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The 'Mutuality' of a mutually agreed solution under the Dispute Settlement Understanding

By **Divyashree Suri**

The Dispute Settlement Understanding ('**DSU**') lays down the legal framework under which resolution of trade disputes must operate under the World Trade Organization ('**WTO**'). The DSU prioritizes the conclusion of the trade disputes in a positive and effective manner and expresses a preference to the adoption of a mutually agreeable solution between the parties to the dispute. Article 3.7 of the DSU creates a hierarchy of preferences which must be adopted during the dispute resolution process:

I. In case of a trade dispute between Member Countries, the Member Countries must aim at reaching a mutually agreeable solution between themselves and notify such a solution to the Dispute Settlement Body ('**DSB**').[1]

II. However, if the disputing Member Countries are unable to reach a mutually agreeable solution, the dispute resolution mechanism must aim at the withdrawal of the measure which is inconsistent with WTO laws and obligations under various WTO agreements.

III. In the event that the withdrawal of the measure is not practicable, the Member Country imposing such a measure may compensate the aggrieved Member Country. However, the DSU clarifies that compensation is only a temporary solution, till the measure is not withdrawn.[2]

IV. Lastly, the aggrieved Member Country may suspend the application of concessions and other obligations under various agreements *vis-à-vis* the other Member Country. However, the aggrieved Member Country must seek authorization from the DSB before suspending concessions or other obligations. [3]

Interestingly, in a recent trade dispute concerning the 'trade war'[4] between the United States of America and China, *United States- Tariff Measures on Certain Goods from China (DS543),* the United States requested the Panel to not issue findings regarding the tariffs imposed by the United States against Chinese imports.[5] Article 12.7 of the DSU states that *"[w]here a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached."*[6]

[1] Article 3.7, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement

[2] *Ibid.*

[3] *Ibid.*

[4] The United States of America levied additional duties on Chinese imports in July and September 2018. This was in pursuance of a Section 301 investigation, in which it was determined that the Intellectual Property policies adopted by China were detrimental to US interests. In response to the said duties, China requested for the composition of a WTO Panel in December 2018, and also imposed retaliatory tariffs.

[5] Para 7.4, Panel Report in United States- Tariff Measures on Certain Goods from China (DS543), 15th September 2020

[6] Article 12.7, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement

In this regard, the United States noted that the bilateral negotiations between China and the United States were underway, which were aimed at addressing various trade concerns between the two countries. It also referred to the Economic and Trade Agreement between the Government of the United States of America and the Government of People's Republic of China (Phase One) entered into by both the countries on 14-02-2020 ('**Phase One Agreement**'). United States also pointed out that China had also imposed retaliatory tariffs against imports from the United States, without the authorization of the DSB, as required under Article 3.7 of the DSU.[7]

However, China was clear that no such solution has been arrived at between the two parties. It pointed out that any mutually agreed solution must be notified to the DSB under Article 3.6 of the DSU. It further argued that the Phase One Agreement was not relevant to the issues being addressed in the dispute since it did not address the measures in question. China's claim in the dispute was that the tariffs imposed by the United States were inconsistent with Article I:1, Article II:1(a) and Article II:1(b) of the General Agreement on Tariffs and Trade 1994 ('**GATT**') since they violated the Most-Favored Nation Principle and were not in accordance with the United States' Schedule of Concessions. It pointed out that the WTO-inconsistent measures continue to remain in force and hamper trade. The non-resolution of the matter warranted an adjudication by the Panel.[8]

Adjudicating upon whether bilateral negotiations can constitute a mutually agreed solution between Member Countries, the Panel noted that bilateral negotiations may not always reach a mutually agreed solution. It emphasized on the importance of the solution being arrived at being 'mutually' accepted by both Parties. It stated that in the event that a solution is found to a problem, the problem shall cease to exist. However, as pointed out by China, China continued to be aggrieved by the tariffs imposed by the United States. [9]

