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Why Trump's \$355 Million Civil Fraud Penalty Won't Be A Simple Tax Write-Off



After a well-publicized bench trial, a New York judge ordered former President Donald Trump to pay \$355 million in penalties, concluding that the former president lied about his wealth for years. The nature of the case and the statutes under which it was brought were both unusual, and it had the star power that Trump and his supporters and detractors always seem to bring. The plaintiff in the case was the State of New York, by Letitia James, the state's Attorney General. If you have some time, you can read Judge Engoron's 92-page decision [here](#).

The amount could get even bigger with interest, and even filing an appeal—as Trump will do—may not stop the financial hurt of paying or bonding in the meantime. Trump and his lawyers argued that no one was hurt by any financial misstatements, but the judge did not buy the argument and ordered what he called disgorgement of the Trump Organization's ill-gotten gains. Many headlines called it a fine, but it is not crystal clear how the payment would be classified for tax purposes.

Indeed, it is conceivable that if he ever pays it, Trump could try to write off most or all of it on his taxes. There is a vast category in the tax law for ordinary and necessary business expenses, and what is “ordinary and necessary” is surprisingly malleable. Compensatory settlements by businesses are clearly deductible, and even *punitive* damages are too. That surprises most people. Tax bills have been introduced in Congress over the years to make punitive damages, but the bills never gained traction.

However, this payment is not punitive damages, but is rather a payment to the government of New York, and it is worth asking how this payment to the State of New York would be treated. Sometimes, even amounts paid to the government are deductible, despite corporate wrongdoing. For decades, [Section 162\(f\)](#) of the tax code prohibited deducting any fine or similar penalty

paid to a government for the violation of any law. That includes criminal and civil penalties, as well as sums paid to settle potential liability for a fine.

This sounds absolute, but the law has historically allowed exceptions. To begin with, the rules cover only government payments, and some companies find ways to write off even the biggest payments. For example, BP probably wrote off a majority of its [\\$20.8 billion out-of-court settlement](#) for the Gulf of Mexico oil spill. The deal designated only about one quarter, \$5.5 billion, as a non-tax-deductible Clean Water Act penalty.

Congress has pushed back on such practices. In 2017, the tax rules were tightened, but even under the new ones, it is permissible to write off certain payments of restitution or amounts paid to come into compliance with law. Some settlement agreements contain an explicit no-deduction provision.

For example, when Tesla and Elon Musk settled with the SEC for \$20 million each, [a court filing](#) said Tesla expressly agreed not to claim a tax deduction for its \$20 million. Had it not been for that agreement, the tax write-offs don't seem to have been prohibited. After all, the SEC said the \$40 million in penalties will be distributed to harmed investors under a court-approved process, and that sounds like restitution.

Although the 2017 change in the tax law made more payments to the government nondeductible, payments of restitution are generally still fair game for tax write-offs. However, Judge Engoron's lengthy decision refers to the payment as "disgorgement," not restitution, and that may make it tough for Trump to argue that this is deductible. On page 81 of his opinion, the Judge notes that, "Disgorgement is distinct from the remedy of restitution because it focuses on the gain to the wrongdoer as opposed to the loss to the victim."

In any event, tax rules seems constantly to be changing, and businesses often look high and low to claim deductions wherever they can. And it is well-known that when it comes to taxes, Trump is no shrinking violet.

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