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## Contents

### Article

Implementation of Significant Distortions Methodology by EU in original anti-dumping investigations – Who's next after China? ..... 2

### Trade Remedy News

Trade remedy measures by India ..... 6

Trade remedy measures against India 7

WTO News ..... 7

### India Customs & Trade Policy

Update..... 9

Ratio Decidendi..... 10

July  
2020



## Article

### Implementation of Significant Distortions Methodology by EU in original anti-dumping investigations – Who's next after China?

By **Vikrant Nehra**

The European Union ('EU') amended the EU Regulation 2016/1036 of 8-06-2016 (the 'Basic Anti-Dumping Regulation') on 12-12-2017 through which it introduced Article 2(6a).<sup>1</sup> The European Commission ('Commission') concluded in the expiry reviews of anti-dumping duty from China initiated after 20-12-2017<sup>2</sup> that there were significant distortions in prices and costs and therefore, the normal value cannot be determined based on domestic prices and costs in China.<sup>3</sup>

Significant distortions methodology on imports from China as per Article 2(6a) has been applied in three original anti-dumping investigations namely, (i) *Steel Road Wheels*<sup>4</sup>, (ii) *Glass Fibre Fabrics*<sup>5</sup> and (iii) *Hot Rolled Stainless Steel Sheets and Coils*<sup>6</sup>.

In *Steel Road Wheels from China*, Government of China ('GOC') did not submit questionnaire response. Some of the key observations made by the Commission regarding the existence of significant distortions are as below:

- i. Both public and private companies in the steel sector are subject to policy supervision and guidance of the GOC. Because of the high level of government intervention and share of State-Owned Enterprises ('SOEs') in the steel sector, even the private enterprises are not able to operate under market economy conditions. There is also significant control of the State in the raw material market of hot-rolled flat steel ('HRS');
- ii. Major steel producers are owned by the State. Public documents of State-owned producers like Baoshan Iron & Steel (or Baosteel) and SAIC Motor have shown the intervention of GOC in both steel and automotive sectors;
- iii. The Policy on Development of Automotive Industry provides for a foreign shareholding restriction in auto manufacturing joint ventures;
- iv. The steel road wheels producers are also affected by the discriminatory

<sup>1</sup> See Introduction of Significant Distortions Methodology in the EU's anti-dumping laws, available at:

<https://www.lakshmisri.com/insights/articles/introduction-of-significant-distortions-methodology-in-the-eu-s-anti-dumping-laws/>

<sup>2</sup> The date of entry into force of amended EU Regulation 2016/1036.

<sup>3</sup> See Implementation of Significant Distortions Methodology by EU in review of anti-dumping duty on exports from China, available at:

<https://lakshmisri.com/insights/articles/implementation-of-significant-distortions-methodology-by-eu-in-review-of-anti-dumping-duty-on-exports-from-china/#>

<sup>4</sup> Commission Implementing Regulation (EU) 2020/353 of 3 March 2020 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of steel road wheels originating in the People's Republic of China (OJ L 65, 4.3.2020, p. 9).

<sup>5</sup> Commission Implementing Regulation (EU) 2020/492 of 1 April 2020 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt (OJ L 108, 6.4.2020, p. 1).

<sup>6</sup> Commission Implementing Regulation (EU) 2020/508 of 7 April 2020 imposing a provisional anti-dumping duty on imports of certain hot rolled stainless steel sheets and coils originating in

Indonesia, the People's Republic of China and Taiwan (OJ L 110, 8.4.2020, p. 3).

- application or inadequate enforcement of bankruptcy and property laws. For example, HRS producers benefit from the provision of land at less than adequate remuneration and the role of the State in directly influencing the outcome of bankruptcy proceedings;
- v. China has not ratified many essential conventions of the International Labour Organisation ('ILO'). Workers who do not possess the local residence registration receive a lower income than the holders of the residence registration because of which the wage costs are distorted;
  - vi. The raw material HRS benefitted from preferential lending. Artificially low-interest rates by the banks result in under-pricing and excessive utilisation of the capital.

