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Article

Change of opinion: Whether permissible under the new provisions of reassessment?

By Neha Sharma

The Finance Act, 2021 substituted the provisions of reassessment under the Income-tax Act, 1961. Under the new reassessment provisions, the concept of 'reason to believe' has been substituted with 'information' which suggests that the income has escaped assessment. The 'information' referred to has been exhaustively defined in Explanation 1 to Section 148 of the Income-tax Act. In view of the above referred substitution, the article in this issue of Direct Tax Amicus discusses the question as to whether such 'information' is required to be tested against the concept of 'change of opinion', as was required under the old reassessment provisions. Deliberating on the relevant old and new reassessment provisions, and the meaning of escaped income, the author is of the view that the reopening of an assessment on the basis of change of opinion is still not permissible under the new reassessment provisions. According to her, it was never the intention of the Legislature to permit the Assessing Officer to reopen an assessment on the basis of change of opinion. Stating that it is however yet to be seen as to how the Courts interpret the new provisions, the author notes that the Hon'ble Bombay High Court has recently asked the Revenue to submit a response on whether 'change of opinion' is now permissible for initiating reassessment proceedings.

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Change of opinion: Whether permissible under the new provisions of reassessment?

Introduction

The Finance Act, 2021 substituted the provisions of reassessment under the Income-tax Act, 1961 ('**Act**'). The old reassessment provisions, as they stood prior to the Finance Act, 2021, required the Assessing Officer to have 'reason to believe' that the income has escaped assessment. The 'reason to believe' was judicially interpreted to mean an 'independent belief' of the Assessing Officer, not based on 'borrowed satisfaction' or 'opinion of another authority'. Further, such reason to believe was to be based on 'new tangible material' and not on 'material already available on record'. However, under the new reassessment provisions, the concept of 'reason to believe' has been substituted with 'information' which suggests that the income has escaped assessment. The 'information' referred to has been exhaustively defined in Explanation 1 to Section 148 of the Act.

In view of the above referred substitution, the question is whether such 'information' is required to be tested against the concept of 'change of opinion', as was required under the old reassessment provisions.

Snapshot of the relevant old reassessment provisions

The old reassessment provisions required the Assessing Officer to have 'reason to believe' that the income of the assessee chargeable to tax has escaped assessment for any year, before the issuance of a notice under Section 148 of the Act. Interpreting the 'reason to believe', the Courts[1] have categorically held that the power to reassess is different from the power to review. The Assessing Officer cannot reopen an assessment merely to review the material already examined. Once the Assessing Officer has formed a view on a particular piece of information, the Assessing Officer cannot seek to review the same again because of a change in opinion. There has to be some new tangible material with the Assessing Officer which indicates the income to have escaped assessment.

[1] Like in *Calcutta Discount Co. Ltd.* v. *ITO* [1961] 41 ITR 191 (SC) and *CIT* v. *Kelvinator of India Ltd* [2010] 187 Taxman 312 (SC).

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Snapshot of the relevant new reassessment provisions

Under the new reassessment provisions, the Assessing Officer is required to possess 'information' which suggests escapement of income. The term 'information' has been exhaustively defined under the Act to mean[2]:

- information flagged in the case of the assessee in accordance with the risk management strategy formulated by CBDT; or
- any audit objection that assessment has not been made in accordance with the provisions of the Act; or
- information received under double taxation avoidance agreements; or
- information collected under e-Verification Scheme, 2021; or
- information requiring action in terms of the order of a Tribunal or a Court.

Such information with the Assessing Officer has to suggest that the income of the assessee chargeable to tax has escaped assessment. Thereby, a valid notice under Section 148 reopening the assessment of an assessee can be issued.

The question, therefore, is whether the principle that the reassessment cannot be initiated merely to review the already existing material on account of a change in opinion, is now rendered inapplicable.

