



Wood LLP

Tax Alert



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BofA Grabs \$12 Billion Tax Write-Off From \$17 Billion Mortgage Settlement

If you get stuck paying out huge amounts to *anyone*, you want to ease the burden by writing it off. Bank of America may be smarting over the [historic \\$17 billion legal settlement](#) it reached over soured mortgage securities. Still, it should be mollified that it's getting a hefty tax write-off. How, you might ask?

It got around the Department of Justice's recent policy of nixing tax deductions. See [DOJ Allows Bank of America to Deduct \\$12 Billion of \\$17 Billion Settlement](#). Not everyone is pleased that BofA gets to pass on \$4 billion to taxpayers, though the \$4 billion figure was confirmed by a bank spokesman. Some lawmakers and consumer advocates say the DOJ and regulators need to take taxes into account in touting the settlement figures.



Photo of Bank of America ATM Machine (Photo credit: Wikipedia)

Otherwise, people think it's costing a targeted business one thing, when the after tax cost—paid for by taxpayers—is something else. But isn't everything in business deductible? Not always.

In general, fines and penalties paid to the government are not deductible, and in this case that agreed civil penalty is \$5.02 billion. Amazingly, though, there's even a chance that the \$5.02 billion is deductible too. The [U.S. Public Interest Research Group](#) tracks the tax implications of legal settlements, and they are not easy on the DOJ, saying that the DOJ should forbid deductibility.

The tax code already speaks to this subject. [Section 162\(f\)](#) of the tax code prohibits deducting “any fine or similar penalty paid to a government for the violation of any law.” Despite punitive sounding names, though, some fines and penalties are considered remedial and deductible. That allows some flexibility. As a result, some defendants insist that their settlement agreement confirms that the payments are not penalties and are remedial.

Explicit provisions about taxes in settlement agreements are becoming more common. For example, the DOJ did [expressly forbid](#) Credit Suisse from deducting its \$2.6 billion settlement for helping Americans evade taxes. Ditto for the BNPP terror [settlement](#), which states that BNPP will not claim a tax deduction. Sometimes the government and a defendant split the baby.

Of the \$13 billion JP Morgan settlement struck in late 2013, only \$2 billion was said to be nondeductible. The DOJ doesn't always disclose the terms of settlements either. But that could change. The proposed Truth in Settlements Act (S. 1898 – [fact sheet](#)) would require agencies to report after-tax settlement values. Another bill, [S. 1654](#), would restrict tax deductibility and require agencies to spell out the tax status of settlements.

A [poll](#) released by the U.S. Public Interest Research Group Education Fund says most people disapprove of deductible settlements. The BofA deal might fuel such sentiments, particularly since the government's deal with BofA seems to go out of its way to allow tax deductions, saying that:

“Nothing in this Agreement constitutes an agreement by the United States concerning the characterization of the Settlement Amount for the purposes of the Internal Revenue laws, Title 26 of the United States Code.”

Armed with that language, the U.S. Public Interest Research Group says BofA might even be able to deduct the whole thing. Sure, federal law prohibits a deduction of government fines or penalties. But companies often deduct ‘compensatory penalties,’ a maneuver affirmed in a recent Circuit Court [ruling](#).

Assuming BofA does not deduct the \$5.02 billion in civil penalties, the bank's deduction is worth \$4.0705 billion. If the bank succeeds in writing off the full \$16.65 billion, including the civil penalties, its write-off is worth \$5.8275 billion. U.S. PIRG has also created a [fact sheet](#) on Wall Street settlement tax deductions.

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.