

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR  
&  
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR**

**MONDAY, THE 14TH JANUARY 2008 / 24TH POUSHA 1929**

**ITR.No. 182 of 1996()**

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AGAINST THE ORDER DATED 21/08/1996 IN RA 284C/92 IN  
ITA.184C/1987 of I.T.A.TRIBUNAL,COCHIN BENCH  
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**APPLICANT:**

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THE COMMISSIONER OF INCOME TAX,  
ERNAKULAM.**

**BY ADV. SRI.P.K.R.MENON(SR.),SR.COUNSEL FOR IT  
SRI.GEORGE K. GEORGE, SC FOR IT**

**RESPONDENTS:**

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- 1. M/S. NECHUPADAM CONSTRUCTION,  
C/O. K.P.POULOSE,  
KADAYIRUPPU KOLENCHERRY,  
(DISSOLVED).**
  - 2. K.P.IYPE, NECHUPADAM, KADAYIRUPU,  
KOLENCHERRY 682 311.**
  - 3. K.E.THOMAS, OF DO. DO.**
  - 4. GEROGE THOMAS OF DO. DO.**
  - 5. DAISY THOMAS OF DO. DO. (REMOVED THE PETITION AS PER  
ORDER IN CMP. 4980/2002 DT. 10.10.2002.**
  - 6. DR. C.I. DARLY, 33, GREEM VALLEY VILLAGE,  
VAZHAKALA, KAKKANAD.**
  - 7. LILLY ISSAC, C/O. RAJAN, VALAVIL HOUSE,  
KIZHAKKAMBALAM.**
  - 8. K.P.MARY, C/O. GEORGE VARKEY, SANKARAMANGALAM  
THIRUVALLA.**

**I.T.R. NO.182/1996**

- 9. ANNIE PAUL, NECHUPADAM, KADAYIRUPPU.**
- 10. VALSA PAUL, 10/579, JASEELA PARK, FEROOK, CALICUT 673 631./**
- 11. C.P.PAUL , PAULSON PARK HOTEL, ERNAKULAM  
COCHIN 11.**
- 12. USHA PETER, JDGES AVENUE, KALoor, ERNAKULAM**

**ADDL. RESPONDENTS 2 TO 12 ARE IMPLAED AS PER ORDER DT. 24.10.2002  
ON CMP. NO.5527/2000.**

**BY ADV. SRI.P.JACOB VARGHESE R6,R7 & R12**  
**SRI.T.V.VARGHESE - R3**  
**SRI.JOMY GEORGE - R8**  
**SRI.V.C.SABU**  
**SRI.M.C.SEN - R11**  
**SRI.M.P.SREEKRISHNAN**  
**SMT.SHAHNA KARTHIKEYAN**

**THIS TAX REFERENCE HAVING BEEN FINALLY HEARD  
ON 14/01/2008, THE COURT ON THE SAME DAY DELIVERED  
THE FOLLOWING:**

**C.N. Ramachandran Nair &  
T.R. Ramachandran Nair, JJ.**

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**I.T.R.NO.182 of 1996**  
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**Dated this the 14<sup>th</sup> day of January, 2008.**

**JUDGMENT**

C.N. Ramachandran Nair, J.

Heard learned counsel for the applicant and learned Standing Counsel appearing for the respondents as well. The questions which arise from the order of the Tribunal for the assessment year 1978-79 are the following:

- “1. Whether on the facts and in the circumstances of the case the Tribunal is right in law and fact in deleting the addition of Rs.68,581?
2. Whether, on the facts and in the circumstances of the case the Tribunal is right in law in holding that the loss in relation to the tippers cannot be viewed as capital loss?”

The assessee was awarded a contract on 22.12.1976 by the Mysore Power Corporation for the construction of a tunnel and allied works. The awarder had sold four tippers to the assessee for use in the construction work. Admittedly, the trucks were charged. It is not known whether the assessee made payment for the trucks or whether the value remained as amount payable to the awarder to be set off against the bills raised by the assessee. The accepted position is that the assessee carried out only very little work, valued at Rs.68,581/- and on account of the failure of the assessee to

complete the work, the contract was cancelled on 27.12.1977. In fact, it is seen that the contract awarded on 22.12.1976 was cancelled within a year on account of the assessee's failure to carry out the work. It is seen from the Tribunal's order that the total liquidated damages claimed by the awardee is Rs.11 lakhs. Besides the liquidated damages claimed, the awardee forfeited the four tippers sold to the assessee for use in the construction work. The assessing officer, while granting the loss claimed, reduced the amount of work in progress and allowed the net loss which was objected by the assessee. Similarly, the loss claimed for forfeiture of the trucks was disallowed by the assessing officer, treating it as capital loss. Even though the Commissioner of Income Tax affirmed the assessment, the Tribunal allowed both the claims.

2. On going through the Tribunal's order and after hearing learned counsel appearing on both sides, we are unable to answer the questions, for the reason that full facts are not on record. In the first place, it is not known whether the assessee had billed for the work in progress and if so, following the mercantile system, it was to be set off against the net loss claimed. Moreover, if the work bill was not approved by the awardee for payment, then there is no question of reducing the value of work in progress from the loss claimed by the assessee. On the other hand, if the bill was

entertained for consideration, then it was rightly reduced from the loss claimed by the assessee. So far as the value of the forfeited tippers are concerned, we do not know whether it was treated as a business asset and depreciation granted for the preceding assessment year, i.e. 1977-78. If the vehicles are treated as business assets and depreciation granted, then the department's claim that it is a business asset and hence forfeiture leads to capital loss only, is to be upheld. If it was a case of procurement of trucks for purpose of business and business never took off, then it could not be claimed as a business loss and there was no occasion to use the trucks for any business purpose. If the tippers were seized before commencement of the work and the awarder has reckoned the cost of the seized tippers while computing liquidated damages, then the question of allowing its cost as loss over and above the liquidated damages, does not arise. The Tribunal had allowed the claim on the ground that apart from claiming liquidated damages, the awarder has forfeited the tippers.

3. Since factual position is not clear from the Tribunal's order and the same will be evident only from the final claim of liquidated damages by the awarder, we set aside the order of the Tribunal and the Commissioner of Income Tax (Appeals) and remand the matter to the assessing officer for reconsidering the issue after verifying facts and with reference to the

subsequent years' assessment also.

The Income Tax Reference is disposed of as above.

**(C.N. Ramachandran Nair, Judge.)**

**(T.R. Ramachandran Nair, Judge.)**

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C.N. Ramachandran Nair & &  
T.R. Ramachandran Nair, JJ.

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I.T.R. No.182 of 1996  
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JUDGMENT

14<sup>th</sup> January, 2008.