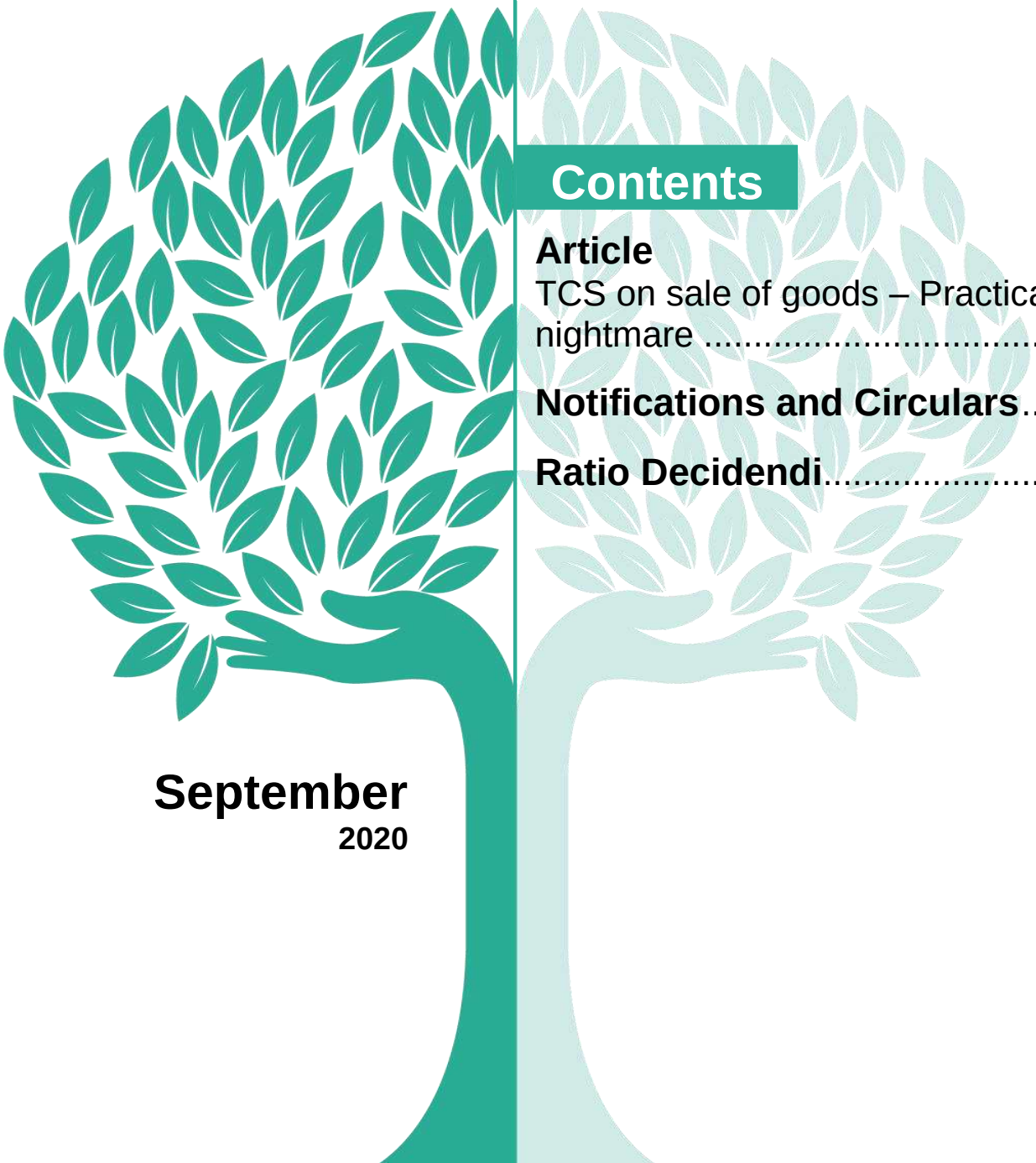
Lakshmikumaran & Sridharan attorneys

Direct Tax

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

September 2020 / Issue–72



Contents

September
2020

Article

TCS on sale of goods – Practical nightmare

By **S Sriram**

Introduction

Sub-section (1H) introduced in Section 206 of the Income-tax Act, 1961 ('IT Act') by the Finance Act, 2020, seeks to extend the ambit of Tax Collection at Source ('TCS') to consideration received from sale of goods. Though the scheme seems harmless, given that the tax to be collected at source is currently proposed to be just 0.1% of the consideration from sale of goods in excess of INR 50 Lacs, it is not uncommon for the Government to magnify the rates manifold in future years to augment revenue collection, if the scheme is found effective. Be it as it may, this article seeks to address certain practical issues that would be faced by tax payers.

'Goods' meaning of

Though the section seeks to provide for collection of tax on sale of 'goods', the IT Act does not define the word 'goods'. Article 366(12) of the Constitution defines goods to include all materials, commodities, and articles. This is an inclusive definition and does not throw much light on the meaning of the word 'goods'. Section 2(7) of Sale of Goods Act, 1930 defines 'goods' to *inter alia* mean every kind of movable property other than actionable claims and money and includes stocks and shares. On the other hand, Section 2(52) of the Central Goods and Services Tax Act, 2017 ('CGST Act'), defines the word 'goods' to include every movable property except money and securities[1], *but includes actionable claims*[2].

If the definition of 'goods' as contained in the Sale of Goods Act is adopted in the IT Act, consideration received on sale of stocks and shares would be subject to TCS, and consideration for sale actionable claims would be outside the purview of TCS. On the other hand, if the meaning of 'goods' as contained in CGST Act is adopted in the IT Act, consideration received on sale of securities would be outside the purview of TCS, but consideration for sale o actionable claims would be subject to TCS.

The Sale of Goods Act is a law enacted to codify the law relating to sale of goods, and hence contains natural meaning of the word 'goods'. On the other hands, the CGST Act is a taxing statute, seeking to levy tax on the transaction of sale of goods. The CGST Act thus contains an artificial meaning of the word 'goods', so as to enlarge the collection of tax, rather than providing the commercial parlance meaning of the word 'goods'. The expression 'sale of goods' is a term of well recognised legal import in the general law. In that sense, the Author believes that the meaning of 'goods' to be used in the IT Act must be derived from the Sale of Goods Act,

