

**EXPOSURE DRAFT - FOR COMMENT AND DISCUSSION ONLY | HUKIHUKI HURANGA
- MŌ TE TĀKUPU ME TE MATAPAKI ANAKE**

Deadline for comment | Aukatinga mō te tākupu: **1 November 2024**

Please quote reference | Whakahuatia te tohutoro: **PUB00457/B**

Send feedback to | Tukuna mai ngā whakahokinga kōrero ki
public.consultation@ird.govt.nz

Notes | Pitopito kōrero: Section CD 43(2)(c) current defines “returns” as “subject to subsections (22) and (23)”. Section CD 43(2)(c) should refer to being subject to subsections (22) to (25). An amendment to replace “(22) and (23)” with “(22) to (25)” has been included in the Taxation (Annual Rates for 2024–25, Emergency Response, and Remedial Measures) Bill (s 9) (the Bill) with application from the 2008-09 and later income years. This draft item refers to the wording in s CD 43(2)(c) as proposed in the Bill.

QUESTIONS WE’VE BEEN ASKED | PĀTAI KUA UIA MAI

How does an amalgamated company calculate its available subscribed capital following an amalgamation?

Issued | Tukuna:

QB XX/XX

This question we’ve been asked explains how an amalgamated company calculates its available subscribed capital.

Key provisions | Whakaratonga tāpua

Income Tax Act 2007 – s CD 43

REPLACES | WHAKAKAPIA: QB 13/02 and QB 14/05

Question | Pātai

How does an amalgamated company calculate its available subscribed capital (ASC) following an amalgamation?

Answer | Whakautu

An amalgamated company calculates its ASC using the formula:

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

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 definitions of “subscriptions” and “returns” are modified for an amalgamated company.

The amalgamated company’s “subscription” amount for a class of share will include the:

- total amount of consideration that the company received after 30 June 1994 for the issue of shares of the same class; and
- ASC of all shares in the amalgamating companies, provided that:
 - the amalgamating company’s shares are of an equivalent class;
 - the amalgamating company’s shares are not held directly or indirectly by an amalgamating company; and
 - the shares are not shares in the amalgamated company.

The “returns” amount will increase if an amalgamating company holds shares in an amalgamated company and the shares are cancelled on amalgamation. The amalgamated company’s ASC per share will reduce by the “returns” amount.

Key terms | Kīanga tau tāpua

Amalgamated company means the company that continues after an amalgamation.

Amalgamating company means a company that amalgamates with one or more other companies under an amalgamation. Every company involved in an amalgamation is an amalgamating company. Any reference in this Item to amalgamating company includes the amalgamated company.

ASC means the amount that shareholders have paid into a company as capital when subscribing for shares. It is calculated using the formula in s CD 43(1).

Explanation | Whakamāramatanga

Introduction

1. This question we've been asked (QWBA) explains how an amalgamated company calculates its ASC following an amalgamation.
2. We have been asked to consider how the "subscriptions" and "returns" amounts are modified for an amalgamated company.
3. This item applies to both resident's restricted amalgamations and amalgamations that are not resident's restricted amalgamations.
4. See IS XX/XX: **Income tax and GST – Amalgamations** for general tax guidance on amalgamations.
5. All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This QWBA replaces previous publications

6. In 2013, the Commissioner issued a QWBA on determining the "subscriptions" amount for an amalgamated company under the ASC rules ([QB 13/02: Income tax – Determining the "subscriptions" amount for an amalgamated company under the available subscribed capital rules](#)).
7. To complement QB 13/02, the Commissioner issued a further QWBA on the topic: [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](#).
8. This QWBA replaces QB 13/02 and QB 14/05 from the date of issue.

Formula for calculating available subscribed capital

9. Section CD 43(1) contains the formula for calculating ASC:

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), and including consideration for the issue of shares by the company as a result of the application of section CD 6 (Trusts are nominees):

- (c) **returns**, subject to subsections (22) to (25)¹, 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, CD 23B, or CD 24 or a corresponding provision of an earlier Act.

...

10. The ASC formula has four components. However, in this QWBA we focus on “subscriptions” and “returns” because the “subscriptions” and “returns” amounts are specifically modified in an amalgamation.

