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Article
Underreporting and misreporting of income - Proposed penalty regime 2

Budget 2016 – Highlights 5

Notifications and Circulars 8

Ratio Decidendi 9

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Article

Underreporting and misreporting of income - Proposed penalty regime

By **Sumeet Khurana**

Introduction

With the Finance Bill 2016, the penalty regime in income-tax law is proposed to undergo a major overhaul. Earlier system provided for a levy of penalty, for concealment of income or furnishing inaccurate particulars of income, of an amount between 100% to 300% of the tax sought to be evaded. The newly proposed system classifies all variations made in the income into two categories – 'under-reporting' and 'misreporting'. The penalties are now pegged at 50% and 200% of the prescribed tax base computed on under-reported or misreported income respectively. The changes are proposed to be implemented from Assessment Year 2017-18.

Dissection

Penalty *may* be levied by Assessing Officer, Commissioner Appeals, Commissioner or Principal Commissioner (hereinafter referred to as AO for short). By using the word 'may' in the new section the legislature seeks to retain the existing fundamental feature of penalty that it should not be levied unless the conduct of assessee has been contumacious.

Under-reporting and its quantum

Situation	Under-reporting	Quantum
Assessment of a return filed	If, Income assessed (A) is greater than summary assessment amount[1] (B)	A – B
Assessment without return (Individual)	If, Income assessed (A) is greater than minimum exemption slab (C)	A – C
Assessment without return (Non-Individual)	Note 1	A
Re-assessment	If, income reassessed (D) is greater than income assessed earlier (A)	D – A

[1] Amount of income determined by processing the return under section 143(1)

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Situation	Under-reporting	Quantum
Minimum Alternate Tax - MAT (Assessment) [Sec. 115JB and 115JC]	If, MAT profits assessed (A-1) is greater than summary assessment of MAT profits (B-1)	[*Total* income assessed – (total income assessed minus under-reported income[2])] plus [MAT profits assessed – (MAT profits assessed – under-reported income[3])]
MAT (reassessment)	If, MAT profits re-assessed (D-1) is greater than summary assessment of MAT profits (B-1) (Note 2)	
Loss reduced or converted into income	If, returned loss (E) got reduced on assessment (F)	E – F
	If assessed loss (F) got reduced on reassessment (G)	F – G

Note 1: Sub-section (3) of Section 270A prescribes quantum of under-reported income and provides that in case of assessment without a return having been furnished by a company, firm etc the income assessed would be the income under-reported. However sub-section (2) which defines under-reporting does not contain a corresponding clause for non-corporate assessees. It simply states that if income assessed is greater than maximum amount not chargeable to tax then the case will be of under-reporting of income.

In case of company, firm, or local authority, one view is to take the maximum amount not chargeable to tax as NIL. Alternatively, one can explore the argument that the definition of 'under-reporting' in sub-section (2) does not cover the case of non-filing of return by these assessees and the machinery fails on that count. Further, there is no similar clause for Association of Persons.

Note 2: Logically speaking, in case of re-assessment of a MAT case the comparison of re-assessed amount should be made with the earlier assessed amount. One can hope that this inconsistency is ironed out by the time of enactment of Finance Bill.

Exclusions from under-reporting

Sub-section (6) of the proposed Section 270A provides following situations where despite addition to the income during assessment / reassessment the assessee would not be treated as having under-reported his income. (This does not apply in case of misreporting)

