

TECHNICAL DECISION SUMMARY > PRIVATE RULING

WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKATAUNGA  
TŪMATAITI

# How does the business continuity test apply to a consolidated group?

Decision date | Rā o te Whakatau: 27 June 2025

Issue date | Rā Tuku: 28 October 2025

TDS 25/26

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## Subjects | Kaupapa

This item summarises a private ruling about the exit of two company subsidiaries from a consolidated group and the sale of a third subsidiary (the sole remaining member of the consolidated group) to a third party. It considers the business continuity test and whether a specific anti-avoidance provision applies.

## Taxation laws | Ture tāke

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

## Summary of facts | Whakarāpopoto o meka

1. The Applicant was a Consolidated Group of companies made up of three subsidiaries (referred to as Sub 1, Sub 2 and Sub 3) of a Parent Company.
2. The Consolidated Group had losses to carry forward. At the end of a previous income year:
  - Sub 1 and Sub 2 were in a net taxable income position; and
  - Sub 3 had incurred significant losses as part of its business activities.
3. The Parent Company intended to retain Sub 1 and Sub 2 but sell its 100% interest in Sub 3 to a third party.
4. The following steps would occur under the Arrangement:
  - Sub 1 and Sub 2 would exit from the Consolidated Group by providing the Commissioner with an election notice.
  - Sub 3 would:
    - not leave the Consolidated Group under s FM 37; and
    - continue to satisfy the eligibility criteria set out in s FM 31.
  - Sub 3 would remain as the nominated company and sole member of the Consolidated Group.
  - The Parent Company would sell its 100% interest in Sub 3 to a third party.

## Issues | Take

5. The Tax Counsel Office (TCO) considered these issues:
  - Where Sub 3 was the sole remaining member of the Consolidated Group prior to an ownership continuity breach of Sub 3, whether Sub 3 was able to apply s IB 3 to carry forward losses of the Consolidated Group and whether it was the nature of Sub 3's business which was to be considered.
  - Whether the business activities of the other entities which exited the Consolidated Group prior to the ownership continuity breach of Sub 3 were relevant when considering the requirements under s IB 3.
  - Where other entities exited the Consolidated Group within 2 years prior to the ownership continuity breach of Sub 3, whether s GB 3BA would apply.

## Decisions | Whakatau

6. TCO made the following decisions:
  - The Consolidated Group was treated as the company that had a tax loss component arising in an earlier income year under s IB 3.
  - In determining whether a major change in the nature of the business activities carried on by the Consolidated Group had occurred under s IB 3, the business activities of the Consolidated Group comprised the business activities of Sub 3.
  - The business activities of Sub 1 and Sub 2 were not relevant when determining if a major change had occurred to the Consolidated Group under s IB 3.
  - Section GB 3BA did not apply to the Arrangement.

## Reasons for decisions | Pūnga o ngā whakatau

### **Issue 1 | Take tuatahi: Change of membership in a consolidated group and effect on applying the business continuity test**

7. TCO considered this issue under the following headings:
  - Treatment of tax losses by consolidated groups;
  - Changes in Consolidated Group membership;

- Sale of Sub 3; and
- Loss carry forward.

## Treatment of tax losses by consolidated groups

8. TCO analysed the treatment of tax losses by consolidated groups as follows:
  - In essence, consolidation treats a group of companies owned by the same shareholders as one economic entity. Unless a provision of the Act expressly provides otherwise or the context requires another result, the Act applies to companies that are part of a consolidated group as if they were a single company (s FM 2).
  - Section ID 1(1) provides that a consolidated group is treated as if it is a single company for loss purposes. The tax loss is the consolidated group's tax loss and not the tax loss of the member company.
  - Sections FM 6(1)(b) and ID 1(1) are support for the position that any tax losses incurred by Sub 1, Sub 2 or Sub 3 while they were members of the Consolidated Group were deemed to be the tax losses of the Consolidated Group and not of the individual entity that incurred the tax loss.

## Changes in Consolidated Group membership

9. The Applicant advised that Sub 1 and Sub 2 would elect to leave the Consolidated Group. The effect was that the Consolidated Group would have one remaining member, Sub 3. Section FM 33 specifically provides that a consolidated group continues to exist if the number of group companies is reduced to one company, but if the consolidated group has no company at any time, the consolidated group no longer exists.
10. TCO considered the effect of ss FM 33 and ID 1 was that the tax losses remained the Consolidated Group's tax losses and were not forfeited following the departure of Sub 1 and Sub 2 from the Consolidated Group.
11. Therefore, based on the description of the Arrangement, TCO concluded that Sub 3 would remain as the nominated company and sole member of the Consolidated Group.

