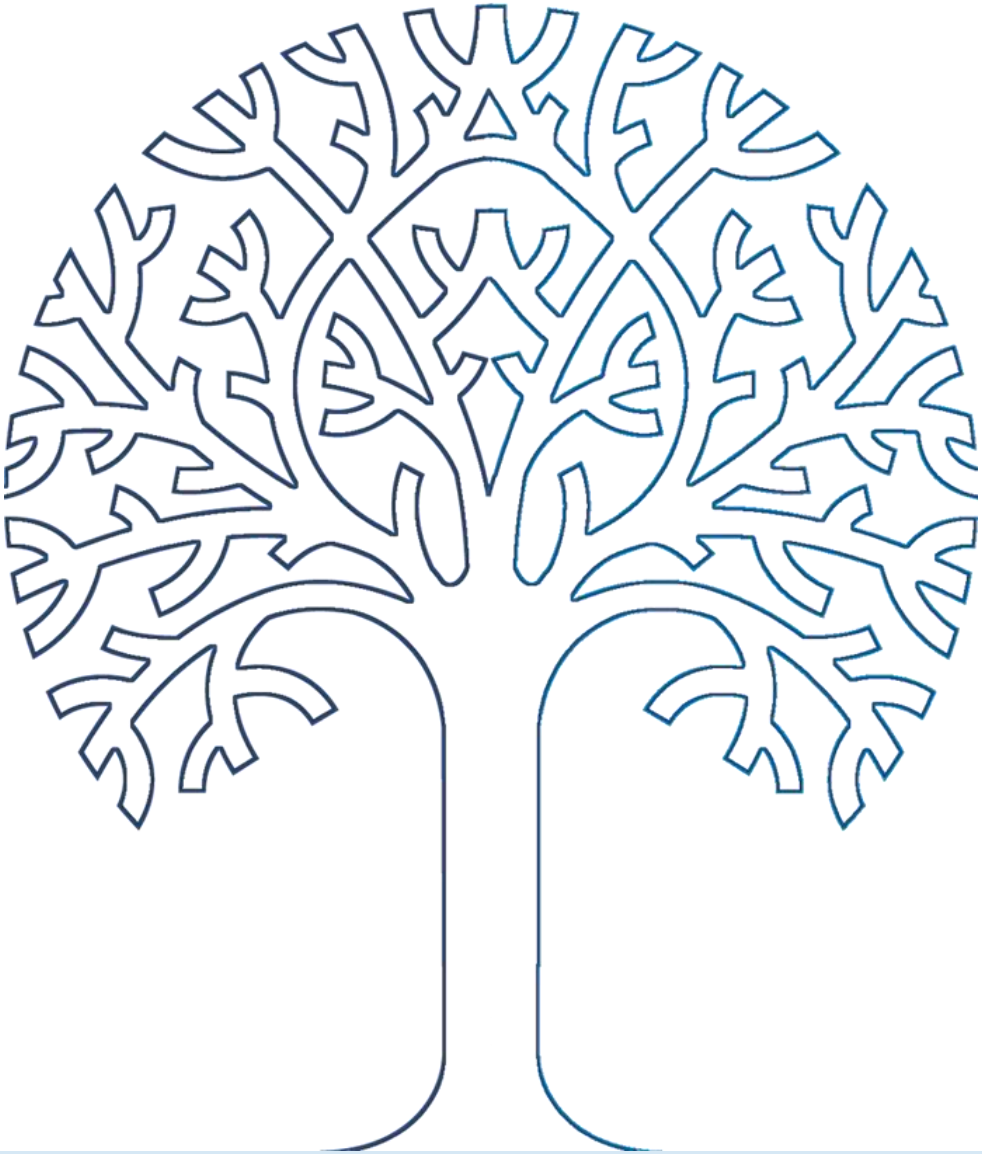
TAX amicus

July 2023 / Issue – 145

An e-newsletter from
Lakshmikumaran & Sridharan, India

Lakshmikumaran & Sridharan attorneys

Table of Contents



Article

Leasing of capital goods between two GSTINs

By Brijesh Kothary, Padmasri Manyam and Ananya Raghavendra

The article in this issue of Tax Amicus seeks to analyse the GST implications on leasing of capital goods between 'distinct persons', in the light of a recent ruling of the Maharashtra Appellate Authority of Advance Ruling. After providing the crisp summary of the Ruling, the article examines the implication of the Ruling in respect of issues regarding valuation, mere movement of goods not amounting to supply, and documentation. Observing that the AAAR ruling brings out the proposition that mere possession of goods by the other GSTIN does not automatically result in the 'supply of goods' but rather, is a supply of services, the authors point out that to substantiate the same without any dispute, taxpayers need to ensure that appropriate documentation is maintained both in respect of the supply between the two GSTINs, and also, for the actual movement of such goods. They also emphasize that the value of transactions of this nature are to be ascertained based on the provisions under GST laws along with the recently issued CBIC Circular.

Leasing of capital goods between two GSTINs

Under GST Laws, the registration being State specific[1], a single entity may obtain multiple GST registrations in various States using, the same Permanent Account Number (PAN). Therefore, a deeming fiction has been created under *Section 25(4)* of the Central Goods and Services Tax Act, 2017, ('CGST Act, 2017') as per which, two registrations (GSTIN's) of the single entity shall be treated as 'distinct persons'. Consequently, supplies between such distinct persons would be taxable, even if made without any consideration[2].

In this context, the article seeks to analyse the GST implications on leasing of capital goods between such distinct persons, in light of the ruling of the Appellate Authority of Advance Ruling ('AAAR') in Re: *Chep India Private Limited* [2023-VIL-25-AAAR Maharashtra].

Summary of the ruling

In the instant case, CHEP India Private Limited ('CIPL') engaged in the business of leasing of pallets, crates and containers ('equipment'), sought to operate under a business model where such equipment owned by the Maharashtra GSTIN of the entity would be provided on lease to other GSTINs by executing MoU's. For such supply, Maharashtra GSTIN raises periodical invoices on Karnataka GSTIN for lease charges ('Transaction 1') and thereafter, Karnataka GSTIN may further provide such equipment to its end customers for consideration. In case such equipment may be required by another GSTIN, say, Tamil Nadu (' TN GSTIN'), instead of sending such equipment back to Maharashtra, Karnataka GSTIN undertakes to transport such equipment directly to TN upon instructions from Maharashtra GSTIN ('Transaction 2'). Upon receipt of equipment by TN, Maharashtra GSTIN charges the TN GSTIN for lease amount, while Karnataka GSTIN charges Maharashtra GSTIN for the facilitation of movement to TN GSTIN.