Escaped Income – Meaning of

The Act provides for different mechanisms to the Assessing Officer for different stages at which a return of income filed by an assessee can be assessed. Section 143(1) of the Act provides for a summary assessment by the Assessing Officer, allowing correction of arithmetical errors, etc. at this stage. Section 143(3) of the Act provides for full scrutiny of the return, known as original assessment. Section 147 of the Act provides for limited scrutiny to the extent the income of the assessee has escaped assessment, known as reassessment. Thus, to understand the scope of reassessment, it is first imperative to examine the circumstances when an income shall be said to have escaped assessment.

The expression 'escaped assessment' connotes that the income for a particular assessment year went unnoticed by the Assessing Officer and because of it not being noticed by him/ her for any reason, it escaped assessment.[3] Where original assessment has taken place in the case of the assessee, it refers to a situation where the Assessing Officer did not take into consideration a particular information on account of which the resulting income could not be taxed during those proceedings and thus, income escaped assessment. Such a situation has to be distinguished from an original assessment proceeding where the

[2] Explanation 1 to Section 148 of the Act.

[3] *Hum Boldt Wedag India Ltd.* v. *ACIT* [1999] 236 ITR 845 (Cal.) (App.).

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Assessing Officer considers the information and forms a view thereof *albeit* erroneous.

The Hon'ble Supreme Court in *Calcutta Discount Co. Ltd.* v. *ITO* [1961] 41 ITR 191 (SC) held that even if the conclusion drawn by the Assessing Officer from the facts disclosed by the assessee during the course of original assessment is erroneous, the Assessing Officer cannot reopen the assessment to change that erroneous conclusion once reached at.

Further, in *CIT* v. *Kelvinator of India Ltd.* [2010] 187 Taxman 312 (SC), the Hon'ble Supreme Court held that mere change of opinion cannot *per se* be a reason to reopen. The Court highlighted the conceptual difference between power to review and power to reassess and that review cannot be done in the garb of reopening the assessment. That the concept of 'change of opinion' must be treated as an in-built test to check abuse of power by the Assessing Officer.

Therefore, in the cases where an original assessment had taken place and the Assessing Officer had formed a particular view basis the available material, the Assessing Officer could not have validly reopened an assessment.

Change of opinion: Whether now permissible?

In the author's view, the reopening of an assessment on the basis of change of opinion is still not permissible under the new reassessment provisions. Even under the new reassessment provisions, the Assessing Officer has the power to reassess only when the income chargeable to tax has 'escaped assessment'. As discussed *infra*, when the Assessing Officer forms a view in relation to a fact and the resulting income, it cannot be said that the said income 'escaped assessment'. Thus, in case of a change of opinion, the Assessing Officer cannot validly reopen an assessment.

Further, this concept is a check against the abuse of power by the Assessing Officer. The CBDT in Circular No. 549 dated 31 October 1989 provided that it was to allay the fears that the Assessing Officer shall reopen past assessments on mere change of opinion that the expression 'has reason to believe' was reintroduced in place of the words 'for reasons to be recorded by him in writing, is of the opinion' (by the Amending Act, 1989) in the then existing Section 147 of the Act. Drawing an inference from this Circular, the author submits that it has never been the intention of the Legislature to permit the Assessing Officer to reopen an assessment on the basis of change of opinion.

For that matter, the Courts have, now and then, categorically highlighted the distinction between power to reassess and power to review. Change of opinion is nothing but review of the material which had already been once subjected to assessment, which is impermissible under the powers of reassessment. The same holds good, in the view of the author, even under the new reassessment provisions.

Conclusion

The power to reassess is distinct from the power of review. The old provisions as well as the new provisions grant the Assessing Officer only the power to reassess the income which has escaped assessment. Therefore, even though the Finance Act,

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2021 completely overhauled the reassessment provisions, the principle that the Assessing Officer cannot review under the garb of reassessment on account of a change of opinion still holds good. It is however yet to be seen as to how the Courts interpret the new reassessment provisions. For that matter, the Hon'ble Bombay High Court has recently asked the Revenue to submit a response *inter alia* on whether 'change of opinion' is now permissible for initiating reassessment proceedings.

