1. **<u>Where the entire amount of expense was paid by the assessee during the relevant financial year and nothing remained payable/outstanding on the last day of the relevant previous year, the provisions of section 40(a)(ia) will have no application.</u>**

We have considered the submissions of the parties and perused the materials on record as well as the decisions relied upon by the parties. At the outset we propose to deal with the issue whether provisions of section 40(a)(ia) of the Act would be applicable, if the payments have been made during the relevant previous year and nothing remained outstanding/payable as on the last date of the relevant previous year. ITAT Visakhapatnam Special Bench in case of *Merilyn Shipping & Transports* (*supra*) has held that if the assessee has paid the amounts to which TDS provisions are applicable, within the relevant previous year and nothing remained payable on the last date of the relevant previous year, then no disallowance can be made under section 40(a)(ia) of the Act. The Department has preferred appeal before the jurisdictional High Court of Andhra Pradesh against the aforesaid order of the ITAT Visakhapatnam Bench. It is an undisputed fact that the Hon'ble High Court has stayed the operations of the aforesaid decision of ITAT. However, it is worth mentioning here, the Hon'ble jurisdictional High Court while considering the issue whether the effect of the decision in case of *Merilyn Shipping & Transports* (*supra*) has been completely obliterated by operation of the stay order, in case of *Jayapriya Engineering* (*supra*) held as under:

> "4. We are of the view that until and unless the decision of the Special Bench is upset by this Court, it binds smaller Bench and coordinate Bench of the Tribunal. Under the circumstances, it is not open to the Tribunal, as rightly contended by Mr. Narasimha Sarma, learned Counsel to remand on the ground of pendancy on the same issue before this Court, overlooking and overruling, by necessary implication, the decision of the Special Bench. We simply say that it is not permissible under quasi judicial discipline. Under the circumstances, we set aside the impugned judgment and order and restore the matter to the file of the Tribunal which will decide the issue in accordance with law and it would be open to the Tribunal either to follow the Special Bench decision or not to follow. If the special Bench decision is not followed, obviously remedy lies elsewhere.
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> 5. The appeal is thus allowed only on the point of remand. We direct the Tribunal to decide the matter on remand afresh within a period of two months from the date of communication of this order. No cost".

Following the aforesaid decision of the Hon'ble jurisdictional High Court, ITAT Hyderabad Bench in a recent order in the case of *Ushodaya Enterprises* v. *Dy. CIT* [IT Appeal No. 676 (Hyd.) of 2009 and 411 (Hyd.) of 2010, dated 7-1-2014] followed the ratio laid down by the ITAT Special Bench in case of *Merilyn Shipping & Transports* (*supra*) by observing as under:

"8. We have heard both the parties. We direct that the AO may follow the decision of the Special Bench in the case of *Merilyn Shipping & Transports* v. *ACIT* in ITA No.477/Viz/2008 dated 29.03.2012 and the disallowance u/s 40(a)(ia) may not be made by the AO for the amounts/payments which have already been paid before the end of the relevant accounting year, out of the amounts disallowed which have been upheld by the CIT (A). This ground is partly allowed for statistical purposes".

DCIT vs. Veera Associates, [2015] 68 SOT 218 (Visakhapatnam - Trib.)(URO)

2. **TDS on payments made to non-residents can be deducted as per rate prescribed in DTAA and provisions of section 206AA cannot be invoked, who did not furnish their PAN.** Section 206AA cannot be understood to override the charging sections 4 and 5. Thus, section 90(2) provides that DTAAs override domestic law in cases where the provisions of DTAAs are more beneficial to the assessee and the same also overrides the charging sections 4 and 5 which, in turn, override the DTAAs provisions especially section 206AA. Therefore, where the tax has been deducted on the strength of the beneficial provisions of DTAAs, the provisions of section 206AA cannot be invoked by the Assessing Officer to insist on the tax deduction at the rate of 20 per cent, having regard to the overriding nature of the provisions of section 90(2). **DDIT vs. Serum Institute of India Ltd., [2015] 68 SOT 254 (Pune - Trib.)**