With this background, CIPL Maharashtra sought an advance ruling[3] regarding the taxability of both the aforementioned transactions, valuation to be adopted if taxable and documents to be issued, which was thereafter appealed to the AAAR where:

- The AAAR concurred with the ruling of the Authority of Advance Ruling ('AAR') that Transaction 1 between Maharashtra GSTIN and Karnataka GSTIN would amount to a 'supply of services' since there is no transfer of title, also noting that this position was not challenged.
- The AAR ruling which stated that value of Transaction 1 would be the same as value charged by Karnataka GSTIN to its end customer was modified. The AAAR held that the value of services between such distinct persons would be

[1] Section 22(1) of the CGST Act, 2017

[2] Entry 2 of Schedule I read with Section 7(1) (c) of the CGST Act, 2017

[3] CHEP India Pvt Ltd reported at 2022-VIL-309- AAR Maharashtra

the value as stated in the invoice as per the second proviso to *Rule 28* of the Central Goods and Services Tax Rules ('CGST Rules, 2017'), concurring with a ruling provided to CIPL by the Karnataka AAR.[4]

- Contrary to the position adopted by the AAR, the AAAR addressed the implications on Transaction 2 stating that the movement of goods from Karnataka GSTIN to TN GSTIN would be a mere movement of goods not amounting to a supply since the Karnataka GSTIN is merely a bailee, without having ownership of such goods. It was also held that the supply of services of leasing of equipment would be from the Maharashtra GSTIN to TNGSTIN, with Karnataka GSTIN acting as an agent of Maharashtra GSTIN providing facilitation services for such Transaction of leasing of equipment by ensuring movement of the goods, which is leviable to GST.

The analysis regarding nature of supply between two GSTINs is clearly established under the provisions of the CGST Act, 2017 and therefore, the issues that may be further examined to ascertain the implications of such ruling are regarding valuation, mere movement of goods not amounting to supply and documentation in case of such transactions.

Valuation

While due consideration was not given to the second proviso of *Rule 28* of the CGST Rules, 2017 to ascertain valuation in the AAR ruling, the AAAR concurred with existing rulings[5], including that of the Karnataka AAR in CIPL's own case regarding a similar transaction.

It is also pertinent to refer to the recent Circular[6] on supplies between distinct persons categorised as 'internally generated services' by the Central Board of Indirect Taxes and Customs ('Board') in which it was clarified that where full Input Tax Credit ('ITC') is available to the recipient branch, the value of such supply would be the invoice value, in accordance with the *second proviso* to *Rule 28* of the CGST Rules, 2017. Further, in cases where no invoice is raised and full ITC is available, the value of services may be deemed to be declared as 'Nil'.

In light of such clarification, taxpayers may re-evaluate the value of leasing and facilitation services between two GSTINs in the absence of an agreement/MoU between the GSTINs/branches.

Mere movement of goods not amounting to supply

The ruling has provided clarity in respect of transactions involving mere movement of goods upon ascertaining which GSTIN actually owns and has title to such goods. In this regard, it may be emphasized, as also reiterated by the Karnataka AAR[7], while goods belong to entities as a whole under general laws due to which all branches of such entity will have ownership of the goods, a deeming fiction has been created specifically applicable under GST laws to consider each branch as a distinct person.

[4] CHEP India Pvt Ltd reported at 2021- VIL- 269-AAR Karnataka

[5] Kansai Nerolac Paints Ltd reported at 2019-VIL 167-AAR Maharashtra; Specs Makers Opticians Pvt Ltd reported at 2019-VIL-233-AAAR Tamil Nadu

[6] Circular No. 199/11/2023-GST dated 17.07.2023

[7] CHEP India Pvt Ltd reported at 2021- VIL- 269-AAR Karnataka

Maharashtra AAAR ruling on the outward supply by Karnataka GSTIN

In the aforesaid ruling, Maharashtra AAAR has ruled that Karnataka GSTIN is providing facilitation services to Maharashtra GSTIN, wherein, the appellant in this case is recipient of such services.

The divergent interpretation of the authorities may be noted wherein, while the Maharashtra AAAR and Karnataka AAR ruled on transactions occurring outside the jurisdiction of the respective States, the AAR refused to do so, due to lack of jurisdiction. Upon a perusal of Sections 96 and 99 of the CGST Act, 2017 specifying that an AAR and AAAR respectively, are constituted under the State GST Acts and will be authority only in respect of that particular State, the applicability of such ruling in respect of transactions in a different state may be challenged based on lack of jurisdiction. Further, considering that the Maharashtra GSTIN in the instant case is the 'recipient' of agency services and that rulings are to be obtained by a supplier regarding transactions being undertaken or sought to be undertaken[8], an inconsistency in the position of the authorities in this regard might lead to ambiguity regarding applicability of such rulings.

Documentation

Regarding documentation, reference may be made to Rule 55 and Rule 138 of the CGST Rules, 2017 which provides for the issuance and generation of documents like delivery challan and e-way bill respectively, in case of transactions involving the movement of goods. Therefore, taxpayers may need to check the requirement of generating/issuing and maintaining such documents considering that the underlying supplies in such transactions will be in the nature of 'services' and not 'goods' itself.

Parting remarks

The AAAR ruling brings out the proposition that mere possession of goods by the other GSTIN does not automatically result in the 'supply of goods' but rather, is a supply of services. To substantiate the same without any dispute, taxpayers are to ensure that appropriate documentation is to be maintained both in respect of the supply between the two GSTINs, and also, for the actual movement of such goods.

Further, it may also be reiterated and emphasized that the value of transactions of this nature are to be ascertained based on the provisions under GST laws along with the recently issued Circular mentioned above.