[1] The word 'securities' is defined in Section 2(h) of the Securities Contracts (Regulation) Act, 1956, to include inter alia shares, stocks, bonds, debentures, derivatives, unites of mutual fund, rights or interests in securities, etc.

[2] The phrase 'actionable claim' is defined in Section 3(28) of The Transfer of Property Act, 1882 to inter alia means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property.

rather than the CGST Act, as the former contains the natural meaning of the word.

The meaning of the words 'goods' has been judicially interpreted to include shares[3], electricity[4], licenses and scrips[5], canned software incorporated in a media[6], but would not include debentures and other debt instruments[7]. Doubts still exist as to whether the section would cover foreign currencies, forward contracts, derivatives, and other financial instruments.

Point of collection

The event that would trigger the applicability of Section 206C(1H) of the IT Act, is the sale of goods, but the collection of the tax has been fixed as the date on which consideration for the sale is received. It should always be remembered that TCS is a mechanism for collection of tax in advance. The section would therefore have to be interpreted in a manner to make it applicable on a date as close to the date on which taxable income accrues, except when a statutory deviation is made. Questions like whether TCS would have to be collected when money is received in advance, or where the goods were sold before the section came into force and consideration alone is received after 01-10-2020, or whether the section would apply to a non-resident, or whether a number of transactions with a single buyer have to be aggregated, would have to be answered with this crucial point in mind.

Consideration for sale

TCS is to be collected on the 'consideration for the sale'. The phrase would include all indirect taxes collected on the sale[8] and reimbursements of costs. Cash and quantity discounts offered on the sale of goods would be reduced from the consideration for sale of goods, when applying the provisions of this section, provided such reduction in sale price satisfies the definition of "discounts" as held by courts in numerous cases.

