

(1984) 11 BOM CK 0037

In the Bombay High Court

Case No : IT APPEAL NO. 2365 TO 2368 (BOM.) OF 1982

GOODLASS NEROLAC PAINTS LTD.

APPELLANT

Vs

Income Tax OFFICER.

RESPONDENT

Date of Decision : 29-11-1984

Acts Referred:

Income Tax Act, 1961 — Section 37(2A)

Citation : (1985) 11 ITD 767

Hon'ble Judges : D. S. Meenakshisundaram, Member; D. S. Meenakshisundaram, J.M.

Bench : Division Bench

Judgement

Per Shri D. S. Meenakshisundaram, Judicial Member -Goodlass Nerolac Paints Ltd., the assessee herein, has filed these four appeals against the common order of the Commissioner (Appeals), dated 23-3-1982, for the assessment years 1975-76, 1976-77, 1977-78 and 1978-79. Since there are common contentions involved in these appeals, it will be convenient to dispose of the same by a common order. The assessee is a company carrying on business in the manufacture and sale of paints. The assessee follows the calendar year as its previous year.

2. The first objection, which is common to all the four years, is to the disallowance of the following amounts under the head Sales promotion expenses :

Assessment year

Amount disallowed

Rs.

1975-76

14,187

1976-77

33,702

1977-78

27,954

1978-79

50,820

These amounts were disallowed by the departmental authorities for the reason that they represented entertainment expenditure incurred by the assessee in giving launches and dinners to its customers in five star hotels. The Commissioner (Appeals) found that what the ITO had done in all these years, was to have disallowed only the expenditure in respect of lunches and dinners given in five star hotels and that he had not even considered the sales promotion allowance paid to the assessee's employees as entertainment expenses, though these allowances partook of the character of entertainment allowance and as per the Explanation given to section 37(2A) of the Income Tax Act, 1961 (the Act), it had to be considered as part of the entertainment expenses. The Commissioner (Appeals) was of the opinion that the ITO has been fair in making the impugned disallowance. He pointed out that the assessee has a separate head of expenditure named Tea and coffee expenditure, which could be considered as expenses incurred in connection with the extending customary courtesy and hospitality of the clients. He, therefore, confirmed these disallowances made by the ITO. Only in the assessment year 1978-79, the Commissioner (Appeals) reduced the disallowance from Rs. 88,671 to the actual amount of Rs. 50,820.

3. Before us, it was contended on behalf of the assessee by Shri S. P. Mehta, the learned counsel, that the expenses claimed by the assessee for the first year 1975-76 would be covered by the decision of the Bombay High Court in the case of Commissioner of Income Tax, Vidarbha And Marathwada Vs. Shah Nanji Nagji, as the Explanation 2 to section 37(2A), inserted by the Finance Act, 1983, would apply only from the assessment year 1976-77 onwards. The learned counsel also argued that these expenses included sales promotion allowances paid to the supervisory staff to the extent of Rs. 10,800 in the assessment year 1976-77 and Rs. 10,900 in the assessment year 1978-79. He pointed out that the ITO himself had allowed similar sales promotion allowances paid to the employees in the assessment years 1975-76 and 1976-77 to the extent of Rs. 10,860 and Rs. 21,241. The learned counsel argued that these amounts of sales promotion allowances have been considered as part of the salaries of the employees, for which tax deduction at source had been made. He, therefore, submitted that at least to the extent of these sales promotion allowances, the departmental authorities should have allowed in the two assessment years 1976-77 and 1978-79.