[The authors are Partner, Principal Associate and Associate, respectively, in the Indirect Tax practice at Lakshmikumaran & Sridharan Attorneys, Bengaluru]

[8] Section 95(a) of the CGST Act, 2017

Goods & Services Tax (GST)

Notifications and Circulars

- 50th GST Council Meeting – Highlights and clarifications

Ratio decidendi

- Demand – Notice under CGST Section 74 can be issued without recourse to scrutiny under Section 61 – Andhra Pradesh High Court
- Provisional attachment of bank account can be made of 'any person' – Territorial jurisdiction of concerned Commissioner is immaterial – Bombay High Court
- Provisional attachment – Communication to Bank for extension, with copy to assessee, is not fresh order to continue provisional attachment – Bombay High Court
- ITC reversal cannot be compelled without mentioning basis of cancellation of selling dealer registration – Calcutta High Court
- Non-renewal of e-way bill when not calls for 200% penalty – Calcutta High Court
- Interest on delayed refund – Provisions of Section 56 are mandatory – Gujarat High Court
- Refund in case of exports – Consideration of application as filed under Section 16(3)(a) when refund granted under Section 16(3)(b) repatriated – Karnataka High Court
- Refund in case of exports – Manual filing of supplementary claims when to be permitted – Gujarat High Court
- Input Tax Credit pertaining to period prior to the date of approval of resolution plan (under insolvency law) is not available to the new management – Jharkhand High Court
- Appeal can be filed manually when electronic portal does not have provision for e-filing – Bombay High Court
- PG/hostel rent paid by inhabitants does not qualify for GST exemption – Karnataka AAR
- Charging of Electric Vehicles – Supply of electrical energy and service charges, together to be considered as supply of service – Karnataka AAR
- No 'supply' in case of settlement of dues for goods/services received by one GSTIN by another GSTIN – Kerala AAR
- UK VAT – Input tax incurred on sale of shares has a direct and immediate link to taxable activities – UK Upper Tribunal (Tax and Chancery Chamber)
- EU VAT – Accommodation services sold without ancillary services qualify to be taxed under 'special VAT scheme' applicable to travel agents – Court of Justice of the European Union

Notifications and Circulars

50th GST Council Meeting – Highlights and clarifications

The GST Council held its 50th Meeting on 11 July 2023. The meeting saw many important decisions on various topics, including taxation of online gaming and on compensation cess on utility vehicles. The Council also attempted to tackle several complex and controversial issues that have been plaguing the industry with uncertainty for the last six years. Highlights of the recommendations of the meeting are covered here.

Further, the Central Board of Indirect Taxes and Customs (CBIC) has on 17 July 2023 issued 8 Circulars (from 192/04/2023-GST to 199/11/2023-GST) and 9 Notifications (from 18/2023-Central Tax to 26/2023-Central Tax) to bring into force various recommendations of the 50th GST Council Meeting. Detailed coverage of the Circulars, along with comments from the LKS Indirect Tax Practice Team on different issues, is available here.

Ratio Decidendi

Demand – Notice under CGST Section 74 can be issued without recourse to scrutiny under Section 61

The Andhra Pradesh High Court has held that the source for the proper officer to proceed under Section 74 of the Central Goods and Services Tax Act, 2017 or the Andhra Pradesh Goods and Services Tax Act, 2017 may be either Section 61 or 65 or some other fact/information but cannot be constricted to Section 61 or 65 alone. Rejecting the contention of the assessee that notice under Section 74 cannot be issued unless procedure under Section 61 (scrutiny of returns and calling for explanation) is followed, the Court held that Section 73 and 74 are not controlled by Section 61 alone. The Court in this regard also noted that Section 74 starts with the clause '*Where it appears to the proper officer that any tax has not been paid*'. The Court held that the

word 'appears' has a wider amplitude subsuming in it not only Section 61 and 65, but also any other credible information from a different source. The Court also noted that there is no specific reference to Section 61 or 65 in Section 74. [*Devi Traders* v. *State of Andhra Pradesh* – (2023) 8 Centax 22 (A.P.)]

Provisional attachment of bank account can be made of 'any person' – Territorial jurisdiction of concerned Commissioner is immaterial

The Bombay High Court has held that the powers conferred under Section 83(1) of the Central Goods and Services Tax Act, 2017 can be exercised in respect of a person, who may not be within the territorial jurisdiction of the concerned GST Authority. The Court was of the view that a cumulative reading of the provisions of Section 83(1) read with Section 122(1-A) makes it manifest that the Commissioner for the purposes of exercising power under Section 83 read with Section 122(1-A), would have a power to take action against 'any person' as Section 122(1-A) mandates, even if such a person is outside his jurisdiction. The High Court in this regard also stated that the provisions do not contemplate of a situation where the person should be located within the State in which the transaction is carried out. According to the Court, a contrary reading of the said provisions would defeat the legislative intention. [*Sunbright Designers Pvt. Ltd.* v. *State of Maharashtra* – 2023 VIL 408 BOM]

Provisional attachment – Communication to Bank for extension, with copy to assessee, is not fresh order to continue provisional attachment

The Bombay High Court has quashed the extension of the provisional attachment, just before the expiry of the period of one year after the initial provisional attachment order, by a mere communication to the Bank for this purpose, wherein the assessee was only marked copy. According to the Court, the said communication could never be a fresh order under Section 83(1) of the Central Goods and Services Tax Act, 2017, provisionally attaching the assessee-Petitioner's bank account. The Court in this regard also noted that mere noting in the file of the concerned Officer cannot constitute an order as the law may mandate being passed and communicated to the affected person, whose bank account is attached. [*Sunbright Designers Pvt. Ltd.* v. *State of Maharashtra* – 2023 VIL 408 BOM]

ITC reversal cannot be compelled without mentioning basis of cancellation of selling dealer registration

The Calcutta High Court has held that the assessee, having availed the input tax credit against the inward supply, cannot be directed to reverse the same by way of an email communication without mentioning as to what was the basis of the cancellation of

registration of the selling dealer. According to the Court, the procedure adopted by the authority for directing reversal of the input tax credit and thereafter compelling the assessee-appellants to pay the amount was not sustainable in the eye of law but was in violation of the principles of natural justice. The Department was directed to remit the amount of input tax credit reversed by transmitting the same amount in the assessee's electronic credit ledger. [*Car Chassis Carriers Private Limited* v. *Assistant Commissioner* – (2023) 8 Centax 155 (Cal.)]