Thus, the Commission concluded that the prices or costs in China suffers from significant state intervention and it is not appropriate to use domestic prices and costs to establish normal value. Brazil was considered as the appropriate representative third country for constructing the normal value.

In *Glass Fibre Fabrics from Egypt and China*, the presence of significant distortions was alleged against Egypt as well, but its presence was only found in China by the Commission. The Commission in this investigation also used the facts available as no reply was received from the GOC. Following are the key observations made by the Commission regarding the existence of significant distortions:

- i. The State has significant shares in both CNBM Group and Yuntianhua Group which covers 68 % of the total production capacity in China of glass fibre fabrics and glass fibre rovings

- (‘GFR’), the main raw materials to produce glass fibre fabrics;
- ii. Based on the Articles of Association of the exporting producers and other confidential documents, State’s presence and influence was found in the producing companies;
- iii. Glass fibre fabrics industry is treated as an important industry supported by the GOC which was evident from various plans of the GOC such as the 13<sup>th</sup> Five-Year Plan for Fibre and Composite Materials Industry and the Made in China 2025 initiative. This results in advantages to the glass fibre fabrics industry stemming from the support mechanisms like Financial Support Policies and Fiscal & Taxation Policy;
- iv. Bankruptcies are very low and the role of the State in insolvency proceedings is very strong;
- v. The wage costs are distorted as the full access to the social security system is limited to local residents. Other employees and workforce remain vulnerable and receive lower income. This is particularly of great significance as labour accounts between 5 % and 25 % of the total cost of production in the glass fibre fabrics;
- vi. The GFR producers in China benefitted from preferential loans, both from State-owned banks and from private banks. The exporting producers borrow significant amounts from banks and potentially benefit from the preferential policies of the GOC.

Producer/exporter from China, Taishan Fiberglass Inc contended that the report on significant distortions in the economy of China which has been relied on by the Commission at various instances does not has a specific chapter on the glass fibre sector and is also outdated as it was published in December 2017. The Commission rejected these claims as the report describes different types of distortions present in China which are cross-cutting and applicable throughout the Chinese economy including to the glass fibre sector.

As a result, the Commission concluded that there exists significant distortions of prices and costs in China. The Commission considered Turkey as the appropriate representative third country for the construction of the normal value instead of using the domestic prices and costs prevailing in China.

In *Hot Rolled Stainless Steel Sheets and Coils from Indonesia, Taiwan and China*, significant distortions within the meaning of Article 2(6a) of the Basic Anti-Dumping Regulation were only found in China. The Commission used the facts available because no questionnaire response was received from the GOC. Some of the key observations made by the Commission regarding the existence of significant distortions are as below:

- i. The major stainless steel producers are SOEs, for example, TISCO, Baosteel, Ansteel Lianzhong, Jiujuan Iron and Steel and Tangshan. Most of the fixed asset investment has been organised by the GOC and its SOEs, both of which have displayed higher investment growth than the private sector;
- ii. The GOC has a presence in the stainless steel enterprises for example in TISCO, the Deputy Secretary of the

Chinese Communist Party ('CCP') Committee was also nominated the as the President of TISCO by a decision from the Shanxi Province CCP Committee and Government;

- iii. The steel sector is an important sector of the Chinese economy. There are numerous plans and directives in place to induce operators to comply with the public policy objectives of the State that impede market forces from operating normally;
- iv. The producers of hot rolled stainless steel sheets and coils are subject to the ordinary rules on Chinese bankruptcy, corporate, and property laws that suffers from distortions arising from the discriminatory application or inadequate enforcement of such laws;
- v. Conventions of the ILO are not ratified. Full access to the social security system is limited to local residents. Other employees and workforce remain vulnerable and receive lower income. The steel sector is subject to the same set of labour laws as all other enterprises. This results in wage cost distortion;
- vi. Chinese credit ratings correspond to lower international ratings. Bad debt has been handled by rolling over debt, thus creating the so-called 'zombie' companies, or by transferring the ownership of the debt.