4. On behalf of the revenue, it was submitted that there was no distinction that could be drawn in respect of the expenditure claimed by the assessee under this

head in the assessment year 1975-76 and in the later three years. Shri Tuli argued that Explanation 2 to section 37(2A) would directly apply to the facts of the present case for the assessment years 1976-77 and 1978-79 and that for the first year, even judged by the standards laid down by the Bombay High Court in the case of Shah Nanji Nagsi (supra), these expenses would not be allowable as business expenditure as they partook the character of entertainment expenditure only. The learned departmental representative further submitted that there was no justification in excluding the sale promotion allowances paid to the employees, as they would squarely fall within the mischief of Explanation 1(i) to section 37(2A), which was there in the statute book from 1-4-1968. He submitted that the allowances made by the ITO in the two assessment years 1975-76 and 1977-78 were incorrect and that, therefore, we should not be guided by the same.

5. On a careful consideration of the submission urged on both sides, we do not see any reason to interfere with the order of the Commissioner (Appeals) on this point in all the four years. There is no dispute before us that the expenses in question were mainly incurred for giving lunches and dinners to the customers of the assessee-company in Five Star Hotels. We are unable to see how these expenses would cease to be an entertainment expenditure merely because the assessee-company classified these expenses under the different nomenclature, viz., sales promotion expenses. The revenue is right in its submission that even judged by the standards laid down by the Gujarat High Court in Commissioner of Income Tax, Gujarat II Vs. Patel Brothers and Co. Ltd., which has been followed in Shah Nanji Nagsis case (supra), the expenditure in question would certainly be regarded as entertainment expenditure even for the assessment year 1975-76. We are unable to agree with the assessee's learned counsel that the sales promotion allowances paid to its employees in the two years 1976-77 and 1978-79, amounting to Rs. 10,800 and Rs. 10,900, should be excluded for the purpose of disallowance as we are of the view that these allowances would fall within the mischief of Explanation 1(i) to section 37(2A). Further, apart from stating that these allowances paid to the supervisory staff were included in their salaries and tax deducted at source, no material has been placed before us by the assessee in support of the same. We further find that the entertainment expenditure representing expenses incurred under the head Tea and coffee expenditure were allowed by the Commissioner (Appeals), in the assessment years 1976-77 and 1978-79. The department came up in appeal against the said decision of the Commissioner (Appeals), which has been decided by the Tribunal, Nagpur Bench Camp, at Bombay, in IT Appeal Nos. 2616 to 2619 (Bom) of 1982 decided on 19-7-1983. In paragraphs 6 and 11 of the said order, the Tribunal restored the disallowance of Rs. 22,901 in the assessment year 1976-77 and Rs. 40,501 in the assessment year 1978-79, in view of the amendment brought about by section 17 of the Finance Act, 1983. In our view, this decision of the Tribunal is squarely applicable to the expenses under the head Sales promotion also for all the three years. Explanation 2 to section 37(2A) brings within its

ambit expenditure on provision of hospitality of every kind by the assessee to any person, whether by way of provision of food or beverages or in any other manner whatsoever and whether or not such provision is made by reason of any express or implied contract or custom or usage of trade. We, therefore, confirm the order of the Commissioner (Appeals) on this point in all the four years and reject this ground.

6 and 7. [These paras are not reproduced here as they involve minor issues.]

8. The next ground, which is common for all the four years, is the disallowance of selling expenses claimed by the assessee as business expenditure. The assessee claimed that these amounts were paid to the employees of its customers as an incentive and to keep them in good humour, so that it can push up its sales in future. Since this contention is common not only for the four years presently under appeal, but also for the later assessment years 1979-80 to 1982-83, which appeals were also heard along with these appeals, we set out below the figures of selling expenses claimed under this head in all these eight years :

Assessment year

Amount of selling expenses

Rs.

1975-76

1,16,713

1976-77

79,352

1977-78

88,852

1978-79

1,11,558

1979-80

1,08,690

1980-81

1,37,620

1981-82

2,23,892

1982-83

3,25,463

The Commissioner (Appeals) had upheld these disallowances by following the decision of the Bombay High Court in the assessee's own case for the assessment years 1963-64 to 1968-69, now reported in *Goodlas Nerolac Prints Ltd. Vs. Commissioner of Income Tax, Bombay City-II*, .