Non-renewal of e-way bill when not calls for 200% penalty

In a case where the assessee did not renew the first e-way bill which had expired while the vehicle broke down, and the goods were sold and were being transported under a new e-way bill at the time of interception of the vehicle, the Calcutta High Court has set aside the order imposing 200% penalty. The Court though observed that the appellants should have extended the e-way bill since the goods were sold in transit and that there was a violation, according to it, the violation was not so grave to call for imposition of 200% penalty. Reducing the penalty from 200% to INR 50,000, the High Court noted that on the date when the vehicle was intercepted the goods were covered by a valid e-way bill which satisfies the requirement under Section 129 of the Central Goods and Services Tax Act, 2017. [*Bitumix India LLP* v. *Deputy Commissioner* – (2023) 8 Centax 58 (Cal.)]

Interest on delayed refund – Provisions of Section 56 are mandatory

Observing that the provisions of Section 56 of the Central Goods and Services Tax Act, 2017 are clear and unambiguous, the Gujarat High Court has held that the provisions of the said section are mandatory in nature. Further, observing that pending the petition, the Department had released partial refund to the assessee and had not granted interest on the delayed refunds, the Court stated that according to it, this is against the provisions of Section 56. Relying upon the Supreme Court decision in the case of *Ranbaxy Laboratories Ltd. [2011 (273) ELT 3 (S.C.)]*, the assessee had submitted that the wordings of Section 11BB of the Central Excise Act, 1944 and Section 56 of the Central Goods and Services tax Act, 2017 are same. [*Panji Engineering Private Limited* v. *Union of India* – 2023 VIL 428 GUJ]

Refund in case of exports – Consideration of application as filed under Section 16(3)(a) when refund granted under Section 16(3)(b) repatriated

In a case where the application for refund was earlier filed under 16(3)(b) of the Integrated Goods and Services Tax Act, 2017 (for refund of IGST paid on exports) but later there was repatriation of refund and filing of separate applications for refund under Section 16(3)(a) of the IGST Act (refund of ITC), the Karnataka High Court has set aside the decision of the Department rejecting the assessee's applications for refund only on the ground that

there was contravention of Rule 96(10) of the CGST Rules, 2017. According to the Court, the Department should have considered the indisputable fact of refund, later repatriation of refund and filing of separate applications for refund later under Section 16(3)(a). Further, considering new Rule 86(4B) of the CGST Rules, 2017, the Court directed the Department to reconsider the assessee's request for recredit to the Electronic Credit Register. [*Sungrow Developers India Pvt. Ltd.* v. *Union of India* – (2023) 7 Centax 567 (Kar.)]

Refund in case of exports – Manual filing of supplementary claims when to be permitted

In a case where the assessee had erroneously filed claims for lower amount of refund of unutilised ITC on zero-rated supplies, due to inadvertent arithmetical error, and later filed a supplementary claim while showing the category as 'any other', the Gujarat High Court has directed the Department to allow the assessee to manually furnish the refund applications for refund of the left-out amount. The Department had denied the balance refund on a ground that the category under which the supplementary claims were lodged was not applicable to the case of the assessee. Observing that as the assessee had already filed refund application under Clause 7(c) at first point of time, for the same month and same period, supplementary application for the refund of the balance amount cannot be filed on the portal and therefore there was no option to submit the application under the category 'any other', the Court held this was nothing but a technical error. According to the Court, for such technical error, the claim of the assessee cannot be rejected without examining the same by the authorities on its own merits and in accordance with law. The Department was directed to allow the assessee to furnish manually the refund applications for refund of the amount left out. [*Shree Renuka Sugars Ltd.* v. *State of Gujarat* – (2023) 8 Centax 235 (Guj.)]

Input Tax Credit pertaining to period prior to the date of approval of resolution plan (under insolvency law) is not available to the new management

In an interesting intersection of GST and Insolvency laws, the Jharkhand High Court has set aside the Order confirming the demand of alleged irregularly availed transitional credit. Relying upon the Apex Court decision in the case of *Ghanshyam Mishra and Sons Pvt. Ltd*., the High Court reiterated that no recovery can be made of any alleged dues prior to the date on which the National Company law Tribunal had approved the resolution plan of the Petitioner-assessee. Further, observing that the liability of the earlier management cannot be shifted to the current management (post approval of Resolution Plan), the High Court rejected the contention of the assessee that past credit will not get expunged. The Court was of the view that the credit available to the earlier management will also not be available to the current management as the latter was not a taxpayer during the period of procurement of inputs and capital goods as availed in the TRAN-1. [*ESL Steel Ltd.* v. *Principal Commissioner* – (2023) 8 Centax 160 (Jhar.)]

Appeal can be filed manually when electronic portal does not have provision for e-filing

The Bombay High Court has held that merely because electronic portal does not make a provision for filing of an appeal against an intimation issued in Form DRC-05, the assessee-petitioners cannot be faulted and for such technical reason, it cannot be countenanced that a statutory right of appeal available to the petitioners is rendered *otiose*. On finding that the electronic portal did not have a window/ provision for an appeal to be filed against the intimation under DRC-05, the petitioners had approached the Department seeking permission to file an appeal manually. The Department had however not accepted manual filing of the appeals on the ground that appeals are required to be filed by using electronic portal. [*Savita Oil Technologies Ltd.* v. *Union of India* – 2023 VIL 457 BOM]

PG/hostel rent paid by inhabitants does not qualify for GST exemption

The Karnataka AAR has held that PG/hostel rent paid by inhabitants does not qualify for GST exemption under Sl. No. 12 of Notification No. 12/2017- C.T.(Rate), since they do not qualify to be residential dwelling. The AAR in this regard observed that where un-related people share a room and invoices are raised per bed on monthly basis, the same are not characteristic of a residential dwelling and thus the applicant was not providing service of renting of residential dwelling. Further, the Authority answered in negative the question of whether the charges collected towards allied additional services such as meals, security, housekeeping, internet, vehicle parking, etc. provided by the applicant are to be considered as bundled service along with the service of providing of hostel/paying guest. The AAR noted that the allied facilities do not affect the main supply. It may be noted that the AAR also held that the applicant was liable to pay GST under RCM on the rent payable to landowners. [In RE: *Srisai Luxurious Stay L–P* - 2023 (7) TMI 870]

