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Article

Tariff Rate Quotas: A Balanced Safeguard

By Divyashree Suri

Free trade across the globe is the spine of a mutually benefiting world. Users of several goods rely on imports, when they are not readily available in India due to short supply. However, the influx of imports from various countries is injurious to the growth and sustenance of domestic producers. Reliance on imports without any domestic progress also hinders the economic growth and development of the country. Appropriate mechanisms are required to be in place to protect the interests of the domestic industry, while also ensuring that the demand of users and downstream industries is met.

With that in view, provisions relating to Safeguard duty have been proposed to be amended by the Finance Bill, 2020 as presented in the Lower House of the Indian Parliament on 1st February 2020. The existing provision contained in Section 8B of the Customs Tariff Act, 1975 (“Customs Tariff Act”) empowers the Central Government to impose a safeguard duty on any article which is imported in such ‘*increased quantities and under such conditions so as to cause or threatening to cause serious injury to the domestic industry.*’¹ The proposed amendment would expand the powers of the Central Government to implement a safeguard measure by the way of a tariff rate quota or any “other safeguard measure” it deems fit. At present, without the proposed amendment, India can either impose a safeguard measure in the form of a ‘safeguard duty’ under Section 8B of the Customs Tariff Act or a ‘quantitative

restriction’ under Section 9A of the Foreign Trade (Development and Regulation) Act, 1992. A tariff rate quota acts as a hybrid of both these existing forms of measures.

In a tariff rate quota regime, if imports are coming in within a set ‘quota’, i.e. threshold for imports, a lower or no tariff rate will be charged on the imports. A higher tariff rate is charged for imports above the concessionary level. This allows for imports to freely enter the country to fill the demand-supply gap which may exist in the country. However, it protects the domestic industry and its market share by imposing a duty on imports which exceed the threshold.

The said quota is determined in compliance with Article 5 of the Agreement on Safeguards (“AoS”) and cannot be below the level of the average imports during the last three representative years of which statistics are available. The proposed amendment incorporates this requirement in its text. To illustrate, imports for ‘Item X’ have been as follows:

	2017-18	2018-19	2019-20
Item X	10,000 MT	15,000 MT	20,000 MT
Average of last three years:	15,000 MT		

In such a situation, the following tariff quota regime can be introduced for Item X:

¹ Section 8B, Customs Tariff Act 1975

Imports of Item X	Tariff Rate
Up to 15,000 units ('In-quota' tariff)	Nil
>15,000 units ('Out-quota' tariff)	10%

In order to maintain an equitable system, the proposed amendment further allows the Government to allocate the tariff rate quota to exporting countries having a substantial interest in supplying the article concerned, i.e. countries which regularly and substantially export the said article to India. Article 5(2) of the AoS as well as Article XIII:2(d) of General Agreement on Tariffs and Trade 1994 ("GATT 1994") lay down the procedure to be followed in case of such allocation:

- Agreement with all other countries having a substantial interest in supply the product concerned; or where an agreement is not practical
- Allocate product shares based upon the proportions supplied by such contracting parties during a previous representative period.
- No conditions can be imposed on any country which would prevent it from utilizing the full share of its allotment.

The Appellate Body observed in *EC-Bananas* that while Article XIII:2 of GATT 1994 lays down the procedure to be followed in case of allocation of tariff rate quota to supplying countries having a substantial interest, no law dictates the allocation of tariff rate quota to countries with no substantial interest. It noted:

"Article XIII:2(d) does not provide any specific rules for the allocation of tariff quota shares to Members not having a substantial interest. Nevertheless, allocation to Members not having a substantial interest must be subject to the basic principle of non-discrimination. When this principle of non-discrimination is

*applied to the allocation of tariff quota shares to Members not having a substantial interest, it is clear that a Member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest. To do so is clearly inconsistent with the requirement in Article XIII:1 that a Member cannot restrict the importation of any product from another Member unless the importation of the like product from all third countries is "similarly" restricted."*²

Therefore, it is clear that the allocation must be made to the supplying countries with substantial interest, either on the basis of (i) an agreement; or (ii) the proportions supplied by such contracting parties during a previous representative period. The remainder of the quota must be uniform and non-discriminatory.

