IN THE HIGH COURT OF KARNATAKA, BANGALORE

DATED THIS THE 13TH DAY OF AUGUST, 2009

BEFORE

THE HON'BLE MR. JUSTICE AJIT J GUNJAL

WRIT PETITION No 11376 OF 2009 (T-IT)

BETWEEN

1 THE MEDI ASSIST INDIA TPA P LTD
"SHILPA VIDYA", 3RD FLOOR, NO. 49
I MAIN ROAD, SARAKKI INDUSTRIAL LAYOUT
III STAGE, J.P.NAGAR, BANGALORE-560078
REP. BY ITS CHIEF EXECUTIVE OFFICER
SRI. B. MADHAVAN S/O SRI. M. BALASUBRAMA
AGED ABOUT 54 YEARS
560078

... PETITIONER.

(By SRI SARANGAN, SENIOR COUNSEL FOR
Smt : VANI H, ADV.)

AND

1 DEPUTY COMMISSIONER OF INCOME TAX (TDS)
CIRCLE-18(1), NO. 59, 4TH FLOOR
HMT BHAVAN, BELLARY ROAD
BANGALORE-560032

2 THE COMMISSIONER OF INCOME TAX(TDS)
CIRCLE-18(1), NO.59, 4TH FLOOR
HMT BHAVAN, BELLARY ROAD
BANGALORE-560032

3 CENTRAL BOARD OF DIRECT TAXES
REP. BY UNDER SECRETARY
O T DIVISION, 4TH FLOOR

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JEEVAN DEEP BUILDING
PARLIAMENT STREET
NEW DELHI-110001
110001

4 UNION OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
REP.BY DIRECTORATE OF INCOME TAX(TDS)
5TH FLOOR, MAYUR BHAWAN
CONNAUGHT CIRCUS
NEW DELHI-110 001

... RESPONDENTS.

(By Sri M V SESHACHALA, ADV.)

THIS W.P. FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION, PRAYING TO DECLARE SECTION 201(1) OF THE INCOME TAX ACT, 1961 SUBSTITUTED BY THE FINANACE ACT; 2008 WITH RETROSPECTIVE EFFECT FROM 1.6.2002 AS ULTRA VIRES THE CONSTITUTION OF INDIA IN SO FAR THE PETITIONER IS CONCERNED.

QUASH THE SHOW CASUE NOTICE DT. 19.1.2009 ISSUED BY THE FIRST RESPONDNET VIDE ANNEX-C.

QUASH THE ORDER DT. 23.3.2009 PASSED BY THE FIRST RESPONDENT UNDERS SECTION 201(1) AND 201(A) FOR ASSESSMENT YEAR 2008-09 VIDE ANNEX-H.

RESTRAIN THE RESPONDENTS FROM INITIATING PROCEEDINGS UNDER SECION 201 OF THE INCOME TAX ACT, 1961 BY HOLDING THAT THE PETITIONER IS NOT LIABLE TO DEDUCT TAX AT SOURCE UNDER SECTION 194 J OF THE INCOME TAX ACT, 1961 ON THE PAYMENTS MADE TO HOSPITALS OR POLICY HOLDERS IN SO FAR AS THE PETITIONER IS CONCERNED.

THIS PETITION HAVING BEEN HEARD AND RESERVED, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT DELIVERED THE FOLLOWING:

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ORDER

The petitioner is in all these writ petitions is questioning the order passed by the first respondent under section 201(1) and 201 (1A) of the Income Tax Act, 1961 (for short 'the Act'), for the respective assessment years. The petitioner is also questioning the show cause notice issued on 19.1.2009, pursuant to which Annexure-H has been passed.

2. The facts in a nut-shell are as follows:

The petitioner is a Third Party Administrator licensed by the Insurance Regulatory and Development Authority under the Third Party Administrator Health Services Regulations, 2001 (for short 'TPA Regulations"). The petitioner is engaged in the business of providing health insurance claim services under various Health Insurance Policies issued by several Insurers. The services include providing cashless service through Network Hospitals and settlement or reimbursement of claims in accordance with

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the terms of the Health Insurance Policies. The petitioner also provides for 24x7 Call Centre Services to the Health Card holders on various aspects of Health Insurance Claims. Pursuant to regulation 2 (h) of the T.P.A. Regulations, an agreement is entered into between TPA and insurance company registered under section 3 of the Act, prescribing the terms and conditions of health services, which may be rendered to and received by each of the parties thereto. It is the specific contention of the petitioners that TPA agreement would cover 'health insurance business' or 'health cover' as defined in regulation 2(f) of the Registration of Indian Insurance Companies, Regulations, 2000 (for short "IRDA Regulation"). But, however, it does not include business of an insurance company or the soliciting, directly or through an insurance intermediary including an insurance agent. Suffice it to say that a number of individuals or groups of individuals take medi-claim policies by paying annual premia and avail medical insurance benefits provided by