2 The phrase under-reported income here can be understood as per section 270A(3)(i)/(ii)

3 The phrase under-reported income here has to be understood by applying common-sense else there will be a circular loop

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a) *Bona-fide explanation:* If an assessee offers a bona-fide explanation in respect of the relevant income (alleged to be under-reported) and substantiates such explanation by disclosing all material facts. For example if assessee adopted a legal interpretation which is not accepted by department;

b) *Cases of estimation of income:* Where the AO determines the income on the basis of estimate provided the account are *correct* and *complete* however *method* (of accounting?) is such that income cannot be properly deduced therefrom;

c) *Estimated self disallowances:* Where the Assessee had himself made a disallowance in return of income (e.g. under section 14A) while the AO enhances the disallowance;

d) *TP addition:* TP addition would per se not be treated as under-reporting. This is subject to the condition that assessee had (a) maintained all documentation (b) declared the transaction and (c) disclosed material facts pertaining to the transaction; and

e) Undisclosed income admitted during search as per section 271AAB

Mis-reporting

Of the cases of under-reported income as above, the taxpayer would be said to have 'misreported' income, if he has:

- Misrepresented or suppressed facts
- Failed to record any investments in the books of account
- Claimed any expenditure not substantiated by evidence
- Failure to record receipts in books of account
- Recording of any false entry in the books of account
- Failure to report international transaction (including a deemed one) or any specified domestic transaction, to which transfer pricing provisions would apply

  This will be an area of concern because an assessee may adopt a legal view that two entities are not Associated Enterprises or a transaction between them is not in the nature of an International transaction and therefore not report the same. Even in such case the benefit of a *bona-fide* belief would not be available to the assessee and in case of adjustment to income on account of TP provisions penalty of misreporting will get attracted.

Under-reporting as well as misreporting

It may so happen that in a case that on one stream of income the AO alleges under-reporting and for another element of income or expense the AO alleges misreporting. In order to implement the provisions of this section it would be desirable to compute the amount of under-reporting and misreporting separately. Sub-section (2) and (3) seek comparison between *income assessed* and income determined under section 143(1)(a). The expression "income assessed" accordingly would need to be understood as

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income of particular nature that is enhanced during assessment. This interpretation is also supported from the fact that expression *'total income assessed'* is used only in first proviso to clause (ii) section 270(3).

This interpretation however poses its own challenges. Namely, the case of disallowance of expense would be difficult to fit into any clause because though that reflects its effect on the 'total income assessed', the expense itself cannot be said to fall under the expression 'income assessed' as understood in previous paragraph.

The balance needs to struck between the case of (A) making the section un-workable when there is both under-reporting and misreporting and (B) making the section unworkable for expense disallowance.

Base tax for levy of penalty

For individuals, the tax base for levy of penalty is 30% of under-reported income. For Firm, Company and Local Authority, the regular tax rate would be applied to the under-reported income as if it were the total income of such firm etc.

This provision has serious consequences as it is not linked to tax sought to be evaded. For example, in case of an income earned by an individual in the nature of royalty from Indian patent taxable @ 10% under the proposed section 115BBF while the tax underpaid would be 10% of the under-reported income, the tax base for levy of penalty would still be 30% of the under-reported income.

To sum-up

It is worth appreciation that the essential elements of the penal provision as (a) not being a mandatory levy and (b) containing room for a bona-fide conduct, have been retained. The provision seeks to provide clear demarcation between un-intended under-reporting and a malicious under-reporting and thereby treat the latter harshly. This is also a step in good direction. In this process the proposed provision uses certain expressions like 'misrepresentation or suppression of facts', 'false entry' etc. for understanding which one may look at jurisprudence developed under various other tax laws. The effect of loose ends like (a) implication of bona-fide explanation for non-reporting of international transaction and (b) penalty for MAT cases, merit attention to avoid undesirable litigation around this.

[The author is a Director, Direct Tax Practice, Lakshmikumaran & Sridharan, Bangalore]

Budget 2016 – Highlights

Corporate tax rates and taxation of royalty from patents

Corporate tax will be 25% if the company satisfies following conditions:

- Registered after 01.03.2016 and engaged in manufacture or production of an article
- No weighted deduction, incentive linked deductions and accelerated depreciation to be allowed
- No set off of any loss carried from earlier years, if loss attributed to weighted deductions and accelerated depreciation

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- Depreciation to be computed in the manner as may be prescribed
- The scheme to be optional and to be satisfied at the time of filing return for A.Y. 2017-18 (section 115BA)

Where the turnover of the company does not exceed Rs. 5 crore corporate tax to be 29% and 30% in other cases. Royalty in respect of patents developed and registered in India to be taxed at the rate of 10%. The rate applies to royalty income from patents registered even before insertion of provision. Deduction will be allowed only to resident of India who is true and first inventor of the invention. No deduction shall be allowed in computing income from royalty.