Therefore, the Commission preliminarily concluded that because of the significant distortions of costs and prices in China, the domestic costs and prices cannot be used for determining the normal value. Brazil was

considered as the appropriate representative third country for constructing the normal value.

It is also important to note that the scope of another amendment *vide* Article 7(2a) of the Basic Anti-Dumping Regulation, which provided for the suspension of lesser duty rule has not been invoked in the aforementioned three anti-dumping investigations. Suspension of lesser duty rule is subject to specific conditions i.e. only when there is existence of raw material distortion through (i) dual pricing schemes, export taxes, export surtax, export quota and other such measures under (2a). and (ii) a single raw material, for which a distortion is found, account for not less than 17 % of the cost of production of the product concerned, Article 7(2a) can be invoked. Moreover, a Union interest test should also be carried out before suspending the application of lesser duty rule.<sup>7</sup>

Examination of these anti-dumping investigations show that while individual producers/exporters continue to register their participation, there is no opposition/response from the GOC during the anti-dumping investigations to avoid the application of the significant distortion methodology. As a result, exports from China effectively face the same treatment to that of a non-market economy country in the ongoing anti-dumping investigations and are subject to a higher rate of anti-dumping duty by the EU. However, the suspension of lesser duty rule has not been implemented in case of imports from China. Its application may not be imminent due to relatively stringent conditions attached to it.

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<sup>7</sup> Article 7(2b) of the Basic Anti-Dumping Regulation. In *Hot Rolled Stainless Steel Sheets and Coils from Indonesia, Taiwan and China*, the requirements of Article 7(2a) were met against Indonesia and China, however, the lesser duty rule was still applied as it was not in the Union's interest to impose the duty equivalent to the dumping margin because of the negative effect it would have had on the supply chains for the Union companies.

It is also of relevance to note that on 15<sup>th</sup> June 2020, the work of the WTO Panel that was established to examine the consistency of erstwhile EU provision regarding non-market economy treatment to China i.e. under Articles 2(1) to 2(7) of the Basic Anti-Dumping Regulation, was also allowed to lapse. China requested for suspension of the work of the WTO Panel in June 2019 and has now allowed it to continue for more than 12 months, which has caused the authority for the establishment of the WTO Panel to lapse. There is also no renewed challenge by China before the WTO Dispute Settlement Body ('DSB') against the state distortion methodology 'as such' or against individual instances of its application by the EU in different anti-dumping investigations.

It appears that China, who was swift in initiating WTO Dispute against the EU upon expiration of Paragraph 15(a)(ii) of Protocol on the Accession of the People's Republic of China ('Accession Protocol') on 11 December 2016, is now reserved about its opposition on the contentious issue of continued non-market economy and similar discriminatory treatment to its exports by the EU. It requires to be seen if the application of the significant distortions methodology will be applied only against China or it will be extended to other countries as well.<sup>8</sup>

**[The author is an Associate in International Trade Practice, Lakshmikumaran & Sridharan, New Delhi]**

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<sup>8</sup> . For example, if countries which were originally considered as non-market-economy countries by the EU are also subjected to the significant distortions methodology i.e. Albania, Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Mongolia, North Korea, Tajikistan, Turkmenistan and Uzbekistan.