When the buyer in unknown

When goods are sold through an exchange (like a commodity exchange or an electricity exchange), the seller of the goods does not generally know the details of the person who bought the goods. Applying the provisions of TCS in such situations would raise practical difficulties. Though it may be possible for the exchange in certain cases to identify the names of the buyer-seller for each transaction through the exchange, the exchanges may explore the possibility of taking over the responsibility of collecting and depositing the TCS on behalf of the sellers for administrative convenience.

Applicability on transactions covered within other section

Section 206(1) of the IT Act seeks to collect tax on consideration receivable on sale of certain specified goods like alcoholic liquor for human consumption, tendu leaves, timber, coal, lignite, iron ore, etc. Clause (1A) of the section however exempts applicability of the section to buyers who procure the goods for manufacturing some other products. Section 206(1F) of the IT Act provides for collection of tax on sale of motor vehicles. TCS would however not apply on sale of vehicles by a manufacturer to a dealer. Section 206(1H) of

[3] *Vadilal Sarabhai* v. *Manekji Pestonji Bharucha,* (1923) 25 BomLR 414, decided in the context Indian Contract Act, 1872, before the Sale of Goods Act, 1930 was introduced.
[4] *Karnataka Power Transmission Corporation* v. *Ashok Iron Works Pvt. Ltd.,* (2009) 3 SCC 240, decided in the context of Consumer Protection Act, 1986.
[5] *Vikas Sales Corporation* v. *Commissioner of Commercial Taxes,* (1996) 4 SCC 433.
[6] *Tata Consultancy Service Ltd.* v. *State of Andhra Pradesh,* (2004) 137 STC 620 (SC).
[7] *R D Goyal* v. *Reliance Industries Ltd.,* (2003) 1 SCC 81, decided in the context of Monopolies and Restrictive Trade Practices Act, 1969.

[8] *Vinod Rathore* v. UOI, [2005] 278 ITR 122 (MP); *Paprika Ltd.* v. *Board of Trade*, [1944] 1 All ER 372 (KB).

the IT Act provides for collection of TCS on sale of goods, other than the goods referred to in clause (1) or (1F) of Section 206(1A). An interpretation that goods excluded under sub-section (1A) would now be covered within sub-section (1H) of the section, does not seem to the reflect the correct legal position. In other words, a mining company selling coal to a power generating company would be exempted from collection of tax under sub-section (1), by virtue of sub-section (1A). Once coal is a class of goods covered in sub-section (1), applicability of TCS on sale of coal is expressly excluded from the ambit of sub-section (1A). Such conclusion is irrespective of the fact that the application of sub-section (1) on the transaction was exempted by sub-section (1A).

Conclusion

Given the wide net that the section seeks to cast, the practical difficulties that the operation of the section would create on high value and high volume transactions, and the different interpretations that the general words used in this section can invoke, the Central Board of Direct Taxes would have to come up with necessary clarification/ procedural facilitation so as to increase the ease of doing business.

[The author is a Joint Partner, Direct Tax Team, Lakshmikumaran & Sridharan Attorneys, Mumbai]

Notifications and Circulars

Pension funds – Additional conditions notified to qualify for exemption under Section 10(23FE)

Central Board of Direct Taxes ('CBDT') has prescribed additional conditions for the pension fund to be eligible to avail the exemption of income in the nature of dividend, interest or long-term capital gains arising from an investment made by it in India under Section 10(23FE) of the Income Tax Act, 1961. For the said purpose, Rule 2DB and 2DC have been inserted in the Income-tax Rules, 1962 by Notification No. 67/2020, dated 17-08-2020. Rule 2DB provides for the following additional conditions to be satisfied by the pension fund:

a. It should be regulated by the law of a foreign country under which it is created or established;

b. It is responsible for administering or investing the assets for meeting the statutory obligations and defined contributions of one or more funds or plans established for providing retirement, social security, employment, or any similar compensation to the participants or beneficiaries of such funds or plans;

c. Its earnings and assets are used only for meeting statutory obligations and defined contributions for participants or beneficiaries of funds or plans;

d. It does not undertake any commercial activity whether within or outside India;

e. It shall intimate the details in respect of each investment made by it in India on quarterly basis in Form No. 10BBB;

f. It shall file return of income within the due date specified under Section 139(1) and furnish along with such return a certificate in Form No. 10BBC from an accountant.

