

Now you see it now you don't: "Who is the taxpayer" in *Macquarie Bank* case

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Abstract

The *Macquarie Bank* case is possibly the modern case on the issue "who is the taxpayer". However, it differs from *Federal Coke* on a critical point. While the Commissioner failed to identify the correct taxpayer in *Federal Coke*, there is no chance that he could have identified the correct taxpayer in *Macquarie Bank*. This is because, through the 'magic' of the consolidation regime, the correct taxpayer did not exist at all.

Macquarie Bank Ltd successfully took advantage of the consolidation regime and reduced an otherwise taxable gain of \$318 million to \$41 million. The ATO challenged the arrangement under Part IVA, but was in vain. The interaction between the consolidation regime and Part IVA dictates that the company – that, in the absence of the scheme, would have made the gain of \$318 million – was no longer a taxpayer under the definition of "tax benefit" in Part IVA. Despite the desperate attempt of issuing duplicate assessments with respect to the same \$318 million gain to two different companies, the Commissioner was doomed to defeat, as *no* taxpayer could have obtained a "tax benefit".

This outcome defies common sense and highlights the difficult interaction between the enterprise doctrine – under which a corporate group is treated as one single enterprise for income tax purposes – and the separate entity doctrine which treats each company as a separate taxpayer, even if the company is a wholly owned subsidiary of another company.

This paper first reviews the facts and decisions of the case. This is followed by the analysis of two key issues arising from the case with respect to the interaction between the consolidation regime and Part IVA: the issue of "who is the taxpayer", and the problematic application of the definition of "tax benefit" to a consolidated

group. The paper then explores possible policy options to address not only the particular issues arising in *Macquarie Bank* case, but also the more general problem of inserting a strong application of the enterprise doctrine in the income tax system.

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