The Panel Report lays great emphasis on the absolute right of the Member Countries to initiate WTO dispute proceedings, if benefits being accrued to them are impaired by the measures adopted by a Member Country, under Article 3.3 of the DSU. The Panel relied on the Appellate Body Report in the dispute of *EC-Bananas III*, which held that while Article 3.7 places an obligation on the Member Countries to self-regulate and only initiate proceedings when a mutually agreed solution cannot be reached at, nothing in the language of the DSU bars a Member Country from initiating proceedings if aggrieved. Para 135 of the Appellate Body Report states as follows:

"Accordingly, we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful""[10]

The Panel noted that bilateral negotiations are not a substitute for an ongoing dispute. They are an '*additional path towards solving the parties' disagreement*.' If a solution has not been reached at, which is mutually agreeable to both parties, a Member Country should not be barred from initiating proceedings.[11]

[7] Paras 7.4 and 7.5, Panel Report in *United States- Tariff Measures on Certain Goods from China* (DS543), 15th September 2020
[8] Paras 7.6, Panel Report in *United States- Tariff Measures on Certain Goods from China* (DS543), 15th September 2020
[9] Paras 7.12, Panel Report in *United States- Tariff Measures on Certain Goods from China* (DS543), 15th September 2020
[10] Para 135, Appellate Body Report in European Communities- Regime for the Importation, Sale and Distribution of Bananas (DS27), 9th September 2007
[11] Paras 7.7, Panel Report in United States- Tariff Measures on Certain Goods from China (DS543), 15th September 2020

The approach adopted by the Panel in this dispute is consistent with existing WTO jurisprudence and rightly spells out the intention of the DSU. It has clarified that for a solution to be accepted as a mutually agreed solution within the meaning of Article 12.7 the solution must be acceptable to both parties, i.e. should be *mutual,* and must resolve the issue at hand. While shying away from commenting on the consequences of a solution which is not notified under Article 3.6, the Panel has emphasized on the importance of a written document which may serve as evidence of the existence of a mutually agreed solution.

Therefore, the Panel rejected the contentions raised by the United States under Article 12.7 of the DSU and issued a detailed Panel Report on the tariffs imposed by the United States under Section 301 of the Trade Act of 1974 ("**Section 301**"). The Panel held that the Section 301 tariffs imposed by the United States against Chinese imports were:

i. Violative of Article I:1, Article II:1(a), and Article II:1(b) of the GATT; and

ii. Not justifiable as being in the interest of public morals under Article XX(a) of the GATT.[12]

The effect of the findings of the Panel Report, if adopted, is that the United States would be bound by the Panel Report and would have to withdraw the Section 301 tariffs against Chinese imports. However, the United States may prefer an appeal, which will prevent the Panel Report from being adopted. Given that the Appellate Body of the WTO has been dysfunctional since 11th December 2019, the appeal may remain in a limbo.

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

Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of Notification	Remarks
2-Ethyl Hexanol	European Union, Indonesia, Korea RP, Malaysia, Taiwan and USA	F. No. 7/28/2020-DGTR	28-08-2020	ADD sunset review initiated

[12] Paras 8.1, Panel Report in United States- Tariff Measures on Certain Goods from China (DS543), 15th September 2020

Product	Country	Notification No.	Date of Notification	Remarks
Acrylic Fibre	Belarus, European Union, Peru and Ukraine	F. No. 6/25/2019-DGTR	01-09-2020	Definitive anti-dumping duty recommended
Acrylic Fibre	Thailand	F. No. 7/18/2019-DGTR	31-08-2020	Anti-dumping duty recommended to be continued after sunset review
Aluminium and Zinc coated flat products	Korea RP	F. No. 7/25/2020-DGTR	15-09-2020	ADD – Mid-term review initiated limited to change of name of producer/exporter from Korea RP
Axle for trailers	China	F. No. 4/11/2020-DGTR	15-09-2020	ADD – Anti-circumvention investigation initiated
Calcined Gypsum Powder	Iran, Oman, Saudi Arabia and UAE	F. No. 6/45/2020-DGTR	29-09-2020	Anti-dumping investigation initiated
Ceftriaxone Sodium Sterile	China	F. No.6/46/2020-DGTR	24-09-2020	Anti-dumping investigation initiated
Ciprofloxacin Hydrochloride	China	28/2020-Cus. (ADD)	02-09-2020	Provisional anti-dumping duty imposed
Diketopyrrolo Pyrrole Pigment Red 254 (DPP Red 254)	China	F. No. 7/27/2019-DGTR	08-09-2020	Sunset review - Anti-dumping measures recommended to be continued
Flat rolled products of Aluminium	China	F. No. 6/27/2020-DGTR	08-09-2020	Anti-dumping investigation initiated
Flexible Slabstock Polyol	Saudi Arabia and United Arab Emirates	F. No. 6/20/2019-DGTR	01-09-2020	Definitive anti-dumping duty recommended
Float Glass of thickness 2 mm to 12 mm	China	29/2020-Cus. (ADD)	02-09-2020	Anti-dumping duty extended till 07-12-2020
Glass Fibre and articles thereof	China	F. No. 713412020-DGTR	25-09-2020	ADD sunset review initiated
Hot Rolled Flat Products of Stainless Steel – 304 grade	China, Malaysia, Korea RP	F. No. 7/16/2019-DGTR	29-09-2020	Definitive anti-dumping duty recommended to be continued after sunset review

