

TD 94/84A1 - Addendum - 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)?

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Addendum

Taxation Determination

Income tax: is

- (a) a late lodgement 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 Addendum amends Taxation Determination TD 94/84 to reflect the changes to the law caused by the repeal of inoperative provisions and to update other legislative references.

TD 94/84 is amended as follows:

1. Title

Omit the title; substitute:

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*?

2. Paragraph 1

Omit second sentence.

3. Paragraph 2

Omit paragraph; substitute:

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.'

4. Paragraph 3

- (a) Omit 'ITAA'; substitute 'ITAA 1997'.
- (b) Omit 'paragraph 51(4)(a)' (first occurrence); substitute 'section 26-5'.
- (c) Omit 'paragraph 51(4)(a)' (second and third occurrence); substitute 'paragraph 26-5(1)(a)'.

5. Paragraph 4

Omit the paragraph; substitute:

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.

6. Paragraph 5

Omit the paragraph (including the heading); substitute:

Late lodgment fee under Corporations (Fees) Regulations 2001

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.

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

7. Paragraph 6

Omit the paragraph; substitute:

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.

8. Paragraph 7

- (a) Omit: 'paragraph 51(4)(a)'; substitute: 'paragraph 26-5(1)(a) of the ITAA 1997';
- (b) Omit: 'subsection 51(1) of the ITAA'; substitute: 'section 8-1'.

9. Paragraph 8 (including the heading)

- (a) Omit: '*Corporations Law*' (where occurring); substitute: '*Corporations Act 2001*'.
- (b) After 'Securities', insert: 'and Investments'.
- (c) Omit the last sentence; substitute 'The penalty notice sets out a prescribed penalty for the particular offence.'

10. Paragraph 9

Omit paragraph (including the example); substitute:

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.

11. Subject references

Omit 'Corporations (Fees) Regulations; Corporations Law;'; substitute 'Corporations (Fees) Regulations 2001; Corporations Act 2001;'

12. Legislative references

Omit the references, substitute:

- ITAA 1997 8-1
- ITAA 1997 26-5
- ITAA 1997 26(1)
- ITAA 1997 26(1)(a)
- CA 2001 1313
- C(F)A 2001 5
- C(F)R 2001 3
- C(F)R 2001 Sch 1
- C(F)R 2001 Sch 1 item 28

This Addendum applies on and from 14 September 2006.

Commissioner of Taxation

24 August 2011

ATO references

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