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certain Insurance Companies. Apparently there is a contract of insurance between the insurance company and the individual who takes the medi-claim policy But however subject to the terms and conditions exclusions and definitions contained in the policy. The insurance company undertakes that if during the subsistence of the policy any insured person who contracts any disease or suffers from any illness or sustain any bodily injury through accident and if such disease or injury requires and any such insured person is required to be treated by a physician or medical specialist or medical practitioner etc; would pay through TPA to the insured person or hospital or nursing home. It also stipulates that such injured person is required to be treated by a qualified physician, medical specialist, medical practitioner etc. Indeed that would provide easy and convenient access to the healthcare services for the insured persons. The Insurance Company enters into Service Level Agreement (SLA) with TPA for settling the insurance claims among other obligations and duties as mentioned in the

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SLA. The TPA settles the bills raised by hospitals or in some cases reimburses the insurance claims to the policy holders, from a separate account which is claim float account. Indeed the insurance company deposits certain amounts which are made available to the TPA. As and when the amount in the said claim float account diminishes, it has to be replenished by the insurance company. The TPA in order to provide better services to the policy holders of the insurance company enters into an memorandum of understanding (MoU) with various hospitals and nursing homes. Under the MoU, the TPA gives an undertaking to the hospitals to reimburse/settle the bills of the policy holders. The Memorandum of Understanding inter alia allows the policy holders to be treated in the hospital without the policy holder making any payment i.e., cashless facility. The payment of reimbursement/settlement of insurance claims is done in two ways - (1) when the policy holder gets treatment for a medical condition and pays by himself directly to the

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hospital and (2) when a policy holder gets himself treated at the Network hospital which has an agreement with the TPA to treat the patients who are their members on cashless basis. The TPA processes the medical documents for reimbursement of the medical expenses incurred by the policy holder and the amount is paid. According to the petitioners an individual will not come within the ambit of section 194J of the Act, in as much as, the payments are made in fulfillment of the contractual obligations between the insurance company and the policy holder and not towards rendering any professional services. Hence, according to the petitioners, sections 194J are not at all attracted to these payments.

3. The first respondent conducted the survey on 2.1.2009 under section 133A of the Act of the business premises of the petitioner and collected certain information including the details and copies of returns of the income filed by the petitioner for the years ending 31.3.2006,

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31.3.2007 and 31.3.2008. The petitioner also furnished details of the TDS for the assessment years 2006-07, 2007-08, and 2008-09. The petitioner was called upon by the first respondent to furnish additional details in this regard. The petitioner was later on served with a show cause notice dated 19.1.2009 proposing to pass orders under sections 201(1) and 201(1A) of the Act. According to the petitioners, the said show cause notice was issued by the respondent before collecting the relevant information and before ascertaining the facts from the petitioner. Be that as it may, the petitioner was called upon to show cause why orders under sections 201(1) and 201(1A) of the Act should not be passed. The petitioner raised a preliminary objection to the show cause notice denying the applicability of the provisions of section 194J to the petitioner's case. The main contention of the petitioner is that the hospitals to which the payments were made by the petitioner have filed their returns of income and paid tax due thereon. Hence no action under section 201(1) of the Act could be enforced

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against the petitioner. Before the competent authority the petitioner also relied upon the judgment of the Apex Court in the case of Hindustan Coco-Cola Beverage (P) Ltd., vs. CIT, reported in 293 ITR 226, a copy of which is produced as Annexure-D.

4. The Assessing Authority having regard to the show cause notice as well as the reply given was of the view that the petitioner was obliged to deduct the tax at source; that having not been done, there is a clear violation of the provisions of section 194J of the Act. The total sum payable for the relevant year i.e., for the year 2002-03 was Rs. 14,78,042/-. The said determination is assailed in this writ petition.

5 Mr. Sarangan, learned senior counsel appearing for the petitioner would vehemently submit that in the given set of circumstances, section 194J of the Act is not at all applicable. He submits that the explanation to section

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194J of the Act deals with the contents of the agreement. Another primary contention of Mr. Saranmgan, learned senior counsel is that sufficient opportunity was not given to the petitioner to put forth their case. It is specifically contended that it is in violation of principle of natural justice. It is also submitted that no opportunity was given to file objections to the equitable claim with the reduction of income. On these grounds he submits that the impugned order holding that section 194J of the Act is applicable to the petitioner is unsustainable.