Product	Country	Notification No.	Date of Notification	Remarks
Hydrofluorocarbons (HFC) component R-32	China	F. No. 6/33/2020-DGTR	28-09-2020	Anti-dumping investigation initiated
Measuring tapes	China	F. No. 7/36/2020-DGTR	21-09-2020	ADD – Anti-circumvention investigation initiated
Melamine	China	F. No. 7/32/2020-DGTR	22-09-2020	ADD sunset review initiated
Methylene Chloride	China	F. No. 7/19/2020-DGTR	31-08-2020	ADD sunset review initiated
Non-woven fabric	Malaysia, Indonesia, Thailand, Saudi Arabia and China	F. No. 14/23/2015-DGAD	15-09-2020	Anti-dumping investigation terminated
Normal Butanol	European Union, Malaysia, Singapore, South Africa and USA	F. No. 7/29/2020-DGTR	31-08-2020	ADD sunset review initiated
Persulphates	China and USA	F. No. 6/25/2020-DGTR	28-09-2020	Anti-dumping investigation initiated
Phthalic Anhydride	Korea RP	F. No. 22/8/2019-DGTR	28-09-2020	Safeguard duty recommended under bilateral measures
PVC Suspension Grade Resin	Japan	F. No. 20/6/2020-DGTR	08-09-2020	Bilateral safeguard investigation initiated
Silicone Sealants	China	F. No. 06/31/2020-DGTR	28-09-2020	Anti-dumping investigation initiated
Sodium Hydrosulphite	China and Korea RP	F. No. 6/35/2020-DGTR	16-09-2020	Anti-dumping investigation initiated
Toluene Di-Isocyanate	European Union, Saudi Arabia, Chinese Taipei and United Arab Emirates	F. No. 6/43/2019-DGTR	04-09-2020	Imposition of provisional anti-dumping duty recommended

Product	Country	Notification No.	Date of Notification	Remarks
Untreated Fumed Silica	China and Korea RP	F. No. 6/40/2020-DGTR	22-09-2020	Anti-dumping investigation initiated
Vitamin C	China	F. No. 6/32/2020-DGTR	04-09-2020	Anti-dumping investigation initiated

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Carbazole Violet Pigment 23	USA	Investigation No. 701-TA-437 and Investigation No. 731-TA-1060-1061	25-09-2020	Institution of third Five-Year-Review
Frozen Warmwater Shrimp	USA	FR 85 57192 [A-533-840]	15-09-2020	Notice of initiation and preliminary results of anti-dumping duty changed circumstances review
Polyethylene Terephthalate	USA	85 FR 59548 [Investigation Nos. 701-TA-415 and 731-TA-933-934]	22-09-2020	ADD and CVD – Affirmative 5-year review issued
Tungsten electrodes	European Union	Commission Implementing Regulation (EU) 2020/1249	02-09-2020	ADD anti-circumvention investigation terminated