## Trade Remedy News

### Trade Remedy actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Aluminum Wire/Wire Rods above 7 mm dia	Malaysia	F. No. 6/3/2020	30-06-2020	Anti-subsidy/ countervailing duty investigation initiated
Fluoroelastomers (FKM)	China	19/2020-Cus. (ADD)	21-07-2020	Anti-dumping duty extended till 27-10-2020
Phenol	South Africa	18/2020-Cus. (ADD)	09-07-2020	Anti-dumping duty extended till 09-01-2021
Phthalic Anhydride	Korea RP	29/2020-Cus.	06-07-2020	Provisional bilateral safeguard duty imposed by increasing rate of duty of customs under the India-Korea Comprehensive Economic Partnership Agreement
Polybutadiene Rubber	Korea RP	31/2020-Cus.	13-07-2020	Provisional bilateral safeguard duty imposed by increasing the rate of duty of customs under the India-Korea Comprehensive Economic Partnership Agreement
Solar Cells whether or not assembled in modules or panels	-	F. No. 22/1/2019-DGTR	18-07-2020	Final Findings of the review of safeguard duties investigation recommend continuation of measures for one year
Steel and Fibre Glass Measuring Tapes and their parts and components	China PR	17/2020- Cus. (ADD)	08-07-2020	Definitive anti-dumping duty continued after sunset review
Viscose Rayon Filament Yarn above 60 deniers	China PR	F. No. 6/26/2020-DGTR	20-07-2020	Anti-subsidy/ countervailing duty investigation initiated

## Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Commodity Matchbooks	United States of America	85 FR 41558 [C-533-849]	10-07-2020	Affirmative final results of second expedited sunset review of Countervailing Duty Order
Forged Steel Fluid End Blocks	United States of America	85 FR 44517 [A-533-893]	23-07-2020	Preliminary negative determination of sales at less than fair value
Oil country tubular goods	Canada	Canada Border Services Agency Publication [OCTG2 2020 ER]	23-07-2020	Expiry review finding of continuation or resumption of dumping
Pre-stressed Concrete Steel Wire Strand	United States of America	85 FR 38846 [C-533-829]	29-06-2020	Affirmative final results of expedited sunset review of Countervailing Duty Order



## WTO News

### Indian tariffs on ICT products – Panel established at European Union’s request

The Dispute Settlement Body of the WTO has on 29-06-2020 accepted European Union’s request to establish a Panel to examine India’s tariff on certain high-tech goods (Information and communication technology products). The European Union reiterated that India had taken the commitment not to apply import duties on the ICT products in question but for several years India has adopted measures to reinforce and regularly increase import duties on those

products, up to 20 per cent. India, on the other hand, stated that the EU seeks to take advantage of an error made by India when transposing its tariff lines to an updated Harmonized System (HS) and oblige India to accept commitments under the expanded Information Technology Agreement (ITA-II) to which it had never agreed. According to India, the complaint goes beyond the consent India provided when it agreed to accept the first ITA agreement (ITA-I). EU’s request for a single panel to review the complaints filed by the EU, Japan and Chinese Taipei, was also rejected by India.

## India-USA poultry dispute – Arbitrator’s decision again postponed, this time till 21-01-2021

India and USA have on 15-07-2020 again requested the arbitrator to postpone issuance of its decision in the dispute *India - Measures Concerning the Importation of Certain Agricultural Products* (DS430). Earlier, following the United States’ request to the DSB for authorization to suspend concessions or other obligations in accordance with Article 22.2 of the DSU and India’s objection to the United States’ proposed level of suspension of concessions or other obligations, the matter was referred to arbitration, as required by Article 22.6 of the DSU, on 19 July 2016. As per document circulate in WTO on 27-07-2020, this is the twelfth request by the parties and the arbitrator will now issue its decision on 21-01-2021. It may be noted that the USA had in 2012 requested consultations with India with respect to the prohibitions imposed by India on the importation of various agricultural products (poultry products) from the USA purportedly because of concerns related to Avian Influenza. The Appellate Body had on 04-06-2015 upheld the Panel’s Report holding that the Indian measures were inconsistent various provisions of the WTO’s Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

## European Union’s ‘Cost Adjustment Methodology’ held inconsistent with WTO provisions

WTO Panel has in its report dated 24-07-2020 held that European Union’s Cost Adjustment Methodology for construction of normal value, was inconsistent with Article 2.2 of the Anti-Dumping Agreement since it provided for the use of out-of-country input price information without explaining how such information was adequate to represent the costs of production in the country of origin. The Panel in its report in the dispute *European Union — Cost Adjustment*