Start Ups

Start ups will get 100% deduction of profits in any 3 consecutive years out of first 5 years (Section 80-IAC). A Startup defined as a business which involves innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property.

Country by Country Reporting (CbCR)

This reporting requirement has been brought in this budget in line with the recommendations of BEPS Action 13 and effective from April 1, 2016 (AY 2017-18). As per Sec.286(2) , an Indian company who is a Parent entity (Parent) or an Alternate Reporting entity (Alternate) which is resident in India should file the Country-by-Country report for every accounting year while filing its tax return u/s 139(1).

Under Sec.286(4), a constituent entity resident in India who is part of the international group , not being a parent or alternate reporting entity as mentioned above, shall be asked to file Country-by-Country report only if there is no agreement with the Parent or Alternate of the group or a systemic failure is reported and the constituent entity is notified of such failure by Indian Tax Authorities.

This reporting requirement shall not apply to those international group for an accounting year, if the total consolidated group revenue does not exceed the amount , as may be prescribed. Please note that BEPS in Action 13 has mentioned Euro 750 Mio as the limit which might be followed by the Indian Revenue Authorities also.

BEPS Action 13 prescribes a Master File containing high level information about the Multi-national group or international group's global operations and transfer pricing policies and a Local File providing for all material information regarding the related party transactions, amounts involved and TP study for Arms length nature of such transactions.

A CBCR template shall include the following apart from any other information as may be prescribed :

- Tax Jurisdictions where each of the constituent entities is incorporated or organised or established and where it is resident and its main business activities
- Amount of revenue – related parties and unrelated parties, profit or loss before income tax, amount of income

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tax paid , amount of income tax accrued , capital and reserves, number of employees and tangible assets not being cash or cash equivalents with regard to each country or territory in which the group operates.

For non-compliance, there shall be penalty as detailed below :

- Any Assessee who does not maintain and file the required information within the due date – Rs. 5,00,000
- Non-filing of CbCR by the Parent or Alternate who is an Indian resident in respect of the reporting accounting year, a sum of Rs. 5000 per day up to one month, Rs. 15,000 per day beyond one month and Rs. 50,000 per day for continuing default after serving of notice
- Non furnishing the information called for by the tax officer within the given time period, a sum of Rs. 5000 per day up to serving of penalty order and Rs. 50,000 per day for default beyond the date of serving penalty order
- Furnishing inaccurate details knowingly or failure to file corrected report within 15 days from the date of discovery of inaccuracy or files inaccurate information or document in response to the notice issued under Sec.286(6) calling for information to be produced within 30 days from the date of receipt of such notice issued by the prescribed authority, a sum of Rs.5,00,000 shall be levied as penalty.

Filing of returns

Belated Return of Income is to be filed by the end of relevant assessment year or completion of assessment whichever is earlier and a belated return can be revised within 1 year from the end of relevant assessment year or before completion of assessment whichever is earlier. A person earning exempt income from sale of long term capital asset shall be required to file a return if the income without giving effect to the exemption, exceeds maximum amount not chargeable to tax.

The scope of automatic processing of return of income has been (Section 143(1))widened and it shall include disallowance of loss claimed, if return of previous year for which loss claimed is intended to be set off was furnished beyond due date, expenditure which has been disallowed by the tax auditor in his report but not disallowed in return and disallowance of loss claimed, if return of previous year for which loss claimed is intended to be set off was furnished beyond due date.