Tariff rate quotas are frequently used globally, especially under the Agreement for Agriculture. However, several countries such as European Union, Japan, United States and Canada are regular users of the safeguard mechanism even for non-agricultural products. For example, Canada applied safeguard measures in the form of tariff rate quota on imports of "Stainless Steel Wire" from all countries in May 2019³. The duty table for the safeguard measure was as follows:

Period	Duration	Surtax Rate	TRQ (Tonnes)
1	13th May 2019-12th May 2020	25%	2,800
2	13th May 2020-12th May 2021	15%	3,080

² Appellate Body Report, *European Communities - Regime For The Importation, Sale And Distribution Of Bananas*

³ Customs Notice 19-08, Final Safeguard Measures imposed on Importation of Certain Steel Goods

Period	Duration	Surtax Rate	TRQ (Tonnes)
3	13th May 2021- 12th May 2022	5%	1,532

As it can be seen, the safeguard measure has been progressively reduced, similar to the liberalization of a safeguard duty.

There exists no precedent for the imposition of such measures in India. However, sub-section (10) of the proposed Section 8B allows the Central Government to create Rules under the

said section. More clarity on the procedure which shall be adopted by the Authority in the imposition of such measures will come as and when the rules are framed by the Central Government. This is a welcome move since it not only protects the interests of the domestic industry, but also protects the user industry from facing a shortage of supply of their inputs and other products.

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

Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Acetone	Korea RP	4/2020-Cus. (ADD)	10-2-2020	Anti-dumping duty extended till 15-4-2020
Acrylonitrile Butadiene Rubber	Korea RP	F. No. 7/5/2020-DGTR	7-2-2020	Initiation of Sunset Review of anti-dumping duty
Aniline	China	F. No. 6/42/2019-DGTR	24-1-2020	Initiation of Anti-dumping investigation
Black Toner in powder form	China, Malaysia, Taiwan	F. No. 6/6/2020-DGTR	10-2-2020	Initiation of anti-dumping investigation
Caustic Soda	China, Korea RP	F. No. 7/1/2020-DGTR	7-2-2020	Initiation of Sunset Review of anti-dumping duty
Chlorinated Polyvinyl Chloride (CPVC) Resin	China and Korea RP	F.No.6/3/2019-DGTR	19-2-2020	Definitive anti-dumping duty recommended

Product	Country	Notification No.	Date of Notification	Remarks
Digital Offset Printing Plates	China, Japan, Korea RP, Taiwan, Vietnam	02/2020-Cus. (ADD)	30-1-2020	Imposition of provisional anti-dumping duty
Float Glass	China	F.No. 7/4/2020-DGTR	10-2-2020	Initiation of Mid-Term Review to review product scope of anti-dumping duty
Float Glass	China	F. No. 7/2/2020-DGTR	10-2-2020	Initiation of Sunset Review of anti-dumping duty
Floureslastomers	China	F. No. 7/3/2020-DGTR	7-2-2020	Initiation of Sunset Review of Anti-Dumping Duty
Nylon Filament Yarn (Multi Filament)	European Union and Vietnam	F. No. 7/30/2019-DGTR	31-1-2020	ADD - Initiation of Mid Term Review investigation to review the product scope
Purified Terephthalic Acid	China, Iran, Indonesia, Malaysia, Taiwan, Korea RP, Thailand	3/2020- Cus. (ADD)	2-2-2020	Revocation of anti-dumping duty
Self-Adhesive Polyvinyl Chloride Film	China	F. No. 6/1/2020-DGTR	7-2-2020	Initiation of Anti-Dumping investigation
Soda Ash	Turkey and USA	F. No. 6/39/2019-DGTR	22-1-2020	Initiation of Anti-dumping investigation
Sodium Nitrite	China	1/2020-Cus. (ADD)	24-1-2020	Anti-dumping duty revised
Toluene Di-Isocyanate	European Union, Saudi Arabia, Chinese Taipei and United Arab Emirates	F. No. 6/43/2019-DGTR	31-1-2020	Initiation of Anti-dumping investigation

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Carbazole Violet Pigment 23	USA	85 FR 5394 [A-533-838]	30-01-2020	Preliminary Results of Antidumping Duty Administrative Review; 2017-2018
Carbazole Violet Pigment 23	USA	85 FR 7730 [C-533-839]	11-02-2020	Preliminary Results of Countervailing Duty Administrative Review
Carbon and Alloy Steel Threaded Rod	USA	85 FR 8828 [C-533-888]	18-2-2020	Final Affirmative Countervailing Duty Determination
Carbon and Alloy Steel Threaded Rod	USA	85 FR 8818 [A-533-887]	18-2-2020	Final Affirmative Determination of Sales at Less Than Fair Value
Steel products	EU	2020/C 51/11	14-2-2020	Initiation of review of safeguard measures
Welded Carbon Steel Standard Pipes and Tubes	USA	84 FR 2715 [A-533-50]	16-01-2020	Final Results of Antidumping Duty Administrative Review; 2017-2018



WTO News

Russian measures on imported railway equipment - Appellate Body issues report

The Appellate Body, on 4 February, issued its report in the case initiated by Ukraine in “*Russia — Measures affecting the importation of railway equipment and parts thereof*” (DS499). Notably, the Appellate Body became defunct in December 2019. The Appellate Body found that Ukraine did not establish that the Panel failed to make an

objective assessment of the matter before it under Article 11 of the DSU in finding that Ukraine failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia. It also found that the Panel erred in its application of Article 5.1.1 of the TBT Agreement to the facts of the present case in finding that less favourable access conditions were granted to Ukrainian suppliers of railway products.

