

QUESTION WE'VE BEEN ASKED QB 13/02

INCOME TAX – DETERMINING THE “SUBSCRIPTIONS” AMOUNT FOR AN AMALGAMATED COMPANY UNDER THE AVAILABLE SUBSCRIBED CAPITAL RULES

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This Question We've Been Asked is about ss CD 43(2)(b) and CD 43(15).

Question

1. We have been asked whether the “subscriptions” amount in the available subscribed capital (ASC) formula in s CD 43 excludes consideration received for shares issued by an amalgamated company between 30 June 1994 and the date of the amalgamation through the operation of s CD 43(15)(a)(iii).

Answer

2. The consideration received for shares issued by an amalgamated company between 30 June 1994 and the date of the amalgamation is not excluded from the amalgamated company's subscriptions amount by s CD 43(15)(a)(iii).
3. Section CD 43(15)(a)(iii) operates to prevent the double-counting of an amalgamated company's “subscriptions”. For an amalgamated company, as with any other company, it is necessary to determine the consideration received for shares issued under s CD 43(2)(b). Section CD 43(15) provides that the ASC of an amalgamated company “includes” the ASC of all amalgamating companies (except the amalgamated company under s CD 43(15)(a)(iii)). Therefore, s CD 43(15) adds an additional amount to the “subscriptions” amount of an amalgamated company determined under s CD 43(2)(b).
4. The purpose of the ASC formula is to determine the amount that shareholders have paid into a company as capital when subscribing for shares. The ASC of a company can be returned to shareholders tax-free in certain circumstances rather than being treated as a dividend.

Explanation

5. This Question We've Been Asked clarifies the effect of s CD 43(15)(a)(iii). It has been suggested that this subparagraph might exclude the ASC of the amalgamated company from being taken into account as “subscriptions” in the ASC formula.

Section CD 43(2)(b)

6. Subsections (1) and (2)(b) of s CD 43 provide:

CD 43 Available subscribed capital (ASC) amount

Formula for calculating amount of available subscribed capital

- (1) For a share (the share) in a company at any relevant time (the calculation time), the amount of available subscribed capital is calculated using the formula—

1 July 1994 balance + subscriptions – returns – look-through company returns.

Definition of items in formula

- (2) In the formula in subsection (1),—

...

- (b) subscriptions, subject to subsections (6) to (21), is the total amount of consideration that the company received, after 30 June 1994 and before the

calculation time, for the issue of shares of the same class (the class) as the share, ignoring section HB 1 (Look-through companies are transparent):

7. Section CD 43(2)(b) provides that the subscriptions amount of a company is the total amount of consideration that the company received after 30 June 1994 and before the calculation time for the issue of shares of the same class.
8. Section CD 43(2)(b) is subject to s CD 43(15) when determining the ASC of an amalgamated company. The phrase "subject to" indicates that one provision qualifies, modifies or changes another. The phrase also indicates which provision is to prevail in the event of a conflict: *C & J Clark Ltd v Inland Revenue Commissioner* [1973] 1 WLR 905; *Harding v Coburn* [1976] 2 NZLR 577; *Re Tasman Pacific Airlines of NZ Ltd (in rec & liq)* [2002] 1 NZLR 688; JF Burrows and RI Carter, *Statute Law in New Zealand* (4th edition, LexisNexis, Wellington, 2009) at p 440. In addition, the courts will generally favour an interpretation of the phrase "subject to" that is consistent with the scheme and purpose of the Act: *Walker v Walker* [1983] NZLR 560.

Section CD 43(15)