6. Mr. Aravind, appearing for the respondent Revenue submits that the petitioner is carrying on the business of profit in respect of Health Insurance claim services. He further submits that under section 133A of the Act a survey was conducted and the information received was not in compliance with the provisions of the Income Tax Act. He submits that prior to amendment to section 201, there was a controversy that any person who has failed to comply

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with the provisions of the Act in not deducting the TDS at source was not liable to be treated as default assessee. But, however the amendment was introduced clarifying the position that if a person including the principal officer of a company does not comply with the provisions of the Act by not deducting the TDS, will be treated as assessee in default. Hence he submits that section 194J of the Act is applicable to the case on hand.

7. To appreciate the controversy, it is necessary to look into certain provisions of the Act. Section 194J of the Act would relate to fees for professional or technical services. Sub-section (1) of Section 194J would deal with individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of fees for professional services, or fees for technical services, shall at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by other mode, whichever is earlier, deduct an

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amount equal to five per cent of such sum as income tax on income comprised therein. The said provision i.e., section 194J (A) and (B) is qualified by indicating that no deduction shall be made under this section in respect of certain payments which are made where the amount does not exceed a sum of Rs. 20,000/- in the case of fees for professional services and other technical services. The professional service is defined under explanation to Section 194J(B) which would mean service rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purpose of section 44AA or of this section. Fees for technical services shall have the same meaning as in explanation 2 to clause (vii) of sub-section (1) of section 9. These are the broad classifications which would attract deduction of the income tax at source under section 194J of the Act.

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8. Section 201 of the Act deals with consequences on failure to deduct or pay the tax which is due. Sub-section (1) speaks about the cases referred to in section 194. The principal officer and the company of which he is the principal officer does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under the Act, he shall without prejudice to any other consequences which he or it may incur be deemed to be an assessee in default in respect of the tax. Sub-section (1A) was introduced on 1.4.1966 which would indicate that notwithstanding what is stated in sub-section (1), if any person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under the Act, he shall be liable to pay simple interest at 12% per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid. These are the broad provisions which would relate to if the tax is not deducted at source.

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One will have to consider whether the petitioners would come within the ambit of section 194J as well as section 201(1) and 201(1A) of the Act.

9. The facts relating to TPA are also referred to along with the relevant provisions. Before considering the case on merits, whether the petitioner was obliged to deduct tax at source, it is necessary to see whether the proceedings disclose that the impugned order at Annexure-H is passed in violation of the principle of natural justice and without affording an opportunity, the matter requires remittance. If it is found that sufficient opportunity was given, the question of remitting the matter would not arise. In this regard one will have to look into the impugned order passed by the authority. Indeed it is not in dispute that a show cause notice was issued and a reply is filed. The authority has specifically dealt with the issuance of the show cause notice to the assessee and a reply was also sought which was given by the petitioner. The assessee replied to the

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show cause notice and the same is extracted in the impugned order. Thereafter the authority has dealt with the applicability of section 194J of the Act and also whether the provisions of sections 201(1) and 201(1A) of the Act are attracted.

10. It is also required to be looked into whether there is any lack of application by the authorities, in as much as, the reference to some cases is made in the impugned order which does not relate to the petitioner's case.

11. In so far as those contentions are concerned, the impugned order discloses that the agreement with the insurance company which is referred to at para 9 no doubt gives an impression that the agreement which is referred to may not be in respect of the petitioner company. But, however, that shall not alter the situation. Indeed, in so far as denial of an opportunity is concerned, some reference can be made to the correspondence inter se between the

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petitioner as well as the authority. The first of the correspondence is at Annexure-D dated 29.1.2009, wherein a show cause notice was given and a reply would indicate that they have denied that they are liable to deduct the tax at source under section 194J of the Act for the reasons stated in the reply. But, however, they would make a request that they are not in a position to collect the relevant data and material which are in the nature of agreement between the insurance and third party administrator; agreement between the insurance company and the policy holder; agreement between the third party administrator and the hospitals; agreement between the policy holder and the hospital and agreement between the insurance company and the hospitals. That would conclude the said reply with a request that they are not in a position to collect the data of this magnitude and it would require some more time. Hence two weeks time was sought to submit all the details. Another communication on 2.2.2007, a copy of which is at Annexure-E reiterating the