Charging of Electric Vehicles – Supply of electrical energy and service charges, together to be considered as supply of service

The Karnataka AAR has held that the activity of charging of battery does not involve 'sale of electricity' to any person as the electricity is consumed by the charging station and thus the electrical energy is put to use as a consumable, for charging of battery. The Authority hence was of the view that the 'supply of electrical energy' and 'service charges' together are to be treated as 'supply of service', for which the applicant collects Electric Vehicle Charging Fee as consideration. Electricity Act, 2003 and Guidelines dated 13 April 2018 issued by the Ministry of Power were relied upon for the purpose. It was also held that charging the batteries of EV amounts to charging of the batteries of motor cars and thus is squarely covered under SAC 998714, with applicable GST at the rate of 18%. Finally, the AAR also held that

the applicant is eligible to avail input tax credit and utilize the same in terms of Sections 16 and 17 of the CGST Act, 2017 read with the Rules 42 and 43 of the CGST Rules, 2017. [In RE: *Chamundeswari Elecricity Supply Corporation Limited* – 2023 (7) TMI 869]

No 'supply' in case of settlement of dues for goods/services received by one GSTIN by another GSTIN

The Kerala AAR has held that consideration can be paid for inward supplies by way of net off of receivables of one GSTIN by another GST1N of the same applicant, or net-off of receivables with payables of supplier of goods/service. It was further held that input tax credit is admissible when consideration is paid through book adjustment as detailed above, subject to the other conditions and restrictions prescribed in the CGST Act, 2017 and CGST Rules, 2017. On the issue of whether such book adjustments would amount to supply between the two GSTINs, the Authority held that the arrangement of settlement of dues for the goods/services received by one GSTIN by another GSTIN, or payment of consideration by the Head Office in respect of goods/services received by different branches having different GSTINS as detailed do not come within the meaning and scope of supply as defined in Section 7 of the CGST Act. [In RE: *Malabar Gold Private Limited* - 2023 (7) TMI 573]. For ITC on settlement of mutual debts by book adjustments, see also In RE: *Paragon Polymer Products Pvt. Ltd.* – 2023 VIL 128 AAR.

UK VAT – Input tax incurred on sale of shares has a direct and immediate link to taxable activities

In a case involving sale of shares where proceeds of such sales were used to fund taxable activities, the United Kingdom's Upper Tribunal (Tax and Chancery Chamber) has held that input tax incurred on sale of shares has a direct and immediate link to the taxable activities of the assessee. The Revenue department (HMRC) had denied entitlement to an input deduction in respect of certain services supplied to the assessee because, in HMRC's view, they were directly and immediately linked to assessee's exempt supplies, *viz.* the sale of shares in its subsidiary. The assessee had however contended that the relevant services were directly and immediately linked to its taxable supplies because the shares were sold in order to raise funds for the building of a new hotel. [*Commissioner HMRC* v. *Hotel La Tour Ltd.* – Judgement dated 24 July 2023 in Case Number: UT/2022/000031, UK Upper Tribunal (Tax and Chancery Chamber)]

EU VAT – Accommodation services sold without ancillary services qualify to be taxed under 'special VAT scheme' applicable to travel agents.

The Court of Justice of the European Union recently deliberated on an issue concerning the Special VAT scheme applicable to travel agents. It held that purchasing accommodation services

from other taxable persons and reselling them to other economic operators falls under the special VAT scheme applicable to travel agents, even if ancillary services are not provided. The case involved a company that purchased accommodation from taxable persons and resold it to customers, even though it did not own any accommodation itself. The tax authority essentially took the view that a tourist service should consist of multiple services, but the court disagreed, stating that the special VAT scheme should be applied as needed to achieve its objective. Excluding services solely on the ground that they cover only the supply of accommodation would lead to a complicated tax system in which the VAT rules applicable would depend upon the constituents of the services offered to each traveller which would fail to comply with the purpose of the scheme. The court clarified that the importance of other supplies or services combined with accommodation does not affect the application of the special scheme. [*Dyrektor Krajowej Informacji Skarbowej* v. *C. sp. z o.o.* – Judgement dated 29 June 2023 in Case C-108/22, Court of Justice of the European Union]

Customs

Notifications and Circulars

- EPCG scheme – Condonation of delay in submission of installation certificate
- Liquified Propane and Liquified Butane – AIDC rate increased
- Rice – Export of non-basmati white rice prohibited
- Gold imports made 'restricted' – Imports by SEZ still 'free'

Ratio decidendi

- Penalty under Customs Section 112(a) for abetting an offence is not imposable in absence of knowledge of wrong – Delhi High Court
- Valuation – License fee is not includible when it is not a condition of sale – CESTAT Chennai
- Breach of condition of import through canalized agencies – Goods when not 'prohibited' but only 'restricted' – CESTAT Bengaluru
- SHIS and EPCG issuance in same year – Interpretation of term 'year of issuance' in Notification No. 102/2009-Cus. – CESTAT Chennai
- MEIS benefit not deniable for merely marking 'No' in shipping bill – Error a technical lapse – Gujarat High Court
- Earphones are not part of mobile phones – Exemption under Notification No. 57/2017-Cus. is available – CESTAT New Delhi
- All-Terrain vehicles – Classification under Headings 8704 and 8709 and not under Heading 8703 – CESTAT New Delhi
- Tomato dry flavour is classifiable under TI 3302 10 10 and not under TI 2106 90 60 – CESTAT Chennai
- Optomo creative Touch 3-series Interactive Flat Panel is classifiable under Heading 8471 – Word 'interactive' is important – Customs AAR

Notifications and Circulars

EPCG scheme – Condonation of delay in submission of installation certificate

As a measure to promote ease of doing business, the DGFT has relaxed the procedure regarding acceptance of installation certificate under EPCG Scheme for authorizations issued under FTP, 2009-14 and FTP, 2015-20 (up to 31 March 2023) beyond the prescribed time limit. Now the jurisdictional RAs may accept such installation certificates up to 31 December 2023 for regularization on payment of late fee of INR 10,000/- per authorization (in addition to composition fee, wherever applicable), subject to the conditions that the installation certificate was obtained within the prescribed period, but it could not be submitted within time; the authorization holder has given *bona fide* reasons for delay; and the subject EPCG authorization is not under investigation/adjudication. DGFT Public Notice No. 22/2023, dated 13 July 2023 has been issued for the purposes.

