

## **QUESTION WE'VE BEEN ASKED QB 14/05**

### **INCOME TAX – ASC RULES: CALCULATING THE “SUBSCRIPTIONS” AMOUNT FOR AN AMALGAMATED COMPANY WHEN THE SHARES OF AN AMALGAMATING COMPANY ARE HELD BY ANOTHER AMALGAMATING COMPANY**

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

This Question We've Been Asked is about s CD 43(15)(a)(ii).

#### **Question**

1. We have been asked whether s CD 43(15)(a)(ii) excludes an amount equal to the consideration received for shares issued by an amalgamating company that are directly or indirectly held by another amalgamating company from the “subscriptions” amount for an amalgamated company in the available subscribed capital (ASC) formula in s CD 43(1).

#### **Answer**

2. Yes. An amount equal to the consideration received for shares issued by an amalgamating company that are held directly or indirectly by another amalgamating company is excluded from the amalgamated company's subscriptions amount by s CD 43(15)(a)(ii).
3. For an amalgamated company, as with any other company, the “subscriptions” amount in the ASC formula is the consideration received for shares issued, under the definition of “subscriptions” in s CD 43(2)(b). Section CD 43(15) adds an additional amount to the “subscriptions” amount of an amalgamated company. Section CD 43(15) provides that the “subscriptions” amount of an amalgamated company includes an amount equal to the ASC of all shares in the amalgamating companies except:
  - shares in the amalgamating companies that are held (directly or indirectly) by another amalgamating company (s CD 43(15)(a)(ii)); and
  - shares in the amalgamated company (s CD 43(15)(a)(iii)).
4. Section CD 43(15)(a)(ii) operates to prevent the counting of the ASC of shares in an amalgamating company if those shares are held by another amalgamating company.
5. 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. The reason for excluding the ASC of subsidiaries from this calculation is to avoid the double-counting of capital that has been introduced by the underlying shareholders.
6. This question arose following a previous QWBA (QB 13/02 Income Tax – Determining the “subscriptions” amount for an amalgamated company under the available subscribed capital rules) published in Tax Information Bulletin Vol 25, No 6 (July 2013): 50. This QWBA should be read in conjunction with QB 13/02.

#### **Explanation**

7. This Question We've Been Asked clarifies the effect of s CD 43(15)(a)(ii), following the publication of QB 13/02.

8. It had been suggested that the conclusion reached in QB 13/02 indicated that the subscriptions amount of an amalgamated company included the ASC of the shares in all amalgamating companies (other than the amalgamated company). The purpose of this QWBA is to clarify that the ASC of an amalgamated company includes the ASC of the shares in all amalgamating companies other than those shares listed in both ss CD 43(15)(a)(ii) and (iii).

### **Section CD 43(2)(b)**

9. Sections CD 43(1) and (2) 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),—

(a) **1 July 1994 balance** is,—

(i) if the company existed before 1 July 1994, the amount calculated under subsection (3); and

(ii) in any other case, zero:

(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):

(c) **returns**, subject to subsections (22) and (23), is the total amount of consideration that the company paid, after 30 June 1994 and before the calculation time, on the cancellation of shares in the relevant class and that was not a dividend because of section CD 22 or CD 24 or a corresponding provision of an earlier Act:

(d) **look-through company returns** is the total amount of consideration that the company paid, before the calculation time, on the cancellation or buyback of shares in the relevant class while the company was a look-through company, ignoring section HB 1.

10. This QWBA only considers the “subscriptions” amount in the formula. 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.
11. Section CD 43(2)(b) is subject to s CD 43(15) when determining the subscriptions amount of an amalgamated company.

### **Section CD 43(15)**

12. Section CD 43(15) 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:

- (b) does not include any other amount for the agreement of shareholders of an amalgamating company to the amalgamation and the resulting property acquisitions by the amalgamated company.
13. Section CD 43(15) applies to a company that is an amalgamated company. An “amalgamated company” is defined in s YA 1 as the one company that results from and continues after an amalgamation and it may be one of the amalgamating companies or a new company. “Amalgamating company” is a company that amalgamates with one or more other companies under an amalgamation. Therefore, all companies involved in an amalgamation are amalgamating companies. A company that exists before an amalgamation and continues as the amalgamated company is both the “amalgamated company” and an “amalgamating company”.
14. 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 of the same class in the amalgamating companies. This amount, however, does not include:
- the ASC of shares in an amalgamating company that are held by an amalgamating company (s CD 43(15)(a)(ii)); and
  - the ASC of shares in the amalgamated company (s CD 43(15)(a)(iii)). This is because the ASC of the shares in the amalgamated company is already included in the “subscriptions” amount in s CD 43(2)(b). See QB 13/2 for further clarification of this point.
15. It is further noted that s CD 43(15)(b) provides that the subscriptions amount also does not include any amounts for the agreement of shareholders to the amalgamation and the resulting property acquisitions by the amalgamated company.
16. Under s CD 43(15)(a)(ii), the shares of any subsidiaries of the amalgamating companies (including the company that becomes the amalgamated company) are not included in the calculation of the amalgamated company’s subscriptions amount.
17. By reading ss CD 43(2)(b) and (15) together, it can be seen that the subscriptions amount of an amalgamated company equals the amount under s CD 43(2)(b) plus the ASC of the shares of all the amalgamating companies other than the amalgamated company and any amalgamating companies that are subsidiaries of other amalgamating companies.
18. The reason for excluding the ASC of subsidiaries from this calculation is to avoid the double-counting of capital that has been introduced by the underlying shareholders. This is because the underlying shareholders have only subscribed for the shares in the parent company, and so that ASC value should only be included once. Otherwise it could be possible for shareholders to create extra ASC through capitalising subsidiaries, and increasing their ASC on an amalgamation.
19. We note that this item only concerns the “subscriptions” component of the formula for calculating an amalgamated company’s ASC. Other components of the formula, such as the “returns” amount, may be relevant in certain situations (eg, where there is a cancellation of shares under s CD 43(24)).