[The author is Principal Associate, Direct Tax Team, Lakshmikumaran and Sridharan Attorneys, Mumbai]

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Notifications & Circulars

- Cost Inflation Index notified for Financial Year 2023-24
- Transfer pricing – Arm's Length Price – Tolerance range notified for Financial Year 2023-24
- TDS/ TCS Statements – Relaxation in time limits
- Liberalised Remittance Scheme and Tax Collection at Source – Amendments deferred

Notifications & Circulars

Cost Inflation Index notified for Financial Year 2023-24

The Central Government has, *vide* Notification No. 39 dated 12 June 2023, notified the cost inflation index for the Financial Year 2023-24 as '348'. The notification comes into force with effect from 01.04.2024 and shall, accordingly, apply to AY 2024-25 and subsequent AYs.

Transfer pricing – Arm's Length Price – Tolerance range notified for Financial Year 2023-24

The Income Tax Act requires an assessee undertaking an international transaction or a specified domestic transaction to ensure that the same is at Arm's Length Price ('**ALP**'). For the said purpose, Section 92C lays down various methods for the determination of ALP. Generally, if the transaction is undertaken at a price lower than the ALP, then a transfer pricing adjustment is required to be made, either by the assessee *suo moto* or by the Transfer Pricing Officer.

However, the Act provides for a tolerance range for the determination of the ALP of a transaction. If the difference between the ALP determined and transaction value is within the tolerance range, then the transaction value is deemed to be the ALP. For the Assessment Year 2023-24, *vide* Notification No. 46 dated 26 June 2023, such tolerance range has been notified to be (a) 1% of the transaction value in respect of wholesale trading, and (b) 3% of the transaction value in other cases.

'Wholesale trading' has been defined to mean an international transaction or specified domestic transaction of trading in goods, which fulfils the following conditions:

- Purchase cost of finished goods is 80% or more of the total cost pertaining to such trading activities; and
- Average monthly closing inventory of such goods is 10% or less of sales pertaining to such trading activities.

TDS/ TCS Statements – Relaxation in time limits

The Central Board of Direct Taxes has provided relaxation in furnishing the TDS and TCS Statement for the first quarter of the Financial Year 2023-24 for the following:

- TDS statement in Form No. 26Q (Statement for TDS on all payments other than salaries) may be furnished on or before 30 September 2023.

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- TDS statement in Form No. 27Q (Statement for TDS on income received from interest, dividends, or any other sum payable to non-residents) may be furnished on or before 30 September 2023.
- TCS statement in Form No. 27EQ (Statement of collection of tax at source) may be furnished on or before 30 September 2023.

Liberalised Remittance Scheme and Tax Collection at Source – Amendments deferred

Vide the Finance Act, 2020, sub-section (1G) of Section 206C was introduced to provide for TCS on (i) foreign remittance through the Liberalised Remittance Scheme (LRS), and (ii) sale of overseas tour program package.

Section 206C(1G) of the Income Tax Act, as introduced, provided for collection of tax at (i) 5% on remittances made through LRS exceeding INR 7 lakh, and at (i) 5% on the any sum collected for sale of overseas tour program package.

Amendments by Finance Act, 2023

Through the Finance Act, 2023, amendments were carried out in sub-section (1G) of Section 206C of the Act. These amendments, *inter alia*, (i) increased the rate of TCS from 5% to 20% for remittance under LRS as well as for purchase of overseas tour program package, and (ii) removed the threshold of INR 7 lakh for triggering TCS on LRS. These amendments were to take effect from 1 July 2023.

Amendments by Exchange Control Regulations

Rule 7 of the FEMA (Current Account Transaction) Rules, 2000 was omitted by the Foreign Exchange Management (Current Account Transactions) (Amendment) Rules, 2023, with effect from 16 May 2023. Consequentially, international credit card spends would fall within the ambit of LRS limit of USD 2,50,000 and any spending above the said limit will require prior approval of RBI.