Liquified Propane and Liquified Butane – AIDC rate increased

The Central Board of Indirect Taxes and Customs has amended Notification No. 11/2021-Cus. to insert Sr. No. 10AA providing for AIDC rate of 15% for Liquified Propane and Liquefied Butane classifiable respectively under TI 2711 12 00 and TI 2711 13 00 of the Customs Tariff Act, 1975. Further, after the table, a proviso has been added which mentions that Sr. No. 10AA shall not apply to imports of Liquified Propane and Liquified Butane mixture, Liquified Propane and Liquified Butane by certain oil PSUs for supply to household domestic consumers or to Non-Domestic Exempted Category (NDEC) customers. Further, according to another proviso inserted by Notification No. 45/2023-Cus., dated 1 July 2023, Sr. No. 10B providing for AIDC rate of 15% for TI 27111910, TI 27111920 and TI 27111990, shall not apply to imports of Liquified Petroleum Gas by certain oil PSUs for supply to household domestic consumers or to Non-Domestic Exempted Category (NDEC) customers. It may be noted that consequential changes in this regard have also been made in the First Schedule to the Customs Tariff (for increase in Tariff rate of the two products from 2.5% to 15%) and Notification No. 50/2017-Cus. (for maintaining the BCD at 2.5%). Also, similar amendments were made in respect of LPG on 30 June 2023.

Rice – Export of non-basmati white rice prohibited

Export of non-basmati white rice falling under ITC(HS) Code 1006 30 90 has been prohibited with effect from 20 July 2023. As per DGFT Notification No. 20/2023, dated 20 July 2023 issued for the

purpose, the provisions of Para 1.05 of the Foreign Trade Policy regarding transitional arrangements will not be applicable for export of non-basmati rice. The notification however mentions 4 conditions under which export of such rice will be allowed. Accordingly, rice export would be allowed if the loading of such rice had commenced before this notification, where shipping bill is filed and vessels have already berthed or arrived and anchored, where the rice has been handed over to customs before the notification, and lastly in case of permission granted by Government of India to other countries to meet their food security needs.

Gold imports made 'restricted' – Imports by SEZ still 'free'

By Notification No. 19/2023 dated 12 July 2023, the import policy and policy condition for import of gold under ITC (HS) Code 7113 19 11, 7113 19 19 and 7114 19 10 has been amended. As per the amended import policy and policy condition, import of gold under the aforementioned codes has been amended from 'Free' to 'Restricted', with immediate effect. However, import of gold covered under ITC (HS) Code 7113 19 11 shall be permitted freely without any import licence, under India-UAE CEPA Tariff Rate Quota. It may be noted that according to Policy Circular No. 3/2023-24, dated 14 July 2023 imports made by SEZ units under the abovementioned codes are outside the purview of Notification No. 19/2023. The DGFT has relied upon Rule 27(1) of the Special Economic Zone Rules, 2006 for this purpose.

Ratio Decidendi

Penalty under Customs Section 112(a) for abetting an offence is not imposable in absence of knowledge of wrong

The Delhi High Court has held that person who has no knowledge that the goods imported are liable for confiscation, cannot be made liable for penalty under Section 112(a) of the Customs Act, 1962 for abetting such an offence. In this case penalty was imposed on the Customs Broker on the allegation that it had abetted the acts of misdeclaration and importation of prohibited goods. Observing that abetment necessarily requires, at the minimum, knowledge of the offending act, the Court held that the principal, that persons who have committed the acts of omission or commission in relation to goods that rendered them liable for confiscation are liable to pay the penalty, is not applicable to persons who are alleged to have abetted such acts of omission or commission. The High Court in this regard also delved into the meaning of 'abet' in Section 112(a) and observed that it necessarily involves the knowledge that the act being abetted is wrong. [*Rajeev Khatri* v. *Commissioner* – 2023 (7) TMI 218 – Delhi High Court]

Valuation – License fee is not includible when it is not a condition of sale

The CESTAT Chennai, while relying on its judgment in *Commissioner* v. *Remy Electricals Ltd. Ltd.* has reiterated that the license fee is includible in transaction value only when the same is paid as condition of sale in terms of Rule 10(1)(c) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Accordingly, it was held that license fee cannot be included to the transaction value when the same is not a condition of sale. The Tribunal in this regard observed that as per the License Agreement, the payment of license fee was for each WTG commissioned, and thus it cannot be said that the fee was a condition of sale of the parts and components imported by assessee. [*Commissioner* v. *Vestas Wind Technology India Pvt Ltd.* – Final Order No. 40546/2023 dated 11 July 2023, CESTAT Chennai]

Breach of condition of import through canalized agencies – Goods when not 'prohibited' but only 'restricted'

The CESTAT Bengaluru has held that violation of the condition of import only through canalized agencies, in the case where the goods were imported under a valid certificate of analysis, invoice etc., but later found to be kerosene on retest, which was also in dispute, is to be considered a technical breach and the goods imported are to be considered as 'restricted' one and not absolutely prohibited. Further, the Tribunal was also of the view that once the goods are allowed to be redeemed on payment of fine, the condition of re-export tagged with it was unwarranted, in the facts and circumstances of the present case.

Supreme Court's decision in the case of *Raj Grow Impex LLP* was distinguished while the Tribunal observed that the interest of public would not be affected if the said goods are allowed to be

used by the assessee for their own use, even if found to be a different item than imported. The CESTAT in this regard also noted that there was no allegation that the import was not *bona fide* and the assessee knowingly imported kerosene in the guise of industrial solvent not for use in their factory but for sale. [*Hardex* v. *Commissioner* – 2023 VIL 560 CESTAT BLR CU]

SHIS and EPCG issuance in same year – Interpretation of term 'year of issuance' in Notification No. 102/2009-Cus.