9. Section CD 43(15)(a)(i) to (iii) provides:

Subscriptions amount: amalgamated company

- (15) The subscriptions amount for a company that is an amalgamated company resulting from an amalgamation—
 - (a) includes an amount, as if it were consideration received at the time of the amalgamation for the issue of the amalgamated company's shares, equal to the available subscribed capital, at the time of the amalgamation, of all shares in the amalgamating companies that are—
 - (i) of an equivalent class to the class; and
 - (ii) not held directly or indirectly by an amalgamating company; and
 - (iii) not shares in the amalgamated company;
10. Section CD 43(15) applies to a company that is an amalgamated company. All companies involved in an amalgamation are amalgamating companies. A company that exists before an amalgamation and continues as the amalgamated company is both an "amalgamated company" and an "amalgamating company".
11. Section CD 43(15) includes an amount (as if it were consideration received at the time of the amalgamation for the issue of the amalgamated company's shares) equal to the ASC of all shares in the amalgamating companies. This amount, however, does not include the ASC on shares in the amalgamated company by virtue of s CD 43(15)(a)(iii). A definition that uses the word "includes" is generally understood to extend the meaning of the term defined beyond that which it would normally cover: *Dilworth v Commissioner of Stamps* [1899] AC 99; *CIR v Albany Warehouse Ltd* (2009) 24 NZTC 23,532, at [37]. In this situation, the term "includes" operates to add an additional amount to the "subscriptions" amount in s CD 43(2)(b) for an amalgamated company.
12. By reading subss (2)(b) and (15) of s CD 43 together, it can be seen that the ASC of an amalgamated company equals the amount calculated under s CD 43(2)(b) plus the ASC of all the amalgamating companies (but not the amalgamated company). The ASC of all the other amalgamating companies is added to the subscriptions amount of the amalgamated company. Because the amalgamated company may also be an amalgamating company until the amalgamation occurs, s CD 43(15)(a)(iii) is necessary to prevent the subscriptions of the amalgamated company from being counted twice.

Conclusion

13. Accordingly, the Commissioner considers the two provisions do not conflict. Section CD 43(15) merely extends the general definition of subscriptions in s CD 43(2)(b). As a result, the ASC of an amalgamated company includes an additional amount that is equal to the ASC of all the amalgamating companies, except the amalgamated company. Therefore, while s CD 43(15)(a)(iii) appears to exclude the ASC on the shares of the amalgamated company, this subparagraph is necessary to prevent double-counting. This is because the consideration received by the amalgamated company for shares will have already been taken into account under the general definition of "subscriptions" in s CD 43(2)(b). This interpretation of the definition of "subscriptions" for an amalgamated company under subs (2)(b) and (15) of s CD 43 is consistent with the wording of the legislation and the scheme and purpose of the ASC rules.

Example

14. A Co Ltd was incorporated in December 2012 and issued 1,000 shares for \$1 each. B Co Ltd was incorporated in December 2012 and issued 2,000 shares for \$1 each. Neither company have issued any more shares since. A Co Ltd and B Co Ltd amalgamate in March 2013. A Co Ltd remains as the amalgamated company.
15. The ASC of the amalgamated company is calculated using the following formula:
1 July 1994 balance + subscriptions – returns – look-through company returns
16. The subscriptions amount is determined under ss CD 43(2)(b) and CD 43(15). Based on the interpretation in this QWBA, the subscriptions amount equals the subscriptions of the amalgamated company under s CD 43(2)(b) plus the subscriptions of the amalgamating companies under s CD 43(15). However, because an amalgamated company can also be an amalgamating company, s CD 43(15)(a)(iii) excludes the subscriptions of the amalgamated company from being counted again under s CD 43(15).
17. The ASC of A Co Ltd would therefore be calculated as follows:
1 July 1994 balance + (subscriptions of A Co Ltd under s CD 43(2)(b) + subscriptions of the amalgamating companies (not including the amalgamated company, being A Co Ltd) under s CD 43(15)(a)) – returns – look-through company returns.
0 + (subscriptions of A Co Ltd of 1,000 + subscriptions of B Co Ltd of 2,000) – 0 – 0
= 3,000 ASC

References

Subject references

amalgamated company
amalgamating company
amalgamation
available subscribed capital
"includes"
income tax
"subject to"

Legislative references

Income Tax Act 2007, s CD 43(1), (2)(b) and (15),
s YA 1.

Case references

C & J Clark Ltd v Inland Revenue Commissioner
[1973] 1 WLR 905
CIR v Albany Warehouse Ltd (2009) 24 NZTC
23,532
Dilworth v Commissioner of Stamps [1899] AC 99
Harding v Coburn [1976] 2 NZLR 577
Tasman Pacific Airlines of NZ Ltd (in rec & liq), Re
[2002] 1 NZLR 688
Walker v Walker [1983] NZLR 560

Other references

JF Burrows and RI Carter, *Statute Law in New Zealand* (4th edition, LexisNexis, Wellington, 2009)