*Methodologies and Certain Anti-Dumping Measures on Imports from Russia — (Second complaint)*” (DS494), was also of the view that the Methodology was inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, by providing for the rejection of the costs reflected in the records of the exporter or producer under investigation in a manner inconsistent with the second condition in the first sentence of Article 2.2.1.1. It noted that Russia had established the existence of the Cost Adjustment Methodology as a measure of general and prospective application attributable to the European Union.

## Peru initiates complaint against Brazil’s PET duties and tax treatment of imports

Peru has on 15-07-2020 requested WTO dispute consultations with Brazil about the anti-dumping measures imposed by the latter on imports of biaxially oriented polyethylene terephthalate (PET) film and the tax treatment on industrialized products. Peru alleges that the measures in question appear to be inconsistent with Articles III and VI of the GATT 1994 and with the Anti-Dumping Agreement.

## Columbian duties on fries from Belgium, Germany and Netherlands – Panel established at EU’s request

The Dispute Settlement Body of the WTO has on 29-06-2020 agreed to establish a Panel to examine Colombia’s anti-dumping duties on frozen fries from Belgium, Germany and the Netherlands. According to the EU, it had serious concerns relating to nearly all aspects of the dumping investigation and proceeding. Columbia however maintained that it acted in strict adherence with WTO rules. India along with Japan, the United States, China, Turkey, Russia, Honduras and Brazil have reserved their third-party rights to participate in the proceedings.





## India Customs & Trade Policy Update

### Contactless Customs – *Turant Suvidha Kendra* and other initiatives by Customs

CBIC has extended the facility of *Turant Suvidha Kendras* to all the Customs formations for carrying out various functions as specified in its Circular dated 05-06-2020 issued earlier to provide for setting up of such *Kendras* in Bengaluru and Chennai for the purpose of implementation of 1st phase of Faceless Assessment. Further, CBIC has enabled, w.e.f. 06-07-2020, certain functionalities in ICEGATE which would reduce the need for physical interaction between Customs and trade and also speed up the Customs clearance process. As per Circular No. 32/2020-Customs, dated 06-07-2020, the new facilities will allow registration of Authorised Dealer Code and Bank Accounts through ICEGATE, automated debit of bond after assessment, and simplified registration of importers/exporters in ICEGATE.

### Sunset review of countervailing duty – DGTR issues guidelines and procedure for applications

Directorate General of Trade Remedies (DGTR) has on 24-07-2020 issued guidelines and procedure for filing applications for sunset review of countervailing duty measures. As per Trade Notice No. 4/2020, the domestic industry must file the petition seeking extension to continue the anti-subsidy measures at least 270 days prior to the date of expiry of such measures. The Designated Authority can however accept the petition till 180/120 days before the expiry, subject to conditions. The DGTR will then point out the deficiencies within 15 days which need to be rectified by the domestic industry within 5

days. Final findings will be issued at least 45 days prior to the expiry of existing anti-subsidy duty. The Trade Notice also lists the information that the petitioner needs to provide regarding likelihood and recurrence under appropriate sections of subsidy and injury, respectively.

### All Industry Rates of Duty Drawback – Changes effective from 15-07-2020

Ministry of Finance has made certain changes in the All Industry Rates (“AIRs”) of Duty Drawback which are effective from 15-07-2020. As per CBIC Circular No. 33/2020-Cus., dated 15-07-2020, while AIRs/caps of duty drawback have been enhanced for certain footwear items made of leather covered under Chapter 64 and gold jewellery covered under Chapter 71, rates of drawback have been rationalised for silver jewellery/articles covered under Chapter 71. Further, description of TIs 870301, 870303, 870305 and 870307 pertaining to motor cars of various engine capacities with Manual Transmission (“MT”) has been changed. Accordingly, the change in description will allow motor cars with Automated Manual Transmission (“AMT”) to claim the same AIRs of duty drawback as given to motor cars with MT. Notification No. 56/2020-Cus. (N.T.), dated 13-07-2020 has been issued to amend Notification No. 7/2020-Cus. (N.T.), effective from 15-07-2020.