WTO News

USA's additional duties on certain Chinese goods violate WTO provisions

The WTO's DSB Panel has held that the United States of America's tariff measures in respect of certain Chinese goods are inconsistent with Articles I:1, II:1(a) and II:1(b) of the General Agreement on Tariffs and Trade 1994 ('GATT 1994'). The United States had, imposed additional duties pursuant to the findings of a Section 301 of the Trade Act of 1974 Report

addressing China's practices related to technology transfer, intellectual property, and innovation, which according to the USA were unfair and distortive policies of state-sanctioned theft. Observing that the measures applied only to products from China and were applied in excess of the rates to which the United States bound itself in its schedule of concessions, the Panel held the measures to be in violation of Articles I.1 and II.1(a) and (b) of the GATT, 1994. USA's contention that the measures were justified under Article XX(a) of the GATT as are necessary to protect US public moral, was rejected by the Panel, observing that USA did not met its burden of demonstrating that the measures are provisionally justified under Article XX(a).

Indonesian and Russian localisation measures discussed at TRIMs Committee

The WTO's Committee on Trade-Related Investment Measures ('TRIMs') on 15-09-2020 discussed Indonesian and Russian measures in respect of localisation and import substitution policies. As per reports, the United States, European Union and Japan alleged that the Indonesian measures required the use of local products contrary to Indonesia's WTO obligations. The United States also expressed concern at the expansion of Russia's localization measures to direct private companies to give priority to Russian-sourced goods, services and works over imports, contrary to Russia's WTO obligations.

Safeguard investigations initiated around the world

Aluminium foil – Thailand has on 18-09-2020 launched safeguard investigation on imports of aluminium foil. According to a document circulated in Committee on Safeguards, the deadline for presentation of evidence, documents and views by the exporters and other interested parties situated outside Thailand, is 15-10-2020.

Ceramic floor and wall tiles – Malaysia has on 13-09-2020 launched safeguard investigation on imports of ceramic floor and wall tiles. As per document G/SG/N/6/MYS/6, dated 23-09-2020, all interested parties need to submit their views and response to the questionnaires in writing within 30 days from the date of publication of the Notice of Initiation in the Federal Government Gazette of Malaysia.

High-density polyethylene and linear low-density polyethylene pellets and granules – Philippines has on 04-09-2020 initiated a preliminary safeguard investigation on import of high-density polyethylene and linear low-density polyethylene pellets and granules. The measures were notified in the WTO on the same day.

Wires – Ukraine has on 28-07-2020 initiated safeguard investigation on imports of Insulated wires, cables and other insulated electric conductors, whether or not fitted with connectors, and optical fiber cables, made up of individually sheathed fibers. As per communication circulated on 09-09-2020 in WTO, Ukrainian Ministry for Development of Economy, Trade and Agriculture will consider the written comments within 45 days of publication of the notice.

India Customs & Trade Policy Update

Merchandise Export from India Scheme – Ceiling and sunset notified: The Ministry of Commerce has fixed a ceiling limit of INR 2 crores per IEC for claiming the Merchandise Export from India Scheme ('**MEIS**') benefits against exports made between 01-09-2020 to 31-12-2020 (based on LEO date of shipping bill). According to the new para 3.04A of the Foreign Trade Policy 2015-20, as inserted by Notification No. 30/2015-20, dated 01-09-2020, the said ceiling limit is subject to further reduction to ensure that the total claim under MEIS for the said period does not exceed INR 5000 crores. Further, IEC holder who has not made any exports with LEO date between 01-09-2019 to 31-08-2020 or has obtained IEC on or after 01-09-2020 would not be entitled for MEIS claim against exports made from 01-09-2020 onwards. New para 3.04B provides that MEIS Scheme will not be available for exports made from 01-01-2021.

FTAs – Bill of Entry formats revised to enforce requirements of CAROTA Rules: The Ministry of Finance has revised the formats for all 3 types of Bills of Entry – for home consumption, for warehousing and for ex-bond clearance. The revised formats which are effective from 21-09-2020, now capture the new requirements as mandated by the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 ('**CAROTA Rules**'). As per the new formats, the country of origin and country of origin code is now required to be declared. Further, if the country of consignment is different from the country of origin, it must be specifically declared along with the country code. Certain declarations in respect of preferential duty claims have also been revised. Bill of Entry (Forms) Regulations, 1976 has been amended for this purpose by Notification No. 90/2020-Cus. (N.T.), dated 17-09-2020.