9. It was submitted by Shri S. P. Mehta, the learned counsel for the assessee, that though this decision of the Bombay High Court in *Goodlas Nerolac Paints Ltd.'s case (supra)* is against the assessee, there are decisions of the Tribunal in the assessee's own case for the later assessment years, when the matter was again re-examined and decided in favour of the assessee on the same issue. In support on this submission, Shri Mehta relied on the order of the Tribunal in IT Appeal No. 702(Bom.) of 1971-72 and 2153 (Bom.) of 1973-74, dated 28-2-1975, for the assessment years 1970-71 and 1971-72. He particularly invited our attention to the assessee's contentions set out in paragraph No. 4 of this order as well as the contentions of the revenue set out in paragraph No. 5 of the same order and also the findings of the Tribunal, in paragraph Nos. 6 and 7 of the said order. The learned counsel also referred to the order of the Tribunal, for the assessment years 1972-73 and 1973-74 at page 23 of the paper book. Shri Mehta further submitted that the matter was again examined in detail in the assessment year 1974-75 by the Tribunal, in IT Appeal Nos. 1479 and 1612 (Bom.) of 1978-79, dated 20-3-1980, since the department relied on the decision of the Bombay High Court in the case of *Amritlal and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, Central, Bombay*, . He particularly relied on the findings in paragraph Nos. 5 and 6 of this last order. The learned counsel, however, fairly stated that the department's reference applications against these orders of the Tribunal are pending before the High Court.

10. Shri Mehta further argued that the facts and circumstances, for the eight years under appeal, are identical to the facts and circumstances considered by the Tribunal in these orders for the years 1970-71 to 1974-75 and that, therefore we should follow these orders of the Tribunal, which had examined the matter in great detail. He further submitted that the decision of the Bombay High Court in *Goodlas Nerolac Paints Ltd.'s case (supra)* in the assessee's own case would not stand in its way in view of the observations of the Honble Bombay High Court explaining the said decision in their later judgment in *CIT v. Mills Stores Trading Co. India (P.) Ltd.* [1984] 18 Taxman 85. The learned counsel particularly relied on paragraph Nos. 3 and 4 of this judgment at page 86 of the report. Shri Mehta also invited our attention to the particulars of the selling expenses furnished by him in pages 43 to 48 of the assessee's paperback. He also pointed out that the percentage of the selling expenses, claimed by the assessee in these years, was less than those allowed in the earlier years, as could be seen from the comparative statement at page 48 of the paperbook. The learned counsel also placed before us two payment vouchers for selling expenses as illustrative examples and also a copy of the resolution of the board of directors, dated 10-4-1974, approving the selling expenses of Rs. 13,176 incurred by the assessee in March 1974. On the basis of these materials, Shri Mehta submitted

that the expenses claimed by the assessee were allowable as business expenditure u/s 37(1).

11. Shri K. K. Tuli, the learned departmental representative, submitted that there was no distinction on facts, between the years presently under appeal and the years which were considered and decided by their Lordships of the Bombay High Court in Goodlas Nerolac Paints Ltd.s case (supra). He argued that the said decision of the Bombay High Court squarely applies to the fact of the present case and that we should follow this decision, as the later orders of the Tribunal were also the subject-matter of further reference pending before the Bombay High Court though at the instance of the revenue.

12. We have carefully considered the rival submissions of the parties in the light of the materials placed before us and the decisions relied on by them. Since the matter has already been considered by the Honble High Court, it is necessary that we should first examine the ratio of the decision in Goodlas Nerolac Paints Ltd.s case (supra). A careful reading of this judgment, a copy of which has been placed at pages 35 to 42 of the paperbook, shows that reliance was placed before the High Court on the decision of Ciba Dyes Ltd. Vs. Commissioner of Income Tax, Bombay City, After setting out the ratio of the earlier decision, their Lordships distinguished the case of the present assessee in the following words :