The effect of the omission of Rule 7 of the FEMA (Current Account Transaction) Rules, 2000 would also have the result of TCS being applicable on foreign exchange drawn through usage of international credit cards.

Press Release dated 28 June 2023

The Government issued a Press Release on 28 June 2023 announcing its intention to:

- Give more time for implementation of revised TCS rates.
- Give more time for inclusion of credit card payments in LRS.
- Make the increased TCS rates effective from 1st October 2023.
- Not change the rate of TCS on remittance under LRS and for overseas travel tour packages, regardless of mode of payment, for amounts up to Rs. 7 lakh per individual per annum.

In other words, the law as it stood prior to amendment by Finance Act, 2023 and Foreign Exchange Management (Current Account Transactions) (Amendment) Rules, 2023 would prevail till 30 September 2023.

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The Government also announced that the necessary changes to the Foreign Exchange Management (Current Account Transactions) Rules, 2000 are being issued separately and further that the legislative amendment in this regard shall be proposed in due course. Government has also indicated that a Circular and Frequently Asked Questions (FAQs) shall be issued to clarify various practical issues in implementing this provision.

Earlier and new TCS rates are summarized as under:

Nature of payment (1)	Rate before Finance Act, 2023 (2)	Rate w.e.f. 1 October 2023 (3)
LRS for education, financed by loan from financial institution	Nil upto INR 7 lakh 0.5% above INR 7 lakh	Nil upto INR 7 lakh 0.5% above INR 7 lakh
LRS for Medical treatment/ education (other than financed by loan)	Nil upto INR 7 lakh 5% above INR 7 lakh	Nil upto INR 7 lakh 5% above INR 7 lakh
LRS for other purposes	Nil upto INR 7 lakh 5% above INR 7 lakh	Nil upto INR 7 lakh 20% above INR 7 lakh
Purchase of Overseas tour program package	5% (without threshold)	5% till INR 7 lakh 20% thereafter

Note: (i) TCS rate in column two shall continue to apply till 30 September 2023.

(ii) There shall be no TCS on expenditures under LRS under clause (i) of sub-section (1G) for the first INR 7 lakh, irrespective of purpose.

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Ratio Decidendi

- CIT(Exemption) has no power to condone delay in filing application for exemption under Section 10(23C)(vi) – ITAT Raipur
- Appeal – Delay of over 1600 days in filing appeal when condonable – ITAT emphasizes substantial justice over technicalities – ITAT Kolkata
- Transfer pricing – Rate applied in MAP for transactions with AE to be applicable during the period not covered under MAP, and on the non-AE transaction – ITAT Bangalore
- Capital gains exemption under India-Singapore DTAA allowed to Singapore based FII, rejecting the invocation of Limitation of Benefit clause – Bombay High Court
- Additional depreciation which could not be claimed in full in eligible year, can be availed in the subsequent year – ITAT Mumbai

Ratio Decidendi

CIT(Exemption) has no power to condone delay in filing application for exemption under Section 10(23C)(vi)

The Assessee was a society set up with the primary object of 'imparting education by conducting examinations for children who could not attend school as regular students. The Assessee filed Form 56D claiming exemption u/s. 10(23C)(vi) of the Act for AY 2013-14 with the CIT(E) on 17 December 2018. The CIT(E) rejected the application on the ground that the application had been filed after the due date for the subject AY and the delay in seeking the exemption u/s. 10(23C) cannot be condoned by the CIT(E).

Alternatively, the Assessee requested the application to be taken into consideration for AY 2019-20, since the application for the said year is delayed owing to the department which had delayed disposing off its application for the year in question i.e., AY 2013-14. The CIT(E) denied exemption for the succeeding year as well, on the grounds that (i) Assessee had not prepared its books of accounts and audited the same for the purposes for making an application under Form 56D, and (ii) that the details in Form 56D pertain to AY 2013-14 and not AY 2019-20.

