of the By-Laws and the Regulations.

### 5.4 ALLEGATION 5

- The PCC submitted that the Member's failure to provide the documents and attend the Case Conference brought discredit because:
  - the Member's conduct was inappropriate and disrespectful of Chartered Accountants ANZ and its disciplinary process and this brought discredit to the Member
  - without the cooperation of members, Chartered Accountants ANZ cannot properly investigate a complaint of this nature and that brings the disciplinary process itself into disrepute.
- The Tribunal determined that the Member had brought discredit to himself, Chartered Accountants ANZ and the profession of accountancy because:
  - the Member did not comply with reasonable and lawful directions given to him by the PCC that related to the good order and management of Chartered Accountants ANZ; ie investigation of a complaint made about the Member

- the principal objects of Chartered Accountants ANZ, set out in the Supplemental Royal Charter, include:
  - ...
  - (e) to promote quality, expertise and integrity in the profession of accountancy by its members;
  - (f) to prescribe high standards of practice and professional conduct for, and to maintain the observance of such standards by:
    - (i) its members;...
  - (g) to prescribe disciplinary procedures and sanctions, to exercise disciplinary powers and to impose sanctions for the better observance of the standards of practice and professional conduct of CA ANZ by its members...; and
  - ...
- the Member's refusal to participate in the investigation of the Complaint, and then the disciplinary process, was antithetical to the principal objects of Chartered Accountants ANZ. Members of the public are entitled to expect that Members will comply with the obligations of their membership and that if a complaint is raised against a member, that Chartered Accountants ANZ will and can properly investigate that complaint.

## 6. REASONS FOR SANCTIONS

- The PCC submitted that the Member should be terminated from membership because:
  - it was a serious case of misconduct both in relation to the matters raised in the initial Complaint involving the Complainant's SMSF and his failure to respond to Chartered Accountants ANZ
  - the Member had failed to notify Chartered Accountants ANZ until five months after the bankruptcy event when he was obligated to do so within seven days
  - although the Member had recently attempted to resign his membership, the Board had not accepted that resignation because there were "*matters concerning [the Member] which are the subject of disciplinary action or professional conduct proceedings*". The Member's attempt to resign indicated that he no longer wished to be a member of Chartered Accountants ANZ.
- The Tribunal determined that the appropriate sanction was to terminate the Member's membership because:
  - the Member made no real attempt to justify his conduct which involved serious allegations made against him over a long period of time
  - the Member had failed to engage with Chartered Accountants ANZ in its investigation of the matter
  - the Member's attempt to resign indicated that he no longer wished to be a Member of Chartered Accountants ANZ.

## 7. REASONS FOR COSTS SANCTION

- The PCC submitted that the full costs of the proceedings in the sum of \$11,631 should be borne by the Member because:
  - this was a serious matter involving multiple breaches of the By-Laws
  - there had been a failure by the Member to comply with APES 110 for a long period
  - the Member's failure to comply with reasonable directions and failure to attend a Case Conference, aborted the investigative process and was disgraceful conduct in itself.

- The Tribunal determined that it was appropriate for the Member to pay the full costs of the proceedings because:
  - the PCC had established all of the allegations in the Notice of Disciplinary Action
  - no mitigating factors had been presented to the Tribunal which warranted a reduction in the costs awarded against the Member
  - had the Member engaged with the PCC and attended the Case Conference, the matter may have been resolved at that stage. Instead the PCC was obliged to refer the matter to the Disciplinary Tribunal and the costs of the proceedings had been properly incurred.



**Chair  
Disciplinary Tribunal**

## SCHEDULE 1 - THE PCC'S ALLEGATIONS

It is alleged that while a member of Chartered Accountants Australia and New Zealand (**CA ANZ**) the Member is liable to disciplinary action in accordance with:

1. By-Law 40(2.1)(i), in that the Member failed to:
  - a) provide the documents required by the Professional Conduct Committee (PCC) by its letter dated 23 May 2019; and
  - b) attend the case conference held on 20 June 2019, as required by the PCC by its letter dated 23 May 2019,and thereby failed to comply with a reasonable and lawful direction of an officer or organ of CA ANZ acting within the powers conferred by the By-Laws.
2. By-Law 40(2.1)(a), in that the Member failed to observe a proper standard of professional care, skill or competence in the course of carrying out his professional duties, in circumstances where the Member failed to appropriately manage conflicts of interest by simultaneously performing audit and accounting work for the Complainants' Self-Managed Superannuation Fund (SMSF) in breach of the fundamental principle of Objectivity and sections 120.1, 120.2, 200.4, 200.5, 200.7, 200.8, 290.156, 290.168, 290.171 and 290.182 of APES 110, *Code of Ethics for Professional Accountants*.
3. By-Law 40(2.1)(j), in that on 6 December 2018 the Member became bankrupt.
4. By-Law 40(2.1)(h), in that the Member failed to give notice to the PCC of his bankruptcy within 7 days and send a written statement to the PCC within 21 days setting out the reasons why his membership should not be affected, including suspended (whether or not on an interim basis) or terminated and that the Member's name should not be removed from the Registers, as required by By-Law 40(3.2).
5. By-Law 40(2.1)(k), in that the Member's conduct, as set out in paragraph 1 above, brings or may bring discredit upon him, CA ANZ or the profession of accountancy.