".... In the present case, on the other hand, the claim for deduction has been made by the assessee on an altogether different footing. It has been made by the assessee on the footing that these selling expenses represent commissions paid by the assessee to the employees of certain customers through its salesmen. The claim of the assessee-company, in this case, therefore, is that the commissions were paid by the assessee and its salesmen came into the picture merely as the agents through whom the commissions were paid by the assessee. In these circumstances, we fail to see how it could be said that the Tribunal was in error in holding that the burden of proving that the amounts were actually expended lay on the assessee. Section 37 of the said Act, inter alia, clearly provides that the expenditure claimed by way of deduction should be laid out or expended wholly and exclusively for the purposes of business or profession and we totally fail to see how it could be said that the assessee was not bound to prove that the said amounts claimed to have been paid as secret commissions were actually laid out or expended as secret commissions before becoming entitled to deduction u/s 37. As the assessee refused to furnish the names and addresses of the parties to whom such secret commission had been paid, it was perfectly open to the Tribunal not to accept that the assessee had, in fact, paid those amounts by way of secret commissions. It was for the Tribunal decide, as the final judge of facts, as to whether the case of the assessee that these amounts were actually paid by way of secret commissions, should be believed or not, in the absence of names and addresses of the persons to whom secret commissions were alleged to have been paid. In the present case, the Tribunal has disbelieved this claim of the assessee and we do not see why we

should interfere or how we can interfere with that conclusion. We may also refer to section 133(4) of the said Act which clearly requires that the names and addresses of the persons to whom commissions are alleged to be paid, must be disclosed to the ITO on demand. Where such disclosure is not made and the ITO or the Tribunal disbelieves the case that such commissions were paid as claimed by the assessee, we fail to see how it can be said that the Tribunal has gone wrong." (p. 62)

Their Lordships, therefore, answered the question in the affirmative and against the assessee.

13. In Mills Stores Trading Co. India (P.) Ltd.s case (supra), the Commissioner sought a direction u/s 256(2) of the assessment to the Tribunal to state a case and refer four questions set out in his application. Their Lordships rejected this petition, since their Lordships were of the view that all the questions turned over the basic controversy as to whether an amount of Rs. 26,112 should be allowed to be deducted out of the assessee's total income for the purpose of the assessment. The said sum was claimed by the assessee as ad deduction on account of secret commission, paid by the assessee to the employees of various mills purchasing the goods of the assessee. After setting out the salient facts, their Lordships held as follows in paragraph Nos. 2 to 4 of their judgment, which is quoted below :

"2. The facts giving rise to this application are that the assessee carries on the business of the supplying mill stores to various mills. The assessee claimed an amount of Rs. 26,112 by way of secret commission paid to the employees of various mills who had purchased goods from the assessee. The ITO disallowed the sum of Rs. 26,112 on the ground that the fact of payment and its nexus with the business of the assessee has not been established. An appeal preferred by the assessee was, however, allowed by the Commissioner (Appeals). The Tribunal upheld this decision. The present application is directed against the order of the Tribunal. The crucial question is whether there was any evidence before the Tribunal to prove the fact of payment of this amount as the secret commission and whether it could be said to have been an amount laid out wholly and exclusively for the purpose of the assessee's business. These are largely questions of fact. The assessee showed to the Tribunal that the payment of this amount as the commission had been approved by the board of directors of the assessee, which is a private limited company. It was further pointed out by the learned counsel for the assessee that such payments had been made even in earlier years and had been allowed as deductions without any objection being raised by the department. The commission was paid at a uniform rate at 2.1/2 per cent. We further find that the assessee had filed before the Tribunal a detailed list containing names of the mills to whose agents and employees such commission had been paid and showing also the value of the goods sold to these mills. The assessee had also supplied to the Tribunal the particulars of the bills and the amounts of the commissions paid, although the names of the persons to

whom it was paid were not disclosed. It is easy to understand why such names were not disclosed, because had they been disclosed, such employees would have been dealt with by their employers - the mills concerned. On this material, the Tribunal held that although the evidence was not direct, there was evidence to show that there was nexus between these payments and the business of the assessee.