Aggrieved with the order of CIT(E), the Assessee preferred an appeal before ITAT, Raipur. The ITAT held that CIT(E) was vested with no power under the Act to condone the delay in filing the application u/s. 10(23C)(vi). Madras High Court decision in the case of *All Angels Educational Society* v. *Chief CIT* [72 taxmann.com 251], was relied upon for the purpose.

However, the ITAT held that the CIT(E) erred in not considering the said application for subsequent AY, because the application could not be filed within the prescribed date for the succeeding AY owing to the late disposal of the application in question. The ITAT here again relied on *All Angels Educational Society* (*supra*) and remanded the matter back to CIT(E) with a direction to consider the subject application filed by the Assessee as filed for the succeeding year. [*Chhatisgarh Rajya Open School* v. *CIT(E)* – Order dated 15 June 2023 in ITA Nos. 16 & 17 of 2021, ITAT Raipur - TS-354-ITAT-2023(RAI)]

Appeal – Delay of over 1600 days in filing appeal when condonable – ITAT emphasizes substantial justice over technicalities

The Assessee preferred an appeal before the ITAT, Kolkata against the order of the CIT(A). The Assessee also filed a condonation petition seeking condonation of delay of 1639 days in filing the appeal. The Assessee stated in its condonation petition that the appellate order was passed in 2017 and served on the Assessee in 2019. However, due to an inadvertent mistake, the advocate of the Assessee mentioned the communication date of the order as

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being 2017 and not 2019. Thus, the due date for filing the appeal was 16 February 2020 (since the order was communicated in 2019) but the appeal was filed only on 2 November 2021. Further, a substantial part of the delay was contended as attributable to the Covid-19 outbreak.

The ITAT condoned the delay in the filing of the appeal on the basis that: (a) the Supreme Court Order dated 10 January 2022 had extended the period of limitation during Covid-19 period holding that the period between 15 March 2020 and 2 November 2021 will stand excluded for the purpose of limitation, and accordingly, there is no delay in filing from 15 March 2020 till 2 November 2021, and (b) that the Assessee cannot be denied the right to be heard by the appellate authorities for the counsel's failure as the substantial justice has to prevail over the technicalities. The Tribunal in this regard also observed that the ITAT has powers to condone the delay where there is a sufficient cause. [*Monitor Vincom Pvt. Ltd.* v. *ITO* – Order dated 12 June 2023 in ITA No. 469 of 2021, ITAT Kolkata - TS-319-ITAT-2023(Kol)]

Transfer pricing – Rate applied in MAP for transactions with AE to be applicable during the period not covered under MAP, and on the non-AE transaction

The Assessee provided software design services to its AEs and earned revenue from it. For the year under consideration, the TPO *inter alia* made a transfer pricing adjustment.

Aggrieved, the Assessee submitted before the ITAT, Bangalore that the mark-up on cost for the transaction with US-AE as agreed in the MAP (April 2012-December 2012) may be considered for the transaction with US-AE for the period not covered in the MAP (January 2013-March 2013). The ITAT observed that the transaction with an entity is to be considered in a consolidated way and cannot be bifurcated according to the calendar year prevalent in that contracting state. Thus, the ITAT directed the AO/ TPO to consider the rate applied in the MAP for the transactions with US-AE to the transactions entered with the US-AE during the period not covered in the MAP. The ITAT further held that if any transaction with a non-AE has been considered in a consolidated way in the said amount of adjustment by the TPO, then the same rates have to be applied. [*Harman Connected Services Corporation India Pvt. Ltd.* v. *ACIT* – Order dated 27 June 2023 in IT(TP)A No. 2824 of 2017, ITAT Bangalore]

Capital gains exemption under India-Singapore DTAA allowed to Singapore based FII, rejecting the invocation of Limitation of Benefit clause

The Assessee was a tax resident of Singapore and registered with the Securities and Exchange Board of India as a Foreign Institutional Investor (FII). During the AY 2010-11, the Assessee invested in the debt securities in India and made a capital gain on

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the sale thereof. The Assessee claimed exemption of the capital gains from tax in India under Article 13(4) of the India-Singapore DTAA. The AO rejected the Assessee's contention invoking Article 24 of the DTAA which restricts the exemption to the extent of repatriation of the concerned income to Singapore and basis the fact that the Assessee did not show evidence of repatriation. Aggrieved, the Assessee filed an appeal before the ITAT, Mumbai which was allowed.