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fact that they would require some more time to collect the necessary information. Another letter dated 6.2.2009 at Annexure-F is also to the effect that they were in the process of collecting the balance of data as required by them. The last of the communication dated 12.3.2009 which would once again seeking some more time to do the needful at the earliest and once they are in receipt of the copies they will be in a position to give a comprehensive reply to the show cause notice. That was received by the authority on the same day. Nevertheless, the authority has proceeded to pass an order dated 23.7.2009. It is no doubt true that a request was made on 12.3.2009 in seeking some more time to collect the data and file a comprehensive reply. Indeed it is not a case where it can be said that the petitioners are denied of an opportunity, in as much as, on several occasions time was granted and the petitioners have filed a reply. What was lacking is only the documents which were not available which are the TPA agreement. Indeed the question is not one of interpretation of the terms

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of the TPA agreement but as to whether the petitioners who are third party administrator are required to deduct tax at source. Undisputedly the insurance company has entered into an agreement with the petitioners herein for the purpose of payment or reimbursing the amount which is spent by the policy holder. Indeed it is to be noticed that the insurance company issued cashless medi-claim policies and they are serviced through the TPAs. It is required to be looked into as to how this TPA operates. Indeed any policy holder who is desirous of availing the benefit of medi-claim policy is required to enter into a contract with the insurance company. Under the said contract the policy holder is insured and is assured of a free treatment up to a limit not exceeding the sum assured. Indeed the insurance company enters into an agreement with the TPAs to service their policies. The working of this arrangement is whenever a person is insured the insurer would send the copy of the policy to a particular TPA, the TPA in turn issues certain identity card to the insured, the policy holder

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thereafter is required to approach the said TPA for the service. The TPAs have a network of hospitals with which it has arranged for cashless treatment, which is informed to the insured. If the policy holder or insured is in need of medical treatment he can approach any of the network hospitals to avail the said cashless benefit. The normal procedure would be the hospital sends the requests to the TPA and upon their approval the police holder would be treated in the hospital. After the treatment and discharge, the hospital sends the bill along with the investigation report to the TPA and the TPA upon receipt of the documents processes for reimbursement of the medical expenses. Once the claim is processed the payment is released to the hospital by the TPA directly. Indeed the TPA gets reimbursed of all the amount of claim processed. In the case on hand, it is to be noticed that the TPA normally takes a list of insurance companies in settling the claims of the policy holder. Since the money is paid from the 'claim float account' of the TPA, it is the TPA who is

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responsible for making payments to the hospital under cashless system under the medi-claim service to the policy holder. In fact the role of TPA can be termed as the agent of the insurance company. It is no doubt true that a contention is taken that they are not responsible for payment of sums as there is no approved contract for rendering the professional service. The agreement which is made available along with the papers would clearly disclose some of the conditions laid down in the agreement which are as under:

(1) The hospital is required to provide necessary medical treatment;

(2) The hospital will not provide cashless benefit to any beneficiary without authority letter;

(3) After beneficiary is discharged from the hospital the provider will submit original final bill amongst other documents;

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(4) All payments in respect of the complete/eligible bills shall be made by the TPA directly to the provider.

Thus a perusal of the agreement itself discloses that the TPA is responsible for making the payment to the hospital for rendering the medical service to the policy holders. The TPAs enter into an agreement with the hospitals for the aforesaid purpose. It is not necessary as to when the services are required to be provided by the TPA. Services can also be said to have been provided if they are provided through some one else on the request of the TPA. Indeed the TPA is given unbridled power in this regard. This would be in the nature of TPA taking over a part of the work of the insurance company. The TPA would be working in the nature of the insurance company except the fact that they do not issue policy. Their decision as to the payment of bill and sending the insured to the accredited hospitals is final. Indeed it is to be noticed that after taking the policy from the insurance company, the insurance

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company is not in touch with the insured at all, in as much as, they are not required to process the claim for approval. The decision of the TPA in this regard is final.

12. Another factor which would be a pointer to the fact that the TPA is required to deduct tax at source is to be found in the nature of operation of funds. A claim float account is opened in the name of the TPA. The insurer would go on depositing certain sums of money in the said float account from which the TPA would draw the amount and pay the amount to the hospitals. As and when the amount in the float account is diminished or reduced, the insurer would replenish the account. The TPA is required to open float fund account with a designated bank specified by the insurer. The amount is transferred from the account of the insurer after the claim process and payment is made. As observed once the funds are exhausted the same would be replenished by the insurer. Indeed it is to be noticed that it is the TPA which is in control of making

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the payments to the hospitals. The liability of the insurer is only of replenishing of the funds. After the transfer of funds the control of the funds is with the TPA i.e., when once the amount is deposited in the float fund account. The application of the funds is left to the contracting party i.e., the insured and the TPA. A perusal of the network and as to how the cashless medi facility is made available, the ultimate party who pays the amount to the hospital is the TPA. In fact there is no agreement between the insurer and the hospitals. The agreement is essentially between the TPA and the hospitals. In this regard it is necessary for us to look into the agreement itself which is made available, which is termed as Service Level Agreement.