“Subscriptions” is the total amount of consideration received

11. 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 (s CD 43(2)(b)).

¹ See s 9 of the Taxation (Annual Rates for 2024–25, Emergency Response, and Remedial Measures) Bill.

12. When an amalgamated company is determining its “subscriptions” amount, s CD 43(2)(b) is subject to s CD 43(15). 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; and *Re Tasman Pacific Airlines of NZ Ltd (in rec & liq)* [2002] 1 NZLR 688.

Modifying the “subscriptions” amount for an amalgamated company

13. Section CD 43(15) modifies the s CD 43(2)(b) definition of “subscriptions”:

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.

14. Section CD 43(15)(a) specifies that the subscriptions amount for an amalgamated company includes an amount equal to the ASC at the time of the amalgamation of all shares in the amalgamating companies that are:
- of an equivalent class to the class; and
 - not held directly or indirectly by an amalgamating company; and
 - not shares in the amalgamated company.
15. Each of these requirements is considered further below.
16. Section CD 43(15)(b) provides that the subscriptions amount does not include any amount for the agreement of shareholders to the amalgamation and the resulting property acquisitions by the amalgamated company.

Shares are of an equivalent class

17. The first requirement in s CD 43(15)(a) is that the shares in the amalgamating companies are “of an equivalent class to the class” of shares in the amalgamated company.
18. To determine whether the shares of an amalgamating company are of an equivalent class to those of the amalgamated company, the amalgamating company’s constitution and any shareholder agreements should be reviewed. Factors to consider are whether the amalgamating company’s shares carry the same:
 - shareholder decision-making rights;
 - rights to be paid profits that the company distributes; and
 - rights to the distribution of assets on the cancellation of shares.

Shares are not held directly or indirectly by an amalgamating company

19. The second requirement in s CD 43(15)(a) is that the shares of the amalgamating company are “not held directly or indirectly by an amalgamating company”.
20. The amalgamated company’s ASC does not include an amount equal to the ASC of shares in an amalgamating company if another amalgamating company holds the amalgamating company’s shares.
21. The reason for excluding the ASC of subsidiaries from the ASC calculation is to avoid the double-counting of capital that the underlying shareholders have introduced. The underlying shareholders have subscribed for the shares in the parent company, and an amount of ASC equivalent to that value should be included only once for the amalgamated company (see Example | Taura 1).

Shares are not the amalgamated company’s shares

22. The third requirement in s CD 43(15)(a) is that the shares are “not shares in the amalgamated company”.
23. Section CD 43(15)(a) modifies the subscriptions amount to include an amount equal to the ASC of all shares in the amalgamating companies. The term “includes” operates to add an amount to the “subscriptions” amount in s CD 43(2)(b) for an amalgamated company. However, as an amalgamated company is also an “amalgamating company”, the third requirement prevents the amalgamated company’s subscriptions from being counted twice (see Example | Taura 2).

Conclusion

24. The subscriptions amount of an amalgamated company equals the amount calculated under s CD 43(2)(b) plus an amount equal to the ASC of all shares in the amalgamating companies that are of an equivalent class, except:
- shares held directly or indirectly by an amalgamating company; and
 - shares in the amalgamated company.

“Returns” is the total consideration paid on cancellation

25. The “returns” amount of a company is the total amount of consideration that the company has paid after 30 June 1994 and before the calculation time on the cancellation of shares of the same class and the consideration was excluded from being a dividend under specific provisions.

Modifying the “returns” amount for an amalgamated company

26. Section CD 43(24) modifies the s CD 43(2)(c) definition of “returns”:

Returns amount: shares cancelled on amalgamation

- (24) If shares in an amalgamated company held by an amalgamating company are cancelled on the amalgamation, the returns amount included in calculating the available subscribed capital amount of a share in the amalgamated company that is of the same class as the cancelled shares is increased by the amount calculating using the formula—

cancelled shares × asc per share.

Definition of items in formula

- (25) In the formula in subsection (24),—
- (a) **cancelled shares** is the number of cancelled shares:
 - (b) **asc per share** is the available subscribed capital per share calculated under the slice rule of each cancelled share immediately before the amalgamation.