Further, Rule 2DC lays down the guidelines for notification under sub-clause (iv) of clause (c) of Explanation to Section 10(23FE). For the purpose of this rule, the pension fund shall make an application in Form No.10BBA enclosing relevant documents and evidence to the authorities mentioned therein. The Pr. Director General (Systems)/ Director General (Systems) shall lay down the data structure, standards and procedure of furnishing and verification of Form No. 10BBB and Form No. 10BBC and shall be responsible for formulating and implementing appropriate security, archival and retrieval policies in relation to the said forms so furnished.

Banks to refund charges collected, from 01-01-2020, on prescribed electronic modes under Section 269SU

Section 269SU of the Income Tax Act provides that every person having a business turnover of more than Rs. 50 crores during the previous year is required to provide facilities for accepting payments through prescribed electronic modes ('e-modes'). Further, Section 10A of the Payment and Settlement Systems Act 2007 ('PSS Act') provides that no bank or system shall impose any charges on a payer making payment, or a beneficiary receiving payment, through e-modes prescribed Section 269SU.

The CBDT had *vide* Circular No. 32/2019, dated 30-12-2019 clarified that any charge including the MDR (Merchant Discount Rate) shall not be applicable on or after 01-01-2020 on payments made through prescribed e-modes. However, some banks have been imposing and collecting charges on transactions carried out through UPI, which is a breach of Section 10A of the PSS Act and Section 269SU of the IT Act.

Accordingly, the banks have been advised to immediately refund the charges collected, if any, on or after 01-01-2020 on transactions carried out using the e-modes prescribed under Section 269SU and not to impose charges on any future transactions carried through the said prescribed modes. Circular No. 16/2020, dated 30-08-2020 has been issued for the purpose.

Faceless Assessment Scheme – Guidelines for implementation of issued

In view of the Faceless Assessment Scheme, the CBDT has notified National e-Assessment Center (NeAC) and various Regional e-Assessment Centers (ReACs). Though the ReACs will perform the functions relating to assessment and verification, but all the communications from the department will be in the name of NeAC. Broadly, the functions to be performed by the ReAC are-

a. Assessment proceedings under Section 143, 144, 148 read with 143(2)/ 142(1);

b. Verification related to assessment and centralized dissemination of information by the Directorate of Systems;

c. Review of draft orders;

d. Technical support; and

e. Passing and dispatch of the final orders by the NeAC.

The Pr. CCsIT have been notified as the cadre controlling authority in respect of all field formations in their area of jurisdiction. Functions like taxpayer outreach and taxpayer education and facilitation, rectification proceedings, audit functions, judicial functions, statutory powers under Section 263/ 264 of the Income Tax Act, prosecution and compounding proceedings, and administrative functions will be performed by Pr. CCsIT.

Ratio Decidendi

Capital gains on compulsory land acquisition would be taxable in the year of awarding of compensation

The assessee was allotted certain evacuee land in lieu of its property left in Pakistan due to partition in 1947. However, substantial part of the said land was leased to a college by the original evacuee owner. Upon expiry of lease, the college made an application for compulsory acquisition of the subject land pursuant to which it was acquired by the Government in 1968 and finally an award was made in 1970. Though the assessee contended that the capital gains arose in the year in which the notification was passed (i.e. AY 1969-70), but the AO held that the same was taxable in the year in which the award was received (i.e. AY 1971-72).

On appeal, the Supreme Court noted that the capital gains shall be deemed to have accrued: (1) upon making of the award, in case of ordinary acquisition; and (2) after expiry of 15 days from the date of publication of notification, in case of urgent acquisition.