Standard Unit Quantity Codes mandatory from 1-11-2020 for all exports/imports: Directorate General of Foreign Trade ('**DGFT**') has requested all authorisation holders, where non-standard units are indicated in the authorisations in the import and export quantities, to approach the concerned Regional Authority ('**RA**') for converting them to standard Unit Quantity Codes ('**UQC**'). As per Trade Notice No. 27/2020-21, dated 14-09-2020, for authorisations already issued and carrying non-standard units, Customs have been requested to allow export against such authorisations till 30-10-2020. The Trade Notice also states that exports/imports without standard UQC will not be permitted after 1-11-2020.

Faceless assessment for import of goods to be rolled out pan India from 31-10-2020: The Central Board of Indirect Taxes and Customs ('**CBIC**') has decided to roll-out the Faceless Assessment at all India level at all ports of import and for all imported goods by 31-10-2020. Circular No. 40/2020-Cus., dated 04-09-2020 issued for this purpose, provides various roll-out dates for different ports. It may be noted that Phase I of the faceless assessment was launched on 05-06-2020 at Chennai and Bengaluru for goods falling under Chapters 84 and 85 of the Customs Tariff Act, 1975. Phase II had begun on 03-08-2020 at Chennai, Bengaluru, Delhi, for goods covered under Chapters 50 to 71, 84, 85 and 86 to 92, and in Mumbai for goods under Chapter 29.

Steel Import Monitoring System – Compulsory registration of all goods falling under Chapters 72, 73 and 86 of ITC (HS): Import under all HS Codes of Chapters 72, 73 and 86 of ITC (HS), 2017 shall now require compulsory registration under Steel Import Monitoring System ('**SIMS**'). DGFT Notification No. 33/2015-20, dated 28-09-2020 amends Policy Condition in Chapters 72, 73 and 86 of the Schedule-I to the ITC (HS), for this purpose. Further, according to DGFT Public Notice No. 19/2015-20, also dated 28-09-2020, implementation date in respect of the additional Codes now covered under SIMS by this notification, will be 16-10-2020. It may be noted that *vide* Notification No. 17/2015-20, dated 05-09-2019 the import policy of some 284 specified Codes under said Chapters of the ITC (HS) was already changed from 'free' to 'free subject to compulsory registration under SIMS'. The latest notification now extends the SIMS requirement to import of all other goods under these Chapters.

Onion exports prohibited: Export of all varieties of onion, excluding cut, sliced or broken, in powder form is now prohibited with effect from 14-09-2020. According to Notification No. 31/2015-20, dated 14-09-2020, the provisions under para 1.05 of the Foreign Trade Policy 2015-20 regarding transitional arrangement shall not be applicable for such prohibition.

LED products – Random sampling to be done: A new policy condition has been added in Chapters 85 and 94 in Schedule I to the ITC (HS), 2017 to provide for sampling of LED products and control gear for LED products notified under Electronics and Information Technology Goods (Requirement of Compulsory Registration) Order, 2012. Notification No. 32/2015-20, dated 17-09-2020 has been issued for the purpose.

Ratio Decidendi

Anti-dumping duty – Action of Designated Authority asking for contemporary data, correct

The Supreme Court of India has upheld the action of the Designated Authority ('DA') in the Directorate General of Trade Remedies ('DGTR'), requiring the domestic industry to furnish relatively contemporary data. Relying on the guidelines contained in the Manual of Operation for Trade Remedy Investigations (Period of Investigation and Injury Investigation period), the Apex Court set aside the impugned order of the Telangana High Court and held that the DA's action could not be termed as arbitrary. The Telangana High Court had set aside the DA's letters issued in 2018, seeking updated data from the domestic industry as the initial application was filed in 2016. The DA in its letter, issued pursuant to earlier directions by the High Court in remand proceedings, had observed that the domestic industry had filed data for the period January 2016 to December 2016, however, to investigate further the period of investigation was proposed to be considered as 01-04-2018 to 31-

03-2019. Setting aside the High Court order, the Supreme Court also observed that any investigation carried out for past periods would result in minimal levy. [*Designated Authority* v. *Andhra Petrochemicals Limited* – Judgement dated 01-09-2020 in Civil Appeal No(s). 3046-3048 of 2020, Supreme Court of India]