3. In the state of facts, set out above, it is not possible to say that the findings of the Tribunal, which we have referred to above, have been arrived at without any evidence. As pointed out by a Division Bench of this Court in *Goodlas Nerolac Prints Ltd. Vs. Commissioner of Income Tax, Bombay City-II*, , the Court observed :

... It was for the Tribunal to decide as the final judge of facts, as to whether the case of the assessee that these amounts were actually paid by way of secret commissions, should be believed or not, in the absence of the names and addresses of the persons to whom secret commissions were alleged to have been paid ... (p. 62)

4. In that case, on the facts, the Tribunal had disbelieved the case of the assessee regarding payments of such amounts as secret commission and we declined to interfere with that finding for the reasons stated above. In the present case, the Tribunal has believed the case of the assessee that the payments were made as well as that there was nexus between the said payment and the business of the assessee and we do not see how these findings of fact can be interfered with a reference." (p. 86)

14. When we examine the earlier orders of the Tribunal in the assessee's own case for the assessment years 1970-71 and 1971-72, we find that the Tribunal has decided the issue after examining the materials placed before them in the following words in paragraph Nos. 6 and 7 of their order in IT Appeal Nos. 702 (Bom.) of 1971-72 and 2153 (Bom.) of 1973-74, dated 28-2-1975 :

"6. The assessee must satisfactorily establish two facts for successfully claiming the deduction of the amount under dispute. It should first establish the payment. It should next establish that the amount was paid wholly and exclusively for the purpose of its business. The assessee carries on a line of business where it is common knowledge such payments are made to the employees of the customers to keep them on the right side and to ensure the smooth running of the business and ensure quick payment of bills. The existence of the practice of such payments has been referred to Court decisions and in a number of decisions of the Tribunal. Apart from this, the fact is undeniable that the assessee-company at least follows the practice of making such payments since before the assessment year 1956-57. Not only that but the Income Tax Officer allowed one-half of the amount of such payments to be deducted in the assessment years 1956-57 to 1963-64. Moreover, a payment does not cease to be a deductible payment merely because it is not paid in pursuance of any practice. What is

required by law is that the payment-be it in pursuance of a practice or custom or outside it-should be paid for the purpose of business. Hence, existence of a practice, though we find ample reason to accept such a practice, is not necessary for allowing the deduction.

7. The assessee-company maintains proper accounts and records regarding these payments. The payments are made under the instructions and direction of the top executives of the company. The payments are approved by the board of directors at the end of every month. The assessee is a public limited company. Its shares are quoted on the Bombay Stock Exchange. The company is to maintain, which it has done, account and records not only to ensure itself but also to satisfy its large number of shareholders that the amounts have been paid for the purpose of its business and that the amounts have reached the persons to whom they were intended to be paid. In the preceding years, the Tribunal did not uphold the disallowance of the deduction of the payment in question on the ground that the payments were not made but only on the short ground that the names of the recipients were not furnished. What we have to satisfy ourselves is that the payments were not made but only on the short ground that the names of the recipients were not furnished. What we have to satisfy ourselves is that the payments were actually made for the purpose of its business. One can be satisfied in this regard, even where the names of the final recipients are not disclosed. The payments up to the last point have been satisfactorily established in the present case. It was in the interest of the company to see that the payments reached proper destination. The company employed checks and counter-checks to satisfy itself on the point. The payment cannot be held not to have been paid or its claim cannot be rejected merely because the names of the recipients have not been furnished. If the company furnishes the names, it would defeat the very purpose of the payment. It would not take such a suicidal measure. That, however, does not debar it from claiming he deduction of the payment if the payments and purposes are satisfactorily established. There can be not doubt that the payments and the purpose can be satisfactorily established even without disclosing the names of the final recipients. The reference made by the revenue to the non-disclosure of the details of the payments in section C (sic) of the return is irrelevant. Section 133 requires details regarding the payment of commission to be furnished. The payments under consideration were not payments of commission. They were payments made for keeping the employees of some of the principal customers on the right side and to induce them to render proper co-operation in dealing with its transaction. The assessee-company was, therefore, under no obligation to furnish the details of these payments. The revenue did not point out any principle of provision nor do we know of any, debarring an assessee from claiming deductions of payments referred to in section 133, where he does not furnish the details thereof in his return. We notice that Forbes Campbell & Co. Ltd. which manages the assessee-company, maintained its accounts and records on the lines on which the assessee company maintained them. It made similar payments and the Tribunal allowed