The CESTAT Chennai has upheld the decision of the Commissioner, in favour of assessee, in the case where the SCN had alleged violation of Notification No. 102/2009-Cus. as the assessee was issued both SHIS scrips and EPCG authorization in same year, i.e. 2011-12. The Commissioner had held that the term 'year of issuance' in the notification must be related to the period for which the SHIS *vis-à-vis* EPCG benefits were being availed by the exporter, and not physical issue of or application for the licenses or scrips, as the purpose of such restriction in the Policy was to prevent simultaneous availment of benefit under two schemes. According to the Commissioner, the interpretation of condition 2(4) of the notification that there cannot be any availment of EPCG in the year of issuance of SHIS was not correct. [*Commissioner* v. *Danieli India Ltd.* – 2023 VIL 644 CESTAT CHE CU]

MEIS benefit not deniable for merely marking 'No' in shipping bill – Error a technical lapse

The Gujarat High Court has reiterated that merely an error of clicking 'No' instead of 'Yes' in the Shipping Bills does not debar the assessee from availing the benefits under MEIS scheme, more particularly when the communication reveals that the intention of the assessee was to avail the benefit of MEIS. The Court in this regard observed that the assessee had mentioned in the invoice that he has opted for the benefit under the MEIS scheme and that the rejection of the benefit was merely a technical rejection based on noncompliance of clauses of the procedure (Handbook of Procedures) which could have been avoided. The Department was directed to amend the shipping bills and also to allow the modification in online system to enable the assessee to correct the technical error by allowing selection of 'Yes' for shipping bills to be under the reward scheme. [*SRF Ltd.* v. *Union of India* – 2023 TIOL 770 HC AHM CUS]

Earphones are not part of mobile phones – Exemption under Notification No. 57/2017-Cus. is available

The CESTAT New Delhi has held that earphones CX 275s imported by the assessee are not 'part of cellular mobile phone' and not 'wired headset', and hence are not excluded from the benefit of exemption Notification No. 57/2017-Cus. as amended by Notification No. 22/2018-Cus, at Sl. No. 18. The Tribunal in this

regard noted that utility of earphone is not confined to cellular mobile phones as they are also used with laptops, i-pads, desktops, etc., and that mobile phones are often used with earphones. Holding that earphones would qualify as accessory to mobile phones, the Tribunal rejected the contention of the Department that the word 'part' in Sl. No. 18 of the notification is used in a general sense and should be treated as including earphones. The Tribunal in this regard also noted that the Supreme Court in its decision in the case of Dilip Kumar and Company did not completely rule out the possibility of liberal interpretation of an exemption notification. [*Sennheiser Electronics India Pvt. Ltd.* v. *Principal Commissioner* – 2023 (7) TMI 839 - CESTAT New Delhi]

All-Terrain vehicles – Classification under Headings 8704 and 8709 and not under Heading 8703

The CESTAT New Delhi has held that All-Terrain Vehicles – Ranger vehicles and Brutus vehicles, are not principally designed for transport of persons and hence would be correctly classifiable under Headings 8704 (non-electric) and Heading 8709 (electric). Rejecting the Department's contention that the vehicles in question were to be classified under Heading 8703 as vehicles for transporting passengers, the Tribunal noted that the vehicles did not have the features that a vehicle for transporting persons is required to have as per the HSN Explanatory Notes. Observing that it is the gross-weight usage that determines whether the vehicle is principally designed for transportation of persons, the Tribunal noted that out of the total payload capacity, more was designed to be used for carrying cargo and not passengers. The Tribunal further applied the usage/functionality test as the condition of 'principally designed for transportation of passengers' implied reading of 'end-use' stipulation. The CESTAT in this regard noted that the vehicles were over the years sold to different agencies primarily for the purpose of transportation of goods and utility purposes. [*Polaris India Pvt. Ltd.* v. *Commissioner* – 2023 (7) TMI 446 - CESTAT New Delhi]

Tomato dry flavour is classifiable under TI 3302 10 10 and not under TI 2106 90 60

The CESTAT Chennai has held that Tomato dry flavour, which according to the description in the import invoice was 'Tomato Flavour (For Industrial Use only - Not for Direct Consumption)' is classifiable under Tariff Item 3302 10 10 of the Customs Tariff Act, 1975 and not under Heading 2106 (Food preparations not elsewhere specified or included) thereof. The Tribunal noted that imported product was a mixture of odoriferous substances, and as submitted by the assessee, was not a naturally extracted product from tomato, but an in-house blend made by using various aroma chemicals, essential oils/extracts, etc., to be used in flavours which need tomato taste in them. The adjudicating authority had ruled out the classification of tomato dry flavour basing on the HSN to Heading 3302, stating that none of the ingredients listed under the HSN form the basis for the product other than natural tomato powder, which does not fall under the list of principle essential oils, resinoids and extracted oleoresins of CTH 3301. However, allowing the appeal, the Tribunal noted that odoriferous substances can be of synthetic origin and that Heading 3302 covers both natural and/or synthetic mixtures of

odoriferous substances. [*Symrise Private Limited* v. *Commissioner* – Final Order No. 40499/2023, dated 28 June 2023, CESTAT Chennai]

Optomo creative Touch 3-series Interactive Flat Panel is classifiable under Heading 8471 – Word 'interactive' is important

The Customs AAR has held that 'Optoma Creative Touch 3-series Interactive Flat Panel (IFP) (Model–3652RK, 3752RK & 3862RK)' is classifiable sub-heading 8471 41 90 of the First Schedule to the Customs Tariff Act, 1975. Rejecting the Department's plea of classification under Heading 8528, the Authority held that the word 'Interactive' in the description of the goods brings to the front various capabilities of the subject goods and that the capabilities of the subject goods meet the requirement under Chapter Note 6(A) of Chapter 84 for a machine to mean as 'automatic data processing machine'. Department's contention that the subject goods were mainly display devices incorporating and working in conjunction with an ADP machine, was hence rejected. [In RE: *Supertron Electronics Pvt. Ltd.* – 2023 VIL 16 AAR CU]