13. Clause 2 of the agreement would relate to the services, which would read that the TPA agrees to provide the services by itself in the service area in the panel of GIPSA Companies outside the service area to the insurer and the insured persons on the terms and conditions and

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in the manner more particularly set out in the agreement. What is service fees is to be found in clause 3, which would indicate that the insurer shall pay to the TPA the fees as detailed in the schedule. Clause 3.2 of the agreement would relate to the applicable taxes and other levies of the Govt. or any Governmental authority in relation to the fees payable, shall be borne by the insurer provided the TPA is regular payee of service tax and they are having the service tax account with the concerned department of the Government which should be mentioned in the service charge bill raised by the TPA. Indeed, a perusal of this clause does not give any indication that the TPA is not obliged to deduct the tax at source, which would be with reference to only to the service tax.

14. The petitioners have also made available the hospitals which are on the panel of the TPA. One such agreement with empaneled hospital is made available along with the petition papers. The agreement entered into between the

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TPA as well as the hospital has certain obligations to the reperform on either part. It would relate to procedure for approval cashless admission and treatment which would indicate that in the event any TPA member is required to be admitted and treated by the hospital, as may be planned in advance, the hospital shall promptly send to the medi assist (petitioner) by fax or e-mail or any other communication as may be designated by the petitioner from time to time. The said clause would also indicate that the hospital shall take all necessary steps to ensure that the request of cashless beneficiary is duly filled and completed by the hospital as the TPA member only sends the request for cashless hospitalisation at the designated place. There are hosts of other clauses which are required to be performed by the hospital including emergency hospitalization and processing of request for cashless hospitalisation. Processing of request form for cashless hospitalization is to be found at clause 4 of the agreement with the hospital which would indicate that it is at the sole

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discretion of the casheless hospitalization with the petitioner. What is more relevant for our purpose to determine as to whether the TPA is required to deduct tax at source is to be found at clause 3.5. Indeed it would read that on receipt of the authorization letter by the hospital, the hospital shall admit and treat the approved TPA members, the charges for which shall be reimbursed by medi assist to the hospital on behalf of the insurance company that the approved TPA members is a medi-claim policy holder of, subject to the terms and conditions of the authorisation letter issued by the Medi-assist and the agreement. For the purposes of the agreement, that is the hospital, the approved TPA member shall mean those TPA members with respect to whose admission and treatment at the hospital, to which the TPA has issued an authorisation letter in accordance with the terms of the agreement. Payments to be made are to be found at clause 5. Clause 5.1 would relate to the obligation on the part of the TPA to reimburse the hospital on behalf of the insurance company

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with the approved TPA member who is a medi claim policy holder and under no circumstance the TPA is required to pay the hospital any amounts that will not be reimbursed by the insurance company.

15. A perusal of the terms of payment would clearly indicate that it is the duty and the obligation of the TPA to pay the hospitals. Indeed the insurer in this regard will not have any role to play, in as much as, it is only to replenish the amount in the float account once the amount deposited therein is exhausted. Ultimately the agreement entered into inter se between the hospital and the TPA for payment of money holds the field. In the circumstance, it cannot be said that the TPA who is the authority or the person to pay the amount to the hospital is not required to deduce the tax at source and section 194J is not attracted cannot be accepted.

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16. A feeble attempt was made by Mr. Sarangan, learned senior counsel with reference to the definition of profession under section 2(36) and business under section 2(3) and profits and gains, to buttress his contention that it is only the profession and business which are required to deduct the tax at source under section 194J. He would also press into service the provisions of sections 121 of the Act which would relate to direct payment and section 28 which would relate to profits and gains from the business and profession. I am of the view those provisions do not advance the case of the petitioner, in as much as, they are required to be looked into with regard to the terms of the agreement whether section 194J and sections 201(1) and 201(1A) of the Act are attracted.

17. A perusal of the impugned order does not indicate that it has not addressed itself to the contentions urged. Having re-examined the matter, I am of the view that the impugned order cannot be faulted and the petitioner is

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obliged to deduct the tax at source under section 194J of the Act, in as much as, moneys are paid by it to the hospitals in respect of cashless treatment.

18. Having given my anxious consideration, I am of the view that the petition does not merit consideration and the same is rejected.

Sd/-
JUDGE

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