US duties on Canadian paper - Appellate Body issues report

The DSB's Appellate Body has issued its report on 6 February in the case brought by Canada in "*United States — Countervailing Measures on Supercalendered Paper from Canada*" (DS505). The Appellate Body agreed with the Panel that the consistent manner in which the USDOC refers to the "Other Forms of Assistance-Adverse Facts Available" (OFA-AFA) measure, the frequent reference to previous applications of the measure in USDOC determinations, the fact that the USDOC refers to the measure as its "practice", and the USDOC's characterization of a departure from the measure as an "inadvertent error", all support the conclusion that the measure is likely to continue to be applied. It was held that the OFA-AFA measure was an "ongoing conduct" that could be challenged in WTO dispute settlement. The Appellate Body also disagreed with the United States' claim that the Panel erred under Article 12.7 of the DSU by failing to provide a "basic rationale" for its finding.

Korean support to shipbuilders - Japan files consultation request

Japan has on 31st of January 2020 sought consultation with Korea RP on latter's certain support measures to the shipbuilders affecting trade in commercial vessels. Japan claims that the funds, loans, guarantees, insurance and other financing provided to the shipbuilders by

the Korean Government are inconsistent with the WTO's Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the General Agreement on Tariffs and Trade (GATT) 1994. The measures in question relate to the development, production, marketing and/or sale or purchase of commercial vessels, including vessels designed to carry crude oil, liquefied natural gas (LNG), liquefied petroleum gas (LPG) and shipping containers.

Brexit - UK notifies WTO members of withdrawal from the EU

The United Kingdom ceased to be a Member State of the European Union at 23.00 GMT on 31st January 2020. On 1 February 2020, the United Kingdom notified its withdrawal from the European Union and outlined the consequences of this departure for itself and other WTO members. According to the document circulated by UK to the WTO members, the transition period will end at 23.00 GMT on 31 December 2020, and the United Kingdom has made clear that it will not seek an extension. It also states that for the duration of the transition period, the United Kingdom will be treated as a Member State of the European Union for the purpose of international agreements entered into by the European Union will also continue to be treated as a Member State of the European Union for the purpose of ongoing WTO disputes to which the European Union is a party.



India Customs & Trade Policy Update

Important changes in anti-dumping, countervailing and safeguard provisions proposed/made in Budget 2020

India is set to revise provisions relating to its trade remedy measures. While provisions relating to Safeguard duty have been proposed to be amended by the Finance Bill, 2020 as presented in the lower House of the Indian Parliament on 1-2-2020, Rules relating to Anti-dumping duty and Countervailing duty have been revised by notifications issued by the Ministry of Finance.

Safeguard measures:

Section 8B of the Customs Tariff Act, 1975 is being proposed to be substituted by Clause 114 of the Finance Bill, 2020 to allow Central Government to apply 'safeguard measures' which include

1. imposition of safeguard duty,
2. application of tariff-rate quota, or
3. such other measure as the Central Government may consider appropriate,

to curb the increased quantity of imports of an article to prevent serious injury to the domestic industry.

The new Section 8B empowers the Central Government to conduct an enquiry and apply safeguard measures on an imported article which has been imported in such increased quantities, and under such conditions so as to cause or

threaten to cause serious injury to domestic industry.

In respect of tariff-rate quota as a safeguard measure, the Central Government shall not fix such quota lower than the average level of imports in the last three representative years for which statistics are available, unless a different level is deemed necessary to prevent or remedy serious injury. Further, the Government may allocate such tariff-rate quota to supplying countries having a substantial interest in supplying the article concerned.

Anti-dumping duty:

Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 has been amended to strengthen the anti-circumvention measures by making them more comprehensive and wider in scope to take care of all types of circumventions of anti-dumping duty.

Accordingly, 'circumvention' shall be considered as a change in the pattern of trade between any country and India or between individual companies in any country subject to measures and India, as a result of a 'practice, process or work' for which there is insufficient cause or economic justification other than the imposition of the duty; and where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of the prices or quantities or both of the like product; and where there is evidence of dumping in relation to the normal

values previously established for the like product. The new Rule 25 in this regard also states what 'practice, process or work' includes.