It held that in the present case, since the land was compulsorily acquired by following the ordinary method, the capital gains would have accrued upon taking over of possession after making of the award, i.e. not before 29-09-1970 (being the date of award). The Court also rejected the assessee's contention that the land was already in possession of the beneficiary of such compulsory acquisition and thus the land vested in the Government immediately upon issuance of notification. For this, it relied on multiple rulings rendered in the context of Transfer of Property Act, 1882, to hold that even if the said college was going to be the ultimate beneficiary of the acquisition, it could not be said that immediately upon issuance of notification for acquiring the land, the possession of the college became the possession of the Government. [*Raj Pal Singh* v. *Commissioner* - Order dated 25-08-2020 in Civil Appeal No. 2416/2010, Supreme Court]

Exchange of shares held as stock-in-trade to be taxable as business income

Nalwa Investment Limited ('Nalwa') held shares of Jindal Ferro Alloy Ltd. ('JFAL'). During the year under consideration, JFAL got amalgamated into Jindal Strips Ltd. ('JSL'). As part of the amalgamation, Nalwa transferred its shares in JFAL in *lieu* of receipt of shares of JSL and claimed that the amalgamation was exempt from capital gains tax under Section 47(vii) of the Income Tax Act, 1961.

During the course of assessment, the AO held that the difference between the market value of the shares of JSL and book value of the shares held in JFAL was taxable as business income. The AO noted that the since the shares were held as stock-in-trade and not as capital asset, the assessee was not entitled to the exemption under Section 47(vii).

The Delhi High Court held that the transfers which are exempt from tax under Section 45, nevertheless qualify to be 'transfer'. Thus, the receipt of shares in JSL in exchange for shares of JFAL constituted a 'transfer'. Applying the ratio of *Grace Collis (SC),* the Court held that the exchange should constitute transfer on the basis that such exchange resulted in 'extinguishment of shares' which forms a part of the definition of 'transfer' under Section 2(47). It also held that in case, a 'transfer' is not taxable by virtue of Section 47(vii), its taxability would be governed by Section 28, and accordingly, income arising out of 'transfer' of stock-in-trade should be chargeable to tax under the head 'profits and gains from business and profession'. [*Commissioner* v. *Nalwa Investment Ltd.* - (2020) 118 taxmann.com 278 (Del)]

Interest paid to creditors allowable under Section 57 on establishment of nexus between interest earned and expended; Indexation benefit on long term capital gains available while arriving at book profits under Section 115JB

The assessee was incorporated as a Special Purpose Vehicle for restructuring of a company, with the aim to manage the surplus arising on sale of non-manufacturing and liquid assets and subsequent disbursement of the liabilities. In order to cover the cost of interest payable to the creditors for the unpaid period, the assessee invested surplus funds in fixed deposits and earned interest, which were offered to tax after claiming interest paid to creditors under Section 57 of the Income Tax Act, 1961. During assessment, the AO disallowed the claim under Section 57, of interest paid to the creditors, treating it as capital expenditure. The AO also invoked the provisions of Section 115JB and assessed the assessee on book profits without giving the benefit of indexation on the cost of capital asset sold during the year.

Relying on the decisions of the Supreme Court, the High Court noted that it was evident that the 'purpose' of expenditure was relevant in determining the applicability of Section 57(iii) and that the 'purpose' must be for making/earning income. The High Court concluded that "*there was a nexus between the interest paid to the creditors on the unpaid balance and interest earned on the deposits*" and thus held that the interest expenditure was incurred wholly and exclusively for the purpose of earning the interest income. It held that therefore, the assessee was entitled to deduction of the interest income under Section 57.

As far as the benefit of indexation is concerned, the High Court noted that by virtue of Section 115JB(5), the application of other provisions of the Income Tax Act was open, except if specifically barred by the section itself. The difference between the sale consideration and indexed cost of acquisition represents the actual income of the assessee, which is taxable as per Section 45. The Court observed that since there was no provision in the Income Tax Act to prevent the assessee from claiming indexed cost of acquisition on the sale of asset in case where the assessee was subjected to Section 115JB, the assessee would be entitled to claim the benefit of indexation. [*Best Trading & Agencies Ltd* v. *DCIT* – Order dated 26-08-2020 in ITA No. 191/2011 & 32/2012, Karnataka High Court]