## Sale of Sub 3

12. TCO analysed whether the Parent Company's sale of its interest in Sub 3 triggered deconsolidation of the Consolidated Group, as follows:
  - If a company that was a member of a consolidated group was sold and was no longer in the same wholly owned group of companies as the other members, it would no longer be eligible to be a member of the consolidated group (s FM 31(1)(eb)). However, the sale of shares in a company did not in itself result in that company losing its eligibility to be a member of a consolidated group.
  - If the consolidated group had only one member, the sale of the shares in the member did not result in the member leaving the consolidated group. That is, the consolidated group would continue under the new ownership.
13. It followed that the Consolidated Group would not be deconsolidated and would continue to exist after:
  - Sub 1 and Sub 2 chose to leave the consolidated Group; and
  - the Parent Company sold its interest in Sub 3.

## Loss carry forward

14. As the Consolidated Group would continue to exist after the Parent Company sold Sub 3, the next step for TCO was to determine whether any of the Consolidated Group's tax losses could be carried forward and used in future tax years.

## Ownership continuity test

15. TCO considered:
  - a company could carry forward a loss balance if there had been at least 49% ownership continuity for the continuity period (s IA 5); and
  - the Parent Company's sale of Sub 3 would result in a breach in the ownership continuity test. The Consolidated Group's tax losses would be forfeited unless the business continuity test could be satisfied.

## Business continuity test

16. In cases where the ownership continuity test was breached, a company would still be able to carry forward its tax losses if the business continuity test (BCT) in s IB 3 was satisfied.

17. One requirement of the BCT is there has been no major change in the nature of the business activities carried on by the company during the business continuity period, unless the change was a permitted major change (s IB 3(2)(c) and s IB 3(5)).
18. Even if s IB 3 applied, TCO noted that targeted anti-avoidance rules in ss GB 3BAB and GB 3BAC might apply to negate any benefit of s IB 3.
19. TCO was asked to rule on how the BCT would apply in the context of a consolidated group's business activities.

### **Applying the BCT to a consolidated group**

20. As stated at [8], TCO considered a consolidated group was treated as a single company. That is, the tax loss provisions in Part I of the Act would apply with modifications to a consolidated group as if it were one tax entity.
21. Therefore, before Sub 1 and Sub 2 left the Consolidated Group, the Consolidated Group's business activities consisted of the three Subs' businesses. However, after Sub 1 and Sub 2 elected to leave the Consolidated Group, the Consolidated Group's business activity would consist solely of Sub 3's business.
22. In determining whether the BCT could apply to the Consolidated Group following an ownership continuity breach, TCO considered the key issue was what the business continuity period was.

### **Business continuity period**

23. Section IB 4 defines "business continuity period".
24. TCO considered the business continuity period would start immediately before the ownership continuity breach, rather than on the date that the tax loss was incurred. Therefore, if Sub 1 and Sub 2 were not members of the Consolidated Group, and Sub 3 was the sole member immediately before an ownership continuity breach occurred, then for the purpose of determining if the business continuity test applied, the business activity to consider was Sub 3's, and not the business activity of Sub 1 or Sub 2.
25. TCO reached the following conclusions:
  - The Consolidated Group was treated as the company that has a tax loss component arising in an earlier income year under s IB 3.
  - In determining whether a major change in the nature of the business activities of the Consolidated Group had occurred under s IB 3, the business activities of the

Consolidated Group were considered to be comprised of the business activities of Sub 3.

- The business activities of Sub 1 and Sub 2 were not relevant when determining if a major change has occurred to the Consolidated Group under s IB 3.

## Issue 2 | Take tuarua: Anti-avoidance

26. This second issue was to establish, where other entities exited the Consolidated Group within 2 years before the ownership continuity breach of Sub 3, whether s GB 3BA would apply.
27. TCO considered s GB 3BA was a specific anti-avoidance rule that may apply when a company carries a tax loss forward under the BCT. Section GB 3BA has the following requirements:
  - A share in a company known as the “loss company” or a share in another company was subject to an arrangement.
  - The arrangement was entered into within the 2 years immediately preceding a breach of the continuity of ownership requirements in s IA 5.
  - The arrangement allowed the loss company to meet the requirements of s IB 3(2).
  - A purpose of the arrangement was to defeat the intent and application of s IB 3.