### Personal protection equipment (PPE) and masks – Export Policy revised

The export of the following types of personal protection equipment (PPEs), either as part of kits or individual items, falling under ITC HS Codes 901850, 901890, 9020, 392690, 621790 and 630790, is prohibited:

- Medical coveralls of all classes/categories,
- Medical goggles,
- All masks other than non-medical/non-surgical masks (cotton, silk, wool, polyester, nylon, rayon, viscose – knitted, woven or blended).
- Nitrile/NBR Gloves,
- Face Shield.

It may be noted that though the above-mentioned prohibitions were introduced by Notification No.14/2015-2020, dated 22-06-2020, Notification No. 20/2015-20, dated 21-07-2020 removes from prohibition surgical drapes, isolation aprons, surgical wraps and X-Ray gowns under the medical coveralls of all classes and categories. It may be noted that export of PPE medical coveralls for COVID-19 was also made restricted (earlier prohibited) by Notification No.16/2015-2020, dated 29-06-2020, with a monthly export quota of 50 Lakh PPE medical coveralls for COVID-19. Trade Notice No. 18/2020-21, dated 20-07-2020 lays down the procedure and criteria for submission and approval of applications for export of PPE medical coveralls for COVID-19. Procedure for export of samples of PPE medical

coveralls for COVID-19 is prescribed in DGFT Trade Notice dated 21-07-2020.

### Power tillers and components – Import Policy revised to ‘restricted’

Import Policy of Power Tiller and its components, covered under HS Code 8432 8020 and 8432 9090, has been amended from ‘free’ to ‘restricted’ with effect from 15-07-2020. A new Policy Condition No. 3 has been added in Chapter 84 of ITC (HS) by Notification No. 19/2015-20, dated 15-07-2020, to also provide for definition of Power Tillers. Further, Public Notice No. 13/2015-20, also of the same date, notifies the conditions and modalities for issuance of authorisations for import.

### Cut flowers – Import policy revised

The import of fresh cut flowers such as roses, carnations, orchids, etc. falling under HS Code 0603 is now permitted only through Chennai airport. Notification No.17/2015-2020, dated 09-07-2020 has been issued for the purpose. It may be noted that Import Policy of cut flowers under HS Code 0603 continues to remain ‘free’.



## Ratio Decidendi

### Anti-dumping duty – Effect of high percentage of price underselling and dumping margin in exports to other countries – CESTAT sets aside DGTR’s recommendation of non-continuation of anti-dumping duty

Anti-dumping Bench of the CESTAT has set aside the recommendations of the Designated Authority in its second sunset review, that

continuation of anti-dumping duty on import of Ductile Iron (DI) pipes from China was no longer required. The CESTAT was of the view that anti-dumping duty on DI pipes needs to continue after the expiry of the period covered by the first sunset review.

Taking note of the Price underselling analysis of the actual exports made by Chinese exporters to other countries such as Turkey, Vietnam and Sri

Lanka, the Tribunal observed that the price underselling percentage was from 27% to 39% and hence the injury margin was likely to be positive if the anti-dumping duty was not extended. It held that the price undercutting would also be positive. Further, it was observed that the margin of dumping was also very high (varying from 50% to 67%) in respect of exports to other specified countries and that it will be difficult for any industry to compete with such a dumped price. The 3-Member Tribunal in this regard also noted that the capacity of the subject goods in China was 3.36 times of the capacity of the Domestic Industry, and that Chinese capacity of the subject goods was 5.1 times and 4.36 times of the demand in India and production of the Domestic Industry respectively. The anti-dumping Bench also noted that various key economic parameters indicated that the health of domestic DI pipe manufacturing industry was showing improvement only after imposition of anti-dumping duty, as the imports from China had become negligible.