the deduction thereof. There is no reason why the assessee should not be allowed the deduction of the amount. The past sales and similar payment show that the ratio of selling expenses to turnover dropped from 1.34 per cent to 0.22 per cent. The reasonableness of the payment has not been doubted by the revenue before us nor could it be doubted. In the circumstances, we are satisfied that the assessee made the payment in question and that it was made wholly and exclusively for the purpose of its business. In these circumstances, we allow the deduction of the amount in its entirety."

A careful reading of these findings would establish that they are in conformity with the principles laid down by their Lordships of the Bombay High Court in the case of Mills Stores Trading Co. India (P.) Ltd. (*supra*).

15. Since the order of the Tribunal for the assessment years 1972-73 and 1973-74 has simply followed its earlier order for the assessment years 1970-71 and 1971-72, we need not refer to the same in detail. However, we find that the matter was again re-examined by the Tribunal in the assessee's own case for the assessment year 1974-75 in IT Appeal Nos. 1479 and 1612 (Bom.) of 1978-79, dated 20-3-1980. After setting out the facts and contentions in paragraph Nos. 2 to 4 of their order, the Tribunal held as follows in paragraph Nos. 5 and 6 to allow the assessee claim :

"5. The first point to be decided is whether the expenditure incurred was bona fide. The AAC holds that no expenditure was incurred because there were no vouchers. While vouchers would certainly prove the case, the absence of vouchers per se does not mean that there is no such expenditure incurred. We should also see the surrounding circumstances. These are that the board has approved the payments, that the salesmen had given vouchers; that such payments had been made for a number of years; and we may also add that, speaking pragmatically, it is a well known fact that in trade circles such payment have to be given. It is also known as kick-back to the executives. So, we can accept as a fact that such payments had been made by the company. At any rate, the vouchers clearly show that these amounts had gone out of the coffers of the company.

6. The next issue is whether this is a business expenditure. The answer is obviously yes. It has been paid for the sale of the company's goods. The vouchers are given by the salesmen. Now, the AAC has referred to illegal payments. On the facts shown, there is no apparent illegality. If any of the consumers happens to be a Government department, then there might be a question of illegality. But the consumers are all industrial companies, not Government departments. Besides, we also find that the payment made hardly comes to 0.1 per cent of the turnover. Reliance placed on *Amritlal and Co. Pvt. Ltd. Vs. Commissioner of Income Tax, Central, Bombay*, is of no help. That case dealt with excess payments made to the directors. We are of the opinion, therefore, that considering the matter afresh, the assessee's contention should be accepted on this point."

It will again be noticed that this decision of the Tribunal is also in conformity with the principles of the decision of their Lordships in the case of Mills Stores Trading Co. India (P.) Ltd. (supra). In fact, there is no conflict between the later orders of the Tribunal and the decision of their Lordships for the assessment years 1963-64 to 1968-69 in the case of Goodlas Nerolac Paints Ltd. (supra). We may further point out that the later orders, which we have quoted above, have really followed the guidelines that have been indicated both in the judgment in the own case in Goodlass Nerolac Paints Ltd. (supra) as well as in the case of Mills Stores Trading Co. India (P.) Ltd. (supra). It will further be noticed that in the order for 1974-75, the Tribunal found that the decision of the Bombay High Court in Amritalal & Co. (P.) Ltd.s case (supra), relied upon by the revenue, was distinguishable on facts. We are, therefore, of the view that the decision of the Tribunal for the assessment years 1970-71 and 1971-72 and for the assessment year 1974-75 would apply with equal force in all these eight assessment years under appeal. We may further point out that the selling expenses claimed by the assessee work out to less than even 0.1 per cent of the total turnover as noticed in the assessment year 1974-75. We set out below the particulars of turnover and selling expenses and their percentage for the four assessment years 1975-76 to 1978-79, as given in the comparative figures at page 48 of the paper book :