27. Section CD 43(24) applies if an amalgamating company holds shares in an amalgamated company, and the shares are cancelled on amalgamation.
28. The effect of s CD 43(24) is to increase the returns amount by the amount calculated using the formula (ie, the ASC of the amalgamated company will be reduced by this amount) (see Example | Taura 3).

Examples | Taurira

29. The following examples provide guidance on how to apply the law.

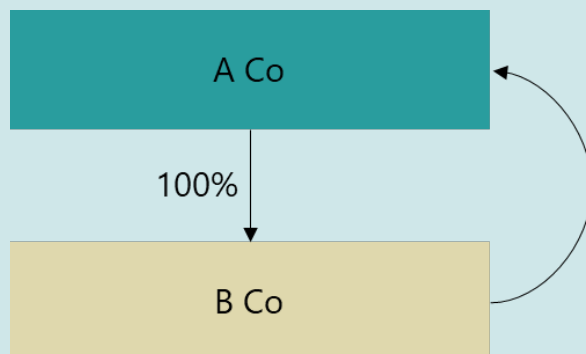
Example | Taurira 1 – Upward amalgamation

On 16 February 2021, A Co was incorporated and issued 2,200 ordinary shares for \$1 each.

Then on 17 March 2022, B Co was incorporated and issued 1,500 ordinary shares for \$1 each to A Co.

Neither A Co nor B Co is a look-through company.

A Co and B Co undertake a short-form amalgamation under s 222(1) of the Companies Act 1993. A Co continues as the amalgamated company. B Co's shares are cancelled.



The subscriptions amount of A Co is determined under para (2)(b) and subs (15) of s CD 43.

A Co's share capital (\$2,200) is included in A Co's subscriptions amount under s CD 43(2)(b).

An amount equivalent to B Co's ASC (\$1,500) is not included under s CD 43(15), because an amalgamated company (A Co) holds all of B Co's shares.

As the shares of A Co (the amalgamated company) are not cancelled, s CD 43(24) does not apply, and the returns amount is not modified due to the amalgamation.

A Co calculates its ASC as follows:

1 July 1994 balance = \$0

Subscriptions = \$2,200 (s CD 43(2)(b)) + \$0 (s CD 43(15))

Returns = \$0

Look-through company returns = \$0

ASC = \$2,200

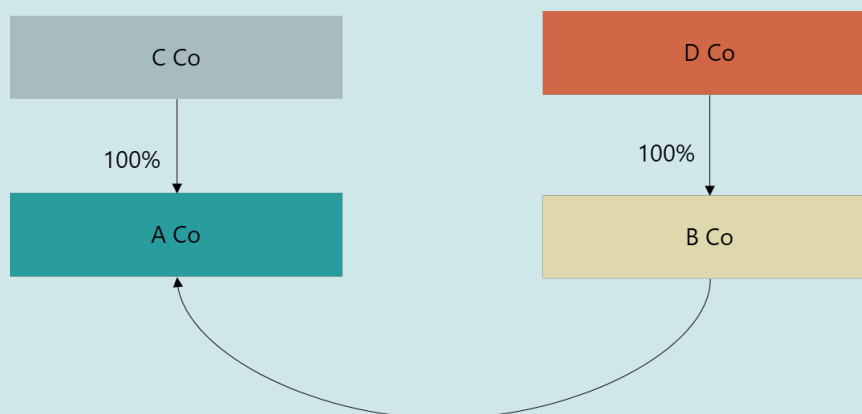
Example | Taura 2 – Horizontal amalgamation

On 16 February 2021, A Co was incorporated and issued 2,200 ordinary shares for \$1 each to C Co.

Then on 17 March 2022, B Co was incorporated and issued 1,500 ordinary shares for \$1 each to D Co.

Neither A Co nor B Co is a look-through company.

A Co and B Co undertake a long-form amalgamation under s 220 of the Companies Act 1993. A Co continues as the amalgamated company. The shares in B Co are cancelled.



The subscriptions amount of A Co is determined under para (2)(b) and subs (15) of s CD 43.

A Co's share capital (\$2,200) is included in A Co's subscriptions amount under s CD 43(2)(b).

As an amalgamating company does not own B Co directly or indirectly, and as B Co is not the amalgamated company, an amount equivalent to B Co's ASC (\$1,500) is included under s CD 43(15).

