

***TD 94/84 - Income tax: is:(a) a late lodgment fee under the Corporations(Fees) Regulations; and (b) a penalty for an offence under the Corporations Law an 'amount payable, or expressed to be payable, by way of penalty' within the meaning of that phrase in paragraph 51(4)(a) of the Income Tax Assessment Act 1936 (ITAA)?***

 This cover sheet is provided for information only. It does not form part of *TD 94/84 - Income tax: is:(a) a late lodgment fee under the Corporations(Fees) Regulations; and (b) a penalty for an offence under the Corporations Law an 'amount payable, or expressed to be payable, by way of penalty' within the meaning of that phrase in paragraph 51(4)(a) of the Income Tax Assessment Act 1936 (ITAA)?*

 This document has changed over time. This is a consolidated version of the ruling which was published on *20 October 1994*

This Determination, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the *Taxation Administration Act 1953*, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Determination is a public ruling and how it is binding on the Commissioner. Unless otherwise stated, this Determination applies to years commencing both before and after its date of issue. However, this Determination does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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## Taxation Determination

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**Income tax: is: (a) a late lodgment fee under the Corporations (Fees) Regulations; and  
(b) a penalty for an offence under the Corporations Law**

**an 'amount payable, or expressed to be payable, by way of penalty' within the meaning of that phrase in paragraph 51(4)(a) of the Income Tax Assessment Act 1936 (ITAA)?**

1. Yes. Paragraph 51(4)(a) of the ITAA denies a deduction under subsection 51(1) for an amount, however described, payable, or expressed to be payable, by way of penalty under a Commonwealth, State, Territory or foreign country law.
2. The critical issue is whether the late lodgment fee and the penalty answer the description of 'an amount ... payable, or expressed to be payable, by way of penalty'.
3. The word 'penalty' is not defined in the ITAA and, in its context in paragraph 51(4)(a), bears its ordinary meaning. According to dictionary meanings, a 'penalty' is a punishment (which may be pecuniary) for a breach of the law. What is necessary for paragraph 51(4)(a) to apply is that the amount be one payable 'by way of' penalty. It is not essential that an amount actually be a penalty for it to come within paragraph 51(4)(a), but an actual penalty would satisfy the description 'an amount ... payable ... by way of penalty'.
4. If an amount 'payable, or expressed to be payable, by way of penalty' in terms of paragraph 51(4)(a) is paid by a company, that paragraph precludes a deduction under subsection 51(1) for the amount paid. If the amount is paid by a tax agent or professional representative of a company, rather than by the company itself, paragraph 51(4)(a) again precludes a deduction under subsection 51(1) for the amount paid.

### **Late lodgment fee under Corporations (Fees) Regulations**

5. Section 33 of the *Corporations Act 1989* imposes the fees prescribed by regulation 3 and the Schedule to the Corporations (Fees) Regulations. The prescribed fee for a chargeable matter is specified in column 3 of the Schedule for that matter. Item 28 in the Schedule states the fee payable on the late lodgment of a document (in addition to any fee provided by any other item for the lodgment of that document). The fee payable for late lodgment is \$50 if the document is

lodged within one month after the prescribed time (other than an annual return of a company, for which no late lodgment fee is payable). If a document (including an annual return) is lodged more than one month after the prescribed time, the fee is \$200.

6. A fee for late lodgment in item 28 in the Schedule to the Corporations (Fees) Regulations is imposed in addition to any fee for the lodgment of the particular document. In our view, the late lodgment fee is imposed as a pecuniary punishment for a breach of the *Corporations Law* by failing to lodge the document within the statutory time limit. It is not, in our view, simply an administrative charge to recognise any additional cost of promptly processing late documents. The late lodgment fee is therefore 'an amount, however described, payable, or expressed to be payable, by way of penalty' within the meaning of that phrase in paragraph 51(4)(a) of the ITAA. It is not deductible under subsection 51(1).

7. Quite apart from paragraph 51(4)(a), we consider that the reasons for the decision of the Supreme Court of Victoria (Ormiston J) in *Mayne Nickless Ltd v. FC of T* 84 ATC 4458; (1984) 15 ATR 752 support the view that the late lodgment fee is not deductible under subsection 51(1) of the ITAA.

#### **Penalty for an offence under the *Corporations Law***

8. Under section 1313 of the *Corporations Law*, the Australian Securities Commission may give a person a penalty notice in relation to an alleged commission by that person of a particular offence. Regulation 9.4.01 and Schedule 12 of the Corporations Regulations prescribe penalties for particular offences.

9. A prescribed penalty in Schedule 12 is, in our view, either 'an amount ... expressed to be payable, by way of penalty' or 'an amount ... payable ... by way of penalty' within the meaning of the relevant phrase in paragraph 51(4)(a) of the ITAA. It is not deductible under subsection 51(1).

#### *Example:*

*Slack Pty Ltd holds its annual general meeting each year on 30 September and is required to lodge its annual return by 31 October. In 1993 the annual return was not lodged. The company creates a charge on 15 March 1994 but lodged a notice under subsection 263(1) of the Corporations Law 15 days late. An amount of \$150 was paid on lodgment of the subsection 263(1) notice comprising a basic lodgment fee of \$100 and a late lodgment fee of \$50. A penalty notice was issued by the Australian Securities Commission on 1 May 1994 for an amount of \$125 for the failure to lodge the 1993 return. The \$50 late lodgment fee and the \$125 penalty are not deductible under subsection 51(1) by the operation of paragraph 51(4)(a) of the ITAA.*

#### **Commissioner of Taxation**

20/10/94

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