## SCHEDULE 2 - RELEVANT BY-LAWS

### Resignation

21. Any Member may resign his or her Membership by sending his or her resignation in writing together with all moneys owing by him or her to CA ANZ, whether for subscription, fee or other amount, to the CEO:
- (a) Provided that no resignation shall take effect unless and until it has been accepted by the Board. The Board may decline to accept the resignation of a Member who is the subject of disciplinary action or professional conduct proceedings by either CA ANZ or NZICA or whose conduct, in the opinion of the Board, by virtue of matters brought to the attention of CA ANZ, may become the subject of professional conduct proceedings or who has been requested to provide information, given notice of or is undergoing a review or any follow up process arising from a review, investigation or professional conduct proceedings.

...

40. Except as provided by By-Law 41, the By-Laws in this Section 5, including the following paragraphs of this By-Law 40, do not apply to Members who are also members of NZICA in respect of disciplinary matters over which NZICA has jurisdiction and which relate to the practice of the profession of accountancy by NZICA's members in New Zealand. Nothing in this By-Law 40 excludes from the operation of this Section 5, conduct of a Member:
- (a) who was, but is no longer, a member of NZICA; or
- (b) who has subsequently also become a member of NZICA.

Except as provided by By-Law 41, no Member shall be sanctioned under both this Section 5 and NZICA Rule 13 in respect of the same conduct.

...

### **40(2) Disciplinary action**

40(2.1) A Member is liable to disciplinary sanctions under these By-Laws if (whether before or after the date of adoption of this By-Law) that Member:

- (a) has failed to observe a proper standard of professional care, skill, competence or diligence in the course of carrying out that Member's professional duties and obligations;
- ...
- (h) has committed any breach of the Supplemental Charter, these By-Laws or the Regulations, any pronouncements issued by the Accounting Professional and Ethical Standards Board, Australian Accounting Standards Board and Auditing and Assurance Standards Board (or their successor entities) including the Code of Ethics, or any applicable pronouncements, instruments, technical or professional standards or guidance issued by any similar body whether in Australia or in a foreign jurisdiction;
- (i) has failed to comply with any reasonable and lawful direction of any officer or organ of CA ANZ acting within the powers conferred by CA ANZ's Supplemental Charter, these By-Laws or the Regulations and which relates to a matter concerning the good order and management of CA ANZ;
- (j) suffers an Insolvency Event;
- (k) has committed any act, omission or default which, in the opinion of the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal brings, or may bring, discredit upon that Member, CA ANZ or the profession of accountancy;

...

**40(10) Disciplinary Tribunal**

40(10.12) If the Disciplinary Tribunal determines that the complaint contained in the Notice of Disciplinary Action or any part thereof is established it may, subject to By-Law 40(9.3)(c), and having given the Member a reasonable opportunity of being heard on the question of sanctions, impose any one or more of the sanctions in the table below identified as applicable to that class of Member:-

(a) terminate that Member's Membership and remove the Member's name from the Registers on which it appears

...

(k) require the Member to pay to CA ANZ all or any portion of the Costs incurred by or on behalf of CA ANZ (including by or on behalf of the Professional Conduct Committee) in investigating and dealing with the original complaint and the matters the subject of the Notice of Disciplinary Action as the Disciplinary Tribunal determines

...

40(10.16) The Disciplinary Tribunal may notify interested parties including other professional bodies, regulatory authorities, the Member's current and/or former employers, partners, clients of the Member or the Member's Practice Entity who are or may be affected by the Member's conduct to which the disciplinary action relates, of so much of a decision (including a decision to suspend on an interim basis), the reasons for it and/or the sanctions imposed, as it thinks fit. The Disciplinary Tribunal will not do so until the day following the last date on which an appeal may be notified in accordance with By-Law 40(11.1). If an appeal is notified in accordance with By-Laws 40(11.1) or 40(11.2), the Disciplinary Tribunal will not make such a notification until that appeal is heard or otherwise determined.

...

40(10.18) A determination of the Disciplinary Tribunal shall take effect from the day immediately after the expiry of the period during which an appeal may be notified, if no appeal has been notified within that period.

...

40(12.3) Where the Disciplinary Tribunal or Appeals Tribunal determines that a complaint is established, imposes a sanction adverse to the Member (including one with the consent of a Member or a written undertaking under By-Law 40(13.8)) or decides to suspend a Member on an interim basis, it must direct that a notice be published by CA ANZ of its decision and the sanctions imposed (if any). Any such publication must disclose the name and location of the relevant Member unless the Disciplinary Tribunal or Appeals Tribunal (as applicable) considers that there are exceptional circumstances for not doing so.

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## **SCHEDULE 3 - EXCERPTS FROM APES 110, CODE OF ETHICS FOR PROFESSIONAL ACCOUNTANTS**

### **SECTION 100**

#### **Introduction and Fundamental Principles**

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#### *Fundamental Principles*

100.5 A Member shall comply with the following fundamental principles:

...