Assessment year

Turnover

Selling Expenses

Percentage of selling expenses to turnover

Rs.

Rs.

1975-76

13,12,70,579

1,16,713

0.09

1976-77

14,18,11,071

79,352

0.06

1977-78

17,57,49,644

88,852

0.05

1978-79

18,66,77,199

1,11,558

0.06

The figures for the remaining four years are also given below, as taken from the final accounts filed before us :

1979-80

16,86,00,000

1,08,690

0.06

}

These percentage figures are approximately worked

1980-81

22,80,00,000

1,37,620

0.06

1981-82

28,79,00,000

2,23,892

0.07

1982-83

35,58,00,000

3,25,463

0.06

It will be noticed from the above figures that the turnover of the assessee has been increasing progressively and that the selling expenses claimed by the assessee are less than 0.1 per cent of the turnover that was accepted as reasonable in the assessment year 1974-75. In the light of these facts, the selling expenses claimed by the assessee in these eight years can neither be considered as excessive nor unreasonable considering the increase in the

turnover for these years. We, therefore, respectfully follow the orders of the Tribunal for the assessment years 1970-71, 1971-72 and 1974-75 and hold that the assessee is entitled to this deduction of selling expenses in the computation of its business income u/s 37(1). Accordingly, this ground is allowed in all the eight years.

16. The last ground for consideration arises only in the assessment year 1978-79. It is against the disallowance of the assessee's claim for investment allowance u/s 32A of the Act, amounting to Rs. 4,21,564, in respect of the new plant and machinery installed for the manufacture of synthetic resin and Rs. 44,809 in respect of the new plant and machinery installed for the manufacture of pigments.

17. As regards the investment allowance of Rs. 44,809 on the plant and machinery of pigment plant, the learned counsel for the assessee, Shri Mehta, fairly conceded that the assessee would not be entitled to this investment allowance in view of the fact that pigments are specified in item 26 of the Eleventh Schedule of the Act. However, he did not want to give up the claim of the assessee in respect of the same. This identical contention has also been considered by us while disposing of the assessee's appeals for the later three assessment years 1979-80, 1980-81 and 1981-82 in IT Appeal Nos. 3891, 3892 and 7227 (Bom.) of 1982 by our order of even date. For the detailed reasons discussed in paragraph Nos. 3 to 5 of the said order, we confirm the disallowance of investment allowance of Rs. 44,809 in respect of the machinery installed for the manufacture of pigments.

18. As regards the new plant and machinery installed for the manufacture of synthetic resin, the Commissioner (Appeals) held that the Act is a self contained code and assistance, if any, is to be sought only if there is any ambiguity in the law. He was of the opinion that no assistance could be drawn from the classification made in item 14 of the Central Excise Tariff on which reliance was placed by the assessee's learned counsel. He pointed out that item 26 in the Eleventh Schedule is quite clear and it includes pigments, colours, paints, enamels, varnished, blacks and cellulose, lacquers and that the assessee was manufacturing only these items and that, therefore, the claim of the assessee for investment allowance could not be accepted.