Equalization levy

An equalization levy of 6% of amount received by a non-resident for services provided in relation to online advertisement, providing digital advertising space and other facilities in relation to online advertisements to resident or a non-resident having a permanent establishment in India, is proposed to be levied. In case the levy is not deducted on the service to which it is applicable then deduction in respect of the sum paid will not be allowed (Section 40(a)(ib)). In case equalization levy

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is paid on the income received for rendering the specified services, then such income shall be exempt from income tax under Sec.10(50) in the hands of the non-resident.

Other highlights in Finance Bill 2016 include

- the Income Declaration Scheme, 2016 in respect of undisclosed income for any financial year up to 2015-16
- Direct Tax Dispute Resolution Scheme, 2016 in relation to tax arrears
- No dividend distribution tax if dividend to be received by business trusts provided that business trust holds the entire share capital in SPV other than share capital mandatorily required to be held by the government and
- the requirement to 'acquire and install' the machinery in same year posed by section 32AC has been replaced with 'acquired' and 'installed before 31.03.2017'
- the department cannot go on appeal against the DRP orders. Sec.253(2A) & (3A) have been proposed to be omitted
- 1% TCS to be collected from the buyer on (a) sale of motor vehicles exceeding Rs. 10 lacs and (b) sale of goods or provision of services in cash exceeding Rs. 2 lacs
- Section 35ABA has been inserted to allow for capital expenditure incurred for acquiring use of spectrum to be written off in equal instalments proportionately over the period of the rights in spectrum , remaining in force.
- Sec. 80JJAA has been introduced to allow for deduction of 30% of the additional employee costs incurred in the course of such business for three assessment years for new employees for those persons engaged in any new business or expansion of an existing business and subject to Sec.44AB audit as well as other conditions stipulated therein
- Exemption has been granted from furnishing PAN by certain non-residents, not being a company or a foreign company, in order to reduce the compliance burden under Sec.206AA

Notifications and Circulars

Appeals to Commissioner (Appeals) - Electronic filing

Notification No.11/2016 [F.No.149/150/2015-TPL] dated 1-3-2016 provides that an appeal to the Commissioner (Appeals) shall be made in the Form No. 35. A person who is required to furnish return of income electronically shall furnish the form electronically under digital signature, if the return of income is furnished under digital signature or electronic verification code as the case may be while assessees who have the option to file a paper return may choose either method. Any document accompanying Form No. 35 shall be furnished in the manner in which the said form is furnished.

Clarification regarding taxability of consortium members

Since AOP is not specifically defined in the Income Tax Act, 1961, there are divergent

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views on whether a consortium in relation to EPC /Turnkey contracts is assessable as an AOP. It has been clarified by Circular No. 07/2016 [F. No. 225/2/2016/ITA.II] dated 7-3-2016 that a consortium arrangement for EPC/ Turnkey projects may not be treated as an AOP if each member is independently responsible for executing its part of the work and bears risk and earns profit or loss based on its scope of work and men and material used for any area of work are within the risk and control of respective consortium members. The circular is not applicable when some or all members of the consortium are Associated Enterprises.

No TDS deduction on commission paid to advertisement companies

It has been clarified by Circular No. 5/2016 dated 29-2-2016 that TDS need not be deducted on payments by television channels and publishing houses to advertisement companies for procuring or canvassing for advertisements. The issue of whether commission paid to advertisement companies for canvassing or booking advertisements is a trade discount and hence outside purview of TDS, has been much debated.