The Revenue then filed an appeal before the Hon'ble Bombay High Court. The High Court upheld the order of the ITAT and held that Article 24 shall not apply only when under the laws in force in Singapore, the income is subject to tax by reference to the full amount thereof, whether or not remitted to or received in Singapore. In the present facts, the Singapore authorities had themselves certified that the capital gain income would be brought to tax in Singapore without reference to the amount remitted or received in Singapore. The Court further held that such certificates issued by the Singapore Tax Authorities will constitute sufficient evidence for accepting the legal position. Accordingly, the Court dismissed the appeal of the Revenue. [*Commissioner of Income-tax* v. *Citicorp Investment Bank* – Judgment dated 21June 2023 in ITXA 256 of 2018, Bombay High Court]

Additional depreciation which could not be claimed in full in eligible year, can be availed in the subsequent year

The Assessee was a company engaged in the business of power generation. During the assessment proceedings for AY 2014-15, the assessee claimed expenses towards community development expenses and environment health and safety expenses as deduction u/s. 37(1) of the Act. The Assessee also claimed balance additional depreciation in the concerned year as the plant and machinery were put to use for less than 180 days in the immediate previous year and only half of the additional depreciation could be claimed then.

The AO held that (i) the community development expenditure and environment health and safety expenses are not incurred wholly and exclusively for the purpose of business, and (ii) the additional depreciation can only be claimed in the year in which the plant and machinery is acquired and put to use.

On an appeal, the CIT(A) allowed the appeal filed by the Assessee. Aggrieved, the Revenue filed an appeal before the ITAT, Mumbai.

The ITAT observed that the AO did not dispute that the expenditures have in fact been incurred for the purpose of community development and environment health & safety. The AO merely disallowed the expenditures on the basis that the said expenditures are not incurred wholly and exclusively for the purpose of business. The ITAT noted that it is only w.e.f. 1 April

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2015 that CSR expenses are not allowable u/s. 37(1) of the Act. The ITAT thus held that once the expenditures have been accepted to be for the community development and environment health & safety, the same cannot be held to be not incurred wholly and exclusively for the purpose of business.

As regards the claim of balance additional depreciation, the ITAT relied on *CIT* v. *Rittal India (P) Ltd*. [2016] 380 ITR 423 (Kar.) and held that if the plant and machinery eligible for additional depreciation under Section 32(1)(iia) of the Income Tax Act is put to use for less than 180 days in the eligible financial year and only 50% of additional depreciation can be claimed in that year, balance 50% can be availed in the subsequent year. Accordingly, the ITAT upheld the CIT(A)'s order and dismissed the Revenue's appeal. [*DCIT* v. *GMR Warora Energy Ltd.* – Order dated 15 June 2023 in ITA No.597 of 2023, ITAT Mumbai - TS-321-ITAT-2023(Mum)]

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Lakshmikumaran & Sridharan attorneys
An ISO 27001:2013 certified law firm

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

GURGAON
OS2 & OS3, 5th floor, Corporate Office Tower, Ambience Island, Sector 25-A,
Gurgaon-122001
phone: +91-0124 - 477 1300 Email: 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

NAGPUR
First Floor, HRM Design Space, 90-A, Next to Ram Mandir, Ramnagar,
Nagpur - 440033
Phone: +91-712-2959038/2959048
E-mail : lsnagpur@lakshmisri.com

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