19. Before us, Shri Mehta, the learned counsel for the assessee, apart from relying on his submissions at the page 87 and 88 of the paperbook, pointed out that in the subsequent assessment years 1979-80 to 1982-83, the assessee's contentions in this regard have been accepted by the Commissioner (Appeals) who had allowed such investment allowance in respect of new plant and machinery in the synthetic resin plant. He further submitted that this decision of the Commissioner (Appeals) has been accepted by the department, as they had not filed any appeal against the same even though they had come up in appeal against the said orders on other points. He, therefore, submitted that the assessee's claim for investment allowance in respect of the synthetic resin plant

should be accepted.

20. On behalf of the revenue, Shri Tuli argued that assessee-company is not essentially a manufacturer of synthetic resin, but is a manufacturer basically of pigments and paints, which are specified in item 26 of the Eleventh Schedule. He, therefore, argued that Commissioner (Appeals) was right in disallowing the assessee's claim for investment allowance for this year.

21. We have perused the order of the Commissioner (Appeals) for the assessment year 1979-80, wherein he had examined this issue in great detail. He had also examined the order of his predecessor for the year under appeal as well as the order of the Commissioner (Appeals) in the case of Garware Paints Ltd. After examining these order and the relevant provisions of the Act, the Commissioner (Appeals) allowed the assessee's claim in the following words in paragraph 4 of his order :

"4. After considering both the views, I am of the opinion that the view held by the learned Commissioner (Appeals) in the case of Garware Paints Ltd. has to be preferred to the view of my predecessor in this case because the language of section 32A (2A) is quite clear on this point. This subsection states that the deduction u/s 32A (1) shall not be denied in respect of any machinery or plant installed and used mainly for the purpose of manufacture of article or thing, which is not listed in the Eleventh Schedule only by the reason that such machinery or plant is also used for the purpose of business of manufacture of any article or thing specified in the said list. Thus, investment allowance has to be allowed in respect of any machinery or plant which is used jointly for purposes, i.e. for the purpose of manufacture of an article or thing not mentioned in the Eleventh Schedule as well as for the purpose of manufacture of of an article or thing mentioned in the Eleventh Schedule. In the present case, facts are much stronger in favour to the appellant in the sense that the machinery or plant is used only for the purpose of manufacturing of synthetic resin (since the appellant is having separate plant for the manufacture of synthetic resins). It is another matter that this synthetic resin is further used by the appellant itself for the manufacture of colours, pigments, etc., items which are listed in the Eleventh Schedule. The investment allowance is to be allowed on individual items of plant and machinery and not on the whole unit as such. The appellant is utilising the synthetic resin manufactured by it for its own purpose of manufacturing colours or pigments. But, if it were the case of an industrial unit which is manufacturing only synthetic resin, investment allowance would have to be allowed on the plant and machinery installed by it. Therefore, considering the language and the spirit behind section 32(2A) as well as the facts that, subsequently, the Legislature has itself omitted item 26 by the Finance Act, 1981, with effect from 1-4-1982, I hold that the appellant is entitled to the deduction of investment allowance claimed by it in respect of plant and machinery which is used for the manufacturing of synthetic resin. The appellant will obviously not be entitled to deduction of investment allowance in respect of

machinery other than the items used for the manufacture of synthetic resin. For the assessment year 1979-80, this figure is mentioned by the appellants learned counsel at Rs. 4,72,572. The IAC will allow this deduction from the computation of the business income. The appellant succeeds on this ground".

We are of the view that the aforesaid reasoning and conclusion of the Commissioner (Appeals), in his appellate order for assessment year 1979-80, are correct and sound and have to be accepted. We are unable to agree with the revenue that because the assessee is a manufacturer of paints and pigments, it would not be entitled to this investment allowance in respect of the new plant put up by it for the manufacture of synthetic resin. The Commissioner (Appeals) has found as a fact tht the assessee is piped a separate plant for the manufacture of synthetic resin. We, therefore, agree with the said reasoning and conclusion of the Commissioner (Appeals) and hold that the assessee would be entitled to investment allowance in respect of the new plant and machinery installed for the manufacture of synthetic resin for the assessment year 1978-79.

22. In the result, the appeals are partly allowed.