The shares of A Co (the amalgamated company) are not cancelled, and s CD 43(24) does not modify the returns amount.

A Co calculates its ASC as follows:

1 July 1994 balance = \$0

Subscriptions = \$2,200 (s CD 43(2)(b)) + \$1,500 (s CD 43(15))

Returns = \$0

Look-through company returns = \$0

ASC = \$3,700

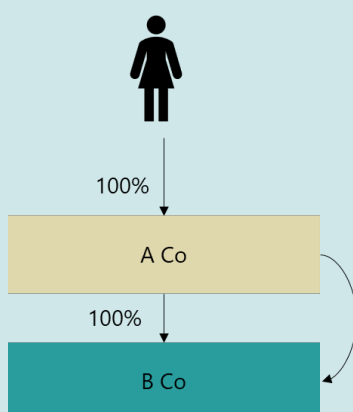
Example | Taura 3 – Downwards amalgamation

On 16 February 2021, A Co was incorporated and issued 2,200 ordinary shares for \$1 each.

Then on 17 March 2022, B Co was incorporated and issued 1,500 ordinary shares for \$1 each to A Co.

Neither A Co nor B Co is a look-through company.

A Co and B Co undertake a long-form amalgamation under s 220 of the Companies Act 1993. B Co continues as the amalgamated company. The amalgamation proposal states that the shares in B Co are cancelled, and A Co's shares will convert into B Co's shares.



The subscriptions amount of B Co is determined under para (2)(b) and subs (15) of s CD 43.

B Co's share capital (\$1,500) is included in B Co's subscriptions amount under s CD 43(2)(b).

As an amalgamating company does not own A Co directly or indirectly, and as A Co is not the amalgamated company, an amount equivalent to A Co's ASC (\$2,200) is included under s CD 43(15).

As the shares of B Co (the amalgamated company) are cancelled and as an amalgamating company owns B Co, s CD 43(24) applies and modifies the returns amount.

B Co calculates its ASC as follows:

1 July 1994 balance = \$0

Subscriptions = \$1,500 (s CD 43(2)(b)) + \$2,200 (s CD 43(15))

Returns = \$1,500

Look-through company returns = \$0

ASC = \$2,200 (s CD 43(24))

Draft items produced by the Tax Counsel Office represent the preliminary, though considered, views of the Commissioner of Inland Revenue.

In draft form these items may not be relied on by taxation officers, taxpayers, or practitioners. Only finalised items represent authoritative statements by Inland Revenue of its stance on the particular issues covered.

Send feedback to | Tukuna mai ngā whakahokinga kōrero ki
public.consultation@ird.govt.nz

References | Tohutoro

Legislative references | Tohutoro whakatureture

Companies Act 1993 – ss 220, 222

Income Tax Act 2007 – ss CD 43,

Case references | Tohutoro kēhi

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

Other references | Tohutoro anō

IS XX/XX: *Income tax and GST – Amalgamations* (PUB00457, interpretation statement, draft for external consultation, Inland Revenue, 2024)

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

taxtechnical.ird.govt.nz/tib/volume-25---2013/tib-vol25-no6

taxtechnical.ird.govt.nz/questions-we-ve-been-asked/2013/qb-1302-income-tax-determining-the-subscriptions-amount-for-an-amalgamated-company-under-the-availab

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 *Tax Information Bulletin* Vol 26, No 6 (July 2014): 51

taxtechnical.ird.govt.nz/tib/volume-26---2014/tib-vol26-no5

taxtechnical.ird.govt.nz/questions-we-ve-been-asked/2014/qb-1402-income-tax-entry-of-a-new-partner-into-a-partnership-effect-on-continuing-partners

About this document | Mō tēnei tuhinga

Questions we've been asked (QWBAs) are issued by the Tax Counsel Office. QWBAs answer specific tax questions we have been asked that may be of general interest to taxpayers. While they set out the Commissioner's considered views, QWBAs are not binding on the Commissioner. However, taxpayers can generally rely on them in determining their tax affairs. See further [Status of Commissioner's advice](#) (Commissioner's Statement, Inland Revenue, December 2012). It is important to note that a general similarity between a taxpayer's circumstances and an example in a QWBA will not necessarily lead to the same tax result. Each case must be considered on its own facts.