



# Tax & Legal Flash



August 2020

## Proposed amendments to section 45 of the Income Tax Act to remove anomalies on de- grouping

**Section 45 of the Income Tax Act contains a number of anti-avoidance provisions. These include a deemed base cost of nil in respect of any debt incurred or shares issued as consideration for the acquisition of the assets under the transaction. Payments of the capital are however tax neutral whilst the parties remain within the group of companies. The 2020 Draft Taxation Laws Amendment Bill (DTLAB) released on 31 July 2020 proposes to amend these provisions to allow for a base cost in respect of these instruments in instances where the section 45 de-grouping provisions have been triggered.**

The provisions of section 45(3A) of the Income Tax Act provide for a nil base cost in respect of any debt incurred as consideration for the acquisition of assets under a section 45 transaction (provided such debt is issued by another company within the same group of companies). The repayment of the amounts, other than interest on such debt, is disregarded for income tax purposes provided the amounts are received by or accrue to the holder from a company within the same group of companies.

Similarly section 45(3A) provides for a nil base cost in respect of any share that is not an equity share that is issued as consideration by another company within the same group of companies and disregards the reduction of capital in respect of the shares where the holder of the shares forms part of the same group of companies as the issuer<sup>[1]</sup>.

In terms of section 45(4), where a transferor and transferee cease to form part of the same group of companies within a period of six years from the date of the section 45 transaction, the transferee is deemed to have disposed of the assets acquired under the section 45 transaction, and which are still held, at market value. Section 45(4B) deems a de-grouping to have occurred in certain circumstances, triggering a deemed disposal event. These de-grouping provisions have the effect of eliminating any tax benefit associated with the section 45 transaction.

In this regard, where the holder of a debt or share contemplated in section 45(3A) ceases to form part of the same group of companies as the issuer, they would no longer be permitted to disregard the payment of loan capital or return of capital. As a result of the nil base cost, the receipt of such amounts would trigger a tax charge for the holder.

The DTLAB proposes an amendment to section 45 by the insertion of a new subsection 45(3B), that would deem the holder of the debt or share to have incurred an amount in respect of the debt or share equal to the market value of the instrument on the date acquired less any amounts applied previously as a repayment of the debt or reduction of share capital. The holder will therefore be placed in the position that they would have been in had the provisions of section 45 not been applied to the acquisition of the assets.

It is proposed that the amendment will come into operation on 1 January 2021 in respect of years of assessment commencing on or after that date.

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<sup>[1]</sup> Similarly, the tax treatment of the dividend payment remains unaffected.

Regards  
KPMG Tax and Legal

**FOOTNOTES**

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