Further, relying on Supreme Court decision in the case of *Reliance Industries* [2006 (202) ELT 23 (SC)], it also held that non-disclosure of dumping margin to the appellant by claiming shelter of Rule 7 of Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determining Injury)

Rules, 1995, was not justified and violated the principles of natural justice. [*Jindal Saw Ltd. v. Designated Authority - Final Order No. 50723/2020, dated 14-07-2020, CESTAT Anti-dumping Bench*]

### **Valuation – Import prices as per international journals on date of contract between related parties, acceptable**

CESTAT Ahmedabad has held that the portion of SVB Order, holding that if contemporaneous imports at higher prices by the importers are noticed, valuation may be done under the appropriate provisions of the Valuation Rules, cannot be read in isolation and must be read with Rule 3(3)(a) of the Customs Valuation Rules, 2007. Further, relying on *Dow Chemical International Pvt. Ltd. v. Commissioner* [2008 (226) ELT 420 (Tri- Ahd.)], it held that addition to the value was not correct as the imports were assessed on the contract price corresponding to the internationally prevailing prices as reported in international journals on the date of contract. Revenue had sought to increase the value based on import of identical goods from the same supplier and the same country of origin, at the same bottom cargo from the same port, but assessed at a much higher price. [*Mosaic India Pvt. Ltd. v. Commissioner – 2020 TIOL 998 CESTAT AHM*]

**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](mailto: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](mailto:lsbom@lakshmisri.com)

**CHENNAI**

2, Wallace Garden, 2nd Street  
Chennai - 600 006

Phone : +91-44-2833 4700

E-mail : [lsmds@lakshmisri.com](mailto:lsmds@lakshmisri.com)

**BENGALURU**

4th floor, World Trade Center  
Brigade Gateway Campus  
26/1, Dr. Rajkumar Road,  
Malleswaram West, Bangalore-560 055.

Ph: +91(80) 49331800

Fax:+91(80) 49331899

E-mail : [lsblr@lakshmisri.com](mailto: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](mailto: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](mailto:lsahd@lakshmisri.com)

**PUNE**

607-609, Nucleus, 1 Church Road,  
Camp, Pune-411 001.

Phone : +91-20-6680 1900

E-mail : [lpune@lakshmisri.com](mailto:lpune@lakshmisri.com)

**KOLKATA**

2nd Floor, Kanak Building  
41, Chowringhee Road,  
Kolkatta-700071

Phone : +91-33-4005 5570

E-mail : [lskolkata@lakshmisri.com](mailto:lskolkata@lakshmisri.com)

**CHANDIGARH**

1st Floor, SCO No. 59,  
Sector 26,

Chandigarh -160026

Phone : +91-172-4921700

E-mail : [lschd@lakshmisri.com](mailto:lschd@lakshmisri.com)

**GURUGRAM**

OS2 & OS3, 5th floor,  
Corporate Office Tower,  
Ambience Island,

Sector 25-A,

Gurgaon-122001

phone: +91-0124 - 477 1300

Email: [lsurgaon@lakshmisri.com](mailto:lsurgaon@lakshmisri.com)

**PRAYAGRAJ (ALLAHABAD)**

3/1A/3, (opposite Auto Sales),  
Colvin Road, (Lohia Marg),

Allahabad -211001 (U.P.)

phone . +91-0532 - 2421037, 2420359

Email:[lsallahabad@lakshmisri.com](mailto:lsallahabad@lakshmisri.com)

**KOCHI**

First floor, PDR Bhavan,  
Palliyil Lane, Foreshore Road,  
Ernakulam Kochi-682016

Tel: +91 (0484) 4869018; 4867852

E-mail: [lskochi@lakshmisri.com](mailto:lskochi@lakshmisri.com)

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