- (b) *Objectivity* – to not allow bias, conflict of interest or undue influence of others to override professional or business judgments.

...

Each of these fundamental principles is discussed in more detail in Sections 110-150.

...

### **SECTION 120**

#### **Objectivity**

120.1 The principle of objectivity imposes an obligation on all Members not to compromise their professional or business judgment because of bias, conflict of interest or the undue influence of others.

120.2 A Member may be exposed to situations that may impair objectivity. It is impracticable to define and prescribe all such situations. A Member shall not perform a Professional Service if a circumstance or relationship biases or unduly influences the Member's professional judgment with respect to that service.

...

### **SECTION 200**

#### **Introduction**

...

#### *Threats and Safeguards*

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200.4 Examples of circumstances that create self-interest threats for a Member in Public Practice include:

- A member of the Assurance Team having a Direct Financial Interest in the Assurance Client.
- A Firm having undue dependence on total fees from a client.
- A member of the Assurance Team having a significant close business relationship with an Assurance Client.
- A Firm being concerned about the possibility of losing a significant client.
- A member of the Audit Team entering into employment negotiations with the Audit Client.
- A Firm entering into a Contingent Fee arrangement relating to an Assurance Engagement.
- A Member discovering a significant error when evaluating the results of a previous Professional Service performed by a member of the Member's Firm.

- 200.5 Examples of circumstances that create self-review threats for a Member in Public Practice include:
- A Firm issuing an assurance report on the effectiveness of the operation of financial systems after designing or implementing the systems.
  - A Firm having prepared the original data used to generate records that are the subject matter of the Assurance Engagement.
  - A member of the Assurance Team being, or having recently been, a Director or Officer of the client.
  - A member of the Assurance Team being, or having recently been, employed by the client in a position to exert significant influence over the subject matter of the engagement.
  - The Firm performing a service for an Assurance Client that directly affects the subject matter information of the Assurance Engagement.

...

- 200.7 Examples of circumstances that create familiarity threats for a Member in Public Practice include:
- A member of the Engagement Team having a Close or Immediate Family member who is a Director or Officer of the client.
  - A member of the Engagement Team having a Close or Immediate Family member who is an employee of the client who is in a position to exert significant influence over the subject matter of the engagement.
  - A Director or Officer of the client or an employee in a position to exert significant influence over the subject matter of the engagement having recently served as the Engagement Partner.
  - A Member accepting gifts or preferential treatment from a client, unless the value is trivial or inconsequential.
  - Senior personnel having a long association with the Assurance Client.

- 200.8 Examples of circumstances that create intimidation threats for a Member in Public Practice include:
- A Firm being threatened with dismissal from a Client Engagement.
  - An Audit Client indicating that it will not award a planned non-assurance contract to the Firm if the Firm continues to disagree with the client's accounting treatment for a particular transaction.
  - A Firm being threatened with litigation by the client.
  - A Firm being pressured to reduce inappropriately the extent of work performed in order to reduce fees.

...

## **SECTION 290**

### **INDEPENDENCE—AUDIT AND REVIEW ENGAGEMENTS**

...

#### **Provision of Non-assurance Services to Audit Clients**

- 290.156 Firms have traditionally provided to their Audit Clients a range of non-assurance services that are consistent with their skills and expertise. Providing non-assurance services may, however, create threats to the Independence of the Firm or members of the Audit Team. The threats created are most often self-review, self-interest and advocacy threats.

...

### *Preparing Accounting Records and Financial Statements*

#### General Provisions

...

290.168 Providing an Audit Client with accounting and bookkeeping services, such as preparing accounting records or Financial Statements, creates a self-review threat when the Firm subsequently audits the Financial Statements.

...

#### Audit Clients that are Not Public Interest Entities

290.171 The Firm may provide services related to the preparation of accounting records and Financial Statements to an Audit Client that is not a Public Interest Entity where the services are of a routine or mechanical nature, so long as any self-review threat created is reduced to an Acceptable Level. Examples of such services include:

- Providing payroll services based on client-originated data;
- Recording transactions for which the client has determined or approved the appropriate account classification;
- Posting transactions coded by the client to the general ledger;
- Posting client-approved entries to the trial balance; and
- Preparing Financial Statements based on information in the trial balance.

In all cases, the significance of any threat created shall be evaluated and safeguards applied when necessary to eliminate the threat or reduce it to an Acceptable Level. Examples of such safeguards include:

- Arranging for such services to be performed by an individual who is not a member of the Audit Team; or
- If such services are performed by a member of the Audit Team, using a partner or senior staff member with appropriate expertise who is not a member of the Audit Team to review the work performed.

...

### *Taxation Services*

...

290.182 Performing certain tax services creates self-review and advocacy threats. The existence and significance of any threats will depend on factors such as (a) the system by which the tax authorities assess and administer the tax in question and the role of the Firm in that process, (b) the complexity of the relevant tax regime and the degree of judgment necessary in applying it, (c) the particular characteristics of the engagement, and (d) the level of tax expertise of the client's employees.

...