Central Excise, Service Tax and VAT

Ratio decidendi

- Refund of service tax when service rendered and consumed outside India – Receipt of payment in foreign currency is not material – CESTAT Ahmedabad
- Refund of service tax when service rendered and consumed outside India – Receipt of payment in foreign currency is not material – CESTAT Kolkata
- Error in filing ST-3 Return is not fatal for claiming otherwise eligible refund – CESTAT Chennai
- No Business Support Service in case of concession agreement for development of port – CESTAT Chennai
- Demand – Limitation – No suppression when requirement to disclose is absent – Supreme Court
- Appeal to Supreme Court – Resurrection of point made at original stage when not permissible – Supreme Court

Ratio decidendi

Refund of service tax when service rendered and consumed outside India – Receipt of payment in foreign currency is not material

Observing that if tax itself is not leviable, it would be immaterial whether payment for services is received in Indian currency or foreign currency, the CESTAT Ahmedabad has allowed assessee's appeal in a case involving refund claim where Consulting engineering services was rendered outside India and duly consumed by the recipient outside India. The Department had, relying upon Rule 3(2)(b) of Export of Services Rules, 2005, held the refund application to be premature as the assessee was yet to receive the amount in foreign exchange. According to the Tribunal, when the services in question were not taxable at all, as they were consumed outside India, the refund claim could not have been returned as premature on the ground that payment for the services were to be received in foreign exchange on a future date. The CESTAT in this regard also stated that the provisions of refund do not give liberty to the sanctioning authority to return the refund application by terming the same to be premature. [*Aegis Limited* v. *Commissioner* – 2023 VIL 557 CESTAT AHM ST]

Manufacture – Giving different trade names to market products cannot be called emergence of new final products

In a case involving the processes of re-crystallization and distillation, the CESTAT Kolkata has held that giving different trade names to market the products cannot be called emergence of new final products to amount to 'manufacture'. Holding that the processes of re-crystallization and distillation undertaken by the assessee cannot be called fractional distillation to amount to 'manufacture' under Section 2(f) of the Central Excise Act, 1944, the Tribunal observed that there was no evidence to show that various components of liquid mixtures emerged at different stages in the process undertaken by the assessee. [*Ganga Rasayanie* v. *Commissioner* – 2023 VIL 564 CESTAT KOL CE]

Error in filing ST-3 Return is not fatal for claiming otherwise eligible refund

The CESTAT Chennai has held that the Department cannot retain an amount just because of an inadvertent error relating to the information provided in ST-3 Return. According to the Tribunal, a refund claim should not be rejected because of an error in the Return when it is otherwise found eligible. The ST-3 Returns filed by the assessee showed that it had adjusted the amount under

Rule 6(3) of the Service Tax Rules, 1994 towards their service tax liability. The assessee however claimed that it was an inadvertent error and that in fact they had adjusted only a part of the amount. The Tribunal in this regard observed that while the self-assessed Return is to be ordinarily accepted by the Department, there is no dilution of the statutory responsibility of the jurisdictional officers in ensuring the correctness of the duty paid. The Tribunal was also of the view that claim was wrongly dismissed without examining the claim based on verifiable facts. [*Gail India Ltd.* v. *Commissioner* – 2023 VIL 568 CESTAT CHE ST]

No Business Support Service in case of concession agreement for development of port

The CESTAT Chennai has held that royalty/concession fee/lease charges received by the Port from a company, under a Concession Agreement for development of a port project, not represents consideration for providing services relatable to the taxable service defined under Section 65(105)(zzzq) of the Finance Act, 1994 under the category of 'Support Services of Business or Commerce'. The assessee-appellant was an arm of the Government of Puducherry and was alleged to have outsourced the activity of designing, financing, building, owning, maintaining, operating and transferring a port and thus alleged to have rendered the activity under infrastructure support service in relation to business or commerce. Allowing the appeal, the Tribunal held that the contractual permission by the assessee/Port Department for setting up and running port facilities cannot be termed as support services of business or commerce, to be taxed at the Port Departments hands. According to the Tribunal, the 'concession fee' paid to the assessee as a percentage of gross revenue generated by the concessionaire each year was also not a payment for any support services given by the Port Department. [*The Port Department* v. *Commissioner* – 2023 TIOL 580 CESTAT MAD]

Demand – Limitation – No suppression when requirement to disclose is absent

Observing that an accusation of non-disclosure can only be made if there is in the first instance a requirement to disclose, the Supreme Court has held that in absence of any specific column or note in ER-1/RT-12 Returns similar to note 4 thereof, requiring a separate disclosure of the value of deemed export clearance, there was no suppression of facts as a consequence of assessee's failure to separately disclose the value of deemed export clearance. The Apex Court further did not agree with the findings of the Commissioner that certain relevant documents were not filed and thereby suppressed from the scrutiny. The Court in this regard noted that the SCN itself had accepted that self-assessment procedure did not require an assessee to submit copies of all contracts, agreements and invoices.

Dismissing Department's appeal on the ground that demands were time-barred, the Court also observed that the assessee's conduct, during the period involved, could not be considered as *malafide* when it merely followed the view taken by the Tribunal, which was though subsequently (after the period involved) overturned by the Supreme Court. [*Commissioner* v. *Reliance*

Industries Ltd. – Judgement dated 4 July 2023 in Civil Appeals Nos. 6033 of 2009 with 5714 of 2011, Supreme Court]

Appeal to Supreme Court – Resurrection of point made at original stage when not permissible

The Supreme Court has held that the mere fact that the oral arguments of the Revenue were supported by findings of the adjudicating authority, which was not the order impugned before the Apex Court, does not entitle the Revenue to resurrect a point which though made at the original stage, was never pressed before the Tribunal or even incorporated in the memo of appeal filed before the Court. The Court in this regard was of the view that the Revenue could not be permitted to argue its matters by going beyond the written pleadings filed by it before the Court. [*Commissioner* v. *Reliance Industries Ltd.* – Judgement dated 4 July 2023 in Civil Appeals Nos. 6033 of 2009 with 5714 of 2011, Supreme Court]

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