Ratio decidendi

Subsidies to reimburse cost incurred in manufacturing and selling products – Profits 'derived' from business: Interpreting the term 'profits derived from business' the Supreme Court held that as long as profits and gains emanate directly from the business itself, the fact that the immediate source of the subsidies is the Government would make no difference. The revenue department argued that deduction under Section 80–IB (for industrial undertaking set up in industrially backward States) was in respect of 'profits and gains derived from such industrial undertaking'. Since the source of the amount by way of subsidy – transport subsidy, power subsidy and interest subsidy - was the government and not the business of the assesse, it was to be taxed as income from other sources and could not be included under Section 80–IB. However, the Supreme Court opined that there is direct nexus between the subsidies which are revenue receipts which are reimbursed to the assessee for elements of cost relating to manufacture or sale of their products. Therefore profits 'derived' for the purpose of Section 80-IB would be profits arrived at after deducting manufacturing cost and selling costs reimbursed to the assessee by the Government concerned. [*CIT* v. *Meghalaya Steels Ltd*, Civil Appeal No.7622 OF 2014, Supreme Court judgement dated 9-3-2016]

Director residing in India not sufficient to establish PE of foreign subsidiary in India: The assessee, subsidiary of an Indian company was engaged in business of operating ships in international traffic across Asia and Middle East. The revenue department sought to tax the income as business profits under Section 44B reasoning that the holding company secured the business from India for the assessee, and that the common director of

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both companies was permanently residing in India and was looking after the policy matters of assesse and thus the non-resident subsidiary had a PE in India. However, the ITAT ruled that factors like staying of one of the directors in India or holding of only one meeting during the year under consideration or the location of parent company in India in themselves would not decide the residential status of the assesse and since there was not enough evidence that effective management and control of affairs was in India, no income was taxable in India. [*Forbes Container Line Pte. Ltd.* v. *ADIT* , ITA No.1607/Mum/2014, ITAT, Mumbai Order dated 11-3-2016]

Depreciation claim by unregistered proprietor of a trademark : The dispute revolved around eligibility for depreciation claim on trademark. The assessee had acquired the marks pursuant to a slump sale and had not registered them. However, the ITAT found force in the reasoning that even though unless a trademark is registered in the name of a person, he does not get exclusive rights to use the trademark in respect of the goods for which the trade mark is registered, the registered proprietor who had the legal rights, had assigned the rights to the assessee. There was no dispute that the assessee was the beneficial owner of the mark and the business had been transferred as a going concern. Hence it was held that the assesse could claim depreciation on the intangible asset by way of trademark. [*Trio Elevators Company (India) Ltd.* v. *ACIT*, I.T.A. No.2477/Ahd/2011, ITAT, AHD Order dated 8-3-2016]

Deduction allowable under Section 80IC though return is filed belatedly : The revenue department contended, *inter alia* that the assesse could not claim deduction under Section 80IC since the return had not been filed within the due date as per Section 139(1). It relied on Section 80AC which states that deduction will not be allowed unless the return is filed as per Section 139(1). The assesse argued that since it had filed the return within the time of one year as allowed under Section 139(4), deduction should not be denied to it. Observing that Section 80IC is incentive provision and has to be interpreted in a manner so as to advance the objects of economic activities in the country, the Tribunal held that return filed by the assessee would for all technical purposes be considered being filed under Section 139(1) and deduction cannot be denied. [*Fibrefill Engineers* v. *ACIT*, ITA no. 1853/Del/2015, ITAT Delhi, Order dated 25-2-2016]

Payment for granting of economic interest of first refusal is not royalty: Examining whether payment for the right of first refusal was in the nature of royalty, the ITAT held that the right envisaged in the agreement was only acquiring the controlling interest in new initiatives taken by the promoter. The lower appellate authority had agreed with TDS Officer that by grant of right of first refusal, the transferor (promoter) had parted with his commercial and scientific knowledge and experience, skill in the field of networking in favour of the assessee-company and hence

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TDS should have been deducted on the 'technical fee' paid to him. The ITAT observed that the department had ignored the explicit terms contained in the agreement governing impugned payments and re-characterized the transaction. Therefore, in granting of economic interest of first refusal, no intellectual property rights are involved and Section 194J is not attracted. [*WiFi Networks Pvt. Ltd.* v. *DCIT*, ITA Nos.1624 to 1627/Bang/2012, ITAT, Bangalore, Order dated 24-2-2016]