Further, Anti-dumping duty already imposed for co-operative un-sampled exporters or producers may also be extended to new producers/exporters. Sub-rule (3) has been inserted in this regard in Rule 22 of the Anti-dumping Rules. An Explanation has also been inserted to provide for parameters for the "period of investigation", which has also been, for the first time, defined in the Rules.

Countervailing duty:

Rules relating to investigation and imposition of Countervailing duty as enshrined in Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995 have been amended to provide for investigation into case of circumvention of countervailing duty. Hence, Rule 25, similar to the one provided in the now revised Anti-dumping Duty Rules, has been inserted in the Countervailing Duty Rules. Further, new Rules 26 and 27, also inserted with effect from 2nd of February, provide for initiation of investigation to determine circumvention and determination of circumvention, respectively.

A new Rule 6A has been inserted to provide for consultations with the Government of the exporting country. Accordingly, as soon as an application under Rule 6 for the initiation of investigation is accepted, and in any event before the initiation of any investigation, the Government of the exporting country, the products of which may be subject to investigation, shall be invited for consultations to clarify the situation for the matters so as to arrive at a mutually agreed solution.

Further, the definition of "domestic industry" has been revised in line with that provided in the Rules relating to anti-dumping. "Like article" and "period of investigation" have also now been defined in the Countervailing duty Rules.

Budget 2020 – Trade agreements – Procedure for administration of Rules of Origin proposed

A new Chapter VAA has been proposed in the Customs Act, 1962 to provide for enabling provision for administering the preferential tariff treatment regime under various trade agreements, including FTAs, etc. The new proposed Section 28DA, which will come into effect once the Finance Bill is passed by both the Houses of the Parliament and is assented by the President, provides for a procedure to be followed by the importer while claiming any preferential rate of duty in terms of any trade agreement which India has signed with any other country.

It may be noted that according to the proposals, the request for verification may be sent within five years from the date of claim of preferential tariff treatment, unless specified otherwise in the trade agreement, and the preferential tariff treatment to the goods can also be temporarily suspended pending the verification. This provision also lists the circumstances under which the claim for preferential tariff treatment may be rejected by the Customs authorities even without verification. Further, according to an amendment proposed in Section 111 of the Customs Act, relating to confiscation of goods, the goods imported under claim of preferential tariff treatment and found to contravene the provisions of the new Chapter VAA or the Rules, will also be liable to confiscation.

“Trade Agreement” has been defined as an agreement for trade in goods between the Government of India and the Government of a foreign country or territory or economic union.

Budget 2020 - Health Cess imposed on certain medical devices

A new levy by the name “Health Cess” @ 5% has been imposed on certain medical devices. The Cess will be imposed on certain goods falling under Headings 9018 to 9022 of the Customs Tariff Act, 1975, on *ad valorem* basis, i.e. on the value of the imported goods. According to the provisions enshrined under Clause 139 of the Finance Bill, 2020 read with the declaration made under the Provisional Collection of Taxes Act, 1931, this levy is effective from 2-2-2020 and shall be in addition to any other duties of customs chargeable on such goods under the Customs Act or any other law for the time being in force.

Further, as per notifications issued by the Ministry of Finance, exemption has been provided to all goods falling under Heading 9022, other than those for medical, surgical, dental or veterinary uses. It may be noted that certain goods which are exempted from the Basic Customs Duty would also be exempted from Health Cess. The exemption includes goods exempted under various specified FTA’s. It may be noted that according to the TRU letter and the Memorandum explaining the Budget provisions, export promotion scrips cannot be used for payment of said Cess.

Budget 2020 - Import prohibition to prevent injury to the economy of the country

Central Government is at present empowered to prohibit import or export of gold or silver in order

to prevent injury to the economy of the country by the uncontrolled import or export of such goods. Now this provision [Section 11(2)(f) of the Customs Act, 1962] has been proposed to be amended to include “any other goods” as well. Accordingly, the Central Government will now be empowered, after the Bill receives Presidential assent, to prohibit import or export of “any other goods” also, in order to prevent injury to the economy of the country.