Denial of TDS credit without assigning reasons in intimation under Section 143(1) is not sustainable

For the year under consideration, the assessee received certain payments in advance for rendering services. In the return of income, only such portion of income which pertained to the particular year was recognized along with corresponding TDS and that the balance amount was shown as deferred revenue on the liability side of the balance sheet. The assessee had also carried forward TDS credit from the previous period which pertained to services rendered in subsequent years. This brought forward credit was also claimed by the assessee in his return. *Vide* intimation under Section 143(1), the corresponding TDS brought forward by the assessee was not allowed.

The ITAT noted that the intimation not only does not speak of the reasons for the impugned disallowance, it also does not appear to be the result of any due examination of the issue by the AO. It further noted that in absence of a speaking order, not only the assessee does not know the reason for disallowance, but at the same time the higher forums would also be unable to appreciate the legality otherwise of such an act of disallowance. Accordingly, the ITAT held that the impugned disallowance of credit of TDS under intimation under Section 143(1) suffers legal irregularity and cannot be sustained. [*AWP Assistance (India) Pvt. Ltd.* v. *DCIT* – Order dated 07-08-2020 in ITA No. 5128/2018, ITAT Delhi]

Renovation expenses on 'new house' amounts to construction and hence eligible for deduction under Section 54F

Assessee, being a co-owner of a plot of land sold the same and claimed exemption under Section 54F of the capital gains on purchase of a residential house in the same year. Some balance amount was deposited in the Capital Gains Scheme Account. During assessment, the AO observed that the assessee had claimed to have utilized the amount deposited to renovate the existing residential unit. Noting that the extension of the existing residential unit may not amount to investment in a new residential house, the AO disallowed the claim of exemption under Section 54F.

The ITAT observed that Section 54F only mandates that the capital gain should be invested in 'a residential house' within the stipulated time by way of purchase or construction. Thus, the amount spent on renovation of existing residential house by the assessee would also be allowable as exempt under Section 54F as it would amount to construction of a residential house, as long as the construction is completed within three years from the date of transfer of the original asset. The issue was remitted back to the file of AO with directions to allow the exemption under Section 54F in respect of the cost of the house, as well as the amount spent on renovation/re-modification of the house. [*Juveria Begum & Ors.* v. *ITO* – Order dated 04-09-2020 in ITA No. 2224/2018, 2972019, 298/2019 & 340/2019, ITAT Hyderabad]

Power to rectify an order not to be exercised when issue highly debatable

The assessee-HUF, for AY 2012-13, claimed deduction under Section 54B of the Income Tax Act, 1961. During assessment, the AO disallowed certain expenses incurred on transfer of land but allowed the deduction under Section 54B. Later, the AO passed an order under Section 154 rejecting the claim of deduction under Section 54B, observing that an HUF was not entitled to claim the said deduction in AY 2012-13, and could claim the deduction only from AY 2013-14 onwards, which is when the amendment to the section came in force.

The ITAT noted that it was a highly debatable issue whether the word 'assessee' in the pre-amendment provisions meant an individual only or would include an 'HUF' as well. Post amendment, the term 'assessee' was qualified with the words 'being an individual, or his parents, or a HUF'. Thus, even before the amendment, the term 'assessee' could mean an individual as well as an HUF. The ITAT further noted that amendment is in respect of the 'user' of land and not in respect of the claimant-assessee. The ITAT thus held that since the issue was highly debatable and needed lengthy arguments, the powers under Section 154 cannot be exercised to reject or admit such claim. [*Sandeep Bhargava HUF* v. *DCIT* – Order dated 06-07-2020 in ITA No. 43/2019, ITAT Chandigarh]

NEW DELHI
5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Phone : +91-80-49331800
Fax:+91-80-49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURUGRAM
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
Phone : +91-124-477 1300
E-mail : lsgurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@laskhmisri.com

JAIPUR
2nd Floor (Front side),
Unique Destination, Tonk Road,
Near Laxmi Mandir Cinema Crossing,
Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com