### **Purpose of the arrangement was to defeat the intent and application of s IB 3**

28. TCO focused on s GB 3BA(1)(d). Section GB 3BA(1)(d) requires that a purpose of the arrangement was to defeat the intent and application of s IB 3. It was not necessary for the purpose to be the dominant or main purpose of the arrangement. It was sufficient if a purpose of the arrangement was to defeat the intent and application of s IB 3.
29. TCO considered that the same principles that applied to s BG 1 (general anti-avoidance rule) would apply to s GB 3BA. This meant that if the effect of an arrangement, determined objectively, was to defeat the intent and application of s IB 3, that will be the purpose of the arrangement.
30. The Supreme Court in *Ben Nevis* considered it desirable to settle the approach to applying s BG 1.<sup>1</sup> This approach is referred to as the Parliamentary contemplation test,

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<sup>1</sup> *Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115, [2009] 2 NZLR 289.

which is an intensely fact-based inquiry. *Ben Nevis* has been followed in subsequent judicial decisions.

31. TCO's approach in making this decision was consistent with *Tax avoidance and the interpretation of the general anti-avoidance provisions sections BG 1 and GA 1 of the Income Tax Act 2007* (3 February 2023) (IS 23/01). IS 23/01 will not be replicated in this TDS but in summary the steps are as follows:

- Understanding the legal form of the arrangement. This involves identifying and understanding the steps and transactions that make up the arrangement, the commercial or private purposes of the arrangement and the arrangement's tax effects.
- Determining whether the arrangement has a tax avoidance purpose or effect. This involves:
  - Identifying and understanding Parliament's purpose for the specific provisions that are used or circumvented by the arrangement.
  - Understanding the commercial and economic reality of the arrangement as a whole by using the factors identified by the courts. Artificiality and contrivance are significant factors.
  - Considering the implications of the preceding steps and answering the ultimate question under the Parliamentary contemplation test: Does the arrangement, when viewed in a commercially and economically realistic way, make use of or circumvent the specific provisions in a manner consistent with Parliament's purpose?
- If the arrangement has a tax avoidance purpose or effect that is not the sole purpose or effect of the arrangement, consider the merely incidental test. The merely incidental test considers many of the same matters that are considered under the Parliamentary contemplation test.

32. Taking into account all of the relevant facts and circumstances (noting that as this is a summary it may not contain all the facts or assumptions relevant to the decision and, therefore, cannot be relied on) the TCO concluded as follows.

### **Purpose of s IB 3**

33. Section IB 3 allows a loss company that has breached the ownership continuity threshold to carry its loss balance forward if no major change has occurred in the nature of the business activities the company carries on during the applicable business continuity period (other than a permitted major change). Parliament's specific purpose



for s IB 3 is to allow a company to carry a loss balance forward despite a continuity of ownership breach if the business the company carries on before the breach is the same business that the company carries on after the breach.

34. The specific purpose of the BCT rules is contained in s IB 1. Section IB 1 is a clear legislative statement of Parliament's purpose for s IB 3. Namely:
- a loss will be carried forward under s IB 3 only if the business a loss company carries on before a breach of ownership continuity is in commercial and economic reality the same as the business it carries on after the breach; and
  - a loss will not be carried forward under s IB 3 as part of a loss trading transaction.

### **The arrangement's purpose is not inconsistent with the purpose of s IB 3**

35. As [13] describes, the Arrangement has two steps:
- Sub 1 and Sub 2 elected to leave the Consolidated Group; and
  - the Parent Company sold its shares in Sub 3.
36. While the Arrangement has resulted in a change in the Consolidated Group's business activities, TCO considered that the Arrangement was not inconsistent with Parliament's purpose for s IB 3:
- The Parent Company's proposed sale of Sub 3 would be the sale of a genuine commercial business. Sub 3 had significant assets and the current phase in its business lifecycle meant that it had commercial value in addition to any potential future tax savings represented by the Consolidated Group's carried forward loss balance.
  - There was a commercial reason for removing Sub 1 and Sub 2 from the Consolidated Group because purchasers would have no interest in buying those companies as part of the Consolidated Group. This step was not artificial or contrived. It was not there to allow the Consolidated Group to meet the requirements of s IB 3.
  - The benefit of the Consolidated Group's tax losses would remain with the business activities (Sub 3's business) that incurred the tax losses.
  - The Arrangement was not a loss trading transaction. Loss trading occurred where there was little or no economic basis for the transaction in which a company was acquired. Its principal purpose was the purchase of losses that would otherwise not be used. There was a clear commercial or economic basis for the sale of Sub 3, an established business. Further, in the absence of any

evidence to the contrary, it appeared that the Consolidated Group's tax losses would be used in the future if the Arrangement did not occur. This was not the case of a taxpayer that was in the process of winding down and only had value due to its tax loss profile.

37. In summary, TCO considered the Arrangement was not inconsistent with the purpose and intent of the BCT and that s GB 3BA did not apply to the Arrangement. On this basis, TCO did not need to conclude on the other requirements of s GB 3BA.