### **Conclusion**

20. The Commissioner considers that the subscriptions amount of an amalgamated company includes the amalgamated company’s ASC, as well as an additional amount that is equal to the ASC of all shares in the amalgamating companies that are of an equivalent class, except:

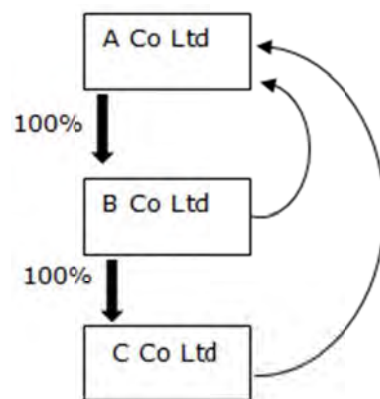
- shares in the amalgamated company (as that ASC is already counted), and
- the shares of any amalgamating companies that are held by other amalgamating companies.

## Examples

21. The following examples are included to assist in explaining the application of the law.

### Example 1: Vertical Amalgamation

- A Co Ltd was incorporated in December 2012 and issued 2,000 ordinary shares for \$1 each.
  - B Co Ltd was incorporated in December 2012 and issued 1,000 ordinary shares to A Co Ltd for \$1 each.
  - C Co Ltd was incorporated in December 2012 and issued 1,000 ordinary shares to B Co Ltd for \$1 each.
22. The three companies amalgamated in March 2013. A Co Ltd remains as the amalgamated company.



23. The ASC of the amalgamated company is calculated using the following formula:

$$1 \text{ July } 1994 \text{ balance} + \text{subscriptions} - \text{returns} - \text{look-through company returns}$$

24. The subscriptions amount is determined under ss CD 43(2)(b) and CD 43(15). Based on the interpretation in this QWBA and in QB 13/02, 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, ss CD 43(15)(a)(ii) and (iii) exclude the subscriptions of any subsidiaries and of the amalgamated company from being counted.

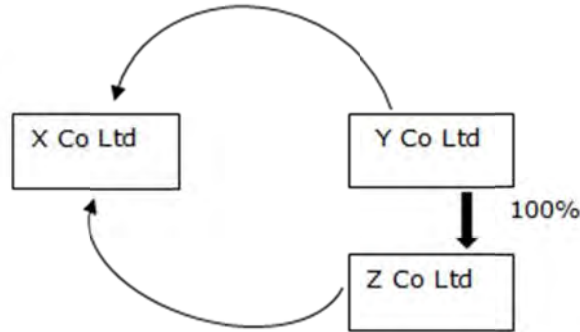
25. The ASC of A Co Ltd is calculated as follows:

$$0 + (\text{subscriptions of A Co Ltd of } 2,000) - 0 - 0 \\ = 2,000 \text{ ASC}$$

### Example 2: Horizontal Amalgamation

- X Co Ltd was incorporated in December 2012 and issued 2,000 ordinary shares for \$1 each.

- Y Co Ltd was incorporated in December 2012 and issued 1,000 ordinary shares for \$1 each.
  - Z Co Ltd was incorporated in December 2012 and issued 1,000 ordinary shares to Y Co Ltd for \$1 each.
26. The three companies amalgamated in March 2013. X Co Ltd remains as the amalgamated company.



27. The subscriptions amount is determined under ss CD 43(2)(b) and CD 43(15). Based on the interpretation in this QWBA and in QB 13/02, 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, ss CD 43(15)(a)(ii) and (iii) exclude the subscriptions of any subsidiaries and of the amalgamated company from being counted.
28. The ASC of X Co Ltd is calculated as follows:
- $$0 + (\text{subscriptions of X Co Ltd of } 2,000 + \text{subscriptions of Y Co Ltd of } 1,000) - 0 - 0 = 3,000 \text{ ASC}$$
29. The question asked and the above analysis and examples only need to be concerned with the calculation of the “subscriptions” amount for determining the ASC of an amalgamated company. In some amalgamations the other items in the ASC formula will also be relevant. For example, the “returns” amount in the formula requires a subtraction of the amount of consideration paid on the cancellation of shares in the relevant class (that is not a dividend under ss CD 22 or CD 24). For example, s CD 43(24) requires that the ASC of any shares in an amalgamated company held by an amalgamating company that are cancelled on amalgamation are included in the “returns” amount.

## References

### Subject references

amalgamated company  
 amalgamating company  
 amalgamation  
 available subscribed capital

### Legislative references

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

### Other references

QB 13/02 Income Tax – Determining the “subscriptions” amount for an amalgamated company under the available subscribed capital rules *Tax Information Bulletin* Vol 25, No 6 (July 2013): 50.