

TD 94/84 - Income tax: is:(a) a late lodgment fee under the Corporations (Fees) Regulations 2001; or (b) a pecuniary penalty for an offence under the Corporations Act 2001 , 'an amount (however described) payable, by way of penalty' within the meaning of that phrase in paragraph 26-5(1)(a) of the Income Tax Assessment Act 1997?

 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 2001; or (b) a pecuniary penalty for an offence under the Corporations Act 2001 , 'an amount (however described) payable, by way of penalty' within the meaning of that phrase in paragraph 26-5(1)(a) of the Income Tax Assessment Act 1997?*

 This document has changed over time. This is a consolidated version of the ruling which was published on *24 August 2011*

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).

[Note: This is a consolidated version of this document. Refer to the ATO Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

Taxation Determination

Income tax: is:

- (a) a late lodgment fee under the *Corporations (Fees) Regulations 2001*; or
- (b) a pecuniary penalty for an offence under the *Corporations Act 2001*,

'an amount (however described) payable, by way of penalty' within the meaning of that phrase in paragraph 26-5(1)(a) of the *Income Tax Assessment Act 1997*?

1. Yes.

2. Paragraph 26-5(1)(a) of the *Income Tax Assessment Act 1997* (ITAA 1997)¹ denies a deduction under section 8-1 for an amount, however described, payable by way of penalty under an Australian or foreign law. The critical issue is whether the late lodgment fee and the penalty answer the description of 'an amount ... payable, by way of penalty'.

3. The word 'penalty' is not defined in the ITAA 1997 and, in its context in section 26-5, 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 26-5(1)(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 26-5(1)(a), but an actual penalty would satisfy the description 'an amount ... payable ... by way of penalty'.

4. If an amount 'payable by way of penalty' in terms of paragraph 26-5(1)(a) is paid by a company, subsection 26-5(1) precludes a deduction under section 8-1 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, subsection 26-5(1) again precludes a deduction under section 8-1 for the amount paid.

Late lodgment fee under *Corporations (Fees) Regulations 2001*

¹ All subsequent legislative references in this Determination are to the ITAA 1997 unless indicated otherwise.

5. Section 5 of the *Corporations (Fees) Act 2001* imposes the fees prescribed by regulation 3 and Schedule 1 to the Corporations (Fees) Regulations 2001 for 'chargeable matters'. Chargeable matters include late lodgment of documents. Item 28 in Schedule 1 specifies 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 amount of the fee payable is dependant on how long after the prescribed time the document is lodged.

6. A fee for late lodgment in item 28 in Schedule 1 to the Corporations (Fees) Regulations 2001 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 Act 2001*. 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, by way of penalty' within the meaning of that phrase in paragraph 26-5(1)(a) of the ITAA 1997. It is not deductible under section 8-1 of the ITAA 1997.

7. Quite apart from paragraph 26-5(1)(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 section 8-1.

Penalty for an offence under the *Corporations Act 2001*

8. Under section 1313 of the *Corporations Act 2001*, the Australian Securities Investments Commission may give a person a penalty notice in relation to an alleged commission by that person of a particular offence. The penalty notice sets out a prescribed penalty for the particular offence.

9. The prescribed penalty is, in our view, 'an amount (however described) payable, by way of penalty' within the meaning of the phrase in paragraph 26-5(1)(a). It is not deductible under section 8-1.

Commissioner of Taxation

20/10/94

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