

**Note regarding claim of deduction in respect of a sum payable to an employee  
in lieu of leave to his credit – Section 43B(f)**

Please refer to my earlier e-mail on the above subject, dt. 3.9.2009. Vide the aforesaid e-mail, a Note regarding claim of deduction in respect of a sum payable to an employee in lieu of leave to his credit was forwarded to your office.

In the aforesaid Note, a reference was made to the judgement of Calcutta High Court in the case of *Exide Industries Ltd. Vs Union of India [2007] 292 ITR 470 (Cal)*, wherein it was held that section 43B(f) of the Income-Tax Act, 1961 (the Act) was arbitrary, unconscionable and *de-hors* the Supreme Court decision in the case of *Bharat Earth Movers Vs CIT [2000] 245 ITR 428 (SC)* and accordingly, the same was struck down as *ultra-vires*.

Recently, the Kerala High Court has dealt with the aforesaid issue in the case of *CIT Vs Hindustan Latex Ltd. [2012] 74 DTR 212 (Ker)*. It was held in this case that the Revenue having not challenged the correctness of the law laid down by the Calcutta High Court in the case of *Exide Industries Ltd.*, it is not open to the Revenue to challenge the correctness of the same in the case of another assessee.

It may be reiterated here that in the aforesaid judgement in the case of *Exide Industries Ltd.* the Hon. Calcutta High Court had laid down that leave encashment not being a statutory liability or a contingent liability, enactment of clause (f) of section 43B was not consistent with the original provision of section 43B and the Legislature having disclosed no reason while inserting the said clause, section 43B(f) was liable to be struck down, being arbitrary and unconscionable. Accordingly, section 43B(f) of the Act, was struck down as *ultra-vires*.

In the light of the aforesaid reasons, the provisions of section 43B(f) are legally inoperative. In other words, the provision made in the books of account in respect of any sum payable by an assessee as an employer in lieu of leave at the credit of his employee, will be allowable as deduction in computing the total income of the assessee, under section 37(1) of the Act, irrespective of the provisions of section 43B(f) of the Act.

It is, therefore, advisable that the provision made by the assessee employer for meeting the liability, in respect of leave encashment, should be claimed as a deduction in the computation of total income.

Place : Pune

Date : 28.8.2012

( S.K. Tyagi )

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