Payment for license to distribute channels is royalty: The assesse, a DTH operator obtained licenses directly from the TV channels and paid them for the use of licenses. It contended that the TDS was deductible under Section 194C under payments to contractors for 'broadcasting and telecasting of channels under a contract' and not under Section 194J for royalty. ITAT, Delhi however held that, the payment was towards transfer of Intellectual Property Rights (IPRs) in programmes to be used by DTH/cable operators in 'connection with television' since the revenue from ultimate viewership goes to the operator and not the channels. The operator obtained the rights to use the programmes even if it was a limited right of distribution alone with the IPRs continuing to be the exclusive property of the channels. [*Dish TV India Ltd* v. *ACIT (TDS)*, ITA No.5310/Del/2013, ITAT, Delhi decision dated 29-2-2016]

'Ownership' for purpose of adoption FMV as on 1-4-1981 : The dispute was regarding the adoption of Fair Market Value (FMV) of the property as on 1-4-1981 though the assessee acquired legal ownership of the property in 1994. The land had been assigned to the assessee in 1970 by the government of Tamil Nadu by an Indenture for construction of building and erection of machinery etc. The assessee paid consideration for the same and in 1994 the property was sold to the assesse for consideration already paid by it as per the terms of the deed of assignment. Observing that Assessee had an antecedent interest over the property as early as 3.3.1970 and a vested right over the property by paying the entire sale consideration and complying with the other terms of the deed, the ITAT held that the assesse could adopt the FMV as on 1-4-1981. Thus, the expression 'where the capital asset became the property of the Assessee before 1st April, 1981' as used in the said section should not be equated to legal ownership. [*Stewarts & Lloyds of India* v. *CIT*, ITAT Kolkata, Order dated 2-3-2016]

Maintenance charges received from tenants – Whether concept of mutuality applies: The Resident Welfare Association collected maintenance charges from owners and tenants. The Assessing Officer was of the view that the members had profit motive as they give the house on rent instead of using for their own residential purposes and hence the concept of mutuality was not applicable to the amounts received as maintenance charges by the assessee-society. Emphaising that the concept of mutuality required that the contributor and beneficiary should be identified and in the present case the beneficiary is identified as the flat occupants/ owners as long

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as it will occupy the flat in the condominium, the ITAT held that the maintenance charges were not taxable in the hands of the society. [*Beverlly Park-1, Condominium* v. *ACIT,* ITA no. 1775/Del/2013, ITAT, Delhi, Order dated 1-3-2016]

PE - Actual days of stay to be counted rather than duration of the project: The issue revolved around the revenue department's contention that since an employee of the non-resident company had rendered supervisory services in India in respect of 3 projects for more than 6 months, the assessee had a Permanent Establishment (PE) in India in terms of the Indo-German DTAA. The AO further sought to tax the payment received by the assessee under Section 115A at 20.30% reasoning that Article 7 (on business profits) of the DTAA would prevail over Article 12 (taxation as royalty). The ITAT held that for computing continuous stay for PE purpose, actual stay of employees has to be considered and not the entire contract period and in the instant case since the employee had stayed for 64 days only, no PE resulted. Also, the services rendered were of consultancy and hence Article 7 did not apply. [*Rheinbraun Engineering Und Wasser GmbH* v. *DDIT*, ITA No. 2353, ITAT, Mumbai, Order dated 4-3-2016]

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NEW DELHI
5 Link Road,
Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014

B-6/10, Safdarjung Enclave
New Delhi - 110 029
Phone : +91-11-4129 9811
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.
Ph: +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.
Maharashtra
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

LONDON
Octagon Point,
St. Paul's,
London EC2V 6AA
Phone : +44 20 3823 2165
E-mail : lslondon@lakshmisri.com

GENEVA
Lakshmikumaran & Sridharan
SARL
35-37, Giuseppe Motta
1202 Geneva
Phone : +41-22-919-04-30
Fax: +41-22-919-04-31
E-mail : lsgeneva@lakshmisri.com

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