General principles of GATT 1994 not fully applicable unless notified by Government under FTDR Act

The Supreme Court of India has held that General Agreement on Trade & Tariff, 1994 ('GATT 1994') have not been statutorily fully made a subject of 'act of transformation' and incorporated in the domestic legislation i.e., the Foreign Trade (Development & Regulation) Act 1992 ('FTDR Act'), and therefore, the application of the various principles and articles thereof, is subject to the powers conferred by the Central Government under Section 3 of the FTDR Act. It was held that the entire GATT-1994 does not stand transposed and enacted by way of statutory law or delegated legislation. It noted that 'Act of transformation' principle means and implies that an international treaty is not directly applicable in the domestic law system and requires provision in the domestic rules before it is applied.

The case involved a challenge to the validity of the DGFT Notifications dated 29-03-2019 and Trade Notice dated 16-04-2019 on the ground of excessive delegation as the notifications imposed quantitative restrictions on import of certain pulses. The Court held that notwithstanding Section 9A of the FTDR Act, the Central Government continues and has authority to impose quantitative restrictions by an order under Section 3(2) of the FTDR Act. [*Union of India* v. *Agricas LLP* – Judgement dated 26-08-2020 in Transfer Petition (Civil) Nos. 496-509 of 2020 and Ors., Supreme Court of India]

Rate of duty when notification issued on same date when bills of entry presented

Observing that the self-assessment was carried out on the basis of the rate of duty which prevailed at the time of the presentation of the bill of entry, the Supreme Court has upheld the High Court's Orders setting aside re-assessments, by the Customs department, due to a notification issued later on the date of presenting of bill of entry. The rate of duty on goods from Pakistan was raised to 200% by the notification in question issued under Section 8A of the Customs Tariff Act, 1975. The Apex Court rejected the department's contentions that two different rates of duty cannot be applicable on the same day, and that by use of the phrase 'on the date' (under Section 46 of Customs Act, 1962) without making a reference to time, the legislature has by a legal fiction enacted that the rate of duty will be the rate that is prevalent on the date of the presentation of the bill of entry for home consumption. The contention that the notification issued at 20:46:58 hours on 16-02-2019 took effect commencing from 0000 hours on that day, was thus rejected.

The Court observed that notification operates only prospectively and cannot displace the rate of duty applicable when the bill of entry was presented. It also noted that a notification issued under Section 8A(1) does not fall under definition of 'Central Acts' and 'Regulations' under the General Clauses Act, 1897, and hence the Section 5(3) of the latter would not be applicable. It also noted that Parliament did not either expressly or by necessary implication indicated that a notification once issued under Section 8A will have force and effect anterior in time. Further, relying on Information Technology Act 2000, Information Technology (Electronic Service Delivery) Rules 2011 and Digital Signature (End entity) Rules 2015, the Court held that the

provisions in the Customs Act for the electronic presentation of the bill of entry for home consumption and for self-assessment have to be read in the context of Section 13 of the Information Technology Act which recognizes 'the dispatch of an electronic record' and 'the time of receipt of an electronic record'. [*Union of India* v. *G S Chatha Rice Mills & Anr.* – Judgement dated 23-09-2020 in Civil Appeal No 3249 of 2020 and Ors., Supreme Court of India]

Refund of anti-dumping duty – Protest payment

The Madras High Court has allowed refund of anti-dumping duty even after the refund claim was filed after the limitation period and when the assessee-importer, as per the customs department, had not requested the concerned Appraising group regarding payment of duty under protest. The Court observed that the assessee had all along contended that anti-dumping duty is not payable and had in fact approached the Court for direction to the department for release of goods. The High Court noted that the Deputy Commissioner on the Court's earlier direction to adjudicate, had held that anti-dumping duty was not payable. It observed that duty was hence required to be refunded on basis of said Order-in-Original. The Court also directed for payment of 6% interest. [*ELPE Labs* v. *Commissioner* – Order dated 17-08-2020 in W.P.No.29944 of 2018, Madras High 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

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

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

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

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