Budget 2020 - Rates of Customs Duty revised for many articles

Rates of Basic Customs Duty have been increased on many products relating to Agriculture and Food Industry covered under Chapters 04, 10, 12, 17, 18, 19 and 23, Electronics Industry products covered under Chapters 84, 85 and 94, and Copper and articles thereof used in manufacturing of specified electronic items. Further, rate of BCD has also been increased on many products under category of general machinery or appliances falling under Chapter 84 of the Customs Tariff Act, and certain products of the Information Technology Industry covered under Chapter 85. Rate of BCD has also been increased on footwear including parts of footwear covered under Chapter 64, certain household items falling under Chapters 69, 70, 83, and on certain furniture items and toys falling respectively under Chapter 94 and 95 of the Customs Tariff. It may be noted that rate of Customs duty has however been decreased on certain fuels, chemicals and plastics and on certain goods of the paper industry (including on newsprint).

Further, in respect of Social Welfare Surcharge (SWS), it may be noted that all products of Chapter 84, 85 and 90 will now attract SWS. Exemptions earlier available to certain goods of

these Chapters have been withdrawn. However, all commercial vehicles (including electric vehicles), falling under Heading 8702 and 8704, if imported as completely built units (CBUs) would be exempted from such surcharge with effect from 1-4-2020.

Export of garments and made-ups – RoSCTL scheme updated

Central Board of Indirect Taxes and Customs (CBIC) has clarified that the benefit of Rebate of State and Central Taxes and Levies (RoSCTL) would be available for export of garments and made-ups with Let Export Order dates from 7-3-2019 to 31-3-2020. The Circular No. 13/2020-Cus., dated 19-2-2020 also states that for Additional Ad-hoc Incentive Scheme, providing benefit of upto 1% of FOB value of exports, the benefit shall be available for exports with LEO dates from 7-3-2019 to 31-12-2019. It may be noted that MEIS benefit has been withdrawn in respect of export of garments, with effect from 7-3-2019. The scrips received under RoSCTL and Additional Ad-hoc Incentive Scheme can be used for payment of specified duties of Customs and Central Excise.

Valuation of second-hand machinery – Procedure specified for inspection or appraisal

CBIC has laid down a procedure for inspection or appraisal of second-hand machinery. According to Circular No. 7/2020-Cus., dated 5-2-2020, the inspection or appraisal reports issued by Chartered Engineers or their equivalent, based in the country of sale of the

second-hand machinery shall be accepted by all Custom Houses. The inspection or appraisal report must be in the format as specified in the Circular. The Circular also states that in case the report is not available from the country of sale, the importer would be free to engage services of any of the empaneled Chartered Engineers and that no Custom House will require any importer to have a report from a particular Chartered Engineer.

All Industry Rates of Duty Drawback revised

The All Industry Rates (AIRs) of duty drawback have been revised with effect from 4-2-2020. As per CBIC Circular No. 6/2020-Cus., dated 30-1-2020, Drawback has been increased for certain items pertaining to marine products and seafood (Chapter 3, 15, 16, 23), chemicals (Chapter 29), finished and lining leather, leather articles and footwear (Chapter 41, 42 and 64), cotton and MMF textiles (Chapter 50 to 60), carpets (Chapter 57), made-ups (Chapter 63) and glass and glass ware (Chapter 70). Further, the rates have been rationalized for bicycles tubes (Chapter 40), wool yarn/fabrics/readymade garments (Chapter 51 and 61-62) and silk yarn/fabrics/readymade garments (Chapter 50 and 61-62) among other items. While 31 new tariff items have been introduced in the Schedule pertaining to sectors viz. chemicals, textiles and readymade garments, leather articles and footwear and glass handicraft/ art ware, appropriate caps of duty drawback amount have been provided wherever felt necessary to prescribe upper limit of duty drawback.



Ratio Decidendi

Computation of Customs duty on goods auctioned after expiry of warehousing period

The Larger Bench of the Supreme Court has held that the custom duty must be paid on the basis of sale proceeds realised from the sale of the goods kept in a warehouse and not on the basis of the custom duty payable at the time of filing the Bill of Entry or on the date of expiry of permitted period of warehouse. The case involved sale of imported goods by auction by the warehouse

keeper after the importer refused to clear them even on expiry of warehousing period. The Court was of the view that the judgment in the case of *Kesoram Rayon v. Collector of Customs* will not be applicable in respect of the goods to be auctioned on account of failure to seek the release of imported goods by the importer though after the permission from the proper officer. [*Union of India v. Associated Container Terminal Ltd.* - Civil Appeal No. 4490 OF 2008, decided on 14-2-2020, Supreme Court Larger Bench]

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.

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.

Phone : +91-20-6680 1900

E-mail : ls pune@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: lsurgaon@lakshmisri.com

ALLAHABAD

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

Allahabad -211001 (U.R)

phone . +91-0532 - 2421037, 2420359

Email:lsallahabad@lakshmisri.com

KOCHI

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

Tel: +91 (0484) 4869018; 4867852

E-mail: lskochi@lakshmisri.com

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